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

The Reach of Rights

Migrants, Citizens, and Status

Constitutional Rights to State-Subsidized Services

The EU, the ECHR, Constitutional Pluralism, and
Federations

Extraterritoriality and Human Rights

Extraterritoriality, Privacy, and Surveillance

Editor
Judith Resnik





Gruber Program for Global Justice and Women's Rights

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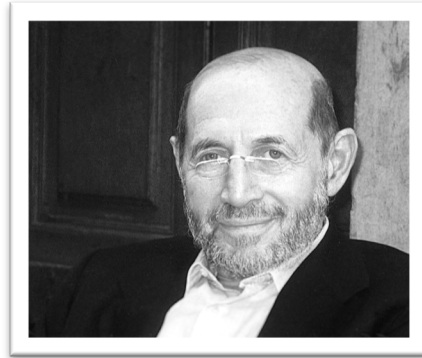
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Dedication

This volume, *The Reach of Rights*, for the 2015 Global Constitutionalism Seminar, convened at Yale Law School, is in honor and in memory of Peter Gruber, co-founder and chairman emeritus of The Gruber Foundation.

Peter Gruber was born in Budapest, Hungary in 1929. He escaped to India with his parents, three months before the Second World War engulfed Europe. During the brief Japanese bombing of Calcutta, his parents sent him to a boarding school in the Himalayas, where he was educated by Irish Christian Brothers and Jesuits. These early experiences sparked a lifelong intellectual journey, and a far-ranging search for knowledge and understanding.



After the war, he nurtured his growing interest in science, religion, and philosophy. He eventually moved to New York City where he founded the Oriental Studies Foundation, which sponsored the translation and English-language publication of Tibetan Buddhist texts. After serving briefly in the U.S. Army Finance Corps, he went on to work on Wall Street.

The success of Peter Gruber's pioneering investments in Latin America made possible the establishment of The Peter and Patricia Gruber Foundation and its International Prize Program, which he co-founded with his wife Patricia.

In 2011, The Gruber Foundation transitioned to Yale University. Peter's commitment is reflected through the Gruber Program for Global Justice and Women's Rights, including the Global Constitutionalism Seminar, as well as through The Foundation's science programs and Prizes.

Peter Gruber was an inspiration to those who knew him, yet humble about his accomplishments. He was known to modestly say: "I throw my glass, that others might throw their jade." His legacy continues to have enormous impact, and we at Yale are grateful for the opportunity to further his commitments. The support of Patricia and Peter Gruber has made possible sustained exchanges of ideas, reinvigorating aspirations to shape a more humane, egalitarian, and just environment than our current world provides.

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PREFACE

This year's volume, *The Reach of Rights*, explores the crossing of borders—by migrants searching for safety, by internet technologies disseminating information, by governments seeking to enhance national security, and by courts analyzing legal claims and crafting remedies. As always, the debates are about the roles judges play when asked to alter decisions made by other public and private sector actors. Cross-border issues are sometimes framed in terms of the “extra-territorial” implications of laws and remedies. Yet, in light of the unceasing movement of persons, objects, information, and rights around the globe, one might understand many of the problems as “a-territorial,” in the sense that the land masses and political authority of nation-states do not map easily onto either the alleged harms or the remedies.

All five chapters in this book prompt questions about the durability of the spatial, territorial conception of rights, predicated on the practices of a particular body-politic and privileging the status of citizenship. In each chapter, arguments are made that in light of constitutional obligations to respect individuals' privacy, dignity, well-being, and their membership in families, judges ought to intervene, even as the effects of rulings go beyond a particular nation-state. In each chapter, counter-arguments are raised about the wisdom of loosening the nexus between a polity and the reach of its rights given the democratic legitimacy of national-level rulings, the importance of identities based in political communities, the appropriate boundaries of constitutional adjudication, and the remedial capacities of courts.

We begin with individuals, some fleeing unrest and others hoping for material security. The many tragic images of treacherous sea voyages, smugglers, and detention camps raise questions about whether the current legal regime is sustainable. As may be familiar, the Universal Declaration of Human Rights recognizes a right to emigrate but not a parallel right to immigrate. Chapter I, *Migrants, Citizens, and Status*, provides examples of courts addressing claims of non-nationals challenging the power of nation-states to make migration a crime; to disrupt citizen-families through deportation; and to link access to health, welfare, and employment to citizenship status and to discriminate in the distribution of benefits among kinds of migrants. The materials, compiled by Professors Cristina Rodríguez and Sabino Cassese and by the Honorable Marta Cartabia, enable reconsideration of the authority of nation-states in light of transnational commitments to the dignity of all persons and the unremitting evidence that individuals move across borders.

In Chapter II, *Constitutional Rights to State-Subsidized Services*, we continue to explore governments' relationship to individuals, this time in the context of activities that are often characterized as "social rights." Around the world, individuals ask courts to mandate that governments provide services—for example, by subsidizing the use of courts through fee waivers or by ordering support for health, housing, and social security. In the mix of claimants are citizens and non-nationals making arguments about what constitutions require. The materials, edited by Professors Abbe Gluck and Judith Resnik and by the Honorable Manuel Cepeda-Espinosa, illustrate that courts have sometimes responded with detailed orders, specifying levels of services or requiring other branches of government to use procedures for decision-making that can be tested for their compliance with legal standards. Here the questions about the "reach of rights" are whether judges, considering ordering government support of a particular activity, have special obligations of deference to other branches of government. Are judicial responses related to the provision of goods and services (of courts, housing, education, and welfare benefits) a distinct genre, markedly different from the work required of judges in other domains? Thus, at the core of this segment is the sustainability of distinctions between "negative" and "positive" rights, between "social" and other forms of rights, and between citizens and non-nationals.

Judicial authority over other government-branch decisions is also at the center of Chapter III, *The EU, the ECHR, Constitutional Pluralism, and Federations*. In December of 2014, the Court of Justice of the European Union (CJEU) ruled that the draft European Union (EU) accession agreement to the European Convention on Human Rights (ECHR) was not compatible with EU law. The materials excerpted by Professors Bruce Ackerman, Sabino Cassese, Dieter Grimm, and Miguel Maduro provide a concise overview of the complex and lengthy 2014 judgment and explore its implications, both in and beyond Europe. The Chapter puts the questions of judicial and political autonomy, exemplified by the CJEU judgment, in the wider frame of ongoing discussions about constitutional pluralism and the interactions among courts in federated and quasi-federated states.

Chapter IV, *Extraterritoriality and Human Rights*, explores whether fundamental rights alter the obligations of nation-states to individuals, within and beyond their borders. Hence, the themes of sovereignty, citizenship, and judicial authority are again at the fore. The materials by Professor Harold Koh and the Honorable Rosalie Abella analyze competing doctrinal approaches and presumptions as countries deal with refugees and non-nationals, civilians in the

midst of armed conflicts, alleged terrorists, and the acts and actions of individuals inside and outside their territories. This Chapter considers whether, when, and how to mediate between the poles of extraterritoriality and strict territoriality—for example, through “reasonableness” standards and the possibility of special rules, such as for armed conflict. As in the other Chapters, the question for judges is the relevance of territory to legal and political authority.

Chapter V, *Extraterritoriality, Privacy, and Security*, builds on the 2014 discussion of Surveillance and National Security. The jumping off point of the materials compiled by Professors Amy Kapczynski and Kim Lane Scheppele and the Honorable Allan Rosas is the CJEU 2014 ruling on “the right to be forgotten” requiring search engine companies to de-link “irrelevant” or “inadequate” information about individuals unless the public interest in the information outweighs the personal privacy interests. A host of questions have emerged about the role played by Google as a quasi-court assessing the balance between private and public interests; about the authority of courts to order effective remedies, such as by mandating global de-listing; and about how either private or public sector actors ought to weigh the trade-offs between privacy and free information flows given that countries around the world value these rights differently. After considering the question of when to order the deletion of information, we turn to issues of information gathering as governments continue to amass data in the hopes of thwarting threats to security. Here, the issues include whether data collection or protection rights ought to vary depending on what entities (domestic, foreign, public, private) collected the information and on whether the data relate to the citizens or to non-nationals of the collecting entity. As regulators in and out of courts balance privacy rights, security rights, and free information rights, the borders of the nation-state seem mismatched to the task.

A note about format is in order. As is the custom, the materials have been relentlessly pruned, and most footnotes and citations have been omitted. We have retained the original footnote numbers when footnotes are retained. All editorial footnotes are marked by asterisks. Square brackets indicate editorial additions.

Further, this is the occasion to thank the many people who made this volume possible. The readings for each chapter were selected and edited by the colleagues mentioned above, who worked with Yale Law School students. Thanks are therefore owed to David Louk, Executive and Managing Editor; Andrea Scoseria Katz, Senior Managing Editor; Eric Chung, E-book Editor, and to Senior Editors, Rebecca Forrestal, Sarafina Midzik, Mara Revkin, and Zayn Siddique, who were joined by new Editors Tal Eisenzweig, Rhea Fernandes, April Hu, and Rebecca Lee. Michael VanderHeijden, Yale Law School Head of Faculty

Services and Lecturer in Legal Research, identified and gathered sources that would otherwise have been unavailable. Jason Eiseman, Yale Law School's Librarian for Emerging Technologies, provided guidance on these eBooks, as did Professor Jack Balkin, in connection with the Information Society Project that he chairs. Renee DeMatteo, Senior Conference and Events Services Manager, assisted by Barbara Corcoran, and by Bonnie Posick, Senior Administrative Assistant and expert editor, provided wise guidance, as did Sara Lulo, Director of Yale Law School's International Programs and the Gruber Program for Global Justice and Women's Rights. This volume is the nineteenth since the Seminar was founded by Paul Gewirtz and Anthony Kronman, and thereafter chaired by Robert Post, Bruce Ackerman, and Jed Rubenfeld.

The Yale Global Constitutionalism Seminar is proud to be part of the Gruber Program for Global Justice and Women's Rights at the Yale Law School. As the Dedication explains, this is the year both to mourn the loss of Peter Gruber and to continue to be inspired by his vision and by the commitments that he shared with Patricia Gruber. Their support is what makes possible many ongoing efforts—across borders—to contemplate what law ought to provide, within and beyond the nation-state.

Judith Resnik
Arthur Liman Professor of Law, Yale Law School
November, 2015

MIGRANTS, CITIZENS, AND STATUS

DISCUSSION LEADERS

CRISTINA RODRÍGUEZ, MARTA CARTABIA, AND
SABINO CASSESE

I. MIGRANTS, CITIZENS, AND STATUS

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On April 18, 2015, more than eight hundred would-be migrants drowned in the Mediterranean Sea. Many of those who perished sought to escape war, economic deprivation, and poverty in the Middle East and Africa. All were hoping to reach Europe. Parallel efforts to cross borders in the Americas, prompted by patterns of economic development as well as domestic instability and violence, have likewise generated humanitarian dilemmas. This chapter asks how and whether these dynamics have prompted and should prompt legal change.

The Universal Declaration of Human Rights recognizes a right to emigrate but does not specify the conditions under which one might exercise a parallel right to immigrate. Law creates a wide variety of statuses, both within a body politic and transnationally. Rights and forms of benefits often depend on what status a person or a family holds. In this chapter, we explore the role of courts in creating and intervening in the definition of status, making decisions with respect to entry and exit, and identifying the rights that result from multiple statuses. These materials illuminate how constitutional law sets some of the parameters of noncitizens' political, economic, and legal integration into a political community. The cases also provide a platform for raising questions about the power (or lack thereof) of law to shape the cultural and political reception of migrants.

We begin by considering the constitutionality of making movement across borders illegal and the forms of regulation or punishment that may attach to persons unauthorized to be present. We then turn to whether family relationships create distinctive claims for status and rights to remain in a country. Thereafter, we examine the relationship between migration status and access to health, welfare, and labor rights. Finally, we consider the extent to which states may deprive persons of the security of citizenship and force them into the precarious position of migrants without status. In the context of considering whether new constitutional rights are emerging, we conclude with excerpts from the classic debates about open borders and the democratic legitimacy of closure.

The seminar has visited these issues before. We return to them again to consider how shifting norms of transnational personhood, evolving concerns about safety and security, and pressing distributional effects caused by volatile markets and economies have prompted reconsideration of migration as a human activity.

CLAIMS OF RIGHT

Statement of the Global Migration Group on the Human Rights of Migrants in Irregular Situation (2010)*

Principals of the Global Migration Group, assembled in Geneva on 30 September 2010, have adopted the following statement:

The Global Migration Group (GMG) is deeply concerned about the human rights of international migrants in an irregular situation around the globe. Although the number of migrants without proper legal status in transit or host countries is unknown, they are estimated to be in the tens of millions worldwide.

Migrants in an irregular situation are more likely to face discrimination, exclusion, exploitation and abuse at all stages of the migration process. . . . Rendered vulnerable by their irregular status, these men, women and children are often afraid or unable to seek protection and relief from the authorities of countries of origin, transit or destination. . . .

Too often, States have addressed irregular migration solely through the lens of sovereignty, border security or law enforcement, sometimes driven by hostile domestic constituencies. Although States have legitimate interests in securing their borders and exercising immigration controls, such concerns cannot, and indeed, as a matter of international law do not, trump the obligations of the State to respect the internationally guaranteed rights of all persons, to protect those rights against abuses, and to fulfill the rights necessary for them to enjoy a life of dignity and security.

The fundamental rights of all persons, regardless of their migration status, include:

* “The Global Migration Group (GMG) is an inter-agency group bringing together heads of agencies to promote the wider application of all relevant international and regional instruments and norms relating to migration, and to encourage the adoption of more coherent, comprehensive and better coordinated approaches to the issue of international migration.” See <http://www.globalmigrationgroup.org/what-is-the-gmg>. Members include international organizations and agencies such as the International Labour Organization, the International Organization for Migration, the Office of the High Commissioner for Human Rights, the United Nations Department of Economic and Social Affairs, the United Nations High Commissioner for Refugees, the United Nations Children’s Fund, the United Nations Development Programme, the United Nations Entity for Gender Equality and the Empowerment of Women, the World Bank, and the World Health Organization.

The right to life, liberty and security of the person and to be free from arbitrary arrest or detention, and the right to seek and enjoy asylum from persecution;

The right to be free from discrimination based on race, sex, language, religion, national or social origin, or other status;

The right to be protected from abuse and exploitation, to be free from slavery, and from involuntary servitude, and to be free from torture and from cruel, inhuman or degrading treatment or punishment;

The right to a fair trial and to legal redress;

The right to protection of economic, social and cultural rights, including the right to health, an adequate standard of living, social security, adequate housing, education, and just and favorable conditions of work; and

Other human rights as guaranteed by the international human rights instruments to which the State is party and by customary international law.

Protecting these rights is not only a legal obligation; it is also a matter of public interest and intrinsically linked to human development. . . .

The irregular situation which international migrants may find themselves in should not deprive them either of their humanity or of their rights. As the Universal Declaration of Human Rights states: “all human beings are born free and equal in dignity and rights.”

Catherine Dauvergne

*Making People Illegal: What Globalization Means
for Migration and Law (2009)**

. . . The most straightforward way to define illegal migration is by reference to the migration law of the state doing the counting. Under this method, anyone who is currently in contravention of the law has an “illegal” status. This will include people who enter the country in breach of the law and those who

* Excerpted from CATHERINE DAUVERGNE, MAKING PEOPLE ILLEGAL: WHAT GLOBALIZATION MEANS FOR MIGRATION AND LAW (2009).

overstay their permission to remain. More ambiguously, it may include those who intend to make an asylum claim but have not yet made one. . . .

. . . [The] overall picture [is] of a vast amount of population movement outside legal frameworks. . . . [I]llegal migration is an important part of the contemporary story of globalization. . . .

One factor that accounts for the growth of illegal migration is the law. Since the early 1990s, prosperous Western states have been engaged in a worldwide crackdown on illegal migration. This has included constitutional changes in Germany; a range of restrictions introduced in France by the notorious Pasqua laws; extensive reduction of asylum seeker rights in Britain; shifts in Italian law; moves toward European Union harmonization in matters of illegal migration and asylum admission. Canada has introduced stricter penalties for migration infringements The United States has increased border and inland scrutiny. Most innovatively, Australia has moved to excise whole tracts of territory from its “migration zone”

. . . [T]he current “crackdown” on extralegal migration cannot help but increase it. . . . In the absence of law, there can be no illegal migration. . . . Migration law is being used to make people “illegal” and this rhetoric is resonating as never before. . . .

. . . Although the term “illegal” is precise in its relationship with the law, it is empty of content. It says even less than other identity markers in the migration hierarchy: resident, visitor, guest worker, or refugee. It circumscribes identity solely in terms of its relationship with law: those who are illegal have broken (our) law. Discourse about illegals gathers together a shred of common meaning, some pejorative connotation, and a fixed idea of The Law. . . .

Making people illegal reflects an increasingly globally coherent view that there are proper and improper reasons to migrate. The force of sanctions against extralegal migration is often aimed at “mere economic migrants.” Being destitute, or even being poor or “average” . . . are insufficient reasons to migrate today. . . .

The emergence of “the illegal” as a subject and object of migration law thus reflects features of the crackdown currently being pursued by prosperous Western states. The term, however, has moved well beyond its legal moorings. “Illegal” is now established as an identity of its own, homogenizing and obscuring the functioning of the law and replicating layers of disadvantage and exclusion. Even as it is difficult to accurately track numbers of extralegal migrants, the discursive phenomenon magnifies this difficulty and makes accurate social and political understandings of this migration near to impossible. For extralegal

migrants seeking legal protection or redress for harms, the status of “illegal” has been almost insurmountable. This will eventually prove to be one of the most important tests of the global spread of human rights. . . .

Seyla Benhabib

The Rights of Others: Aliens, Residents, and Citizens (2004)*

. . . *Transnational migrations* . . . pertain to the rights of individuals, not insofar as they are considered members of concrete bounded communities but insofar as they are human beings *simpliciter*, when they come into contact with, seek entry into, or want to become members of territorially bounded communities. . . .

[T]he treatment by states of citizens and residents within their boundaries is no longer an unchecked prerogative. One of the cornerstones of Westphalian sovereignty, namely that states enjoy ultimate authority over all objects and subjects within their circumscribed territory, has been delegitimized through international law.

What then should be the guiding normative principles of membership in a world of increasingly deterritorialized politics? Which practices and principles of civil and political incorporation are most compatible with the philosophical self-understanding and constitutional commitments of liberal democracies? . . .

. . . Sovereignty is a relational concept; it is not merely self-referential. Defining the identity of the democratic people is an ongoing process of constitutional self-creation. . . . We can render the distinctions between “citizens” and “aliens,” “us and them,” fluid and negotiable through democratic iterations. Only then do we move toward a postmetaphysical and postnational conception of cosmopolitan solidarity which increasingly brings all human beings, by virtue of their humanity alone, under the net of universal rights, while chipping away at the exclusionary privileges of membership. . . .

The right of hospitality entails a claim to temporary residency which cannot be refused, if such refusal would involve destruction . . . of the other. . . . What is unclear in Kant’s discussion [of hospitality] is whether such relations

* Excerpted from SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS* (2004).

among peoples and nations involve acts of supererogation, going beyond the call of moral duty, or whether they entail a certain sort of moral claim concerning the recognition of “the rights of humanity in the person of the other.” . . .

The universal right to hospitality which is due to every human person imposes upon us an *imperfect moral duty* to help and offer shelter to those whose life, limb, and well-being are endangered. This duty is “imperfect” . . . in that it can permit exceptions, and can be overridden by legitimate grounds of self-preservation. . . . [H]ow. . . should [we] understand legitimate grounds of self-preservation: is it morally permissible to turn the needy away because we think that they are altering our cultural mores? . . .

I want to distinguish between *cultural integration* and *political integration* and to suggest that in robust liberal democracies the porousness of borders is not a threat to, but rather an enrichment of, existing democratic diversity. Cultural communities are built around their members’ adherence to values, norms, and traditions that bear a *prescriptive* value for their identity, in that failure to comply with them affects their own understandings of membership and belonging. . . .

Political integration refers to those practices and rules, constitutional traditions and institutional habits, that bring individuals together to form a functioning political community. . . . [N]ot only must it be possible to run the economy, the state, and its administrative apparatus, but there must also be a dimension of belief in the *legitimacy* of the major institutions of societies in doing so. . . . In the modern state, . . . the disjunction between personal identities and personal allegiances, public choices and private involvements, is constitutive of the freedom of citizens in liberal democracies.

CRIMINALIZING PRESENCE

This section considers whether constitutional precepts impose any limits on the criminalization of migrants. In 2008, Italy enacted Law Decree No. 125/2008, which made irregular status an aggravating circumstance for criminal offenses and increased the punishment for irregular status by enhancing the sentence. In 2009, Italy criminalized the act of illegal entry and residence in Law 94/2009 (“the 2009 Security Package”). That law authorized expulsion and imposed fines from €5,000 to €10,000 (approximately \$5,650 to \$11,300 in U.S. 2015 dollars) as sanctions for illegal entry. The constitutionality of these measures is the subject of the following two decisions.

Italian Constitutional Court

No. 249-2010 (2010)

[The Constitutional Court composed of: President: Francesco Amirante; Judges: Ugo De Siervo, Paolo Maddalena, Alfio Finocchiaro, Alfonso Quaranta, Franco Gallo, Luigi Mazzella, Gaetano Silvestri, Sabino Cassese, Maria Rita Saulle, Giuseppe Tesauro, Paolo Maria Napolitano, Giuseppe Frigo, Alessandro Criscuolo, Paolo Grossi

Gaetano SILVESTRI authored the judgment:]

1. The *Tribunale di Livorno* and the *Tribunale di Ferrara* . . . have raised questions concerning the constitutionality of Article 61 of the Criminal Code, which provides that an ordinary aggravating circumstance shall consist in the fact that the guilty person committed an offence “whilst illegally in the country.” . . .

4.1. This court has held as a general matter in relation to inviolable rights that they are vested “in individuals not insofar as they are members of a particular political community but as human beings as such.” Accordingly, the legal status of foreign nationals must not be considered—as far as the protection of such rights is concerned—as a legitimate basis for different and less favourable treatment, especially under criminal law, as the area of law most directly related to fundamental human freedoms

Rigorous compliance with inviolable rights implies that more severe criminal treatment based on the personal characteristics of individuals resulting from the commission of previous acts that are “entirely extraneous to the offence,” thereby introducing criminal responsibility that is tailored to the perpetrator “in evident breach of the principle of the requirement of harm . . . ,” will be unlawful. . . .

5. . . . [T]he goal of combating illegal immigration cannot be deemed to be reasonable and sufficient, as this purpose cannot be pursued indirectly by classifying offences committed by irregular foreign nationals as more serious than identical conduct engaged in by Italian or EU nationals. In fact, it would end up entirely detaching the punishment imposed from the offence contemplated under the criminal law provision and the nature of the interests affected by it, which were specifically held by the legislator to be worthy of enhanced protection through the imposition of a criminal sanction. . . .

6. . . . The introduction of the offence of illegal entry into and stay in the country . . . heightened . . . contradiction[s] by laying the foundations for potential

duplicate or multiple punishments, all resulting from the status acquired through a single violation of immigration law—which is now a self-standing criminal offense—but which did not however have any connection with the provisions of the criminal law alleged to have been violated by the person concerned. . . .

9. . . . Ultimately, the status of an “illegal” immigrant—which is acquired through illegal entry into Italy or remaining after the expiry of a residence permit . . . turns into a “stigma,” which operates as a premise for different treatment under the criminal law of a person whose actions appear . . . to be characterised by an accentuated antagonism towards respect for the law. The specific characteristics of the individual person on trial are disregarded in favour of the general characteristics stipulated in advance by the law, on the basis of an absolute presumption which identifies a “type of perpetrator” who is subject to more severe treatment always and under all circumstances.

This means that the contested legislation contrasts with Article 25(2)* of the Constitution, which stipulates that criminal responsibility must be based on a person’s actions . . . and not for his or her personal characteristics. . . .

11. . . . [T]he contested provision must be ruled unconstitutional on the grounds that it violates Articles 3(1) and 25(2) of the Constitution.

Italian Constitutional Court
No. 250-2010 (2010)

[The Constitutional Court composed of: President: Francesco Amirante; Judges: Ugo De Siervo, Paolo Maddalena, Alfio Finocchiaro, Alfonso Quaranta, Franco Gallo, Luigi Mazzella, Gaetano Silvestri, Sabino Cassese, Maria Rita Saulle, Giuseppe Tesauro, Paolo Maria Napolitano, Giuseppe Frigo, Alessandro Criscuolo, Paolo Grossi

* The relevant excerpts from the Constitution of the Italian Republic, provided in English by Hein Online at http://heinonline.org/HOL/cowdocs?state=&tfile=it_1947_2012_parl_eng_2.pdf, are:

Article 3(1): “All citizens have equal social status and are equal before the law, without regard to their sex, race, language, religion, political opinions, and personal or social conditions.”

Article 25(2): “No punishment is allowed except provided by a law already in force when the offence has been committed.”

Giuseppe FRIGO authored the judgment:]

1.1. . . . The charge originates from a control carried out by a Carabinieri patrol, following which it was ascertained that the foreign national – who did not have any identification documents – was illegally staying in the country, since he had not applied for a residence permit within the statutory time limit following his entry into Italy An expulsion order was therefore issued against him . . . to leave the country within five days In parallel, the foreign national had been arraigned, charged with the offence provided for under Article 10a of Legislative Decree no. 286 of 1998. . . .

6.2. . . . Contrary to the assertions of the referring court, it is not possible to conclude that, by introducing . . . the offence of the “illegal entry into and stay in the territory of the State,” [the legislature] penalises a mere “personal and social condition”—namely that of the “illegal immigrant” (or, more properly, the “irregular” foreign national)—who is arbitrarily deemed to be a danger to society. The object of the offence is not a “manner of being” of the person, but specific conduct in breach of applicable legislation. . . .

Status as a so-called “illegal immigrant” is not a pre-existing given . . . extraneous to the offence, but on the contrary is the consequence of the very same conduct that is criminalised, encapsulating its unlawful nature (no differently from the way in which the status of previous offender for particular offences results from the fact that those offences have been committed, as subsequently ascertained by the courts).

6.3. Moreover, the Court cannot endorse the argument that this case involves an unlawful act “of mere disobedience” that does not infringe any legal interest which deserves protection Thus its punishment is claimed to establish an instance of “criminal law guilt due to personal characteristics,” which is underpinned by the intention to criminalise situations of poverty and marginalisation *per se*

The legal interest protected under the provision creating the offence can in reality easily be identified as the State’s interest in the control and management of migratory flows in accordance with a specific legislative framework: the adoption of this interest as the object of criminal law protection cannot be regarded as irrational or arbitrary—since it moreover amounts to a “category” legal interest . . . a common feature of most of the criminal law provisions

It cannot be disputed that the power to regulate immigration is one of the essential features of State sovereignty as an expression of territorial control. . . .

Indeed, the legislation governing the entry into and stay in Italy by foreign nationals is “associated with the consideration of various public interests such as, for example, security and public health, public order, restrictions of an international nature and the national policy on immigration.” These are restrictions and policies which, in turn, are the result of assessments relating to the socio-economic “sustainability” of the phenomenon.

. . . The determination of the most appropriate response to that offence in terms of punishment, and specifically to determine whether it is to be regulated under the criminal law rather than merely under administrative law . . . , falls to the discretionary choice of the legislature, which may indeed modify the quality and level of the criminal law provision in this area differently over time

6.4. Within this perspective, the lower court’s view that the criminal offence has essentially introduced an absolute presumption of the social dangerousness of an illegal immigrant which does not reflect *id quod plerumque accidit*, and is hence arbitrary, is also groundless. . . .

6.5. . . . [T]he choice made by the Italian Parliament in the 2009 amendment is far from isolated within the international context.

Indeed, a comparative analysis reveals that provisions creating an offence of illegal immigration of similar inspiration . . . are present within the legislation of various countries of the European Union: both within those of the countries closest to our legal traditions (such as France and Germany) as well as those hailing . . . [from] a different tradition (such as the United Kingdom).

8. . . . With regard to the additional challenge . . . alleging the infringement of inviolable human rights and the principle of solidarity

. . . “[T]he requirements of human solidarity are not *per se* at odds with the rules on immigration put in place in order to ensure an orderly migratory flow and an adequate welcome and integration of foreign nationals.” . . . Moreover, this balance must be struck within the context of a “legislative framework . . . which regulates in a different manner . . . the entry into and stay within the country of foreign nationals, depending upon whether they are asylum seekers or refugees, or so-called ‘economic migrants.’” . . . The legislature therefore has a broad range of discretion in this area when placing limits on the entry by foreign nationals into the territory of the State

10. The complaint alleging the violation of the principles of reasonableness and the proper administration of public offices . . . on the basis . . . that the contested provision, considered overall, pursues an objective (the removal

of foreign nationals illegally present within the territory of the State) that could be achieved in the same manner through the institution of administrative expulsion . . . is also groundless. . . .

. . . Parliament has demonstrated that it regards the application of the criminal penalty as a “subordinate” outcome compared to the actual removal from the national territory of illegally staying foreign nationals. . . .

Moreover, . . . the subjection of immigration offences to pecuniary penalties is also far from unknown within a comparative perspective

Vélez Loor v. Panama
Inter-American Court of Human Rights
(Nov. 23, 2010)

[The Inter-American Court of Human Rights (hereinafter, the “Inter-American Court” or “the Court”), composed of the following judges:

Diego García-Sayán, President; Leonardo A. Franco, Vice-president; Manuel E. Ventura Robles, Judge; Margarette May Macaulay, Judge; Rhadys Abreu-Blondet, Judge; Alberto Pérez Pérez, Judge, and, Eduardo Vio Grossi, Judge; also present: Pablo Saavedra Alessandri, Secretary, and Emilia Segares Rodríguez, Deputy Secretary.]

1. On October 8, 2009, the Inter-American Commission on Human Rights . . . submitted an application against the Republic of Panama After determining that Panama had not adopted its recommendations, the Commission decided to submit the present case to the Court’s jurisdiction. . . .

2. The application concerns the alleged arrest in Panama of Mr. Jesús Tranquilino Vélez Loor, a citizen of Ecuador, and his subsequent prosecution for crimes relating to his immigration status, without being afforded due guarantees and or the possibility of being heard or of exercising his right of defense; the alleged failure to investigate the report on torture filed by Mr. Vélez Loor before Panamanian authorities as well as the alleged inhumane conditions he experienced in several Panamanian prisons where he was detained after his arrest on November 11, 2002, and until his deportation to Ecuador on September 10, 2003. . . .

92. It is an undisputed fact that Mr. Jesús Tranquilino Vélez Loor, an Ecuadorian national, was stopped at the Tupiza Police Post in Darien Province, Panama, on November 11, 2002, because “he did not have the necessary documentation to justify his presence in Panama.” . . .

94. On December 6, 2002, . . . the Director of the National Immigration Office, after confirming that Mr. Vélez Loor had been previously deported from Panama . . . for having entered national territory “illegally,” decided to sentence him “to serve a two (2) year prison term in one of the country’s prisons” for “ignoring the warnings . . . of the prohibition against his entry to Panama” . . .

97. This Court has already stated that, in the exercise of their authority to set immigration policies, States may establish mechanisms to control the entry into and departure from their territory of individuals who are not nationals, provided that these are compatible with the standards of human rights protection established in the American Convention. . . .

98. . . . [M]igrants who are undocumented or in an irregular situation have been identified as a group in a vulnerable situation Clearly, this situation of vulnerability has “an ideological dimension and occurs in a historical context that is different for each State and is maintained by *de jure* (inequalities between nationals and foreigners in the laws) and *de facto* (structural inequalities) situations.” Moreover, cultural prejudices about migrants perpetuate the situation of vulnerability, making it difficult for migrants to integrate into society. Finally, it is worth mentioning that human rights violations committed against migrants often go unpunished . . . due to cultural factors that justify them, the lack of access to power structures in a given society and the legal and practical obstacles that make effective access to justice illusory. . . .

100. This does not mean that States cannot take any action against migrants who do not comply with their legal system, but rather that upon adopting the relevant measures, States should respect human rights and guarantee their exercise and enjoyment to all persons who are within their territory, without discrimination based on their regular or irregular status, or their nationality, race, gender or any other reason. Likewise, the evolution of this aspect of international law has placed certain limits on the application of immigration policies, which must always be applied with strict regard for the guarantees of due process and respect for human dignity, regardless of the migrant’s legal status.

106. . . . In this case, . . . the rights holder is a foreign national, who was arrested because he was not authorized by State law to enter and stay in Panama. In other words, the measures to restrict Mr. Vélez Loor’s personal liberty were not related to the commission of a criminal offense, but to his irregular migratory

status for having entered Panama in an unauthorized area, without the necessary documents and in violation of a prior deportation order. . . .

161. Both the Commission and the representatives alleged the violation of Article 7(3) of the American Convention [on Human Rights^{*}] because the two-year sentence imposed on Mr. Vélez Loor by Order 7306 was of a criminal nature. . . .

162. The representatives also emphasized what they termed “the phenomenon of the criminalization of migrants.” They argued that the law in force in Panama at the time of the events clearly illustrates this, since it called for the imposition of the penalty of imprisonment on recidivists who illegally entered the country. Furthermore, they stressed that this tendency to criminalize migrants is reinforced by “practices or discourses that encourage the perception that migrants [were] dangerous, that they caus[ed] an increase of insecurity, that they p[ut] pressure on public services and, therefore, that they constitut[ed] a burden to society.” Finally, the representatives argued that this rule was “discriminatory and stigmatizing, [given] that it equated the irregular immigrant with a criminal; however, it did not offer any guarantees of due process.” . . .

167. . . . [T]he Court shall proceed to evaluate whether the custodial measure applied to Mr. Vélez Loor complied with the requirements provided for by law, served a legitimate purpose and was appropriate, necessary and proportional. . . .

168. . . . [U]nlike the European Convention for the Protection of Human Rights and Fundamental Liberties,^{**} the American Convention does not establish, explicitly or implicitly, the reasons, cases or circumstances that would be considered legitimate in a democratic society for authorizing a custodial measure under domestic legislation.

169. . . . [T]he application of preventive custody may be suitable to regulate and control irregular immigration to ensure that the individual attends the immigration proceeding or to guarantee the application of a deportation order.

* Article 7(3) of the American Convention on Human Rights provides: “No one shall be subject to arbitrary arrest or imprisonment.”

** Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, “Right to Liberty and Security,” sets forth the conditions for “lawful arrest or detention.”

However, and in the view of the Working Group on Arbitrary Detention,* “criminalizing an irregular entry into a country goes beyond the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary detention.” Moreover, the United Nations Rapporteur on the human rights of migrants has argued [in 2002] that “[d]etention of migrants because of their irregular status should under no circumstance be of a punitive nature.” In this case, the Court considers that the purpose of imposing a punitive measure on an immigrant who reenters a country in an irregular manner subsequent to receiving a deportation order cannot be considered [a] legitimate purpose according to the Convention.

170. . . . In a democratic society punitive power is exercised only to the extent that is strictly necessary to protect fundamental legal rights from serious attacks that may impair or endanger them. The opposite would result in the abusive exercise of the punitive power of the State. . . .

171. According to this principle, it is clear that detaining people for non-compliance with migration laws should never involve punitive purposes. . . . [M]igratory policies based on the mandatory detention of irregular migrants, without ordering the competent authorities to verify, in each particular case and by means of an individualized evaluation, the possibility of using less restrictive measures to achieve the same ends, are arbitrary.

172. Accordingly, the Court rules that Article 67 of Decree Law 16 of 1960 did not pursue a legitimate purpose and was disproportionate, given that it established a punitive penalty for foreigners who evade previous orders for deportation and, therefore, result in arbitrary detentions. In short, the deprivation of liberty imposed on Mr. Vélez Loor, based on this standard, constituted a violation of Article 7(3) of the Convention in relation to Article 1(1) of the same treaty.

[The Court orders] [u]nanimously, that: . . .

11. This Judgment constitutes *per se* a form of reparation. . . .

14. The State shall continue to carry out, effectively and with the utmost diligence and within a reasonable period of time, the criminal investigation initiated in regard to the events alleged by Mr. Vélez Loor. . . .

* The Working Group on Arbitrary Detention, an independent body of human rights experts, was established in 1991 by the former United Nations Commission on Human Rights and is overseen by the United Nations Human Rights Council.

15. The State shall, within a reasonable period of time, adopt the necessary measures to create establishments with sufficient capacity to hold persons whose detention is necessary and reasonable for migratory reasons, specifically adapted for such purposes, which offer appropriate physical conditions and a regimen suitable for migrants and which are staffed by properly qualified and trained civilians

19. The Court shall monitor full compliance with this Judgment, in exercise of its authority and in compliance with its obligations pursuant to the American Convention on Human Rights, and shall consider this case concluded once the State has fully complied with the measures ordered therein. The State shall, within a period of one year from the notification of this Judgment, submit a report to this Court regarding the measures adopted in compliance with this Judgment. . . .

El Dridi v. Italy

Court of Justice of the European Union (First Chamber)

C-61/11 (Apr. 28, 2011)

THE COURT (First Chamber), composed of A. Tizzano, President of the Chamber, J.-J. Kasel, M. Ilešič (Rapporteur), E. Levits and M. Safjan, Judges, gives the following

18. Mr El Dridi is a third-country national who entered Italy illegally and does not hold a residence permit. A deportation decree was issued against him by the Prefect of Turin (Italy) on 8 May 2004. . . .

20. A check . . . revealed that Mr El Dridi had not complied with that removal order.

21. Mr El Dridi was sentenced at the conclusion of an expedited procedure . . . to one year's imprisonment for the offence. . . .

25. . . . [T]he Corte d'appello di Trento decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘ . . . [D]o Articles 15 and 16 of Directive 2008/115* . . . preclude:

—the possibility that criminal penalties may be imposed in respect of a breach of an intermediate stage in the administrative return procedure, before that procedure is completed, by having recourse to the most severe administrative measure of constraint which remains available?

—the possibility of a sentence of up to four years’ imprisonment being imposed in respect of a simple failure to cooperate in the deportation procedure on the part of the person concerned, in particular where the first removal order issued by the administrative authorities has not been complied with?” . . .

31. . . . [R]ecital 2 in the preamble to Directive 2008/115 states that it pursues the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and also their dignity. . . .

* Additional relevant excerpts from Directive 2008/115 of the European Parliament and of the Council are:

Article 7(1): “A return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days

Article 7(4): “If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.”

Article 15:

“1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

(a) there is a risk of absconding or

(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence. . . .

5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. . . . [and] may not exceed six months. . . .”

Article 16: “1. Detention shall take place . . . in specialised detention facilities. Where a Member State cannot provide [such] accommodation . . . and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners.”

34. . . . Directive 2008/115 sets out specifically the procedure to be applied by each Member State for returning illegally staying third-country nationals and fixes the order in which the various, successive stages of that procedure should take place. . . .

36. As part of that initial stage of the return procedure, priority is to be given, except where otherwise provided for, to voluntary compliance

38. . . . [W]here the obligation to return has not been complied with Article 8(1) and (4) of Directive 2008/115 provides that, in order to ensure effective return procedures, those provisions require the Member State which has issued a return decision against an illegally staying third-country national to carry out the removal by taking all necessary measures including, where appropriate, coercive measures, in a proportionate manner and with due respect for, inter alia, fundamental rights.

39. In that regard, . . . Member States must carry out the removal using the least coercive measures possible. It is only where . . . the enforcement of the return decision in the form of removal risks being compromised by the conduct of the person concerned that the Member States may deprive that person of his liberty and detain him.

40. . . . [T]hat deprivation of liberty must be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence. . . .

52. . . . [A]s regards the coercive measures which the Member States may implement . . . it is clear that in a situation where such measures have not led to the expected result being attained, namely, the removal of the third-country national against whom they were issued, the Member States remain free to adopt measures, including criminal law measures, aimed inter alia at dissuading those nationals from remaining illegally on those States' territory.

57. . . . Directive 2008/115 . . . makes the use of coercive measures expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued.

Consequently, the Member States may not, in order to remedy the failure of coercive measures adopted in order to carry out forced removal pursuant to Article 8(4) of that directive, provide for a custodial sentence, such as that provided for by . . . [the Italian Legislature], on the sole ground that a third-country national continues to stay illegally on the territory of a Member State

after an order to leave the national territory was notified to him and the period granted in that order has expired; rather, they must pursue their efforts to enforce the return decision, which continues to produce its effects.

59. Such a penalty, due inter alia to its conditions and methods of application, risks jeopardising the attainment of the objective pursued by that directive, namely, the establishment of an effective policy of removal and repatriation of illegally staying third-country nationals. . . .

60. That does not preclude the possibility for the Member States to adopt, with respect for the principles and objective of Directive 2008/115, provisions regulating the situation in which coercive measures have not resulted in the removal of a third-country national staying illegally on their territory.

62. Consequently, . . . Directive 2008/115, in particular Articles 15 and 16 . . . must be interpreted as precluding a Member State's legislation, such as that at issue in the main proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period.

While limiting the capacity of the state to hold migrants in criminal detention, *El Dridi* may have created incentives to expand the use of administrative detention under a civil rubric, raising the question of whether constitutional precepts similarly constrain civil detention. Under a 2008 Directive, the European Commission authorized each Member State to set its own time limit for civil detention, not to exceed six months, but with the possibility of a one-year extension under specified circumstances. Courts in the United States have imposed some limits on civil detention. In 2001, in *Zadvydas v. Davis*, for example, the Supreme Court interpreted a 1996 statute that had authorized detention pending removal; the statute did not specify a time limit on detention. To avoid constitutional due process concerns, the Court read the statute to include a presumption of detention of no more than six months:

We do have reason to believe, however, that Congress previously doubted the constitutionality of detention for more than six months. Consequently, for the sake of uniform administration in the federal courts, we recognize that period. After this 6-month period, once the alien provides good reason to believe that there is

no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the “reasonably foreseeable future” conversely would have to shrink. This 6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.

These limits aside, immigration law in the United States has increasingly become a matter for criminal law. Willfully entering the United States without permission was not, until 1929, a violation of federal criminal law. Indeed, one federal appellate court noted in 1925 that it had “never been the policy of the Government to punish criminally aliens who come here in contravention of our immigration laws.” Further, even after the 1920s, as discussed in the excerpts below, federal prosecutions were rare until the 1980s. But the materials below detail some of the ways in which, in the United States, criminalization of immigration is giving rise to new constitutional questions, including what limits, if any, can be imposed on government action.

David A. Sklansky

Crime, Immigration, and Ad Hoc Instrumentalism (2012)*

Criminal justice and immigration enforcement used to be separated in four critical respects: immigration violations were not prosecuted as crimes; criminal activity was not punished by deportation; immigration proceedings were administrative rather than criminal in character; and local police officers did not enforce immigration laws. None of these propositions remain true today; . . . the line between criminal justice and immigration enforcement has all but disappeared. . . .

In 1929, Congress made illegal entry into the United States a misdemeanor and illegal entry following deportation a felony. Illegal reentry following deportation became a separate, more serious offense in 1952. But there

* Excerpted from David A. Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157 (2012).

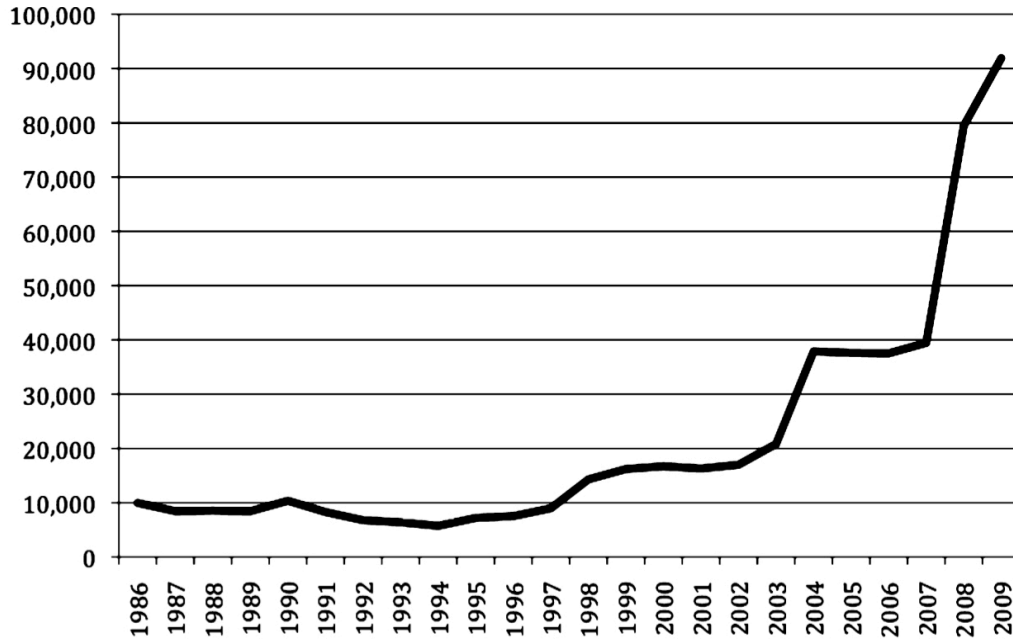
were relatively few prosecutions for these offenses . . . until the 1980s. . . . Congress began enacting more and more criminal statutes aimed at illegal immigration, defining new crimes and increasing the penalties for existing crimes. . . .

. . . The Immigration Marriage Fraud Amendments [of 1986] . . . made it a felony to marry for the purpose of evading immigration laws. The Anti-Drug Abuse Act of 1988 raised the criminal penalties for unlawful reentry following deportation, if the deportation resulted from a felony conviction, and for aiding the illegal entry of aliens previously convicted of “aggravated felonies” or known to be entering the country illegally. . . . The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 again raised penalties for assisting noncitizens to enter the country illegally, and it created a raft of new immigration crimes, including driving above the speed limit when fleeing an immigration checkpoint, failing to disclose one’s role in preparing a false immigration application, and filing an immigration application without a “reasonable basis in law or fact.” . . . Prosecutions for immigrant crimes—especially the various grades of illegal entry—have skyrocketed, to the point where immigration offenses account for a majority of all criminal cases in federal court. . . .

Over a twelve-year period, from 1997 to 2009, immigration prosecutions per year grew more than tenfold, from less than 9,000 to more than 90,000. . . . [O]ver the same period of time, the numbers for other categories of federal prosecutions were far more constant, with the result that immigration prosecutions are now not only the largest single category of federal prosecutions, they are a majority of all federal criminal cases. . . .

The sentences imposed under Operation Streamline [to expedite removal through processing cases in groups] tend to be relatively short. Although some defendants receive the statutory maximum six months, many more are sentenced to time served. The average is roughly thirty days. For defendants convicted of illegal reentry after deportation, the average is significantly longer, twenty-one months. . . .

Table 1. Immigration Prosecutions [in the United States], 1986-2009



Judith Resnik

Bordering by Law: The Migration of Law, Crimes, Sovereignty, and the Mail (forthcoming, 2016)*

. . . The terms “cimmigration” and “crim-imm” entered the lexicon to capture that the criminal law and immigration systems, once formally discrete, are being conflated. . . .

Given the ease with which one becomes inured to what exists, the novelty of federal criminalization merits attention. . . . As of 2013, immigration-related charges represented 25 percent of the federal prosecution caseload.

Sanctions include both incarceration and deportation, and persons convicted of a crime of “moral turpitude” are subjected to lifetime bars on reentry

* Excerpted from Judith Resnik, *Bordering by Law: The Migration of Law, Crimes, Sovereignty, and the Mail*, NOMOS: IMMIGRATION AND EMIGRATION (Jack Knight ed., forthcoming 2016).

absent special permission. Further, since 1996 and under the eerie term “removal,” such sanctions have become more frequent. In 2005, some 40,000 persons were removed based on criminal convictions; by 2009, the number was 393,000. A 2014 report concluded that 4.5 million people, many of whom had “deep ties in the United States,” had been deported since 1996. Whether to think that approach efficacious depends on the baseline chosen. Estimates . . . are that about 11 million people reside without documentation in the United States.

The constraints preventing federal prosecutions and deportations from rising unendingly come from the limits of relatively small size of federal law enforcement resources, as contrasted with those of the states. In 2012, the Supreme Court held in *Arizona v. United States* that states have no authority to add criminal penalties to those imposed under federal law; in an earlier ruling the Court had held that the federal government cannot “commandeer” state police resources. . . .

On one account, purposeful migration without permission is a crime, constituted by the willful failure to respect the sovereignty of a polity by intruding on or by taking a form of its and its peoples’ property and identity. With crime as the model, incarceration and deportation are appropriate sanctions. A competing account is that unauthorized entry is akin to the civil tort of trespass, to which the state may respond by ejecting the trespasser. Another possibility . . . is that migration ought not to be seen as wrong in either sense, even if it can be subjected to regulation based on the concerns for the wellbeing of migrants and of the receiving community. “Legalization” is typically used in reference to changing the status of those present in the country, but its deeper purchase would be to undermine the idea that border-crossing without permission is illicit. Illegal activities can, of course, be subjected to regulation, including penalties (such as civil fines or restitution) for non-compliance, rather than deportation and incarceration.

Given the current penalty structure, however, the contemporary category question centers around whether classifying processes of removal as “civil” or “criminal” makes a difference. That debate . . . reflects the degree to which the criminalization of migration has taken hold; the exile of individuals who have lived their lives in the United States has become normalized, albeit without naming it as such. Choosing between a “civil” or “criminal” descriptor requires identifying normative end-states, such as being more or less protective of migrants, discouraging or encouraging migration based on moral and welfarist conceptions of the world, enabling better sorting of individual claims of rights to remain, generating fewer or more deportations, imposing less stigma, creating

more safety and community life, or shaping a cost effective system efficacious on its own terms.

. . . [T]he effects of classification in practice include that, currently criminal defendants—but not migrants—have rights to remain silent . . . and—if facing prison terms—rights to counsel

Keeping deportation as a “civil” sanction provides other protections. Criminal defendants, once properly charged, can be held in detention prior to trial for long periods, while migrant detainees are not supposed to be subjected, as a matter of constitutional law, to indefinite detention. . . . Other factors in choosing between either “criminal” or “civil” labels include which system gives more discretion to the government, whether the current link between criminal convictions and “civil” removal gives more or less power to prosecutors, and the resulting implications for the expansion or shrinking of judicial discretion.

. . . My concern is that focusing on whether to term deportation “civil” or “criminal” functions, akin to the question of the supremacy of state-federal power over migrants, to deflect attention from the foundational problem—that criminalization ought not to be seen as a lawful sanction for human movement, that deportation is too grave a sanction to have become so frequently deployed, and that discrimination against migrants has become so familiar through both civil and criminal routes that it is difficult to dislodge. Employer sanctions, state and local stops, detention, and deportation have repositioned the migrant from “irregular” and “undocumented” to “illegal” and “criminal,” with a new term of art—“priority aliens”—emerging to flag those high-up on the government deportation queue. The growth in reporting requirements, in state and in federal policing, in detention, and in the federal criminal docket has expanded the public and private sector participants in the oversight of migrants. To undo this apparatus requires revising not only law enforcement procedures, detention obligations, and deportation practices but also employment practices and equal protection law’s toleration of criminalization and of limiting benefits and jobs based on alienage.

That work has become all the more difficult because of cross-border developments that sustain the propriety of state control. From “Fortress Europe” and the rapid growth in detention centers on and offshore, initiatives around the globe inscribe outsider entry as illicit. . . .

CLAIMS TO STAY: TIME AND FAMILY RELATIONSHIPS

This section addresses the intersection of the constitutional rights of the family and migration law. The questions are whether family relations impose limits on state power to remove migrants and what institutions make decisions about which kinds of family relationships qualify for special solicitude. Yet another question is whether families should be privileged as the unit of analysis either for rights of entry or for rights to remain.

As discussed here, in many jurisdictions, certain family relationships endow noncitizens with constitutional or statutory entitlements to remain, even when they might otherwise be removable. Excerpted are debates about the sorts of family ties that ground such entitlements and whether other factors, such as the length of a person's sojourn in a country, the noncitizen's birth in a former colony, or the needs of other family members, bear on the adjudication of claims. In the United States, the focus has been less on the constitutional law of family rights and more on which branch of government has the power to determine a migrant's status as it affects the family unity of U.S. citizens. Much of the contemporary debate focuses on whether the Executive Branch has the constitutional authority to decline to deport categories of individuals otherwise eligible to be "removed."

Case of Jeunesse v. The Netherlands

European Court of Human Rights (Grand Chamber)

App. no. 12738/10 (Oct. 3, 2014)

[The European Court of Human Rights, sitting as a Grand Chamber composed of: Dean Spielmann, President, Josep Casadevall, Guido Raimondi, Ineta Ziemele, Mark Villiger, Isabelle Berro-Lefèvre, Corneliu Bîrsan, Alvina Gyulumyan, Ján Šikuta, Luis López Guerra, Nona Tsotsoria, Ann Power-Forde, Işıl Karakaş, Vincent A. De Gaetano, Paul Mahoney, Johannes Silvis, Krzysztof Wojtyczek, judges, and Lawrence Early, Jurisconsult, delivers the following judgment:]

9. In March 1987 the applicant met and started a relationship with Mr W., who—like the applicant—was born and had always lived in Suriname. . . .

10. . . . In 1993, Mr W. was granted Netherlands nationality which entailed the renunciation of his Surinamese nationality. . . .

13. . . . [T]he applicant entered the Netherlands on 12 March 1997 and did not return to Suriname when her visa expired 45 days later. To date, she has been staying in the Netherlands. . . .

76. The applicant complained that to deny her residence in the Netherlands was contrary to her right to respect for family life as guaranteed by Article 8 of the [European] Convention [on Human Rights*]. . . .

101. The Court notes the applicant's clear failure to comply with the obligation to obtain a provisional residence visa from abroad before seeking permanent residence rights in the Netherlands. It reiterates that, in principle, Contracting States have the right to require aliens seeking residence on their territory to make the appropriate request from abroad. They are thus under no obligation to allow foreign nationals to await the outcome of immigration proceedings on their territory.

102. Although the applicant has been in the Netherlands since March 1997, she has—apart from the initial period when she held a tourist visa valid for 45 days—never held a residence permit issued to her by the Netherlands authorities. Her stay in the Netherlands therefore cannot be equated with a lawful stay

103. Where a Contracting State tolerates the presence of an alien in its territory thereby allowing him or her to await a decision on an application for a residence permit, an appeal against such a decision or a fresh application for a residence permit, such a Contracting State enables the alien to take part in the host country's society, to form relationships and to create a family there. However, this does not automatically entail that the authorities of the Contracting State concerned are, as a result, under an obligation pursuant to Article 8 of the Convention to allow him or her to settle in their country. . . .

* Article 8 of the European Convention on Human Rights provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, 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.”

107. . . . [I]n a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest. Factors to be taken into account . . . are the extent to which family life would effectively be ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion.

108. Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. . . .

109. . . . [T]he Court reiterates that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance Accordingly, national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it. . . .

113. . . . Having made numerous attempts to secure regular residence in the Netherlands and having been unsuccessful on each occasion, the applicant was aware—well before she commenced her family life in the Netherlands—of the precariousness of her residence status. . . .

114. Where confronted with a *fait accompli* the removal of the non-national family member by the authorities would be incompatible with Article 8 only in exceptional circumstances. The Court must thus examine whether in the applicant's case there are any exceptional circumstances which warrant a finding that the Netherlands authorities failed to strike a fair balance in denying the applicant residence in the Netherlands.

115. The Court first and foremost takes into consideration the fact that all members of the applicant's family with the exception of herself are Netherlands nationals and that the applicant's spouse and their three children have a right to enjoy their family life with each other in the Netherlands. The Court further notes that the applicant held Netherlands nationality at birth. She subsequently lost her nationality when Suriname became independent. She then became a Surinamese national, not by her own choice but pursuant to . . . the Agreement between the

Kingdom of the Netherlands and the Republic of Suriname concerning the assignment of nationality. . . .

116. The Court considers that a second important feature of the instant case is the fact that the applicant has been in the Netherlands for more than sixteen years and that she has no criminal record. . . . The tolerance of her presence for such a lengthy period of time, during which for a large part it was open to the authorities to remove her, in effect enabled the applicant to establish and develop strong family, social and cultural ties in the Netherlands. . . .

117. . . . [T]he Court accepts, given the common background of the applicant and her husband and the relatively young age of their children, that there would appear to be no insurmountable obstacles for them to settle in Suriname. However, it is likely that the applicant and her family would experience a degree of hardship if they were forced to do so. . . .

119. [The Court notes] that the applicant takes care of the children on a daily basis . . . [and] that the applicant's husband provides for the family by working full-time in a job that includes shift work. . . . The applicant—being the mother and homemaker—is the primary and constant carer of the children who are deeply rooted in the Netherlands of which country—like their father—they are nationals. . . .

121. The central issue in this case is whether, bearing in mind the margin of appreciation afforded to States in immigration matters, a fair balance has been struck between the competing interests at stake, namely the personal interests of the applicant, her husband and their children in maintaining their family life in the Netherlands on the one hand and, on the other, the public order interests of the respondent Government in controlling immigration. In view of the particular circumstances of the case, it is questionable whether general immigration policy considerations of themselves can be regarded as sufficient justification for refusing the applicant residence in the Netherlands.

122. The Court . . . finds that . . . the circumstances of the applicant's case must be regarded as exceptional. Accordingly, the Court concludes that a fair balance has not been struck between the competing interests involved. There has thus been a failure by the Netherlands authorities to secure the applicant's right to respect for her family life as protected by Article 8 of the Convention.

Joint Dissenting Opinion of Judges VILLIGER, MAHONEY, and SILVIS: . . .

We were unable to follow the majority in finding that the domestic authorities failed to live up to a positive obligation by not granting the applicant residence in the Netherlands upon any of her repetitive requests. . . . [T]he Court can be seen to be acting as a first-instance immigration court, in disregard of the principle of subsidiarity; although, in all fairness, the rejoinder to that criticism is presumably that the Court has merely taken the approach of granting paramount importance to the best interests of the children. Is the Court striking the right balance, while the respondent State had failed to do so? Who is to perform such a balancing exercise going into the factual, detailed merits of the applicant's individual circumstances? Where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court should require strong reasons to substitute its own view for that of the domestic courts. . . .

At the outset it is important to observe that the subject-matter of the Court's judgment is not interference in family life by the State. Rather, the judgment goes to the issue of the Contracting States' positive obligations regarding family life in the sphere of immigration. If this judgment is to be taken as establishing principled guidelines, it (a) expands the positive obligations incumbent on the State under the Convention in the interface of immigration and family law, (b) thus shrinks the margin of appreciation in relation to family life created during illegal overstay, (c) virtually disregards the attitude of the applicant as a relevant matter of consideration, (d) upgrades the obligation to take into account the best interests of the children. . . .

. . . The Convention does not guarantee the right of a foreign national to enter or to reside in a particular country and it does not prevent the Contracting States from enacting into law and enforcing a strict, even very strict, immigration policy. In concrete terms, the Court has taken the stance that a Contracting State is not obliged under the Convention to accept foreign nationals and permit them to settle except in cases where family life could not be lived elsewhere than on its soil. In the great majority of cases, it has pointed out that such family life could flourish in another country.

Thus, having chosen not to apply for a provisional residence visa from Suriname prior to travelling to the Netherlands, the applicant had no right whatsoever to expect to obtain any right of residence by confronting the Netherlands authorities with her presence in the country as a *fait accompli*. . . .

. . . The Court's reasoning can hardly be understood as applying the principle that family-creation without having stable grounds for residence is at the risk of those who do so in a situation that is known to them to be precarious. The margin of appreciation, which was wide in such circumstances, has undergone a hot wash in this case.

Where parents make personal choices, the State's positive obligations under Article 8 are generally spoken of as being of secondary importance and almost the same goes for facing consequences of deliberate acts. Thus, imprisonment of fathers sentenced for having committed a crime rarely raises issues under Article 8 of the Convention, even though their children are liable to suffer from it. The same goes for divorce. The present case, of course, is not at all about a committed crime or a divorce; nor is it about an eventual rupture of family life caused by the State. It is about a family wishing to establish a particular place of residence. What would be the perspective in cases of chosen emigration from the Netherlands in contrast with this case of refused residence? Many parents seek economic or other opportunities abroad; and nowadays Suriname is a notably popular destination. Even though children of such emigrants might prefer to stay where they reside, they would be obliged to follow their parents. In such cases of chosen emigration the State has generally speaking no positive obligation to intervene. It is commonly understood that respect for family life implies that the best interests of the children are then considered to be best served by accepting the consequences of the (lawful) choices made by their parents, unless fundamental rights of the children (such as those protected by Article 3) would thereby be violated. Shifting the responsibility for consequences of choices made by parents to the State is, in our view, in principle not conducive to the furtherance of the best interests of the children with regard to family life. There would also be a great risk that parents exploited the situation of their children in order to secure a residence permit for themselves.

Mario Savino

The Right to Stay as a Fundamental Freedom? The Demise of Automatic Expulsion in Europe (forthcoming, 2016)*

. . . Under [interpretations of the role of family protections in Article 8 of the European Convention on Human Rights (ECHR)], the right to stay is not

* Excerpted from Mario Savino, *The Right to Stay as a Fundamental Freedom? The Demise of Automatic Expulsion in Europe*, 2015 LEGAL THEORY 25 (forthcoming).

treated as a fundamental right *per se*, [but] . . . protected to the extent that it overlaps with the right to respect for “family life.” As a result, a permanent immigrant who lives in Italy as a single or unaccompanied person remains exposed to automatic expulsion . . . [on the grounds of a “weaker liberty interest” and that the State has discretion to remove the person. The question is whether European law continues to reflect] a *qualitative* distinction between a fundamental right to stay connected to the protection of family life [and the right of the “unaccompanied alien,” who is seen as having “a non-fundamental right to stay.”] . . . Recent developments in the case-law of the European court of human rights (ECtHR) point to [the development of a right to stay for both kinds of individuals.] . . .

The Convention neither calls into question the [State’s] “right” to control the entry and the sojourn of aliens in its territory, nor aims at creating an absolute right not [to] be removed from the host country: . . . this privilege is reserved to nationals. Nonetheless, various provisions of the Convention constrain the [State’s] power to expel aliens.

Article 8 is especially relevant in this context. In principle, when a measure of territorial exclusion *interferes* with [the] right of everyone to respect for his or her “*private and family life*,” Article 8 ECHR requires that that measure pursues a *legitimate aim* (as laid down in paragraph 2) and is *proportionate* or “necessary in a democratic society.”

As for the *legitimate aim*, automatic expulsion of foreign national offenders seems to comply with Article 8: the ground of “prevention of disorder or crime” is consistently referred to in Strasbourg’s case-law on expulsion of convicted aliens.

. . . [M]ore problematic is the *proportionality* requirement. An inflexible instrument of exclusion, based on an *ex ante* (legislative) non-rebuttable presumption, might well lead State authorities to adopt exclusion measures that are not proportional. This issue arises every time an expulsion order *interferes* with the interests protected by Article 8, namely “*private and family life*.” Yet, does the “private life” aspect enjoy an autonomous protection under Article 8? . . .

[Starting in 2003,] . . . the European Court . . . [began] to ascribe autonomous relevance to “private life”. . . . The *Üner [v. the Netherlands]* case [2006], concerning a discretionary expulsion of a convicted alien, marks the turning point. . . . The principle . . . established is that, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual’s social identity, it must be accepted that the totality of social ties between settled

migrants and the community in which they are living constitute part of the concept of “private life” within the meaning of Article 8. . . .

In principle, even if the State’s “margin of appreciation” remains untouched, it is for the Court itself to ascertain whether the expulsion has struck a “fair balance” between “the individual’s rights protected by the Convention on the one hand and the community’s interests on the other”: the State’s margin of appreciation, in fact, “goes hand in hand with European supervision, embracing both the legislation and the decisions applying it.”

In concrete, the proportionality test requires that, in balancing it against the State interest in the expulsion, the weight of [the] alien’s “private life” be commensured [with] the length of the stay: briefly put, “the longer the stay, the stronger the claim.”

Therefore, although Article 8 provides no absolute protection against expulsion for any category of aliens, “for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion”. . . when the alien lacks a family life in the meaning of Article 8 and thus the removal only interferes with his or her “private” life, his position is weaker and this might more easily determine a finding of proportionality in favour of the State measure.

Quite significantly, though, in *Samsonnikov* [*v. Estonia*, 2012] the European judges have come to assert that it is not necessary to establish whether the expulsion interferes only with the “private” life of the alien or also with his or her “family” life

. . . [I]n Europe, convicted aliens facing an expulsion or deportation order always enjoy the protection of Article 8, regardless of whether the order interferes also with their “family” life, or exclusively affects their “private” life. The concept of “private” life under Article 8, in fact, is broadly understood, as it involves . . . “the totality of social ties between settled migrants and the community in which they are living”

The result is that, in principle, all the addressees of an expulsion order, including those convicted of a crime, are protected by the Convention against any arbitrary interference in their *right to stay*. This right is by no means absolute, [given that] the right of abode [is] still a franchise reserved to nationals. Yet, under Article 8 ECHR, the right to stay has come to share the essential attributes of a *fundamental right*, insofar as any constraints imposed on it by the State has to

be based on a general legislative provision, to be proportionate and justified on one of the few legitimate grounds admitted.

Automatic expulsion is manifestly at risk in Europe.

The United States Constitution does not expressly address “family life” and “privacy,” and decades of debates have centered on the propriety of courts elaborating rights under the rubric of “substantive due process.” Yet, as the materials in the chapter on *State-Subsidized Services* illustrate, the U.S. Supreme Court takes for granted the centrality of family life, as a fundamental interest. In a variety of contexts, the Court has protected parental and marital relationships. At times, the issue of familial rights emerges in the context of what process the state must provide when disrupting families, for example, if considering the termination of parental rights.

In the spring of 2015, the Supreme Court addressed the claim of a citizen wife, Fauzia Din, who alleged that she had a liberty interest in her marriage to a noncitizen and that the government’s denial of a visa without sufficient explanation violated her due process rights by arbitrarily precluding her from having the potential to live in the United States with her husband. In earlier cases addressing visa claims based on First Amendment rights, the Court had developed a doctrine of “consular nonreviewability” that posited a very limited role for courts. In the *Din* case, the lower appellate court held that she, as a wife, had a right to receive more explanation than a cite to a statutory provision authorizing the State Department not to issue visas, on a “variety of terrorism-related grounds,” to particular individuals. The government brought the case to the Supreme Court, which debated whether Din had a constitutionally protected interest and, if so, what process was due.

Kerry v. Din
Supreme Court of the United States
135 S. Ct. 2128 (2015)

JUSTICE SCALIA announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and JUSTICE THOMAS join.

Fauzia Din is a citizen and resident of the United States. Her husband, Kanishka Berashk, is an Afghan citizen and former civil servant in the Taliban regime who resides in that country. . . .

The state action of which Din complains is the denial of Berashk’s visa application. . . . [Because he is] an unadmitted and nonresident alien, he has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission. . . . [Din] claims that the Government denied her due process of law when, without adequate explanation of the reason for the visa denial, it deprived her of her constitutional right to live in the United States with her spouse. There is no such constitutional right . . . to immigrate into America. . . .

[Under the statutory process, a] citizen-relative first files a petition on behalf of the alien living abroad, asking to have the alien classified as an immediate relative. . . . One ground for inadmissibility . . . covers “[t]errorist activities” [defined to include] providing material support to a terrorist organization

The Fifth Amendment provides that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.” . . . [N]o process is due if one is not deprived of “life, liberty, or property”

Despite this historical evidence, this Court has seen fit on several occasions to expand the meaning of “liberty” under the Due Process Clause to include certain implied “fundamental rights.” . . .

. . . [E]ven if one accepts the textually unsupportable doctrine of implied fundamental rights, Din’s arguments would fail. Because “extending constitutional protection to an asserted right or liberty interest . . . place[s] the matter outside the arena of public debate and legislative action,” . . . and because the “guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended,” . . . “[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground” Accordingly, before conferring constitutional status upon a previously

unrecognized “liberty,” we have required “a careful description of the asserted fundamental liberty interest,” as well as a demonstration that the interest is “objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed.” . . .

Din describes the denial of Berashk’s visa application as implicating, alternately, a “liberty interest in her marriage,” . . . a “right of association with one’s spouse,” . . . “a liberty interest in being reunited with certain blood relatives,” . . . and “the liberty interest of a U. S. citizen under the Due Process Clause to be free from arbitrary restrictions on his right to live with his spouse.” . . .

. . . [T]he Federal Government here has not attempted to forbid a marriage. . . .

Nothing in the cases Din cites establishes a free-floating and categorical liberty interest in marriage (or any other formulation Din offers) sufficient to trigger constitutional protection whenever a regulation in any way touches upon an aspect of the marital relationship. . . . Even if we might “imply” a liberty interest in marriage generally speaking, that must give way when there is a tradition denying the specific application of that general interest. . . .

Here, a long practice of regulating spousal immigration precludes Din’s claim that the denial of Berashk’s visa application has deprived her of a fundamental liberty interest. . . .

. . . Modern equal protection doctrine casts substantial doubt on the permissibility of . . . [the former] asymmetric treatment of women citizens in the immigration context, and modern moral judgment rejects the premises of such a legal order. Nevertheless, this all-too-recent practice repudiates any contention that Din’s asserted liberty interest is “deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty.” . . .

Although Congress has tended to show “a continuing and kindly concern . . . for the unity and the happiness of the immigrant family,” . . . this has been a matter of legislative grace rather than fundamental right. . . . This Court has consistently recognized that these various distinctions are “policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress.” . . .

Neither Din’s right to live with her spouse nor her right to live within this country is implicated here. There is a “simple distinction between government

action that directly affects a citizen’s legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizen only indirectly or incidentally.” . . .

JUSTICE KENNEDY, with whom JUSTICE ALITO joins, concurring in the judgment.

. . . [R]ather than deciding, as the plurality does, whether Din has a protected liberty interest, my view is that, even assuming she does, the notice she received regarding her husband’s visa denial satisfied due process. . . .

. . . [T]he Government provided a reason for the visa denial: It concluded Din’s husband was inadmissible under [the statute’s] s terrorism bar. . . .

The Government, furthermore, was not required, as Din claims, to point to a more specific provision [than the statute]. . . . Congress evaluated the benefits and burdens of notice in this sensitive area and assigned discretion to the Executive to decide when more detailed disclosure is appropriate. This considered judgment gives additional support to the independent conclusion that the notice given was constitutionally adequate, particularly in light of the national security concerns the terrorism bar addresses. . . . And even if Din is correct that sensitive facts could be reviewed by courts in camera, the dangers and difficulties of handling such delicate security material further counsel against requiring disclosure in a case such as this. . . .

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

. . . Ms. Din should prevail on this constitutional claim. . . .

The liberty interest that Ms. Din seeks to protect consists of her freedom to live together with her husband in the United States. She seeks procedural, not substantive, protection for this freedom. . . .

Our cases make clear that the Due Process Clause entitles her to such procedural rights as long as (1) she seeks protection for a liberty interest sufficiently important for procedural protection to flow “implicit[ly]” from the design, object, and nature of the Due Process Clause, or (2) nonconstitutional law (a statute, for example) creates “an expectation” that a person will not be deprived of that kind of liberty without fair procedures. . . .

[T]he institution of marriage, which encompasses the right of spouses to live together and to raise a family, is central to human life, requires and enjoys

community support, and plays a central role in most individuals' "orderly pursuit of happiness"

At the same time, the law, including visa law, surrounds marriage with a host of legal protections to the point that it creates a strong expectation that government will not deprive married individuals of their freedom to live together without strong reasons and (in individual cases) without fair procedure. . . .

. . . How could a Constitution that protects individuals against the arbitrary deprivation of so diverse a set of interests not also offer some form of procedural protection to a citizen threatened with governmental deprivation of her freedom to live together with her spouse in America? . . .

. . . [N]either spouse here has received any procedural protection. . . .

Rather, here, the Government makes individualized visa determinations through the application of a legal rule to particular facts. Individualized adjudication normally calls for the ordinary application of Due Process Clause procedures. . . .

These procedural protections help to guarantee that government will not make a decision directly affecting an individual arbitrarily but will do so through the reasoned application of a rule of law. . . .

Here, we need not consider all possible procedural due process elements. . . .

[I]n the absence of some highly unusual circumstance . . . , the Constitution requires the Government to provide an adequate reason why it refused to grant Ms. Din's husband a visa. That reason, in my view, could be either the factual basis for the Government's decision or a sufficiently specific statutory subsection that conveys effectively the same information.

. . . The generality of the statutory provision cited [by the government for denying the visa] and the lack of factual support mean that here, the reason given is analogous to telling a criminal defendant only that he is accused of "breaking the law"; telling a property owner only that he cannot build because environmental rules forbid it; or telling a driver only that police pulled him over because he violated traffic laws. As such, the reason given cannot serve its procedural purpose. It does not permit Ms. Din to assess the correctness of the State Department's conclusion; it does not permit her to determine what kinds of facts she might provide in response; and it does not permit her to learn whether, or

what kind of, defenses might be available. In short, any “reason” that Ms. Din received is not constitutionally adequate. . . .

I do not deny the importance of national security, the need to keep certain related information private, or the need to respect the determinations of the other branches of Government in such matters. But protecting ordinary citizens from arbitrary government action is fundamental. Thus, the presence of security considerations does not suspend the Constitution. . . .

Below we excerpt a decision by the appellate body, within the U.S. Department of Justice, that reviews the decisions of immigration judges who decide removal questions in the first instance. This case highlights how most removal decisions are made by administrative officials who, on the one hand, are constrained by limited statutory language governing which family relationships give rise claims to stay, and, on the other, possess significant discretionary power. In this decision, the extent to which removal would disrupt the requisite family relationships forms the core of the case. Thereafter, we turn to efforts by the Executive Branch to reunite families. In both instances, constitutional questions of the underlying rights—such as to family life—have not been at the center. Rather the focus has been on the boundaries set by Congress and on the degree of discretion accorded to the Executive in implementing them.

In re Monreal-Aguinaga

United States Department of Justice, Executive Office for
Immigration Review, Board of Immigration Appeals
23 I. & N. Dec. 56 (May 4, 2001)

[Before Board En Banc: Scialabba, Acting Chairman; Dunne, Vice Chairman; Heilman, Schmidt, Holmes, Hurwitz, Villageliu, Filppu, Cole, Guendelsberger, Mathon, Jones, Grant, Moscato, Miller, Brennan, Espenoza, Osuna, and Ohlson, Board Members. Concurring and Dissenting Opinion: Rosenberg, Board Member.]

HOLMES, Board Member: . . .

The respondent is a 34-year-old native and citizen of Mexico who has been living in the United States since his entry in 1980. He has not returned to Mexico since coming to this country as a 14-year-old child. . . . The couple's two older children have remained with the respondent in the United States. The oldest child is now 12 years old and the middle child is 8 years old. Both are United States citizens.

The respondent has been gainfully employed in this country since his entry as a teenager, and he provides the sole support for his two citizen children in this country, as well as sending money to his wife in Mexico. . . . The respondent's parents lawfully immigrated to this country in 1995, and his children sometimes spend time with these grandparents when their father is working. In addition, the respondent has seven siblings who reside lawfully in the United States

. . . [I]f he were found statutorily eligible for cancellation, we would grant relief in the exercise of discretion. In this latter regard, the Immigration Judge noted that this was a "sad" case, particularly in view of its effect on the United States citizen children Thus, the determinative issue . . . is whether this respondent's United States citizen children or his lawful permanent resident parents will suffer "exceptional and extremely unusual hardship" if the respondent is ordered deported, as is required for him to establish statutory eligibility for cancellation of removal.* The Immigration Judge concluded that this hardship requirement had not been met. We agree.

. . . [U]nder the new statute, hardship to the applicant for relief is not considered; only hardship to the alien's United States citizen or lawful permanent resident spouse, parent, or child may be considered. . . .

. . . The new standard requires a showing of hardship beyond that which has historically been required in suspension of deportation cases involving the "extreme hardship" standard. As the legislative history indicates, the hardship to an alien's relatives, if the alien is obliged to leave the United States, must be "substantially" beyond the ordinary hardship that would be expected when a close

* Under Section 240A(b) of the Immigration and Nationality Act of 2011, an applicant for cancellation of removal, a discretionary form of relief, must *inter alia* . . .

"D. establish[] that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence."

family member leaves this country. Cancellation of removal . . . is to be limited to “truly exceptional” situations. . . .

For cancellation of removal, we consider the ages, health, and circumstances of qualifying lawful permanent resident and United States citizen relatives. For example, an applicant who has elderly parents in this country who are solely dependent upon him for support might well have a strong case. Another strong applicant might have a qualifying child with very serious health issues, or compelling special needs in school. A lower standard of living or adverse country conditions in the country of return are factors to consider only insofar as they may affect a qualifying relative, but generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship. As with extreme hardship, all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship. . . .

This case presents a good example of the difference between the “extreme hardship” and the “exceptional and extremely unusual hardship” standards. . . . The hardship to the respondent, particularly in view of his 20 years of residence after his entry at age 14, his loss of long-standing employment, the adverse effect of his forced departure from this country on his two school-age United States citizen children, and the separation from his lawful permanent resident parents would likely have been found to rise to the level of “extreme” hardship by a majority of this Board. However, under the cancellation of removal requirements, we cannot conclude that the respondent has established that the hardship to his citizen children or lawful permanent resident parents rises to the higher level of “exceptional and extremely unusual hardship.”

The respondent’s two oldest children will likely relocate to Mexico with him. . . . There is nothing to show that he would be unable to work and support his United States citizen children in Mexico. . . . [S]hould the children go to Mexico with their father, the family will be reunited. . . .

The respondent’s oldest child is 12 years old. He testified at the hearing that he has classes in both English and Spanish and can speak, read, and write in both languages. . . .

The respondent’s parents have been lawful permanent residents since 1995. . . . The respondent did not present any evidence to show that they have any particular health problems or that there are any other unusual factors that might make it an exceptional and extremely unusual hardship for them if the respondent is returned to Mexico. . . .

. . . The respondent has not provided evidence to establish that his qualifying relatives would suffer hardship that is substantially different from, or beyond, that which would normally be expected from the deportation of an alien with close family members here. . . .

The following excerpt comes from an opinion issued by the Office of Legal Counsel in the U.S. Department of Justice—an office that provides legal advice to the President and the Executive Branch concerning the legality of proposed policies and actions. This opinion considers whether the President has the authority to defer the removal of certain categories of unauthorized immigrants. The President’s proposal for administrative relief remains the subject of litigation as of this writing, based on claims that the Executive Branch violated administrative procedures and exceeded its constitutional authority to enforce the law.

Office of Legal Counsel, U.S. Department of Justice
*The Department of Homeland Security’s Authority to Prioritize
Removal of Certain Aliens Unlawfully Present in the United States
and to Defer Removal of Others* (Nov. 19, 2014)

. . . [Y]ou have asked whether it would be permissible for DHS [the Department of Homeland Security] to extend deferred action, a form of temporary administrative relief from removal, to certain aliens who are the parents of children who are present in the United States. Specifically, DHS has proposed to implement a program under which an alien could apply for, and would be eligible to receive, deferred action if he or she is not a DHS removal priority . . . ; has continuously resided in the United States since before January 1, 2010; has a child who is either a U.S. citizen or a lawful permanent resident; is physically present in the United States both when DHS announces its program and at the time of application for deferred action; and presents “no other factors that, in the exercise of discretion, make[] . . . the grant of deferred action inappropriate.” . . .

As has historically been true of deferred action, these proposed deferred action programs would not “legalize” any aliens who are unlawfully present in the United States: Deferred action does not confer any lawful immigration status, nor

does it provide a path to obtaining permanent residence or citizenship. Grants of deferred action under the proposed programs would, rather, represent DHS's decision not to seek an alien's removal for a prescribed period of time. . . .

. . . [W]e conclude that DHS's proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents [LPRs] would be permissible exercises of DHS's discretion to enforce the immigration laws. We further conclude that, as it has been described to us, the proposed deferred action program for parents of DACA [Deferred Action for Childhood Arrivals]* recipients would not be a permissible exercise of enforcement discretion. . . .

Deferred action . . . differs in at least three respects from more familiar and widespread exercises of enforcement discretion. First, . . . the conferral of deferred action . . . represents a decision to openly tolerate an undocumented alien's continued presence in the United States for a fixed period Second, . . . deferred action carries with it benefits in addition to nonenforcement itself; specifically, the ability to seek employment authorization and suspension of unlawful presence Third, class-based deferred action programs . . . do not merely enable individual immigration officials to select deserving beneficiaries from among those aliens who have been identified or apprehended for possible removal but rather set forth certain threshold eligibility criteria and then invite individuals who satisfy these criteria to apply for deferred action status. . . .

We begin by considering whether the proposed program for the parents of U.S. citizens and LPRs reflects considerations within the agency's expertise. . . . First, . . . [p]arents with longstanding ties to the country and who have no significant criminal records or other risk factors rank among the agency's lowest enforcement priorities Second, DHS has explained that the program would serve an important humanitarian interest in keeping parents together with children who are lawfully present in the United States, in situations where such parents have demonstrated significant ties to community and family in this country. . . .

This second justification for the program also appears consonant with congressional policy embodied in the INA [the Immigration and Nationality Act]. Numerous provisions of the statute reflect a particular concern with uniting aliens with close relatives who have attained lawful immigration status in the United States. . . .

* The Deferred Action for Childhood Arrivals (DACA) is an initiative launched in 2012 pursuant through which unauthorized immigrants who were brought to the United States as minors and meet certain other criteria have been able to apply for deferred action and authorization to work for up to two years at a time.

. . . While Congress has provided a path to lawful status for the parents of U.S. citizens and LPRs, the process of obtaining that status “takes time.” . . . The proposed program would provide a mechanism for families to remain together, depending on their circumstances, for some or all of the intervening period. . . . Removing the parents of U.S. citizens and LPRs—that is, of children who have established permanent legal ties to the United States—would separate them from their nuclear families, potentially for many years, until they were able to secure visas through the path Congress has provided. During that time, both the parents and their U.S. citizen or LPR children would be deprived of both the economic support and the intangible benefits that families provide. . . .

We now turn to the proposed deferred action program for the parents of DACA recipients. The relevant considerations are, to a certain extent, similar to those discussed above

But the proposed program for parents of DACA recipients is unlike the proposed program for parents of U.S. citizens and LPRs in two critical respects. First, . . . the parents of DACA recipients are differently situated from the parents of U.S. citizens and LPRs under the family-related provisions of the immigration law. . . . [T]he immigration laws do not express comparable concern for uniting persons who lack lawful status (or prospective lawful status) in the United States with their families. DACA recipients unquestionably lack lawful status in the United States. . . . Extending deferred action to the parents of DACA recipients would therefore expand family-based immigration relief in a manner that deviates in important respects from the immigration system Congress has enacted and the policies that system embodies.

Second, . . . [g]ranting deferred action to the parents of DACA recipients would not operate as an interim measure for individuals to whom Congress has given a prospective entitlement to lawful status. Such parents have no special prospect of obtaining visas, since Congress has not enabled them to self-petition . . . or enabled their undocumented children to petition for visas on their behalf. . . . [A] concern with furthering family unity alone would not justify the proposed program, because in the absence of any family member with lawful status in the United States, it would not explain why that concern should be satisfied by permitting family members to remain in the United States. . . . The logic underlying such an expansion does not have a clear stopping point: It would appear to argue in favor of extending relief not only to parents of DACA recipients, but also to the close relatives of any alien granted deferred action through DACA or any other program, those relatives’ close relatives, and perhaps the relatives (and relatives’ relatives) of any alien granted any form of discretionary relief from removal by the Executive.

CALIBRATING RIGHTS: EMPLOYMENT, HEALTH, AND WELFARE

In this segment, we consider the extent to which different constitutional regimes permit state-provided benefits to turn on citizenship or immigration status, a question that is also addressed in the next chapter, *Constitutional Rights to State-Subsidized Services*. Here, we begin with cases from the United States, in which the issue is whether the equal protection components of the Fifth and Fourteenth Amendments of the U.S. Constitution* limit the authority of government to draw distinctions among beneficiaries or professionals based on citizenship status. We then turn to decisions from the Inter-American Court of Human Rights, the Constitutional Court of South Africa, and the Constitutional Court of Spain, which are also focused on the permissibility of line-drawing on the basis of migrant status.

Mathews v. Diaz

Supreme Court of the United States
426 U.S. 67 (1976)

MR. JUSTICE STEVENS delivered the opinion of the Court.

The question presented by the Secretary's appeal is whether Congress may condition an alien's eligibility for participation in a federal medical insurance program on continuous residence in the United States for a five-year period and admission for permanent residence. The District Court held that the first condition was unconstitutional and that it could not be severed from the second. Since we conclude that both conditions are constitutional, we reverse. . . .

* The United States Constitution provides:

Fifth Amendment: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification. . . . [A] host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country.

In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry. The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is "invidious."

In particular, the fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for all aliens. Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests. The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence.

The real question presented by this case is not whether discrimination between citizens and aliens is permissible; rather, it is whether the statutory discrimination within the class of aliens—allowing benefits to some aliens but not to others—is permissible. . . .

In this case the appellees have challenged two requirements—first, that the alien be admitted as a permanent resident, and, second, that his residence be of a duration of at least five years. But if these requirements were eliminated, surely Congress would at least require that the alien's entry be lawful; even then, unless mere transients are to be held constitutionally entitled to benefits, some durational requirement would certainly be appropriate. In short, it is unquestionably reasonable for Congress to make an alien's eligibility depend on both the character and the duration of his residence. Since neither requirement is wholly irrational, this case essentially involves nothing more than a claim that it would

have been more reasonable for Congress to select somewhat different requirements of the same kind.

We may assume that the five-year line drawn by Congress is longer than necessary to protect the fiscal integrity of the program. We may also assume that unnecessary hardship is incurred by persons just short of qualifying. But it remains true that some line is essential, that any line must produce some harsh and apparently arbitrary consequences, and, of greatest importance, that those who qualify under the test Congress has chosen may reasonably be presumed to have a greater affinity with the United States than those who do not. In short, citizens and those who are most like citizens qualify. Those who are less like citizens do not. . . .

We hold that [this five-year line] has not deprived appellees of liberty or property without due process of law. . . .

Ambach v. Norwick
Supreme Court of the United States
441 U.S. 68 (1979)

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether a State, consistently with the Equal Protection Clause of the Fourteenth Amendment, may refuse to employ as elementary and secondary school teachers aliens who are eligible for United States citizenship but who refuse to seek naturalization.

New York Education Law § 3001(3) forbids certification as a public school teacher of any person who is not a citizen of the United States, unless that person has manifested an intention to apply for citizenship. The Commissioner of Education . . . has [created exemptions] with respect to aliens who are not yet eligible for citizenship. . . .

Appellee Norwick . . . is a subject of Great Britain. She has resided in this country since 1965 and is married to a United States citizen. Appellee Dachinger is a Finnish subject who came to this country in 1966 and also is married to a United States citizen. Both . . . meet all the educational requirements New York has set for certification as a public school teacher, but they consistently have

refused to seek citizenship in spite of their eligibility to do so. . . . Both applications [for teacher certification] were denied

Over time, the Court's decisions gradually have restricted the activities from which States are free to exclude aliens. This process . . . culminated in *Graham v. Richardson* [(1971)], which for the first time treated classifications based on alienage as "inherently suspect and subject to close judicial scrutiny." Applying *Graham*, this Court has held invalid statutes that prevented aliens from entering a State's classified civil service, practicing law, working as an engineer, and receiving state educational benefits.

. . . [O]ur more recent decisions . . . have not abandoned the general principle that some state functions are so bound up with the operation of the States as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government. In *Sugarman [v. Dougall* (1973)], we recognized that a State could, "in an appropriately defined class of positions, require citizenship as a qualification for [civil service] office[s]." . . .

The exclusion of aliens from such governmental positions would not invite as demanding scrutiny from this Court. . . .

The rule for governmental functions, which is an exception to the general standard applicable to classifications based on alienage, rests on important principles inherent in the Constitution. The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State. . . .

Public education, like the police function, "fulfills a most fundamental obligation of government to its constituency." The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions. . . .

Furthermore, it is clear that all public school teachers, and not just those responsible for teaching the courses most directly related to government, history, and civic duties, should help fulfill the broader function of the public school system. . . . More importantly, a State properly may regard all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught. . . .

As the legitimacy of the State's interest in furthering the educational goals outlined above is undoubted, it remains only to consider whether § 3001(3) bears

a rational relationship to this interest. The restriction is carefully framed to serve its purpose, as it bars from teaching only those aliens who have demonstrated their unwillingness to obtain United States citizenship. Appellees, and aliens similarly situated, in effect have chosen to classify themselves. They prefer to retain citizenship in a foreign country with the obligations it entails of primary duty and loyalty. They have rejected the open invitation extended to qualify for eligibility to teach by applying for citizenship in this country. The people of New York, acting through their elected representatives, have made a judgment that citizenship should be a qualification for teaching the young of the State in the public schools, and § 3001(3) furthers that judgment.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS join, dissenting.

. . . It seems constitutionally absurd, to say the least, that in these lower levels of public education a Frenchman may not teach French or, indeed, an Englishwoman may not teach the grammar of the English language. The appellees, to be sure, are resident “aliens” in the technical sense, but there is not a word in the record that either appellee does not have roots in this country or is unqualified in any way, other than the imposed requirement of citizenship, to teach. . . . Each is willing, if required, to subscribe to an oath to support the Constitutions of the United States and of New York. Each lives in an American community, must obey its laws, and must pay all of the taxes citizens are obligated to pay. Appellees, however, have hesitated to give up their respective British and Finnish citizenships, just as lawyer Fre Le Poole Griffiths, the subject of *In re Griffiths* [(1973)], hesitated to renounce her Netherlands citizenship . . .

. . . [I]t is logically impossible to differentiate between this case concerning teachers and *In re Griffiths* concerning attorneys. If [as we held in *Griffiths*] a resident alien *may not* constitutionally be barred from taking a state bar examination and thereby becoming qualified to practice law in the courts of a State, how is one to comprehend why a resident alien *may* constitutionally be barred from teaching in the elementary and secondary levels of a State’s public schools? One may speak proudly of the role model of the teacher, of his ability to mold young minds, of his inculcating force as to national ideals, and of his profound influence in the impartation of our society’s values. Are the attributes of an attorney any the less? He represents us in our critical courtroom controversies even when citizenship and loyalty may be questioned. He stands as an officer of every court in which he practices. He is responsible for strict adherence to the announced and implied standards of professional conduct and to the requirements of evolving ethical codes, and for honesty and integrity in his professional and personal life. Despite the almost continuous criticism leveled at the legal

profession, he, too, is an influence in legislation, in the community, and in the role-model figure that the professional person enjoys. . . .

Advisory Opinion OC-18/03
Requested by the United Mexican States
Inter-American Court of Human Rights (Sept. 17, 2003)

Those present: Antônio A. Cançado Trindade, President; Sergio García Ramírez, Vice President; Hernán Salgado Pesantes, Judge; Oliver Jackman, Judge; Alirio Abreu Burelli, Judge; and Carlos Vicente de Roux Rengifo, Judge. [A]lso present, Manuel E. Ventura Robles, Secretary, and Pablo Saavedra Alessandri, Deputy Secretary. . . .

4. . . . Mexico requested the Court's opinion on the following issues: . . .

Can an American State establish in its labor legislation a distinct treatment from that accorded legal residents or citizens that prejudices undocumented migrant workers in the enjoyment of their labor rights . . . ?

. . . [Is] an individual's legal residence in the territory of an American State . . . a necessary condition for that State to respect and ensure the rights and freedoms recognized in these provisions to those persons subject to its jurisdiction? . . .

112. Migrants are generally in a vulnerable situation as subjects of human rights; they are in an individual situation of absence or difference of power with regard to non-migrants (nationals or residents). This situation of vulnerability has an ideological dimension and occurs in a historical context that is distinct for each State and is maintained by *de jure* (inequalities between nationals and aliens in the laws) and *de facto* (structural inequalities) situations. This leads to the establishment of differences in their access to the public resources administered by the State. . . .

119. Consequently, States may not discriminate or tolerate discriminatory situations that prejudice migrants. However, the State may grant a distinct treatment to documented migrants with respect to undocumented migrants, or between migrants and nationals, provided that this differential treatment is reasonable, objective, proportionate and does not harm human rights. For

example, distinctions may be made between migrants and nationals regarding ownership of some political rights. . . .

133. Labor rights necessarily arise from the circumstance of being a worker A person who is to be engaged, is engaged or has been engaged in a remunerated activity, immediately becomes a worker and, consequently, acquires the rights inherent in that condition. The right to work . . . is a protective system for workers . . . that . . . regulates the rights and obligations of the employee and the employer, regardless of any other consideration of an economic and social nature. A person who enters a State and assumes an employment relationship, acquires his labor human rights in the State of employment, irrespective of his migratory status, because respect and guarantee of the enjoyment and exercise of those rights must be made without any discrimination. . . .

135. It is important to clarify that the State and the individuals in a State are not obliged to offer employment to undocumented migrants. The States and individuals, such as employers, can abstain from establishing an employment relationship with migrants in an irregular situation.

136. However, if undocumented migrants are engaged, they immediately become possessors of the labor rights corresponding to workers

148. The State is obliged to respect and ensure the labor human rights of all workers, irrespective of their status as nationals or aliens, and not to tolerate situations of discrimination that prejudice the latter in the employment relationships established between individuals (employer-worker). The State should not allow private employers to violate the rights of workers, or the contractual relationship to violate minimum international standards.

149. This State obligation arises from legislation that protects workers—legislation based on the unequal relationship between both parties—which therefore protects the workers as the more vulnerable party. In this way, States must ensure strict compliance with the labor legislation that provides the best protection for workers . . . ; therefore they have the obligation to take any necessary administrative, legislative or judicial measures to correct *de jure* discriminatory situations and to eradicate discriminatory practices against migrant workers by a specific employer or group of employers

151. In labor relations, employers must protect and respect the rights of workers, whether these relations occur in the public or private sector. The obligation to respect the human rights of migrant workers has a direct effect on

any type of employment relationship, when the State is the employer, when the employer is a third party, and when the employer is a natural or legal person.

152. The State is thus responsible for itself, when it acts as an employer, and for the acts of third parties who act with its tolerance, acquiescence or negligence, or with the support of some State policy or directive that encourages the creation or maintenance of situations of discrimination. . . .

156. . . [The] many legal instruments that regulate labor rights at the domestic and the international level . . . must be interpreted according to the principle of the application of the norm that best protects the individual, in this case, the worker. . . . Thus, if a domestic practice or norm is more favorable to the worker than an international norm, domestic law should be applied. To the contrary, if an international instrument benefits the worker, granting him rights that are not guaranteed or recognized by the State, such rights should be respected and guaranteed to him.

157. In the case of migrant workers, there are certain rights that assume a fundamental importance and yet are frequently violated, such as: the prohibition of obligatory or forced labor; the prohibition and abolition of child labor; . . . rest and compensation. The safeguard of these rights for migrants has great importance based on the principle of the inalienable nature of such rights, which all workers possess, irrespective of their migratory status

158. This Court considers that the exercise of these fundamental labor rights guarantees the enjoyment of a dignified life to the worker and to the members of his family. Workers have the right to engage in a work activity under decent, fair conditions and to receive a remuneration that allows them and the members of their family to enjoy a decent standard of living in return for their labor. Likewise, work should be a means of realization and an opportunity for the worker to develop his aptitudes, capacities and potential, and to realize his ambitions, in order to develop fully as a human being.

159. On many occasions . . . undocumented migrant workers cannot even resort to the courts of justice to claim their rights owing to their irregular situation. This should not occur; because, even though an undocumented migrant worker could face deportation, he should always have the right to be represented before a competent body so that he is recognized all the labor rights he has acquired as a worker.

160. The Court considers that undocumented migrant workers, who are in a situation of vulnerability and discrimination with regard to national workers, possess the same labor rights as those that correspond to other workers of the

State of employment, and the latter must take all necessary measures to ensure that such rights are recognized and guarantee in practice. Workers, as possessors of labor rights, must have the appropriate means of exercising them. . . .

Reasoned Concurring Opinion of Judge SERGIO GARCÍA RAMÍREZ

43. It would be unrealistic to believe that the opinion of a jurisdictional body—even though it is supported by the convictions and decisions of States representing hundreds of millions of individuals in this hemisphere—and the trend towards progress with justice that inspires many men and women of good will, could, in the short-term, reverse obsolete tendencies that are rooted in deep prejudices and sizeable interests. However, when combined, these forces can play their role in man’s effort to move mountains. Making this effort and succeeding requires the adoption . . . of strategies, policies, programs and measures that are part of the “responsibility of all the States, with the full participation of civil society, at the national, regional, and international level.”

Union of Refugee Women and Others v. Director, Private Security Industry Regulatory Authority and Others
Constitutional Court of South Africa
Case CCT 39/06 (Dec. 12, 2006)

KONDILE AJ: . . .

20. . . . [T]he application is concerned with whether the Authority is entitled to refuse to register the applicants as security service providers or to withdraw certificates of registration erroneously issued, and whether the Appeal Committee is entitled to dismiss their appeals against the Authority’s decisions, in either event, on the sole basis that the applicants are neither citizens nor permanent residents of South Africa. . . .

32. The applicants contend that section 23(1)(a)^{*} of the Security Act is unconstitutional^{**} and consequently invalid, since it discriminates against them on

^{*} The relevant provisions of the South African Private Security Industry Regulation Act of 2001 are:

the basis of their refugee status and consequently infringes their right to equality. . . .

35. . . . Section 23(1)(a) of the Security Act differentiates between citizens and permanent residents on the one hand, and all other foreigners, including refugees, on the other. This differentiation is clear; citizens and permanent residents may apply for registration as security service providers, all other foreigners are barred from doing so unless they come within the terms of section 23(6) of the Security Act. . . .

37. . . . The private security industry is a very particular environment. At stake is the safety and security of the public at large. . . .

38. That is not to say that foreign nationals, including refugees, are inherently less trustworthy than South Africans. In a country where xenophobia is causing increasing suffering, it is important to stress this. It is not that the Authority does not trust refugees. Rather, it requires everyone to prove his/her trustworthiness. The reality is that citizens and permanent residents will be more easily able to prove their trustworthiness in terms of the Security Act. . . .

42. Differentiating between citizens and permanent residents on the one hand, and all other foreigners on the other, therefore has a rational foundation and serves a legitimate governmental purpose. . . .

43. Once differentiation is established, the analysis then moves to the question of discrimination. . . . Unlike “mere differentiation,” discrimination is

Section 23(1): “Any natural person applying for registration . . . may be registered as a security service provider if the applicant is a fit and proper person to render a security service, and— (a) is a citizen or has permanent resident status in South Africa.” . . .

Section 23(6): “Despite the provisions of subsections (1) . . . , the Authority may on good cause shown and on grounds which are not in conflict with the purpose of this Act . . . register any applicant as a security service provider.”

** The relevant provisions of the Constitution of South Africa are:

Section 9(3): “The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

Section: 9(4): “No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.”

differentiation on illegitimate grounds or on grounds that have historically been associated with patterns of disadvantage. . . .

45. Section 23(1)(a) does not, however, single out refugees. The differentiation is between citizens and permanent residents on the one hand, and all other foreigners . . . on the other. . . .

47. Section 27(f) of the Refugees Act provides that “[a] refugee is entitled to seek employment.” Section 23(1)(a) of the Security Act limits the refugees’ right to choose employment only to the extent that they may not work in the private security industry. It in no way prevents them from seeking employment in other industries. . . .

54. The activity for which the applicants seek constitutional protection is the enjoyment of the right to choose a vocation. The activity does not, however, fall within a sphere of activity protected by a constitutional right available to refugees and other foreigners. In the circumstances, stage two cannot be reached. Accordingly, on this approach as well, the applicants must fail. . . .

67. I recapitulate, the discrimination is not unfair and does not breach the equality right at the threshold. This is particularly so if the entire statutory scheme of the employment qualification is taken into consideration. The scheme is for a limited fixed period; it is not a blanket ban on employment in general but is narrowly tailored to the purpose of screening entrants to the security industry; it is flexible and has the capacity to let in any foreigner when it is appropriate and to avoid hardship against any foreigner. It permits blanket exemption of categories of work within the industry and permits departure from the strict requirements of section 23(1)(a) on “good cause shown.” In short, the discrimination is a legitimate legislative choice on a highly prized public interest which is safety and security, in a country where security workers in this industry exceed the police and the army in number. . . .

Moseneke DCJ, Madala J, Nkabinde J, Sachs J and Yacoob J concur in the judgment of Kondile AJ. . . .

MOKGORO J and O’REGAN J [dissenting]:

Langa CJ and Van der Westhuizen J concur in the judgment of Mokgoro J and O’Regan J.

SACHS J [concurring]:

126. At the heart of this case lies tension between the legal status accorded by our law to refugees and certain objectives sought to be achieved by the law governing private security. . . . In my view, the impasse is not intractable. Officials may use the powers of exemption granted to them by section 23(6) of the Private Security Act in a flexible and expansive way to ensure that refugees are kept out of the industry only when objectively speaking it is fair to do so. By this means adequate weight can be given to the status refugees enjoy, without the legitimate legislative concerns about the private security industry being ignored.

127. The starting point for the officials is that when determining what would constitute good cause for granting an exemption under section 23(6) . . . [t]hey are responding to claims made under international and domestic law, and their discretion is bound by the need to take account of corresponding legal obligations. These obligations strongly favour acknowledging the right of refugees to seek employment in all spheres of economic activity. . . .

128. In this regard the mere fact that they are non-nationals, which is built into their status as refugees, could not on its own render it fair to keep them out. If there were no escape from the peremptory terms of section 23(1), I would agree with . . . [the dissent] that the provision is overbroad and that words should be read in to entitle refugees to enter the security industry in the same way as permanent residents may do. I believe, however, that there are substantive grounds of an objective character that are pertinent to the nature of the activity itself, that could render it fair to exclude them.

129. Thus, the absence of proof of a clean record, even though not attributable to the fault of the applicants, could be highly relevant in regard to people who might be called upon to guard key installations. . . . After five years, the applicant for unqualified access to the security industry would be able to show a clean record for a considerable period, and, as a permanent resident, no longer be excluded from engaging in the more sensitive areas of security work. In these circumstances a requirement of a five year period to prove reliability for the most sensitive security tasks would not impose a bar that discriminated unfairly. . . .

131. Thus, I agree with Kondile AJ that section 23(1) of the Private Security Act is not unconstitutional. In my view, the section can be saved from unconstitutionality if the powers granted under section 23(6) are used in a way that acknowledges and gives effective expression to the special status enjoyed by accredited refugees. . . .

132. . . . I wish to supplement the factors which Kondile AJ identifies [to give] special emphasis . . . to four considerations, all of which bear on the status given by law to refugees. . . .

133. The first factor to take into account is the set of obligations undertaken by South Africa in terms of international law. The second is the significance of the provisions of the Refugees Act. The third is the historical and social setting in which the rights and entitlements of refugees have to be determined. And the fourth is the constitutionally-mandated obligation to counteract xenophobia. . . .

136. . . . The positive obligation to admit refugees, provide them with asylum and treat them in accordance with specific standards, thus contrasts sharply with the absence of a mandatory obligation to admit foreigners to the state's territory. . . .

138. The [1951 UN] Convention [relating to the Status of Refugees] devotes considerable attention to the question directly raised in the present matter, namely, the obligation to respect the right of a refugee to engage in wage-earning employment. This obligation requires acknowledgement of the right to receive at least the most favourable treatment accorded to nationals of a foreign country in the same circumstances; and in any case not to be subjected to restrictive measures for the protection of the national labour market after three years of residence. Furthermore, the Contracting States are expressly required to give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals. These provisions should not be read in a begrudging, technical way so as to limit work opportunities and to guarantee only the bare minimum. On the contrary, they should be viewed conjunctively and purposively as being designed to encourage self-reliance on the part of refugees and to promote the possibility of their being able to lead valuable, dignified and independent lives; the quality of asylum, like the quality of mercy, should not be strained. . . .

143. . . . This prejudice [xenophobia] is strong in South Africa. It strikes at the heart of our Bill of Rights. . . . If refugees are treated as intrinsically untrustworthy, with their capacity to perform honestly and reliably being placed presumptively in doubt, then xenophobia is given a boost and constitutional values are undermined. . . .

144. . . . One of the purposes of refugee law is precisely to overcome the experience of trauma and displacement and make the refugee feel at home and welcome. Disproportionate and uncalled-for adverse treatment would defeat that

objective and induce an unacceptable and avoidable experience of alienation and helplessness. It would be most unfortunate if the left hand of government, that supervises the security industry, took away what the right hand of government, that accords to accredited refugees a special status, gives. . . .

146. . . . One [applicant] was the child of a school teacher, the other of a king. Both were students when forced to flee to South Africa. They do not seek hand-outs from the state, but simply the opportunity to work and earn a living. They have organised themselves into groups and received training as security guards. This capacitates them to do relatively humble tasks such as guarding parked cars or patrolling shopping-malls.

147. I see no reason why access to employment in the security industry by persons in their situation should not be permitted in relation to sectors such as these, where no high security interests are at stake. To bar them would be to discriminate against them unfairly. At the same time I would not regard it as unfair to keep them from guarding installations and persons where particularly high security considerations come into play. . . .

149. In summary: the applicants were correct in their initial approach to court when they challenged the criteria used by officials who had excluded them in blanket fashion from the security industry, in some cases withdrawing permits already granted. For the reasons I have given, however, I believe that the applicants' subsequent challenge to the constitutionality of section 23(1) was over-ambitious. The mere fact of being refugees does not entitle them to be admitted as of right to all spheres of the private security industry. The key factor is that being an accredited refugee goes a long way in itself to establish that there is "good cause" for exempting an applicant from the prohibition against non-nationals and non-permanent residents entering the security industry. . . .

The Spanish decision excerpted below examines whether legislators can make constitutional rights and liberties conditional on immigration or residency status. Organic Law 4/2000, enacted in January of 2000, recognized a set of rights, including the rights to assembly, association, and to join labor unions, without regard to immigration status. Organic Law 8/2000, enacted in December of 2000 after a new government took power, amended 4/2000 to limit recognition of those rights only to authorized immigrants. In addition, Law 8/2000 limited the rights to education and free legal aid to "residents," a term that excluded certain categories of noncitizens.

Judgment No. 236/2007
Constitutional Court of Spain (Nov. 7, 2007)

[The Constitutional Court of Spain, composed of María Emilia Casas Baamonde, President, don Guillermo Jiménez Sánchez, don Vicente Conde Martín de Hijas, don Javier Delgado Barrio, doña Elisa Pérez Vera, don Roberto García-Calvo y Montiel, don Eugenio Gay Montalvo, don Jorge Rodríguez-Zapata Pérez, don Ramón Rodríguez Arribas, don Pascual Sala Sánchez, don Manuel Aragón Reyes and don Pablo Pérez Tremps, Judges.]

[The Parliament of Navarre in Spain argued that Article 1 of the Organic Law 8/2000, which required that a child must be a legal resident in order to have access to non-compulsory education, violated the Spanish Constitution, Article 28 of the Convention on the Rights of the Child, and Article 26 of the Universal Declaration of Human Rights.]

1. In this unconstitutionality appeal, the Parliament of Navarre contests twelve points of article one of the Organic Law 8/2000 of 22 December,* reforming Organic Law 4/2000 of 11 January on the rights and freedoms of foreigners in Spain and their integration in society. . . .

2. . . . The first [claim of unconstitutionality] refers to the freedom granted by art. 13.1 of the Spanish Constitution (SC)** to the legislature in Title I [of the

* Article 1 of the Organic Law 8/2000 of 22 December governed the right to documentation, the right to freedom of movement, public participation, freedom of assembly and public demonstration, freedom of association, the right to education, the right to work and to social security, freedom to unionise and to strike, the right to health care, the right to housing assistance, the right to social security and to social services, and the subjection of foreign nationals to the same taxation as Spaniards.

** The relevant provisions of the Spanish Constitution are:

Article 10:

“1. The dignity of the person, the inviolable rights which are inherent, the free development of the personality, the respect for the law and for the rights of others are the foundation of political order and social peace.

2. Provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain.”

Article 13.1: “Aliens in Spain shall enjoy the public freedoms guaranteed by the present Part, under the terms to be laid down by treaties and the law.”

Spanish Constitution]^{*} to regulate the exercise of the public freedoms granted to foreigners in Spain, and the restrictions to which it is subject in establishing differences with respect to nationals. . . . [F]or the first time the question is raised before this Court of the possible unconstitutionality of a law which denies the exercise of specific rights, not to foreigners in general, but to those who do not possess the pertinent authorisation or residence permit for Spain. . . .

The second general argument on which the appeal is based . . . allege[s] contradiction of international treaties ratified by Spain in matters of rights and freedoms

3. . . . [T]he expression “public freedoms” used in the precept should not be interpreted in the restrictive sense, so that foreigners in Spain shall enjoy “not only freedoms but also the rights recognised in title I of the Constitution. Furthermore, as deduced from its wording and situation in the first chapter (“Spaniards and foreigners”) of Title I, this constitutional precept refers to all foreigners, in contrast to persons with Spanish nationality, despite the fact that they may be located in Spain in a variety of legal situations. Referral to the law contained in art. 13.1 does not therefore presuppose deconstitutionalisation of the legal position of foreigners since the legislature, despite having a wide margin of freedom in which to specify the “terms” under which said foreigners will enjoy rights and freedoms in Spain, is subject to restrictions deriving from the text of title I of the Constitution and especially the content of the first and second sections of art. 10 in terms to be explained below. . . .

. . . Title I contains rights which “correspond to foreigners through constitutional mandate and any treatment other than that which is equal to that accorded to Spaniards is not possible These rights are those which “belong to the person as such and not as citizens, or in other words, these rights are essential to ensure human dignity which, pursuant to 10.1 of our Constitution, is fundamental to Spanish political order.” . . . We have also referred to these as rights “inherent to the dignity of human beings.” . . . This would include the right to life, physical and moral integrity, intimacy, ideological freedom . . . , but also the right to effective judicial protection . . . and the instrumental right to free legal aid . . . , the right to freedom and security . . . and the right not to be discriminated against on grounds of birth, race, sex, religion or any other personal or social condition or circumstance

To this effect the degree of association with human dignity of a specific right will be a decisive factor, since the legislature has limited freedom of configuration when regulating those rights “essential to ensure human dignity.”

^{*} Title I of the Spanish Constitution encompasses “Fundamental Rights and Duties.”

The reason is that when legislating such rights it is not possible to modulate or mitigate their content . . . nor of course deny that foreign nationals should exercise them irrespective of their situation, as the rights “belong to the person as such and not as a citizen.” . . .

. . . [I]n this process of determining such rights, special relevance is attached to the universal declaration of human rights and other treaties and international agreements on the same issues ratified by Spain to which art. 10.2 SC refers as an interpretative criterion of fundamental rights. This decision of the constitutional assembly expresses recognition of our own concurrence with the scope of values and interests that those instruments protect, as well as our intention as a nation to be part of an international legal system which propounds the defence and protection of human rights as a fundamental basis for State organisation.

4. . . . [A]rt. 13 SC authorises the legislature to establish “restrictions and limitations” on those rights, however, this possibility is not unconditional in that it shall not be able to affect those rights which are essential to ensure human dignity . . . nor “additionally to the content defined for the right by the Constitution or international treaties to which Spain is party” From our case law we deduce that this would be a legal system of rights such as the right to work . . . , the right to health . . . , the right to receive unemployment benefit[s] . . . , and also specific details of the right to residence and movement within Spain.

. . . [T]he freedom of the law is also restricted in that the conditions for exercising these rights and freedoms of foreigners in Spain established in [the] legislature shall only be constitutionally valid if . . . they are designed to preserve other rights, property or interests which are constitutionally protected and which are suitably proportionate to the intended purpose. . . .

Therefore, . . . art. 13.1 SC grants the law a remarkable freedom to regulate the rights of foreigners in Spain enabling the establishment of specific conditions for their exercise. Notwithstanding, a regulation of this type should take into account firstly, the degree of connection of certain rights with the guarantee of human dignity, according to the criteria expressed; secondly, the compulsory content of the right when it is recognised that foreigners are directly entitled to it according to the Constitution, thirdly in any case, the content defined for the right by the Constitution and international treaties. Finally, the conditions of exercise of the rights established by the Law should lead to the preservation of other rights, property or interests which are constitutionally protected, and are suitably proportionate to the final purpose. . . .

8. . . . In the opinion of the appealing party, . . . [the] new wording [of Organic Law 8/2000] infringes art. 27.1 SC in relation to art. 39.4 SC, art. 28 of the Convention of the United Nations on the rights of the child, and art. 26 of the Universal Declaration of Human Rights by preventing access to non elementary education by foreigners under the age of eighteen who do not have legal residence in Spain. The right of the child to education as laid down in art. 27.1 SC would include both elementary and non elementary education (art. 1 of the Organic Law on the right to education), which should form part of the essential content of this right.

Furthermore, the provisions examined and their correct interpretation indicate that the right to education ensured in art. 27.1 SC corresponds to “everyone”, irrespective of whether or not they are a national or a foreigner, and including their legal situation in Spain. This conclusion is reached by interpreting the expression in art. 27.1 SC in accordance with the aforementioned international texts, where expressions such as “everyone has” or “nobody shall be denied” the right to education. As has been said, access to teaching establishments and the right to use, in principle, the means of instruction available at a given moment, should be guaranteed, in accordance with art. 1 ECHR, “to any person depending on the jurisdiction of a signatory State”. . . .

Art. 27 SC states that “Everyone is entitled to education” (section 1) which shall “have as its objective the full development of the human character compatible with respect for the democratic principles of co-existence and for the basic rights and freedoms” (section 2), with public authorities being responsible for ensuring “the right of everyone to education, through general planning of education . . .” (section 5) which when “basic is compulsory and free” (section 4).

As this Court has indicated, the close connection of all the precepts included in art. 27 SC “enables us to speak indubitably in generic terms denoting overall, the right to education, or including the right of all to education, using as an all encompassing expression that which the aforementioned articles uses as a preliminary formula.”

Art. 27 SC is significantly similar to art. 26 of the Universal Declaration of Human Rights[,] the first section of which states: “Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. . . .” The second section establishes that “Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. . . .”

. . . The right to education as such is contained in art. 13 of the International Covenant on economic social and cultural rights [(ICESCR)] . . .

which in section one states that “The States Parties to the present Covenant recognise the right of everyone to education” while the second paragraph establishes that “the States Parties to the present Covenant recognise that, with a view to achieving the full realisation of this right: a) primary education shall be compulsory and available free to all; b) secondary education in its different forms, including technical and vocational secondary education shall be made generally available and accessible to all by every appropriate means, and in particular by progressive introduction of free education; c) higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; d) fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education; e) the development of a system of schools at all levels shall be actively pursued, and adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.”

Finally, art. 2 of the Additional Protocol of the Convention for the protection of Human Rights and fundamental freedoms of 20 March 1952 (Ratification instrument of 2 November 1990, BOE of 12 January 1991) establishes: “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

From the foregoing provisions, the unequivocal link of the right to education with the guarantee of human dignity is clear, given the undeniable significance that this acquires for the full and free development of the human character and for co-existence in society which is reinforced by teaching of democratic values and respect for human rights consistent with establishing “a democratic and advanced society,” as the preamble to the Spanish Constitution states. . . .

To conclude, the content constitutionally declared by the texts referred to in art. 10.1 SC on the right to education ensured in art. 27.1 SC includes access, not only to basic education, but also to non compulsory education, of which foreigners in Spain who do not hold authorisation for residence cannot be deprived. . . .

Cristina M. Rodríguez and Ruth Rubio-Marín

*The Constitutional Status of Irregular Migrants: Testing the Boundaries of Human Rights Protection in Spain and the United States (2011)**

. . . [I]n Spain, the concept of dignity substantially shapes court consideration of the rights possessed by irregular migrants. In the United States, the courts have framed the question of whether irregular migrants have rights using the concept of personhood and in relation to social policy objectives. In both jurisdictions, the irregularity of status has given rise to a confused jurisprudence that simultaneously conceptualises rights as conditioned on policy concerns and leaves open considerable space for debate in the political sphere concerning irregular migrants' status. . . .

Human rights are axiomatically grounded in personhood. . . . The concept of personhood . . . may refer to all human beings, or to all those capable of being recognised as persons before the law—a characteristic that irregular migrants might not possess. . . .

The concept of dignity, central to the development of a rights core for non-citizens in Spain, has no formal significance in the U.S. Supreme Court's cases. But dignity nonetheless operates as a kind of subterranean norm in the court's evaluation of immigrants' interests. . . .

. . . The Spanish Court's reliance on dignity as a limiting principle has produced a notably different framework of analysis from the approach taken in the United States, and the U.S. judiciary's deep ambivalence about addressing matters understood primarily as social policy questions has emerged clearly. . . .

. . . The [Spanish Constitutional Court] characterised unauthorised immigrants not as outlaws who had placed themselves beyond the bounds of constitutional protection by breaching the wall of sovereignty, but as persons endowed with human dignity. . . . The court found that, for those rights inextricably connected to the protection of dignity, the legislature could not modulate their content, nor deny them to non-citizens; these rights attached to personhood, not citizenship. . . .

* Excerpted from Cristina M. Rodríguez and Ruth Rubio-Marín, *The Constitutional Status of Irregular Migrants: Testing the Boundaries of Human Rights Protection in Spain and the United States*, in ARE HUMAN RIGHTS FOR MIGRANTS?: CRITICAL REFLECTIONS ON THE STATUS OF IRREGULAR MIGRANTS IN EUROPE AND THE UNITED STATES (Marie-Benedicte Dembour & Tobias Kelly eds., 2011).

The court also made clear that the legislature is not free to regulate without constraint beyond the sphere of core dignitary rights . . . even with regard to other rights, namely those that do not derive from the Constitution *tout court* (such as the rights to work, health and unemployment benefits and, with some nuances, the right to reside in Spain), the court noted that the legislature's discretion is limited. . . .

. . . The connection between peaceful assembly and human dignity—a connection derived by the court from the link between assembly and the freedom of speech . . . meant that the legislator was required to recognise a minimum of the right for all people. . . .

. . . The court . . . drew a link between the right to education and human dignity, citing the importance of education to the free development of personality, as well as to enabling people to live together in a democratic society. . . .

By contrast, in the United States, although irregular migrants are hardly complete outlaws . . . , their rights as people have emerged through a patchwork of practice, rather than through clear judicial articulation of their status before the law or the Constitution. . . . [T]he human subjects of the debate are inchoate in the public and legal mind. In addition, because public and legal discourse frame illegal immigration as a transgression, the debate skews away from the human rights framework and towards a law and order, or rule of law, paradigm. . . .

. . . [T]he failure to engage the personhood dilemma head-on has engendered confusion about what the status of unauthorised immigrant really means. Illegality has come to serve as a nearly totalising justification for denying irregular migrants any status independent of what political actors believe is appropriate as a matter of grace. . . .

. . . Without discounting the severity of the legal disabilities generated by irregular status, it is worth emphasising that the rule of law/public order discourse employed to erase the irregular migrant's status as a rights-holder does not always translate into practice. . . . As Linda Bosniak has observed, the irregular immigrant in U.S. law 'inhabits a sphere of circumscribed, but real, civil and social membership. In certain formal and practical spheres, the undocumented alien functions as an acknowledged member of the national community. . . . What is more . . . some of the problematics discussed above have been resolved through administrative practice, or by relaxing legal exclusion through discretionary decision-making. . . .

Over the last decade, perhaps the most important sphere in which irregular migrants have been established as rights holders has been in the domain of the workplace. . . . [T]hese [unauthorized] workers are neither passive in the face of exploitation, nor are they beyond the law's reach. . . .

. . . The political process and political mobilisations may provide significant opportunities for irregular migrants in the United States to protect their interests and transform themselves into rights holders of a kind. But this status will remain unstable, unless and until irregular migrants are expressly situated within the constitutional framework.

REVOKING CITIZENSHIP

This segment considers whether the state has the power to end the citizenship relationship. The question has renewed saliency in the wake of concerns around terrorism.

Rainer Bauböck and Vesco Paskalev

Citizenship Deprivation: A Normative Analysis (2015)*

. . . Hannah Arendt famously argued that citizenship is “the right to have rights,” whereas “the Rights of Man” proved to be inadequate to actually protect “abstract” human beings who were no longer recognised by “their state.” Only belonging to “one's own people” could ensure protection of supposedly inalienable and universal human rights.

Despite the momentous development of the international system for protection of human rights since her time, the citizenship of a person remains pivotal for her treatment by this system; the rights people effectively have are still generally determined with a reference to the country they belong to. . . .

In the new millennium, the expectation that ‘the right to have rights’ would eventually be secured by depriving liberal democratic governments of the

* Rainer Bauböck and Vesco Paskalev, *Citizenship Deprivation: A Normative Analysis* (Ctr. for European Policy Studies Papers in Liberty and Security, No. 82, 2015).

power of citizenship deprivation has once again been challenged, in several contexts. First, in the context of the relationship between public security and citizenship, the most obvious challenge is global terrorism and the wide use of extralegal means in fighting it. . . .

The second challenge concerns the linkage between citizenship and migration. Whether citizenship properly belongs to those who have a permanent interest in membership of the political community, or reflects the depth of social relationships brought about by residence, political theorists generally regard it as a secure status that must not depend on the government of the day and its political goals. However, States increasingly use citizenship instrumentally to control immigration

The final context that helps to explain the rise of involuntary deprivation of citizenship is the proliferation of multiple citizenship. . . . As international law aims to proscribe deprivation when the person concerned has no other citizenship, the new powers of deprivation generally apply to dual nationals only. . . .

We must . . . not forget that public security threats or political motives are not the only reasons why States deprive citizens of their status. There are other justifications for deprivation, such as fraud in naturalisation, loss of citizenship by a relevant anchor person (spouse or parent), expiry of citizenship after long-term residence abroad or loss in case of acquisition of a foreign nationality. Except for the last of these justifications, there is no clear international trend and we have seen a number of countries in which changes have happened in either direction.

Pham v. The Secretary of State for the Home Department
Supreme Court of the United Kingdom
[2015] UKSC 19 (Mar. 25, 2015)

Before Lord Neuberger, President; Lady Hale, Deputy President; Lord Mance; Lord Wilson; Lord Sumption; Lord Reed; Lord Carnwath

LORD CARNWATH: (with whom Lord Neuberger, Lady Hale and Lord Wilson agree)

1. The central issue in this appeal is whether the Secretary of State was precluded under the British Nationality Act 1981 from making an order depriving the appellant of British citizenship because to do so would render him stateless.

This turns on whether (within the meaning of article 1(1) of the 1954 Convention relating to the Status of Stateless Persons) he was “a person who is not considered as a national by any state under the operation of its law.” If this issue is decided against him he also seeks to argue that the decision was disproportionate and therefore unlawful under European law. . . .

2. The appellant was born in Vietnam in 1983 and thus became a Vietnamese national. In 1989, after a period in Hong Kong, the family came to the UK, claimed asylum and were granted indefinite leave to remain. In 1995 they acquired British citizenship. Although none of them has ever held Vietnamese passports, they have taken no steps to renounce their Vietnamese nationality. . . . Between December 2010 and July 2011 he was in the Yemen, where, according to the security services but denied by him, he is said to have received terrorist training from Al Qaida. It is the assessment of the security services that at liberty he would pose an active threat to the safety and security of this country. That assessment has not yet been subject to judicial examination.

3. On 22 December 2011 the Secretary of State served notice of her decision to make an order under section 40(2) of the British Nationality Act 1981* depriving the appellant of his British citizenship, being satisfied that this would be “conducive to the public good.” She considered that the order would not make him stateless . . . because he would retain his Vietnamese citizenship. . . . Thereafter, the Vietnamese government has declined to accept him as a Vietnamese citizen.

4. The United States of America have asked for him to be extradited to stand trial in that country. . . .

21. . . . [A]cademic texts and international instruments on this subject [of statelessness] have drawn a distinction between *de jure* and *de facto* statelessness: that is, between those who have no nationality under the laws of any state, and those who have such nationality but are denied the protection which should go with it. . . .

24. We have the advantage of even more recent guidance from the [United Nations High Commissioner for Refugees] UNHCR in the form of a handbook

* Section 40 of the British Nationality Act provides:

“2. The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good. . . .

4. The Secretary of State may not make an order under subsection (2) if he is satisfied that the order would make a person stateless.”

issued in June 2014, which draws on the results of the expert meetings and the earlier guidance. The following passage appears under the heading “not considered as a national . . . under the operation of its law”:

“Meaning of ‘law’

The reference to ‘law’ in article 1(1) should be read broadly to encompass not just legislation, but also ministerial decrees, regulations, orders, judicial case law (in countries with a tradition of precedent) and, where appropriate, customary practice.

When is a person ‘not considered as a national’ under a State’s law and practice?

Establishing whether an individual is not considered as a national under the operation of its law requires a careful analysis of how a State applies its nationality laws in an individual’s case in practice and any review/appeal decisions that may have had an impact on the individual’s status. This is a mixed question of fact and law. . . .

34. . . . It is clear that, as understood by the UNHCR at least, the term “law” is to be interpreted broadly as including ministerial decrees or practices, even if not subject to court review, and even where they appear to depart from the substance of the domestic law. Familiar principles of the rule of law, as it would be understood in this country, are not the governing consideration. . . .

36. . . . The earlier findings by [the Special Immigration Appeals Commission] SIAC . . . indicate that the appellant did not automatically lose his Vietnamese citizenship on acquiring British nationality, and that no action has been taken by the Vietnamese government . . . to deprive him of that citizenship. Nor is there any evidence that the government issued a ministerial decree, or adopted any other form of practice or position which could be treated as equivalent to “law” Rather the implication is that it has simply declined, no doubt for policy reasons, to make any formal decision on the appellant’s status, whether under the operation of its own nationality law or at all. . . .

39. These issues raise a new question as to whether the Secretary of State’s decision fell within the ambit of European law, given that its effect would be to deprive him not only of British citizenship, but also of citizenship of the European Union; and if so what if any consideration must be given to the

“proportionality” of the Secretary of State’s action under well-established principles of European law. . . .

62. . . . If an issue of proportionality under EU law is properly raised before SIAC by amendment of the present grounds of appeal, it would in my view be appropriate and helpful for SIAC to reach a view on its merits, even if only on a hypothetical basis. That would ensure that any future consideration by the higher courts will be informed by a clear understanding of the practical differences if any (substantive or procedural) from the remedies otherwise available. . . .

LORD MANCE: (with whom Lord Neuberger, Lady Hale and Lord Wilson agree)

72. . . . The appellant’s case on Union law rests on two premises: the first is that Union law applies in some relevant respect to a decision by the Secretary of State to remove the appellant’s British citizenship and, second, assuming that it does, that it offers advantages over the relevant domestic law which could make the difference between upholding and setting aside the Secretary of State’s decision. . . .

84. In the present context, it is clearly very arguable that there are under the Treaties jurisdictional limits to European Union competence in relation to the grant or withdrawal by a Member State of national citizenship. Fundamental though its effects are where it exists, citizenship of the Union is under the Treaties a dependant or derivative concept—it depends on or derives from national citizenship. . . .

85. There is nothing on the face of the Treaties to confer on the EU, or on a Union institution such as the Court of Justice, any power over the grant or withdrawal by a Member State of national citizenship, even though such grant or withdrawal has under the Treaties automatic significance in terms of European citizenship. . . .

LORD SUMPTION: (with whom Lord Neuberger, Lady Hale and Lord Wilson agree)

104. . . . It is hardly satisfactory to apply a proportionality test to the decision so far as it affects his European citizenship but not so far as it affects his British nationality when the decision is a single indivisible act. An alternative approach would be to regard European citizenship as a mere attribute of national citizenship. That would be consistent with the fact that it is wholly parasitic on national citizenship. But it is not consistent with some of the wider dicta of the

Court of Justice of the European Union treating European citizenship as “fundamental.”

105. However, although English law has not adopted the principle of proportionality generally, it has for many years stumbled towards a concept which is in significant respects similar, and over the last three decades has been influenced by European jurisprudence even in areas of law lying beyond the domains of EU and international human rights law. . . .

**Bill C-24: An Act to Amend the Citizenship Act and to Make
Consequential Amendments to Other Acts**
Statutes of Canada 2014: Chapter 22
Assented to June 19, 2014

. . .

10.

(1) Subject to subsection 10.1(1), the Minister may revoke a person’s citizenship or renunciation of citizenship if the Minister is satisfied on a balance of probabilities that the person has obtained, retained, renounced, or resumed his or her citizenship by false representation or fraud or by knowingly concealing material circumstances.

(2) The Minister may revoke a person’s citizenship if the person, before or after the coming into force of this subsection and while the person was a citizen,

(a) was convicted under . . . the *Criminal Code* of treason and sentenced to imprisonment for life or was convicted of high treason under that section;

(b) was convicted of a terrorism offence as defined in . . . the *Criminal Code*—or an offence outside Canada that, if committed in Canada, would constitute a terrorism offence as defined in that section—and sentenced to at least five years of imprisonment;

(c) was convicted of an offence under . . . *the National Defence Act* and sentenced to imprisonment for life because the person acted traitorously; . . .

(3) Before revoking a person's citizenship or renunciation of citizenship, the Minister shall provide the person with a written notice that specifies

(a) the person's right to make written representations;

(b) the period within which the person may make his or her representations and the form and manner in which they must be made; and

(c) the grounds on which the Minister is relying to make his or her decision.

(4) A hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required.

(5) The Minister shall provide his or her decision to the person in writing. . . .

10.1 . . .

(2) If the Minister has reasonable grounds to believe that a person, before or after the coming into force of this subsection and while the person was a citizen, served as a member of an armed force of a country or as a member of an organized armed group and that country or group was engaged in an armed conflict with Canada, the person's citizenship may be revoked only if the Minister — after giving notice to the person — seeks a declaration . . . that the person so served, before or after the coming into force of this subsection and while they were a citizen, and the Court makes such a declaration. . . .

10.4

(1) Subsections 10(2) and 10.1(2) do not operate so as to authorize any decision, action or declaration that conflicts with any international human rights instrument regarding statelessness to which Canada is signatory.

(2) If an instrument referred to in subsection (1) prohibits the deprivation of citizenship that would render a person stateless, a person who claims . . . [it] would operate in the manner described in subsection (1) must

prove, on a balance of probabilities, that the person is not a citizen of any country of which the Minister has reasonable grounds to believe the person is a citizen. . . .

Audrey Macklin

*Citizenship Revocation, the Privilege to Have Rights and the
Production of the Alien (2014)**

Denationalization is not only a political analogue to death; it may also be a prelude to it. Once outside the territory, the state has neither legal claim nor legal duty to the former citizen and is relieved of any obligation to object if another state kills one of its nationals. . . .

. . . Citizenship revocation provides the opportunity to assay the legal implications that flow from regarding citizenship as a privilege. . . .

The 2013 UK Supreme Court decision in *Secretary of State for the Home Department v Al-Jedda* affirmed that the prohibition on creating statelessness is violated when the Home Secretary issues an order for revocation and the individual does not, at that moment, possess another nationality. The Home Secretary argued unsuccessfully that al-Jedda (a naturalized UK citizen) was eligible to reclaim his former Iraqi citizenship as of right and that his failure to do so made him the author of his own statelessness. . . . The judgment also prompted the British government to amend the [British Nationality Act] to restore the power to render people stateless. The 2014 reform to the British Nationality Act [of] 1981 now empowers the Home Secretary to render naturalized citizens stateless (beyond cases of fraud) if, *inter alia*, the person “has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom” and the Secretary of State believes on reasonable grounds that the individual is able to acquire citizenship elsewhere. The new provisions are retrospective. Whether the 2014 legislative reform complies with the UK’s obligations under the 1961 Statelessness Convention remains contentious.

* Excerpted from Audrey Macklin, *Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien*, 40 QUEEN’S L.J. 1 (2014).

Since 2006, the UK has stripped at least fifty-three UK nationals of citizenship. Twenty-seven were deprived on grounds of “conducive to the public good” All but one of the subjects of national security revocations were Muslim males, and in all but two known cases since 2006, the Home Secretary issued the order when the person was abroad. . . .

. . . . Notably, since 2001, the US has not attempted to use its existing expatriation power against US citizens accused or convicted of terrorist crimes

Both the UK and the US regimes governing citizenship revocation differ from the Canadian model in significant ways. The UK and US models formally clothe citizenship revocation for misconduct in the rhetoric of risk prevention or voluntary renunciation, respectively. Under Canada’s Bill C-24, citizenship revocation is explicitly punitive and non-volitional

Case of Expelled Dominicans and Haitians v. Dominican Republic Inter-American Court of Human Rights (Aug. 28, 2014)

In the case of *Expelled Dominicans and Haitians*, the Inter-American Court of Human Rights (hereinafter also “the Inter-American Court” or “the Court”), composed of the following judges: Humberto Antonio Sierra Porto, President, Roberto F. Caldas, Vice President, Manuel E. Ventura Robles, Judge, Eduardo Vio Grossi, Judge, and Eduardo Ferrer Mac-Gregor Poisot, Judge; also present, Pablo Saavedra Alessandri, Secretary, and Emilia Segares Rodríguez, Deputy Secretary

1. . . . [T]he case relates to the “arbitrary detention and summary expulsion from the territory of the Dominican Republic” of the presumed victims who are Haitians and Dominicans of Haitian descent, including children . . . , without following the expulsion procedure set out in domestic law. In addition, the [Inter-American] Commission considered “that a series of obstacles prevented Haitian immigrants from registering their children born in Dominican territory,” and persons of Haitian descent born in the Dominican Republic from obtaining Dominican nationality. . . .

153. The Commission and the representatives have argued . . . the existence of a context of discrimination against the Haitian population and those of Haitian descent in the Dominican Republic. They also indicated that this

includes the practice of collective expulsions and, with regard to individuals of Haitian descent born in Dominican territory, the denial of access to personal identification documents. The State rejected these accusations. . . .

155. The Court has verified previously that the first major migratory flows of Haitians towards the Dominican Republic occurred during the first third of the twentieth century, when around 100,000 people went to work in the Dominican sugar plantations

156. . . . [I]n 2013, the Inter-American Commission . . . indicated that poverty affected the Dominicans of Haitian descent disproportionately, and that this was related to the obstacles they faced to access their identity documents

225. . . . [T]he Court will examine together the alleged violations of the rights* to recognition of juridical personality, to a name, to nationality, and to identity . . . because, in this case, the facts that presumably resulted in these violations overlap. Based on the arguments of the parties and the Commission . . . the Court will make this analysis, as pertinent, in relation to the rights of the child and the right to equality before the law, as well as to the obligations to respect and ensure the rights without discrimination and to adopt domestic legal provisions.

226. Two types of arguments have been presented, and will be evaluated separately. The first situation alleged is the destruction of identity documents of Dominicans, or the authorities' failure to take them into account at the time of the expulsions, and the second is the failure to register persons of Haitian descent born in Dominican territory. . . .

253. Regarding the right to nationality recognized in Article 20 of the American Convention, the Court has indicated that nationality, . . . as a legal and

* The relevant provisions of the American Convention on Human Rights include:

Article 1(1): "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

Article 3: "Every person has the right to recognition as a person before the law."

Article 20:

1. Every person has the right to a nationality.
2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.
3. No one shall be arbitrarily deprived of his nationality or the right to change it."

political bond that links a person to a particular State, allows the individual to acquire and to exercise the rights and responsibilities inherent in membership in a political community. . . . [N]ationality is a fundamental right of the human person that is established in other international instruments.

254. Furthermore, it should be mentioned that the American Convention includes two aspects of the right to nationality: the right to a nationality from the perspective of endowing the individual with the basic legal protection for a series of relationships by establishing his connection to a specific State, and the protection of the individual against the arbitrary deprivation of his nationality because this would deprive him of all his political rights and of those civil rights that are based on a person's nationality. . . .

256. In this regard, the Court considers that the determination of its nationals continues to be subject to the internal jurisdiction of the States. Nevertheless, this State attribute must be exercised in conformity with the parameters that emanate from binding norms of international law which States, in the exercise of their sovereignty, have undertaken to abide by. Thus, in accordance with the current trend of international human rights law, when regulating the granting of nationality, States must take into account: (a) their obligation to prevent, to avoid and to reduce statelessness, and (b) their obligation to provide each individual with the equal and effective protection of the law without discrimination. . . .

258. Regarding the moment at which the State's obligation to respect the right to nationality and to prevent statelessness can be required, pursuant to the relevant international law, this is at the time of an individual's birth. . . .

264. Regarding the right to nationality, the Court reiterates that the *jus cogens* principle of equal and effective protection of the law and non-discrimination requires States, when regulating the mechanisms for granting nationality, to abstain from establishing discriminatory regulations or regulations that have discriminatory effects on different groups of a population when they exercise their rights. . . . The Court has also established that States have the obligation to guarantee the principle of equality before the law and non-discrimination irrespective of a person's migratory status, and this obligation extends to the sphere of the right to nationality. In this regard, the Court has established, when examining a case with regard to the Dominican Republic, that the migratory status of the parents cannot be transmitted to their children. . . .

265. With regard to the right to juridical personality protected in Article 3 of the American Convention, the Court has stated that juridical personality "implies the ability to be a holder of rights (ability and enjoyment) and of

obligations.” Consequently, the State must put in place and respect the means and legal conditions to ensure that the right to juridical personality can be exercised freely and fully by those with title to this right. . . . The Court has also asserted that “[a] stateless person, *ex definitione*, does not have a recognized juridical personality, because he has not established a juridical and political relationship with any State.”

266. Furthermore, the Court has determined that the right to nationality forms part of what has been called the right to identity

267. In this regard, the General Assembly of the Organization of American States . . . has indicated “that recognition of the identity of persons is one of the means through which observance of the rights to juridical personality, a name, a nationality, civil registration, and family relationships is facilitated, among other rights recognized in international instruments, such as the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights.” . . . Similarly, the Inter-American Juridical Committee has stated that the “right to identity is consubstantial to human rights and dignity”

274. The actions of the State agents signified failure to acknowledge the identity of the victims by not allowing them to identify themselves or not considering the documents they presented. This situation affected other rights, such as the right to a name, to recognition of juridical personality, and to nationality that, taken as a whole, impaired the right to identity. . . .

275. In addition, considering the context in which the facts of the case occurred, the Court found that, in violation of the obligation not to discriminate, the said violations were the result of derogatory treatment based on the personal characteristics . . . that, in the opinion of the authorities who intervened, denoted their Haitian origin. . . .

293. . . . [T]he presumed victims never obtained documentation proving their nationality. In this regard, the State’s assertion that the presumed victims are not Dominicans relates to the interpretation of constitutional provisions in force prior to January 26, 2010 . . . , following the birth of the individuals in question Thus, the said understanding of the applicable legal regime would mean, in practical terms, a retroactive application of norms, affecting legal certainty concerning the enjoyment of the right to nationality. In addition, in the circumstances of the case, this would entail the risk of statelessness for the presumed victims, because the State has not proved sufficiently that these persons would obtain another nationality. Consequently, the State has not proved sufficiently that there are valid legal arguments to justify that the State’s omission

to provide documentation to the said persons did not result in the deprivation of their access to nationality. Hence, the State's denial of the right of the presumed victims to Dominican nationality resulted in an arbitrary violation of that right. . . .

301. Based on the above, the Court considers that the State violated the rights to recognition of juridical personality, to a name, and to nationality recognized in Articles 3, 18 and 20 of the American Convention, as well as – owing to this series of violations – the right to identity, in relation to non-compliance with the obligations established in Article 1(1) of the Convention

OPEN BORDERS AND DEMOCRATIC AUTHORITY

To what extent do underlying moral views concerning the legitimacy of borders and bounded citizenship inform the constitutional questions addressed in the cases excerpted in this chapter? Michael Walzer famously wrote of membership as the ultimate good that a democratic polity has the power to distribute, according to its own terms. By contrast, Joseph Carens subjects restrictions on migration to scrutiny and makes a case for open borders, albeit not unregulated borders. Both discussions invite reflection on whether constitutional rights have begun to emerge to constrain state authority over migrants and whether political and popular support for such rights is strong enough to use such rights as a basis for meaningful integration.

Michael Walzer
Spheres of Justice (1983)*

. . . Since human beings are highly mobile, large numbers of men and women regularly attempt to change their residence and their membership, moving from unfavored to favored environments. Affluent and free countries are, like elite universities, besieged by applicants. They have to decide on their own size and character. More precisely, as citizens of such a country, we have to decide:

* Excerpted from the chapter "Membership" in MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983).

Whom should we admit? Ought we to have open admissions? Can we choose among applicants? What are the appropriate criteria for distributing membership?

The plural pronouns that I have used in asking these questions suggest the conventional answer to them: we who are already members do the choosing, in accordance with our own understanding of what membership means in our community and of what sort of a community we want to have. Membership as a social good is constituted by our understanding; its value is fixed by our work and conversation; and then we are in charge (who else could be in charge?) of its distribution. But we don't distribute it among ourselves; it is already ours. We give it out to strangers. Hence the choice is also governed by our relationships with strangers—not only by our understanding of those relationships but also by the actual contacts, connections, alliances we have established and the effects we have had beyond our borders. . . .

Neighborhoods can be open only if countries are at least potentially closed. Only if the state makes a selection among would-be members and guarantees the loyalty, security, and welfare of the individuals it selects, can local communities take shape as “indifferent” associations, determined solely by personal preference and market capacity. Since individual choice is most dependent upon local mobility, this would seem to be the preferred arrangement in a society like our own. The politics and the culture of a modern democracy probably require the kind of largeness, and also the kind of boundedness, that states provide. I don't mean to deny the value of sectional cultures and ethnic communities; I mean only to suggest the rigidities that would be forced upon both in the absence of inclusive and protective states. To tear down the walls of the state is not, as Sidgwick worriedly suggested, to create a world without walls, but rather to create a thousand petty fortresses. . . .

. . . It is important first to insist that the distribution of membership in American society, and in any ongoing society, is a matter of political decision. The labor market may be given free rein, as it was for many decades in the United States, but that does not happen by an act of nature or of God; it depends upon choices that are ultimately political. What kind of community do the citizens want to create? With what other men and women do they want to share and exchange social goods?

Joseph Carens

The Ethics of Immigration (2013)*

. . . [D]ebates about immigration raise ethical questions, . . . many of these ethical questions are interconnected, and . . . a commitment to democratic principles greatly constrains the kinds of answers we can offer to these questions.

I use the term “democratic principles” in a very general sense to refer to the broad moral commitments that underlie and justify contemporary political institutions and policies throughout North America and Europe—things like the ideas that all human beings are of equal moral worth

I see it as our responsibility to include those immigrants who have already arrived and to be open to more. Broadly speaking, in my view, immigrants belong, and democratic states and populations ought to adjust their policies and self-understandings to make that belonging more of a social reality. . . .

. . . Some people resist the idea of using words like “right” and “wrong” or “just” and “unjust” in talking about these matters. These are political issues, not moral ones, they say. One way to elaborate this position is to say that the use of moral language in discussing immigration and citizenship is incompatible with the norm of state sovereignty. On this view, states must be free to construct their own immigration and citizenship policies, free from external interference. Another version of the critique emphasizes the ideal of democratic self-determination. From this perspective, questions about immigration and citizenship should be left to self-governing peoples to answer for themselves. . . .

This sort of attempt to shield immigration and citizenship policies from moral scrutiny is misguided. It confuses the question of who ought to have the authority to determine a policy with the question of whether a given policy is morally acceptable. . . .

The claim that something is a human right or a moral obligation says nothing about how that right or obligation is to be enforced. . . . The very idea of constitutional democracy is built upon the notion of self-limiting government, that is, that states have the capacity to restrict the exercise of their power in accordance with their norms and values. . . .

Ultimately, there is no way to escape the terrain of moral argument in discussing immigration and citizenship, at least so long as we approach the issue from the perspective of democratic principles. Indeed, to say that states are

* Excerpted from JOSEPH CARENS, *THE ETHICS OF IMMIGRATION* (2013).

morally free to adopt whatever policies they want with respect to citizenship is itself a moral argument, a claim about what justice permits. It is a claim that must be supported with normative arguments. . . .

In many ways, citizenship in Western democracies is the modern equivalent of feudal class privilege—an inherited status that greatly enhances one’s life chances. . . .

. . . [L]et me outline the positive case for open borders. I start from three basic interrelated assumptions. First, there is no natural social order. The institutions and practices that govern human beings are ones that human beings have created and can change, at least in principle. Second, in evaluating the moral status of alternative forms of political and social organization, we must start from the premise that all human beings are of equal moral worth. Third, restrictions on the freedom of human beings require a moral justification. These three assumptions are not just my views. They undergird the claim to moral legitimacy of every contemporary democratic regime. . . .

Given these three assumptions there is at least a prima facie case that borders should be open, for three interrelated reasons. First, state control over immigration limits freedom of movement. . . . It is precisely this freedom, and all that this freedom makes possible, that is taken away by imprisonment. . . .

Of course, freedom of movement cannot be unconstrained, but restrictions on freedom of movement require some sort of moral justification This justification must take into account the interests of those excluded as well as the interests of those already inside. . . . There are restrictions that meet this standard of justification, . . . but granting states a right to exercise discretionary control over immigration does not.

The second reason why borders should normally be open is that freedom of movement is essential for equality of opportunity. . . . This ideal of equal opportunity is intimately linked to the view that all human beings are of equal moral worth [F]reedom of movement is an essential prerequisite for equality of opportunity. . . .

A third, closely related point is that a commitment to equal moral worth entails some commitment to economic, social, and political equality

Why make an argument that we should open our borders when there is no chance that we will? Because it is important to gain a critical perspective on the ways in which collective choices are constrained

One important challenge to the idea of open borders is that it exaggerates the moral claims that people outside a political community can make on those within. From this perspective, the demands of justice arise primarily within the context of a state, from common subordination to political authority and from the many ways in which that common subordination inevitably affects people's lives. . . . I will call this the bounded justice view. . . .

One immediate problem with the bounded justice view is that it simply presupposes the moral legitimacy of the coercion that is used to exclude peaceful immigrants who want only to enter in order to build decent lives for themselves and their families. . . . Coercion must be justifiable to the person being coerced. . . . [W]e must offer reasons for our use of coercion, . . . those reasons must respect the claims of all human beings to be regarded as moral agents, and . . . the reasons must be open to criticism and contestation. . . .

One famous effort to justify discretionary control over immigration is offered by Michael Walzer. . . . Without closure, he says, there can be no "*communities of character*"

Closure . . . is not necessary to protect communities of character unless a lot of people are trying to get in

. . . Why focus on the defensive measures (closure) needed to sustain a community under pressure from an unwanted influx of migrants rather than on the positive measures that would make closure unnecessary? . . . Wouldn't it be morally preferable for communities of character to flourish without closure . . . ? Furthermore, if many people *are* seeking to leave their community of character to go somewhere else, don't we have to weigh their reasons for seeking entry elsewhere against the desires of those already present to maintain their community as it is? . . .

CONSTITUTIONAL RIGHTS TO STATE-
SUBSIDIZED SERVICES

DISCUSSION LEADERS

ABBE GLUCK, JUDITH RESNIK,
AND MANUEL CEPEDA-ESPINOSA

II. CONSTITUTIONAL RIGHTS TO STATE-SUBSIDIZED SERVICES

DISCUSSION LEADERS:

ABBE GLUCK, JUDITH RESNIK, AND MANUEL CEPEDA-ESPINOSA

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This chapter raises questions about how to conceptualize state obligations to support or to provide services and whether categorizing a variety of these obligations under the rubric of “social rights” or “positive rights” illuminates courts’ relationship to such obligations and distinguishes the work of judges in these domains from others.

The first segment takes up these questions in the context of subsidies for litigants to use courts. Many constitutions specify the existence of courts—protecting judicial independence and detailing jurisdiction and structure. Some constitutions also include language about rights to remedies, the requirement that courts be “open,” and that criminal defendants have rights to counsel. Yet constitutional directives on funding and budgets for courts and lawyers are not common. Thus, when litigants argue for waivers of fees or subsidies for transcripts and lawyers in civil and criminal cases, justices are faced with questions about whether they ought to order use of their *own* services.

We then turn to activities that have become more conventionally understood as “social rights”—health, housing, and social security—and provide a few cases in which courts call on polities to support those services. As the cases illustrate, the claims—by citizens and non-nationals—are predicated on a mix of arguments about what constitutions, interpreted in light of concerns about human dignity and social solidarity require. Thus, materials in this chapter address when courts require the provisions of services to non-nationals as well as to citizens.

Across these different subject matter domains and jurisdictions, the questions about the judiciary’s role remain constant. When and why do courts insist that other branches of government adjust their decisions on allocations of resources? Which constitutional provisions invite judicial review? When, even with textual commitments to specific rights, ought courts be deferential in light of concerns about separation of powers and judicial competence? Upon ordering relief, when do judges specify providing specific levels and kinds of services (lawyers, health, housing) or, instead, delineate processes of transparency and accountability by which other government branches are to make decisions about the level and kinds of services required? Do answers come from transnational obligations and comparative law or are the issues particularly related to national constitutions and the political orders they structure?

Another way to frame the inquiries is to ask whether remedies falling under the category “social rights” differ from those required by judges in other arenas. For example, in this Volume’s chapter *Extraterritoriality, Privacy, and Surveillance*, we discuss directives from courts to data service providers to de-list data (the “right to be forgotten”) and to governments to limit the ways in which

they scan for information (under privacy rights). In the Chapter *Migrants, Citizens, and Status*, excerpted cases include judicial directives to governments to provide better detention facilities and to protect the labor rights of migrants. Are court orders to provide social welfare subsidies or health care any more or less “judicial” or more or less subject to criticism for being unduly “legislative” than the rulings on information gathering, surveillance, or migration?

One response is that some jurisdictions consider all rights and liberties as having two dimensions: one negative and another positive. The sustainability of distinctions between “negative” and “positive” rights and between “social” and other forms of rights are explored in the concluding brief excerpts from a few of the many commentators puzzling about how to conceptualize this genre of judges’ work.

SUBSIDIZING COURTS: WAIVING FEES AND FUNDING LAWYERS

In the nineteenth century, Jeremy Bentham described court filing fees as a “tax upon distress.” The cases excerpted below are but a small sample of the many judgments addressing whether courts must waive or adjust filing, user, and transcript fees; require funding for lawyers; or modify procedures to enable individuals to make claims in courts—as defendants or as plaintiffs in civil or in criminal cases. (As the readings suggest, in some jurisdictions, criminal defendants and family members in civil litigation are accorded more state support than other kinds of litigants.) Court-ordered fee-shifting from one party to another is also an option, illustrated later in the chapter by the South African decision to oblige Port Elizabeth Municipality to pay for the cost of lawyers challenging the city’s dislocation of “various occupiers” of land.

Another response is to require courts to alter their own processes to help litigants represent themselves, or to structure collective procedures such as class actions so as to spread the costs of litigation across aggregates of disputants. The last excerpted case in this segment, from the European Court of Human Rights, raises the issue of whether governments have to provide remedial systems as well as to facilitate their use.

**Trial Lawyers Association of British Columbia v. British
Columbia (Attorney General)**

Supreme Court of Canada

2014 SCC 59, [2014] 3 S.C.R. 31

The judgment of McLachlin C.J. and LeBel, Abella, Moldaver and Karakatsanis JJ. was delivered by

MCLACHLIN, C.J.—

1. The issue . . . is whether court hearing fees imposed by the Province of British Columbia that deny some people access to the courts are constitutional . . .

2. . . . [T]he fees . . . violate s. 96 of the Constitution Act, 1867. Although the province can establish hearing fees under its power to administer justice under s. 92(14) of the Constitution Act, 1867, the exercise of that power must also comply with s. 96 of the Constitution Act, 1867, which constitutionally protects the core jurisdiction of the superior courts. . . . [T]he fees impermissibly infringe on that jurisdiction by, in effect, denying some people access to the courts. . . .

3. . . . Ms. Vilardell and Mr. Dunham began a relationship in England and came to British Columbia, Canada, with their daughter. The relationship foundered, and the question arose—who should have custody of the child? Ms. Vilardell wanted to return with the child to Spain, her country of origin. Mr. Dunham wanted to keep the child in British Columbia. Ms. Vilardell also claimed an interest in Mr. Dunham’s house.

4. Ms. Vilardell went to court to have these issues resolved. . . . [T]o get a trial date, she had to undertake in advance to pay a court hearing fee. At the outset of the trial, Ms. Vilardell asked the judge to relieve her from paying the hearing fee. The judge reserved his decision . . . so he could address the question of ability to pay after hearing evidence respecting the parties’ means, circumstances, and entitlement to property.

5. The parties were not represented by lawyers, and the hearing took 10 days. The hearing fee amounted to some \$3,600—almost the net monthly income of the family . . . Ms. Vilardell is not an “impoverished” person in the ordinary sense of the word. She is qualified as a veterinary surgeon in Europe. She was unemployed in the year leading up to the trial; the “family” income appears to have come mainly from her partner. She had some assets, including about \$10,000 in savings in a Canadian bank account, \$10,000 in a Barclays Investment Savings Account in the United Kingdom, and \$4,500 in a registered retirement

account in Spain. However, after legal fees had depleted her savings, she could not afford the hearing fee.

6. . . . [T]he judge held that the Attorney General should be given an opportunity to intervene [and] invited submissions from the Law Society of British Columbia and the B.C. branch of the Canadian Bar Association [which] . . . argued that . . . [individuals should] have the right to have a court adjudicate their legal disputes, and that the hearing fee regime in British Columbia essentially denies them that right. . . .

10. The current hearing fees . . . in . . . the Supreme Court Civil Rules and the Supreme Court Family Rules . . . escalate from no fee for the first three days of trial, to \$500 for days four to ten, to \$800 for each day over ten.

11. Rule 20-5(1) of the Supreme Court Civil Rules provides for an exemption from hearing fees . . . [i]f the court . . . finds that a person receives benefits under the Employment and Assistance Act or the Employment and Assistance for Persons with Disabilities Act or is otherwise impoverished, . . . unless the court considers that the claim or defence (a) discloses no reasonable claim or defence, as the case may be; (b) is scandalous, frivolous or vexatious, or (c) is otherwise an abuse of the process of the court. . . .

19. Section 92(14) of the Constitution Act, 1867 provides:

. . . In each Province the Legislature may exclusively make Laws in relation to . . . The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of the Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil matters in those Courts. . . .

21. Hearing fees fall squarely within the “administration of justice” and may be used to defray some of the cost of administering the justice system, to encourage the efficient use of court resources, and to discourage frivolous or inappropriate use of the courts. . . .

28. . . . [T]he other constitutional grant of power that must be considered is s. 96 of the Constitution Act, 1867,^{*} which has been held to guarantee the core jurisdiction of provincial superior courts throughout the country.

29. . . . [Section] 96[’s] . . . broader import is to guarantee the core jurisdiction of provincial superior courts: Parliament and legislatures can create inferior courts and administrative tribunals, but “[t]he jurisdiction which forms this core cannot be removed from the superior courts by either level of government, without amending the Constitution” . . . [and] the Canadian Constitution “confers a special and inalienable status on what have come to be called the ‘section 96 courts’”

32. The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. . . . The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the Constitution Act, 1867. As a result, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts. . . .

39. . . . As access to justice is fundamental to the rule of law, and the rule of law is fostered by the continued existence of the s. 96 courts, it is only natural that s. 96 provide some degree of constitutional protection for access to justice.

40. . . . If people cannot challenge government actions in court, individuals cannot hold the state to account—the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. And the balance between the state’s power to make and enforce laws and the courts’ responsibility to rule on citizen challenges to them may be skewed

45. Litigants with ample resources will not be denied access to the superior courts by hearing fees. Even litigants with modest resources are often capable of arranging their finances so that, with reasonable sacrifices, they may access the courts. However, when hearing fees deprive litigants of access to the superior courts, they infringe the basic right of citizens to bring their cases to

^{*} S. 96 of the Constitution Act of 1867 provides: “The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.”

court. That point is reached when the hearing fees in question cause undue hardship to the litigant who seeks the adjudication of the superior court.

46. . . . [P]roviding exemptions only to the truly impoverished may set the access bar too high. A fee that is so high that it requires litigants who are not impoverished to sacrifice reasonable expenses in order to bring a claim may, absent adequate exemptions, be unconstitutional because it subjects litigants to undue hardship, thereby effectively preventing access to the courts. . . .

52. The trial judge, affirmed by the Court of Appeal, found that B.C.'s hearing fees . . . limit access to courts for litigants who are not indigent or impoverished (and therefore who do not fall under the exemption provision), but for whom the hearing fees are nonetheless unaffordable. This is supported by the evidence. At trial, the appellants filed a report by economist Robert Carson, who used a "Market Basket Measure" ("MBM") developed in 2003 by Human Resources Development Canada to measure poverty. . . . [H]e concluded that a significant percentage of the population would not be exempted from hearing fees (because their income is above MBM), but would nonetheless have great difficulty affording the hearing fees for a 10-day trial

53. Mr. Carson's summary is as follows:

In 2005 the median after tax income of couples households in B.C., without children, was \$53,468. . . .

On the basis of fairly limited information with respect to income distribution and the extent and quality of participation in paid work among First Nations people, recent immigrants and the disabled it is my opinion that people in these groups are certain to be over-represented among those likely to qualify for indigent status, and among those with incomes that are too high to qualify for indigence, but low enough that hearing fees would represent a significant barrier to recourse to a court. . . .

61. . . . [L]ong trials are not necessarily inefficient. Prolonged trials may be caused by the nature of the case or the evidence. Litigants in long but efficient trials ought not to be penalized by hearing fees—particularly fees that escalate with the length of the trial. . . .

65. This leaves the question of the appropriate remedy. The trial judge struck down the scheme as unconstitutional. The Court of Appeal preferred the remedy of "reading in" the words "or in need" into the exemption provision.

66. “Reading in” is a remedy sparingly used, and available only where it is clear that the legislature, faced with a ruling of unconstitutionality, would have made the change proposed I am not satisfied that this condition is met here. The legislature or Lieutenant Governor in Council has a number of options, from abandoning or modifying the hearing fee to changing the exemption provision. Moreover, any expansion of the exemption provision will be at odds with the legislative objective of deterring use of the courts. “Reading in” to cure the constitutional defect of the hearing fee scheme would defeat the purpose of the legislation. . . .

68. The proper remedy is to declare the hearing fee scheme as it stands unconstitutional and leave it to the legislature or the Lieutenant Governor in Council to enact new provisions, should they choose to do so. . . .

CROMWELL J.:

70. I prefer to resolve this case on administrative law grounds

71. First, the Attorney General concedes that there is a common law right of reasonable access to civil justice . . . [T]he United Kingdom [has] recognized the existence of this right

72. It is widely accepted, and the Attorney General agrees, that this right of reasonable access may only be abrogated by clear statutory language

74. The Attorney General submits, and I agree, that the common law right of access to civil justice allows court fees, but only if there is an exemption to ensure that no person is prevented from making an arguable claim or defence because he or she lacks the resources to carry on the proceeding This is a flexible standard: whether a person has the ability to pay the fees depends not only on wealth and income, but also on the amount of their reasonable, necessary expenses and the magnitude of the fees

79. I would therefore . . . declare that the hearing fees are ultra vires the Court Rules Act. Ms. Vilardell does not have to pay the hearing fee. It is not necessary for me to answer the constitutional question.

ROTHSTEIN J. (dissenting):

81. . . . [T]he British Columbia hearing fee scheme does not offend any constitutional right. . . . [T]here is no express constitutional right to access the civil courts without hearing fees.

82. . . . [T]he majority enters territory that is quintessentially that of the legislature. The majority looks at the question solely from the point of view of the party to litigation required to undertake to pay the hearing fee. It does not consider, and has no basis or evidence upon which to consider, the questions of the financing of court services or the impact of reduced revenues from reducing, abolishing, or expanding the exemption from paying hearing fees. Courts must respect the role and policy choices of democratically elected legislators. In the absence of a violation of a clear constitutional provision, the judiciary should defer to the policy choices of the government and legislature. How will the government deal with reduced revenues from hearing fees? Should it reduce the provision of court services? Should it reduce the provision of other government services? Should it raise taxes? Should it incur debt? These are all questions that are relevant but that the Court is not equipped to answer. . . .

83. Section 92(14) of the Constitution Act, 1867 entrusts the administration of justice in the provinces to provincial legislatures. Legislatures must balance a number of important values, including providing access to courts and ensuring that those same courts are adequately funded. They are accountable to voters for the choices they make. In a constitutional democracy such as ours, courts must be wary of subverting democracy and its accountability mechanisms beneath an overly expansive vision of constitutionalism. . . .

90. . . . In the absence of any demonstrated destruction of the core powers of the superior courts, there is no . . . removal sufficient to find a violation of s. 96. . . . The British Columbia government's measures cannot be said to have "emasculated" B.C. courts or to have made them something "other than a superior court." The hearing fees are a financing mechanism and do not go to the very existence of the court as a judicial body or limit the types of powers it may exercise. . . .

91. The majority reads the unwritten principle of the rule of law as supporting the striking down of legislation otherwise properly within provincial jurisdiction. . . . The written constitutional provisions guide government action and provide the touchstone for judicial review, anchoring the authority of courts to invalidate non-compliant laws enacted by democratically elected governments.

92. There is no express right of general access to superior courts for civil disputes in the text of the Constitution. Rather, the Constitution specifies the particular instances in which access to courts is guaranteed. Section 24(1) of the Charter provides that persons whose Charter rights have been infringed or denied may apply to the courts for a remedy. . . .

93. . . . [Section 96] of the Constitution Act, 1867 requires that the existence and core jurisdiction of superior courts be preserved, but this does not . . . necessarily imply the general right of access to superior courts described by the majority. So long as the courts maintain their character as judicial bodies and exercise the core functions of courts, the demands of the Constitution are satisfied. In using an unwritten principle to support expanding the ambit of s. 96 to such an extent, the majority subverts the structure of the Constitution and jeopardizes the primacy of the written text.

94. This purported constitutional right to access the courts circumvents the careful checks and balances built into the structure of the Charter. Unlike Charter rights, rights read into s. 96 are absolute. They are not subject to s. 1 justification or the s. 33 notwithstanding clause. These provisions reflect a recognition that, in certain circumstances, governments will be permitted to enact legislation or take action that places limits on Charter rights. Indeed, s. 33 contemplates and permits the legislative override of, among other things, the fundamental freedoms described in s. 2, the right to life, liberty and security of the person embodied by s. 7, and numerous rights applicable in the criminal context. The question my colleagues avoid answering is why access to superior courts for civil disputes warrants even stronger protection than those rights expressly enumerated in the Charter. . . .

98. To circumvent this caution against using the rule of law as a basis for striking down legislation, the majority characterizes the rule of law as a limitation on the jurisdiction of provinces under s. 92(14) of the Constitution Act, 1867. . . . Dressing the rule of law in division-of-powers clothing does not disguise the fact that the rule of law, an unwritten principle, cannot be used to support striking down the hearing fee scheme. . . .

103. Even if there were a constitutional basis upon which to challenge the British Columbia hearing fee scheme, I would not find the scheme to be unconstitutional. . . .

107. . . . [First,] the updated impoverishment exemption provides a measure of discretion to trial judges in determining its application. . . .

109. Second, the financial burden of hearing fees, a disbursement, may be reapportioned through both interim and final costs awards. Judges may consider factors such as the success of a party, the reasonableness of the positions taken, the importance of the case, and whether one party was responsible for an excessively lengthy hearing.

110. Third, and most importantly, judges have a key role to play in limiting hearing fees. Active judicial case management is critical to ensuring reasonable timelines in civil proceedings and efficient use of court resources, especially in the case of self-represented litigants. . . .

By order of the Lieutenant Governor in Council and “after consultation with the Chief Justice of the Supreme Court,” and “with advice and consent of the Executive Council,” British Columbia amended its filing fee rules. The revised Rule 20-5(1), which became effective in July of 2015, provides:

Court may order that no fees are payable

(1) If the court, on application made in accordance with subrule (3) before or after the start of a proceeding, finds that a person

(a) receives benefits under the Employment and Assistance Act or the Employment and Assistance for Persons with Disabilities Act, or

(b) cannot, without undue hardship, afford to pay the fees under Schedule 1 of Appendix C in relation to the proceeding,

the court may order that no fees are payable by the person to the government under Schedule 1 of Appendix C in relation to the proceeding unless the court considers that the claim or defence

(c) discloses no reasonable claim or defence, as the case may be,

(d) is scandalous, frivolous or vexatious, or

(e) is otherwise an abuse of the process of the court.

In the United States, in 1963, the Supreme Court held in *Gideon v. Wainwright* that the Sixth Amendment right “to have the Assistance of Counsel for his defense” was “incorporated” through Fourteenth Amendment due process guarantees and applied to states when they tried individuals accused of felonies. In a series of cases thereafter, the Supreme Court created an “actual imprisonment” standard in that the right to counsel depended not on whether a crime was characterized as a felony or a misdemeanor but on whether a person could, as a result of a conviction, spend any time imprisoned—as contrasted with being subject to fines or probation.

Many states had some forms of free legal assistance for indigent defendants before *Gideon* but the *Gideon* mandate was more comprehensive. It obliged governments to create systems by which to supply lawyers—either through creating offices (called public defender services) with staff lawyers or by paying private counsel, appointed in individual cases.

In the 1980s, as governments expanded prosecutorial efforts, the need for such services soared. Funding—either for defender programs or private lawyers—did not keep pace with demand; the track-record on implementation is mixed. Some states have found ways to train lawyers, support funds, and create innovative programs. In others, complaints are legion about large caseloads and under-prepared lawyers that do not live up to “*Gideon*’s promise.” In some jurisdictions, criminal defendants are offered the option of foregoing lawyers and pleading to misdemeanor charges; in others, after individuals are convicted, the government tries to collect money as reimbursement for the costs of lawyers, and thus produces cycles of debt. When criminal defendants bring claims of “ineffective assistance of counsel” as grounds for reversal of convictions, they are faced with exacting tests to prove that the Sixth Amendment has been violated. The current law permits convictions to stand absent proof by a defendant that, but for a lawyer’s performance falling far below professional standards, the result of the proceeding would have been different.

The question of whether states were obliged to provide *civil* litigants with counsel reached the Supreme Court in 1981 in *Lassiter v. Department of Social Services*. That decision is discussed in *M.L.B. v. S.L.J.*, excerpted below. *M.L.B.* involves state efforts to terminate the parental rights of a mother who could not afford to pay the transcript fees required to appeal, as she argued that no evidence supported the judge’s ruling. Debated are both the constitutional sources of the right to have fees waived and whether a mandate for such support applied only the small number of individuals facing the complete termination of their status as a parent, to other family conflicts, or to all civil litigants who are too poor to pay transcription fees.

M.L.B. v. S.L.J.
Supreme Court of the United States
519 U.S. 102 (1996)

Justice GINSBURG delivered the opinion of the Court.

By order of a Mississippi Chancery Court, petitioner M.L.B.'s parental rights to her two minor children were forever terminated. M.L.B. sought to appeal from the termination decree, but Mississippi required that she pay in advance record preparation fees estimated at \$2,352.36. Because M.L.B. lacked funds to pay the fees, her appeal was dismissed. . . .

May a State, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay record preparation fees? We hold that, just as a State may not block an indigent petty offender's access to an appeal afforded others, so Mississippi may not deny M.L.B., because of her poverty, appellate review of the sufficiency of the evidence on which the trial court found her unfit to remain a parent.

Petitioner M.L.B. and respondent S.L.J. are, respectively, the biological mother and father of two children, a boy born in April 1985, and a girl born in February 1987. In June 1992, after a marriage that endured nearly eight years, M.L.B. and S.L.J. were divorced. The children remained in their father's custody, as M.L.B. and S.L.J. had agreed at the time of the divorce.

S.L.J. married respondent J.P.J in September 1992. In November of the following year, S.L.J. and J.P.J filed suit in Chancery Court in Mississippi The complaint alleged that M.L.B. had not maintained reasonable visitation and was in arrears on child support payments. M.L.B. counterclaimed, seeking primary custody of both children and contending that S.L.J. had not permitted her reasonable visitation, despite a provision in the divorce decree that he do so.

After taking evidence . . . the Chancellor, in a decree filed December 14, 1994, terminated all parental rights of the natural mother, approved the adoption, and ordered that J.P.J, the adopting parent, be shown as the mother of the children on their birth certificates. Twice reciting a segment of the governing Mississippi statute, the Chancellor declared that there had been a "substantial erosion of the relationship between the natural mother, [M.L.B.], and the minor children," which had been caused "at least in part by [M.L.B.'s] serious neglect, abuse, prolonged and unreasonable absence or unreasonable failure to visit or communicate with

her minor children.”¹ . . . In January 1995, M.L.B. filed a timely appeal and paid the \$100 filing fee. The Clerk of the Chancery Court, several days later, estimated the costs for preparing and transmitting the record: \$1,900 for the transcript (950 pages at \$2 per page); \$438 for other documents in the record (219 pages at \$2 per page); \$4.36 for binders; and \$10 for mailing.

Mississippi grants civil litigants a right to appeal, but conditions that right on prepayment of costs. Relevant portions of a transcript must be ordered, and its preparation costs advanced by the appellant, if the appellant “intends to urge on appeal,” as M.L.B. did, “that a finding or conclusion is unsupported by the evidence or is contrary to the evidence.”

Unable to pay \$2,352.36, M.L.B. sought leave to appeal *in forma pauperis*. The Supreme Court of Mississippi denied her application . . . , [saying], “[t]he right to proceed in forma pauperis in civil cases exists only at the trial level.”² . . .

We observe first that the Court’s decisions concerning access to judicial processes . . . reflect both equal protection and due process concerns. . . . The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs. The due process concern homes in on the essential fairness of the state-ordered proceedings anterior to adverse state action. A “precise rationale” has not been composed . . . because cases of this order “cannot be resolved by resort to easy slogans or pigeonhole analysis.” Nevertheless, “[m]ost decisions in this area,” we have recognized, “res[t] on an equal protection framework,” . . . [because] due process does not independently require that the State provide a right to appeal. We place this case within the framework established by our past decisions. . . . [W]e inspect the character and intensity of the individual interest at stake, on the one hand, and the State’s justification for its exaction, on the other. . . .

. . . [T]he stakes for petitioner M.L.B.—forced dissolution of her parental rights—are large, “more substantial than mere loss of money.” In contrast to loss of custody, which does not sever the parent-child bond, parental status termination is “irretrievabl[y] destructi[ve]” of the most fundamental family

¹ Miss. Code Ann. § 93–15–103(3) (1994) sets forth several grounds for termination of parental rights, including, in subsection (3)(e), “when there is [a] substantial erosion of the relationship between the parent and child which was caused at least in part by the parent’s serious neglect, abuse, prolonged and unreasonable absence, unreasonable failure to visit or communicate, or prolonged imprisonment.” . . .

² In fact, Mississippi, by statute, provides for coverage of transcript fees and other costs for indigents in civil commitment appeals. . . .

relationship. And the risk of error, Mississippi's experience shows, is considerable.

. . . Mississippi has, by statute, adopted a "clear and convincing proof" standard for parental status termination cases. Nevertheless, the Chancellor's termination order in this case simply recites statutory language; it describes no evidence, and otherwise details no reasons for finding M.L.B. "clear[ly] and convincing[ly]" unfit to be a parent. Only a transcript can reveal to judicial minds other than the Chancellor's the sufficiency, or insufficiency, of the evidence to support his stern judgment.

The countervailing government interest . . . is financial. Mississippi urges . . . the State's legitimate interest in offsetting the costs of its court system. But . . . appeals are few, and not likely to impose an undue burden on the State. . . . [O]nly 16 reported appeals in Mississippi from 1980 until 1996 referred to the State's termination statute, and only 12 of those decisions addressed the merits of the grant or denial of parental rights . . . [as contrasted to] 63,765 civil actions filed in Mississippi Chancery Courts in 1995 . . . Mississippi's experience with criminal appeals is noteworthy in this regard. In 1995, the Mississippi Court of Appeals disposed of 298 first appeals from criminal convictions; of those appeals, only seven were appeals from misdemeanor convictions, notwithstanding our holding . . . requiring *in forma pauperis* transcript access in petty offense prosecutions.

In States providing criminal appeals . . . an indigent's access to appeal, through a transcript of relevant trial proceedings, is secure under our precedent. . . . But counsel at state expense, we have held, is a constitutional requirement, even in the first instance, only when the defendant faces time in confinement. When deprivation of parental status is at stake, however, counsel is sometimes part of the process that is due. It would be anomalous to recognize a right to a transcript needed to appeal a misdemeanor conviction—though trial counsel may be flatly denied—but hold, at the same time, that a transcript need not be prepared for M.L.B.—though were her defense sufficiently complex, state-paid counsel, as *Lassiter* instructs, would be designated for her.

. . . [W]e do not question the general rule . . . that fee requirements ordinarily are examined only for rationality. The State's need for revenue to offset costs, in the mine run of cases, satisfies the rationality requirement. . . .

. . . The basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license.¹⁴ . . . [W]e place decrees forever terminating parental rights in the category of cases in which the State may not “bolt the door to equal justice”

[Justice KENNEDY concurred on the grounds that “the existing appellate structure in Mississippi, the realities of the litigation process, and the fundamental interests at stake” prohibited the State from barring appellate review through costs “beyond the petitioner’s means.” CHIEF JUSTICE REHNQUIST dissented, writing separately to specify that, while he joined Justice Thomas’s dissent not to “extend” the previous rulings to this context, he would not overturn them either and therefore did not join the part of the opinion addressing that issue.]

Justice THOMAS, with whom Justice SCALIA joins, and with whom THE CHIEF JUSTICE joins except as to Part II [excerpted below], dissenting.

Today the majority holds that the Fourteenth Amendment requires Mississippi to afford petitioner a free transcript because her civil case involves a “fundamental” right. The majority seeks to limit the reach of its holding to the type of case we confront here, one involving the termination of parental rights. I do not think, however, that the new-found constitutional right to free transcripts in civil appeals can be effectively restricted to this case. The inevitable consequence will be greater demands on the States to provide free assistance to would-be appellants in all manner of civil cases involving interests that cannot . . . be distinguished from the admittedly important interest at issue here. . . .

The distinction between criminal and civil cases—if blurred at the margins—has persisted throughout the law. The distinction that the majority seeks to draw between the case we confront today and the other civil cases that we will surely face tomorrow is far more ephemeral. . . . Will the Court, for example, now extend the right to a free transcript to an indigent seeking to appeal the outcome

¹⁴ The pathmarking voting and ballot access decisions are *Harper v. Virginia Bd. of Elections* (1966) (invalidating, as a denial of equal protection, an annual \$1.50 poll tax imposed by Virginia on all residents over 21); *Bullock v. Carter* (1972) (invalidating Texas scheme under which candidates for local office had to pay fees as high as \$8,900 to get on the ballot); *Lubin v. Panish*, (1974) (invalidating California statute requiring payment of a ballot-access fee fixed at a percentage of the salary for the office sought). Notably, the Court in *Harper* recognized that “a State may exact fees from citizens for many different kinds of licenses.” For example, the State “can demand from all an equal fee for a driver’s license.” But voting cannot hinge on ability to pay, the Court explained, for it is a “fundamental political right . . . preservative of all rights.” *Bullock* rejected as justifications for excluding impecunious persons, the State’s concern about unwieldy ballots and its interest in financing elections. *Lubin* reaffirmed that a State may not require from an indigent candidate “fees he cannot pay.”

of a paternity suit? To those who wish to appeal custody determinations? How about persons against whom divorce decrees are entered? Civil suits that arise out of challenges to zoning ordinances with an impact on families? Why not foreclosure actions—or at least foreclosure actions seeking to oust persons from their homes of many years? . . .

In brushing aside the distinction between criminal and civil cases . . . the Court has eliminated the last meaningful limit on the free-floating right to appellate assistance. . . .

. . . I do not dispute the wisdom or charity of these heretofore voluntary allocations of the various States' scarce resources. I agree that, for many—if not most—parents, the termination of their right to raise their children would be an exaction more dear than any other. It seems perfectly reasonable for States to choose to provide extraconstitutional procedures to ensure that any such termination is undertaken with care. I do not agree, however, that a State that has taken the step, not required by the Constitution, of permitting appeals from termination decisions somehow violates the Constitution when it charges reasonable fees of all would-be appellants. . . .

**Delhi High Court Bar Association v. Government of National
Capital Territory of Delhi**

High Court of Delhi at New Delhi, India

WP No. 4770/2012 & CM Nos. 9869/2012, 11129/2012, 16545/2012,
16845/2012, 16882/2012 (Oct. 9, 2013), appeal pending

[In 2012, the Legislative Assembly of the National Capital Territory of Delhi amended the Court Fees Act of 1870. Under the old schedule, the court fee for a matter in dispute worth up to 50,000 rupees (approximately \$780 in 2015 U.S. dollars) was 48 rupees (U.S. \$0.75); under the new system, the fee became 1000 rupees (U.S. \$15.60). Under the old system for matters up to 400,000 rupees (U.S. \$6,250), the fee was 6,248 rupees (U.S. \$97.50) with an additional 1% of the value of the matter in dispute for amounts above that sum; under the new system the fee was raised to 4% of the value of the matter in dispute.

Petitioners were Delhi High Court Bar Association, Rajiv Khosla, former President of the Delhi Bar Association, and Umesh Kapoor, who had challenged an arbitral award and been ordered by a judge on the Delhi High Court to pay

court fees based on the value of the properties that were the basis for the effort to appeal. They brought a lawsuit against the Government of the North Capital Territory of Delhi and argued that the amendment to the Court Fees Act was unconstitutional.

They relied on the following provisions of the Constitution of India:

Article 14: “Equality before law. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

Article 21: “Protection of life and personal liberty. No person shall be deprived of his life or personal liberty except according to procedure established by law.”

Article 38: “State to secure a social order for the promotion of welfare of the people.

(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

(2) The State shall, in particular, strive to minimise the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.”

Article 39A: “Equal justice and free legal aid. The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.”]

GITA MITTAL, J. . . .

34. . . . [P]etitioners . . . argue [that] . . . the impugned amendment is against the basic constitutional value of administration of justice in a welfare State. The levy affects the untrammelled fundamental and human right of access

to justice of the citizens, and also forms an insurmountable barrier to accessing justice. . . .

68. The respondents state that the amendment to the Court Fees Act was enacted to fulfill the cherished and fundamental human and societal aspiration of a more law abiding citizenry and an organized state/nation. . . . It is settled law that the State government can recover fees for services rendered. . . .

379. Article 14 [of the Constitution of India] unequivocally declares that the State shall not deny to any person equality before the law or equal protection of the laws within.

386. . . . It is a settled legal proposition that Article 14 of the Constitution strikes at arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. This doctrine of arbitrariness is not restricted only to executive actions, but also applies to [legislative actions]. . . .

397. In the new schedule, the court fee has been increased by almost 400%. After the amendment, 4% of [the] court fee is payable on claims above rupees twenty lakhs [approximately U.S. \$31,000]. As a result, the larger the value of the claim, the larger is the amount of court fee payable thereon. There is no capping on the maximum court fee. . . .

406. . . . By virtue of the amendment, the plaintiff has to pay [the] court fee[s] at the time of institution of the suit on the value of the entire property, notwithstanding that he is in part possession thereof. . . .

451. . . . There is no logic or basis for fixation of the court fee based on the amount awarded. In fact such prescription supports the petitioner's contention that there is no correlation between the services rendered and the court fee levied. The only object of the amendment appears to be raising the general revenue of the Government which is impermissible. . . .

537. The jurisprudence of the Supreme Court of India has repeatedly emphasized that the right to a fair trial and of access to justice is a basic fundamental/human right. . . .

III. The State has failed to discharge the onus which rested on it to justify the increase in the court fee. . . . The levy has a discriminatory impact on the litigants; the same is based on no intelligible differentia and is constitutionally impermissible classification. The impugned legislation, therefore, is *ex facie* substantively unreasonable, arbitrary and *ultra vires* Article 14 of the Constitution.

The court fee levy has a disproportionate gender impact as well and is not sustainable for this reason.

IV. The imposition of the court fee by percentage without a maximum limit is unrelated to the cost of any service rendered. The ad valorem levy of court fee after a particular level, loses all elements of quid pro quo and, therefore, loses the characteristics of a 'fee'. It thus tantamounts to recovery of amounts towards general revenue under the guise of court fees and, therefore, partakes all characteristics of a 'tax'. . . .

V. The Court Fees (Delhi Amendment) Act, 2012 disproportionately impacts the fundamental right of access to justice under Article 21 of the Constitution of India and has a deleterious impact on litigation in courts. It results in violation of the obligations of the State to ensure an effective and efficient system for administration of justice. It is an absolute entry point financial barrier to the courts for not only those who are below the poverty line but also those on the 'border line' who are barely meeting the essentials of daily needs (that is, such persons who would not meet the forma pauperis definition disentitling them to court fee waivers and exemptions). The impugned legislation results in denial of equality before the law to parties to a proceeding as it results in unequal opportunity of access to court to persons placed in different economic categories. The Court Fees (Delhi Amendment) Act, 2012 is [also] unconstitutional as it adversely . . . violates the Directive Principles of State Policy under Article 38 and 39A of the Constitution. . . .

Airey v. Ireland

European Court of Human Rights (Chamber)

App. No. 6289/73 (Oct. 9, 1979)

[The European Court of Human Rights, sitting as a Chamber composed of: Mr. G. Wiarda, President, Mr. P. O'Donoghue, Mr. Thór Vilhjálmsson, Mr. W. Ganshof Van Der Meersch, Mr. D. Evrigenis, Mr. L. Liesch, Mr. F. Gölcüklü, and also Mr. M.-A. Eissen, Registrar, and Mr. H. Petzold, Deputy Registrar.] . . .

8. Mrs. Johanna Airey, an Irish national born in 1932, lives in Cork. . . . She married in 1953 and has four children, the youngest of whom is still dependent on her. . . . [Mrs. Airey's] . . . net weekly wage in December 1978 was £39.99. . . .

Mrs. Airey alleges that her husband is an alcoholic and that, before 1972, he frequently threatened her with, and occasionally subjected her to, physical violence. In January 1972 . . . Mr. Airey was convicted . . . of assaulting her and fined. In the following June he left the matrimonial home; he has never returned . . . although Mrs. Airey now fears that he may seek to do so. . . .

10. In Ireland, although it is possible to obtain under certain conditions a decree of nullity—a declaration by the High Court that a marriage was null and void ab initio—, divorce in the sense of dissolution of a marriage does not exist. In fact, Article 41.3.2 of the Constitution provides: “No law shall be enacted providing for the grant of a dissolution of marriage.”*

However, spouses may be relieved from the duty of cohabiting either by a legally binding deed of separation concluded between them or by a court decree of judicial separation (also known as a divorce a mensa et thoro). . . . [T]he petitioner [must provide] . . . evidence proving one of three specified matrimonial offences, namely, adultery, cruelty or unnatural practices. . . .

11. Decrees of judicial separation are obtainable only in the High Court. The parties may conduct their case in person. However . . . in each of the 255 separation proceedings initiated in Ireland . . . from January 1972 to December 1978 . . . the petitioner was represented by a lawyer.

. . . [T]he approximate range of the costs incurred by a legally represented petitioner was £500 - £700 in an uncontested action and £800 - £1,200 [approximately \$1228 - \$1843 in 2015 U.S. dollars] in a contested action

Legal aid is not at present available in Ireland for the purpose of seeking a judicial separation, nor indeed for any civil matters. . . .

24. . . . [T]he Court considers it most improbable that a person in Mrs. Airey’s position can effectively present his or her own case. . . . ‘

26. . . . [T]he Convention’s** only express provision on free legal aid is Article 6 para. 3 (c) which relates to criminal proceedings and is itself subject to

* Article 41.3.2 prohibiting divorce was repealed by the Fifteenth Amendment of the Irish Constitution, passed by popular referendum in 1995 and signed into law on June 17, 1996.

** The relevant provisions of the European Convention on Human Rights are:

Article 6:

1. “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by

limitations . . . Article 6 para. 1 does not guarantee any right to free legal aid as such. The Government add that since Ireland, when ratifying the Convention, made a reservation to Article 6 para. 3 (c) with the intention of limiting its obligations in the realm of criminal legal aid, a fortiori it cannot be said to have implicitly agreed to provide unlimited civil legal aid. . . .

The Court is aware that the further realisation of social and economic rights is largely dependent on the situation—notably financial—reigning in the State in question. On the other hand, the Convention must be interpreted in the light of present-day conditions . . . and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals. Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. . . . [T]he mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention. . . .

In addition, whilst Article 6 para. 1 guarantees to litigants an effective right of access to the courts for the determination of their “civil rights and obligations,” it leaves to the State a free choice of the means to be used towards this end. The institution of a legal aid scheme—which Ireland now envisages in family law matters—constitutes one of those means but there are others such as, for example, a simplification of procedure. In any event, it is not the Court’s

an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

3. “Everyone charged with a criminal offence has the following minimum rights . . . (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;”

Article 8:

1. “Everyone has the right to respect for his private and family life, his home and his correspondence.”

2. “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, 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.”

function to indicate, let alone dictate, which measures should be taken; all that the Convention requires is that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6 para. 1. . . .

32. The Court does not consider that Ireland can be said to have “interfered” with Mrs. Airey’s private or family life: the substance of her complaint is not that the State has acted but that it has failed to act. However, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life.

33. In Ireland, many aspects of private or family life are regulated by law. As regards marriage, husband and wife are in principle under a duty to cohabit but are entitled, in certain cases, to petition for a decree of judicial separation; this amounts to recognition of the fact that the protection of their private or family life may sometimes necessitate their being relieved from the duty to live together.

Effective respect for private or family life obliges Ireland to make this means of protection effectively accessible, when appropriate, to anyone who may wish to have recourse thereto. However, it was not effectively accessible to the applicant: not having been put in a position in which she could apply to the High Court, she was unable to seek recognition in law of her de facto separation from her husband. She has therefore been the victim of a violation of Article 8.

[The Court held 5-2 that there had been a breach of Article 6 para. 1 of the Convention and 4-3 that there had been a breach of Article 8.]

DISSENTING OPINION OF JUDGE O’DONOGHUE

. . . Many changes have taken place in recent times in the law enabling marriages to be dissolved in the several member States. I am not aware that it has ever been contended that divorce legislation is either required or prohibited by any Article of the Convention. There is a great variety in the laws enabling marriages to be dissolved and it is quite understandable that the rigid position at the moment in Ireland owing to the Constitutional prohibition is somewhat hard to be fully understood and appreciated by those from countries where divorce can be obtained with great facility and expedition. . . .

DISSENTING OPINION OF JUDGE THÓR VILHJÁLMSSON

. . . The war on poverty cannot be won through broad interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms. Where the Convention sees financial ability to avail oneself of a right guaranteed therein as so important that it must be considered an integral part of the right, this is so stated. . . . Any other interpretation of the Convention, at least at this particular stage of the development of human rights, would open up problems whose range and complexity cannot be foreseen but which would doubtless prove to be beyond the power of the Convention and the institutions set up by it. . . .

[The dissenting opinion of Judge Evrigenis has been omitted.]

Valiulienė v. Lithuania

European Court of Human Rights (Second Section)

App. No. 33234/07 (Mar. 26, 2013)

The European Court of Human Rights (Second Section), sitting as a Chamber composed of: Guido Raimondi, President, Danutė Jočienė, Dragoljub Popović, András Sajó, Işıl Karakaş, Paulo Pinto de Albuquerque, Helen Keller, judges, and Stanley Naismith, Section Registrar.

[Loreta Valiulienė alleged that the state had failed to protect her from acts of domestic violence committed by her live-in partner and that the criminal proceedings she had attempted to institute had been futile.] . . .

73. Once the Court has found that the level of severity of violence inflicted by private individuals attracts protection under Article 3 of the Convention,^{*} its case-law is consistent . . . that this Article requires the implementation of adequate criminal-law mechanisms. However, the scope of the State's positive obligations might differ between cases where treatment contrary to Article 3 of the Convention has been inflicted through the involvement of State agents and cases

* The relevant provisions of the European Convention on Human Rights are:

Article 1: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

Article 3: "Prohibition of torture—No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

where violence is inflicted by private individuals. The Court observes in the first place that no direct responsibility can be borne by Lithuania under the Convention in respect of the acts of the private individuals in question.

74. The Court notes, however, that . . . State responsibility may nevertheless be engaged through the obligation imposed by Article 1 of the Convention . . . to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention [and], taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals.

75. Furthermore, Article 3 requires States to put in place effective criminal-law provisions to deter the commission of offences against personal integrity, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions, and this requirement also extends to ill-treatment administered by private individuals. On the other hand, it goes without saying that the obligation on the State under Article 1 of the Convention cannot be interpreted as requiring the State to guarantee through its legal system that inhuman or degrading treatment is never inflicted by one individual on another or that if it is, criminal proceedings should necessarily lead to a particular sanction. In order that a State may be held responsible it must, in the view of the Court, be shown that the domestic legal system, and in particular the criminal law applicable in the circumstances of the case, failed to provide practical and effective protection of the rights guaranteed by Article 3.

76. . . . The Court must grant substantial deference to the national courts in the choice of appropriate measures, while also maintaining a certain power of review and the power to intervene in cases of manifest disproportion between the gravity of the act and the results obtained at domestic level. . . .

79. The Court will now examine whether or not the impugned regulations and practices, and in particular the domestic authorities' compliance with the relevant procedural rules, as well as the manner in which the criminal-law mechanisms were implemented in the instant case, were defective to the point of constituting a violation of the respondent State's positive obligations under Article 3 of the Convention.

80. . . . [A]s early as 14 February 2001 the applicant had addressed the Panevėžys City District Court to bring a private prosecution. On the basis of forensic reports produced soon after each incident of violence, she claimed that J.H.L. had ill-treated her on five separate occasions, describing each incident in

detail. She gave the names and addresses of five witnesses whom she wanted to call in the case. She alleged that the acts of violence against her constituted a crime . . . [under] the old Criminal Code She provided the domestic court with relevant medical documentation in support of her allegations. The Court thus concludes that the Lithuanian authorities received sufficient information from the applicant to raise a suspicion that a crime had been committed. It thus finds that as of that moment those authorities were under an obligation to act upon the applicant's criminal complaint.

81. Indeed, as appears from the Panevėžys City District Court ruling of 21 January 2002, that court took immediate steps to bring J.H.L. to justice. However, given that the latter had failed to appear in court on numerous occasions, the court decided to transfer the case to a public prosecutor. . . . [U]p until that moment, the Lithuanian authorities had acted without undue delay.

82. . . . [O]nce the case had been transferred for public prosecution, the investigation was suspended two times for lack of evidence. Each time the applicant had shown great interest in her case and had made serious attempts to have J.H.L. prosecuted. Upon her persistent appeals, the prosecutors quashed the investigator's decisions as not being thorough enough. The Court thus finds that this was a serious flaw on the part of the State.

83. . . . [E]ven though the Lithuanian Code of Criminal Procedure had changed in May 2003, it was only in June 2005 . . . two years after the legislative reform, that the prosecutor decided to return the case to the applicant for private prosecution, thus taking her back to square one . . . when she had first approached the Panevėžys City District Court in February 2001. . . .

84. . . . Even though the applicant without any delay addressed the same Panevėžys City District Court with an application for private prosecution, that court dismissed her application on the very ground she feared, namely that the prosecution had become time-barred. Finally, the decision to terminate the criminal proceedings due to the statutory limitation was upheld by the Panevėžys Regional Court, thus leaving the applicant in a state of legal limbo. Accordingly, all the attempts by the applicant to have her attacker prosecuted were futile.

85. . . . [T]he choice of the means to secure compliance with Article 3 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the domestic authorities' margin of appreciation, provided that criminal-law mechanisms are available to the victim. . . . [I]t is not for the Court to speculate whether the applicant's criminal complaint should have been pursued by the public prosecutor, or by a way of private prosecution . . .

86. . . . [T]he practices at issue in the present case, together with the manner in which the criminal-law mechanisms were implemented, did not provide adequate protection to the applicant against acts of violence. Therefore the Court finds that there has been a violation of Article 3 of the Convention. . . .

CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE

. . . States have the obligation not only to bring to justice the alleged offenders and empower the victims of domestic violence with an active role in the criminal proceedings, but also to prevent private actors from committing or reiterating the offence and provide elementary social support measures to victims, such as post-traumatic care and shelter. Such an international positive obligation must be acknowledged, in view of the broad and long-lasting consensus mentioned above, as a principle of customary international law, binding on all States. This is a fortiori true in the case of violence against women. Domestic violence is basically violence against women. . . .

Hence, the full *effet utile* of the European Convention on Human Rights (the Convention) can only be achieved with a gender-sensitive interpretation and application of its provisions which takes in account the factual inequalities between women and men and the way they impact on women's lives. . . . [T]he very act of domestic violence has an inherent humiliating and debasing character for the victim, which is exactly what the offender aims at. Physical pain is but one of the intended effects. A kick, a slap or a spit is also aimed at belittling the dignity of the partner, conveying a message of humiliation and degradation. . . . [T]his intrinsic element of humiliation . . . attracts the applicability of Article 3 of the Convention. . . .

One of the most problematic aspects of the State's positive obligation is the definition of the exact ambit of its duty to prevent and protect. The Court has developed the so-called Osman test, which normally assesses if the authorities knew, or ought to have known at the time, of the existence of real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. Put simply, the State answers for the wrongful conduct of non-State actors when their conduct was foreseeable and avoidable by the exercise of State powers. The heart of the dispute in the current case lies in the adequateness of this standard to the particular situation of domestic violence. . . . A more rigorous standard of diligence is especially necessary in the context of certain societies, like Lithuanian society, which are faced with a serious, long-lasting and widespread problem of domestic violence. . . . If a State knows or ought to know that a segment of its

population, such as women, is subject to repeated violence and fails to prevent harm from befalling the members of that group of people when they face a present (but not yet imminent) risk, the State can be found responsible by omission for the resulting human rights violations. The constructive anticipated duty to prevent and protect is the reverse side of the context of widespread abuse and violence already known to the State authorities. . . .

. . . I find . . . a substantive and a procedural violation of Article 3.

Frank I. Michelman

*The Supreme Court and Litigation Access Fees:
The Right to Protect One's Rights (1973)**

. . . [T]here are generally accepted *reasons* for making litigation possible. I think we take little risk of serious distortion if we try to frame those reasons in terms of the values (ends, interests, purposes) that are supposed to be furthered by allowing persons to litigate. . . .

Dignity values. These seem most clearly offended when a person confronts a formal, state-sponsored, public proceeding charging wrongdoing, failure, or defect, and the person is either prevented from responding or forced to respond without the assistance and resources that a self-respecting response necessitates.

The damage to self-respect from the inability to defend oneself properly seems likely to be most severe in the case of criminal prosecution, where representatives of civil society attempt in a public forum to brand one a violator of important societal norms. Thus, if the fee decisions on the criminal side are to be justified by dignity values (as seems perfectly plausible), these holdings may not have any controlling significance for the civil side.

Of course, one immediately sees that there are some nominally “civil” contexts where the would-be litigant is trying to fend off accusatory action by the government threatening rather dire and stigmatizing results (for example, a proceeding to divest a parent of custody of a child on grounds of unfitness), which are exceedingly difficult to distinguish from standard criminal contexts in dignity

* Excerpted from Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L.J. 1153.

value terms. Still these cases do not by themselves show that the dignity notion is uncontainable. Challenging though it may be in a few cases to draw the line between the quasi-criminal and the noncriminal context, the determination usually will not be insuperably difficult.

But this is hardly to say that dignity considerations are entirely absent from civil contexts. Perhaps there is something generally demeaning, humiliating, and infuriating about finding oneself in a dispute over legal rights and wrongs and being unable to uphold one's own side of the case. How serious these effects are seems to depend on various factors including, possibly, the identity of the adversary (is it the government?), the possible outcomes (will the person, or others, feel that he has been determined to be a wrongdoer?), and how public the struggle has become (has it reached the courts yet?).

That listing of factors might seem to lend a degree of plausibility to a general right of court access for civil defendants though not for civil plaintiffs. But the idea is really not very persuasive on close inspection. . . . That a person's self-respect might be seriously injured by inability to have that charge tested in a credibly impartial tribunal seems entirely likely.

Nor does it seem that such a likelihood can readily be ruled out in various other plaintiff contexts that easily come to mind: a citizen wishes to sue a governmental body for breach of contract or for tax refund; a customer wishes to sue an automobile mechanic for breach of warranty; a member wishes to challenge his expulsion from a private association (or a worker, his dismissal from private employment); a tenant wishes to sue his landlord for having evicted him for a malicious or erroneous (and allegedly unlawful) reason; an aggrieved party wishes to sue another for defamation, or for assault, or for malpractice, or for breach of trust. It seems that denial of access would noticeably arouse dignity concerns in all these cases. No doubt, there are variations in the degree of injury, depending on permutations of relevant factors; but dignity concerns seem widespread through the judicial sector.

Participation values. The illumination that may sometimes flow from viewing litigation as a mode of politics has escaped neither courts nor legal theorists. But I can see no way of trenchantly deploying that insight so as to rank litigation contexts for purposes of a selective access-fee relief rule. . . . But if participation values cannot help us differentiate among litigation contexts, they can contribute significantly to the argument for a broad constitutional right of court access. Participation values are at the root of the claim that such a right can be derived from the first amendment . . . [and] they also help inspire the analogy between general litigation rights and general voting rights. . . .

Deterrence values. Litigation is often, and enlighteningly, viewed as a process, or part of a process, for constraining all agents in society to the performance of duties and obligations imposed with a view to social welfare. A possible link between deterrence values and access fees is, of course, supplied by the obvious frustration of those values which results if the person in the best position, or most naturally motivated, to pursue judicial enforcement of such constraints is prevented by access fees from doing so. . . .

Effectuation values. In the effectuation perspective we view the world from the standpoint of the prospective litigant as distinguished from that of society as a whole or as a collectivity. Value is ascribed to the actual protection and realization of those interests of the litigant which the law purports to protect and effectuate (in this perspective one would shamelessly refer to those interests as the litigant's "rights") and more generally to a prevailing assurance that those interests will be protected; and litigation is regarded as a process, or as a part of a process, for providing such protection and assurance. . . . Elaborations may range from the extremely abstract and deontological (inferring legal rights, say, from a transcendental Idea of Freedom) to the borderline utilitarian (viewing rights as necessary to the preservation of a satisfying social order). They may vary in tone and emphasis from the legalistic (strict social contract theories, or looser contractarian theories which entail legal protection for rights as a necessary part of the ethical justification for civil society's coercive aspects) to the humanitarian and psychologically oriented (rights regarded as one of the lenses through which we view and find meaning in, or media through which we express and give meaning to, our notions of self, personality, social relationship). However articulated, defended, or accounted for, the sense of legal rights as claims whose realization has intrinsic value can fairly be called rampant in our culture and traditions. Of course, this sense is aroused more naturally and appropriately by some claims and predicaments than by others. . . .

HEALTH, WELL-BEING, AND SECURITY

Courts in many countries have addressed constitutional obligations to provide health care, housing, and other forms of benefits. Some of these entitlements flow from commitments to human dignity and others have specific textual references often intersecting with international conventions. The phrase "progressive realization" is famously associated with the U.N. International Covenant on Economic, Social, and Cultural Rights (ICESCR), as well as with the South African Constitution. How courts interpret domestic mandates, when

they are applied to non-nationals, the relevance of international obligations, and the forms of implementation of welfarist services are the questions at the center of this segment.

Each of the decisions excerpted below calls on governments to respond by providing more services than they had; across the set, justices provide different levels of detail in their remedial orders. In some cases, entitlements to subsidies also entail entitlements to processes to ensure transparent decisions that courts can review for their consistency, rationality, and proportionality. As always, the questions are about the judicial role. What are the sources of the standards of review? What are metrics of the impact and successes of the decisions that follow, and when can such rulings be critiqued as unduly “legislative” or intruding too much on the executive?

Because some of the decisions reflect international law precepts, by way of background, we provide a few excerpts from transnational conventions protecting various kinds of well-being. The relevant domestic constitutional provisions appear in the cases that follow.

International Rights to Well-Being

Several international conventions address well-being and specify rights of various kinds. Moreover, many domestic constitutions have provisions calling for judges to look outside their legal systems when making decisions about their own law. The terms vary: some constitutions call for “respect for international law,” or that a state must ensure “that its laws comply with international law,” or recognize that international law “shall have supremacy over the national legislation,” or that a state must “observe obligations” under international law. Some constitutions also specify that certain international agreements are superior to domestic constitutional law.

For example the Constitution of Colombia provides in Article 93 section 2 that the “rights and duties mentioned in this Charter will be interpreted in accordance with international treaties on human rights ratified by Colombia.” Since the 1990s, the Colombian Constitution Court has held that it is required to interpret domestic law in a way that is in accordance with such treaties. Similarly, the Constitution of South Africa provides in section 39(1) that “[w]hen interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity,

equality and freedom; (b) must consider international law; and (c) may consider foreign law.”

Below, we provide brief excerpts of provisions from the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), some of which are referenced in the cases that follow.

Universal Declaration of Human Rights
United Nations (1948)*

...

Article 25

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

* Excerpted from the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Supp. 49, U.N. Doc. A/810 (Dec. 12, 1948).

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children. . . .

International Covenant on Economic, Social and Cultural Rights
United Nations (1986)*

. . .

Article 4

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent. . . .

* Excerpted from the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200(A), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc A/6316 (Dec. 19, 1966) (entered into force Jan. 3, 1986).

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness. . . .

**Convention on the Elimination of All Forms of Discrimination
against Women
United Nations (1981)***

. . .

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: . . .

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

* Excerpted from the International Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/RES/34/180 (Dec. 18, 1979) (entered into force Sept. 3, 1981).

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

Article 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 10

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

(a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;

(b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;

(c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;

(d) The same opportunities to benefit from scholarships and other study grants;

(e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes,

particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women

Article 12

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. . . . States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation. . . .

Tutela Consolidated Cases on Health
Constitutional Court of Colombia
Judgment T-760 (July 31, 2008)

[Article 49 of the Colombian Constitution, interpreted in this decision, provides:

Public health and environmental protection are public services for which the state is responsible. All individuals are guaranteed access to services that promote, protect, and rehabilitate public health. It is the responsibility of the state to organize, direct, and regulate the delivery of health services and of environmental protection to the population in accordance with the principles of efficiency, universality, and cooperation, and to establish policies for the provision of health services by private entities and to exercise supervision and control over them. In the area of public health, the state will establish the jurisdiction of the nation, territorial entities, and individuals, and determine the shares of their responsibilities within the limits and under the conditions determined by law. Public health services will be organized in a decentralized manner, in accordance with levels of responsibility and with the participation of the community. The law will determine the limits within which basic care for all the people will be free of charge and mandatory. Every person has the obligation

to attend to the integral care of his/her health and that of his/her community.]

Justice MANUEL JOSÉ CEPEDA ESPINOSA authored the opinion for the Court, which also included Justices Jaime Córdoba and Rodrigo Escobar.

The Constitutional Court has the authority to hear actions of *tutela* ('protection writ,' a flexible jurisdictional action designed to protect fundamental rights), chosen by the Court from the decisions of all the judges of the Republic. Annually, the court reviews hundreds of *tutela* cases Judgment T-760 of 2008 collects 22 *tutelas* . . . relating to systemic problems in the health system, most of which addressed issues that repeatedly had been decided by the Constitutional Court. In addition, the Court addresses the resolution of a series of structural flaws in the health system. . . .

The current system is based on Law 100 of 1993 . . . [that] created a managed care system based on market mechanisms, coupled with defined benefits schemes. The system offered subsidies for demand, in contrast to the old scheme that mainly provided subsidies to the supply side of the health market.

Under Law 100, Health Promoting Entities (Empresas Promotoras de Salud (EPS)), which can be public, private, or mixed ownership, administered two regimes of health coverage for their insured affiliates. [The subsidiary regime is designed for the poor and is funded mainly by the public budget.] The contributory regime is designed for users with capacity to pay—essentially the formal employees and their dependents—obligating a designation of 12.5% of their salary to health (8.5% from the employer and 4% from the employee, or the whole contribution when the member is independently employed). . . .

In the present judgment, the Constitutional Court examines multiple cases that invoke the protection of the right to health—specifically, the access to needed health services

. . . Do the regulatory failures . . . represent a violation of the constitutional obligations of the competent authorities to *respect, protect, and fulfill* the right to health and its effective enjoyment? . . . [W]e respond affirmatively The orders will require the legally competent organs to adopt the determinations that will enable them to overcome the failures of the regulation that have resulted in failures to the protect the right to health

The right to health is a fundamental constitutional right. The Court has protected it in three ways. The first has been to establish its connection with the

right to life, the right to personal integrity, and the right to human dignity, which has permitted the Court to identify aspects of the essential nucleus of the right to health that are worthy of protection through the *tutela*. The second has been to recognize its fundamental nature in contexts in which the *tutela* claimant is subject to special protection, which has called for the Court to assure that a certain scope of required health services be effectively guaranteed. The third has been to affirm in general the fundamental nature of the right to health with respect to a basic set of services, which coincides with the services contemplated by the Constitution, . . . [international human rights treaties], the law, and the obligatory health plans (with the necessary extensions to protect a life of dignity). . . .

3.2.2. . . . [C]onstitutional rights are not absolute, that is to say, they may be limited in accordance with criteria of reasonableness and proportionality as set by the constitutional jurisprudence. Second, the possibility of enforcing the obligations derived from a fundamental right, and the merits of doing so through the action of *tutela*, are distinct and separable issues. . . .

3.3.2. The Court does not find that the positive aspects of a law are always subject to a gradual and progressive protection. “*When the failure to meet the minimum obligations places the holder of the right to health in imminent danger of suffering unreasonable harm,*” such holder can immediately claim the judicial protection of the law. The approach suggested by the case law to determine when such a situation applies is one of *urgency*. . . .

3.3.6. Some of the obligations that arise from a fundamental right and that have a programmatic character, are to be carried out immediately, either because they require a simple action of the State, which does not require additional resources (e.g., the obligation to provide information of their rights to patients before undergoing a medical treatment), or because, despite the need to mobilize resources required, the severity and urgency of the case requires an immediate state action (e.g., the obligation to take appropriate steps to ensure health care for every baby during his or her first year of life—Art. 50, Political Constitution*). Other obligations of programmatic character derived from a fundamental right are carried out progressively, because of the complexity of the actions and resources required to guarantee the effective enjoyment of these protective aspects of the right. . . .

3.3.9. In constitutional jurisprudence, when the effective enjoyment of a fundamental constitutional right depends on progressive realization, “the least [the

* Article 50 of the Constitution of Colombia provides: “Any child under a year old who may not be covered by any type of protection or Social Security will be entitled to receive free care in all health entities that receive state subsidies, as regulated by law.”

responsible authority] must do to protect a programmatic provision derived from the positive dimension of a [fundamental right] under the Rule of Law and in a participatory democracy, is, precisely, to have a program or a plan designed to ensure the effective enjoyment of that right. . . .”

As a consequence, the constitutional obligations of programmatic character, derived from a fundamental right, are violated when the entity responsible for guaranteeing the enjoyment of a right does not even provide a program or a public policy that would permit the progressive advancement in the fulfillment of its corresponding obligations. . . .

. . . [T]he [International Covenant of Economic, Social and Cultural Rights] ICESCR recognizes that states have three types of obligations derived from the recognized rights: obligations to *respect*, obligations to *protect* and obligations to *fulfill*. . . .

3.5.1. As the fundamental right to health is limited, the benefits plan need not be infinite but can be circumscribed to cover the health needs and priorities determined by the competent authorities in light of the efficient use of scarce resources. Consequently, the Constitutional court has on numerous occasions denied services . . . [such as] cosmetic services. Although obesity can in the long run have consequences for the health of a person, every individual has the obligation of taking care of his own health and therefore trying to prevent the diseases that arise from being overweight. Only when obesity reaches a level where it poses definite and potentially irreversible dangers to a person’s life and personal integrity does the prescribed surgery acquire constitutional relevance The same applies to dental care, as healthy and complete teeth are desirable but are far from necessary to preserve the life or personal integrity of a person or to permit a life of dignity. The Court has even agreed that the benefits plan can exclude fertility treatments. The list of examples of health services that the Court has agreed may be excluded from the POS [Plan Obligatorio de Salud, or Obligatory Health Plans]—even when a doctor has prescribed them—could go on but it is unnecessary to provide an exhaustive list of all the cases where the Court had found that the right to health has reasonable and Constitutionally justifiable limits. . . .

4.1.3. In order for essentially everyone to access health services, the State is responsible, under [Article 49] of the Constitution . . . to satisfy the following requirements: (i) *organize*, (ii) *direct* and (iii) *regulate* the provision of health services; (iv) establish policies for the provision of services by private entities, and exercise (v) *monitoring* and (vi) *oversight*; (vii) establish the respective powers of the national and local authorities, as well as members of the public, and

(viii) determine their respective roles and responsibilities on such terms and conditions outlined in the law. . . .

4.4.1. . . . Everyone has the constitutional right to be guaranteed access to the *required* services, that is, those services that are indispensable to maintain one's health when one's life, personal integrity or dignity is seriously threatened. The current constitutional order guarantees every person at least access to services upon which his minimum level of subsistence (*mínimo vital*) and dignity as a person depend. The form in which a person's access to health services is guaranteed depends upon the manner in which he is affiliated with the Health System. . . .

4.4.3. . . . Currently, access to health services depends, in the first place, on whether the service is included in one of the obligatory health service plans to which the person is entitled to be affiliated. Thus, given the current regulations, the services required can be of two types: those that are included within the Obligatory Health Plan (POS) and those that are not. [The Court then describes the norms in which it has sought to establish mechanisms for access to health services not included in the POS.] . . .

Currently, the jurisprudence reaffirms that the right to health of a person who requires medical services not covered by the obligatory health plan is violated, when “(i) *the lack of the medical service violates or threatens the rights to life and personal integrity of those who need it*, (ii) *the service can not be replaced by another that is included in the obligatory plan*, (iii) *the patient can not afford to directly pay for the service, nor the amounts that the health care provider is legally authorized to charge, and can not access the service by another different plan*, and (iv) *the medical service has been ordered by a doctor attached to the entity charged with ensuring the provision of the service to those requesting it.*” . . . [The respective EPS may seek funds from a fund, called FOSYGA, established to finance services not covered by the health plan.]

4.4.5.1.1. Everyone has the constitutional right not to be denied access to health services, so the provision of the health services cannot be conditioned on the payment of a sum of money when the individual lacks the financial ability to pay. . . .

4.4.5.3. . . . A person lacks the capacity to pay when he does not have the resources to cover a certain cost, or when it affects his/her “subsistence minimum” (*mínimo vital*). As the constitutional jurisprudence has reiterated in several cases, the right to the subsistence minimum is not a “*quantitative*” issue, but rather a “*qualitative*” one. The subsistence minimum of an individual depends

on the specific socioeconomic conditions in which he finds himself, and the obligations that weigh on him. . . .

4.4.5.9. . . . When a person with economic capacity has not paid the cost required to access a health service not covered by obligatory health plan, the barrier to access is imposed by that same person, not by the health entities. . . .

4.4.6.2. . . . The constitutional jurisprudence, based on the applicable laws and regulations, has stated several times that everyone has the right to access required health services, which may involve the right to means of transport and the costs of stay to receive the necessary attention. Thus, for example, the Court has noted that the obligation to bear the cost transportation is transferred to the health promoting entity only in the specific situations in which it can be shown that “(i) *neither the patient nor his relatives have sufficient financial resources to pay the value of the transfer; and (ii) the absence of treatment would threaten the life, physical integrity or health status of the user.*” . . .

. . . It is not for the Constitutional Court to set goals or timetables for the unification of the benefit plans, but the Court must urge the competent authorities to act so that, based on epidemiological priorities, the health needs of those in the subsidized regime, and the relevant financial considerations, they design a plan that would allow for the real completion of this goal. . . .

6.1.4.1.2. In conclusion, the State fails to protect the right to health when it . . . [has permitted] the continuation of this unjustifiable situation of constant and repeated violations of the right to health of people on the part of many of the entities responsible for ensuring the provision of the services. . . .

6.2. . . . [There must be an] adequate guarantee of the flow of resources, which is necessary to ensure that everyone actually enjoys the *highest attainable standard of health*, given the budgetary, administrative and structural constraints that exist. . . . Regarding the flow of resources to the EPS, currently no measure has been adopted to ensure its timeliness, for example by ensuring the timely reimbursement of the resources that these institutions must invest to attend to their users when they authorize the provision of services not included in Benefits Plan but approved by the Scientific Technical Committee or ordered by decisions of *tutela*. . . .

In view of the foregoing, the Constitutional Court, administering justice on behalf of the people, and mandated by the Constitution,

Resolves: . . .

[The Court ordered the EPS to authorize medical services and drugs as prescribed for individuals by affiliated physicians.]

Sixteenth. To order the Ministry of Social Protection, the Regulatory Commission on Health and the National Council on the Social Security in Health to take the necessary steps, within their powers, to overcome the failures of regulation in the benefit plans, ensuring that their contents *(i)* are defined in a clear way, *(ii)* are fully up to date, *(iii)* are unified for the contributory and subsidized regimes, and *(iv)* are timely and effectively delivered by the EPS.

This regulation also shall *(i)* encourage the EPS and the regional entities to ensure access to health services to those who are so entitled and *(ii)* discourage the denial of health services by the EPS and regional entities.

To comply with this order, the authorities shall at least adopt the measures described in the seventeenth to twenty-third orders.

Seventeenth. To order the National Commission on the Regulation in Health to integrally update the Obligatory Health Plans (POS). To fulfill this order the Commission must ensure direct and effective participation of the medical community and the users of the health system This integral review must: *(i)* clearly define what health services are included in the benefit plans, evaluating the legal criteria and the jurisprudence of the Constitutional Court, *(ii)* establish what services are excluded and those which are not covered under the benefit plans but will gradually be included, indicating what are the goals for expansion and the dates by which they will be satisfied, *(iii)* decide what services should be deleted from the benefit plans, indicating the specific reasons for such decisions according to health priorities, so as to better protect the rights, and *(iv)* take into account, for the decisions to include or exclude a health service, the sustainability of the health system and the financing of the benefit plans by the UPC [unit to estimate per capita costs] and other funding sources. . . .

Twenty-second. To order the Regulatory Commission in Health to adopt a program and timetable for the gradual and sustainable consolidation of the benefit plans of the contributory regime and the subsidized regime taking into account: *(i)* the priorities of the population according to epidemiological studies, *(ii)* the financial sustainability of the expansion of coverage and its funding by the UPC and other sources of funding for the existing system.

The program of unification should additionally *(i)* provide the definition of mechanisms to streamline access to health services for users, ensuring that the

needs and health priorities are met without impeding access to required health services, (ii) identify the disincentives for the payment of contributions by users and (iii) plan for the necessary measures to encourage those with economic capacity to actually contribute, and to ensure that those who move from the subsidized regime to the contributory regime can return to the subsidized regime swiftly when their income decreases or the socioeconomic situation deteriorates. . . .

In implementing the program and timetable for the unification of the benefit plans, the Commission will provide sufficient opportunity for effective and direct participation by the medical community and the organizations representing the interests of the users of the health system. . . .

Twenty-third. To order the Regulatory Commission in Health to take the necessary measures to regulate the internal procedure that the treating physician must advance so that the respective EPS directly authorizes both non-medication health services not covered by the obligatory health plan (contributory or subsidized), and medications for the attention of the activities, procedures and interventions explicitly excluded from the Obligatory Health Plan, when these are ordered by the treating physician. . . .

When the Scientific Technical Committee denies a medical service, in accordance with the competence laid out in the present ruling, and then is obliged to provide such a service by means of an action of *tutela*, only half of the costs not covered will be reimbursed, in accordance with what is said in this ruling [in accordance with the previous reform to Law 100]. . . .

Twenty-seventh. To order the Ministry of Social Protection to take the necessary measures so that the system of verification, control and payment of claims for recovery operates efficiently, and . . . [to be able to dispense] funds related to applications for recovery. The Ministry of Social Protection can define the type of measures necessary. . . .

Twenty-eighth. To order the Ministry of Social Protection, if it has not already done so, to take the necessary steps to ensure that when joining an EPS, contributory or subsidized, every person is delivered in simple and accessible terms [a letter with the patient's rights and a letter regarding institutional performance]

The Ministry of Social Protection and the National Council on Social Security in Health shall take appropriate steps to protect those who have had disrespected their right of access to adequate and sufficient information to enable

them to exercise their freedom of choice in deciding amongst the entities responsible for ensuring access to health services. These measures must be taken before the first (1st) of June 2009 and a report must be submitted to the Constitutional Court.

Twenty-ninth. To order the Ministry of Social Protection to take the necessary measures to ensure sustainable universal coverage of the General Social Security System in Health, by the date fixed by the Law—before January 2010—. Should it be impossible to achieve this goal, the reasons for this failure should be given and a new goal set and duly justified.

Thirtieth. To order the Ministry of Social Protection to submit an annual report to the Second Review Chamber of the Constitutional Court, the Attorney General of the Nation and the Ombudsman, which includes the number of actions of *tutela* that resolve the legal issues raised in this ruling, and if they have not diminished, an explanation for why not. The first report should be submitted before the first (1) of February, 2009. . . .

In the years immediately following the decision, the government resisted the order, which was also criticized by others, including economists. After the Court struck down a government-declared “state of emergency” that would have undercut implementation of the judgment, political support for the ruling helped to shape acceptance of the Court’s premise that the right to health was fundamental. In subsequent decisions related to implementation, the Court sat in plenary session with all nine members; it then commissioned a panel of three justices to oversee implementation and to report back to the plenary. The result was initially a unified health plan for children up to the age of eighteen, and a few years later, a unified health plan for all adults was adopted with the budget for health significantly increased.

In 2010, a new government came to power and worked to find ways to fund the system and to improve both the health plans and access to medicine, while controlling costs. In its 2008 judgment, the Court had also focused on the fact that the POS for the poor covered half the health services covered by the POS of the contributory regime, and held that the difference violated an aspect of health rights—equal protection of the right of health. The Court ordered the government not to continue the inequality between the POS provided to the poor and that available to middle and upper income households; in 2012, the differences between the two plans ended. As of 2014, coverage extended to most

Colombians. In that year, with the support of the government, new legislation recognized health as a fundamental social right. As of this writing, some implementation issues remain—reflected in a continuing, albeit diminished, flow of individual *tutelas*.

In contrast, the materials excerpted below offer a critique of court-interpreted health rights in Brazil by suggesting that benefits from such judgments are not equally distributed.

Octavio Luiz Motta Ferraz

*The Right to Health in the Courts of Brazil:
Worsening Health Inequities? (2009)**

[The] expansive interpretation of the right to health, which is now firmly established in all levels of the [Brazilian] judiciary, created a favorable environment (or a favorable “opportunity structure for litigation”) for hundreds and then thousands of individual claimants seeking satisfaction of health needs via courts. Indeed, all that a claimant must do to win his or her case under this interpretation is to prove that he or she has an unsatisfied health need as documented by a doctor’s prescription. Not surprisingly, right-to-health litigation has exploded, spreading from mostly HIV/AIDS-related cases in the late 1990s to several other areas of health in the 2000s, including, for example, diabetes, Parkinson disease, Alzheimer’s, hepatitis C, and multiple sclerosis. There is not yet any comprehensive and systematic study that provides a clear picture of the magnitude of the phenomenon in Brazil. But several localized studies and one recent comparative study, together with data released periodically in the press by health authorities, suggest that the phenomenon is widespread, is growing exponentially, and is likely to be reaching (or to have already reached) significant levels in terms of volume and costs. . . .

Does the Brazilian model of litigation give priority to the health needs of those at the bottom of the ranking of health achievement, consequently diminishing the vast health inequalities that persist in the country? In order for the model to have this effect, the majority of litigants would need to belong to the lower socioeconomic groups of Brazilian society But this is not the case. Access to the courts in Brazil (as in most places) is significantly easier for those

* Excerpted from Octavio Luiz Motta Ferraz, *The Right to Health in the Courts of Brazil: Worsening Health Inequities?*, 11 HEALTH & HUM. RIGHTS 33 (2009).

with resources and social attributes that are more predominant in higher socioeconomic groups. Such resources and attributes . . . include “rights awareness; organizational strength and ability to mobilize; and access to legal assistance, technical expertise, and financial resources.” Several recent empirical studies on the phenomenon of health litigation confirm, predictably, that a significant portion of successful litigants do not belong to the most disadvantaged layers of society, but rather the opposite. . . .

. . . [These findings] are also consistent with other studies . . . of social rights litigation in Asia, Africa, and Latin America. Such research shows that the direct effects of litigation benefit predominantly those individuals “in the middle of the social spectrum,” that is, “neither the most disadvantaged nor the wealthiest citizens.”

It is clear, thus, that the model of litigation currently prevalent in Brazil is not improving health equity. But does it worsen health inequities? I suggest that it does, although the extent to which this occurs is difficult to determine with any precision without further research on the opportunity costs of such litigation. It is likely that the increasing amount of resources spent to fund the health benefits granted to successful claimants (hundreds of millions of dollars in some states, mostly consumed to purchase expensive new drugs) is diverted at least in part from current or future health programs that would benefit larger and more disadvantaged groups who cannot easily access the courts to protect their interests. Take as an example the case of the state of São Paulo, where data is more easily available and comprehensive. In 2008, the state spent approximately R\$400 million . . . [approximately \$200 million in U.S. 2009 dollars] to comply with court orders benefiting around 35,000 successful claimants, mostly to purchase expensive drugs, many of which have to be imported and are not even registered for use in Brazil. This is roughly the same level of resources that the federal Ministry of Health has recently announced will be invested in a program of vaccination against pneumococcal bacteria to cover all 3.2 million children born every year in Brazil. But this program will not be fully implemented until 2010 due to resource limitations of the health budget. Further research on the opportunity costs of right-to-health litigation will be very important in assessing health equity.

South Africa v. Grootboom
Constitutional Court of South Africa
[2000] ZACC 19 (Oct. 4, 2000)

[Respondents, Irene Grootboom and others, were squatters who had been evicted from their informal settlement of minimal shelters made of plastic and other materials and lacking basic sanitation or electricity. They filed an action claiming the right to adequate housing and, for the children, a right to basic shelter, and they relied in part on Section 26 of the South African Constitution, which provides:

1. Everyone has the right to have access to adequate housing.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.]

YACOOB J: . . .

26. . . . Section 39 of the Constitution obliges a court to consider international law as a tool to interpretation of the Bill of Rights. [President of the Court] Chaskalson, in the context of section 35(1)* of the interim Constitution, said:

. . . [P]ublic international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European

* Section 35(1) of the interim Constitution provided: "In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law."

Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights]. . . .

27. The *amici* submitted that the International Covenant on Economic, Social and Cultural Rights (the Covenant) is of significance in understanding the positive obligations created by the socio-economic rights in the Constitution. Article 11.1 of the Covenant provides:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

This Article must be read with Article 2.1 which provides:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

28. . . . (a) The Covenant provides for a right to adequate housing while section 26 provides for the right of access to adequate housing.

(b) The Covenant obliges states parties to take appropriate steps which must include legislation while the Constitution obliges the South African state to take reasonable legislative and other measures. . . .

32. It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a

country. All this illustrates the complexity of the task of determining a minimum core obligation for the progressive realisation of the right of access to adequate housing without having the requisite information on the needs and the opportunities for the enjoyment of this right. . . .

45. The extent and content of the obligation consist in what must be achieved, that is, “the progressive realisation of this right.” It links subsections (1) and (2) [of section 26 of the Constitution] by making it quite clear that the right referred to is the right of access to adequate housing. The term “progressive realisation” shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses. The phrase is taken from international law and Article 2.1 of the Covenant in particular. The [Committee on Economic, Social and Cultural Rights] has helpfully analysed this requirement in the context of housing as follows:

Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d’être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources. . . .

75. . . . The United Nations Convention on the Rights of the Child, ratified by South Africa in 1995, seeks to impose obligations upon state parties to ensure

that the rights of children in their countries are properly protected. Section 28* is one of the mechanisms to meet these obligations. It requires the state to take steps to ensure that children's rights are observed. . . . [T]he state does so by ensuring that there are legal obligations to compel parents to fulfil their responsibilities in relation to their children. . . .

Chaskalson P, Langa DP, Goldstone J, Kriegler J, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J and Cameron AJ concur in the judgment of Yacoob J.

Port Elizabeth Municipality v. Various Occupiers
Constitutional Court of South Africa
[2004] ZACC 7 (Oct. 1, 2004)

SACHS J:

1. The applicant in this matter is the Port Elizabeth Municipality (the Municipality). The respondents are some 68 people, including 23 children, who occupy twenty-nine shacks they have erected on privately owned land (the property) within the Municipality. Responding to a petition signed by 1600 people in the neighbourhood, including the owners of the property, the Municipality sought an eviction order against the occupiers in the South Eastern Cape Local Division of the High Court. . . .

14. In this context PIE [The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998] cannot simply be looked at as a legislative mechanism designed to restore common law property rights by freeing them of racist and authoritarian provisions, though that is one of its aspects. Nor is it just a means of promoting judicial philanthropy in favour of the poor, though compassion is built into its very structure. PIE has to be understood, and its governing concepts of justice and equity have to be applied, within a defined and carefully calibrated constitutional matrix.

15. . . . [T]he starting and ending point of the analysis must be to affirm the values of human dignity, equality and freedom. One of the provisions of the

* Section 28 of the Constitution provides:

“1. Every child has the right— . . .

. . . c. to basic nutrition, shelter, basic health care services and social services”

Bill of Rights that has to be interpreted with these values in mind, is section 25, which reads:

Property

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

The blatant disregard manifested by racist statutes for property rights in the past makes it all the more important that property rights be fully respected in the new dispensation, both by the state and by private persons. Yet such rights have to be understood in the context of the need for the orderly opening-up or restoration of secure property rights for those denied access to or deprived of them in the past. . . .

19. Much of this case accordingly turns on establishing an appropriate constitutional relationship between section 25, dealing with property rights, and section 26, concerned with housing rights. The Constitution recognises that land rights and the right of access to housing and of not being arbitrarily evicted, are closely intertwined. The stronger the right to land, the greater the prospect of a secure home. Thus, the need to strengthen the precarious position of people living in informal settlements is recognised by section 25 in a number of ways. Land reform is facilitated, and the state is required to foster conditions enabling citizens to gain access to land on an equitable basis; persons or communities with legally insecure tenure because of discriminatory laws are entitled to secure tenure or other redress; and persons dispossessed of property by racially discriminatory laws are entitled to restitution or other redress. Furthermore, sections 25 and 26 create a broad overlap between land rights and socio-economic rights, emphasising the duty on the state to seek to satisfy both, as this Court said in *Grootboom*.

20. There are three salient features of the way the Constitution approaches the interrelationship between land[,], hunger, homelessness and respect for property rights. In the first place, the rights of the dispossessed in relation to land are not generally delineated in unqualified terms as rights intended to be immediately self-enforcing. For the main part they presuppose the adoption of legislative and other measures to strengthen existing rights of tenure, open up access to land and progressively provide adequate housing. Thus, the Constitution is strongly supportive of orderly land reform, but does not purport to effect transfer of title by constitutional fiat. Nor does it sanction arbitrary seizure of land, whether by the state or by landless people. The rights involved in section

26(3) are defensive rather than affirmative. The land-owner cannot simply say: this is my land, I can do with it what I want, and then send in the bulldozers or sledgehammers.

21. A second major feature of this cluster of constitutional provisions is that through section 26(3) they expressly acknowledge that eviction of people living in informal settlements may take place, even if it results in loss of a home.

22. A third aspect of section 26(3) is the emphasis it places on the need to seek concrete and case-specific solutions to the difficult problems that arise. Absent the historical background outlined above, the statement in the Constitution that the courts must do what courts are normally expected to do, namely, take all relevant factors into account, would appear otiose (superfluous), even odd. Its use in section 26(3), however, serves a clear constitutional purpose. It is there precisely to underline how non-prescriptive the provision is intended to be. The way in which the courts are to manage the process has accordingly been left as wide open as constitutional language could achieve, by design and not by accident, by deliberate purpose and not by omission.

23. In sum, the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case. . . .

29. . . . The Constitution requires that everyone must be treated with care and concern; if the measures though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.²⁹ In a society founded on human dignity, equality and freedom it cannot be presupposed that the greatest good for the many can be achieved at the cost of intolerable hardship for the few,

²⁹ . . . The issue in *Grootboom* was whether or not the housing programme was reasonable. In the present matter the focus is whether an eviction order would be just and equitable. . . . [W]hat they have in common is the need to focus on the question of human dignity and to ensure that the programmes at issue are sufficiently flexible to respond to those in desperate need and to cater appropriately for immediate and short-term requirements. . . .

particularly if by a reasonable application of judicial and administrative statecraft such human distress could be avoided. Thus it would not be enough for the municipality merely to show that it has in place a programme that is designed to house the maximum number of homeless people over the shortest period of time in the most cost effective way. The existence of such a programme would go a long way towards establishing a context that would ensure that a proposed eviction would be just and equitable. It falls short, however, from being determinative of whether and under what conditions an actual eviction order should be made in a particular case. . . .

32. . . . What the court is called upon to do is to decide whether, bearing in mind the values of the Constitution, in upholding and enforcing land rights it is appropriate to issue an order which has the effect of depriving people of their homes. . . .

36. . . . The Constitution and PIE require that in addition to considering the lawfulness of the occupation the court must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result. . . .

49. The occupiers have built shacks on privately owned land in the suburb of Lorraine, in Port Elizabeth. It is clear that the shacks were erected without the necessary approval from the Municipality. . . . The occupiers assert that eight of the respondent families have resided on the land for eight years . . . , three of them for four years and only one family for two years. They aver that most of them moved to the land in Lorraine after having been evicted from land in Glenroy, Port Elizabeth. They also state that they are willing to move again but want to do so only if they are provided with a piece of land upon which to live “without fear of further eviction” until they are provided with housing in terms of the Municipality’s housing scheme. In this short tale, the hard realities of urbanisation and homelessness in South Africa are captured. . . .

56. In considering whether it is “just and equitable” to make an eviction order in terms of section 6 of the Act,^{*} the responsibilities that municipalities, unlike owners, bear in terms of section 26 of the Constitution are relevant. As

^{*} Section 6(3) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) provides: “(3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to—(a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure; (b) the period the unlawful occupier and his or her family have resided on the land in question; and (c) the availability to the unlawful occupier of suitable alternative accommodation or land.”

Grootboom indicates, municipalities have a major function to perform with regard to the fulfilment of the rights of all to have access to adequate housing. Municipalities, therefore, have a duty systematically to improve access to housing for all within their area. They must do so on the understanding that there are complex socio-economic problems that lie at the heart of the unlawful occupation of land in the urban areas of our country. They must attend to their duties with insight and a sense of humanity. Their duties extend beyond the development of housing schemes, to treating those within their jurisdiction with respect. Where the need to evict people arises, some attempts to resolve the problem before seeking a court order will ordinarily be required. . . .

59. To sum up: in the light of the lengthy period during which the occupiers have lived on the land in question, the fact that there is no evidence that either the Municipality or the owners of the land need to evict the occupiers in order to put the land to some other productive use, the absence of any significant attempts by the Municipality to listen to and consider the problems of this particular group of occupiers, and the fact that this is a relatively small group of people who appear to be genuinely homeless and in need, I am not persuaded that it is just and equitable to order the eviction of the occupiers.

60. In the circumstances, the application for leave to appeal fails and the Municipality is ordered to pay the costs of the respondents, including the costs of two counsel.

61. . . . [The Municipality's] function is to . . . use what resources it has in an even-handed way to find the best possible solutions. If it cannot itself directly secure a settlement it should promote a solution through the appointment of a skilled negotiator acceptable to all sides, with the understanding that the mediation proceedings would be privileged from disclosure. On the basis of this judgment a court involved in future litigation involving occupiers should be reluctant to accept that it would be just and equitable to order their eviction if it is not satisfied that all reasonable steps had been taken to get an agreed, mediated solution. . . .

Chaskalson CJ, Langa DCJ, Madala J, Mokgoro J, Moseneke J, Ngcobo J; O'Regan, J, Skweyiya J, Van der Westhuizen J and Yacoob J, concur in the judgment of Sachs J.

Social Security: “Hartz IV”

Federal Constitutional Court of Germany (First Senate)

1 BvL 1/09 (Feb. 9, 2010)

The First Senate of the Federal Constitutional Court with the participation of Justices Papier (President), Hohmann-Dennhardt, Bryde, Gaier, Eichberger, Schluckebier, Kirchhof, [and] Masing on the basis of the oral hearing of 20 October 2009 by Judgment hereby rules:

1. The proceedings on the concrete review of the constitutionality of a statute, which have been consolidated for joint adjudication, relate to the question of whether the amount of the standard benefit paid to secure the livelihood of adults and children until completing the age of 14 in the period from 1 January 2005 to 30 June 2005 . . . is compatible with the Basic Law. . . .

51. The main goal of the labour market policy reforms which were initiated in 2002 was to combine unemployment assistance and social assistance to form a uniform welfare system for employable persons. Here, the law to be newly created of the basic provision for job-seekers and the reformed social assistance law was to be coordinated as to major content-related points. . . .

82. The plaintiffs of the original proceedings form a three-person family, consisting of the plaintiff . . . who was born in 1962, his wife, . . . born in 1963, . . . and their daughter, . . . born in 1994. . . . They have been drawing benefits of the basic provision for job-seekers since 1 January 2005. . . . [T]he defendant of the original proceedings granted them monthly benefits totalling €825 [approximately \$934 in U.S. 2015 dollars]. . . .

83. After unsuccessful objection proceedings, the plaintiffs requested before the Social Court to be granted higher benefits, putting forward that the statutory standard benefit was insufficient to ensure their subsistence minimum. . . .

143. The Federal Constitutional Court hence examines whether the legislature has covered and described the goal to ensure an existence that is in line with human dignity in a manner doing justice to Article 1.1* in conjunction with

* The relevant provisions of the German Basic Law are:

Article 1.1: “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”

Article 20.1: “The Federal Republic of Germany is a democratic and social federal state.”

Article 20.1 of the Basic Law, whether within its margin of appreciation it has selected a calculation procedure that is fundamentally suited to an assessment of the subsistence minimum, whether, in essence, it has completely and correctly ascertained the necessary facts and, finally, whether it kept within the bounds of what is justifiable in all calculation steps with a comprehensible set of figures within this selected procedure and its structural principles.

144. In order to facilitate this constitutional review, there is an obligation for the legislature to disclose the methods and calculations used to determine the subsistence minimum in the legislative procedure. If it fails to do so adequately, because of these shortcomings, the ascertainment of the subsistence minimum is already no longer in compliance with Article 1.1 of the Basic Law in conjunction with Article 20.1 of the Basic Law. . . .

146. According to these principles, the provisions submitted do not comply [with the Basic Law]. . . . By means of the standard benefit paid to secure one's livelihood . . . the legislature has . . . , fundamentally, correctly defined the goal to guarantee a subsistence minimum that is in line with human dignity. It cannot be established that the total amount of the benefits . . . is evidently insufficient to ensure a subsistence minimum in line with human dignity. . . . The legislature has also fundamentally found for the basic standard benefit . . . a viable calculation procedure to assess the subsistence minimum. It however departed from this in various respects in the assessment of the standard benefit of €345 [approximately \$391 in 2015 U.S. dollars], without replacing it with other recognisable or viable criteria. This also leads to the unconstitutionality of the derived benefits . . . the latter also suffers from a complete failure to ascertain the child-specific need. . . .

155. It can also not be ascertained that the amount of €207 [approximately \$234 in 2015 U.S. dollars] that is uniformly applicable to children until completing the age of 14 is manifestly inadequate to ensure a subsistence minimum that is in line with human dignity. . . .

162. The statistical model . . . is a constitutionally permissible method because it is justifiable to realistically determine the subsistence minimum for a single person. . . .

173. The standard benefit of €345 . . . has not been calculated constitutionally because the structural principles of the statistical model, which the legislature itself selected and made the basis of its assessment of the necessary subsistence minimum, has been deviated from without a factual justification. . . .

176. Even if no adequate detailed data on the individual consumption items were to have been available at the time of the evaluation of the sample survey on income and expenditure 1998, as submitted by the Federal Government, this did not justify making estimates freely. Rather, an insufficient data basis should have caused the legislature to forgo making estimated deductions to comply with the constitutional guarantee of a subsistence minimum that is in line with human dignity. This path was also taken later by the legislature handing down the ordinance when evaluating the sample survey on income and expenditure 2003.

177. The deductions in division 04 (Housing, water, electricity, gas and other fuels) with the expenditure item “Electricity” (deduction of 15 %) and in division 07 (Transport) in the expenditure item “Replacement parts and accessories for private vehicles” (deduction of 80 %) have also not been viably reasoned. It is possible to derive considerations from the documents which make a reduction in this consumption expenditure fundamentally justifiable. The amount of the reductions is however not empirically documented. . . .

191. The legislature did not ascertain the subsistence minimum of a minor-age child living with his or her parents in a domestic community. . . . Children are not small adults. Their need which must be covered in order to ensure a subsistence minimum that is in line with human dignity must be orientated in line with child development phases and towards what is necessary for the development of a child’s personality. The legislature omitted to carry out any investigations of this. The deduction of 40 % which it carried out as against the standard benefit for a single person is set freely with no empirical and methodical basis.

192. An additional need is to be anticipated above all with school-age children. Necessary expenditure to comply with school obligations is part of their need in line with the subsistence minimum. Without covering these costs, children in need of assistance are threatened by being excluded from chances in life because they cannot successfully attend school without purchasing the necessary school material, such as school books, exercise books or calculators. The danger exists with school-age children whose parents draw benefits . . . that their development will be compromised if they do not receive adequate state benefits, restricting their future capability to support themselves by their own efforts. This is not compatible with Article 1.1 of the Basic Law in conjunction with the principle of the social welfare state contained in Article 20.1 of the Basic Law. . . .

Benefits for Asylum Seekers

Federal Constitutional Court of Germany (First Senate)

1 BvL 10/10 (July 18, 2012)

[Plaintiffs, foreign nationals who had sought asylum in Germany, became legal residents in Germany and challenged the amounts granted to asylum seekers under German law. They alleged that these amounts were insufficient to provide a dignified minimum existence.]

The federal Constitutional Court-First Senate- with the participation of Justices Vice President Kirchhof, Gaier, Eichberger, Schluckebier, Masing, Paulus, Baer, and Britz, based on the oral hearing held on 20 June 2012, by judgment hereby declares:

...

1. The proceedings on the constitutionality of a specific statute raise the question whether the amount of the cash benefit provided for in the Asylum Seekers Benefits Act to secure one's existence is compatible with the Basic Law.

2. With the Asylum Seekers Benefits Act, a law was created to define, starting 1 November 1993, minimum maintenance for asylum seekers and certain other foreign nationals, apart from the substantive law applicable to Germans and those foreign nationals defined as equals, to provide for considerably lower benefits, and primarily for benefits in kind rather than cash benefits.

3. Regarding social benefits for asylum seekers, the legislature had been pursuing the goal to restrict the benefits altogether and to issue benefits in kind rather than cash benefits from the 1980s onwards, starting in 1981 with the Second Act to Improve the Budget Structure. From 1990 to 1993, the Federal Government primarily sought to limit the number of asylum seekers coming to Germany and to keep the cost of hosting and providing general care to them low. . . .

5. The scope of the Act was originally limited to a small number of groups of individuals whose residence in Germany was expected to be brief. . . . In 1997 . . . , eligible persons in principle included all foreigners who typically stayed in Germany temporarily, that is without an established status under immigration law.

6. The group of beneficiaries . . . was subsequently expanded several times more. . . . All in all, the beneficiaries of the Asylum Seekers Benefits Act were hence persons who did not have a permanent right of residence, but who

otherwise have highly diverse residence status, and whose residence in Germany is based on varying circumstances.

7. Today, the receipt of benefits of the Asylum Seekers Benefits Act also depends on the “duration of prior receipt” In 1993, this was set at twelve months’ residence in Germany. Since 28 August 2007, the actual stay became irrelevant and, according to a new § 2 of the Asylum Seekers Benefits Act it became decisive whether asylum seekers benefits had been claimed for a duration of 48 months

8. In 2009, the Asylum Seekers Benefits Act applied to a total of almost 150,000 people More than two-thirds of them had been in Germany for more than six years. . . .

9. If beneficiaries of the Asylum Seekers Benefits Act do not have any assets of their own, they rely on existential benefits. As a rule, gainful employment is prohibited in the first year of residence, and in most cases is only to be permitted with lower priority in the ensuing period, i.e. if no Germans or similarly treated foreign nationals can be found to fill the post. . . .

42. Regarding the basic needs comparable to the standard needs in general welfare law, benefits of the Asylum Seekers Benefits Act are generally considerably lower than those in the . . . Social Law. . . .

45. The burden on the public federal and state budgets caused by benefits of the Asylum Seekers Benefits Act has decreased considerably since the law was introduced in 1993. In 2009, 121,918 persons drew such benefits. . . . By contrast, there were almost 500,000 beneficiaries in the early years of the Asylum Seekers Benefits Act. Accordingly, expenditure in this field has dropped from 5.6 billion Deutsche Mark to 0.77 billion Euros. . . .

56. In the view of the United Nations High Commissioner for Refugees (UNHCR), the failure to adjust the amount of benefits despite a cost of living which has increased markedly since 1993, and the gap of more than 30 % to the level of benefits for Germans, is indicative of the fact that the minimum of social assistance to be granted under international law is not met. In addition, the amount of the benefits contradicts the requirements of the International Covenant on Economic, Social and Cultural Rights (ICESCR); in particular, complete

exclusion from cultural life may hardly be compatible with Article 15.1.a* of the ICESCR, the right to take part in cultural life. . . .

64. The fundamental right to the guarantee of a dignified minimum existence emerges from Article 1.1 of the Basic Law in conjunction with Article 20.1 of the Basic Law. Article 1.1 of the Basic Law establishes this right as a human right. The principle of the social welfare state contained in Article 20.1 of the Basic Law mandates the legislature to guarantee a dignified minimum existence. In light of the unavoidable value judgments needed to determine the amount of what guarantees the physical and social existence of a human being, the legislature enjoys a margin of appreciation. This fundamental right is in essence not disposable and must be honoured as an enforceable claim to benefits, yet it needs to be shaped in detail and regularly updated by the legislature which has to orient the benefits to be paid towards the respective stage of development of the polity and towards the existing conditions of life regarding the concrete needs of those concerned. In doing so, the legislature has room to shape the issue.

65. Article 1.1 of the Basic Law declares human dignity to be inviolable and obliges all state power to respect and protect it. If people do not have the material means necessary to guarantee a dignified existence because they are unable to acquire means from gainful employment, from their own assets or from payments by third parties, the state is obliged, within its mandate to protect human dignity and to maintain the social welfare state, to ensure that material means are available to those in need. Because it is a human right, both German and foreign nationals who reside in the Federal Republic of Germany are entitled to this fundamental right. . . .

66. The direct constitutional benefit claim to the guarantee of a dignified minimum existence does only cover those means that are absolutely necessary to maintain a dignified life. It guarantees the entire minimum existence as a comprehensive fundamental rights guarantee, that encompasses both humans' physical existence, that is food, clothing, household items, housing, heating, hygiene and health, and guarantees the possibility to maintain interpersonal relationships and a minimal degree of participation in social, cultural and political life, since a human as a person necessarily exists in [a] social context.

67. The guarantee of a dignified minimum existence must be ensured by a statutory enforceable right. This derives already directly from the scope of

* Article 15.1(a) of the International Covenant on Economic, Social and Cultural Rights provides: "The States Parties to the present Covenant recognize the right of everyone . . . [t]o take part in cultural life. . . ."

protection provided for by Article 1.1 of the Basic Law. A person in need may not be referred to voluntary benefits from the state or third parties the provision of which is not guaranteed by a subjective right of this person. The statutory benefit claim must be designed so that it always covers the entire existential need of each individual carrier of this fundamental right. If the legislature does not sufficiently comply with its constitutional obligation to determine the minimum existence, the law is unconstitutional to the degree that its design is deficient.

68. The very existence of a claim to benefits derived from Article 1.1 of the Basic Law is stipulated by the Constitution itself. Its scope may however not be derived directly from the Constitution. The scope depends on the views present in society on what is necessary for a dignified existence, on the specific living conditions of the persons in need, and on the respective economic and technical circumstances, and must thus be specified accordingly by the legislature.

69. The principle of the social welfare state contained in Article 20.1 of the Basic Law obliges the legislature to adequately assess the actual social reality regarding the guarantee of a dignified minimum existence. The necessary value judgments are for parliament as the legislature to take. It is obliged to concretise the claim to a benefit in terms of conditions and legal consequences. Whether it guarantees the minimum existence through benefits in cash, kind or services, is in principle subject to the legislature's discretion. In addition, it enjoys a margin of appreciation to determine the amount of the benefits to secure a minimum existence. This margin of appreciation in determining the amount of benefits comprises the evaluation of actual living conditions as well as the evaluative assessment of necessary needs, and it moreover varies in scope: It is narrower insofar as the legislature concretises what is necessary to secure a human's physical existence, and it is broader when it comes to the nature and extent of the possibility to participate in social life. The decisive point is that the legislature focuses its decision on the actual needs of those who receive assistance. The standard to define this minimum existence may only be taken from the circumstances in Germany, the country in which the minimum existence must be guaranteed. Hence, the Constitution does not permit to define the necessities of a dignified life in Germany at a lower level than the one prescribed by the living conditions in Germany, by referring to the existence level in a country of origin of the people in need, or by referring to the existence level in other countries.

70. In doing so, the legislature is also obliged by further requirements emerging from the law of the European Union and from international obligations. These include Council Directive 2003/9/EC laying down minimum standards for

the reception of asylum seekers in the Member States. Article 10.2* stipulates that children are to be granted access to schooling at the latest after three months and to enrolment in the general school system after twelve months. The rules applicable in Germany to ensure the minimum existence also include the International Covenant on Economic, Social and Cultural Rights of 19 December 1966 (ICESCR, which came into force on 3 January 1976 . . . , which the German *Bundestag* approved in . . . 1973). Article 9 of the Covenant stipulates a right to social security, and Article 15.1.a provides for the human right to take part in cultural life. Additionally, the United Nations Convention on the Rights of the Child of 20 November 1989 (CRC . . . , which came into force . . . in 1990, for the Federal Republic of Germany on 5 April 1992, . . . without reservations since 15 July 2010). Article 3 of the CRC contains the obligation that the best interests of the child shall be a primary consideration in all legislation, whilst Article 22.1 of the CRC determines that particularly children who seek refugee status in accordance with applicable domestic or international asylum law may not be disadvantaged in exercising their rights, while, finally, Article 28 of the CRC states a human right of children to education. . . .

75. If the legislature wishes to consider the particular characteristics of specific groups of individuals when determining the dignified minimum existence, it may not, in specifying the details of existential benefits, differentiate across the board in light of the recipients' residence status. Such differentiation is only possible if their need for existential benefits significantly deviates from that of other persons in need, and if this can be substantiated consistently based on the actual needs of this specific group, in a procedure that is transparent in terms of its content. . . .

82. . . . The provisions submitted to the Court are at any rate evidently insufficient to guarantee a dignified minimum existence. In addition, the amount of benefits has been neither comprehensibly calculated nor is there a realistic calculation focused on needs that secures current the existential minimum. . . .

84. The amount of the cash benefits in the Asylum Seekers Benefits Act has not been changed since 1993 despite considerable price increases.

85. The price level in Germany has risen by more than 30 % since then. . . .

* Article 10.2 of Council Directive 2003/9/EC provides: "Access to the education system shall not be postponed for more than three months from the date the application for asylum was lodged by the minor or the minor's parents. This period may be extended to one year where specific education is provided in order to facilitate access to the education system."

86. It is obvious that the cash benefits according to the Asylum Seekers Benefits Act, which guaranteed minimum existence in 1993, were no longer able to meet the existential need of even a short residence as early as in 2007. . . .

87. The legislature had itself provided for an adjustment mechanism in 1993, which was . . . however never implemented. . . .

94. The presumption on which the Act is evidently based, namely that a short period of residence justifies the limited amount of benefits, also has no adequately reliable basis. Neither the Asylum Seekers Benefits Act nor the legislative materials or the statements in the proceedings at hand reveal any indications that the period of residence has a concrete impact on existential needs, or as to the degree to which this might determine the amount of cash benefits stipulated by the Act. There is also no plausible proof that the beneficiaries covered by the Asylum Seekers Benefits Act typically only stay in Germany for a short period of time. . . .

97. Migration-policy considerations to keep benefits for asylum seekers and refugees low in order to avoid incentives for migration, which may be set by relatively high benefits compared to international standards, may generally not justify any reduction of benefits below the physical and sociocultural minimum existence. Human dignity, guaranteed in Article 1.1 of the Basic Law, may not be modified in light of migration-policy considerations. . . .

99. The provisions of the Asylum Seekers Benefits Act submitted to the Court that set the amount of basic benefits . . . are to be declared incompatible with the Basic Law. A declaration of nullity or a waiver of a transitional provision would lead to a situation in which there is no statutory basis and thus no constitutionally stipulated law, which is necessary according to Article 1.1 of the Basic Law in conjunction with Article 20.1 of the Basic Law, to grant benefits that ensure a dignified minimum existence, and in which those to whom the Asylum Seekers Benefits Act applies could thus not receive any benefits. This would create a situation which would be even further away from a constitutional order than the previous one.

100. Regarding the amount of cash benefits defined in the Act but evidently insufficient, there is a need for a transitional rule by the Federal Constitutional Court. . . .

102. The Federal Constitutional Court has the option, to ensure existential needs, to resort to the Standard Needs Calculation Act to design a proper transitional provision. The amounts set in 1993 that were mere estimates in

relation to the price index of the Federal Statistical Office would not be properly focused on the needs of those concerned. According to the statement of the Federal Government in the proceedings at hand, the provisions of the Standard Needs Calculation Act are the only determination of amounts of benefits to guarantee a dignified minimum existence available that were carried out by the legislature and bases on an assessment within its margin of appreciation. It is not certain that this realistically portrays the possibly deviating needs of those to whom the Asylum Seekers Benefits Act applies. It is also not possible to say anything about whether benefits calculated on this basis for beneficiaries in other welfare systems would pass constitutional muster. Since there is however currently no other viable data on the matter, the Senate can only presume that the essential fundamental needs can be provisionally covered by benefits of the amount set by the Standard Needs Calculation Act.

103. This transitional arrangement does not replace the decision of the legislature. The latter has a constitutional duty to take a decision of its own, consistent with the requirements of the Basic Law as to how and by which amount the minimum existence of the group of individuals affected by the provisions declared unconstitutional may be guaranteed in the future. . . .

105. . . . As a result, this increases basic benefits in every case. . . .

106. The decision of the legislature in § 3.2 sentence 1 of the Asylum Seekers Benefits Act to provide for benefits in kind to primarily cover vital needs is not affected by this transitional rule. Insofar as, and presuming that, benefits in kind currently actually do ensure a dignified minimum existence, the transitional rule does not encroach on the structure of the Asylum Seekers Benefits Act as to the type of benefit. . . .

107. The transitional rule applies until new legislation comes into force. . . .

108. Article 1.1 of the Basic Law in conjunction with Article 20.1 of the Basic Law does not oblige the legislature to retroactively reset benefits.

109. However, it is appropriate to retroactively apply the transitional rule by 1 January 2011, because the legislature had to anticipate the need for new legislation with regard to the Asylum Seekers Benefits Act at the latest with the decision of the Federal Constitutional Court of 9 February 2010. . . .

Judgment No. 306
Italian Constitutional Court (2008)

[Composed of: President: Franco Bile; Judges: Giovanni Maria Flick, Francesco Amirante, Ugo de Siervo, Paolo Maddalena, Alfio Finocchiaro, Alfonso Quaranta, Franco Gallo, Luigi Mazzella, Gaetano Silvestri, Sabino Cassese, Maria Rita Saulle, Giuseppe Tesauro, Paolo Maria Napolitano. . . .

An Albanian citizen, who was married and had two children, had been living in Italy for more than six years when, after a car accident, she became deeply disabled—in what the court described as a “vegetative state.” The non-national challenged the constitutionality of Italian provisions preventing lawfully present foreign citizens who did not have a residence card from receiving an allowance for a caregiver. Further, she argued that, given her impairment, she could not meet the requirements for obtaining a residence card, which included receiving earned income.

Francesco AMIRANTE authored the Judgment:]

9. . . . [T]he carer’s allowance—awarded to disabled persons not capable of walking unaided, or who are not in a position to carry out everyday activities alone, solely by virtue of the fact that they are disabled, and therefore irrespective of any income requirement—falls within the ambit of social security provision and, more generally, also in the terms adopted by the Strasbourg court, pertains to “social security or assistance.”

. . . [T]his Court has held that “the choices relating to the identification of the categories of beneficiaries—which must necessarily be restricted due to the limited extent of financial resources—must be carried out, always and in any case, in accordance with the principle of reasonableness,” but also that Parliament is permitted “to introduce differentiated arrangements concerning the treatment granted to individual recipients only in the presence of a legislative ‘cause’ which is not manifestly irrational or, worse still, arbitrary.”

10. . . . [I]t is manifestly unreasonable to render the award of a social security benefit such as the carer’s allowance—the prerequisites for which are . . . the complete inability to work, as well as the inability to walk unaided or to carry out everyday acts alone—subject to the possession of the right to reside lawfully in Italy which requires for its conferral, amongst other things, the receipt of an income.

This unreasonable requirement impinges upon the right to good health, understood also as the right to possible or, as in this case, partial remedies for handicaps resulting from serious illnesses. It follows that the contested provisions breach not only Article 3 of the Constitution but also Articles 32 and 38 of the Constitution, as well as—taking account of the fact that the right to good health is a fundamental right of the person . . . —Article 2 of the Constitution.*

. . . [T]he contested legislation violates Article 10(1) of the Constitution since the generally recognised norms of international law include those which, in guaranteeing the fundamental rights of the person irrespective of their membership of particular political entities, outlaw discrimination against foreigners lawfully resident in the state.

The Italian Parliament is without doubt entitled to enact legislation regulating the entry into and residence in Italy of non-Community citizens, provided that it is not manifestly unreasonable and does not breach international law obligations . . . Furthermore, Parliament may stipulate, provided that it is not unreasonable, that the award of certain benefits—not however relating to serious and urgent situations—be subject to the fact that the foreigner’s right to stay in Italy demonstrates that it is not intermittent or ephemeral; however, where the right to stay subject to the above conditions is not in doubt, there can be no discrimination against foreigners which requires that they be subject to particular restrictions for the enjoyment of fundamental rights of the person, which are by contrast guaranteed to Italian citizens.

* The relevant provisions of the Constitution of the Italian Republic are:

Article 2: “The Republic recognises and guarantees the inviolable rights of the person, as an individual and in the social groups within which human personality is developed. . . .”

Article 3: “All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove the economic and social obstacles which by limiting the freedom and equality of citizens, prevent the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country.”

Article 10: “The Italian legal system conforms to the generally recognized rules of international law. . . .”

Article 32: “The Republic shall safeguard health as a fundamental right of the individual and as a collective interest and shall guarantee free medical care to the indigent. . . .”

Article 38: “Every citizen unable to work and without the necessary means of subsistence has a right to maintenance and social assistance.”

The contested provisions are therefore unconstitutional insofar as . . . for the purposes of the award of the carer's allowance they also stipulate income requirements

CONCEPTUALIZING COURTS' RELATIONSHIPS TO RIGHTS

Do the cases excerpted above pose distinctive problems for judges or put them in different kinds of relationships with other branches of government? Is there a distinctive constitutional method, either when interpreting liability or when crafting remedies? Do answers follow from the particular obligations within jurisdictions or are transnational precepts—whether about subsidizing courts, housing, or the income of individuals—coming into view, in service of both individual dignity and societal functioning?

Jeff King

Judging Social Rights (2012)*

For a long time the debate about social rights focused on whether they 'are' justiciable. . . . [T]he term has two senses: a fact-stating sense (i.e. that something is in fact an issue that courts will adjudicate) and a normative sense (i.e. that it is something they ought to adjudicate (or have no good reason not to) in view of their institutional capacity and legitimacy). . . . The pressing issue . . . is whether we ought or ought not to empower courts to adjudicate constitutional social rights disputes. Once focused on this issue, one meets with a variety of arguments, some bad, some good, but none conclusive.

A. The bad arguments . . .

Social rights are not human rights: International law has said they are for about sixty years, and even political philosophy has recently awoken from its dogmatic slumber on that issue.

* Excerpted from JEFF KING, *JUDGING SOCIAL RIGHTS* (2012).

Courts cannot and will not adjudicate policy questions: Every first-year law student knows that judges can and do base their decisions at times on policy considerations, and Ronald Dworkin's increasingly refined attempts to deny this is one of the bigger dead ends in modern jurisprudence.

Courts cannot adjudicate positive rights: the embarrassing fact for this argument is that they do.

It would violate the separation of powers: This argument is usually circular or question-begging: its advocates merely define the separation of powers in a way that excludes social rights adjudication. If a better argument lurks in the detail, it cashes out into one of the good arguments against social rights reviewed below.

Social rights are too vague: If that were the real reason not to entrench social rights, then we might need to do away with a few other legal concepts, such as reasonableness, fairness, unfair dismissal, much of regulation, most of criminal law, and all other bills of rights and much of the constitutional division of powers in federal systems. And progressives beware—it is precisely this type of argument that libertarians use to oppose government regulation of the economy.

Social rights conflict with each other: This looks superficially true—my right to health reaches for the same resources as does your right to social security. But there are conflicts between many other rights that we accept in due course: life vs. liberty and the freedom from torture in terrorism cases; privacy vs. freedom of the press; property vs. taxation; free expression vs. the right to vote, or equality, or security of the person. Private law rights are often balanced against one another, and efficiency and justice joust for supremacy in the arena of administrative law. . . .

B. The good arguments

A better set of arguments against constitutional social rights adjudication raises four sets of concerns that are foreshadowed somewhat imperfectly above, but which can be restated more crisply:

Democratic legitimacy: Resource allocation by definition implicates the interests of nearly everyone, because we nearly all pay in and take out of the public system. There could be hardly a better scenario in which the voice of each should count equally, or as close to equally as practically possible, where we can bargain and compromise, and no better institution for that than a representative legislature. The ordinary case against judicial review is thus amplified here.

Polycentricity: Some issues require the comprehension of a vast number of interconnected variables in order for one to understand the likely consequences of any change of policy. Consider whether a country should seek a foreign loan in order to cope with a financial crisis. The question is linked to a judgment about how international markets will react, the political acceptability of any repayment conditions, long-term macroeconomic stability, and all of this must be balanced against similar calculations in respect of alternative policy options. Further, all such factors change over time. This is a polycentric problem because the soundness of some proposals is dependent on the comparative merits of others, the complete comprehension of which is extremely difficult and which involves considerable guesswork. Resource allocation at the nationwide level is a polycentric activity par excellence.

Expertise: Polycentric decision-making often requires expertise. However some questions are not polycentric in a strict sense but primarily require the application of expert judgment. Determining whether a drug is safe, a building structurally sound, whether a certain test is appropriate for measuring a disability, or whether some proposed procedural right will cause unsustainable problems in a modern bureaucracy are matters on which expertise must be brought to bear. Courts not only often lack that kind of expertise, but are invited to strike down expert judgments on the basis of their intuitions. Expertise, in fact, was a key rationale for limiting earlier judicial intrusions into the welfare state that most now see as having obstructed the recognition of social rights.

Flexibility: On some issues the government might be shown to be essentially fumbling in the dark, and there might be no good reason to think that a judge or claimant's view on the issue is in any way inferior to the government's. But there may still, though, be reasons to let the executive or legislature take ownership of the issue if the possibility of changing positions in response to unforeseen information or developments is crucial. It is hard to say that there exists a fundamental right to kidney dialysis in January, but not in December, because the price spiked in June.

Alternatives: No doubt there is a need for justice in the welfare state. But why look to courts first? We have over half a century of administrative justice studies and many of them have been concerned (in the common law world) with reasons why we should consider institutions that improve upon the shortcomings of courts. This led to the creation of many of those institutions. . . .

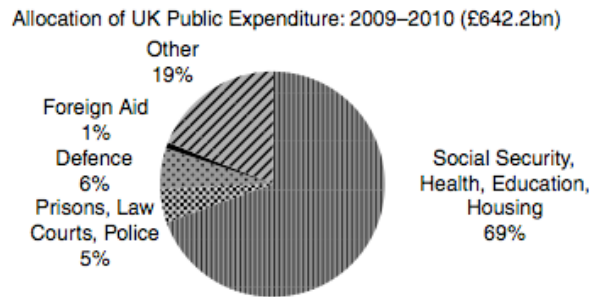


Figure 1

Source: HM Treasury, *Public Expenditure Statistical Analyses 2011 Cm 8104* (2011), p. 69 (Table 5.2).¹³

C. *The best argument—the risky enterprise*

A more refined argument would say, roughly, that even if courts can adjudicate some problematic cases that put a strain on the concerns mentioned in the previous section, it may be that a bill of social rights will present a lot more of them. We can present this type of objection a bit more graphically. It is a common riposte to arguments against social rights to say that courts enforce positive obligations in respect of prisons, courts and the like. Figure 1 allows us to compare the amount of the UK budget spent in 2009–2010 on areas that traditionally concern civil liberties such as law, prisons, policing (including immigration), with that spent on the areas directly implicating social rights (with a few other familiar items thrown in for comparison). One can see that the stakes are not quite the same. The aggregate number of problematic cases could be much higher, this argument goes, and thus the costs associated with all those good but rebuttable arguments against social rights would be much greater with than without constitutional social rights. Taking a few cases here and there, and showing how judges can work through them, will not convince this critic. Even less so when one takes a highly theoretical argument and applies it after the fact to a decided case, in the style of some theorists, rather than by showing how that argument can function predictably in the hands of real judges who disagree with each other and are impatient about theory. The point is, for these critics, that the whole enterprise is too risky.

This book seeks to give a convincing answer to all these daunting arguments. I show . . . that the four considerations set out above are best accounted for in adjudication by being restated as principles of judicial restraint. . . . I argue that courts can respect the idea of treating people as equals but compensate for democratic problems with the finality of legislation by addressing two key problems, namely, the absence of legislative focus on some

rights issues and the failure to protect adequately those groups that are particularly vulnerable to majoritarian bias or neglect. With polycentricity, I show why the argument is good but that there are a range of attenuating factors—such as the existence of a strong judicial mandate, the degree of polycentricity, role of interventions and so on—that moderate the weight that a court should attach to the polycentric character of a given legal issue. On the question of expertise, I show that although the historical relationship between administrative expertise and the welfare state suggests that the idea must be given great weight, both that history and current practice point to something more nuanced than a closed door. There are trade-offs between expertise and accountability, just as there are different types of expertise calling for restraint in different ways. And then there is the problem of failures of expertise—situations where the state is inconsistent, has failed to focus on the issue, or is patently defying a substantial uniformity of expert opinion on the matter. The need for flexibility, too, is acute, but courts can help to strengthen this role both by breaking up bureaucratic or political inertia, and by adopting specific techniques of adjudication that respect the need for flexibility in the welfare state. What emerges over the course of each chapter is a restatement of the argument under consideration as a principle of restraint, one that can assist the task of interpretation, and keep it within safer bounds.

[T]he four principles collectively recommend that judges take a default position of judicial incrementalism. Incrementalism is a useful heuristic, or rule of thumb, for what the principles of restraint ordinarily recommend. Incremental steps are those that require only a relatively small departure from the status quo, or which, when addressing significant macro-level policy, allow for substantial administrative or legislative flexibility by way of response. . . . [In my view] judges can adjudicate social rights disputes if the range of considerations, affected parties and judicial control more generally, are ordinarily limited to a relatively localised set of issues, or, if addressing more macro-level issues, only impose finality upon the resolution of the issue to a limited degree. . . .

Katharine G. Young

Constituting Economic and Social Rights (2012)*

. . . Judicial usurpation occurs when the judiciary interprets and applies rights in such a manner that it assumes control of the political system, crowding out or crabbing the democratically elected branches. Abdication occurs when the

* Excerpted from KATHARINE G. YOUNG, *CONSTITUTING ECONOMIC AND SOCIAL RIGHTS* (2012).

judiciary declines to protect constitutional rights, risking (it is said) debasement of all fundamental rights. Of course, these two challenges, although perhaps exaggerated in the context of economic and social rights because of their more apparent resource implications, apply to the place of courts in upholding the rights required by constitutionalism in general. Yet when economic and social rights raise positive obligations for governments to act, rather than negative obligations for governments to desist, the traditional adjudicative role of courts is challenged to an exceptional degree. The concerns about usurpation and abdication have been most pronounced because of the emphasis on positive obligations that attach to economic and social rights.

The two concerns are not always mutually held. It is fair to say that US commentators are generally more worried about judicial usurpation, and South African commentators are generally more concerned with judicial abdication. At base, both positions accept the terms of the debate within separation of powers concerns. . . .

Two prescriptions are currently offered to address this concern: the first counsels avoidance, the second, embrace. On the one hand, courts should stay out of the contestations around economic and social rights, which are better employed as moral “talk” in politics, or, at most, as unenforceable guides for legislative or administrative decision-making. Usurpation is managed, and abdication cannot come about if expectations of enforcement are not raised. Hence such concerns, suggests Frank Michelman, may provide “moral cover for a choice that moral ideal theory condemns”—the continued exclusion of economic and social rights from constitutional law. The second argument, on the other hand, suggests that courts should acknowledge that they are adjudicating economic and social rights in their everyday application of private law. “Every constitutional court,” claims Mark Tushnet, “enforces some vision of social or economic rights” when they negotiate the terms of property, contract, or tort law. Usurpation, in particular, becomes a tendentious argument when one considers the existing power of courts. . . .

The variety of adjudicative stances employed in economic and social rights adjudication may be considered and appraised as a typology. I introduce five major stances adopted by courts in economic and social rights adjudication. In adopting deferential review, the court assumes that the greater decision-making authority is placed on the elected branches in interpreting economic and social rights and in determining the obligations that arise. In conversational review, the court is instead reliant on the ability of an interbranch dialogue to resolve the determination of rights. A third type of review is experimentalist review, whereby the court seeks to involve the relevant stakeholders—government, parties, and

other interested groups—in solving the problem which obstructs a provisional benchmark of the right. Managerial review occurs when the court assumes a direct responsibility for interpreting the substantive contours of the right and supervising its protection with strict timelines and detailed plans. Finally, peremptory review is involved when the court registers its superiority in interpreting the right, and in commanding and controlling an immediate response. . . .

These five distinctive forms are replicated—to greater or lesser degrees—in comparative constitutional law. The typology thus reveals the migration of distinctive approaches to interbranch and extra-branch interactions, as well as of constitutional doctrines and remedies. In this migration, the South African Constitutional Court has been a prominent participant, encouraged by the terms of its Constitution, which behooves the Court to consider international law, and allows it to consider foreign law when interpreting the Bill of Rights, and by the textual similarities between it and other constitutional and human rights. As depicted by the typology, the forms of review are akin to those that have been developed, employed, and described, in other constitutional systems, such as in Canada, Colombia, India, Germany, the UK, and the United States. Their influence has also extended to the supranational courts of Europe, as well as, to a lesser extent, the developing Inter-American, African and UN adjudicatory or quasi-adjudicatory systems. Moreover, these features are present in the cases, controversies, and challenges that are outside of economic and social rights enforcement, and within the general realm of public law.

Each of the five institutional stances can be linked to a discrete theory of judicial review—of what courts should do under particular conditions. These theories of review can in turn be linked to broader theories of constitutional democracy and the counter-majoritarian role that courts inhabit. . . .

[One can also explore] a comparative typology of courts engaged in adjudicating economic and social rights claims. It suggests that the stances towards judicial review points to a variety of role conceptions, and it diagrammatically demarcates supremacist, engaged and detached courts. These are evidenced with examples from the Colombian Constitutional Court in its application of the constitutional protections of education, health care and housing, the Indian Supreme Court in its application of the constitutional rights to education, to life, and directive principles protective of rights to health, housing and food, and the United Kingdom courts, in applying the positive obligations which are created by the Human Rights Act 1988 (UK) and the ECHR. . . .

. . . [T]hree other role conceptions respond to complaints of economic and social rights infringements by utilizing parts of the initial typology of judicial review. These three opposing role conceptions—which I label a detached court, an engaged court, and a supremacist court—all utilize certain features of judicial review. These role conceptions may openly reject many of the five stances discussed, but none of them reject them all, and most employ at least two. . . .

. . . [An] examination of the general role conceptions of courts that exist within the corners of this typology allows us to resist a country-specific classification with respect to economic and social rights. We can see, for example, what the Indian Supreme Court and the South African Constitutional Court critically share, and why we may evince a reluctance to prescribe justiciable economic and social rights for a supremacist court in a constitutional culture which does not share the democratic conceptions of distributive justice that are minimally required for the protection of economic and social rights. Yet we can also recognize the situationally specific aspects of these features, which itself is an important breakthrough, and one of the best justifications for constitutional comparison that one can provide. The result is not the critiqued “South African obsession,” caused by an exclusive emphasis on innovations occurring in that country, but rather a deeper lens with which to view innovations and differences occurring elsewhere. . . .

Aharon Barak

*Proportionality: Constitutional Rights and Their Limitations (2012)**

. . . [W]hat is the legal source for recognizing the positive constitutional rights or their positive aspects? One answer is that the constitutional “silence” on the matter is a gap (lacuna) which requires judicial filling. This approach would be of no use in those legal systems where such judicial gap-filling is not recognized. At times the positive aspects of rights may be derived from the right to equality, such as through affirmative action. But what is the case when these sources are to no avail? . . .

Does every positive constitutional aspect mean the existence of a positive constitutional right? Could a positive aspect be recognized without recognizing a positive right? Take, for example, the German Constitution Court’s first abortion

* Excerpted from AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* (2012).

case. The German legislature had determined that as long as the abortion was performed within the first twelve weeks of the pregnancy by an authorized physician and with the woman's consent, no criminal responsibility was involved. The German Constitutional Court ruled that the law was unconstitutional in that it violated the fetus' human dignity. Thus, the legislature was required to reenact the law in a way that would guarantee the fetus' human dignity by imposing proper criminal sanctions. The petition was filed by the members of parliament as part of an abstract judicial review process. The Court's decision did not state that the fetus enjoys a constitutional right as the decision never dealt with the issue of whether or not fetuses may be the subject of legal rights and duties.

Is this a case where the state is bound by a constitutional duty while no individual may claim an opposite constitutional right? The answer is in the negative. Opposite the state's constitutional duty stands the individual's constitutional right. A separate issue is the possible remedies for non-performance of that duty. Would the legislature's duty to legislate and the individual's constitutional right to demand this legislation be recognized? This issue has yet to be resolved by the German courts. According to my approach, the answer to this question is positive.

Do these questions—whether a duty exists without a right, or whether there is a duty to legislate—suggest that positive constitutional rights are fundamentally different—“genetically”—from negative rights? This issue has led to an intense discussion particularly in the context of social and economic constitutional rights. It has been argued that in light of the special nature of the positive constitutional rights—in particular, the direct relationship between the state's duty and the national resources those rights are not justiciable. The argument here was that it would be inappropriate for the judges to require the legislator to perform actions that would change the allocation of national resources. Thus, for example, the Constitution of India establishes, in its fourth part, several duties to be imposed on the state; it then states that those duties are not enforceable by any court. This is not the only approach. Many legal systems do recognize constitutional rights—either social, economic, or others—as well as their justifiability. Those rights suffer no genetic defect. However, they do, at times, justify a special attitude by the state. One of the instances where such a special attitude is required by positive constitutional rights is the application of the constitutional rules of proportionality. . . .

THE EU, THE ECHR, CONSTITUTIONAL
PLURALISM, AND FEDERATIONS

DISCUSSION LEADERS

BRUCE ACKERMAN, SABINO CASSESE, DIETER
GRIMM, AND MIGUEL POIARES MADURO

III. THE EU, THE ECHR, CONSTITUTIONAL PLURALISM, AND FEDERATIONS

DISCUSSION LEADERS:

BRUCE ACKERMAN, SABINO CASSESE, DIETER GRIMM & MIGUEL POIARES MADURO

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On December 18, 2014, in its long-awaited Opinion 2/13, the Court of Justice of the European Union (CJEU) ruled that the draft European Union (EU) accession agreement to the European Convention on Human Rights (ECHR) is not compatible with EU law. The decision came as a great surprise and a disappointment to many, and it was met with severe criticism from the academy. The session will explore the decision, its implications both in and beyond Europe, the effects of the ruling on the practices of constitutional pluralism, and the interactions among courts in federated and quasi-federated states.

Opinion 2/13 is very dense, comprising 258 paragraphs and some 45 pages. Yet, as Sionaidh Douglas-Scott has noted, only about 8 pages of the Opinion are devoted to discussing the Court's own position on the compatibility of accession with EU law. Much of the remainder canvasses the arguments made by EU institutions and Member States. Ultimately, the Court decided the case on the grounds that, first, the draft arrangement improperly treated the EU as a state; second, it failed to exclude the possibility of a non-EU institution resolving disputes concerning the interpretation of treaties; third, in its co-respondent mechanism, it would have improperly permitted the European Court of Human Rights (ECtHR) to assess the rules of EU law governing the division of power between the EU and Member States; fourth, it failed to require that the CJEU have the chance to rule on an issue of law before it reached the ECtHR; and fifth, on matters of common foreign and security policy, the ECtHR could issue rulings without CJEU involvement, thus potentially jeopardizing the autonomy of EU law.

After putting forth the Opinion, we provide a selection of analyses, a good many of which are critical. One, by Professor Daniel Halberstam, offers a notably more sympathetic view of the substantive problems that the CJEU had to take into account. We then provide excerpts of other cases famously exemplifying conflicts over judicial authority and conclude with commentary to frame the conversation on judicial autonomy in a legal-political context of pluralism.

Questions for discussion include: What claims for judicial autonomy in adjudication are advanced in the December 18 opinion? Are such claims different from those in cases that also implicate the autonomy of courts in federations or quasi-federations, such as *Solange I*, *Sanchez-Llamas*, or *Kadi*? Structurally, is the EU-ECtHR dyad like or different from the relationship between Member States-EU, Member States-International Court of Justice (ICJ), or the state-federal relationship in the United States that was at issue during the nineteenth century in *Hunter v. Martin's Lessee*?

THE OPINION OF DECEMBER 18, 2014

Opinion 2/13 of the Court (Full Court)

Court of Justice of the European Union (Dec. 18, 2014)

. . . REQUEST for an Opinion pursuant to Article 218(11) TFEU, made on 4 July 2013 by the European Commission, THE COURT (Full Court), composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano (Rapporteur), R. Silva de Lapuerta, M. Ilešič, L. Bay Larsen, T. von Danwitz, A. Ó Caoimh, J.-C. Bonichot, C. Vajda and S. Rodin, Presidents of Chambers, E. Juhász, A. Borg Barthet, J. Malenovský, E. Levits, A. Arabadjiev, C. Toader, M. Safjan, D. Šváby, M. Berger, A. Prechal, E. Jarašiūnas, C.G. Fernlund, J.L. da Cruz Vilaça and F. Biltgen, Judges, gives the following Opinion

178. In order to take a position on the Commission's request for an Opinion [on the compatibility of the draft accession agreement (DAA) with EU primary law], it is important (i) to ascertain whether the agreement envisaged is liable adversely to affect the specific characteristics of EU law . . . and . . . the autonomy of EU law in the interpretation and application of fundamental rights . . . , and (ii) to consider whether the institutional and procedural machinery envisaged by that agreement ensures that the conditions in the Treaties for the EU's accession to the ECHR are complied with. . . .

The specific characteristics and the autonomy of EU law

179. . . . [I]n accordance with Article 6(3) [of the Treaty on European Union, originally the Maastricht Treaty of 1993] (TEU),* fundamental rights, as guaranteed by the ECHR, constitute general principles of the EU's law. However, as the EU has not acceded to the ECHR, the latter does not constitute a legal instrument which has been formally incorporated into the legal order of the EU.

180. By contrast, as a result of the EU's accession to the ECHR, like any other international agreement concluded by the EU, would, by virtue of Article 216(2) [of the Treaty on the Functioning of the European Union,

* Article 6(3) of the Treaty on European Union provides: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

originally the Treaty of Rome] (TFEU),* be binding upon the institutions of the EU and on its Member States, and would therefore form an integral part of EU law. . . .

181. Accordingly, the EU, like any other Contracting Party, would be subject to external control to ensure the observance of the rights and freedoms the EU would undertake to respect in accordance with Article 1 of the ECHR.** In that context, the EU and its institutions, including the Court of Justice, would be subject to the control mechanisms provided for by the ECHR and, in particular, to the decisions and the judgments of the ECtHR.

182. . . . [A]n international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not, in principle, incompatible with EU law; that is particularly the case where, as in this instance, the conclusion of such an agreement is provided for by the Treaties themselves. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions.

183. Nevertheless, the Court of Justice has also declared that an international agreement may affect its own powers only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order. . . .

184. In particular, any action by the bodies given decision-making powers by the ECHR, as provided for in the agreement envisaged, must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law.

185. It is admittedly inherent in the very concept of external control that, on the one hand, the interpretation of the ECHR provided by the ECtHR would, under international law, be binding on the EU and its institutions, including the Court of Justice, and that, on the other, the interpretation by the Court of Justice of a right recognised by the ECHR would not be binding on the control

* Article 216(2) of the Treaty on the Functioning of the European Union provides: “Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.”

** Article 1 of the European Convention on Human Rights provides: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

mechanisms provided for by the ECHR, particularly the ECtHR, as . . . the draft agreement provides and as is stated in . . . the draft explanatory report.

186. The same would not apply, however, with regard to the interpretation by the Court of Justice of EU law, including the Charter. In particular, it should not be possible for the ECtHR to call into question the Court's findings in relation to the scope *ratione materiae* of EU law, for the purposes, in particular, of determining whether a Member State is bound by fundamental rights of the EU.

187. In that regard, it must be borne in mind, in the first place, that Article 53 of the Charter provides that nothing therein is to be interpreted as restricting or adversely affecting fundamental rights as recognised, in their respective fields of application, by EU law and international law and by international agreements to which the EU or all the Member States are party, including the ECHR, and by the Member States' constitutions.

188. The Court of Justice has interpreted that provision as meaning that the application of national standards of protection of fundamental rights must not compromise the level of protection provided for by the Charter or the primacy, unity and effectiveness of EU law (judgment in [*Melloni v. Ministero Fiscale* (2013)] . . .).

189. In so far as Article 53 of the ECHR essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR, that provision should be coordinated with Article 53 of the Charter, as interpreted by the Court of Justice, so that the power granted to Member States by Article 53 of the ECHR is limited—with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR—to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised.

190. However, there is no provision in the agreement envisaged to ensure such coordination.

191. In the second place, it should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.

192. Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.

193. The approach adopted in the agreement envisaged, which is to treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party, specifically disregards the intrinsic nature of the EU and, in particular, fails to take into consideration the fact that the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law.

194. In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law.

195. However, the agreement envisaged contains no provision to prevent such a development.

196. . . . [I]t must be pointed out that Protocol No 16* permits the highest courts and tribunals of the Member States to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the ECHR or the protocols thereto, even

* Draft Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms provides “for the possibility for the highest courts of High Contracting Parties to obtain, from the European Court of Human Rights (“the Court”), opinions on questions of principle relating to the interpretation or application of rights and freedoms defined in the Convention and its protocols.” Its drafters expressed that the protocol would “strengthen the link between the Court and States’ highest courts by creating a platform for judicial dialogue, thereby facilitating the application of the Court’s case law by national courts” and “help shift, from ex post to ex ante, the resolution of a number of questions of interpretation of the Convention’s provisions in the domestic forum, saving—in the long run—the valuable resources of the Court; the speedier resolution of similar cases on the domestic plane will also reinforce the principle of subsidiarity.”

though EU law requires those same courts or tribunals to submit a request to that end to the Court of Justice for a preliminary ruling under Article 267 TFEU.*

197. It is indeed the case that the agreement envisaged does not provide for the accession of the EU as such to Protocol No 16 . . . ; nevertheless, since the ECHR would form an integral part of EU law, the mechanism established by that protocol could—notably where the issue concerns rights guaranteed by the Charter corresponding to those secured by the ECHR—affect the autonomy and effectiveness of the preliminary ruling procedure provided for in Article 267 TFEU.

198. In particular, it cannot be ruled out that a request for an advisory opinion made pursuant to Protocol No 16 by a court or tribunal of a Member State that has acceded to that protocol could trigger the procedure for the prior involvement of the Court of Justice, thus creating a risk that the preliminary ruling procedure provided for in Article 267 TFEU might be circumvented, a procedure which, as . . . noted in . . . this Opinion, is the keystone of the judicial system established by the Treaties. . . .

200. . . . [I]t must be held that the accession of the EU to the ECHR as envisaged by the draft agreement is liable adversely to affect the specific characteristics of EU law and its autonomy.

201. The Court has consistently held that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. That principle is notably enshrined in Article 344 TFEU**

* Article 267 the Treaty on the Functioning of the European Union provides:

“The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. . . .”

** Article 344 of the TFEU provides: “Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.”

204. However, . . . as a result of accession, the ECHR would form an integral part of EU law. Consequently, where EU law is at issue, the Court of Justice has exclusive jurisdiction in any dispute between the Member States and between those Member States and the EU regarding compliance with the ECHR.

205. . . . [T]he procedure for the resolution of disputes provided for in Article 33 of the ECHR^{*} could apply to any Contracting Party and, therefore, also to disputes between the Member States, or between those Member States and the EU, even though it is EU law that is in issue.

206. In that regard, . . . the fact that Article 5 of the draft agreement provides that proceedings before the Court of Justice are not to be regarded as a means of dispute settlement which the Contracting Parties have agreed to forgo in accordance with Article 55 of the ECHR is not sufficient to preserve the exclusive jurisdiction of the Court of Justice.

207. Article 5 of the draft agreement merely reduces the scope of the obligation laid down by Article 55 of the ECHR, but still allows for the possibility that the EU or Member States might submit an application to the ECtHR, under Article 33 of the ECHR, concerning an alleged violation thereof by a Member State or the EU, respectively, in conjunction with EU law. . . .

209. This is particularly so since, if the EU or Member States did in fact have to bring a dispute between them before the ECtHR, the latter would, pursuant to Article 33 of the ECHR, find itself seised of such a dispute. . . .

212. Consequently, the fact that Member States or the EU are able to submit an application to the ECtHR is liable in itself to undermine the objective of Article 344 TFEU and, moreover, goes against the very nature of EU law, which . . . requires that relations between the Member States be governed by EU law to the exclusion, if EU law so requires, of any other law.

213. In those circumstances, only the express exclusion of the ECtHR's jurisdiction under Article 33 of the ECHR over disputes between Member States or between Member States and the EU in relation to the application of the ECHR within the scope *ratione materiae* of EU law would be compatible with Article 344 TFEU. . . .

* Article 33 of the ECHR provides: "Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party."

215. The co-respondent mechanism has been introduced . . . in order to “avoid gaps in participation, accountability and enforceability in the [ECHR] system” [which] might result from [the EU’s] accession to the ECHR.

216. In addition, that mechanism also has the aim of ensuring that, in accordance with the requirements of Article 1(b) of Protocol No 8 EU,* proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the EU as appropriate. . . .

218. Yet, first, Article 3(5) of the draft agreement** provides that a Contracting Party is to become a co-respondent either by accepting an invitation from the ECtHR or by decision of the ECtHR upon the request of that Contracting Party.

219. When the ECtHR invites a Contracting Party to become co-respondent, that invitation is not binding, as is expressly stated in . . . the draft explanatory report.

220. This lack of compulsion reflects . . . above all, the fact that the EU and Member States must remain free to assess whether the material conditions for applying the co-respondent mechanism are met.

221. Given that those conditions result, in essence, from the rules of EU law concerning the division of powers between the EU and its Member States . . . the decision as to whether those conditions are met in a particular case necessarily presupposes an assessment of EU law. . . .

223. As Article 3(5) of the draft agreement provides, if the EU or Member States request leave to intervene as co-respondents in a case before the ECtHR, they must give reasons from which it can be established that the conditions for

* Article 1(b) of Protocol No. 8 provides that the agreement regarding accession “shall make provision for preserving the specific characteristics of the Union and Union law . . . with regard to . . . the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.”

** Article 3(5) provides: “A High Contracting Party shall become a co-respondent either by accepting an invitation from the Court or by decision of the Court upon the request of that High Contracting Party. When inviting a High Contracting Party to become co-respondent, and when deciding upon a request to that effect, the Court shall seek the views of all parties to the proceedings. When deciding upon such a request, the Court shall assess whether, in the light of the reasons given by the High Contracting Party concerned, it is plausible that the conditions in paragraph 2 or paragraph 3 of this article are met.”

their participation in the procedure are met, and the ECtHR is to decide on that request in the light of the plausibility of those reasons.

224. Admittedly, in carrying out such a review, the ECtHR is to ascertain whether . . . the conditions set out in paragraphs 2 and 3 of Article 3^{*} are met, and that review does not relate to the merits of those reasons. However, the fact remains that, in carrying out that review, the ECtHR would be required to assess the rules of EU law governing the division of powers between the EU and its Member States as well as the criteria for the attribution of their acts or omissions, in order to adopt a final decision in that regard which would be binding both on the Member States and on the EU.

225. Such a review would be liable to interfere with the division of powers between the EU and its Member States.

226. Secondly, Article 3(7) of the draft agreement^{**} provides that if the violation in respect of which a Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent are to be jointly responsible for that violation.

227. That provision does not preclude a Member State from being held responsible, together with the EU, for the violation of a provision of the ECHR in respect of which that Member State may have made a reservation in accordance with Article 57 of the ECHR [which permits signatory states to make reservations in respect of particular provisions, but not ones of a general character].

228. Such a consequence of Article 3(7) of the draft agreement is at odds with Article 2 of Protocol No 8 EU, according to which the accession agreement is to ensure that nothing therein affects the situation of Member States in relation to the ECHR, in particular in relation to reservations thereto.

229. Thirdly, there is [a] provision at the end of Article 3(7) of the draft agreement for an exception to the general rule that the respondent and co-respondent are to be jointly responsible for a violation established. The ECtHR

* Article 3(2) of the Draft provides that one or more member States may become co-respondents where the lawfulness of a provision of EU law, the ECHR, EU protocols, or of a founding treaty is challenged.

** Article 3(7) of the Draft provides: "If the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless the Court, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible."

may decide, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, that only one of them is to be held responsible for that violation.

230. A decision on the apportionment as between the EU and its Member States of responsibility for an act or omission constituting a violation of the ECHR established by the ECtHR is also one that is based on an assessment of the rules of EU law governing the division of powers between the EU and its Member States and the attributability of that act or omission.

231. Accordingly, to permit the ECtHR to adopt such a decision would also risk adversely affecting the division of powers between the EU and its Member States. . . .

234. . . . To permit the ECtHR to confirm any agreement that may exist between the EU and its Member States on the sharing of responsibility would be tantamount to allowing it to take the place of the Court of Justice in order to settle a question that falls within the latter's exclusive jurisdiction.

235. Having regard to the foregoing, it must be held that the arrangements for the operation of the co-respondent mechanism laid down by the agreement envisaged do not ensure that the specific characteristics of the EU and EU law are preserved. . . .

236. It is true that the necessity for the procedure for the prior involvement of the Court of Justice is . . . linked to respect for the subsidiary nature of the control mechanism established by the ECHR Nevertheless, it should equally be noted that that procedure is also necessary for the purpose of ensuring the proper functioning of the judicial system of the EU.

237. In that context, the necessity for the prior involvement of the Court of Justice in a case brought before the ECtHR in which EU law is at issue satisfies the requirement that the competences of the EU and the powers of its institutions, notably the Court of Justice, be preserved, as required by Article 2 of Protocol No 8 EU.

238. Accordingly, to that end it is necessary . . . for the question whether the Court of Justice has already given a ruling on the same question of law as that at issue in the proceedings before the ECtHR to be resolved only by the competent EU institution, whose decision should bind the ECtHR.

239. To permit the ECtHR to rule on such a question would be tantamount to conferring on it jurisdiction to interpret the case-law of the Court of Justice.

240. Yet neither Article 3(6) of the draft agreement nor . . . the draft explanatory report contain anything to suggest that that possibility is excluded.

241. Consequently, the prior involvement procedure should be set up in such a way as to ensure that, in any case pending before the ECtHR, the EU is fully and systematically informed, so that the competent EU institution is able to assess whether the Court of Justice has already given a ruling on the question at issue in that case and, if it has not, to arrange for the prior involvement procedure to be initiated. . . .

245. The interpretation of a provision of EU law, including of secondary law, requires, in principle, a decision of the Court of Justice where that provision is open to more than one plausible interpretation.

246. If the Court of Justice were not allowed to provide the definitive interpretation of secondary law, and if the ECtHR, in considering whether that law is consistent with the ECHR, had itself to provide a particular interpretation from among the plausible options, there would most certainly be a breach of the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law. . . .

248. . . . [I]t must be held that the arrangements for the operation of the procedure for the prior involvement of the Court of Justice provided for by the agreement envisaged do not enable the specific characteristics of the EU and EU law to be preserved. . . .

252. . . . [A]s EU law now stands, certain acts adopted in the context of the CFSP [Common Foreign and Security Policy] fall outside the ambit of judicial review by the Court of Justice.

253. That situation is inherent to the way in which the Court's powers are structured by the Treaties, and, as such, can only be explained by reference to EU law alone.

254. Nevertheless, on the basis of accession as provided for by the agreement envisaged, the ECtHR would be empowered to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP, and notably of those whose legality the Court of Justice cannot, for want of jurisdiction, review in the light of fundamental rights.

255. Such a situation would effectively entrust the judicial review of those acts, actions or omissions on the part of the EU exclusively to a non-EU body,

albeit that any such review would be limited to compliance with the rights guaranteed by the ECHR. . . .

257. Therefore, although that is a consequence of the way in which the Court's powers are structured at present, the fact remains that the agreement envisaged fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters.

258. . . . [I]t must be held that the agreement envisaged is not compatible with Article 6(2) TEU or with Protocol No 8 EU in that:

– it is liable adversely to affect the specific characteristics and the autonomy of EU law in so far it does not ensure coordination between Article 53 of the ECHR and Article 53 of the Charter, does not avert the risk that the principle of Member States' mutual trust under EU law may be undermined, and makes no provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU;

– it is liable to affect Article 344 TFEU in so far as it does not preclude the possibility of disputes between Member States or between Member States and the EU concerning the application of the ECHR within the scope *ratione materiae* of EU law being brought before the ECtHR;

– it does not lay down arrangements for the operation of the correspondent mechanism and the procedure for the prior involvement of the Court of Justice that enable the specific characteristics of the EU and EU law to be preserved; and

– it fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters in that it entrusts the judicial review of some of those acts, actions or omissions exclusively to a non-EU body. . . .

ANALYSES OF THE CJEU OPINION

Steve Peers

*The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection (2014)**

At long last, the CJEU has today delivered its ruling regarding the EU's accession to the European Convention on Human Rights (ECHR). . . . [T]he Court's ruling is fundamentally flawed . . . [in] seeking to protect the basic elements of EU law by disregarding the fundamental values upon which the Union was founded. . . .

Back in 1996, . . . the CJEU ruled that as European Community law (as it then was) stood at that time, the EC could not accede to the ECHR. Only a Treaty amendment could overturn this judgment, and in 2009, the Treaty of Lisbon did just that, inserting a new provision in the Treaties that required the EU to accede to the ECHR (Article 6(2) TEU). That treaty also added a Protocol 8 to the Treaties, regulating aspects of the accession, as well as a Declaration requiring that accession to the ECHR must comply with the 'specific characteristics' of EU law.

However, these new Treaty provisions could not by themselves make the EU a contracting party to the ECHR. To obtain that outcome, it was necessary for the EU to negotiate a specific accession treaty with the Council of Europe. After a long negotiation process, this accession treaty was agreed in principle in 2013. Today's ruling by the CJEU concerns the compatibility of that treaty with EU law. . . .

[The judgment has several consequences.] First and foremost, EU accession to the ECHR obviously cannot go ahead on the basis of the current draft agreement. The Court has in effect provided a checklist of amendments to the accession agreement that would have to be made to ensure that accession is compatible with EU law. The amendments would have to deal with the following ten issues: (a) ensuring Article 53 ECHR does not give authorisation for Member States to have higher human rights standards than the EU Charter, where the EU has fully harmonised the law; (b) specifying that accession cannot impact upon the rule of mutual trust in [Justice and Home Affairs] JHA matters; (c) ensuring

* Excerpted from Steve Peers, *The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection*, EU LAW ANALYSIS (Dec. 18, 2014), <http://eulawanalysis.blogspot.com/2014/12/the-cjeu-and-eus-accession-to-echr.html>.

that any use of Protocol 16 ECHR* by national courts cannot undermine the EU preliminary ruling system, presumably by ruling out the use of Protocol 16 where EU law issues are involved; (d) specifying expressly that Member States cannot bring disputes connected with EU law before the ECtHR; (e) ensuring that in the co-respondent system, the ECtHR's assessment of admissibility does not extend to the power to interpret EU law; (f) guaranteeing that the joint responsibility of the EU and its Member States for ECHR breaches cannot impinge upon Member State reservations to the Convention; (g) preventing the ECtHR from allocating responsibility for ECHR breaches as between the EU and its Member States; (h) ensuring that only the EU institutions can rule on whether the CJEU has already dealt with an issue; (i) providing that the CJEU should be allowed to rule on the interpretation, not just the validity, of EU law, during the 'prior involvement' procedure; and (j) curtailing the role of the ECtHR to rule on EU foreign policy matters.

Any such changes to the accession agreement will have to be negotiated by all 47 of the signatories to the ECHR. The accession agreement would, if agreed, then have to be ratified by all of these States to come into force. It would also have to be agreed unanimously by the EU Council, and ratified by the European Parliament. . . .

Some of the Court's objections . . . insist on either the primacy of the EU Courts over the ECtHR, or would give priority to EU law over the substance of the rights protected by the Convention. Those amendments would be difficult to agree in principle, and it might even be doubted whether they would be compatible with the intrinsic nature of the ECHR.

If those amendments were indeed . . . incompatible with the ECHR, there would be no point wasting further time and effort on negotiating them. So it would be best for the Committee of Ministers to invoke Article 47 ECHR, which allows it to ask the ECtHR to give an advisory opinion on the interpretation of the Convention or its protocols. Arguably, this doesn't extend to the draft accession agreement, but then that agreement in its current form would amend the ECHR; any revised agreement would likely amend the ECHR even more. The ECtHR ought to have a chance to rule on whether the CJEU's preferred amendments to the ECHR violate the fundamentals of the Convention system.

* Protocol No. 16 provides a procedure by which a panel of the ECtHR may issue non-binding advisory opinions upon the interpretation or application of Convention rights upon request by another court.

Could the Court's objections (or some of them) be met by the EU making reservations to the ECHR? According to Article 57 ECHR, reservations to the Convention are permitted, provided that they are not of a 'general character.' . . . Arguably reservations relating to CFSP or JHA matters would indeed be invalid, due to their "general character." . . .

There are two categories of objections to the ECHR accession in the Court's judgment: procedural and substantive. . . .

The procedural objections are essentially those . . . in the list above, concerning: Protocol 16 ECHR and the preliminary ruling process; inter-state dispute settlement; the co-respondent procedure; the prior involvement procedure; and CFSP matters. Seven of these eight points have one thing in common: preserving the CJEU's power to rule on EU law. The exception is . . . [that] the CJEU has no power to rule on CFSP matters.

From the point of view of substantive human rights protection, . . . the Court's objection [relating to CFSP] is quite simply mind-boggling. Human rights breaches unfortunately occur in foreign policy operations, ranging from violations of the right to life, to arbitrary detention to human trafficking by foreign forces. The CJEU has no jurisdiction to protect, as regards most CFSP matters; but it rules that the ECtHR *cannot have judicial review powers either*. . . .

. . . [T]he CJEU's position is that if it can't have jurisdiction over CFSP, then *no other international court can* either. In short, since it isn't allowed to play, it's taking the football away from everyone else. It's the judicial politics of the playground. But it could have serious consequences, leaving the victims of serious human rights violations without an effective remedy at international level. Or is the entire world meant to trust that the military forces from the continent that brought us the Holocaust and two World Wars would never, when acting under the EU's *aegis*, commit human rights offences?

This brings us to the two substantive points: the need to ensure that Member States do not set higher standards within the field of EU law, and the need to protect the principle of mutual trust in JHA matters. On the first point, the Court is today extending to the ECHR its long-standing principle that the primacy of EU law prevents Member States having higher human rights standards, where EU law has fully harmonised the matters concerned. . . . [F]rom the perspective of international human rights law, . . . [this is] shocking: it cuts into a central principle found in all human rights treaties.

The Court's ruling on this point would be less problematic if it were not for its ruling on mutual trust in JHA matters. After all, if it were possible to resist

removal to another Member State on human rights grounds despite the Dublin rules on asylum responsibility, or to resist the execution of a European Arrest Warrant on such grounds, then many violations of human rights in individual cases would be avoided. But the Court reiterates, in very strong terms, its established presumption that the EU is built on the principle of mutual trust in this area, which can only exceptionally be set aside. . . .

. . . It's striking that the 'values' of the EU—which are a condition for EU membership, and which could lead to suspension of a Member State in serious cases—include human rights and related principles. . . . [F]or JHA in particular, the Treaty drafters provided in Article 67(1) TFEU that the EU must “constitute an area of freedom, security and justice *with respect for fundamental rights.*” The Treaty doesn't give priority to mutual trust over human rights—quite the opposite.

. . . [A]s a matter of principle, is it still worth advocating EU accession to the Convention? . . .

. . . [F]or those of us who support human rights protection, today's judgment is an unmitigated disaster. For the most part, human rights advocates have supported EU accession to the ECHR for many years, in order to ensure effective external control of the failings of the EU and (within the scope of EU law) its Member States as regards human rights. But today's CJEU judgment has surgically removed that key reason for supporting accession.

Far from enhancing the protection of human rights within the EU legal order, the EU's accession to the ECHR, on the terms which the CJEU insists upon, would significantly diminish it, for the EU would be compelled to ensure that it insulates itself against many human rights claims that might be brought against it.

So for the sake of those who are trafficked by EU-coordinated troops, who are suffering miscarriages of justice in [European Arrest Warrant] EAW proceedings, who are being pushed back from the EU's shores, drinking from toilets in immigration prisons, starving on the streets because Member States won't or can't give them housing or benefits, or drowning in a desperate attempt to reach European refuge, we now have a moral duty to reject the EU's accession to the ECHR.

Turkuler Isiksel

European Exceptionalism and the EU's Accession to the ECHR
(2015)*

. . . The constitutional issues at stake in the controversy over the EU's accession to the ECHR are complex [T]he ECHR accession controversy is an emblematic moment in the evolution of "International Law 2.0," which has been ongoing since the end of World War II. International Law 2.0 denotes a world in which not only states, but also international institutions and regional organizations like the EU, public bodies, individuals, and corporate entities claim various forms of legal subjectivity, normative power, and political agency. Public authority is no longer concentrated in discrete units but shared and contested along functional, territorial, and temporal dimensions. As a consequence, international organizations, which come in myriad forms, have acquired various rights and duties in relation to each other as well as to their members, citizens, and other public and private agents. . . .

Observers of a cosmopolitan persuasion tend to single out the sovereign state as the primary threat to individual liberty and security within the global order, and to consequently celebrate International Law 2.0 and the burgeoning of alternative forms of political organization. Inescapably, however, non-state institutions that exercise public power are, like states, capable of abusing it, and must be held to similarly demanding standards of legitimacy. Although some of these standards need to be adapted to take account of new institutional forms, most observers agree that they must include respect for human rights norms.

Such, anyway, was a primary justification for setting the European Union on the formal path to ECHR accession. Although the original treaties establishing the European Communities lacked a bill of rights to constrain the institutions they called into being, the European Court of Justice began an active campaign in the 1970s to fill this gap, declaring a wide range of fundamental rights enumerated in domestic constitutions to be an "integral part" of the "general principles of law" on which the European legal order is founded. As the EU's functions have sprawled into such areas of policy as asylum and immigration, border control, criminal justice, counter-terrorism, data gathering, and intelligence sharing, they have come to implicate the exercise of core individual rights. Moreover, EU Member States find themselves having to defend measures taken in pursuance of their EU obligations before the ECtHR with increasing frequency. Therefore, the EU's accession to the Convention offers not only a way to consolidate the EU's

* Excerpted from Turkuler Isiksel, *European Exceptionalism and the EU's Accession to the ECHR*, SOCIAL SCIENCE RESEARCH NETWORK (Apr. 5, 2015), <http://ssrn.com/abstract=2590178>.

own human rights standards, but also to ensure that responsibility for any infringements is fairly apportioned between the EU and its member states. . . .

The debate over whether the EU is a state, federation, international organization, or a flying saucer is as old as European integration itself. This ambivalence has always made it tempting to describe the EU as a *sui generis* entity or, to use the Court's parlance, a "new legal order." . . .

Since its earliest days, the ECJ has characterized the European legal order as a web of commitments by means of which Member States have "limited their sovereign rights, albeit within limited fields," whose "subjects . . . comprise not only Member States but also their nationals." . . .

How do we square the Court's vision, honed over several decades, of the European legal order as a dense system of commitments that encompass principles of reciprocity, mutual trust, and the political values enumerated in Art 2 TEU* with its resistance to subjecting the EU to a similar system of commitment embodying similar values? . . .

I view . . . [the Court's] unsparing demolition of the accession agreement as evidence of its underestimation of the necessity, not to mention the value, of the EU's accession to the ECHR. Behind the Court's breathless flurry of objections to the accession agreement, I detect an overconfident belief that the EU, under its own stewardship, has transcended the political and institutional flaws that typically generate human rights infringements. In other words, it is because the Court of Justice views itself as a fail-safe guardian of human rights that it treats membership of the Convention as a luxury the Union can ill afford, a luxury that could only be purchased at the price of scrambling the EU's carefully calibrated constitutional equilibria.

As a deep vein in international relations scholarship has long held, many international regimes can be understood as commitments undertaken by states to safeguard or "lock in" their firmly held values and principles. International agreements can be represented as enabling commitments: the constraints they establish on state behavior are intended to allow states to achieve valued ends that might otherwise elude them, including the stability of democratic institutions, the protection of individual rights, and respect for minorities. From this perspective,

* Article 2 of the Treaty on European Union provides: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

the EU is not *sui generis*; to the contrary, it exemplifies a prominent post-war strategy of bolstering the structure of domestic constitutional democracy by surrounding it with a robust exoskeleton of legal and political safeguards at the international level. . . .

As such one might expect the EU's character as a "new legal order" to facilitate rather than obstruct relationships with other international institutions that instantiate International Law 2.0. However, past decisions of the Court of Justice addressing the tangled problems of autonomy, jurisdiction, and obligation that result from Europe's multileveled constitutional configuration show this expectation to be misplaced. In fact, confronting complex, overlapping, and mediated instances of international legal obligation tends to expose the insecurities that the Court of Justice harbors on behalf of the EU legal order and on account of its own role within it. . . . Opinion 2/13 repeats and expands upon these reservations and concerns.

Although the Court concedes that acceding to an international court whose "decisions are binding" on the EU and the Court of Justice "is not, in principle, incompatible with EU law," it qualifies this concession by holding that . . . submitting to the interpretive authority of the ECtHR "must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law." . . .

Nonetheless . . . "binding the EU and its institutions in the exercise of their internal powers" and curtailing the autonomy of the EU legal order is precisely the point of submitting to the jurisdiction of an external human rights regime. . . . As such, accession to the ECHR implies nothing if not a partial renunciation of autonomy on the part of signatories, the EU not excepted.

It is among the central aims of international human rights law to aid in drawing the legitimate bounds for the exercise of public power. This aim is founded on the assumption that the holders of public power are bad judges of the scope of their own authority. . . .

Although the draft accession agreement indulges the CJEU's long-standing reservations, it is instructive to shift the burden of justifying those reservations back onto the Luxembourg court. Why should the EU's autonomy be a more sensitive condition than state sovereignty, with which the ECHR has reached a robust and successful accommodation? Why should the EU's limited autonomy command so much more respect than state sovereignty, particularly if the latter can be assumed to represent the democratic autonomy of citizens? . . .

Far from vindicating the Court's reservations, these questions throw into high relief why characterizing the EU as a *sui generis* entity is, in addition to being analytically unsatisfactory, politically and normatively problematic. In comparison to generic categories used in constitutional law or comparative social science, the nebulous concept of a "new legal order" has allowed the Court to assume the exclusive role of gatekeeper over the EU's core constitutional structure and the acceptable parameters of change. By defining the EU as an exceptional entity, the Court keeps other institutional actors involved in European integration—including the Member States—guessing as to what may or may not be compatible with its basic structure, while reserving for itself the authority to pronounce on the necessary contours of this new legal order. . . .

In particular, . . . [the Court's] at best indifferent attitude towards ECHR accession implies overconfidence in the EU's supranational structure as already embodying the requisite commitments to reason, universalism, dialogue, and impartiality. In fact, this posture recalls the conception of supranationalism espoused by postwar framers of the integration project as a mode of political ordering that would surmount the tendencies of nation-states to chauvinism, belligerence, and ethnic exclusion. On this view, nation-states, which wield public power in the service of a highly dangerous dream of ethnic unity and greatness, require an external discipline of laws and institutions. By contrast, supranational institutions are intended to decouple public power from identity or "eros," and are for this reason considered immune to irrational impulses of states. Furthermore, being insulated from democratic control, they can resist the siren song of populism and demagoguery, their judgment unclouded by majoritarian pressure.

As is well known, the move by the German and Italian Constitutional Courts in the 1970s to make compliance with fundamental rights a precondition for giving effect to the doctrine of the supremacy of EC law was what prompted the ECJ to take up the cause of human rights in the first place. In view of this experience, it is not unrealistic to expect that competition and overlap among high courts, each of which is anxious to prove to the others the stringency of its own standards of human rights, might generate a higher standard of human rights protection overall.

Regrettably, the Court of Justice seems assured that when it comes to providing the highest standard of rights protection possible within the scope of EU law, it is best to go it alone. . . . This belief has its origins in the founding of the European integration project

Although the integration project envisaged by the founding generation has succeeded in replacing the catastrophic world out of which it arose, the task of

critique remains as important as ever. . . . Even if supranationalism is appraised a superior mode of political organization relative to the flawed nation-state, such an appraisal must not lull EU institutions into a hubristic sense of their own infallibility. Sadly, as far as the protection of human rights is concerned, this is precisely what seems to have happened to the Court of Justice, which sometimes treats the EU as the enlightened guardian that does not need a guardian. . . .

. . . [W]hile we can and should aspire to build better, more humane political institutions, we cannot realistically aspire to build infallible ones. Our best hope therefore lies not with constraining states by means of institutions that are themselves exempted from oversight, but with a compound system of external *and* internal checks, imperfect as each of these will be by itself. If the twentieth century established conclusively that the nation-state is a flawed mode of political organization, then perhaps circumspection is a more reasonable lesson to draw for the twenty-first than dogged self-assurance.

Editorial Comments, *Common Market Law Review*

The EU's Accession to the ECHR—a "NO" from the ECJ! (2015)*

. . . Given the impressive development of human rights protection in the European Union, one may, for a moment, lean back and pose the question why the accession of the European Union to the ECHR has still remained such an important issue that it justifies a provision like Article 6(2) TEU—with all the ensuing difficulties and complexities in drafting an accession agreement, and, later on, in applying and developing the human rights case law in a dialogue between the Court of Justice and the European Court of Human Rights (ECtHR). . . .

Accession to the ECHR would enhance the protection of individuals within the ECHR system insofar as individuals will be in a position to bring their complaints against acts of the EU institutions before the ECtHR. Legal protection of individuals will thereby be improved as compared with the protection provided within the EU system in cases in which individuals may have no access to judicial review at the EU level (e.g. some CFSP measures) which is not entirely compensated at the Member State level. Accession of the EU to the ECHR will, moreover, create a common space of human rights protection in Europe in which

* Excerpted from *The EU's Accession to the ECHR—a "NO" from the ECJ!*, 52 COMMON MARKET L. REV. 1 (2015).

all relevant actors in Europe—Member States of the EU, non-Member States, and the EU as an international organization—will be bound by the same common (minimum) standards, and in which the ECtHR will have the final say regarding these standards (Art. 46(1) ECHR^{*}). Accession to the ECHR is likely to prevent the ECJ and the ECtHR developing a diverging jurisprudence as to certain human rights provisions in the ECHR. And, last but not least, on a more symbolic level, the European Union, being bound in its actions by the human rights standards of the ECHR that do not reflect a specific Union interest and that are enforced by an institution which is not part of the Union system, will be subject to a form of external control, thereby enhancing its legitimacy and its stature in its attempts to improve the protection and enforcement of human rights in the rest of the world.

. . . Since its Opinion 1/91, European Economic Area, the Court has made it clear that an international agreement concluded by the Union (at that time, the Community) may provide for a system of courts whereby the Union (necessarily) submits itself to (binding) decisions of those courts. By implication, the Court has thereby admitted that it will be bound by decisions of such an external court. This position has, however, explicitly been made subject to a number of qualifications related to the autonomy of Union law and its special characteristics. In a nutshell, this case law comprises the following features. First, the decision of such an external court should be confined to the interpretation and application of the provisions of the agreement. Second, it should not touch upon the exclusive jurisdiction of the ECJ to decide disputes among the Member States. And third, the external court should not be attributed the competence in one way or another to authoritatively interpret EU law.

In its discussion document of 2010, dealing with its (future) relationship to the ECtHR in case of accession, the ECJ underlines a number of further points that an accession agreement would have to take care of. The Court stresses its competence to authoritatively interpret Union law, and its exclusive competence to declare an act of the Union invalid, as one of its powers that must not be affected by the accession (referring to Protocol No. 8 EU). The ECJ takes pains, moreover, to dwell on the implications of the principle of subsidiarity as a special feature of the system of judicial protection for individuals. Whenever individuals, after having exhausted domestic remedies, challenge national measures implementing or applying Union law before the ECtHR, the principle of subsidiarity (inherent in the ECHR) would require effective internal review by the courts of the Member States or of the Union before the ECtHR gives its final (and binding) decision.

^{*} Article 46(1) provides: “The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.”

. . . The most problematic argument that the ECJ has put forward relates to . . . judicial review of the CFSP measures. . . . The recognition of jurisdiction of the ECtHR in CFSP matters would only strengthen the effectiveness of the legal protection for individuals—as compared to the present situation! The gist of the problem, however, seems to be the following: does the principle of autonomy of EU law and its specific characteristics preclude the EU from granting jurisdiction to an international court to an extent that goes beyond the jurisdiction of the ECJ? This issue will surely be at the centre of the debate that Opinion 2/13 will stir up. And, moreover and of utmost importance: the authors of the Lisbon Treaty have imposed on the Member States and the EU institutions an obligation for an accession of the Union to the ECHR and thereby foreseen an external control of CFSP measures, at the same time deliberately restricting the ECJ’s jurisdiction as to those measures. This strongly suggests that the authors of the Lisbon Treaty did not see any contradiction between the limited jurisdiction of the ECJ on the one hand and the recognition of jurisdiction of the ECtHR in CFSP matters on the other. Or, to put it in other terms: the Member States (as authors of the Lisbon Treaty) seem to follow a notion of the “specific characteristics” of Union law set forth in Protocol No. 8 EU that deviates from that espoused by the ECJ.

. . . Opinion 2/13 exudes the impression of being strongly influenced by the endeavour of the ECJ to defend its position vis-à-vis the ECtHR rather than by a spirit of cooperation. The somewhat inflexible defence of its judicial powers at the expense of an accession of the EU to the ECHR may, unfortunately, lead to an (unexpected) backlash in the relationship between the ECJ and the constitutional courts of the Member States, who may, paradoxically, draw some inspiration from the ECJ’s attitude. Constitutional Courts may be willing to defend their judicial powers (with regard to fundamental rights) vis-à-vis the ECJ in a fashion parallel to the ECJ vis-à-vis the ECtHR. It will be interesting to see whether the Constitutional Courts will wholeheartedly accept the sweeping implications of the principle of “mutual trust” as set out by the ECJ. Moreover, if and when some of the Member States accede to Protocol No. 16 of the ECHR, the courts of these Member States may feel inclined to turn to the ECtHR as the more “competent” human rights court. If such a development were to happen, Opinion 2/13 might one day be regarded as a questionable defence of the “specific characteristics” of European Union law.

Sionaidh Douglas-Scott

*The Relationship between the EU and the ECHR Five Years on from the Treaty of Lisbon (2015)**

. . . The ECJ Opinion 2/13 clearly sets back the timetable for EU accession some considerable way, prompting speculation as to whether it may take place at all. However, regardless of accession, the following predictions might be made. Only case 4 is dependent on the actual accession of the EU to the ECHR.

1. The ECtHR will continue to determine cases brought against EU member states relating to their application of EU law

Such cases have always been determinable in Strasbourg, as the ECtHR has taken the position that they fall within its jurisdiction under Article 1 ECHR. However, the nature of the litigation may vary, depending on the level of discretion accorded to the state in its implementation of EU secondary law.

. . . [T]he ECtHR has taken the position that in cases where states have a wide margin of discretion they have responsibility for their acts. In such cases, the ECtHR has declared applications admissible.

2. The ‘Bosphorus’ presumption of equivalent human rights protection will not be applied in every case

. . . [In *Bosphorus Hava Yollari Turizm v. Ireland* (2005),] [t]he ECtHR held that, if equivalent protection of human rights (to that under the ECHR) existed in the EU legal order, then it could be presumed that an EU member state had complied with the ECHR when it did no more than directly implement legal obligations flowing from its EU membership, in cases where it had no discretion in the form of implementation. The ECtHR held that this presumption could, however, be rebutted where the human rights protection in the particular case was regarded as “manifestly deficient.” . . .

The *Bosphorus* doctrine has been criticized as shielding the application of EU law from ECtHR scrutiny. This presumption of equivalence, rebuttable only by a “manifestly deficient” protection of rights, produces a minimal, abstract standard of human rights review, rather than one based on the concrete circumstances of the case. . . . It is arguable that accession of the EU to the ECHR

* Excerpted from Sionaidh Douglas-Scott, *The Relationship between the EU and the ECHR Five Years on from the Treaty of Lisbon*, UNIV. OF OXFORD LEGAL RESEARCH PAPER SERIES (Jan. 8, 2015).

would alter the relationship between the two courts, reserving the last word for the ECtHR, rather than continuing the existing situation of co-operation and comity, so perhaps, post accession, Strasbourg should apply a more rigorous, concrete review to EU acts, rather than the abstract test of equivalence of *Bosphorus*. However, it could also be argued that the presumption reflects the specific, sui generis, situation of the EU legal order, as maintained and acknowledged in Protocol No 8 of the Lisbon Treaty, and that accession should not change this, nor the *Bosphorus* presumption. Whatever the arguments, there was no codification of the *Bosphorus* presumption in the draft accession agreement. Apparently, EU member states agreed with the Commission not to request codification of *Bosphorus*, in spite of early calls to do so. . . .

Therefore it is interesting to observe that, in several post-*Bosphorus* cases, the ECtHR has failed to apply the presumption. . . . These cases indicate that the ECtHR is not willing to apply *Bosphorus* in a blanket fashion.

3. There will be more litigation relating to the EU's 'Area of Freedom Security and Justice' in Strasbourg

The EU's 'Area of Freedom Security and Justice' (AFSJ), concerns matters such as criminal, family, succession and procedural law. As such it comprises many measures that were previously close to the heart of state sovereignty and considered national preserves. They are liable to be controversial and raise human rights issues. However, much EU legal co-operation within the AFSJ, such as, for example, execution of European Arrest Warrants, is based on the presumption of human rights compliance throughout the EU. This is problematic because, in fact, human rights protection is not equivalent throughout EU member states. Yet many EU measures in the field of crossborder criminal justice, asylum, immigration and matrimonial matters require recognition of judicial decisions of other member states, or a quasi-automatic transfer of individuals, without any human rights scrutiny of the decision or situation in the requesting state. This is because of an underlying assumption that all EU member states similarly ensure a comprehensive respect for human rights. . . .

However, EU member states do not all provide comprehensive protection of human rights. . . . [A] considerable number of EU states continue to violate even core human rights such as Article 3 ECHR, the prohibition on torture. In these circumstances, EU AFSJ measures are liable to be contested in Strasbourg. . . .

. . . [For example,] problems are likely to arise in the context of execution of European arrest warrants (EAW), which are likely to face challenge in Strasbourg. The ECJ has underlined that the EAW is based on the principle of

mutual recognition, requiring member states to act upon them. Furthermore, in the *Melloni* and *Radu* cases, the ECJ gave little hope that surrender under an EAW might be refused on human rights grounds, or indeed on any grounds other than those in to be found in the EAW framework decision itself. . . . The EAW is likely to face Strasbourg challenges because EAWs have too often been issued for minor offences and without due determination of whether surrender is proportionate, in spite of serious human and financial costs occasioned by surrender. Domestic courts are more and more inclined to accept human rights based refusal grounds to EAWs.

Therefore the Strasbourg Court has an important role to play in underlining that the EU principle of mutual recognition, although a lynchpin of European integration, must not threaten fundamental rights and subvert the very values of the EU. Accession may therefore place a strain on the AFSJ. Whereas the ECJ usually balances mutual trust and fundamental rights by presuming human rights compliance by its member states, rebuttable only in severe cases of systemic violation, the ECtHR applies no such presumption In this context we might wonder how far the ECtHR will acknowledge mutual recognition and mutual trust as applicable principles. . . .

. . . In these circumstances, it has been suggested that the mechanism of a disconnection clause might be used to safeguard the coherence of the AFSJ in the event of EU accession to the ECHR. Such disconnection clauses have been used in previous multilateral conventions, including those adopted within the Council of Europe framework, with the aim of protecting the autonomy of the EU legal order. . . . [T]hese disconnection clauses provide, that, as between the EU member state parties to the international agreement at issue, the relevant provisions of EU law apply rather than the provisions of the international agreement.

Judge Allan Rosas of the ECJ has suggested that such a clause could be included in the EU accession agreement. His argument was that, in certain contexts, the EU should be taken as a whole entity, in order that a clear distinction could be made between internal EU relations, and relations between the EU and third countries.

However, such a general disconnection clause could be problematic, giving the impression that the EU was attempting to reduce the impact of EU accession to the ECHR, indeed making a special case for the EU, as in the case of the *Bosphorus* presumption. For that reason, it appears unlikely to take place.

4. *Post accession, Strasbourg could decide cases that have already been determined in the EU legal order.*

This would mean that a case in which the CJEU had already given a ruling would be further litigated in Strasbourg. *Bosphorus* provides such a previous past example, but at that time, the EU was not yet a member of the ECHR, and the ECtHR's somewhat diplomatic solution was the introduction of the presumption of equivalent protection Post-accession, the ECtHR would be in a position to directly review all EU acts for compatibility with EU law. Cases such as *Connolly* would become admissible. In *Connolly* [*v. 15 Member States of the European Union* (2008)], the applicant challenged a decision of the Luxembourg court in the ECtHR. Being unable to challenge an EU Institution directly, he instead proceeded against all then EU member states of the ECHR, claiming a violation of Article 6 ECHR. However the Strasbourg court rejected his complaint as inadmissible, holding that EU member states could only be held responsible where there was an act of some sort on their territory

It would be somewhat uncomfortable for the EU if the ECtHR were to find EU law in breach of the ECHR, especially if the Strasbourg Court were to find that the CJEU had misinterpreted the ECHR. But what is the likelihood of this happening? . . . [T]he ECHR has been recognised by the ECJ as an integral part of EU law for over 40 years and there has not been a case in which the CJEU has deliberately gone against Strasbourg's interpretation of the ECHR. The usually cited cases of conflict . . . are not evidence for this, but rather examples of instances where there was either no, or no clear authority, from Strasbourg on the issue

Since 1998, the judges and court officials of the CJEU and the ECtHR have met up on a regular, but not formally institutionalized basis. . . . [T]he Courts are under a political obligation to continue with that dialogue and even intensify it. . . . [I]n the words of a judge of the ECJ, 'The influence the one exerts on the other is mutual and real.'



Daniel Halberstam

*“It’s the Autonomy, Stupid!” A Modest Defense of Opinion 2/13 on EU Accession to the European Convention on Human Rights (2015)**

. . . Let’s get one thing out of the way. The President of the Court of Justice has been quoted as saying . . . : “The Court is not a human rights court. It is the Supreme Court of the European Union.” Commentators quote this passage with the suggestion that it demonstrates the Court’s failure to take human rights seriously. . . .

Rights lapses at the Court and anywhere else must be condemned, but there is nevertheless a good deal of respectable truth to the President’s statement. After significant prodding from Member State high courts, the Court has come a long way from its early days of dismissing such claims. Today, the Court sees fundamental rights as at the very heart of EU law, indeed as a precondition of the legality and legitimacy of the entire legal order. . . . Nonetheless, solicitude for international human rights agreements comes with a caveat. The Court will show solicitude for international human rights agreements only insofar as these agreements and their various institutional arrangements do not undermine the constitutional architecture of the European Union. . . .

If constitutionalism is the overarching dimension along which the preservation of the specific characteristics of the European legal order must be judged, another involves the f-word. Put aside for the moment the endless disputes about defining federalism. The web of mutual obligations among the European Union and its Member States goes well beyond that seen in any other international organization to date. . . .

Taken together, constitutionalism and federalism leave international law and the European Union in a quandary as they approach each other in Strasbourg. There is near universal agreement that the EU is not a state. But this negative conclusion does not tell us how, positively and systematically, to conceive of the relationship between the European Union and the Member States, and among the Member States themselves, especially as this constitutional bundle of joined legal systems approaches international law.

We know from [*Commission and Others v. Kadi (2013)*] that the Court considers the Union to be a constitutional entity. But this still leaves open how the

* Excerpted from Daniel Halberstam, “*It’s the Autonomy, Stupid!*” *A Modest Defense of Opinion 2/13 on EU Accession to the European Convention on Human Rights, and the Way Forward*, 16 GERMAN L.J. 105 (2015).

EU's peculiar federal-type nature should generally affect its relationship with international law. . . . How does the deep federal-type structure of the EU's constitutional order affect even those agreements to which the EU is a full-fledged independent party? The terms of this aspect of the engagement are still being set.

Reading the Court's opinion in light of this overarching question, we see that the Court properly identifies some problems while suggesting sensible remedies. On other matters, the Court properly identifies certain problems, but nonetheless seems misguided on the remedy. Even on this approach, there is at least one element of the Opinion that seems misguided even on the underlying substantive complaint. . . .

I. The Co-Respondent Mechanism and the Prior Involvement of the Court

The Court's concerns about the co-respondent mechanism and about the prior involvement procedure are both well founded. And both demand a remedy along the lines the Court suggests. . . .

Were the ECtHR to decide—however minimally—on whether to allow the EU or a Member State to become a co-respondent, Strasbourg would directly or indirectly be deciding on the distribution of competences among the EU and the Member States. From the perspective of international law, the question of state responsibility is considered to be distinct from the internal law of the state or international organization to be judged. . . . But from the perspective of EU law, determining the responsibility for a violation and the competence to provide a remedy are both strictly questions of EU law. . . .

. . . From the perspective of EU law, the EU cannot sign a document that expressly grants the ECtHR the power to decide these questions of EU law (even if only at the margins.) Signing such a document would be signing away the CJEU's power to determine what the law of the Union is. As a constitutional matter, this is not possible. Moreover, after accession, the ECHR would become binding EU law, and the ECtHR's decisions interpreting the ECHR (including joint responsibility questions, if that were allowed) would take on great significance within the EU's legal order. . . .

. . . It seems evident that the CJEU must retain authority to interpret, not just to invalidate, EU law, and that it must retain this power in all cases in which there is any doubt on whether the CJEU has had the opportunity to do so. Let's please just not make the same mistake when fixing the Draft Agreement on this score. Do not specify that the ECtHR may decide whether such doubt exists. . . .

II. Article 344 and the Exclusivity of EU Adjudication of Member State Disputes

This issue, the Court's second main concern, is easy on substance, but far less so on remedy. . . .

. . . As several commentators have pointed out, the Court remarks grandly that the Article 33 ECHR dispute resolution mechanism is problematic because "the very existence of such a possibility undermines the requirement set out in Article 344 TFEU." But commentators have uniformly failed to notice the very next paragraph of *Opinion 2/13*, which adds: "This is particularly so since, if the EU or Member States did in fact have to bring a dispute between them before the ECtHR, the latter would, pursuant to Article 33 of the ECHR, find itself seised of such a dispute." What does this mean?

If a Member State were to take another Member State, or the EU, before the court in Strasbourg in violation of Article 344 TFEU, the Strasbourg court's jurisdiction would not be optional. On its face, the ECHR would demand that the ECtHR entertain the suit. To be sure, one might plausibly argue that a Member State was thereby acting in violation of "good faith" or in *abus de droit*. . . . [W]hether general principles of law or principles of general international law would allow the ECtHR to reject the dispute because of a violation of a treaty other than the ECHR is not clear. If the EU were to violate its own constitutional treaty by bringing a suit in the ECtHR that does not belong there, it would seem rather simple to argue that the suit does not belong there. But if a Member State, which is party to the TEU and TFEU on the one hand, and to the ECHR on the other hand, brings a suit in one forum in violation of the other forum's exclusivity rules, the case for dismissal will likely be a much closer call.

Even if Member States currently can misuse Strasbourg in just this way, accession would worsen the problem in two ways. First, the EU currently cannot be party to such abusive suits, whether in bringing suits or being sued, simply because the ECtHR lacks jurisdiction over the EU. After accession, however, an abusive suit could also be brought by and against the EU itself. Second, by acceding to the ECHR in a way that potentially allows for such suits, the EU is becoming party to the agreement that serves as the basis for such abusive suits. . . .

So what about the remedy?

A binding declaration of the Member States would almost certainly allow the ECtHR to dismiss any action brought under Article 33 ECHR in contravention of Article 344 TFEU as a violation of good faith. With the

existence of such a declaration, the Member States would be acting against the intent they themselves publicly expressed as part of the EU's accession. This places the commitment not to sue one another in Strasbourg in violation of Article 344 TFEU into a domain clearly cognizable by the ECtHR. Again, such a declaration is probably not what the Court had in mind, but the Court might be convinced to accept it depending on how the Court's other concerns are addressed.

III. Protocol 16 on the Optional Advisory Opinion Procedure

. . . Keeping the constitutional autonomy of the EU's legal order in mind, the problem of Protocol 16 is a real problem, and a distinct problem after accession. Here's why.

Before accession, an ECHR question is mostly that: a question about the interpretation of the ECHR. Article 52(3) FRC [Charter of Fundamental Rights of the European Union]* refers to the ECHR for content, but that provision does not incorporate the ECHR into EU law as a legally operative norm. After accession, by contrast, an ECHR question indeed becomes a question of EU law, at least insofar as the question implicates the EU's own ECHR obligations. This means that the advisory opinion process creates a real risk of undermining the EU's preliminary reference procedure after accession, and far more so than before. . . .

. . . Without EU accession, if a Member State court asks the ECtHR instead of the ECJ, it might well be asking the wrong question. That is, the Member State court should have asked Luxembourg about the Charter instead of asking Strasbourg about the Convention. . . .

After accession, by contrast, the mistaken Member State court would be asking Strasbourg about the Convention, when it should be asking Luxembourg about the Convention. Recall that accession turns the Convention into an integral part of EU law, binding on all actors and institutions of the Union. This means that after accession, the CJEU must be considered the authoritative interpreter of the ECHR-as-EU-law for all matters that fall within the scope of EU law. After accession, therefore, the mistaken Member State court that rings up Strasbourg instead of Luxembourg would be asking a non-EU court a question of EU law. . . .

* Article 52(3) of the Charter of Fundamental Rights of the European Union provides: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

. . . Prior to accession, the Member State court would have to invoke that Member State's full sovereignty and independent obligations under the Convention to resist the commands of an "offending" EU law. After accession, by contrast, the Member State court might be encouraged just to play off its own less-favored EU obligation (a secondary provision of EU law the Member Court dislikes) against the higher ranking EU obligation (compliance with the ECHR) after a conversation with Strasbourg. . . .

. . . [I]t may be useful to distinguish between the mere possibility of a violation of EU and signing an agreement that requires or virtually ensures the ECtHR to participate in the violation of EU law.

Here, the apparent obligation on the part of the Strasbourg court to hear such advisory opinions is indeed less pronounced than in the case of Article 33 ECHR. Strasbourg can reject such requests but must "give reasons" for doing so. But nothing would currently tell Strasbourg to refuse a request for an advisory opinion on an open ECHR question that falls within the scope of EU law. A binding unilateral declaration would provide guidance and provide a solid legal basis for the ECtHR to refuse jurisdiction when a Member State wrongly requests an advisory opinion where the question falls within the competence of the CJEU. . . .

IV. The Puzzling Nature of both Article 53s and the Problem of "Higher Standards"

. . . There has always been something counterproductive and downright misleading about Article 53, whether in the ECHR* or in the Charter.** Both provisions purport to ensure that nothing in the Charter or the Convention, as the case may be, shall derogate from existing rights in the laws—or constitutions—of the signatory or member states or their international agreements. These claims are deeply problematic.

. . . Where rights claims are made on both sides [of an issue], holding for one side inevitably means rejecting, or balancing away, the other side's claim. If a

* Article 53 of the ECHR provides: "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party."

** Article 53 of the FRC provides: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

court sets limits on positive gender-based action as a way of vindicating one person's right to equal treatment, for instance, it cannot remain infinitely open to a more broadly conceived right to gender-based preferences. . . .

As far as Article 53 of the EU's Charter of Fundamental Rights was concerned, it should have been clear that the generic reservation of more expansive rights at the Member State level was dead on arrival. Since the earliest days of the Community, and confirmed repeatedly even after the Union expressed its concern for human rights, a Member State was not allowed to object to EU law simply on the grounds that the EU measure violated an idiosyncratic human right found in that Member State's constitution. The rights reservation in Article 53 CFR could not possibly resurrect those claims. To be sure, there can be—and there is—a certain give and take between the Member State high courts and the CJEU on defining the extent of rights protection with the Union. Indeed, the EU has long derived its own set of fundamental rights in one way or another from the Member States' constitutional and international law practice. But from the internal perspective of the CJEU, the formal reservation of the unilateral power of the Member State to create any additional fundamental/human rights they please was always ruled out. And so, sure enough, the Court recently confirmed in *Melloni* that a Member State's idiosyncratic fundamental rights catalogue cannot undermine the primacy, unity, and effectiveness of EU law.

Opinion 2/13 expresses the worry that the Member States might now use Article 53 of the Convention to resurrect fundamental rights standards in defiance of [*Melloni v. Ministero Fiscale* (2013)]. . . .

Regardless whether such a case may arise, however, the claim is legally unfounded, for one simple reason: *the reservation in the Convention cannot create a power that did not previously exist*. . . . If Member States today are denied the power to maintain “higher” standards that violate the primacy, unity, and effectiveness of EU law, then Article 53 of the Convention does not and cannot give them that power in the future. If a Member States seeks to use the Convention to impose a higher standard of rights, that “higher” standard of rights can and will be reviewed under the *Melloni* doctrine just as it was before. . . .

V. The Problem of Mutual Trust and the Ticking Bomb of Non-Accession

This leads us to one of the Court's biggest concerns: mutual trust. . . . At the root of this problem is a very practical tension between the case law of the EHCR and the CJEU, especially in matters of asylum and family law. It also reflects a profound clash between the Court's constitutional and the ECHR's intergovernmental vision of the Union. . . .

One pressing practical problem is the tension between the CJEU and the ECtHR's jurisprudence regarding the Dublin system on the interstate transfer of asylum seekers to the Member State of first entry. . . . [The CJEU] has held that, in the Area of Freedom, Security, and Justice Member States must trust each other's procedures for the protection of fundamental rights. In *N.S. [v. Secretary of State of the Home Department]* (2011), for instance, the Court explained that an individual only has a legal claim to resist transfer to the Member State of first entry if the sending state has evidence of "systemic deficiencies" in the receiving state that "amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment" in the receiving state. . . .

The ECtHR's case law, by contrast, has been rather more solicitous of asylum seekers' fundamental rights. In *M.S.S. v. Belgium and Greece*, for instance, which predates the CJEU's *N.S.* decision by a few months, the ECtHR found Belgium liable under the Convention for having transferred an asylum seeker back to Greece (which the ECtHR had separately found to have violated Article 3 ECHR's prohibition on inhuman or degrading treatment). The ECtHR also held that Belgium violated Article 13 ECHR, which guarantees the right to an effective remedy, by failing to provide for a proper review of such claims. Even though the factual situation in Greece in that case clearly amounted to widespread failures throughout the system, nothing in the ECtHR's judgment suggests that Belgium's responsibility depends on the systemic shortcomings in Greece. The way the ECtHR put it, Article 13 ECHR demanded "independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 [ECHR]." . . .

Shortly after . . . the ECtHR returned to this question and the potential difference in standards . . . [i]n *Tarakhel v. Switzerland* [(2014)]:

In the case of 'Dublin' returns, the presumption that a Contracting State which is also the 'receiving' country will comply with Article 3 of the Convention can *therefore* validly be rebutted where "substantial grounds have been shown for 'believing' that the person whose return is being ordered faces a 'real risk' of being subjected to treatment contrary to that provision in the receiving country. . . .

. . . [T]he ECtHR points out . . . that the "source" of the risk is immaterial and "does not exempt that State from carrying out a thorough and individualized examination of the situation of the person concerned." The question, then, for the ECtHR is to "ascertain whether, in view of the overall situation with regard to the

reception arrangements for asylum seekers in Italy and the applicants' specific situation, substantial grounds have been shown for believing that the applicants would be at risk of treatment contrary to Article 3 if they were returned to Italy." . . .

The CJEU is concerned that, once the ECHR becomes binding on the EU itself, Member States will increasingly invoke the ECHR to disregard their EU obligations of interstate cooperation on account of individual (as opposed [to] systemic) rights violations. . . .

Many might well see this as an outrageous worry. How could the CJEU object to when a Member State refuses to send an individual into another Member State in which that individual's fundamental rights are at real risk of being violated? . . .

I suggest that the survival of any Union that demands every component state trust and give effect to the legal process of every other component state, depends on three interrelated conditions. First, a reasonably common set of values and similar level of fundamental rights protection throughout the Union. Second, the Union's ability to remedy rights violations in component states effectively whenever they occur. And third, a safety valve (either in primary or secondary law) for a component state to invoke overriding policy justifications where compliance with mutual trust would otherwise rip the Union apart.

Furthermore, there is, in my view, a hydraulic connection between these three conditions of mutual trust: where one or more of these elements is weak, the remaining element(s) must be correspondingly strong. For example, if there are serious divergences in fundamental rights protections, and the Union does not have the power to step in protect individuals, it must relax the obligations of mutual trust. At bottom, for a federal union to survive, any legal obligation of mutual trust must be grounded in social reality, not judicial fiat. . . .

. . . [Turning now to the question of accession,] [t]he CJEU's demand that accession provide an exemption for Convention violations caused by a Member State's EU-related mutual trust obligations is rather short sighted. . . .

. . . Here, non-accession is the outcome the Court should really fear. . . .

Currently—in the absence of accession—the ECtHR has decided the EU cannot be sued in Strasbourg. EU actions are reviewable in Strasbourg only indirectly by holding Member States liable either for bringing about an offensive EU measure by unanimous vote, or for implementing an EU measure. Currently, the ECtHR considers such challenges with considerable deference. Member State

actions mandated by the EU are presumed to be lawful under the Convention as long as the action is subject to a roughly equivalent standard of fundamental rights protection within the EU. . . .

As the ECtHR announced in its seminal *Bosphorus* judgment, however, this presumption can be rebutted if “in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.” The ECtHR will thus still hear challenges to a Member State’s implementation of EU law either where the EU has failed to provide an equivalent standard of protection or where the Member State exercised discretion in the matter, and the violation could have been avoided without disregarding Union law.

The *Bosphorus* standard is often likened to German Constitutional Court’s “Solange” doctrine, but there is an important difference between the two. Under the well-known *Solange* compromise, the Member State high court will not review individual complaints that EU actions violate fundamental rights, as long as the EU generally provides an equivalent standard of fundamental rights protection.

The *Solange* compromise has two components. The first is rather similar to the ECtHR’s margin of appreciation, but which we shall here simply call rough equivalence. It suggests that the standards employed by the CJEU and the ECtHR need not be identical, but only comparable—i.e., roughly the same. The second element is what I have long liked to call a wholesale/retail distinction. A Member State court following the *Solange* doctrine will not examine at the retail level—meaning with regard to an individual case—whether the EU violated fundamental rights in that case. Such a court will consider only claims that there has been a wholesale disregard for fundamental rights at the EU level—meaning that Member States will consider fundamental rights violations of the EU only where they exist in bulk As far as EU law is concerned, a Member State high court’s business under the *Solange* compromise is strictly wholesale.

The *Bosphorus* standard that Strasbourg applies to a Member State’s nondiscretionary implementation of EU actions, and the *Solange* standard are currently in serious tension with one another . . . [with regard to] what we’ve termed the *wholesale/retail* distinction.

As far as adjudicating Convention rights are concerned, the ECtHR is still firmly established in the *retail business*. The *Bosphorus* presumption can be rebutted on a case-by-case basis. But a Member State following the *Solange* compromise, as we have just seen, is not. Accordingly, the German high court might well reject an individual’s fundamental rights challenge even though the

CJEU made a grave error in that individual case as long as the CJEU has not failed to protect fundamental rights more generally. That same individual can now go to the Strasbourg court, which will condemn Germany for implementing EU law in that particular case because the action in that individual case manifestly disregarded that particular applicant's fundamental rights. Should this happen, Germany will surely rethink the *Solange* compromise.

The consequences could not be more dramatic. The current tension between Strasbourg's *retail* standard and *Solange's* *wholesale* standard threatens to unravel the entire compromise—a core principle of judicial cooperation in the Union for the past thirty years.

. . . [Yet] [t]he Court seems to miss the fact that accession does not exacerbate the wholesale/retail problem in asylum law or elsewhere. To the contrary, accession defuses the explosive tension in the triangle between Luxembourg, Strasbourg, and the Member State high courts on the wholesale/retail problem of mutual trust in asylum policy and beyond.

Once the EU accedes to the ECHR, the EU will itself be under the normal legal obligation to protect rights according to ECHR standards. According to the Draft Agreement, however, if a Member State that follows the *Solange* compromise or the “mutual trust” obligation is sued in Strasbourg after accession, the EU can become a co-respondent and effectively take over the litigation. The EU can step in and take joint or, where appropriate, full responsibility for the violation.

I am tempted to abuse an idiom and say this would be a “win-win-win” situation. By taking responsibility for the violation, the EU will shield the Member State in question. Thus, the EU will be responsible for fixing the human rights problem; Member State high courts can cheerfully continue to defer to the CJEU under the *Solange* compromise; and mutual trust will be preserved as well. To put the point somewhat colorfully: Karlsruhe can defer to Luxembourg, and if Luxembourg fails, Brussels will step in as joint respondent and take over full responsibility should Berlin get sued in Strasbourg. . . .

The CJEU, then, has identified a substantive problem that seems to be far greater than even the Court itself may have realized. As a result, the Court's proposed remedy asks for both too much and too little.

Opinion 2/13 seems to be pushing the analogy to a traditional federal state too hard. By asking for an express exemption for Member States' Convention violations caused by EU law's mutual confidence obligations, the CJEU is trying to mimic the existence of a federal state in international law. After all, where

component units of a federal state implement federal law in violation of a treaty the federation itself has signed, international law holds the center—not the component units of government—responsible. But simply transferring this rule to the EU for cases involving the Area of Freedom, Security, and Justice does both too much and too little. First, it fails to account for the many ways in which the EU is not an integrated state, especially in that its Member States are generally and broadly full-fledged international states. Second, the proposed remedy seems principally focused on the Area of Freedom, Security, and Justice and on the relations among the Member States themselves, ignoring the larger threat to vertical judicial cooperation under the *Solange* compromise.

Fortunately, the solution to this conundrum may already be contained in changes to the Draft Agreement discussed earlier: (1) eliminating the power of the ECtHR to second guess the EU’s bid to become a co-respondent, and (2) eliminating the ECtHR’s power to second guess the EU’s view on joint versus sole responsibility. As long as those two changes are made . . . , the Commission can present to the Court that it has heard the Court’s concerns, that changes have been made, and that Member State’s obligations of mutual trust will be shielded from ECtHR interference through the co-respondent mechanism.

VI. CFSP Jurisdiction and the “Consolidating Function” of the Court

The final part of the Opinion has been criticized as “mind-boggling,” as “politics of the playground,” and as giving rise to . . . “a moral duty to reject the EU’s accession to the ECHR.” . . .

But . . . [even considering the Opinion from a broad] human rights perspective does not negate the fact that, from a constitutional perspective of the Union, there may nonetheless be legitimate concerns about the Draft Agreement in the area of CFSP. . . . [I]n a nutshell, the Court’s constitutional concern can be summarized as this: The CJEU must be allowed to play a “*consolidating function*” if domestically justiciable claims that European Union law violates fundamental/human rights are brought before an international court.

. . . Although specific elements of the legal order might be adjusted in different areas of functioning, the strong presumption [of the Court] is that the great background principles of the European Union’s legal order should remain the same. As a matter of interpretation, then, in an area such as CFSP, we begin with constitutional principles and ask how these might be minimally altered by express exceptions of the Treaty. We no longer think of CFSP as a separate legal order broadly governed by its own general intergovernmental principles; nor do we take the thin governance provisions of CFSP as suggesting a more

intergovernmental vision of the Union as a whole. This is the constitutional approach that serves as the basis for the complaint about the Draft Agreement.

. . . To the extent jurisdiction over CFSP matters has not been delegated to the CJEU, . . . there is no single EU institution to harmonize potentially conflicting interpretations of EU law in this area. This is more than just “regrettable.” From a constitutional perspective, it is deeply problematic, especially in an area presumably vital to the international security of the Union. Recall Justice Holmes’ famous dictum: “I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states.” . . . If component state courts retain exclusive authority to determine the legality of Union law, the Union may well be in peril.

. . . Once the EU becomes a Contracting Party of the Convention, Strasbourg will gain authority to adjudicate the ECHR compatibility of the CFSP measure itself. Some might believe this ought not to be problematic, even from the perspective of EU law. After all, one might say, Strasbourg would only be adjudicating the “conventionality” of the CFSP measure; and Strasbourg’s judgments do not have immediate legal effect in Contracting States’ legal systems. And so, then as now, Strasbourg would not be adjudicating EU law as such.

This final line of argument may be technically accurate, but it risks ignoring the substantial practical effect that accession on the [Draft Agreement] DA’s terms may have on the constitutional system of the Union. . . .

Accession on terms of the Draft Agreement would have effectively turned the Strasbourg Court into the constitutional court of the Union—at least for certain matters. . . .

Protocol 16 would make this outcome more likely, as it inserts the Strasbourg court institutionally into those signatory states’ process of adjudication. This allows Member State high courts to be in direct communication with Strasbourg on matters of EU law without the buffer of the CJEU as a consolidating authority. . . . [And] because the ECHR itself would be binding on the EU with all the resulting legal effects in the EU’s legal order, Member State high courts might as well have taken Strasbourg’s word on compatibility with the Convention as seriously as they take any CJEU judgment on the legality of a CFSP measure under EU law. In practical terms, then, with regard to fundamental/human rights, Strasbourg’s conventionality review might well have operated as the EU’s legality review. . . .

Add to this that Member State systems are increasingly treating obedience to EU law and ECHR law similarly, often by virtue of domestic constitutional command. . . . Member State judges are principally trained at home and steeped in their domestic judicial bureaucracy. It might well have been hard for them not to look to the ECtHR for complete and final resolution of any conflict between EU law and the ECHR. Without the CJEU in sight, Member State court judges may well see EU law and the ECHR as becoming fused and fungible. After all, for Member State courts both sets of norms are constitutionally imported from Europe beyond the nation state.

In summary, Member State courts might well have taken Strasbourg's decisions on the conventionality of CFSP mandates beyond the purview of the CJEU as a final decision on the legality of action under EU law. . . .

. . . Given the lack of CJEU jurisdiction over certain CFSP matters, accession on these terms places the EU on quite a different—and rather disfavored—footing. . . . All the other Contracting Parties to the Convention have the benefit of a consolidating a domestic judiciary to harmonize interpretation and judicial review of domestic law before a case against them proceeds to Strasbourg. The EU does not. This is more than playground politics.

. . . [An] additional concrete consequence[] of denying Luxembourg the authority to consolidate domestic jurisprudence after accession . . . [is that] the EU as a whole may incur international legal responsibility as a result of a violation that could have been avoided if only the CJEU would have had jurisdiction. What is more, the entire EU may be held in violation of the Convention in Strasbourg on account of the decision of a single Member State high court

. . . [T]he importance of the consolidating function of a domestic high court is corroborated by the double standard that would have implicitly been built into Protocol 16 vis-à-vis the European Union after accession under the Draft Agreement. Notice that the Member States only allow designated “highest” courts to ask Strasbourg for advisory opinions. Under Protocol 16 Member States would not allow their regional high courts, for instance, to contact Strasbourg directly. As far as each Member State is concerned, then, with or without Protocol 16, the domestic consolidation of jurisprudence is fully preserved in interacting with Strasbourg. In the case of the EU, by contrast, accession according to the Draft Agreement would have meant that all Member State high courts could ring up Strasbourg while Luxembourg is shut out of the conversation. . . .

. . . Commentators have condemned *Opinion 2/13* by saying that accession on the terms of the CJEU's opinion is not worth pursuing. But, the human rights gap and the Court's concerns could both be accommodated rather comfortably by granting the CJEU jurisdiction over all matters that could, upon accession, come before the Strasbourg court. Everyone would win as a result.

This change would not require any involvement of non-EU members of the Council of Europe, which means, most concretely, that it would not involve reopening negotiations with Russia. From the perspective of human rights, moreover, nothing is gained by allowing the ECtHR to adjudicate Convention violations of CFSP measures while withholding from the CJEU jurisdiction to review those actions for their compatibility with the Charter and, as a matter of EU law, the Convention. And if the only explanation for this particular outcome is *realpolitik*, then that is a rather weak justification for a constitutional court such as the CJEU to accept. . . .

SOVEREIGNTY, FORMALISM, AND INTEGRATION

Hunter v. Martin, devisees of Fairfax Supreme Court of Appeals of Virginia [U.S.] 18 Va. 1 (1813)

JUDGE ROANE.

. . . We come now to enquire, whether the twenty-fifth section of the judicial act,* so far as it relates to the case before us, is justified by the constitution? . . . [T]his question . . . [includes] [w]hether the constitution gives any power to the Supreme Court of the United States, to reverse the judgment of

* Section 25 of the Judiciary Act of 1789 provided “[t]hat a final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity, . . . or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, *may be re-examined and reversed* or affirmed in the Supreme Court of the United States upon a writ of error . . .” (emphasis added).

the Supreme Court of a state? [A]nd . . . if it does, whether it authorises the limited and partial power of revisal, contemplated by that section? . . .

In order to understand . . . [these] question[s] correctly, it is proper to recollect, that the government of the United States is not a sole and consolidated government. The governments of the several states, in all their parts, remain in full force, except as they are impaired, by grants of power, to the general government. It is not only true, on general principles, that this may be the case of governments in general, but all the enlightened friends of liberty agree that it is, emphatically, the case, as to our own confederated government.

. . . [T]he powers of the federal government result from the compact to which the *states* are parties; are no farther valid, than as they are authorised by the grants enumerated in the compact; and, I will now add, by the same authority, “that in case of a deliberate, palpable, and dangerous exercise of powers, not granted by the said compact, the states, who are the parties thereto, have the right and are in duty bound, to arrest the progress of the evil.” . . .

Upon the whole, I am of opinion, that the constitution confers no power upon the Supreme Court of the United States, to meddle with the judgments of this court, in the case before us; that this case does not come within the actual provisions, of the twenty-fifth section of the judicial act; and that this court is both at liberty, and is bound, to follow its own convictions on the subject, any thing in the decisions, or supposed decisions, of any other court, to the contrary notwithstanding.

My conclusion, consequently, is, that every thing done in this cause, subsequently to the judgment of reversal, by this court, was *coram non iudice*, unconstitutional, and void, and should be entirely disregarded by this court; that the writ of error in this case was improvidently allowed; and that the judgment of reversal by this court, should be now certified to the Superior Court which has succeeded the District Court of Winchester, in its powers, for the purpose of being carried into complete execution.

[The seriatim opinions of Judge Brooke, Judge Cabell, and Judge Fleming—all agreeing that the U.S. Supreme Court’s mandate was not to be obeyed because its effort to assert appellate review was unconstitutional—have been omitted.]

In 1816, when reversing the decision of the Supreme Court of Virginia, Justice Joseph Story wrote for the Court in *Martin v. Hunter's Lessee*:

It is further argued, that no great public mischief can result from a construction which shall limit the appellate power of the United States to cases in their own courts: first, because state judges are bound by an oath to support the constitution of the United States, and must be presumed to be men of learning and integrity . . . [A]dmitting that the judges of the state courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States (which we very cheerfully admit,) it does not aid the argument. It is manifest that the constitution has proceeded upon a theory of its own, and given or withheld powers according to the judgment of the American people, by whom it was adopted. We can only construe its powers, and cannot inquire into the policy or principles which induced the grant of them. The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct or control, or be supposed to obstruct, or control, the regular administration of justice. Hence, in controversies between states; between citizens of different states; between citizens claiming grants under different states; between a state and its citizens, or foreigners, and between citizens and foreigners, it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason than that which has been stated can be assigned, why some, at least, of those cases should not have been left to the cognizance of the state courts. In respect to the other enumerated cases—the cases arising under the constitution, laws, and treaties of the United States, cases affecting ambassadors and other public ministers, and cases of admiralty and maritime jurisdiction—reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation, might well justify a grant of exclusive jurisdiction.

Virginia was not the only state in which justices took exception to the authority of the U.S. Supreme Court. As explained in *Hart and Wechsler's The Federal Courts and the Federal System* (7th ed. 2015), between “1789 and 1860 the courts of Virginia, Ohio, Georgia, Kentucky, South Carolina, California, and Wisconsin denied that the Supreme Court had the power to review state court judgments on writs of error. The legislatures of all these states (except California), and of Pennsylvania and Maryland, adopted measures denying this power to the

Supreme Court. Bills were introduced in Congress on at least ten occasions between 1821 and 1882 to deprive the Court of such jurisdiction. The arguments advanced in these attacks ranged from the relatively narrow grounds adduced in the Martin case to the extreme position that each state had an equal right to stand on its interpretation of the Constitution. The Court's position, as defined by Justice Story, did not change throughout the period of controversy."

Solange I Case

Federal Constitutional Court of Germany (Second Senate) 2 BvL 52/71 (May 29, 1974)*

[The Second Senate of the Federal Constitutional Court, with the participation of Dr. Seuffert, Dr. v. Schlabrendorff, Dr. Rupp, Dr. Geiger, Hirsch, Dr. Rinck, Dr. Rottmann, and Wand, delivered the following:]

. . . A German import/export undertaking is making an application to the Administrative Court of Frankfurt-Main for annulment of a decision of the Einfuhrund Vorratsstelle für Getreide und Futtermittel (EVSt), in which an export deposit . . . was declared to be forfeited after the firm had only partially used an export licence granted to it for 20,000 tons of ground maize. . . .

The European Court's reasoning is as follows: national rules of law could not take precedence over Community law because of the latter's autonomous status. . . .

. . . This Court—in this respect in agreement with the law developed by the European Court of Justice—adheres to its settled view that Community law is neither a component part of the national legal system nor international law, but forms an independent system of law flowing from an autonomous legal source; for the Community is not a state, in particular not a federal state, but “a sui generis community in the process of progressive integration,” an “inter-state institution” within the meaning of Article 24 (1) of the Basic Law.**

* Excerpted from a translation provided by Nomos Verlagsgesellschaft, http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=588.

** Article 24(1) of the Basic Law for the Federal Republic of Germany provides: “The Federation may by a law transfer sovereign powers to international organisations.”

. . . [I]n principle, the two legal spheres stand independent of and side by side one another in their validity, and that, in particular, the competent Community organs, including the European Court of Justice, have to rule on the binding force, construction and observance of Community law, and the competent national organs on the binding force, construction and observance of the constitutional law of the Federal Republic of Germany. The European Court of Justice cannot with binding effect rule on whether a rule of Community law is compatible with the Basic Law, nor can the Federal Constitutional Court rule on whether, and with what implications, a rule of secondary Community law is compatible with primary Community law. This does not lead to any difficulties as long as the two systems of law do not come into conflict with one another in their substance. Therefore there grows forth from the special relationship which has arisen between the Community and its members by the establishment of the Community, first and foremost, the duty for the competent organs, in particular for the two courts charged with reviewing law—the European Court of Justice and the Federal Constitutional Court—to concern themselves in their decisions with the concordance of the two systems of law. Only in so far as this is unsuccessful can there arise the conflict which demands the drawing of conclusions from the relationship of principle between the two legal spheres set out above.

. . . From the relationship between Basic Law and Community law outlined above, the following conclusions emerge with regard to the jurisdiction of the European Court of Justice and of the Federal Constitutional Court[:]

a) In accordance with the Treaty rules on jurisdiction, the European Court of Justice has jurisdiction to rule on the legal validity of the norms of Community law (including the unwritten norms of Community law which it considers exist) and on their construction. It does not, however, decide incidental questions of national law of the Federal Republic of Germany (or in any other member state) with binding force for this State. . . .

In the framework of this jurisdiction, the European Court determines the content of Community law with binding effect for all the member states. . . .

b) As emerges from the foregoing outline, the Federal Constitutional Court never rules on the validity or invalidity of a rule of Community law. At most, it can come to the conclusion that such a rule cannot be applied by the authorities or courts of the Federal Republic of Germany in so far as it conflicts with a rule of the Basic Law relating to fundamental rights. . . .

The result is: as long as the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights decided on

by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law, a reference by a court in the Federal Republic of Germany to the Federal Constitutional Court in judicial review proceedings, following the obtaining of a ruling of the European Court under Article 177 of the Treaty,^{*} is admissible and necessary if the German court regards the rule of Community law which is relevant to its decision as inapplicable in the interpretation given by the European Court, because and in so far as it conflicts with one of the fundamental rights in the Basic Law. . . .

The challenged rule of Community law in the interpretation given by the European Court of Justice does not conflict with a guarantee of fundamental rights in the Basic Law, neither with Article 12 nor with Article 2 (1) of the Basic Law.^{**}

[Dr. Rupp, Hirsch, and Wand filed a dissenting opinion.]

Lisbon Treaty Case
Federal Constitutional Court of Germany (Second Senate)
2 BvE 2/08 (June 30, 2009)

[The Second Senate of the Federal Constitutional Court, with the participation of Justices Voßkuhle (Vice-President), Broß, Osterloh, Di Fabio, Mellinshoff, Lübke-Wolff, Gerhardt, and Landau, delivered the following:]

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 equal to a fundamental right. . . . The right to vote establishes a right to democratic self-determination, to free and

^{*} Article 177 of the Treaty of Rome provides: “The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.”

^{**} Article 12 protects the occupational freedom of the individual. Article 2(1) defends the right to free development of one’s personality.

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 may not be balanced against other legal interests; it is inviolable. . . . The so-called eternity guarantee even prevents a constitution-amending legislature from disposing of the identity of the free constitutional order. 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 determined by the Basic Law for the German constitutional order. This applies as far as the limit of the inalienable constitutional identity 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 directed towards opening the sovereign state system order to peaceful cooperation of the nations and towards European integration. Neither *pari passu* integration into the European Union nor integration into peacekeeping systems such as the United Nations is tantamount to submission to alien powers. Instead, it is a voluntary, mutual *pari passu* commitment 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 powers, however, comes from the Member States of such an institution. They therefore permanently remain the masters of the Treaties. . . .

233. The Basic Law does not authorise the German state bodies 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 Even 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 so far prevailing rules of state equality can, from the perspective of German constitutional law, only occur as a result of the freedom of action of the self-determined people. According to the constitution, such integrational steps 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 by 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 an association of sovereign states (*Staatenverbund*) which is founded on the principle of the reversible self-commitment. . . .

235. The obligation under European law to respect the constituent power of the Member States as the masters of the Treaties corresponds to the non-transferable identity of the constitution . . . , which is not open to integration in this respect. Within the boundaries of its competences, the Federal Constitutional Court must review, where necessary, whether these principles are adhered to. . . .

239. . . . For borderline cases of what is still constitutionally admissible, the German legislature must, where necessary, take precautions in its legislation accompanying approval to ensure that the responsibility for integration of the legislative bodies can sufficiently develop. . . .

264. A structural democratic deficit that would be unacceptable pursuant to Article 23 [of the Basic Law, concerning Germany's obligations of rights protection under, as well as the principle of subsidiarity in, the European Union] 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 opinion-formation 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 example the legislative competences, essential for democratic self-determination, were exercised mainly at Union level. If an imbalance between type 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 because of its responsibility for integration, to endeavour to effect a change, and in the worst case, even to refuse further participate in the European Union. . . .

295. Mere participation of the citizens in political rule which would take the place of representative self-government of the people cannot be a substitute for the legitimising connection of elections and other votes and of a government supported by 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 . . . the citizens of the Union and "representative" associations with the possibility of making their views heard, as well a[s] 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 a supranational organisation the European Union must comply, as before, with the principle of conferral 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 extension 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, a concept conferred under an international treaty, i.e. a derived concept 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 derivative connection is not altered by the fact that the concept of primacy of application is not explicitly provided for in the treaties but was developed 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 in any case in the clear absence of a constitutive order to apply the law, the inapplicability of such a legal instrument to Germany is established by the Federal Constitutional Court. Such determination must also be made if, within or outside the sovereign powers conferred, these powers are exercised with the consequent effect on Germany of a violation of its constitutional identity, which is inviolable pursuant to Article 79.3 of the Basic Law and is also respected by European treaty law, namely Article 4.2[‘s] first sentence [in the] Lisbon TEU. . . .*

Article 36(1)(b) of the Vienna Convention on Consular Relations (1963) 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 rights under this subparagraph.” The Optional Protocol Concerning the Compulsory Settlement of Disputes (1964) gives compulsory jurisdiction to the International

* Article 4.2 of the Treaty on European Union provides: “The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.”

Court of Justice (ICJ) over disputes “arising out of the interpretation or application of the Convention.” In 1969, the United States ratified both the Vienna Convention and the Optional Protocol. On March 7, 2005, the United States withdrew from the Optional Protocol. Below are excerpts from two U.S. Supreme Court cases addressing the domestic implications of the ICJ rulings on the Vienna Convention.

In *Sanchez-Llamas v. Oregon* (2006), the U.S. Supreme Court considered whether state courts were required to suppress criminal evidence that was allegedly obtained without complying with Article 36(1)(b) of the Vienna Convention. Moises Sanchez-Llamas, from Mexico, was arrested and convicted in Oregon of violent crimes. Sanchez-Llamas was not informed of his right to consular notice. As a consequence, Sanchez-Llamas claimed before trial that incriminating evidence obtained during his interrogation should have been suppressed. He lost his motion and was convicted after trial. The Oregon Supreme Court rejected his appeal on Article 36 grounds.

In *Medellín v. Texas* (2008), the U.S. Supreme Court considered a claim by Jose Ernesto Medellín, one of 51 Mexican nationals who prevailed in 2004 before the ICJ, which held that because the United States had violated the Vienna Convention by failing to inform nationals of their Vienna Convention rights, their convictions should be reconsidered. Medellín had been convicted and sentenced in Texas for murder. The Texas courts thereafter refused to hear his Vienna Convention claim as untimely.

Sanchez-Llamas v. Oregon
Supreme Court of the United States
548 U.S. 331 (2006)

ROBERTS, C.J., delivered the opinion of the Court.

Article 36 of the Vienna Convention on Consular Relations, Apr. 24, 1963, addresses communication between an individual and his consular officers when the individual is detained by authorities in a foreign country. These consolidated cases concern the availability of judicial relief for violations of Article 36. We are confronted with three questions. *First*, does Article 36 create rights that defendants may invoke against the detaining authorities in a criminal trial or in a postconviction proceeding? *Second*, does a violation of Article 36

require suppression of a defendant's statements to police? *Third*, may a State, in a postconviction proceeding, treat a defendant's Article 36 claim as defaulted because he failed to raise the claim at trial? We conclude, even assuming the Convention creates judicially enforceable rights, that suppression is not an appropriate remedy for a violation of Article 36, and that a State may apply its regular rules of procedural default to Article 36 claims. . . .

. . . As far as the text of the Convention is concerned, the question of the availability of the exclusionary rule for Article 36 violations is a matter of domestic law.

It would be startling if the Convention were read to require suppression. The exclusionary rule as we know it is an entirely American legal creation. More than 40 years after the drafting of the Convention, the automatic exclusionary rule applied in our courts is still "universally rejected" by other countries. It is implausible that other signatories to the Convention thought it to require a remedy that nearly all refuse to recognize as a matter of domestic law. There is no reason to suppose that Sanchez-Llamas would be afforded the relief he seeks here in any of the other 169 countries party to the Vienna Convention. . . .

We also agree with the State of Oregon and the United States that our authority to create a judicial remedy applicable in state court must lie, if anywhere, in the treaty itself. . . .

Of course, it is well established that a self-executing treaty binds the States pursuant to the Supremacy Clause, and that the States therefore must recognize the force of the treaty in the course of adjudicating the rights of litigants. And where a treaty provides for a particular judicial remedy, there is no issue of intruding on the constitutional prerogatives of the States or the other federal branches. Courts must apply the remedy as a requirement of federal law. But where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own. . . .

. . . [E]ven if Sanchez-Llamas is correct that Article 36 implicitly requires a judicial remedy, the Convention equally states that Article 36 rights "shall be exercised in conformity with the laws and regulations of the receiving State." Under our domestic law, the exclusionary rule is not a remedy we apply lightly. . . .

The Virginia courts denied . . . [the petitioner's] Article 36 claim on the ground that he failed to raise it at trial or on direct appeal. The general rule in federal habeas cases is that a defendant who fails to raise a claim on direct appeal is barred from raising the claim on collateral review. . . .

Nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts.⁵ The ICJ's decisions have "*no binding force* except between the parties and in respect of that particular case." Any interpretation of law the ICJ renders in the course of resolving particular disputes is thus not binding precedent *even as to the ICJ itself*; there is accordingly little reason to think that such interpretations were intended to be controlling on our courts. . . .

. . . [The ICJ's decision in *Avena and Other Mexican Nationals v. U.S.* (2004) is] therefore entitled only to the "respectful consideration" due an interpretation of an international agreement by an international court. . . .

We therefore conclude . . . that claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims. . . .

Although these cases involve the delicate question of the application of an international treaty, the issues in many ways turn on established principles of domestic law. Our holding in no way disparages the importance of the Vienna Convention. The relief petitioners request is, by any measure, extraordinary. . . . It is no slight to the Convention to deny petitioners' claims under the same principles we would apply to an Act of Congress, or to the Constitution itself. . . .

[The concurring opinion of Justice GINSBURG has been omitted.]

Justice BREYER, with whom Justice STEVENS and Justice SOUTER join, and with whom Justice GINSBURG joins . . . [in part].

. . . We . . . consider three related questions: (1) May a criminal defendant raise a claim (at trial or in a postconviction proceeding) that state officials violated this provision? (2) May a State apply its usual procedural default rules to Convention claims, thereby denying the defendant the right to raise the claim in a postconviction proceeding on the ground that the defendant failed to raise the claim at trial? And (3) is suppression of a defendant's confession (made to police after a violation of the Convention) an appropriate remedy?

The Court assumes, but does not decide, that the answer to the first question is "yes." . . . It answers the second question by holding that a State always may apply its ordinary procedural default rules to a defendant's claim of a Convention violation. . . . Its answer to the third question is that suppression is never an appropriate remedy for a Convention violation. . . .

Unlike the majority, I would decide the first question and answer it affirmatively. A criminal defendant may, at trial or in a postconviction proceeding, raise the claim that state authorities violated the Convention in his case. My answer to the second question is that sometimes state procedural default rules must yield to the Convention's insistence that domestic laws "enable full effect to be given to the purposes for which" Article 36's "rights . . . are intended." . . . And my answer to the third question is that suppression may sometimes provide an appropriate remedy. . . .

Medellín v. Texas
Supreme Court of the United States
552 U.S. 491 (2008)

ROBERTS, C.J., delivered the opinion of the Court.

. . . After the *Avena* decision, President George W. Bush determined, through a Memorandum for the Attorney General, that the United States would "discharge its international obligations" under *Avena* "by having State courts give effect to the decision." . . .

. . . 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 procedural default rules? We conclude that neither *Avena* nor the President's Memorandum constitutes directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions. . . .

. . . 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. . . .

. . . 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.” . . .

Justice STEVENS, concurring in the judgment.

. . . [E]ven though the ICJ’s judgment in *Avena* is not “the supreme Law of the Land,” 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 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. . . .

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 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. . . .

Commission and Others v. Kadi

Court of Justice of the European Union (Grand Chamber)
Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, C-584/10 P
(July 18, 2013)

[Composed of V. Skouris, President, K. Lenaerts (Rapporteur), Vice-President, M. Ilešič, L. Bay Larsen, T. von Danwitz and M. Berger, Presidents of Chambers, U. Lõhmus, E. Levits, A. Arabadjiev, C. Toader, J.-J. Kasel, M. Safjan and D. Šváby, Judges, Advocate General: Y. Bot, Registrar: A. Impellizzeri, Administrator.]

1. . . . [T]he European Commission, the Council of the European Union and the United Kingdom of Great Britain and Northern Ireland seek to have set aside the judgment of the General Court of the European Union of 30 September 2010 in *Kadi v. Commission* [(2010)], by which that Court annulled Commission Regulation (EC) No 1190/2008 of 28 November 2008 . . .

8. . . . Initially directed solely against the Taliban of Afghanistan, those resolutions were subsequently extended to include Usama bin Laden, Al-Qaeda and persons and entities associated with them. The resolutions provide, inter alia, for the freezing of assets of the organisations, entities and persons identified by the committee established by the Security Council in accordance with Resolution 1267 (1999) of 15 October 1999

10. Under paragraph 5 of Security Council Resolution 1735 (2006) of 22 December 2006, when States propose names of organisations, entities or persons to the Sanctions Committee for inclusion on the [Sanctions Committee] Consolidated List, they must . . . provide a statement of case

12. As regards delisting requests, Security Council Resolution 1904 (2009) of 17 December 2009 established an ‘Office of the Ombudsperson,’ whose task, under paragraph 20 thereof, is to assist the Sanctions Committee in the consideration of such requests. . . .

17. Mr. Kadi’s name was subsequently added to the list in Annex I to Council Regulation (EC) No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan

19. By judgment of 21 September 2005 in *Kadi v. Council and Commission* [(2005)], the General Court dismissed that action. In essence, the

General Court held that it followed from the principles governing the relationship between the international legal order under the United Nations and the European Union legal order that Regulation No 881/2002, being designed to implement a Security Council resolution leaving no latitude in that regard, could not be the subject of judicial review of its internal lawfulness and thus enjoyed immunity from jurisdiction, except as regards its compatibility with rules falling within the ambit of *jus cogens*, understood as a body of rules of public international law binding on all subjects of international law, including the bodies of the UN, and from which no derogation is possible.

20. Accordingly, the General Court, applying the standard of universal protection of the fundamental rights of the human person covered by *jus cogens*, ruled out, in the given case, any infringement of the rights relied on by Mr Kadi. As regards, in particular, the right to effective judicial review, the General Court stated that it was not for it to review indirectly whether Security Council Resolutions are compatible with such fundamental rights as are protected by the European Union legal order, nor to verify that there had been no error of assessment of the facts and evidence relied on by the Security Council in support of the measures it had taken, nor, again, to review indirectly the appropriateness and proportionality of those measures. The General Court added that any such lacuna in the judicial protection available to Mr Kadi is not in itself contrary to *jus cogens*.

21. By its judgment of 3 September 2008 in *Kadi and Al Barakaat International Foundation v. Council and Commission* [(2008)] ('the *Kadi* judgment'), the Court set aside the judgment of the General Court in *Kadi v Council and Commission* and annulled Regulation No 881/2002* in so far as it concerned Mr Kadi.

22. In essence, the Court held that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all European Union acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by that treaty. The Court held further that, notwithstanding the fact that undertakings given in the UN context must be observed when implementing Security Council resolutions, it does not follow

* Regulation 881/2002 provides for certain specific restrictive measures against persons and entities associated with Usama bin Laden, Al-Qaida and the Taliban, and repealed Council Regulation (EC) No 467/2001 "prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan."

from the principles governing the international legal order under the United Nations that an act adopted by the European Union such as Regulation No 881/2002 thereby enjoys immunity from jurisdiction. The Court added that there is no basis for such immunity in the EC Treaty.

23. In those circumstances the Court held . . . that the Courts of the European Union must ensure the review, in principle the full review, of the lawfulness of all European Union acts in the light of fundamental rights, including where such acts are designed to implement Security Council resolutions, and that the General Court's reasoning was consequently vitiated by an error of law.

24. Ruling on the action brought by Mr Kadi before the General Court, the Court held . . . that the effectiveness of judicial review means that the competent European Union authority is bound to communicate the grounds for the contested listing decision to the person concerned and to provide that person with the opportunity to be heard in that regard. . . .

27. On 21 October 2008 the Chairman of the Sanctions Committee communicated the narrative summary of reasons for Mr Kadi's listing on that committee's Consolidated List to France's Permanent Representative to the UN, and authorised its transmission to Mr Kadi.

33. . . . In order to comply with . . . [the *Kadi* judgment], the Commission has communicated the . . . [summary] of reasons provided by the . . . Sanctions Committee, to Mr. Kadi . . . and given [him] the opportunity to comment on these grounds in order to make [his] point of view known. . . . [T]he Commission considers that the listing of Mr Kadi is justified for reasons of his association with the Al-Qaida network. . . .

59. The Commission, the Council and the United Kingdom put forward various grounds in support of their respective appeals. . . . The first ground, raised by the Council, alleges an error of law in that the contested regulation was not recognised as having immunity from jurisdiction. The second ground, raised by the Commission, the Council and the United Kingdom, alleges errors of law with regard to the level of intensity of judicial review determined in the judgment under appeal. The third ground, again raised by those three appellants, alleges that the General Court erred in its examination of Mr Kadi's pleas in respect of infringement of his rights of defence and his right to effective judicial protection, and in respect of infringement of the principle of proportionality. . . .

61. . . . [T]he Council . . . claims that the refusal to grant the contested regulation immunity from jurisdiction is contrary to international law. That refusal wholly ignores the fact that it is the Security Council which has primary

responsibility for determining the measures necessary for the maintenance of international peace and security and ignores the primacy of obligations under the United Nations Charter over those arising under any other international agreement. It disregards the obligation to act in good faith and the duty to provide mutual assistance which must be respected when implementing Security Council measures. That approach leads the European Union's institutions to substitute themselves for the international bodies which have the relevant powers. It amounts to reviewing the legality of Security Council resolutions in the light of European Union law. The uniform, unconditional and immediate application of those resolutions is jeopardised. States which are members both of the United Nations and of the European Union find themselves in an impossible position as regards meeting their international obligations.

62. The refusal to grant the contested regulation immunity from jurisdiction is also contrary to European Union law. It wholly ignores the fact that, under that law, the European Union institutions are bound to comply with international law and with the decisions of organs of the UN, where those institutions exercise, on the international stage, powers that have been transferred to them by the Member States. It disregards the need to strike a balance between the maintenance of international peace and security, on the one hand, and the protection of human rights and fundamental freedoms, on the other. . . .

65. . . . [In the judgment under appeal, the General Court held that] the contested regulation could not be afforded any immunity from jurisdiction on the ground that its objective is to implement resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations . . . [, which governs action with respect to threats or breaches to the peace, or acts of aggression]. . . .

67. That European Union measures implementing restrictive measures decided at international level enjoy no immunity from jurisdiction has . . . been confirmed . . . without the primacy of a Security Council resolution at the international level thereby being called into question, the requirement that the European Union institutions should pay due regard to the institutions of the United Nations must not result in there being no review of the lawfulness of such European Union measures, in the light of the fundamental rights which are an integral part of the general principles of European Union law. . . .

71. . . . [T]he Commission, the Council and the United Kingdom, . . . claim . . . that the judgment under appeal is vitiated by an error of law in that . . . the *Kadi* judgment contains no indication supporting the General Court's

approach concerning the level of intensity of judicial review to be applied to a European Union measure such as the contested regulation. . . .

97. . . . [T]he Court held . . . that the Courts of the European Union must, in accordance with the powers conferred on them by the Treaties, ensure the review, in principle the full review, of the lawfulness of all Union acts in the light of the fundamental rights forming an integral part of the European Union legal order, including review of such measures as are designed to give effect to resolutions adopted by the [UN] Security Council

98. Those fundamental rights include, inter alia, respect for the rights of the defence and the right to effective judicial protection.

99. The first of those rights . . . includes the right to be heard and the right to have access to the file, subject to legitimate interests in maintaining confidentiality.

100. The second of those fundamental rights . . . requires that the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based . . . so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court having jurisdiction, and in order to put the latter fully in a position to review the lawfulness of the decision in question

107. . . . [W]here, under the relevant Security Council resolutions, the Sanctions Committee has decided to list the name of an organisation, entity or individual on its Consolidated List, the competent European Union authority must, in order to give effect to that decision on behalf of the Member States, take the decision to list the name of that organisation, entity or individual . . . on the basis of the summary of reasons provided by the Sanctions Committee. . . .

117. . . . [I]n the event that the person concerned challenges the lawfulness of the decision to list or maintain the listing of his name . . . , the review by the Courts of the European Union must extend to whether rules as to procedure and rules as to competence, including whether or not the legal basis is adequate, are observed

118. The Courts of the European Union must, further, determine whether the competent European Union authority has complied with the procedural safeguards . . . and, in particular, whether the reasons relied on are sufficiently detailed and specific.

119. . . . [A]s part of the review of the lawfulness of the grounds which are the basis of the decision to list or to maintain the listing of a given person . . . , the Courts of the European Union are to ensure that that decision, which affects that person individually . . . , is taken on a sufficiently solid factual basis. . . .

126. . . . [I]t is for the Courts of the European Union, when carrying out an examination of all the matters of fact or law produced by the competent European Union authority, to determine whether the reasons relied on by that authority as grounds to preclude that disclosure are well founded. . . .

134. The essence of effective judicial protection must be that it should enable the person concerned to obtain a declaration from a court, by means of a judgment ordering annulment whereby the contested measure is retroactively erased from the legal order and is deemed never to have existed, that the listing of his name, or the continued listing of his name, on the list concerned was vitiated by illegality

163. . . . [N]one of the allegations presented against Mr Kadi in the summary provided by the Sanctions Committee are such as to justify the adoption, at European Union level, of restrictive measures against him, either because the statement of reasons is insufficient, or because information or evidence which might substantiate the reason concerned, in the face of detailed rebuttals submitted by the party concerned, is lacking.

164. . . . [T]he errors of law . . . which vitiate the judgment under appeal are not such as to affect the validity of that judgment, given that its operative part, which annuls the contested regulation in so far as it concerns Mr Kadi, is well founded on the legal grounds

165. Consequently, the appeals must be dismissed. . . .



CONSTITUTIONAL PLURALISM: THE EUROPEAN AND INTERNATIONAL LEGAL ORDERS

Hans Kelsen

Pure Theory of Law (1960)*

. . . Traditional theory . . . sees in international and national law two different, mutually independent, isolated, norm systems, based on two different basic norms. This dualistic construction—or rather, “pluralistic” construction, in view of the multitude of national legal orders—is untenable, if both the norms of international law and those of the national legal orders are to be considered as simultaneously valid legal norms. This view implies already the epistemological postulate: to understand all law in one system—that is, from one and the same standpoint—as one closed whole. Jurisprudence subsumes the norms regulating the relations between states, called international law, as well as the norms of the national legal orders under one and the same category of law. In so doing it tries to present its object as a unity. The negative criterion of this unity is its lack of contradiction. This logical principle is also valid for the cognition in the realm of norms. It is not possible to describe a normative order by asserting the validity of the norm: “*a* ought to be” and at the same time “*a* ought not to be.” In defining the relation between international and national law, it is important, above all, to answer the question whether there can be an insoluble conflict between the two systems of norms. Only if this question has to be answered in the affirmative, the unity of international and national law is excluded. In that case, indeed, only a dualistic or pluralistic construction of the relations between international and national law would be possible. If so, however, we cannot speak of both being valid at the same time. This is demonstrated by the relation between law and morals. Here, indeed, such conflicts are possible—for example, if a certain moral order forbids taking of human life under all circumstances, while at the same time a positive legal order prescribes the death penalty and authorizes the government to go to war under the conditions determined by international law. In this dilemma, an individual who regards the law as a system of valid norms has to disregard morals as such a system, and one who regards morals as a system of valid norms has to disregard law as such a system. This is expressed by saying: From the viewpoint of morals, the death penalty and war are forbidden, but from the viewpoint of law both are commanded or at least permitted. By this is only expressed, however, that no viewpoint exists from which both morals and law

* Excerpted from HANS KELSEN, *PURE THEORY OF LAW* 328-329 (Max Knight trans., Univ. of Los Angeles Press, 2005) (1960).

may simultaneously be regarded as valid normative orders. No one can serve two masters.

If an insoluble conflict existed between international and national law, and if therefore a dualistic construction were indispensable, one could not regard international law as “law” or even as a binding normative order, valid simultaneously with national law (assuming that the latter is regarded as a system of valid norms). The relations concerned could be interpreted only either from the viewpoint of the national legal order or from that of the international legal order. Insofar as this is assumed by a theory which believes that insoluble conflicts exist between international law as a “law” but only as a kind of international morality, nothing could logically be objected. But most representatives of the dualistic theory feel obliged to regard both international and national law as valid legal orders, independent of each other in their validity and subject to possible conflict with each other. Such a theory, however, is untenable. . . .

Mattias Kumm

*How Does European Union Law Fit into the World of Public Law? Costa, Kadi and Three Models of Public Law (2011)**

. . . [A]ccording to Kelsen the world of law has to be conceived in monist terms. Taking a legal point of view is incompatible with the claim that from the point of view of one legal order (say, the European legal order) x is the case, but from the point of view of another legal order (the legal order of Member States) y is the case. There can be no coexistence of different legal systems constituted by different ultimate legal rules. The world of law is unified not as an empirically contingent matter, but as a conceptual matter.

This is not the place to provide a comprehensive discussion and critique of the argument. Here it must suffice to point out that the argument is not at all obvious. It is not clear why it would undermine the status of EU Law as law that there is another legal system that incorporates EU Law on its own terms. It is unclear why it should be *conceptually impossible*, as opposed to, say, undesirable on pragmatic grounds, to imagine the legal world in pluralist terms. What is *conceptually* wrong with acknowledging the possibility of the existence of

* Excerpted from Mattias Kumm, *How Does European Union Law Fit into the World of Public Law? Costa, Kadi and Three Models of Public Law*, in *POLITICAL THEORY OF THE EUROPEAN UNION* (Jürgen Neyer & Antje Wiener eds., 2011).

different legal orders, each of which recognize the authority of the law of the other on its own terms? There does not *have to be* only one legal point of view, even though it *might* be desirable that there be only one on other normative grounds. Member States may or may not be doing the right thing if they insist on determining the status of EU Law in light of their own national constitutional requirements. But they are not thereby undermining the status of EU Law as law properly so called. . . .

Neil Walker

*The Philosophy of European Union Law (2015)**

. . . [T]he pan-European political project has always been ‘formally at odds with itself,’ fundamentally challenged by the very conditions that invite it. . . . [T]he political recognition of Europe as a discrete object could only be of an entity whose basic structure and distinctive configuration was one of prior and embedded political plurality. On the one hand, this underlying structure made for a fragile, often broken, inter-state accommodation On the other hand, some such projects of union, in their overweening ambition, threatened to destroy the very diversity that was Europe’s distinctive political inheritance. . . .

. . . [O]ne of the best-known and influential public philosophies of the EU, and one of the fullest attempts to specify supranationalism as a structural vision of the legal and political order, elevates economic prosperity to a polity-defining ideal within a broader understanding of the EU’s mission. . . . Rather than emulate or replace the state, supranationalism undertook to honour the goods of belonging and originality associated with nation statehood. At the same time, it sought to overcome the insularities and tame the excesses of national sentiment under a new voluntary discipline of ‘constitutional tolerance,’ exercised by the still formally sovereign members *inter se* in accordance with their new edifice of common regulation. . . .

Yet the adequacy of these justificatory models [has] . . . become less plausible . . . in a supranational polity with a broader and deeper policy agenda, with a bureaucracy and agency structure increasingly attenuated from national control [T]he very conditions that demand a higher threshold of legitimation of common action have tended to leave the Union less favourably placed to reach

* Excerpted from Neil Walker, *The Philosophy of European Union Law*, in OXFORD HANDBOOK OF EUROPEAN UNION LAW (A. Arnulf & D. Chalmers eds., 2015).

that threshold. For as the EU increasingly sought market-making or market-correcting interventions involving politically salient choices, it simultaneously reduced the capacity of states to act independently in these policy areas. . . .

. . . The EU may not have been born free, but at a certain point of its development of an increasingly capacious and contentious agenda for the allocation of rights, risks and resources, the key to its legitimacy, has come to lie with the collective self-determination of all whom this agenda affects.

. . . [D]eep controversy turns on the legitimate boundaries of supranational policy intervention into traditional areas of national democratic competence through regulatory mechanisms that themselves lack the courage of collective democratic conviction. . . .

In this complex terrain, the idea of a ‘right to justification’ has recently been mooted to allow a more context-sensitive justificatory methodology for different sectors and levels of supranational decision. . . . [P]rovided we respect that logic . . . , we need not make rigid choices for or against the priority of democracy in general or in particular institutional contexts. Such an approach, however, for all its promise, still cannot easily . . . resolve the meta-question of who gets to decide what pattern and degree of democracy is appropriate

. . . [T]here is tension over the extent to which the general principles of the [EU] legal order . . . should be understood as permanent or long-term ideals set apart from the vicissitudes of the EU as a political order, or as sensitive to the changing role and purpose of the EU political order. On one view, the confident maturity of the legal order is indicated in its relative autonomy from these circumstances. On another view, the restricted purview of the discussion of general principles is instead a reflection and indictment of . . . the broader failure of the EU to develop a forthright and morally defensible mission for the 21st century. From that perspective, the relative autonomy of the legal order from deeper ethico-political concerns is understood as a symptom of and apology for, that broader moral shortcoming, rather than accepted in general terms as a self-standing virtue of any legal order seeking to protect itself from undue political influence.

. . . The Court of Justice, then, became a vital mechanism to avoid conflict or gridlock arising from the divergence of national political interests. As a ‘trustee court’ delegated significant power to bind its national principals and to expand its zone of discretion, it could ‘complete’ the supranational contract in incremental fashion. It would do so both by advancing the material agenda of integration case

by case and by adjusting the balance, so sensitive in the mixed polity context, in boundary conflicts over the powers of the diversely-sourced institutions.

The fiduciary role of a trustee court in the making of a legal constitution, however, is not legitimated solely through considerations of system functionality. Performative factors also matter, and here the tradition of legal formalism, underpinned by the predominately civilian roots of the Member States, is significant. A position of judicial neutrality, assiduously cultivated in the context of a Court composed of senior jurists from all Member States and delivering judgment in a typically laconic and scrupulously non-partisan ‘legalese,’ has lent cumulative authority to the Court’s decision making. . . .

. . . What would be both appropriate and necessary, however, and what has been conspicuous by its absence . . . is an inclusive and transparent form of law making producing general norms that speak explicitly, and with settled commitment, to a renewed reciprocity of interests among all Member States. . . .

. . . [O]ne of the distinguishing features of the law, indeed what makes the law ‘the law’ and not just a bundle or jumble of ‘laws,’ concerns how it hangs together as a whole. . . .

. . . The EU, with its partial jurisdiction, its Treaty-dependent foundations and its reliance on state institutions for much of the enforcement and some of the basic legislative elaboration of its normative order, lacks the comprehensiveness of reach, original and unchallenged supremacy, and wide capacity to absorb other legal materials on its own terms that the typical state-centred legal system has. . . .

Does this mean that the EU has no legal system, or at least no independent legal system of its own, but is merely a satellite or extension of the 28 Member State legal systems? Or is the EU part and parcel of one large, conglomerate legal system also embracing the legal systems—or rather sub-systems—of all the Member States? Or is the EU best viewed as possessing its own legal system, distinct from those of the Member States even though densely interconnected with them? . . .



Miguel Poiares Maduro

*Three Claims of Constitutional Pluralism (2012)**

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 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.

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

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. . . .

EXTRATERRITORIALITY AND HUMAN RIGHTS

DISCUSSION LEADERS

HAROLD HONGJU KOH AND ROSALIE ABELLA

IV. EXTRATERRITORIALITY AND HUMAN RIGHTS

DISCUSSION LEADERS:

HAROLD HONGJU KOH AND ROSALIE ABELLA

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This chapter explores the relationship between states' territorial jurisdiction and their obligations to respect and to protect human rights. As the materials detail below, some jurisdictions adopt a presumption of extraterritorial obligations – that their commitments to human rights and to their own laws apply when they act or have effective control over others within or beyond their physical boundaries. Other countries—and notably the United States—are identified with an approach described as “strict territoriality,” generally limiting legal commitments to actions on U.S. soil.

Below, we illustrate differing approaches, presumptions, and applications, sometimes—mediating between the poles of extraterritoriality and strict territoriality—to explore a “reasonableness” standard, the possibility of special rules for armed conflict, and a presumption against extraterritoriality.

THE PROBLEM

Marko Milanovic

Extraterritorial Application of Human Rights Treaties (2011)*

If a state affects the lives of individuals outside its sovereign borders, when does it owe them obligations pursuant to the human rights treaties to which it is a party? . . . In recent years, the issue of the extraterritorial application of human rights treaties has truly come to the fore. Not only is it now the subject of a growing literature, but more and more actual cases are being litigated. Courts have involved themselves on human rights grounds in such controversies as Turkey's invasion of northern Cyprus, [the North Atlantic Treaty Organization] NATO's use of force against Serbia, Russia's involvement in Georgia, or the US and UK invasion of Iraq. No longer are such cases examined solely from the more orthodox standpoints of the *jus ad bellum* and the *jus in bello*, or state sovereignty more generally. Now it is increasingly the individuals directly affected by extraterritorial state action who are pursuing the avenues open to them under international human rights law. And because the impact of human rights treaties in an extraterritorial context is growing, states need to take it into account in their policy-making.

* Excerpted from MARKO MILANOVIC, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY* (2011).

Many of the controversies surrounding the extraterritorial application of human rights treaties . . . have been pushed to their limit by the actions of certain states engaged in the ongoing, if rebranded, ‘Global War on Terror,’ particularly by the United States under the administration of George W. Bush

Most of these controversies are to an extent counterintuitive. Human rights are, after all, supposed to be universal—why should it matter whether a state violates a person’s rights through killing, torture, indefinite detention, or unfair trials by acting within its territory or outside it? Indeed, when a state acts against an individual outside its territory, there is almost a human rights reflex to immediately venture into the substantive issue of whether the person’s rights were violated. . . .

At the legal level, the question whether a Yemeni national, who is living in Yemen when he is killed by the United States with the consent of the Yemeni government, has rights vis-à-vis the United States is a matter of treaty interpretation. . . . [T]he scope of application of many major human rights treaties is defined by a very similar clause: the persons concerned must fall within the state’s *jurisdiction* for that person to be able to raise his or her rights against the state. . . .

. . . It is indeed rather startling that such a fundamental issue regarding the scope of application of these treaties has not been definitively resolved much earlier during their life-span. One, almost trite, response to this observation would be that in the age of globalization states are increasingly affecting the human rights of individuals outside their borders, and that this explains both the increase in litigated cases on extraterritorial application and the growing importance of the issue generally.

There is some truth in this remark, particularly with regard to socioeconomic rights and transnational criminal law enforcement. There is also, however, something profoundly mistaken in suggesting that most of the situations which today involve the extraterritorial application of human rights treaties are truly novel. States, especially powerful states, have *always* acted outside their borders and have *always* affected the lives of foreigners. They have moreover continued to do so even in the period after the Second World War, in which the modern human rights instruments were created. It seems that the better explanation for the increasing urgency of this topic is that society at large has changed and is changing still. Our culture has been permeated by law generally and human rights specifically to such a level that even those state acts that have hitherto been considered as the ultimate expressions of sovereign prerogative have become exposed to human rights scrutiny, in public discourse as well as in courts.

We live in an age of rights, and the rhetoric of rights is no longer solely the province of increasingly aggressive lawyers and human rights activists, but is employed by policy-makers and actors of all stripes. . . .

Extraterritorial application simply means that at the moment of the alleged violation of his or her human rights the individual concerned is not physically located in the territory of the state party in question, a geographical area over which the state has sovereignty or title. Extraterritorial application of a human rights treaty is an issue that will most frequently arise from an *extraterritorial state act*, i.e. conduct attributable to the state, either of commission or of omission, performed outside its sovereign borders—for example, the killing of a suspected terrorist in Pakistan by a US drone. However—and this is a crucial point—extraterritorial application does not *require* an extraterritorial state act, but solely that the individual concerned is located outside the state’s territory, while the injury to his rights may as well take place inside it. For instance, if we accept that the [European Convention on Human Rights] ECHR applies to the taking within the UK of the property of a UK national living in Monaco in tax haven bliss, this would also be an instance of extraterritorial application, since the individual concerned is not himself within the UK’s territory even if his property is. . . .

. . . [I]t is necessary to establish whether public international law has something to say about the extraterritorial application of treaties generally. . . .

. . . There is no default rule of international law, no presumption against extraterritoriality which we can turn to in the absence of a clear norm in the treaty itself regulating its extraterritorial applicability. Conversely, there is also no presumption in *favour* of extraterritoriality. The only guidance can be found in the text, object, and purpose of each particular treaty. In that regard, provisions governing the territorial scope of human treaties can be classified in several broad, yet flexible and overlapping categories.

The first, and most interesting, of these are treaties containing a jurisdiction clause. The first human rights treaties proper—though actually not the first treaties generally—to have such a clause are the ECHR and the [International Covenant on Civil and Political Rights] ICCPR. . . . Article 1 ECHR contains the prototype jurisdiction clause: ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.’ . . .

Though human rights treaties with one sort of jurisdiction clause or another are by far the most common, there are also a few with dedicated

provisions governing their territorial application. As a general matter, these provisions have little or nothing to say about the *extra*-territorial application of a treaty, but are meant to address the two specific problems . . . : the application of the treaty to a state's colonies and dependencies, or, euphemistically, 'territories for whose international relations it is responsible,' on the one hand, and the application of the treaty to a state with several autonomous or federal territorial units, usually with the purpose of limiting the federal state's liability, on the other. . . .

Finally, there are those treaties which have no jurisdiction clause, nor any other clause defining their territorial scope of application. The first such universal human rights treaty was the Convention against Discrimination in Education, while the most notable are the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

. . . [I]n some of the most important human rights treaties, especially those protecting civil and political rights, it is the jurisdiction clauses which determine their scope of application. There are no such clauses in humanitarian law treaties. . . . It is after all only natural that treaties which protect certain categories of persons in times of armed conflict are not territorially confined. Indeed, some parts of the law of armed conflict, namely the law of belligerent occupation, apply *only* extraterritorially, as a state by definition cannot occupy its own territory.

Finally, it should also be noted that the provisions defining the scope of applicability of human rights treaties frequently differentiate between two kinds of state obligations. On the one hand, there is the negative obligation of contracting states to *respect* the human rights of persons within their jurisdiction, which commands states to *refrain* from acts capable of violating the rights of individuals. On the other, there is the positive obligation to *secure* or *ensure* the respect of their rights, which requires states to take various steps to fulfil and protect the rights of individuals, even from third parties. . . .

What is the relevance of the distinction between negative and positive state obligations to the question of extraterritorial application of human rights treaties? Simply put, the ability of a state to comply with—or violate—these obligations is different, since a state needs little by way of means in order to violate a negative obligation, while the state's agents are by definition under its control. On the other hand, a state needs actual or effective control over a territory or a population in order to be able to fulfil its positive obligations.

COMPETING APPROACHES

How far do jurisdictions' powers and human rights obligations extend? This section explores competing approaches of strict territoriality, cosmopolitanism, and an emerging test focused on whether a state exerts "effective control" over an area.

Strict Territoriality

Sale v. Haitian Centers Council
Supreme Court of the United States
509 U.S. 155 (1993)

Justice STEVENS delivered the opinion of the Court.

The President has directed the Coast Guard to intercept vessels illegally transporting passengers from Haiti to the United States and to return those passengers to Haiti without first determining whether they may qualify as refugees. The question presented in this case is whether such forced repatriation, "authorized to be undertaken only beyond the territorial sea of the United States," violates § 243(h)(1)* of the Immigration and Nationality Act of 1952 (INA or Act). We hold that neither § 243(h) nor Article 33 of the United Nations Protocol Relating to the Status of Refugees** applies to action taken by the Coast Guard on the high seas.

. . . When an alien proves that he is a "refugee," the Attorney General has discretion to grant him asylum If the proof shows that it is more likely than not that the alien's life or freedom would be threatened in a particular country

* 8 U.S.C. 1253(h) provides: "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."

** Article 33 provides: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

because of his political or religious beliefs, under § 243(h) the Attorney General must not send him to that country. The INA offers these statutory protections only to aliens who reside in or have arrived at the border of the United States. For 12 years . . . the interdiction program challenged here has prevented Haitians such as respondents from reaching our shores and invoking those protections. . . .

On September 30, 1991, a group of military leaders displaced the government of Jean Bertrand Aristide, the first democratically elected president in Haitian history. As the District Court stated in an uncontested finding of fact, since the military coup “hundreds of Haitians have been killed, tortured, detained without a warrant, or subjected to violence and the destruction of their property because of their political beliefs. Thousands have been forced into hiding.” . . .

. . . [T]he Haitian exodus expanded dramatically. . . . Because so many interdicted Haitians could not be safely processed on Coast Guard cutters, the Department of Defense established temporary facilities at the United States Naval Base in Guantánamo, Cuba

With both the facilities at Guantánamo and available Coast Guard cutters saturated, and with the number of Haitian emigrants in unseaworthy craft increasing (many had drowned as they attempted the trip to Florida), the Government could no longer both protect our borders *and* offer the Haitians even a modified screening process. It had to choose between allowing Haitians into the United States for the screening process or repatriating them without giving them any opportunity to establish their qualifications as refugees. . . .

On May 23, 1992, President Bush adopted the second choice. After assuming office, President Clinton decided not to modify that order; it remains in effect today. . . .

. . . [Plaintiffs] contended that . . . [the policy] violated § 243(h) of the Act and Article 33 of the United Nations Protocol Relating to the Status of Refugees. . . .

Both parties argue that the plain language of § 243(h)(1) is dispositive. . . . Respondents emphasize the words “any alien” and “return”; neither term is limited to aliens within the United States. . . .

Petitioners’ response is that a fair reading of the INA as a whole demonstrates that § 243(h) does not apply to actions taken by the President or Coast Guard outside the United States; that the legislative history of the 1980 amendment supports their reading; and that both the text and the negotiating history of Article 33 of the Convention indicate that it was not intended to have

any extraterritorial effect. . . . [The Court concluded § 243(h)] of the INA contains no reference to a possible extraterritorial application.

Even if . . . the Act were not limited to strictly domestic procedures, the presumption that Acts of Congress do not ordinarily apply outside our borders would support an interpretation of § 243(h) as applying only within United States territory. . . .

As enacted in 1952, § 243(h) authorized the Attorney General to withhold deportation of aliens “within the United States.” Six years later we considered the question whether it applied to an alien who had been paroled into the country while her admissibility was being determined. We held that even though she was physically present within our borders, she was not “within the United States” as those words were used in § 243(h). . . . Although the phrase “within the United States” presumed the alien’s actual presence in the United States, it had more to do with an alien’s legal status than with his location.

The 1980 amendment erased the long-maintained distinction between deportable and excludable aliens for purposes of § 243(h). By adding the word “return” and removing the words “within the United States” from § 243(h), Congress extended the statute’s protection to both types of aliens, but it did nothing to change the presumption that both types of aliens would continue to be found only within United States territory. . . .

Of course, in addition to this most obvious purpose, it is possible that the 1980 amendment *also* removed any territorial limitation of the statute, and Congress might have intended a double-barreled result. That possibility, however, is not a substitute for the affirmative evidence of intended extraterritorial application that our cases require. Moreover, in our review of the history of the amendment, we have found no support whatsoever for that latter, alternative, purpose. . . .

In sum, all available evidence about the meaning of § 243(h)—the Government official at whom it is directed, its location in the Act, its failure to suggest any extraterritorial application, the 1980 amendment that gave it a dual reference to “deport or return,” and the relevance of that dual structure to immigration law in general—leads unerringly to the conclusion that it applies in only one context: the domestic procedures by which the Attorney General determines whether deportable and excludable aliens may remain in the United States. . . .

. . . When the United States acceded to the [Refugee] Protocol in 1968 . . . the INA . . . offered *no* such protection to any alien who was beyond the territorial waters of the United States, . . . and we would not expect the Government to assume a burden as to those aliens without some acknowledgment of its dramatically broadened scope. Both Congress and the Executive Branch gave extensive consideration to the Protocol before ratifying it in 1968; in all of their published consideration of it there appears no mention of the possibility that the United States was assuming any extraterritorial obligations. Nevertheless, because the history of the 1980 Act does disclose a general intent to conform our law to Article 33 of the Convention, it might be argued that the extraterritorial obligations imposed by Article 33 were so clear that Congress, in acceding to the Protocol, and then in amending the statute to harmonize the two, meant to give the latter a correspondingly extraterritorial effect. . . .

Like the text and the history of § 243(h), the text and negotiating history of Article 33 of the United Nations Convention are both completely silent with respect to the Article's possible application to actions taken by a country outside its own borders. . . .

The drafters of the Convention and the parties to the Protocol—like the drafters of § 243(h)—may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33; but a treaty cannot impose unanticipated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions. . . .

Justice BLACKMUN, dissenting.

When, in 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees, it pledged not to “return (*refouler*) a refugee in any manner whatsoever” to a place where he would face political persecution. In 1980, Congress amended our immigration law to reflect the Protocol's directives. Today's majority nevertheless decides that the forced repatriation of the Haitian refugees is perfectly legal, because the word “return” does not mean return, because the opposite of “within the United States” is not outside the United States, and because the official charged with controlling immigration has no role in enforcing an order to control immigration.

I believe that the duty of nonreturn expressed in both the Protocol and the statute is clear. The majority finds it “extraordinary” that Congress would have intended the ban on returning “any alien” to apply to aliens at sea. That Congress

would have meant what it said is not remarkable. What is extraordinary in this case is that the Executive, in disregard of the law, would take to the seas to intercept fleeing refugees and force them back to their persecutors—and that the Court would strain to sanction that conduct. . . .

Article 33.1 of the Convention[’s] . . . terms are unambiguous. Vulnerable refugees shall not be returned. The language is clear, and the command is straightforward; that should be the end of the inquiry. Indeed, until litigation ensued, the Government consistently acknowledged that the Convention applied on the high seas. . . .

[Justice Blackmun provided an extensive statutory analysis of the text of the INA and the drafting history of Article 33 and concluded that the United States’ obligation not to return aliens applied on the high seas.]

That the clarity of the text and the implausibility of its theories do not give the majority more pause is due, I think, to the majority’s heavy reliance on the presumption against extraterritoriality. The presumption . . . stacks the deck by requiring the Haitians to produce “affirmative evidence” that when Congress prohibited the return of “any” alien, it indeed meant to prohibit the interception and return of aliens at sea.

The judicially created canon of statutory construction against extraterritorial application of United States law has no role here, however. It applies only where congressional intent is “unexpressed.” Here there is no room for doubt: A territorial restriction has been deliberately deleted from the statute.

Even where congressional intent is unexpressed, however, a statute must be assessed according to its intended scope. The primary basis for the application of the presumption (besides the desire—not relevant here—to avoid conflict with the laws of other nations) is “the commonsense notion that Congress generally legislates with domestic concerns in mind.” Where that notion seems unjustified or unenlightening, however, generally worded laws covering varying subject matters are routinely applied extraterritorially.

In this case we deal with a statute that regulates a distinctively international subject matter: immigration, nationalities, and refugees. Whatever force the presumption may have with regard to a primarily domestic statute evaporates in this context. There is no danger that the Congress that enacted the Refugee Act was blind to the fact that the laws it was crafting had implications beyond this Nation’s borders. The “commonsense notion” that Congress was

looking inwards—perfectly valid in a case involving the Federal Tort Claims Act . . .—cannot be reasonably applied to the Refugee Act of 1980.

. . . The presumption that Congress did not intend to legislate extraterritorially has *less* force—perhaps, indeed, no force at all—when a statute on its face relates to foreign affairs. . . . [I]n some areas, the President, and not Congress, has sole constitutional authority. Immigration is decidedly not one of those areas. “[O]ver no conceivable subject is the legislative power of Congress more complete” And the suggestion that the President somehow is acting in his capacity as Commander in Chief is thwarted by the fact that nowhere among . . . numerous references [in the relevant Executive Order] to the immigration laws is that authority even once invoked.

If any canon of construction should be applied in this case, it is the well-settled rule that “an act of congress ought never to be construed to violate the law of nations if any other possible construction remains.” The majority’s improbable construction of § 243(h), which flies in the face of the international obligations imposed by Article 33 of the Convention, violates that established principle. . . .

The refugees attempting to escape from Haiti do not claim a right of admission to this country. They do not even argue that the Government has no right to intercept their boats. They demand only that the United States, land of refugees and guardian of freedom, cease forcibly driving them back to detention, abuse, and death. That is a modest plea, vindicated by the treaty and the statute. We should not close our ears to it. . . .

Judith Resnik

Disentangling Territory, People, and Law from Borders
(forthcoming, 2016)*

. . . Understanding the construction of and interactions at “the border” is required as a predicate to mapping the shifting legalities governing the import of borders. Territory is a starting place for, as Justice Oliver Wendell Holmes explained in 1908, “boundary means sovereignty, since, in modern times,

* Excerpted from Judith Resnik, *Bordering by Law: The Migration of Law, Crimes, Sovereignty, and the Mail*, NOMOS: IMMIGRATION AND EMIGRATION (Jack Knight ed., forthcoming NYU Press, 2016).

sovereignty is mainly territorial.” Further, a good deal of legal doctrine focuses on whether “extra-territorial” application of law is permissible.

Such precepts would suggest that the edges of the physical land mass of the United States (and some miles out to sea, under international conventions) constitute the sovereign borders; that persons (and law) inside or outside these territorial confines are “in” or “out” of the United States. Further, given the text of the Fourteenth Amendment, one might assume that any “person within its [the state’s] jurisdiction” would be accorded the same constitutional protections as another.

But such formulations are incomplete because the “border” that constitutes the country’s “jurisdiction” is not an artifact of geography, tidewaters, rivers, and mountains alone. Law both specifies lines and has also regularly been deployed to alter the import of a person’s presence in material space.

One form of extended jurisdiction is the deployment of public or private employees in other countries to police entry from afar through consular inspections for a visa. . . .

. . . The 1952 Immigration and Nationality Act granted “any officer or employee of the Service authorized under regulations prescribed by the Attorney General . . . [the] power without warrant” to “board and search” vessels “within a reasonable distance from any external boundary of the United States.” Since 1957, a Department of Justice regulation has defined reasonable to be “a distance of not exceeding 100 air miles from any external boundary of the United States.” . . .

Another legal attenuation of physical boundaries comes from the United States’ view of its authority to reach outside its own territory to kidnap individuals alleged to have violated its law. This jurisdiction-by-violence has been sanctioned by the United States Supreme Court under what is known as the “*Ker-Frisbie*” doctrine, named after a pair of cases that rejected the defendants’ claims that such a seizure violated their due process rights. In 1952, the Supreme Court explained that the “power of a court to try a person for a crime is not impaired by the fact that he has been brought within the court’s jurisdiction by reason of a ‘forcible abduction.’” The power of the federal government outside the country was not restrained by constitutional injunctions of due process hearings prior to depriving a person of liberty or by Fourth Amendment prohibitions on unreasonable searches and seizures.

This approach was reaffirmed in 1992 in *United States v. Alvarez-Machain*, a case in which a non-citizen argued that his abduction from Mexico violated the “law of nations,” a concept dating from eighteen-century traditions that are themselves border-expanding. The premise is that certain acts—such as piracy—are either unlawful because they occur outside all sovereign bounds or because they are so violative of rights as to license what could be understood as “jurisdiction-by-outrage” (reflecting a form of “universal jurisdiction”). The federal constitution specifically authorized Congress to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.” Further, in 1789, Congress created a right of action for aliens to bring tort actions in federal courts for violation of the law of nations, as well as criminal provisions.

As illustrated by the *Ker-Frisbie* defendants challenging kidnappings, the arrival in the United States appears, from a first reading of the Constitution, to entitle one to constitutional rights. The text of the Fourteenth Amendment (incorporated through the Fifth Amendment to apply to the federal government) insists that no state “shall deprive individuals of life, liberty, or property without due process of law,” nor “deny to any person within its jurisdiction the equal protection of the laws.” Yet another disjuncture between territorial boundaries and legal regulation comes from reading these provisions as licensing the government to treat some individuals who are physically present in the United States as if they were not within the borders and therefore as not entitled to all of the legal rights derived from being “within its jurisdiction.” In other words, crossing the border is an important act of law production but not invariably so.

Specifically, the Supreme Court has concluded that constitutional protections (of some form) apply to those who entered lawfully (by way of a visa, a valid passport, and a second inspection at or near the border) and overstayed their permitted entry. In 1903, the Supreme Court ruled that some process was due, as a matter of constitutional right, before deportation so as to ensure that a particular person was properly deportable.

But unlike practices in Europe, the government can admit an individual not entitled to entry and then legally treat that person as if such a person were outside and, hence, without due process rights. The rule rests, in part, on solicitude for the “excludable” (now described as “removable”) person, deemed to be better off on land than at sea or detained on ships awaiting decisions about entry. Recent exemplars include a group of some 125,000 Cuban “Marielitos” (named because they entered through the Mariel boatlift of 1980) and a group of Haitian refugees who were held in the 1990s at Guantánamo Bay before it gained its current valence as the detention center for alleged terrorists.

Litigation over 9/11 detainees offers up yet more examples of complex border threads lacing the interactions among confinement of individuals, dominion over territory, and law. Over objections from the Bush Administration, the Supreme Court insisted that American control over Guantánamo through a long-term lease rendered aliens confined by the United States eligible to contest their detention under federal constitutional habeas corpus rights. Further, courts have concluded that citizens held in jails abroad by the United States may bring claims, but courts have refused to hear non-citizens who likewise have challenged their confinement and held at U.S.-run facilities, such as in Bagram, Afghanistan.

In short, being “in” the United States can still result in being “outside” arenas of rights, opportunities, and forms of capital. The border of citizen/non-citizen shares the instability of the borders located on land. . . .

Effective Control

Hirsi Jamaa and Others v. Italy European Court of Human Rights (Grand Chamber) App. No. 27765/09 (Feb. 23, 2012)

The European Court of Human Rights, sitting as a Grand Chamber composed of: Nicolas Bratza, *President*, Jean-Paul Costa, Françoise Tulkens, Josep Casadevall, Nina Vajić, Dean Spielmann, Peer Lorenzen, Ljiljana Mijović, Dragoljub Popović, Giorgio Malinverni, Mirjana Lazarova Trajkovska, Nona Tsotsoria, Işıl Karakaş, Kristina Pardalos, Guido Raimondi, Vincent A. De Gaetano, Paulo Pinto de Albuquerque, *judges*, and Michael O’Boyle, *Deputy Registrar*

9. The applicants, eleven Somali nationals and thirteen Eritrean nationals, were part of a group of about two hundred individuals who left Libya aboard three vessels with the aim of reaching the Italian coast.

10. On 6 May 2009, when the vessels were 35 nautical miles south of Lampedusa (Agrigento) . . . , they were intercepted by three ships from the Italian Revenue Police and the Coastguard.

11. The occupants of the intercepted vessels were transferred onto Italian military ships and returned to Tripoli. The applicants alleged that during that

voyage the Italian authorities did not inform them of their real destination and took no steps to identify them. . . .

12. On arrival . . . , the migrants were handed over to the Libyan authorities. According to the applicants' version of events, they objected . . . but were forced to leave the Italian ships. . . .

18. Article 4 of the [Italian] Navigation Code . . . provides as follows:

“Italian vessels on the high seas and aircraft in airspace not subject to the sovereignty of a State are considered to be Italian territory.”

19. On 29 December 2007 Italy and Libya signed a bilateral cooperation agreement in Tripoli to combat clandestine immigration. . . .

22. Italy has ratified the Geneva Convention, which defines the situations in which a State must grant refugee status to persons who apply for it, and the rights and responsibilities of those persons. . . .

28. Article 19 of the Charter [of Fundamental Rights of the European Union] provides:

“. . . No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.” . . .

64. The Government acknowledged that the events in question had taken place on board Italian military ships. However, they denied that the Italian authorities had exercised “absolute and exclusive control” over the applicants.

65. They submitted that the vessels carrying the applicants had been intercepted in the context of the rescue on the high seas of persons in distress—which is an obligation imposed by international law, namely, the United Nations Convention on the Law of the Sea (“the Montego Bay Convention”)—and could in no circumstances be described as a maritime police operation.

The Italian ships had confined themselves to intervening to assist the three vessels in distress and ensuring the safety of the persons on board. They had then accompanied the intercepted migrants to Libya in accordance with the bilateral agreements of 2007 and 2009. The Government argued that the obligation to save human lives on the high seas, as required under the Montego Bay Convention, did

not in itself create a link between the State and the persons concerned establishing the State's jurisdiction. . . .

67. The applicants submitted that . . . Italy had jurisdiction. As soon as they had boarded the Italian ships, they had been under the exclusive control of Italy, which had therefore been bound to fulfil all the obligations arising out of the Convention and the Protocols thereto. They pointed out that Article 4 of the Italian Navigation Code expressly provided that vessels flying the Italian flag fell within Italian jurisdiction, even when sailing outside territorial waters. . . .

70. Under Article 1 of the Convention, the undertaking of the Contracting States is to "secure" ("*reconnaître*" in French) to everyone within their "jurisdiction" the rights and freedoms defined in Section I of the Convention. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms . . . in the Convention.

71. The jurisdiction of a State, within the meaning of Article 1, is essentially territorial. It is presumed to be exercised normally throughout the State's territory.

72. . . . [T]he Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention. . . .

73. In . . . *Loizidou v. Turkey* [(1996)], the Court ruled that bearing in mind the object and purpose of the Convention the responsibility of a Contracting Party may also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. . . .

74. Whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual. . . .

77. The Court observes that, by virtue of the relevant provisions of the law of the sea, a vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying. . . .

169. Therefore, . . . the Court must, for the first time, examine whether Article 4 of Protocol No. 4* applies to a case involving the removal of aliens to a third State carried out outside national territory. It must ascertain whether the transfer of the applicants to Libya constituted a “collective expulsion of aliens” within the meaning of the provision in issue. . . .

172. The Government submitted that there was a logical obstacle to the applicability of Article 4 of Protocol No. 4 . . . [because] the applicants were not on Italian territory at the time of their transfer to Libya so that measure, in the Government’s view, could not be considered to be an “expulsion” within the ordinary meaning of the term.

173. The Court . . . notes . . . that . . . the wording of Article 4 of Protocol No. 4 does not in itself pose an obstacle to its extraterritorial application. It . . . contains no reference to the notion of “territory”, whereas the wording of Article 3 of the same Protocol, on the contrary, specifically refers to the territorial scope of the prohibition on the expulsion of nationals. . . .

178. . . . [W]hile the notion of “jurisdiction” is principally territorial and is presumed to be exercised on the national territory of States, the notion of expulsion is also principally territorial in the sense that expulsions are most often conducted from national territory. Where, however, as in the instant case, the Court has found that a Contracting State has, exceptionally, exercised its jurisdiction outside its national territory, it does not see any obstacle to accepting that the exercise of extraterritorial jurisdiction by that State took the form of collective expulsion. To conclude otherwise, and to afford that last notion a strictly territorial scope, would result in a discrepancy between the scope of application of the Convention as such and that of Article 4 of Protocol No. 4, which would go against the principle that the Convention must be interpreted as a whole. Furthermore, as regards the exercise by a State of its jurisdiction on the high seas, the Court has already stated that the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction. . . .

Concurring Opinion of Judge PINTO DE ALBUQUERQUE.

. . . The prohibition of *refoulement* is not limited to the territory of a State, but also applies to extraterritorial State action, including action occurring on the high seas. This is true under international refugee law

* Article 4 of Protocol No. 4 provides: “Collective expulsion of aliens is prohibited.”

The fact that some Supreme Courts, such as the United States Supreme Court and the High Court of Australia, have reached different conclusions is not decisive. . . .

The words of Justice Blackmun are so inspiring that they should not be forgotten. Refugees attempting to escape Africa do not claim a right of admission to Europe. They demand only that Europe, the cradle of human rights idealism and the birthplace of the rule of law, cease closing its doors to people in despair who have fled from arbitrariness and brutality. That is a very modest plea, vindicated by the European Convention on Human Rights. “We should not close our ears to it.”

Al-Skeini and Others v. United Kingdom
European Court of Human Rights (Grand Chamber)
App. No. 55721/07 (July 7, 2011)

The European Court of Human Rights, sitting as a Grand Chamber composed of: Jean-Paul Costa, *President*, Christos Rozakis, Nicolas Bratza, Françoise Tulkens, Josep Casadevall, Dean Spielmann, Giovanni Bonello, Elisabeth Steiner, Lech Garlicki, Ljiljana Mijović, Davíd Thór Björgvinsson, Isabelle Berro-Lefèvre, George Nicolaou, Luis López Guerra, Ledi Bianku, Ann Power, Mihai Poalelungi, *judges*, and Michael O’Boyle, *Deputy Registrar*

3. The applicants alleged that their relatives fell within United Kingdom jurisdiction when killed and that there had been no effective investigation into their deaths, in breach of Article 2 of the Convention*

95. The applicants contended that their relatives were within the jurisdiction of the United Kingdom under Article 1 of the Convention at the

* Article 2 of the European Convention of Human Rights provides:

1. “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence”
2. “Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

moment of death and that, except in relation to the sixth applicant, the United Kingdom had not complied with its investigative duty under Article 2. . . .

101. The Government further contended that the acts in question took place in southern Iraq and outside the United Kingdom's jurisdiction under Article 1 of the Convention. The sole exception was the killing of the sixth applicant's son, which occurred in a British military prison over which the United Kingdom did have jurisdiction.

102. The Court considers that the question whether the applicants' cases fall within the jurisdiction of the respondent State is closely linked to the merits of their complaints. It therefore joins this preliminary question to the merits. . . .

109. The Government submitted that the leading authority on the concept of "jurisdiction" within the meaning of Article 1 of the Convention was the Court's decision in *Banković and Others* [(2001)] . . . [which] established that the fact that an individual had been affected by an act committed by a Contracting State or its agents was not sufficient to establish that he was within that State's jurisdiction. Jurisdiction under Article 1 was "primarily" or "essentially" territorial and any extension of jurisdiction outside the territory of the Contracting State was "exceptional" and required "special justification in the particular circumstances of each case." . . . The essentially territorial basis of jurisdiction reflected principles of international law and took account of the practical and legal difficulties faced by a State operating on another State's territory, particularly in regions which did not share the values of the Council of Europe member States. . . .

131. A State's jurisdictional competence under Article 1 is primarily territorial. . . . Conversely, acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases.

132. To date, the Court in its case-law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. . . .

134. Firstly, it is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others.

135. Secondly, the Court has recognised the exercise of extra-territorial jurisdiction by a Contracting State when, through the consent, invitation or

acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government. . . .

136. In addition, . . . the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. This principle has been applied where an individual is taken into the custody of State agents abroad. . . .

138. Another exception . . . occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration. Where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. . . . The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. . . .

139. . . . In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area. Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region.

140. The "effective control" principle of jurisdiction set out above does not replace the system of declarations under Article 56 of the Convention* . . . which the States decided, when drafting the Convention, to apply to territories overseas for whose international relations they were responsible. Article 56 § 1 provides a mechanism whereby any State may decide to extend the application of the Convention, "with due regard . . . to local requirements," to all or any of the territories for whose international relations it is responsible. The existence of this mechanism, which was included in the Convention for historical reasons, cannot be interpreted in present conditions as limiting the scope of the term "jurisdiction" in Article 1. The situations covered by the "effective control" principle are clearly

* Article 56 of the European Convention on Human Rights provides:

1. "Any State may . . . declare . . . that the present Convention shall . . . extend to all or any of the territories for whose international relations it is responsible."
3. "The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements." . . .

separate and distinct from circumstances where a Contracting State has not, through a declaration under Article 56, extended the Convention or any of its Protocols to an overseas territory for whose international relations it is responsible.

141. The Convention is a constitutional instrument of European public order. It does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States.

142. The Court has emphasised that, where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a “vacuum” of protection within the “legal space of the Convention.” However, the importance of establishing the occupying State’s jurisdiction in such cases does not imply, *a contrario*, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe member States. The Court has not in its case-law applied any such restriction.

143. In determining whether the United Kingdom had jurisdiction over any of the applicants’ relatives when they died, the Court takes as its starting-point that, on 20 March 2003, the United Kingdom together with the United States of America and their Coalition partners, through their armed forces, entered Iraq with the aim of displacing the Ba’ath regime then in power. . . .

149. It can be seen, therefore, that following the removal from power of the Ba’ath regime and until the accession of the interim Iraqi government, the United Kingdom (together with the United States of America) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in south-east Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basra during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.

150. Against this background, the Court recalls that the deaths at issue in the present case occurred during the relevant period

151. The applicants did not complain before the Court of any substantive breach of the right to life under Article 2. Instead they complained that the Government had not fulfilled its procedural duty to carry out an effective investigation into the killings. . . .

161. The Court is conscious that the deaths in the present case occurred in Basra City in south-east Iraq in the aftermath of the invasion, during a period when crime and violence were endemic. . . .

162. While remaining fully aware of this context, the Court's approach must be guided by the knowledge that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective. Article 2, which protects the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions of the Convention. No derogation from it is permitted under Article 15, "except in respect of deaths resulting from lawful acts of war." Article 2 covers both intentional killing and also the situations in which it is permitted to use force which may result, as an unintended outcome, in the deprivation of life. . . .

163. The general legal prohibition of arbitrary killing by agents of the State would be ineffective in practice if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention . . . requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by . . . agents of the State. . . .

165. What form of investigation will achieve the purposes of Article 2 may vary depending on the circumstances. . . .

167. For an investigation into alleged unlawful killing by State agents to be effective, it is necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. . . . A requirement of promptness and reasonable expedition is implicit in this context. . . . For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. . . .

171. It is clear that the investigations into the shooting of the first, second and third applicants' relatives fell short of the requirements of Article 2, since the

investigation process remained entirely within the military chain of command and was limited to taking statements from the soldiers involved. . . .

172. As regards the other applicants, although there was an investigation by the Special Investigation Branch into the death of the fourth applicant's brother and the fifth applicant's son, the Court does not consider that this was sufficient to comply with the requirements of Article 2. . . . [T]he Special Investigation Branch was not, during the relevant period, operationally independent from the military chain of command.

176. In contrast, the Court notes that a full, public inquiry is nearing completion into the circumstances of the sixth applicant's son's death. In the light of this inquiry, the Court notes that the sixth applicant accepts that he is no longer a victim of any breach of the procedural obligation under Article 2. . . .

Concurring Opinion of Judge ROZAKIS.

. . . I consider that the right approach to the matter would have been for the Court to have included that aspect of jurisdiction in the exercise of the "State authority and control" test, and to have simply determined that "effective" control is a condition for the exercise of jurisdiction which brings a State within the boundaries of the Convention, as delimited by its Article 1.

Concurring Opinion of Judge BONELLO.

3. . . . I would have employed a different test (a "functional jurisdiction" test) to establish whether or not the victims fell within the jurisdiction of the United Kingdom. . . .

8. My guileless plea is to return to the drawing board. To stop fashioning doctrines which somehow seem to accommodate the facts, but rather, to appraise the facts against the immutable principles which underlie the fundamental functions of the Convention.

9. The founding members of the Convention, and each subsequent Contracting Party, strove to achieve one aim, at once infinitesimal and infinite: the supremacy of the rule of human rights law. . . .

11. A "functional" test would see a State effectively exercising "jurisdiction" whenever it falls within its power to perform, or not to perform, any of these five functions. Very simply put, a State has jurisdiction for the purposes of Article 1 whenever the observance or the breach of any of these functions is within its authority and control. . . .

19. The functional test I propose would also cater for the more rarefied reaches of human rights protection, like respect for the positive obligations imposed on Contracting Parties: was it within the State's authority and control to see that those positive obligations would be respected? If it was, then the functional jurisdiction of the State would come into play, with all its natural consequences. If, in the circumstances, the State is not in such a position of authority and control as to be able to ensure extraterritorially the fulfilment of any or all of its positive obligations, that lack of functional authority and control excludes jurisdiction, limitedly to those specific rights the State is not in a position to enforce. . . .

DIFFERING NATIONAL AND REGIONAL APPROACHES

United Kingdom

Smith and Others v. Ministry of Defence Supreme Court of the United Kingdom [2013] UKSC 41

Lord HOPE (with whom Lord Walker, Lady Hale and Lord Kerr agree)

1. These proceedings arise out of the deaths of three young men who lost their lives while serving in the British Army in Iraq and the suffering by two other young servicemen of serious injuries. . . .

10. The claims by Susan Smith and by Courtney and Karla Ellis ("the Snatch Land Rover claims") fall into two parts. The first, which is common to all three claimants, is that the [Ministry of Defense] MOD breached article 2 of the European Convention on Human Rights by failing to take measures within the scope of its powers which, judged reasonably, it might have been expected to take in the light of the real and immediate risk to life of soldiers who were required to patrol in Snatch Land Rovers. The second, which is brought by Courtney Ellis only, is based on negligence at common law.

11. The particulars of the Smith claim under Article 2 of the Convention are that the MOD (i) failed to provide better/medium armoured vehicles for use by [Private] Hewett's commander . . . , (ii) failed to ensure that any patrol inside Al Amarah was led by a Warrior, (iii) caused or permitted a patrol of three Snatch Land Rovers to proceed inside Al Amarah, . . . and it knew or ought to have known that [electronic counter measures] ECMs were ineffective against the triggers that were in use by the insurgents and no suitable counter measures had been provided, (iv) permitted the patrol of Snatch Land Rovers to investigate the bomb blast . . . , (v) failed to provide other vehicles for route clearing and route planning ahead of the Snatch Land Rovers, (vi) failed to provide suitable counter measures to [improvised explosive devices] IEDs . . . and (vii) failed to use means other than patrols to combat the threat posed by the insurgents. . . .

13. The MOD's primary case in reply to the Challenger claims and the Ellis claim in negligence is that they should all be struck out on the principle of combat immunity. . . . Its case for a strike out in reply to the Snatch Land Rover claims under article 2 of the Convention falls into two parts. First, it submits that at the time of their deaths [Private] Hewett and [Private] Ellis were not within the jurisdiction of the United Kingdom for the purposes of article 1 of the Convention. Secondly, it submits that on the facts as pleaded the MOD did not owe a duty to them at the time of their deaths under article 2. . . .

17. Article 1 of the Convention provides as follows:

“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention.”

In *Soering v United Kingdom* (1989) the Strasbourg court said that article 1 sets a limit, notably territorial, on the reach of the Convention and that the engagement undertaken by a contracting state is confined to securing the listed rights and freedoms to persons within its own jurisdiction. . . .

18. The question that the Snatch Land Rover claims raise is whether the jurisdiction of the United Kingdom extends to securing the protection of article 2 of the Convention to members of the armed forces when they are serving outside its territory. For that to be so it would have to be recognised that service abroad by members of the armed forces is an exceptional circumstance which requires and justifies the exercise by the State of its jurisdiction over them extra-territorially.

19. In *R (Al-Skeini) v Secretary of State for Defence* . . . [i]t was argued for the civilians that, because of the special circumstances in which British troops

were operating in Basra, the conduct complained of, although taking place outside the borders of the United Kingdom and any other contracting state, fell within the exceptions recognised by the Strasbourg jurisprudence. . . .

27. The structure of the relevant part of the Grand Chamber's [*Al-Skeini*] judgment, . . . falls into two parts. First, there is a comprehensive statement of general principles relevant to the issue of jurisdiction under article 1 of the Convention. Secondly, those principles are applied to the facts of the case. . . .

38. . . . The effect of . . . the *Al-Skeini* judgment is that [the] proposition, . . . that the rights in Section 1 of the Convention are indivisible, is no longer to be regarded as good law. The extra-territorial obligation of the contracting state is to ensure the observance of the rights and freedoms that are relevant to the individual who is under its agents' authority and control

42. The question whether at the time of their deaths [Private] Hewett and [Private] Ellis were within the jurisdiction of the United Kingdom for the purposes of article 1 of the Convention does not receive a direct answer from the Grand Chamber in its *Al-Skeini* judgment. . . . [T]he question whether the state was exercising jurisdiction extra-territorially in any given case must be determined with reference to the particular facts of that case. . . .

44. The question before us here . . . is not one as to the scope that should be given to the Convention rights, as to which our jurisprudence is still evolving. It is a question about the state's jurisdictional competence under article 1. . . . [A]rticle 1 should not be construed as reaching any further than the existing Strasbourg jurisprudence clearly shows it to reach. I would take that as being for us, as a national court, the guiding principle.

45. It seems to me that three elements can be extracted from the Grand Chamber's *Al-Skeini* judgment which point clearly to the conclusion that the view that . . . the state's armed forces abroad are not within its jurisdiction for the purposes of article 1 can no longer be maintained.

46. The first is to be found in its formulation of the general principle of jurisdiction with respect to state agent authority and control. The whole structure of the judgment is designed to identify general principles with reference to which the national courts may exercise their own judgment as to whether or not, in a case whose facts are not identical to those which have already been held by Strasbourg to justify such a finding, the state was exercising jurisdiction within the meaning of article 1 extra-territorially. . . .

47. The second is . . . the way . . . [in which] this formulation resolves the . . . question whether the test to be applied in these exceptional cases can be satisfied by looking only at authority and control or is still essentially territorial. . . .

48. The third is . . . [a departure from the view] that the package of rights in the Convention is indivisible and cannot be divided and tailored to the particular circumstances of the extra-territorial act in question. . . .

55. . . . I would . . . hold that the jurisdiction of the United Kingdom under article 1 of the Convention extends to securing the protection of article 2 to members of the armed forces when they are serving outside its territory and that at the time of their deaths [Private] Hewett and [Private] Ellis were within the jurisdiction of the United Kingdom for the purposes of that article. . . . The extent of that protection, and in particular whether the MOD was under a substantive duty of the kind for which the Snatch Land Rover claimants contend, is the question which must now be considered.

56. Article 2(1) of the Convention provides as follows:

“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.” . . .

57. . . . The Snatch Land Rover claims . . . are all directed to the substantive obligation, which requires the state not to take life without justification and also, by implication, to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life. . . .

79. The overall aim of the court’s procedure must be to achieve fairness, and I think that it would be unfair to the relatives of the deceased to apply too exacting a standard at this stage to the way the claims have been pleaded. The circumstances in which the various decisions were made need to be inquired into before it can be determined with complete confidence whether or not there was a breach of the implied positive obligation. The details which are needed to place those circumstances into their proper context will only emerge if evidence is permitted to be led in support of them. This seems to me to be a classic case where the decision on liability should be deferred until after trial.

80. . . . [T]he procurement issues may give rise to questions that are essentially political in nature but . . . it is not possible to decide whether this is the case without hearing evidence. He said that there was no sound basis for the

allegations that relate to operational decisions made by commanders, and for this reason took a different view as to whether they were within the reach of article 2. But it seems to me that these allegations cannot easily be divorced from the allegations about procurement, and that here too the question as to which side of the line they lie is more appropriate for determination after hearing evidence. Much will depend on where, when and by whom the operational decisions were taken and the choices that were open to them, given the rules and other instructions as to the use of equipment under which at each level of command they were required to operate. . . .

[The dissenting opinion of Lord Mance, in which Lord Wilson concurred, is omitted.]

**R (Sandiford) v. Secretary of State for Foreign and
Commonwealth Affairs**

Supreme Court of the United Kingdom

[2014] UKSC 44

LORD CARNWATH AND LORD MANCE (with whom Lord Clarke and Lord Toulson agree)

1. The appellant, a British national now 57, is in prison in Bali, Indonesia, awaiting execution by firing squad, following her conviction for drug offences. That follows her arrest in May 2012 and her subsequent trial on 22 January 2013 in the District Court of Denpasar. She had admitted the offences, but claimed that she had been coerced by threats to her son's life. Following her arrest she had co-operated with the police, leading to the arrest of four others. The prosecutor had called for a sentence of 15 years' imprisonment, and supported her appeal to the Indonesian High Court. But that was unsuccessful, as was her further appeal to the Supreme Court on 29 August 2013. The only legal options now available to her to avoid execution are an application to the Supreme Court to reopen the case, and an application to the President for clemency. . . .

2. The UK government has provided substantial consular assistance since it was notified of her arrest, has made diplomatic representations to the Indonesian authorities, and submitted amicus briefs to the High Court and Supreme Court in support of her appeals. But it has declined to pay for legal help,

relying on what was said to be a rigid policy, as stated in its publication *Support for British Nationals Abroad: a Guide* . . . :

“Although we cannot give legal advice, start legal proceedings, or investigate a crime, we can offer basic information about the local legal system, including whether a legal aid scheme is available. We can give you a list of local interpreters and local lawyers if you want, although *we cannot pay for either.*”

The central issue in this case is the legality of that approach, either under domestic law, or (if it applies to her case) the European Convention on Human Rights.

3. The present proceedings sought an order requiring the Secretary of State to make arrangements for an adequate lawyer to represent her in the Indonesian appeal. . . . [T]he Divisional Court . . . granted permission but refused the substantive application

5. . . . [F]ollowing the dismissal of her application by the Divisional Court, the necessary sum was raised by donations from the public. Her appeal to the High Court in Indonesia then proceeded with the assistance of Mr Agus. . . . On 10 April, the High Court of Denpasar dismissed the appeal.

6. In this country her appeal against the order of the Divisional Court was heard by the Court of Appeal on 22 April and judgment was given on 22 May 2013 dismissing the appeal. By that time her request was for £8,000 [approximately \$12,500 in U.S. 2015 dollars] to instruct Mr Agus in the appeal to the Supreme Court (again principally for his expenses). The Court of Appeal noted that some of the money had by that time been raised by donations. In the event, the full sum was raised and the appeal proceeded in the Supreme Court with Mr Agus’ assistance, but unfortunately was again unsuccessful. . . .

18. . . . [I]t is actually article 6, enshrining the right to a fair trial, on which alone reliance is placed. The case advanced is that the United Kingdom can and should secure to Mrs Sandiford free legal assistance under article 6(3)(c), in circumstances where she cannot afford to fund herself and no such assistance is available to her in Indonesia.

19. . . . As was confirmed in [*Al-Skeini*], jurisdiction under article 1 is “primarily territorial,” but there are certain recognised exceptions one of which is in relation to the acts of diplomatic and consular agents which may amount to an exercise of jurisdiction “when these agents exert authority and control over

others.” [The Court of Appeal] concluded that the test was not satisfied in the present case. . . .

21. Mr O’Neill challenged this approach as too narrow. It was wrong to limit the scope of “authority and control” to situations in which a state is exercising *physical* control over a person. Physical power and control, in his submission, were not relevant to the separate category, recognised in *Al-Skeini*, of acts of diplomatic and consular agents. In that context the correct approach was to focus on the activity of the member state, even if its authority was only partial. So in this case, the fact that the appellant is in custody in Indonesia does not prevent the UK exercising its authority, under the Vienna Convention, to arrange for her legal representation. The focus is on whether the state had jurisdiction over the act or omission complained about, not whether she is under its authority and control in other ways.

22. In our view, however, the Strasbourg authorities on which he relies do not support such an extension. . . .

23. The United Kingdom has no territorial jurisdiction over Mrs Sandiford in prison in Indonesia. But the United Kingdom could, in one way or another, provide her with funds for her legal proceedings in Indonesia. It could on the face of it do so without using any diplomatic or consular agents, by providing funds here which could then be remitted to Indonesia. However, there is no general Convention principle that the United Kingdom should take steps within the jurisdiction to avoid exposing persons, even United Kingdom citizens, to injury to rights which they would have if the Convention applied abroad. The principle recognised in cases like *Soering v United Kingdom* (1989) only applies where the United Kingdom is proposing a step such as the surrender or removal from the jurisdiction of a person which may lead to infringement of that person’s Convention rights abroad.

24. The exceptional extra-territorial jurisdiction described in *Al-Skeini* was expressed as depending on “acts of diplomatic or consular agents” abroad where such agents “exert authority and control over others.” It is common ground that the United Kingdom could use its diplomatic or consular agents to fund the defence in Indonesia of a United Kingdom citizen. . . .

25. The Convention on Consular Relations permits, but it is not suggested that it obliges, the exercise of any such functions. In the present case, the United Kingdom has decided not to use its agents to arrange or fund representation of Mrs Sandiford for this purpose. In these circumstances, it is not possible, in our opinion, to identify any relevant acts of diplomatic or consular agents or therefore

any relevant exercise of authority or control by such agents over Mrs Sandiford, which could bring the first extra-territorial exception into play. . . .

32. Looking at the matter more broadly, the position is that Mrs Sandiford has been apprehended, convicted and tried for drug smuggling in Indonesia. If one asks, by reference to any common-sense formulation, under whose authority or control she is, the answer is: that of the Indonesian authorities. It is they who ought to be ensuring her fair trial. If they were party to the Convention, it would be their duty to do so, and to provide appropriate legal assistance in a case of impecuniosity, under article 6. Since *Al-Skeini*, it is possible in certain respects to divide and tailor the Convention rights relevant to the situation of a particular individual. . . . But to divide and tailor the rights under article 6, so as to isolate the duty to fund from the remaining package of rights involved in fair trial, and to treat it as applying to the United Kingdom and as putting Mrs Sandiford to that extent under the authority or control of the United Kingdom, is in our opinion impossible in circumstances where the United Kingdom has deliberately not assumed or performed any role in relation to funding.

33. Before leaving the Convention position, it is also worth considering the full implications of the appellant's case that the Convention applies. Logically, article 6 would be engaged in respect of every criminal charge, however serious or minor, brought against a British citizen in any overseas country in the world. Article 6 would become a compulsory world-wide legal aid scheme for impecunious British citizens abroad, presumably even for those who had decided to live permanently abroad.

34. For reasons we have given, however, in our opinion Mrs Sandiford was not and is not within the jurisdiction of the United Kingdom for the purposes of article 1 of the Convention, so that no part of article 6 is capable of imposing any obligation on the United Kingdom in respect of the criminal proceedings and capital penalty to which she is now subject in Indonesia. . . .

Canada

Canada (Prime Minister) v. Khadr Supreme Court of Canada [2010] 1 S.C.R. 44

[The unanimous judgment was delivered by Chief Justice McLachlin and Justices Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, and Cromwell.]

1. Omar Khadr, a Canadian citizen, has been detained by the United States government at Guantánamo Bay, Cuba, for over seven years. The Prime Minister asks this Court to reverse the decision of the Federal Court of Appeal requiring the Canadian government to request the United States to return Mr. Khadr from Guantanamo Bay to Canada.

2. For the reasons that follow, we agree with the courts below that Mr. Khadr's rights under s. 7* of the *Canadian Charter of Rights and Freedoms* were violated. However, we conclude that the order made by the lower courts that the government request Mr. Khadr's return to Canada is not an appropriate remedy for that breach under s. 24(1)* of the *Charter*. Consistent with the separation of powers and the well-grounded reluctance of courts to intervene in matters of foreign relations, the proper remedy is to grant Mr. Khadr a declaration that his *Charter* rights have been infringed, while leaving the government a measure of discretion in deciding how best to respond. . . .

3. Mr. Khadr was 15 years old when he was taken prisoner on July 27, 2002, by U.S. forces in Afghanistan. He was alleged to have thrown a grenade that killed an American soldier in the battle in which he was captured. About three months later, he was transferred to the U.S. military installation at Guantánamo Bay. He was placed in adult detention facilities.

4. On September 7, 2004, Mr. Khadr was brought before a Combatant Status Review Tribunal which affirmed a previous determination that he was an

* Section 7 of the Charter provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

* Section 24(1) of the Charter provides: "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

“enemy combatant.” He was subsequently charged with war crimes and held for trial before a military commission. . . .

5. In February and September 2003, agents from the Canadian Security Intelligence Service (“CSIS”) and the Foreign Intelligence Division of the Department of Foreign Affairs and International Trade (“DFAIT”) questioned Mr. Khadr . . . and shared the product of these interviews with U.S. authorities. In March 2004, a DFAIT official interviewed Mr. Khadr again, with the knowledge that he had been subjected by U.S. authorities to a sleep deprivation technique, known as the “frequent flyer program,” in an effort to make him less resistant to interrogation. . . .

6. Mr. Khadr has repeatedly requested that the Government of Canada ask the United States to return him to Canada

8. On August 8, 2008, Mr. Khadr applied to the Federal Court for judicial review of the government’s “ongoing decision and policy” not to seek his repatriation

14. As a general rule, Canadians abroad are bound by the law of the country in which they find themselves and cannot avail themselves of their rights under the *Charter*. International customary law and the principle of comity of nations generally prevent the *Charter* from applying to the actions of Canadian officials operating outside of Canada. . . . The jurisprudence leaves the door open to an exception in the case of Canadian participation in activities of a foreign state or its agents that are contrary to Canada’s international obligations or fundamental human rights norms.

15. The question before us, then, is whether the rule against the extraterritorial application of the *Charter* prevents the *Charter* from applying to the actions of Canadian officials at Guantánamo Bay.

16. This question was addressed in *Khadr 2008*, in which this Court held that the *Charter* applied to the actions of Canadian officials operating at Guantánamo Bay who handed the fruits of their interviews over to U.S. authorities. This Court held that “the principles of international law and comity that might otherwise preclude application of the *Charter* to Canadian officials acting abroad do not apply to the assistance they gave to U.S. authorities at Guantánamo Bay,” given holdings of the Supreme Court of the United States that the military commission regime then in place constituted a clear violation of fundamental human rights protected by international law. The principles of fundamental justice thus required the Canadian officials who had interrogated Mr. Khadr to disclose to him the contents of the statements he had given them. . . .

17. . . . [T]he regime under which Mr. Khadr is currently detained has changed significantly in recent years. The U.S. Congress has legislated and the U.S. courts have acted with the aim of bringing the military processes at Guantanamo Bay in line with international law. . . .

19. The United States is holding Mr. Khadr for the purpose of trying him on charges of war crimes. The United States is thus the primary source of the deprivation of Mr. Khadr's liberty and security of the person. However, the allegation on which his claim rests is that Canada has also contributed to his past and continuing deprivation of liberty. To satisfy the requirements of s. 7, as stated by this Court in *Suresh v. Canada* [(2002)], . . . there must be "a sufficient causal connection between [the Canadian] government's participation and the deprivation [of liberty and security of the person] ultimately effected." . . .

22. We have concluded that the conduct of the Canadian government is sufficiently connected to the denial of Mr. Khadr's liberty and security of the person. This alone, however, does not establish a breach of Mr. Khadr's s. 7 rights under the *Charter*. To establish a breach, Mr. Khadr must show that this deprivation is not in accordance with the principles of fundamental justice.

23. The principles of fundamental justice . . . are informed by Canadian experience and jurisprudence, and take into account Canada's obligations and values, as expressed in the various sources of international human rights law by which Canada is bound. . . . [T]he criteria for identifying a new principle of fundamental justice . . . [are]:

- (1) It must be a legal principle.
- (2) There must be a consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate.
- (3) It must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

24. We conclude that Canadian conduct in connection with Mr. Khadr's case did not conform to the principles of fundamental justice. . . . The statements taken by CSIS [the Canadian Security Intelligence Service] and DFAIT [Department of Foreign Affairs and International Trade Canada] were obtained through participation in a regime which was known at the time to have refused detainees the right to challenge the legality of detention by way of *habeas corpus*.

It was also known that Mr. Khadr was 16 years old at the time and that he had not had access to counsel or to any adult who had his best interests in mind. As held by this Court in *Khadr 2008*, Canada's participation in the illegal process in place at Guantanamo Bay clearly violated Canada's binding international obligations. . . . Canadian officials also knew that the U.S. authorities would have full access to the contents of the interrogations . . . by virtue of their audio and video recording. . . . The purpose of the interviews was for intelligence gathering and not criminal investigation. . . . Canadian officials questioned Mr. Khadr on matters that may have provided important evidence relating to his criminal proceedings, in circumstances where they knew that Mr. Khadr was being indefinitely detained, was a young person and was alone during the interrogations. . . . [and] had been subjected to three weeks of scheduled sleep deprivation

25. This conduct establishes Canadian participation in state conduct that violates the principles of fundamental justice. Interrogation of a youth, to elicit statements about the most serious criminal charges while detained in these conditions and without access to counsel, and while knowing that the fruits of the interrogations would be shared with the U.S. prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects.

26. We conclude that Mr. Khadr has established that Canada violated his rights under s. 7 of the *Charter*. . . .

46. In this case, the evidentiary uncertainties, the limitations of the Court's institutional competence, and the need to respect the prerogative powers of the executive, lead us to conclude that the proper remedy is declaratory relief. . . .

47. The prudent course at this point, . . . is for this Court to allow Mr. Khadr's application for judicial review in part and to grant him a declaration advising the government of its opinion on the records before it which, in turn, will provide the legal framework for the executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr, in conformity with the *Charter*.

48. . . . This Court declares that through the conduct of Canadian officials in the course of interrogations in 2003-2004, . . . Canada actively participated in a process contrary to Canada's international human rights obligations and contributed to Mr. Khadr's ongoing detention so as to deprive him of his right to liberty and security of the person guaranteed by s. 7 of the *Charter*, contrary to the principles of fundamental justice. Costs are awarded to Mr. Khadr.

South Africa

National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre and Another Constitutional Court of South Africa CCT 02/14 (Oct. 30, 2014)

MAJIEDT AJ (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Van der Westhuizen J and Zondo J concurring):

4. This application . . . concerns the extent to which the South African Police Service (SAPS) has a duty to investigate allegations of torture committed in Zimbabwe by and against Zimbabwean nationals. . . .

6. The applicant is the National Commissioner of the SAPS . . . who is appointed in terms of section 207(2) of the Constitution to “control” and “manage” the police service. . . .

7. The first respondent is the Southern African Human Rights Litigation Centre (SALC), a non-governmental organisation based in Johannesburg which is an initiative of the International Bar Association and the Open Society Initiative for Southern Africa. . . . The second respondent is the Zimbabwe Exiles’ Forum (ZEF), an organisation concerned with achieving justice and dignity for victims of human rights violations occurring in Zimbabwe. . . .

9. In March 2007, a year before national elections in Zimbabwe, the Zimbabwean police, allegedly acting on instructions from the ruling political party, the Zimbabwe African National Union – Patriotic Front (ZANU–PF), raided Harvest House in Harare. This is the headquarters of the main opposition party, the Movement for Democratic Change (MDC). During the raid more than 100 people were taken into custody, including workers in nearby shops and offices. These individuals were detained for several days and allegedly tortured by the Zimbabwean police. The detention and torture was allegedly part of a widespread and systematic attack on MDC officials and supporters in the run-up to the national elections.

10. SALC compiled detailed evidence of the alleged torture. It obtained 23 sworn written statements. Seventeen of the deponents attested to being tortured whilst in police custody. These deponents stated that they were subjected to severe pain and suffering, as a result of beatings with iron bars and baseball bats,

waterboarding, forced removal of their clothing, and electric shocks applied to their genitals and thighs. They were also subjected to mock executions during which they were hooded and a gun was pressed against their heads. The deponents further stated that they were tortured in order to obtain confessions regarding their purported involvement with the MDC. . . .

12. The gravamen of SALC's submissions is that South African law-enforcement agencies are legally obliged under the [International Criminal Court (ICC)] Act to investigate international crimes (including torture) and to hold the perpetrators of these crimes accountable in South African courts. . . . The SALC memorandum sought the investigation of the alleged crime of torture not only against the Zimbabwean police, but also against their superiors in the police and in government on the basis of the doctrine of "command responsibility." It was not at issue during the proceedings in the High Court, the Supreme Court of Appeal or this Court that the torture complaints were never brought to the attention of the Zimbabwean law-enforcement agencies. On the contrary, the case has been conducted throughout on the basis that the Zimbabwean authorities have failed to act on the torture allegations. . . .

15. The reasons for . . . [SAPS's refusal to investigate] were furnished in a letter sent by Mr Williams to the NDPP . . . [stating] that the SAPS was unable to initiate an investigation because the matter had been inadequately investigated and that further investigations would be impractical, legally questionable and virtually impossible. . . .

21. We have to determine whether, in the light of South Africa's international and domestic law obligations, the SAPS has a duty to investigate crimes against humanity committed beyond our borders. If so, under which circumstances is this duty triggered? . . .

24. The Constitution provides that: (a) customary international law is part of our domestic law insofar as it is not inconsistent with the Constitution or an Act of Parliament; (b) international treaty law only becomes law in the Republic once enacted into domestic legislation; and (c) national legislation should, in turn, be interpreted in the light of international law that has not been domesticated into South African law by national legislation but that is nonetheless binding upon it.

25. The next stage of the enquiry requires us to examine jurisdiction in an international law context. . . .

33. South Africa was the first African state to domesticate the Rome Statute into national legislation. This was done . . . through the enactment of the ICC Act. . . .

34. It is clear that a primary purpose of the Act is to enable the prosecution, in South African courts or the ICC, of persons accused of having committed atrocities, such as torture, beyond the borders of South Africa. . . .

40. Because of the international nature of the crime of torture, South Africa, in terms of . . . the Constitution and various international, regional and sub-regional instruments, is required, where appropriate, to exercise universal jurisdiction in relation to these crimes as they offend against the human conscience and our international and domestic law obligations. The exercise of universal jurisdiction is, however, subject to certain limitations. . . .

49. The alleged acts of torture were perpetrated in Zimbabwe, by and against Zimbabwean nationals. None of the perpetrators is present in South Africa. However, the duty to combat torture travels beyond the borders of Zimbabwe. Torture, as a crime against humanity, is listed in schedule 1 to the ICC Act and forms part of the category of crimes in which all states have an interest under customary international law. South Africa may, through universal jurisdiction, assert prescriptive and, to some degree, adjudicative jurisdiction by investigating the allegations of torture as a precursor to taking a possible next step against the alleged perpetrators such as a prosecution or an extradition request. The contention by the SAPS that it could not investigate without a suspect's presence must therefore fail. . . .

73. The SAPS advanced as its first reason that it has no extra-territorial jurisdiction and that the mere anticipated presence of a suspect at some future time in this country was not sufficient to clothe the SAPS with the requisite power and jurisdiction. As set out above, this is a misconception of the SAPS's domestic legal duty. And, for the reasons stated previously, presence of any kind, even anticipated presence, is not a prerequisite for an investigation into the torture allegations. . . .

78. Given the international and heinous nature of the crime, South Africa has a substantial connection to it. An investigation within the South African territory does not offend against the principle of non-intervention and there is no evidence that Zimbabwe has launched any investigation or has indicated that it is willing to do so, given the period of time since the alleged commission of the crimes. . . .

80. The Supreme Court of Appeal was therefore correct to rule that on the facts of this case the torture allegations must be investigated by the SAPS. Our country's international and domestic law commitments must be honoured. We cannot be seen to be tolerant of impunity for alleged torturers. We must take up

our rightful place in the community of nations with its concomitant obligations. We dare not be a safe haven for those who commit crimes against humanity.

81. The SAPS's decision not to conduct an investigation was wrong in law. . . . This judgment formulates limiting principles and finds that anticipated presence of a suspect in South Africa is not a prerequisite to trigger an investigation. It is only one of various factors that needs to be balanced in determining the practicability and reasonableness of an investigation. . . .

Israel

Adalah Legal Centre for Arab Minority Rights v. Minister of Defense Supreme Court as the High Court of Justice of Israel HCJ 8276/05 (Dec. 12, 2006)

[President Emeritus A. Barak delivered the opinion, joined by President D. Beinisch and Justices A. Procaccia, E.E. Levy, M. Naor, S. Joubran, E. Hayut, and D. Cheshin.]

President Emeritus A. BARAK

The Torts (State Liability) Law (Amendment no. 7), 5765-2005, provides that the state shall not be liable in torts for damage that occurred in a conflict zone as a result of an act carried out by the security forces. . . . Is the law constitutional? . . .

1. The first Intifadeh . . . was characterized by demonstrations, tyre-burning, the throwing of stones and Molotov cocktails at the security forces and Israeli citizens in Judaea, Samaria and the Gaza Strip, stabbings and the use of firearms and other weapons. The security forces operated in the territories in order to maintain order and security there. In the course of these operations, they used weapons and ammunition. This resulted on more than one occasion in injuries to persons and damage to property that was suffered by inhabitants of the territories. . . . In consequence, actions for damages were filed in the courts in Israel against the state by inhabitants of the territories who claimed that the state was liable under the law of torts for damage that they suffered as a result of what they alleged were negligent or deliberate actions of the security forces. . . .

2. These actions were tried in the courts in Israel in accordance with the Israeli law of torts. Under Israeli law, the state's liability in torts is governed by the Torts (State Liability) Law, 5712-1952 (hereafter—the Torts Law). The fundamental principle enshrined in s. 2 of the law is that 'For the purpose of liability in torts, the state is like any incorporated body.' . . . The relevant proviso for our purposes concerns 'combatant activity,' which states:

'The state is not liable in torts for an act that was caused as a result of combatant activity of the Israel Defence Forces.'

The Intifadeh claims gave rise to the question of how the term 'combatant activity' should be interpreted. Judgements that were given in these claims by the District Courts varied . . . between a 'broad outlook' and a 'narrow outlook.' The two approaches held that the activity of the security forces to maintain order and security in the territories during the First Intifadeh might be protected by . . . immunity. The broad approach tended to regard most of the operational activity of the security forces, which was intended to maintain order and security, as combatant activity. The narrow approach distinguished policing activities from combatant activities and sought to examine the circumstances of each activity in order to determine whether it was a combatant activity or not. . . .

6. Against the background of . . . [the second Intifadeh], and in view of the interpretation given to the expression 'combatant activity' by the Supreme Court in *Bani Ouda v. State of Israel* [(2002)], which in the opinion of the Knesset was too narrow, there was [an] . . . attempt to regulate in statute the question of the state's liability for damage caused during the Intifadeh. . . . [T]he Knesset adopted (on 24 July 2002) the Torts (State Liability) Law (Amendment no. 4), . . . (hereafter—'amendment 4'). This amendment added to s. 1 of the Torts Law a definition of the expression 'combatant activity,' which said the following: "Combatant activity—including any act of combating terror, hostilities or an uprising, as well as an act for the prevention of terrorism, hostilities or an uprising that was carried out in circumstances of risk to life or body." . . .

7. . . . On 27 July 2005, the Knesset amended the Torts Law once again in a manner that restricted even further the state's liability for tortious acts that occurred in the territories. It passed the Torts (State Liability) Law (Amendment no. 7), . . . (hereafter—'amendment 7'). This amendment is the focus of the petitions before us. The essence of the amendment was the

addition of ss. 5B and 5C of the Torts Law*

10. The petitioners in HCJ 8276/05 are human rights organizations. The petitioners in HCJ 8338/05 are the estate and surviving relatives of the late Shadan Abed Elkadar Abu Hajla. According to them, on 11 October 2002 in the evening the deceased was sitting with her husband and their son on the balcony of their house at Rafidia in Shechem. Two [Israel Defense Forces] IDF jeeps stopped on the road that passes by the house. Several shots were fired from the vehicle in the direction of the windows of the house. As a result of the shooting, the deceased was killed instantly and her husband and son were wounded. . . . [T]he petitioners filed a claim in torts against the state in the Nazareth Magistrates Court. After the enactment of amendment 7, . . . the state filed an application to dismiss the claim *in limine*. In its application the state said that the Minister of Defence had declared the Shechem district a conflict zone during the whole period from June 2002 until the end of March 2003. For this reason the court was requested to dismiss the claim *in limine*. In HCJ 11426/05 the petitioners include two separate groups. Each group filed a claim in torts against the state with regard to deaths or serious injuries that were caused, according to them, as a result of negligent and even deliberate activity of the security forces in the territories. . . . After the enactment of amendment 7, these claims cannot be heard, if the districts in which the events took place are declared conflict zones.

* The relevant provisions of the Torts Law are:

“5B. Claims by an Enemy, or an activist or member of a Terrorist Organization

(a) Notwithstanding what is stated in any law, the state is not liable in torts for damage that is caused to anyone stipulated in paragraphs (1), (2) or (3), except for damage that is caused in the types of claims or to the types of claimants as stated in the first schedule—

(1) A national of an enemy state, unless he is lawfully present in Israel;

(2) An operative or a member of a terrorist organization;

(3) Anyone who is injured when he is acting on behalf of or for a national of an enemy state or a member or an operative of a terrorist organization.

(b) In this section—‘enemy’ and ‘terrorist organization’— as defined in section 91 of the Penal Law, 5737-1977; “the state”—including an authority, body or person acting on its behalf.

5C. Claims in a Conflict Zone

(a) Notwithstanding what is stated in any law, the state is not liable in torts for damage that is caused in a conflict zone as a result of an act done by the security forces, except for damage that is caused in the types of claims or to the types of claimants as stated in the second schedule —

(b) (1) The Minister of Defence shall appoint a committee that shall be competent to approve, beyond the letter of the law, in special circumstances, a payment to an applicant to whom subsection (a) applies and to determine the amount thereof. . . .

(c) The Minister of Defence may declare an area to be a conflict zone; if the minister makes such a declaration, he shall determine in the declaration the borders of the conflict zone and the period for which the declaration shall apply; notice of the declaration shall be published in *Reshumot* [Israel’s Official Gazette].”

11. The petitioners' position is that amendment 7, and especially ss. 5B and 5C, are unconstitutional and therefore should be set aside. According to them, the Basic Laws apply to the violations of rights that arise from amendment 7, for four reasons. *First*, the Basic Laws apply to the violations of rights that arise from the amendment, because the amendment denies rights in Israel itself and in its courts; *second*, because the amendment applies . . . both to Israelis and to Palestinians; *third*, the Basic Laws apply in the territories because these laws apply to all the organs of government, and therefore every soldier carries in his knapsack not only the principles of administrative law but also the Basic Laws; *fourth*, because the Basic Laws give rights to Palestinians who are inhabitants of the territories, by virtue of their being protected persons who are present in an area that is subject to Israel's belligerent occupation.

12. The petitioners argue that several constitutional rights have been violated. . . . [including] the constitutional right to life and physical integrity, . . . property rights, . . . the constitutional right to apply to the courts . . . [,] the constitutional right to equality, . . . [and] the rights of those persons who were harmed by negligent acts of the security forces and who filed a claim in the years preceding the enactment of the amendment. . . . The result of amendment 7 is that the law exempts the security forces from liability for all the consequences of their acts in the territories that have been declared conflict zones. . . .

15. The [position of the] respondents . . . is that the second Intifadeh . . . has a special character [as a conflict], because the terrorist organizations operate frequently from within residential areas. This requires activity of the security forces inside those residential areas. This activity is intended to target terrorists, but unfortunately inhabitants who are not involved in terrorist activity are also sometimes harmed. . . . [T]he law of torts was not designed to deal with a situation of this kind. . . . [I]t is intolerable that the State of Israel should be liable to compensate not only its citizens who are injured by the armed conflict, but also the inhabitants of the Palestinian Authority. The principle that should be followed is that each party to the armed conflict should be liable for its own damage. . . . [T]here is no basis for applying the law of torts to damage resulting from the armed conflict between the State of Israel and the Palestinians who inhabit the territories. The law of torts should be adapted to the new reality that has been created. Amendment 7 was intended to achieve this goal. The provisions of s. 5B enshrine in the law the principle that is accepted in international law, in English common law and also in Israeli common law, according to which a state is not liable for damage sustained by an enemy alien.

16. The respondents' position is that it is doubtful whether amendment 7 violates constitutional rights, since it is doubtful whether the Basic Laws give

constitutional rights to inhabitants of the territories. . . . [T]heir position [is] that, even if there is a violation of constitutional rights. . . .

[T]he violation of rights in amendment 7 satisfy the requirements of proportionality. . . .

22. In general, Israeli legislation has territorial application. When a law is intended to apply to persons or acts outside Israel, this needs to be stated in statute Indeed, there is a presumption that the laws of Israel apply to legal relationships in Israel, and they are not intended to regulate legal relationships outside Israel. . . . This presumption is rebuttable. This rule also applies to Israeli legislation in the territories. . . . There is a presumption that Israeli legislation applies in Israel and not in the territories, unless it is stated in legislation (expressly or by implication) that it applies in the territories. A similar rule applies also to the Basic Laws. There is therefore a presumption that the various Basic Laws apply to acts done in Israel. As we have seen, this presumption may be rebutted (either expressly or by implication). . . . We held in [*Gaza Coast Local Council v. Knesset* (2005)] that the Basic Laws concerning human rights ‘give rights to every Israeli settler in the area being vacated. This application is personal. It derives from the fact that the State of Israel controls the area being vacated.’ We left unanswered the question whether the Basic Laws concerning human rights also give rights to persons in the territories who are not Israelis. Should we not say that with regard to ‘protected inhabitants’ international human rights law replaces Israeli internal law in this regard? There is no simple answer to these questions. Indeed, in its reply the State does not devote much attention to this question, since in its opinion amendment 7, even if it violates rights that are enshrined in the Basic Law: Human Dignity and Liberty, does so lawfully. It is also our opinion that there is no reason to consider the question of the territorial application of the Basic Law: Human Dignity and Liberty, since the rights that amendment 7 violates are rights in Israel, not rights outside Israel. . . .

23. Section 5B of amendment 7 applies . . . to tortious acts done in Israel. The question of the application of the Basic Law therefore does not arise at all in this context. By contrast, s. 5C of amendment 7 provides that ‘the state is not liable in torts for damage that is caused in a conflict zone as a result of an act done by the security forces.’ A ‘conflict zone’ is outside Israel. Does the question of the application of the Basic Law: Human Dignity and Liberty outside Israel arise with regard to this provision? My answer is no. The rights of the residents of the territories which are violated by amendment 7 are rights that are given to them in Israel. They are their rights under Israeli private international law, according to which, when the appropriate circumstances occur, it is possible to sue in Israel, under the Israeli law of torts, even for a tort that was committed outside Israel.

Indeed, since the Six Day War, and especially since the first Intifadeh, the courts in Israel have heard claims in torts filed by Palestinian inhabitants of the territories who were injured in the territories by Israeli tortfeasors in general. . . . Even the state made no claims against this application of the Israel law of torts. . . . It follows that amendment 7 violates the rights given in Israel to inhabitants of the territories who are harmed by tortious acts of the security forces in the territories. This was the position before amendment 7. This position was changed by s. 5C of amendment 7. The rights in Israel under the law of torts were taken away from the inhabitants of the territories for tortious acts done by the security forces in a conflict zone. The effect of amendment 7 is therefore in Israel. It violates rights that the injured parties from the territories had in Israel. The denial of these rights is subject in principle to the Basic Law: Human Dignity and Liberty. This application is not extra-territorial. It is territorial. Of course, this still leaves us with the second question of whether amendment 7 violates one of the rights prescribed in the Basic Law: Human Dignity and Liberty. . . .

24. Amendment 7 provides that the state is not liable in torts when the conditions set out therein are satisfied. Does this denial of liability for torts violate rights that are enshrined in the Basic Law: Human Dignity and Liberty? The answer is yes. There are two main reasons for this. *First*, the right in torts that is given to the injured party . . . and that was denied by amendment 7 is a part of the injured party's constitutional right to property. . . .

25. *Second*, liability in torts protects several rights of the injured party, such as the right to life, liberty, dignity and privacy. . . .

42. . . . The result is that we deny the petitions in so far as the constitutionality of s. 5B of amendment 7 is concerned. We grant the petitions and make the order nisi absolute, in so far as the constitutionality of s. 5C of amendment 7 is concerned. This section is void. . . .

Justice A. GRUNIS [concurring]:

1. . . . My agreement with the outcome derives mainly from the fact that the respondents did not address, and certainly did not address satisfactorily, two main questions: first, what—under the rules of private international law—is the substantive law that governs claims filed in Israel against the state and its agencies for acts outside Israel? Second, do the Basic Laws have extra-territorial application? . . .

2. One of the first questions that are relevant to an action filed in an Israeli court with regard to an incident that occurred outside the borders of Israel

concerns the substantive law that should be applied. . . . My colleague, the president emeritus, says that under the conflict of law rules that are practised in Israeli law, the Israeli law of torts applies to actions of the security forces in the territory of Judaea and Samaria. In my opinion, the answer to this question is not so clear. . . . [C]laims of Palestinians against the state for alleged tortious acts of the security forces have been tried for years under Israeli law. It is to be wondered why in those cases the state did not raise the argument that the substantive law that should apply, under the conflict of law rules, is the law of the place where the tort was committed. This argument was also not raised in the petitions before us. It is possible that a determination that Jordanian law applies would make it unnecessary to consider the constitutional question. . . .

3. The other main question that should be considered is the question of the application of the Basic Laws—in this case the Basic Law: Human Dignity and Liberty—to events that occur outside the borders of Israel. . . . For the purpose of considering this question I am prepared to assume that the conflict of law rules in Israel lead to the application of the Israeli law of torts with regard to an incident in which a Palestinian is injured as a result of shooting by IDF soldiers. According to the approach of my colleague the president emeritus, ‘The rights in Israel under the law of torts were taken away from the inhabitants of the territories for tortious acts done by the security forces in a conflict zone. The effect of amendment 7 is therefore in Israel. It violates rights that the injured parties from the territories had in Israel.’ This leads my colleague to conclude that there is no need to consider the question of the application of the Basic Law outside the borders of Israel. I cannot agree with this.

Let us remember that we are dealing with events that took place outside the borders of Israel. . . . Applying the Israeli law of torts does not create a fiction whereby the event occurred in Israel. The mere fact that the matter is tried before an Israeli court, under Israeli law, cannot lead to the conclusion that the rights are given to the injured parties in Israel. If you say this, then you arrive at a far-reaching conclusion that the Basic Laws apply to every proceeding that takes place in an Israeli court where the conflict of law rules determine that Israeli law applies. No connection should be made between the rules of Israeli private international law and the scope of application of the Basic Laws. Therefore it would appear that we need first to decide the question of the extraterritorial application of the Basic Law: Human Dignity and Liberty. However, since the respondents stated that in their opinion no decision on this question is required, there is no reason to address it in the present case. It would appear that it will be necessary to address the issue in the future, if an argument is presented before the courts. . . .

8. Since the respondents did not address central questions, and since . . . they agreed, if only by implication, . . . that there is no need to consider in this case the extraterritorial application of the Basic Law, I can only agree with the outcome proposed by my colleague President Emeritus A. Barak. It would appear that the time will come for deciding the aforesaid questions.

Inter-American Commission on Human Rights

Coard v. United States

Inter-American Commission on Human Rights

Report No.109/99 (Sept. 29, 1999)

[The report was signed by First Vice President Hélio Bicudo and Commissioners Alvaro Tirado Mejía, Carlos Ayala and Jean Joseph Exumé.]

1. The petition on behalf of the seventeen claimants was filed before the Commission on July 25, 1991, and processed in accordance with its Regulations. As a general matter, the petitioners alleged that the military action led by the armed forces of the United States of America . . . in Grenada in October of 1983 violated a series of international norms regulating the use of force by states. With regard to their specific situation, they alleged having been detained by United States forces in the first days of the military operation, held incommunicado for many days, and mistreated. They contended that the United States corrupted the Grenadian judicial system by influencing the selection of judicial personnel prior to their trial, financing the judiciary during their trial, and turning over testimonial and documentary evidence to Grenadian authorities, thereby depriving them of their right to a fair trial by an independent and impartial tribunal previously established by law. The petitioners claimed that the United States violated its obligations under the American Declaration of the Rights and Duties of Man, specifically: Article I, the right to life, liberty and personal security; Article II, the right to equality before the law; Article XXV, the right to protection from arbitrary arrest; Article XVII, the right to recognition of juridical personality and civil rights; Article XVIII, the right to a fair trial; and Article XXVI, the right to

due process of law. . . .*

5. The State contested the admissibility of the case before the Commission, asserting that the petitioners' factual allegations were incorrect and/or unsupported, that it was not the proper respondent, and that the Commission lacked the competence to examine the legal validity of its military actions in Grenada as this fell beyond the scope of its mandate, particularly with regard to a non-party to the American Convention.

6. The Commission adopted admissibility Report 14/94 on February 7, 1994, finding the claims concerning the arrest and detention of the petitioners admissible, and the other claims inadmissible. . . .

17. . . . [T]he petitioners claimed that: United States forces arrested them during the period in which it consolidated control over Grenada; that they were held incommunicado for many days; and that months passed before they were taken before a magistrate, or allowed to consult with counsel. "During this period petitioners were threatened, interrogated, beaten, deprived of sleep and food and constantly harassed."

18. The petitioners alleged that their whereabouts were kept secret, and that requests by lawyers and others to meet with them were rejected. . . .

* The relevant provisions of the American Declaration are:

Article I: "Every human being has the right to life, liberty and the security of his person."

Article II: "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor."

Article XVII: "Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights."

Article XVIII: "Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights."

Article XXV: "No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law. . . . He also has the right to humane treatment during the time he is in custody."

Article XXVI: "Every accused person is presumed to be innocent until proved guilty. . . ."

19. The petitioners alleged that United States forces subjected them to threats and physical abuse. . . .

20. The petition alleged that the United States had no legal justification for the actions taken against the petitioners, and is thus responsible for violations of their . . . human rights to liberty, freedom from arbitrary arrest, notification of charges, physical and mental integrity, freedom from cruel, inhuman and degrading punishment and punishment only after conviction in violation of Articles I, II, XVII, XVIII, XXV and XXVI of the American Declaration. . . .

27. The United States submitted that the treatment accorded to petitioners accorded fully with the standards of the American Declaration and applicable international humanitarian law. . . . The United States characterized the allegations of ill treatment as “baseless and unsubstantiated.” The State maintained that the petitioners had provided no specific information to substantiate their claims that they were subjected to threats during their interrogation, and reiterated its contention that that the claims concerning their arrest and detention should be found inadmissible based on the lack of credibility and foundation of their allegations. . . .

36. As the Commission stated in its decision on admissibility, its competence to review the claims before it derives from the terms of the OAS Charter, its Statute and Regulations. Pursuant to the Charter, all member states undertake to uphold the fundamental rights of the individual, which, in the case of non-parties to the Convention, are those set forth in the American Declaration, which constitutes a source of international obligation. . . .

37. While the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination—“without distinction as to race, nationality, creed or sex.” Given that individual rights inhere simply by virtue of a person’s humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state’s territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state—usually through the acts of the latter’s agents abroad. In principle, the inquiry turns not on the presumed victim’s nationality or presence within a particular geographic area, but on whether, under the specific

circumstances, the State observed the rights of a person subject to its authority and control. . . .

[The concurring statement of First Vice President Hélio Bicudo is omitted.]

MEDIATING COMPETING APPROACHES

What analyses are used to determine whether a state's power or human rights obligations should apply extraterritorially? Some possibilities include a rule of "reasonableness," special rules (*lex specialis*) for armed conflict, a presumption against extraterritoriality, and a presumption for extraterritoriality.

Reasonableness

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987)*

(1) Even when one of the bases for jurisdiction under § 402** is present, a state may not exercise jurisdiction to prescribe law with respect to a person or

* Excerpted from Restatement (Third) of Foreign Relations Law of the United States (Am. Law Inst. 1987).

** Section 402 provides:

“Subject to s 403, a state has jurisdiction to prescribe law with respect to

- (1) (a) conduct that, wholly or in substantial part, takes place within its territory;
- (b) the status of persons, or interests in things, present within its territory;
- (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
- (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
- (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.”

activity having connections with another state when the exercise of such jurisdiction is unreasonable.

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

(a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

Comment:

a. Reasonableness in international law and practice. The principle that an exercise of jurisdiction on one of the bases indicated in § 402 is nonetheless unlawful if it is unreasonable is established in United States law, and has emerged as a principle of international law as well. There is wide international consensus that the links of territoriality or nationality, § 402, while generally necessary, are not in all instances sufficient conditions for the exercise of such jurisdiction. Legislatures and administrative agencies, in the United States and in other states, have generally refrained from exercising jurisdiction where it would be unreasonable to do so, and courts have usually interpreted general language in a statute as not intended to exercise or authorize the exercise of jurisdiction in circumstances where application of the statute would be unreasonable.

Some United States courts have applied the principle of reasonableness as a requirement of comity, that term being understood not merely as an act of discretion and courtesy but as reflecting a sense of obligation among states. This section states the principle of reasonableness as a rule of international law. The principle applies regardless of the status of relations between the state exercising jurisdiction and another state whose interests may be affected. While the term “comity” is sometimes understood to include a requirement of reciprocity, the rule of this section is not conditional on a finding that the state affected by a regulation would exercise or limit its jurisdiction in the same circumstances to the same extent. Some elements of reciprocity may be relevant in considering the factors listed in Subsection (2). . . .

d. Reasonable exercise of jurisdiction by more than one state. Exercise of jurisdiction by more than one state may be reasonable—for example, when one state exercises jurisdiction on the basis of territoriality and the other on the basis of nationality; or when one state exercises jurisdiction over activity in its territory and the other on the basis of the effect of that activity in its territory; or when a given activity or transaction, such as international trade or transport, takes place in or affects more than one state. In such situations, the factors in Subsection (2) apply to both states. The fact that one state has exercised jurisdiction with respect to a given person or activity is relevant in applying Subsections (2)(g) and (h), but is not conclusive that it is unreasonable for the other state to do so. Nor is it conclusive that one state has a strong policy to permit or encourage an activity which the other state wishes to prohibit. . . .

Special Rules for Armed Conflict

Harold Hongju Koh

Memorandum Opinion on the Geographic Scope of the Convention Against Torture and Its Application in Situations of Armed Conflict,
U.S. Department of State (2013)*

The United States has been a party to the Convention Against Torture (“CAT”) since 1994. The U.N. Committee Against Torture (“CAT Committee”) has now asked the United States to address in its forthcoming Third Periodic Report a number of questions regarding the United States’ compliance with the Convention Against Torture both (1) extraterritorially and (2) in situations of armed conflict. . . .

. . . Unlike the ICCPR [International Covenant on Civil and Political Rights], which has a single jurisdictional clause, multiple provisions of the CAT address its geographic scope, and the treaty explicitly imposes certain extraterritorial obligations. For example, it is uncontested that the CAT obligates States Parties to criminalize “all” acts of torture, *wherever they occur*, and to establish criminal jurisdiction over various extraterritorial acts of torture, including universal jurisdiction when an offender is present in “any territory under its jurisdiction.” Articles 2, 5, 11, 12, 13 and 16 obligate a State Party to take certain actions limited to “any territory under its jurisdiction,” a concept which, as discussed below, extends beyond sovereign U.S. soil. Article 7 employs a nearly identical phrase (“in the territory under whose jurisdiction”), as does Article 6. Article 14, which requires States Parties to ensure that a victim of torture “obtains redress and has an enforceable right to fair and adequate compensation,” does not include any explicit geographic limitation. However, the United States likewise adopted an understanding upon ratification that it understood Article 14 to apply only to acts of torture “committed in any territory under its jurisdiction.” Other articles in the CAT, however, including Article 3, which prohibits *nonrefoulement* (non-return) to torture, do not include any such textual geographic limitation and the United States adopted no similar understanding.

* Excerpted from Harold Hongju Koh, *Memorandum Opinion on the Geographic Scope of the Convention Against Torture and Its Application in Situations of Armed Conflict*, U.S. Dep’t of State (2013).

With respect to the question of armed conflict, Article 2 of the CAT provides explicitly that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war . . . may be invoked as a justification of torture.”

In the recent past, the United States has articulated a very constrained territorial view of many of its human rights treaty obligations, including under the Convention Against Torture. . . . [T]he last administration specifically claimed that U.S. obligations under many provisions of the CAT did not apply outside sovereign U.S. territory, and that the CAT did not apply to the conduct of armed conflict. However, a number of these positions marked a significant retreat from the United States’ prior interpretations of the CAT, and many of the prior interpretations have been specifically rescinded by this Administration. A number of other intervening developments have also called into question whether prior U.S. positions remain legally sustainable, including the following:

(1) *Ambiguous security situations*: In the last decade, the United States, NATO, and other allies have engaged in increased multilateral military activities overseas, including operations that fall into gray zones that are not easily characterized as armed conflicts, or that have evolved in and out of being situations of armed conflict. Such situations have made it difficult to sustain a bright line distinction between the application of human rights law and the law of armed conflict.

(2) *Foreign and international doctrinal developments*: To address concerns over the existence of perceived legal “black holes,” national, regional and international courts and tribunals have shown increasing willingness to assert the applicability of human rights treaty obligations extraterritorially and in situations of armed conflict. . . . [I]n the last decade the International Court of Justice (ICJ), the European Court of Human Rights (ECHR), the Inter-American Commission and Court of Human Rights, the U.N. Human Rights Committee (HRC), the CAT Committee, the U.N. Human Rights Council, the U.N. General Assembly, and national courts and governments (including in Australia, Canada, and European states) have all become increasingly assertive in publicly recognizing at least some extraterritorial application of human rights treaty obligations, including to some military operations.

(3) *Cooperative operations and aiding and assisting*: The recognition of human rights treaty obligations by some states

extraterritorially and in armed conflict has required closer attention to compliance by all participants in joint and multilateral operations. . . . State obligations regarding *aiding and assisting* have virtually ensured that recognition of extraterritorial human rights obligations by some states *de facto* will cross borders. The rules regarding aiding and assisting mean that states that themselves recognize some human rights obligations extraterritorially and in situations of armed conflict—including our NATO allies and Australia—cannot collaborate in joint operations, transfer detainees, share intelligence, and otherwise cooperate in activities that might constitute aiding and assisting violations of their own human rights obligations. . . .

The international trend toward recognizing some form of extraterritorial application of human rights treaty obligations—however exceptional and limited—has left the United States increasingly isolated in its legal positions in relation to the allies with which it collaborates. . . .

Upon taking office, the Obama Administration formally rescinded most of the prior Administration’s internal legal analyses of the scope of U.S. obligations under the Convention Against Torture. On his second day in office [January 22, 2009], President Obama issued Executive Order 13491 on Ensuring Lawful Interrogations, which was adopted, *inter alia*, “to ensure compliance with the treaty obligations of the United States.”* This Order mandated compliance with the treatment standards of the Convention Against Torture for all persons under the effective control of the United States in situations of armed conflict, wherever located. That order recognizes no geographic limit

To date, the Obama Administration has not publicly reasserted the positions of the prior Administration regarding extraterritorial limitations on application of the Convention Against Torture, or application of the CAT in situations of armed conflict. At the same time, neither has it clearly articulated its

* Executive Order No. 13491 provides: “Consistent with the requirements of the Federal torture statute, 18 U.S.C. 2340-2340A, section 1003 of the Detainee Treatment Act of 2005, 42 U.S.C. 2000dd, the Convention Against Torture, Common Article 3, and other laws regulating the treatment and interrogation of individuals detained in any armed conflict, such persons shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States. . . .”

own public position regarding either the CAT's extraterritoriality or application in situations of armed conflict. To facilitate the Administration's consideration of these questions, this Memorandum Opinion examines those two issues in detail.

Part I of this Memorandum Opinion addresses background issues relating to the extraterritorial application of treaties. *It concludes that international law does not recognize any general background presumption for, or against, the extraterritorial application of treaties. . . .*

Parts II and III apply these interpretive rules to address the geographic scope of various provisions of the Convention Against Torture, particularly the application of certain articles to "any territory under [a State Party's] jurisdiction" *Based upon that application, I conclude that the Convention Against Torture is best understood as establishing and reflecting the following four principles regarding extraterritoriality:*

First, a comprehensive background prohibition against torture: The Convention built upon and incorporated a preexisting, geographically comprehensive, background prohibition against torture and cruel, inhuman, or degrading treatment (CIDT) that was already established as a matter of both treaty and customary international law.

Second, comprehensive obligations to criminalize acts of torture: . . . The Convention . . . imposes geographically comprehensive obligations on State Parties to criminalize *all* acts of torture, not to return individuals to torture, and to prosecute or extradite offenders, regardless where the act of torture occurs.

Third, an effective control test for "any territory under its jurisdiction:" . . . [T]he best interpretation of the term "any territory under its jurisdiction"—which appears in a number of Articles of the CAT—is that this language limits the obligations of a State Party to take the actions specified in those articles to those contexts over which a state exercises sufficient *effective control* to be able to exercise the relevant legal or regulatory authority. *In other words, where a State Party can comply, it must comply.* . . . On its face, and consistent with both the negotiating and ratification history of the Convention and longstanding U.S. interpretations, "any territory under [U.S.] jurisdiction" necessarily includes the special maritime and territorial jurisdiction ("SMTJ") of the United States and special aircraft jurisdiction. On their face these concepts recognize U.S. legal jurisdiction over extraterritorial locations—such as State-registered ships and aircraft, U.S. embassies and consulates, Guantánamo and other U.S. military bases overseas—and other locations

over which the United States . . . exercises lawful jurisdiction. The negotiating history of the Convention also makes clear that “any territory under its jurisdiction” was understood to reach circumstances over which a State exercises *de facto* effective control, including situations of occupation. *In short, the Convention limits obligations to circumstances in which a State Party exercises sufficient de jure or de facto control over circumstances to legally comply. . . .*

Fourth, no general territorial limit, including for nonrefoulement: . . . Although the United States has previously taken the position that the Article 3 *nonrefoulement* obligation is the most geographically restrictive provision of the CAT—limited to sovereign U.S. territory—I find that position legally unsustainable and unsupported by the object and purpose, text, context, and negotiating history of the Convention. . . . Nothing in the CAT suggests that that treaty intended, on the one hand, to criminalize “all” torture, wherever located, yet at the same time to permit a person to be *returned* to torture from any offshore location.

Finally, Part . . . [IV] addresses the Convention’s application, within its geographic scope, to situations of armed conflict. *Although the prior Administration took a different position, I conclude that it is clear that the Convention was intended to apply in situations of armed conflict. . . .*

In sum, an exhaustive analysis of all available sources of treaty interpretation requires rejection of an interpretation that would impose a categorical bar against the Convention’s extraterritorial scope or its application in armed conflict. In my legal opinion, it is not legally available to policymakers to claim such a categorical bar. . . .

PART IV: APPLICATION OF THE CONVENTION AGAINST TORTURE IN SITUATIONS OF ARMED CONFLICT

The CAT Committee has concluded that “the Convention applies at all times, *whether in peace, war or armed conflict*, in any territory under its jurisdiction and that the application of the Convention’s provisions are without prejudice to the provisions of any other international instrument” In its 2006 appearance before the Committee Against Torture, the prior administration took the position that the Convention Against Torture does not apply in situations of armed conflict Based on an exhaustive review of the object and purpose, text, and context of the Convention, its negotiating history, the understanding of the Executive and Senate at the time of ratification, subsequent U.S. positions,

and the views of other States Parties, *I conclude that it is clear that in fact, the Convention was intended to apply, and does apply, in situations of armed conflict.*

A core purpose of the Convention was to universalize a regime of criminal punishment for those who commit torture. In this regard the Convention built upon the regime that already existed under international humanitarian law, under which torture constitutes a grave breach of the Geneva Conventions, a violation of Common Article 3, and a violation of the customary international law of armed conflict, and must be criminally punished as such. Nothing in the design of the Convention suggests that the universalization of criminal punishment that the Convention sought was intended to apply exclusively outside of situations of armed conflict. . . .

This was also plainly the view of the U.S. Executive and Senate at the time of the CAT's ratification, which saw the existing regime of international humanitarian law as an important predecessor to the CAT. . . . This conclusion is also consistent with international law rules regarding *lex specialis*, under which the Convention Against Torture, as the later-in-time and more specific treaty obligation, which is general in application, must be understood to be applicable in armed conflict. It also comports with the view of the overwhelming majority of our close allies with whom we cooperate militarily, who recognize that the CAT applies to their armed conflict operations. Finally, recognizing that the CAT applies in situations of armed conflict is consistent with current U.S. law and policy, which broadly prohibits acts of torture or CIDT by U.S. personnel everywhere, whether in or out of situations of armed conflict. . . .

For all the above reasons, I recommend that in its upcoming CAT Presentation, the United States should (1) reject any legal position claiming a categorical bar against the Convention's extraterritorial scope or its application in situations of armed conflict; and (2) acknowledge that the best reading of the words "any territory under its jurisdiction" in the CAT is one that limits the positive obligations of the United States to take the actions specified in those articles to those contexts over which a State exercises sufficient effective control. . . .

Sarah Cleveland

*The United States and the Torture Convention, Part I:
Extraterritoriality (2014)**

On Wednesday [November 12, 2014], the United States explicitly changed its position regarding application of the Convention Against Torture (CAT) extraterritorially and in situations of armed conflict from the position of the Bush Administration. Simultaneously with the appearance of the U.S. delegation before the Committee Against Torture in Geneva, the White House stated that the United States would be announcing “a number of changes and clarifications” to the prior U.S. legal positions. . . .

The United States . . . stated that the test it will apply for determining the geographic scope of those obligations under the CAT that apply to “any territory under its jurisdiction” is “*control as a government authority*,” and that areas satisfying this test include Guantánamo Bay and U.S.-registered ships and aircraft.

The U.S. also affirmed that the CAT “continues to apply” when the U.S. is “engaged in armed conflict,” and that “the laws of war do not generally displace the Convention’s application,” although IHL will “take precedence over the Convention where the two conflict.” It further confirmed that application of the CAT to Guantánamo military proceedings includes compliance with the Article 15 obligation to exclude evidence extracted by torture.

Both are significant and welcome modifications of Bush administration positions. In this post and one to follow, I will examine first, what these statements mean with respect to extraterritoriality, and second, what they mean for actions taken in armed conflict. . . .

The CAT includes a number of provisions that apply for States Parties to “any territory under its jurisdiction.” . . . Under the Bush Administration, Attorney General Alberto Gonzales publicly asserted that the obligation to prevent cruel, inhuman, or degrading treatment (CIDT) in “any territory under [U.S.] jurisdiction” under Article 16 of the CAT did not apply outside the sovereign United States (including to Guantánamo) That administration also rejected the view that such jurisdiction included U.S.-registered ships and aircraft, and took the position that this jurisdiction was “not governed” by laws extending

* Excerpted from Sarah Cleveland, *The United States and the Torture Convention, Part I: Extraterritoriality*, JUST SECURITY BLOG (Nov. 14, 2014), <http://justsecurity.org/17435/united-states-torture-convention-part-i-extraterritoriality/>.

U.S. criminal jurisdiction to special maritime and territorial zones outside the United States.

The Obama Administration has now expressly abandoned this position. The U.S. delegation instead has adopted an interpretation that appears closer to that accepted by the ratifying Reagan and H. W. Bush Administrations, and the Clinton Administration, all of which recognized that “any territory under its jurisdiction” included state-flagged ships and aircraft and reached the U.S. special maritime and territorial jurisdiction, which includes Guantánamo. The Obama position might appear to be low-hanging fruit, given that the Guantánamo Naval Base is legally subject to “complete U.S. jurisdiction and control.” But no prior administration had specifically identified a territory outside the U.S. other than ships and vessels that qualified as “any territory under its jurisdiction.” Acknowledging that the CAT’s prohibitions apply to Guantánamo was a step the prior administration was never able to take.

Before turning to the new U.S. position, a few preliminary observations are in order.

First, the fact that the United States acknowledged that it exercises “control as a governmental authority” over Guantánamo and U.S.-flagged ships and aircraft does not necessarily mean that it believes that such control is limited to these places. The United States has not stated what it considers to be the outer limits of this jurisdiction. . . .

Second, the purpose of the CAT was not to prohibit acts of torture and CIDT. Instead, the purpose of the CAT was to “make more effective” those prohibitions, which were already universal, by creating express obligations on States to prevent, prosecute, and remedy violations, as the Preamble makes clear. As the ratifying Reagan and [H. W.] Bush Administrations emphasized, the prohibition of torture and CIDT was already “established as a standard for the protection of all persons, in time of peace as well as war.” This universal prohibition is illustrated by the number of provisions of the CAT that include no express territorial limit. These include the obligation to criminalize all acts of torture (Art. 4); not to return individuals to torture (Art. 3); to prosecute a State’s own nationals for acts of torture wherever located (Art. 5(1)(b)); to share evidence with other States (Art. 9); to train and establish rules regarding the prohibition on torture for all personnel involved in detention (Art. 10); and not to introduce evidence derived from torture in legal proceedings (Art. 15).

Thus, the obligations to “prevent” such acts under Articles 2 and 16 of the CAT do not geographically limit the places where acts of torture and cruel treatment are prohibited. If that were the case, acts of torture under the CAT

would not be subject to universal jurisdiction. Thus, the U.S. position that “any territory under its jurisdiction” is limited to locations where the United States exercises “control as a governmental authority” should not be understood to suggest that the prohibition on torture and CIDT is similarly limited. To the contrary, as the White House has again made clear, the official U.S. position is that such acts are prohibited by domestic and international law “at all times, and in all places.”

The Convention only limits to “any territory under [the State’s] jurisdiction” certain obligations: particularly the duties to create institutions and structures to prevent, investigate, and remedy torture and CIDT. These include obligations to “take effective legislative, administrative, judicial or other measures to prevent” acts of torture or CIDT (Arts. 2 and 16); to take an offender into custody (Art. 6); to extradite or submit a case to authorities for prosecution (Art. 7(1)); to ensure the right of victims to complain and to have their case examined by competent authorities (Art. 13); and . . . to ensure an enforceable right to compensation and full rehabilitation for victims of torture (Art. 14). *These latter provisions generally presume that the State exercises sufficient control over the location to fulfill the CAT obligation consistent with domestic and international law.* It is only to such provisions that the limitation to “any territory under its jurisdiction” applies. And the United States now states that these provisions bind it lawfully where the U.S. government exercises “control as a governmental authority.”

But under the new U.S. legal position, would these provisions reach former black sites overseas? . . . [T]he U.S. statement does not clearly answer this question one way or the other. That ambiguity also may not be as fraught as some think. As noted above, the prohibition on torture and cruel treatment itself is not limited to “any territory under [a State’s] jurisdiction,” but is comprehensively banned under U.S. and international law. In addition to the CAT itself, . . . President Obama’s January 22, 2009 Executive order bans torture and cruel inhuman or degrading treatment “consistent with the Convention Against Torture” in situations of armed conflict wherever the U.S. exercises effective control. The Detainee Treatment Act prohibits cruel treatment comprehensively, as do international humanitarian law and customary international human rights law. As the Acting Legal Adviser unequivocally put it, “There should be no doubt: the U.S. affirms that torture and cruel inhuman and degrading treatment are prohibited at all times and in all places and we remain resolute in our adherence to these prohibitions.” She left no doubt that these prohibitions are legal, not merely policy. . . .

The U.S. test of “control as a governmental authority” appears to have been lifted directly from the Reagan administration’s ratification package, which explained that

Article 2 provides generally that each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. The term ‘territory under its jurisdiction’ refers to all places that the State Party *controls as a governmental authority*, including ships and aircraft registered in that State. . . .

The Reagan Administration also took the position that federal laws extending U.S. criminal jurisdiction extraterritorially to “special maritime and territorial” areas, 18 U.S.C. sec. 7, “appear[ed] sufficient” to satisfy the CAT obligation to extend U.S. criminal jurisdiction over torture occurring “in any territory under its jurisdiction.”

The view that “any territory under its jurisdiction” applied to ships and aircraft and was informed by U.S. special maritime and territorial jurisdiction was also embraced by President H.W. Bush and Congress in enacting the original extraterritorial torture statute, 18 U.S.C. 2340(3), and was reaffirmed by the Clinton administration in its appearance before the CAT. Thus, until the George W. Bush administration, although the United States had not publicly defined “any territory under its jurisdiction” with precision, it had never taken the position that this phrase was limited to the territorial United States.

The special maritime and territorial jurisdiction of the United States establishes *de jure* criminal jurisdiction over U.S.-owned vessels and aircraft and “[a]ny lands reserved or acquired for the use of the United States and under the exclusive or concurrent jurisdiction thereof.” The latter has long been understood to include Guantánamo, and could be understood to include diplomatic, consular and military facilities, including embassies. Indeed, as amended, the current version of 18 U.S.C. sec. 7 expressly applies U.S. criminal jurisdiction in such places, at least with respect to crimes committed by U.S. persons. In all such extraterritorial places, the United States accordingly exercises *de jure* control as a governmental authority, as a matter of U.S. domestic law.

All of this suggests that places where the United States exercises “control as a governmental authority” both legally and practically must be understood to extend beyond Guantánamo, ships and aircraft. And appropriately so. U.S. military bases overseas are commonly subject to Status of Forces Agreements that exclude the territorial state from exercising legal jurisdiction over U.S. activities. Embassies and other diplomatic facilities are legally immune from the

enforcement of local law or intrusion by local authorities. Indeed, for many countries, embassies may be the place where extraterritorial acts of cruel treatment are most likely to occur, precisely because of their inviolability, as the recent *Khurts Bat* case (which involved Mongolia's abduction and drugging of a national in its Berlin embassy) demonstrated.

The U.S. may also exercise "control as a governmental authority" within the meaning of the CAT even beyond such territory. The drafters of the CAT recognized, for example, that "any territory under its jurisdiction" also included control over occupied territory. . . .

Moreover, international law understandings of jurisdiction have evolved significantly since the CAT was adopted and ratified. This is particularly true in the human rights area, where . . . jurisprudence from international and regional tribunals has converged around a standard that equates jurisdiction with a government's exercise of effective control. The United States also has exercised control as a government in recent years in locations such as occupied Iraq. The question of when a state exercises control as a government thus will continue to evolve both legally and factually as states act outside their borders, and as jurisprudential and technological developments in cyberspace and elsewhere increasingly defy tying jurisdiction to geography.

In light of these developments in international law, which are also reflected in the CAT Committee's reading noted above, Legal Adviser Harold Hongju Koh concluded in January 2013 that obligations applicable in any territory under a state's jurisdiction should apply wherever a government "exercises sufficient effective control to be able to exercise the relevant legal or regulatory authority." The new U.S. position announced on Wednesday did not use that exact phrase, but it did expressly acknowledge extraterritorial application based on "control as a governmental authority." This is a significant event. Since the *Sale v. Haitian Centers Council* decision in 1993, the United States has argued for strict territoriality with regard to virtually every human rights treaty that it has ratified. The new Obama position now expressly recognizes the extraterritorial scope of the territorially qualified provisions of the CAT, and offers a test that expressly applies these provisions to Guantánamo, ships and aircraft. As important, the Obama Administration did not limit its position to these areas. That move now leaves room open for the U.S. interpretation of "control as a governmental authority" to potentially clarify and evolve according to developing rules of international law that the United States accepts.

A Presumption Against Extraterritoriality

Gary B. Born

*A Reappraisal of the Extraterritorial Reach of U.S. Law (1992)**

. . . The extraterritorial application of federal legislation has been a vexing subject since the early days of the Republic. U.S. courts have recurrently been required to determine the territorial reach of federal statutes, often without clear instructions from Congress or the President. Absent legislative guidance, the earliest U.S. judicial decisions relied on the “Law of Nations” to define the territorial reach of federal law. Because international law authorities during the nineteenth century adhered to strict territorial limits on national jurisdiction, the Supreme Court adopted a canon of statutory construction that is best described as a presumption of territoriality: federal law would not be applied extraterritorially unless Congress clearly expressed an intention to regulate conduct abroad.

During the course of the twentieth century, territorial limits on national jurisdiction gradually eroded. Revolutionary transformations in international commerce, technology and business organization produced regulatory needs that were incompatible with strict territoriality principles. State practice increasingly included extraterritorial assertions of jurisdiction, relying particularly on the effects doctrine and the nationality principle. In turn, public international law doctrine also evolved, particularly in the United States but also elsewhere; ultimately, a consensus emerged that largely rejected the nineteenth century’s strict territoriality principle. At the same time, private international law in the United States and elsewhere increasingly abandoned the territorial approaches of the nineteenth century in favor of more flexible analyses.

This Article argues that the rationale for the territoriality presumption has become obsolete and that the presumption should be abandoned. The presumption unduly constrains the extraterritorial application of U.S. laws—including instances where significant national regulatory policies or interests demand protection, where Congress fairly clearly sought to safeguard such interests, and where no conflict with either international or foreign law would occur. Conversely, the territoriality presumption can result in the application of U.S. law in circumstances where only fleeting or arbitrary territorial contacts exist, but where no meaningful U.S. regulatory policies are involved and where the

* Excerpted from Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL’Y INTL. BUS. 1 (1992).

assertion of U.S. jurisdiction offends both international law and foreign sensibilities.

No replacement for the territoriality presumption will be entirely satisfactory. This Article argues that the most attractive available alternative appears to be an “international law” presumption: courts should generally presume that federal law applies to that conduct which, under principles of public and private international law currently prevailing in the United States, is subject to U.S. law. In broad outline, these principles can be treated as providing for the application of U.S. law to conduct that—by virtue of situs, effects, nationality, regulatory implications and conflicts with foreign laws—has its most significant relationship to the United States. This presumption should not impose a strict “clear statement” test, but should instead permit judicial consideration of ordinary indicia of legislative intent. . . .

In the absence of effective international law or constitutional constraints, the extraterritorial reach of federal legislation has turned almost entirely upon questions of Congressional intent and statutory construction. In the overwhelming majority of cases, however, federal statutes are couched in the most general terms and suggest no meaningful geographic limits. . . .

For nearly 200 years U.S. judicial decisions have relied—albeit with increasing inconsistency—upon a presumption of territoriality in determining the reach of federal legislation. . . .

. . . As developed in these early decisions, the territoriality presumption was supported by three related justifications: (1) public international law; (2) conflicts of law, or private international law; and (3) international “comity.” Most nineteenth century decisions did not distinguish between these rationales for the territoriality presumption; they instead relied on some mix of all three justifications, which were generally subsumed within the “Law of Nations.” . . .

. . . [T]he territoriality presumption adopted by the Court . . . is an unwise and illegitimate method of statutory construction. It is unwise because it unduly constrains the application of U.S. law to conduct that this country has significant interests in regulating, while providing for the application of U.S. law to conduct that can have insignificant U.S. connections and little impact on U.S. regulatory policies. Similarly, the territoriality presumption is illegitimate because it is a wholly judicial construct that prevents the application of U.S. law to conduct that Congress plainly intended to regulate and that frustrates important U.S. regulatory and foreign policy objectives. . . .

This century's profound international political, economic, technological, and legal transformations have significantly undermined the strict territoriality presumption that prevailed in nineteenth century conceptions of public international law. The doctrine of territorial sovereignty has been eroded by the slow emergence of the United Nations and other international institutions . . . [and] the past half-century has witnessed an extraordinary transformation of international economic, political, and social relations. . . .

. . . [S]ection 403 of the *Restatement (Third) Foreign Relations Law* can fairly be said to reflect a consensus—albeit a fragile one—among courts and commentators. As described above, for much of this century the United States asserted broader claims to extraterritorial jurisdiction than many other states regarded permissible under public international law. These differences have narrowed in recent decades, however, as U.S. regulatory authorities and courts have applied “reasonableness” analyses like those in section 403, and as many foreign states have asserted or recognized expanded jurisdictional claims. . . .

Substantial criticism has been leveled at various aspects of the section 403 analysis, and a number of alternatives have been proposed, including formulations of a “rule of reason,” a principle of “non-interference,” and a “comity doctrine.” . . . Determining whether a reasonable connection exists requires consideration of traditional contacts (such as situs of conduct, nationality of parties, and effects), as well as the existence of conflicts between national laws and policies and the needs of the international system.

. . . A broadly similar reasonableness analysis also prevails in contemporary U.S. private international law thinking. . . .

How precisely should these contemporary standards of public and private international law be translated into an international law presumption governing the extraterritorial reach of federal law? . . .

Under the approach outlined above, courts would first consider whether the United States had a “reasonable” jurisdictional basis under sections 402 and 403 of the *Restatement (Third) of Foreign Relations Law*; absent a clear, unambiguous statement to the contrary, no statute would be applied extraterritorially in violation of sections 402 and 403. Relevant to this reasonableness inquiry, among other things, would be the factors set forth in section 403, including the existence of “true conflicts” between U.S. and foreign law. The extraterritorial application of U.S. law would be disfavored where it produced such conflicts, although jurisdiction under sections 402 and 403 might nonetheless exist in many such cases. Assuming that the United States could assert jurisdiction extraterritorially under sections 402 and 403, then the approach

contemplated above would require application of the most significant relationship test of the *Restatement (Second) of Conflict of Laws* in order to determine how Congress would resolve competing U.S. and foreign jurisdictional claims. This inquiry would consider the contacts of the relevant conduct and parties to determine which nation's laws and policies would be most significantly advanced or injured by alternative resolutions of the choice-of-law issue. Where U.S. interests and contacts were most significant, U.S. law would apply extraterritorially. . . .

Morrison v. National Australia Bank
Supreme Court of the United States
561 U.S. 247 (2010)

SCALIA, J., delivered the opinion of the Court.

. . . We decide whether § 10(b) of the Securities Exchange Act of 1934 provides a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges. . . .

. . . In February 1998, National [Australia Bank] bought . . . HomeSide Lending, Inc., a mortgage-servicing company headquartered in Florida. . . .

From 1998 until 2001, National's annual reports and other public documents touted the success of HomeSide's business, . . . [b]ut on July 5, 2001, National announced that it was writing down the value of HomeSide's assets by \$450 million; and then again on September 3, by another \$1.75 billion. . . . According to the complaint, . . . [Homeside] manipulated HomeSide's financial models . . . to appear more valuable than they really were. The complaint also alleges that National . . . [was] aware of this deception by July 2000, but did nothing about it. . . .

It is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" This principle represents a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate. It rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters. Thus, "unless there is the affirmative intention of the Congress clearly expressed" to give a statute

extraterritorial effect, “we must presume it is primarily concerned with domestic conditions.” The canon or presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law. When a statute gives no clear indication of an extraterritorial application, it has none.

Despite this principle of interpretation, long and often recited in our opinions, the Second Circuit believed that, because the Exchange Act is silent as to the extraterritorial application of § 10(b), it was left to the court to “discern” whether Congress would have wanted the statute to apply. This disregard of the presumption against extraterritoriality did not originate with the Court of Appeals panel in this case. It has been repeated over many decades by various courts of appeals in determining the application of the Exchange Act, and § 10(b) in particular, to fraudulent schemes that involve conduct and effects abroad. That has produced a collection of tests for divining what Congress would have wanted, complex in formulation and unpredictable in application. . . .

. . . As long as there was prescriptive jurisdiction to regulate, the Second Circuit explained, whether to apply § 10(b) even to “predominantly foreign” transactions became a matter of whether a court thought Congress “wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries.”

The Second Circuit had thus established that application of § 10(b) could be premised upon either some effect on American securities markets or investors or significant conduct in the United States. It later formalized these two applications into (1) an “effects test,” “whether the wrongful conduct had a substantial effect in the United States or upon United States citizens,” and (2) a “conduct test,” “whether the wrongful conduct occurred in the United States.” . . .

. . . [T]hese tests were not easy to administer. The conduct test was held to apply differently depending on whether the harmed investors were Americans or foreigners: When the alleged damages consisted of losses to American investors abroad, it was enough that acts “of material importance” performed in the United States “significantly contributed” to that result; whereas those acts must have “directly caused” the result when losses to foreigners abroad were at issue. And “merely preparatory activities in the United States” did not suffice “to trigger application of the securities laws for injury to foreigners located abroad.” This required the court to distinguish between mere preparation and using the United States as a “base” for fraudulent activities in other countries. But merely satisfying the conduct test was sometimes insufficient without “some additional factor tipping the scales” in favor of the application of American law. There is no more damning indictment of the “conduct” and “effects” tests than the Second

Circuit’s own declaration that “the presence or absence of any single factor which was considered significant in other cases . . . is not necessarily dispositive in future cases.” . . .

. . . The results of judicial-speculation-made-law—divining what Congress would have wanted if it had thought of the situation before the court—demonstrate the wisdom of the presumption against extraterritoriality. Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects. . . .

On its face, § 10(b) contains nothing to suggest it applies abroad:

“It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—. . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe”

. . . [T]here is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially, and we therefore conclude that it does not. . . .

JUSTICE BREYER, concurring in part and concurring in the judgment.

Section 10(b) of the Securities Exchange Act of 1934 applies to fraud “in connection with” two categories of transactions: (1) “the purchase or sale of any security registered on a national securities exchange” or (2) “the purchase or sale of . . . any security not so registered.” . . . In this case, the purchased securities are listed only on a few foreign exchanges, none of which has registered with the Securities and Exchange Commission as a “national securities exchange.” . . . The first category therefore does not apply. Further, the relevant purchases of these unregistered securities took place entirely in Australia and involved only Australian investors. And in accordance with the presumption against extraterritoriality, I do not read the second category to include such transactions. Thus, while state law or other federal fraud statutes . . . [e.g. mail fraud or wire fraud] may apply to the fraudulent activity alleged here to have occurred in the United States, I believe that § 10(b) does not. . . .

Justice STEVENS, with whom Justice GINSBURG joins, concurring in the judgment.

While I agree that petitioners have failed to state a claim on which relief can be granted, . . . I would adhere to the general approach that has been the law . . . for nearly four decades. . . .

. . . [T]he real question in this case is how much, and what kinds of, *domestic* contacts are sufficient to trigger application of § 10(b). In developing its conduct-and-effects test, the Second Circuit endeavored to derive a solution from the Exchange Act's text, structure, history, and purpose. . . .

. . . The text of the Exchange Act indicates that § 10(b) extends to at least some activities with an international component, but, again, it is not pellucid as to which ones. The Second Circuit draws the line as follows: Section 10(b) extends to transnational frauds “only when substantial acts in furtherance of the fraud were committed within the United States, . . .”

This approach is consistent with . . . the traditional understanding, regnant in the 1930's as it is now, that the presumption against extraterritoriality does not apply “when the conduct [at issue] occurs within the United States,” and has lesser force when “the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States.” . . .

Repudiating the Second Circuit's approach in its entirety, the Court establishes a novel rule that will foreclose private parties from bringing § 10(b) actions whenever the relevant securities were purchased or sold abroad and are not listed on a domestic exchange. The real motor of the Court's opinion, it seems, is not the presumption against extraterritoriality but rather the Court's belief that transactions on domestic exchanges are “the focus of the Exchange Act” and “the objects of [its] solicitude.” In reality, however, it is the “public interest” and “the interests of investors” that are the objects of the statute's solicitude. . . .

EXTRATERRITORIALITY, PRIVACY, AND
SURVEILLANCE

DISCUSSION LEADERS

AMY KAPCZYNSKI, KIM LANE SCHEPPELE,
AND ALLAN ROSAS

V. EXTRATERRITORIALITY, PRIVACY, AND SURVEILLANCE

DISCUSSION LEADERS:

AMY KAPCZYNSKI, KIM LANE SCHEPPELE, AND ALLAN ROSAS

Political Sovereignty and Data: Interpreting and Enforcing Privacy Rights in the Internet Age

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This chapter builds on *Surveillance and National Security* in the 2014 Global Constitutionalism volume *Sources of Law and of Rights*. We begin with the implications of the commitments to protect privacy under the Court of Justice of the European Union (CJEU) ruling on “the right to be forgotten.” As is now familiar, in *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD)*, a Spanish citizen sued Google and relied on a European Union (EU) data protection directive to argue that Google should stop displaying links to “irrelevant” or “inadequate” information when individuals’ names were put into Google’s search engine. The CJEU held that internet search engines must consider requests from individuals to remove links that “appear to be inadequate, irrelevant, or no longer relevant or excessive in the light of the time that ha[s] elapsed.” Many questions have emerged about the reach of this ruling both within and beyond the EU, as data are difficult to contain territorially, and constitutional orders accord different weights to privacy, free expression, and free speech. Thus, we explore the implications of the decision as well as others related to the interaction of courts’ remedial authority, their political authority, and the border-crossing technologies of search engines.

In the second section, we shift from issues of deleting information to those raised by the gathering of information in the name of national security. New disclosures of confidential information coming from the U.S. National Security Agency coupled with high-profile terrorist attacks such as the shootings at the *Charlie Hebdo* offices in France and at the terrorist attacks in a mall in Kenya continue to push the question of surveillance to the fore. Thus, we pivot from public sector regulation of private actors to the role of courts in the regulation of state surveillance. Our questions include whether data collection or protection rights vary depending on what entities (domestic, foreign, public, private) collected the information and whether data relate to individuals who are citizens or non-nationals of the collecting entity. Courts, legislatures, and regulatory bodies are exploring responses. Whether implementing rights to privacy or seeking to deal with the balance between privacy rights and security, the borders of the nation-state seem mismatched to the task.

POLITICAL SOVEREIGNTY AND DATA: INTERPRETING AND ENFORCING PRIVACY RIGHTS IN THE INTERNET AGE

More than a year ago, the CJEU ruled on what the petitioners had argued was the “right to be forgotten” and what others have argued is more accurately called a right to “delisting” or “delinking.” In *Google Spain*, the Court interpreted the EU’s 1995 Data Protection Directive, which provides a right of appeal to a

national data protection authority to compel the correction, removal, or blocking of false and inaccurate information and the right to object to the inclusion of false information in a database. The 2014 *Google Spain* decision raises critical questions about the relationship between privacy and free speech in the Internet Age and highlights the tensions between national efforts to police effectively internet intermediaries, as well as the global effects that such policing can have.

**Google Spain SL, Google Inc. v. Agencia Española de
Protección de Datos (AEPD)**

Court of Justice of the European Union (Grand Chamber)
C-131/12 (May 13, 2014)

The Court (Grand Chamber), composed of V. Skouris, President, K. Lenaerts, Vice-President, M. Ilešič (Rapporteur), L. Bay Larsen, T. von Danwitz, M. Safjan, Presidents of Chambers, J. Malenovský, E. Levits, A. Ó Caoimh, A. Arabadžiev, M. Berger, A. Prechal and E. Jarašiūnas Judges, Advocate General: N. Jääskinen, Registrar: M. Ferreira, Principal Administrator

. . . 14. On 5 March 2010, Mr Costeja González, a Spanish national resident in Spain, lodged with the AEPD [Agencia Española de Protección de Datos, the Spanish Data Protection Agency] a complaint against La Vanguardia Ediciones SL, which publishes a daily newspaper with a large circulation, in particular in Catalonia (Spain) ('La Vanguardia'), and against Google Spain and Google Inc. The complaint was based on the fact that, when an internet user entered Mr Costeja González's name in the search engine of the Google group ('Google Search'), he would obtain links to two pages of La Vanguardia's newspaper, of 19 January and 9 March 1998 respectively, on which an announcement mentioning Mr Costeja González's name appeared for a real-estate auction connected with attachment proceedings for the recovery of social security debts.

15. . . . Mr Costeja González requested, first, that La Vanguardia be required either to remove or alter those pages so that the personal data relating to him no longer appeared or to use certain tools made available by search engines in order to protect the data. Second, he requested that Google Spain or Google Inc. be required to remove or conceal the personal data relating to him so that they ceased to be included in the search results and no longer appeared in the links to La Vanguardia. Mr Costeja González stated in this context that the attachment

proceedings concerning him had been fully resolved for a number of years and that reference to them was now entirely irrelevant. . . .

18. Google Spain and Google Inc. brought separate actions against that decision before the Audiencia Nacional (National High Court) [which referred them to the CJEU]. . . .

32. As to the question whether the operator of a search engine must be regarded as the ‘controller’ in respect of the processing of personal data that is carried out by that engine in the context of an activity such as that at issue in the main proceedings, it should be recalled that Article 2(d) of Directive 95/46 defines ‘controller’ as ‘the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data.’

43. . . . [T]he referring court has established the following facts:

–Google Search is offered worldwide through the website ‘www.google.com.’ In numerous States, a local version adapted to the national language exists. The version of Google Search in Spanish is offered through the website ‘www.google.es,’ which has been registered since 16 September 2003. Google Search is one of the most used search engines in Spain.

–Google Search is operated by Google Inc., which is the parent company of the Google Group and has its seat in the United States.

–Google Search indexes websites throughout the world, including websites located in Spain. The information indexed by its ‘web crawlers’ or robots, that is to say, computer programmes used to locate and sweep up the content of web pages methodically and automatically, is stored temporarily on servers whose State of location is unknown, that being kept secret for reasons of competition.

–Google Search does not merely give access to content hosted on the indexed websites, but takes advantage of that activity and includes, in return for payment, advertising associated with the internet users’ search terms, for undertakings which wish to use that tool in order to offer their goods or services to the internet users.

–The Google group has recourse to its subsidiary Google Spain for promoting the sale of advertising space generated on the website ‘www.google.com. Google Spain, which was established on 3 September 2003

and possesses separate legal personality, has its seat in Madrid (Spain). Its activities are targeted essentially at undertakings based in Spain, acting as a commercial agent for the Google group in that Member State. Its objects are to promote, facilitate and effect the sale of on-line advertising products and services to third parties and the marketing of that advertising.

–Google Inc. designated Google Spain as the controller, in Spain, in respect of two filing systems registered by Google Inc. with the AEPD; those filing systems were intended to contain the personal data of the customers who had concluded contracts for advertising services with Google Inc. . . .

60. It follows from the foregoing that . . . processing of personal data is carried out in the context of the activities of an establishment of the controller on the territory of a Member State, within the meaning of that provision, when the operator of a search engine sets up in a Member State a branch or subsidiary which is intended to promote and sell advertising space offered by that engine and which orientates its activity towards the inhabitants of that Member State. . . .

66. . . . Directive 95/46 seeks to ensure a high level of protection of the fundamental rights and freedoms of natural persons, in particular their right to privacy, with respect to the processing of personal data . . .

69. Article 7 of the Charter [of Fundamental Rights of the European Union]* guarantees the right to respect for private life, whilst Article 8 of the Charter expressly proclaims the right to the protection of personal data. Article 8(2) and (3) specify that such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law, that everyone has the right of access to data which have

* The relevant provisions of the Charter of Fundamental Rights of the European Union (“the Charter”) are:

Article 7: “Everyone has the right to respect for his or her private and family life, home and communications.”

Article 8:

- “1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.”

been collected concerning him or her and the right to have the data rectified, and that compliance with these rules is to be subject to control by an independent authority. . . .

80. . . . [P]rocessing of personal data . . . carried out by the operator of a search engine is liable to affect significantly the fundamental rights to privacy and . . . the protection of personal data when the search by means of that engine is carried out on the basis of an individual's name, since that processing enables any internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the internet—information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty—and thereby to establish a more or less detailed profile of him. Furthermore, the effect of the interference with those rights of the data subject is heightened on account of the important role played by the internet and search engines in modern society, which render the information contained in such a list of results ubiquitous

81. In the light of the potential seriousness of that interference, . . . it cannot be justified by merely the economic interest which the operator of such an engine has in that processing. However, inasmuch as the removal of links from the list of results could, depending on the information at issue, have effects upon the legitimate interest of internet users potentially interested in having access to that information, in situations such as that at issue in the main proceedings a fair balance should be sought in particular between that interest and the data subject's fundamental rights under Articles 7 and 8 of the Charter. Whilst it is true that the data subject's rights protected by those articles also override, as a general rule, that interest of internet users, that balance may however depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life. . . .

93. . . . [E]ven initially lawful processing of accurate data may, in the course of time, become incompatible with the directive where those data are no longer necessary in the light of the purposes for which they were collected or processed. That is so in particular where they appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed. . . .

97. As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer

be made available to the general public by its inclusion in such a list of results, it should be held . . . that those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject's name. . . .

98. . . . [S]ince in the case in point there do not appear to be particular reasons substantiating a preponderant interest of the public in having, in the context of such a search, access to that information, a matter which is, however, for the referring court to establish, the data subject may, by virtue of . . . Directive 95/46, require those links to be removed from the list of results.

99. It follows . . . that . . . Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as meaning that, when appraising the conditions for the application of those provisions, it should *inter alia* be examined whether the data subject has a right that the information in question relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name . . . However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question. . . .

The *Google Spain* decision raised a series of questions about its implementation, its relevance outside the EU, and whether its approach is one to be embraced by other courts. Below, we explore aspects of each of these facets.

One issue is the obligation created for search engines. The opinion requires organizations to set up procedures enabling people to request delisting and then to decide whether the identified information is “inadequate, irrelevant or no longer relevant” and whether the public has a “preponderant interest” in access to the information that outweighs the harm to the individual. This arguably judicial role for search engines is not unprecedented: companies regularly evaluate and act upon requests for removal of links in other contexts, for example copyright and child pornography. Despite the importance of the stakes and complexities of the “right to be forgotten,” the CJEU judgment gave little guidance about how to evaluate and adjudicate claims on delisting.

Another layer concerns public access to the information about Google's processes and their outcomes. (Other search engines also receive and act upon requests; Google is simply the largest processor of such requests.) Google has voluntarily released a limited amount of information about its procedures and their results. As of June 3, 2015, Google reported that it had received more than 260,000 requests for removal and removed 41% of links individuals sought to have removed. Very little is known about the process Google uses.

If Google denies an application, individuals can bring claims to a court or a data protection authority. Google also sometimes notifies webmasters when links to their sites are delisted. That notice enables entities such as newspapers to return to Google to argue that a link to their site was improperly removed. If Google declines to respond to requests, it is not clear what recourse is available, nor is it clear if and how public entities have a role, in general, in the delisting evaluation. An example of a court decision concluding that delisting was not required is provided below by way of a summary of a Dutch decision.

[Claimant] v. Google Netherlands B.V. and Google Inc.
Amsterdam Court of Appeals
ECLI:NL:GHAMS:2015:1123 (Mar. 31, 2015)*

In 2014, a Dutch court considered an individual's claim seeking to remove online information concerning a past criminal conviction. A television broadcast, "Crime Beat," showed the claimant discussing with a hit man how best to murder his competitor. No video or voice distortion was used, although the full name of the claimant was not revealed. In part on the basis of this video footage, the claimant was found guilty of attempted murder and sentenced to six years in jail.

The claimant asked Google NL and Google Inc. to remove links to this information, which appeared when his name was searched. He argued that these searches revealed personal information in a manner that was "irrelevant," "extreme," or "unnecessarily defamatory." Google removed three of the links, but declined to remove links that directed users to sites like Amazon that sold copies

* This summary draws on a report by Youssef Fouad of the Institute for Information Law (IViR), "University of Amsterdam Court rejects application for delisting from search engine results," available at <http://merlin.obs.coe.int/iris/2015/5/article25.en.html>, and on a translation of the summary of the lower court decision provided to us by Chavi Keeney Nana, Yale Law School Class of 2009.

of a book loosely based on the claimant's story. The claimant sued Google NL and Google Inc. to have the additional links removed.

As Youssef Fouad explained, the Amsterdam Court of Appeals held that:

. . . [E]very data-subject has the right to have their personal data rectified, deleted or suppressed where the processing of their personal data is irreconcilable with the European Data Protection Directive. . . . [F]ollowing from the *Google Spain* ruling . . . an interference with data-subjects' rights, as in this case, is justified where the data-subject plays an important role in society and/or the public at large has a legitimate interest in receiving the information.

By balancing the rights of the plaintiff and the public's right to receive and impart information, the Court considered that the news reporting on the plaintiff's conviction was a result of his own actions. Furthermore, the Court accepted Google's claim that suggestions by Google Search's autocomplete function are derived from popular search queries, demonstrating the public's interest in receiving the imparted information. Therefore, Google could not be deemed to have deliberately infringed the rights of the plaintiff. The Court also held that the public at large has a strong interest in receiving information regarding serious crimes, such as the one perpetrated by the plaintiff.

Notably, the Court also took into consideration that certain websites containing information about the plaintiff's conviction merely disclosed his alias and not his full name. . . . [D]ue to the fact that the initials of the plaintiff do not necessarily correspond with his full name, it is not evidently clear for third parties that the plaintiff's initials refer to him and his persona. . . .

Another set of questions is whether the *Google Spain* decision provides a model for comparable legal rules elsewhere. In the year and a half since the *Google Spain* decision, the "right to be forgotten" ruling has resonated with courts beyond European boundaries. As Google manages the growing number of

existing requests for removal, the search engine must also contend with questions about the widening geographic scope of such protections. In 2015, countries in Asia, such as Japan and Korea, debated whether their citizens also could assert a “right to be forgotten.”

Simon Mundy

*Asia Considers “Right to Be Forgotten” Ruling Prompted by Google
(2015)**

When Mario Costeja González asked Google to remove search results relating to the forced sale of his house, the Spanish lawyer would not have been considering the implications for civil liberties in Hong Kong. But Mr. Costeja Gonzalez’s complaint had a global impact when the European Court of Justice last May ordered that individuals may be entitled to force search engines to remove embarrassing results.

The ruling has already compelled Google to remove more than 750,000 links in Europe, and is forcing Asian authorities to assess the proper balance between privacy and freedom of expression as they consider whether to follow the ECJ’s lead by placing new restrictions on search engines.

In the next few months, Hong Kong’s court of appeal will hear a petition from Google on this issue. Last year, a lower court ruled that Google libeled the film tycoon Albert Yeung by giving people who typed in his name prompts that implied his involvement in organized crime. Google argues that it is not a publisher, and that the suggestions are generated automatically based on previous searches.

The debate over the right to put restrictions on search engines accompanies broader concerns about free expression in Hong Kong and the wider region. Japanese journalists fear a new law could dramatically expand the category of “state secrets,” while South Korea’s government has been accused of using a 1948 anti-communist law to crack down on dissent. In Hong Kong, the territory’s top privacy official, Allan Chiang, has called on Google to observe the “right to be forgotten” outside of Europe. After last year’s pro-democracy protests

* Excerpted from Simon Mundy, *Asia Considers “Right to Be Forgotten” Ruling Prompted by Google*, FIN. TIMES (Mar. 12, 2015).

against Beijing, critics fear this could provide a tool for Hong Kong's government to restrict the free flow of information. . . .

There have been similar cases in Japan. In October, a court ordered Google to remove dozens of search results that linked a man to criminal activity. Unlike the ECJ decision this ruling did not set a formal precedent but it was a landmark for online privacy, says Hiroshi Miyashita, a professor at Chuo University in Tokyo. "I have no hesitation to say that the right to be forgotten has arrived in Japan," he says, noting that Yahoo Japan, the country's biggest search provider, is reviewing its policies in the area, despite winning an August case where a man sought to remove links reflecting his criminal past.

Tomohiro Kanda, a lawyer who represented the plaintiff in the October case, says he has received several similar enquiries since the ruling. The ability to target search providers is vital to people who would otherwise need to hire lawyers to sue individual websites, he adds, calling this "a new field of human rights." But Google argues that it should not be search engines' responsibility to censor information. "Search should reflect the information on the web," says Taj Meadows, a policy official at the company. . . .

Debates over the limits of privacy and free speech online have also produced new laws in the United States. On January 1, 2015, S.B. 568 took effect in California. The law requires websites and other online service operators to delete on demand certain content posted by minors. While its reach is limited only to those websites "directed to minors" or online operators who have actual knowledge that their application is being used by a minor, the law requires no balancing of public interest or free speech concerns before requiring removal of the challenged content. Although the law grants the right to obtain removal of content only to California minors, companies outside of the state, and potentially outside of the country, also must comply with such requests.

California’s “Online Eraser” Law

S.B. 568 (California Business & Professions Code Sec. 22581)

Approved Sept. 23, 2013, effective Jan. 1, 2015

(a) An operator of an Internet Web site, online service, online application, or mobile application directed to minors or an operator of an Internet Web site, online service, online application, or mobile application that has actual knowledge that a minor is using its Internet Web site, online service, online application, or mobile application shall do all of the following:

(1) Permit a minor who is a registered user of the operator’s Internet Web site, online service, online application, or mobile application to remove or, if the operator prefers, to request and obtain removal of, content or information posted on the operator’s Internet Web site, online service, online application, or mobile application by the user.

(2) Provide notice to a minor who is a registered user of the operator’s Internet Web site, online service, online application, or mobile application that the minor may remove or, if the operator prefers, request and obtain removal of, content or information posted on the operator’s Internet Web site, online service, online application, or mobile application by the registered user.

The jurisdictional reach of the *Google* decision is yet another key question relevant to implementation of its rule. Assume that jurisdiction X finds a violation of a national law related to a search engine. How ought that judgment be enforced, given the global reach of the Internet? Should the search engine be forced to remove links everywhere, or only locally? In technical terms, Google could implement the right to delisting in three different ways.

First, Google could delist the requested links only from country-specific Google Search sites, such as Google France (google.fr) or Google United Kingdom (google.co.uk), while retaining the links at the root site for all of these national level versions, google.com. This is the approach that Google has adopted. After granting a delisting request, Google will remove the requested links across all European country-specific sites. European users almost always use their country-specific Google Search sites (in part because google.com automatically

redirects them there based on an assessment of their location using their Internet Protocol (IP) address). But they can also access google.com, which still contains the links that were removed locally. As a result, it is possible—though uncommon—for European users to access search results that were delisted from the European Google Search sites.

Second, Google could use geolocation technology to directly prevent users in Europe from receiving the requested links as search results, regardless of which country-specific site they used (European or otherwise). Geolocation technology was developed because it increases the effectiveness of Internet advertising and has become quite sophisticated. However, searchers can use anonymity-preserving technologies like proxy servers to mask their geographical location. Determined European users could thus evade Google's geolocation filter to access search results that would otherwise be unavailable. Whether search engines like Google possess the technical ability perfectly to "geo-locate" users who attempt to mask their location is not clear. In addition, the cost trade-offs to companies of the use of geolocation, as contrasted with domain-based approaches, are not clear. It is possible that, to conserve costs, search engine companies may choose to take information down globally rather than in more tailored fashion.

Third, Google could remove links from the main Google Search site, google.com. Links removed from google.com are removed from all country-specific Google Search sites, and removals from google.com therefore influence search results in every country in the world.

Given these technical remedial options, how should judges decide the scope of the remedies they order? Should courts seek to enforce their judgments for all users in a national jurisdiction, even if the result is collaterally to enforce that ruling around the world? Ought the evaluation depend on a court's assessment of the nature of the harm and the relationship between the particular harm and the court's authority? What weight ought to be given to constitutional claims about rights to, as well as rights to not have information disseminated? What role do concerns about comity—to other jurisdictions' laws, constitutional precepts, and to other courts—play when rulings relate to the Internet? If Europe seeks to apply its privacy law universally, should other jurisdictions seek to apply their own laws prohibiting certain political or sexual speech or insisting on access to information universally for all online users? Who bears the risk of conflicting rulings? How do courts monitor and require compliance across borders?

Yahoo! Inc. v. La Ligue Contre Le Racism et L'Antisemitisme, a case from the Tribunal de Grande Instance (TGI) of Paris in 2000, provides an early example of a court's jurisdictional ambitions in the era of the Internet.

LICRA and UEJF v. Yahoo! Inc.
Tribunal de Grande Instance de Paris
Mo. 00/05309 (2000)*

[Yahoo! Inc. (“Yahoo!”), a U.S. corporation and one of the world’s leading web portals, has an auction site on the Internet that offers for sale Nazi memorabilia such as flags, stamps, and military souvenirs. Persons at computers in France could access this site through links on the French-language portal of Yahoo!’s French subsidiary, Yahoo! France, or by accessing Yahoo!’s portal directly from France by typing www.yahoo.com into a computer browser. The International League Against Racism and Anti-Semitism (LICRA) and the Union of French Jewish Students (UEJF) sued Yahoo! and Yahoo! France; they alleged violations of a World War II-era French law criminalizing the exhibition or sale of racist materials. The plaintiffs asked the court to force Yahoo! to block French users’ access to Nazi objects for sale on Yahoo!’s U.S. auction site.]

First Deputy Chief Justice GOMEZ:

Yahoo! Inc. has argued that our court is not territorially competent over the matter, because the alleged fault is committed on the territory of the United States. . . . [It further argues for rejection of plaintiffs’ claims on the ground that] the duties of vigilance and prior censure which the petitioners would seek to impose upon it are impossible obligations, first in terms of the law and the American constitution, in particular the First Amendment of the Constitution which institutes the liberty of expression and then in view of the technical impossibility of identifying surfers who visit the auction service, while recalling that in its charter it warns all surfers against using the service for purposes worthy of reprobation for whatsoever motive (incitement to hatred, racial or ethnic discrimination . . .).

Whereas it is not challenged that surfers who call up Yahoo.com from French territory may, directly or via the link offered by Yahoo.fr, see on their screens the pages, services and sites to which Yahoo.com gives access, in particular the auction service (Auctions) lodged by Geocities.com, the lodging service of Yahoo! Inc., in particular in its declension relating to Nazi objects;

Whereas the exposition for the purpose of sale of Nazi objects constitutes a violation of French law (article R.645-2 of the Criminal Code) as well as an

* These excerpts and textual commentary are adopted, as edited, from CONFLICTS OF LAWS: CASES AND MATERIALS (R. Lea Brilmayer, Jack L. Goldsmith & Erin O’Hara O’Connor eds., 7th ed. 2015); for the complete case, see <http://www.lapres.net/yahen.html> (Daniel Lapres, trans.).

offence against the collective memory of a country profoundly wounded by the atrocities committed by and in the name of the Nazi criminal enterprise against its citizens and most importantly against its citizens of the Jewish religion;

Whereas while permitting the visualization in France of these objects and eventual participation of a surfer established in France in such an exposition/sale, Yahoo! Inc. thus has committed a wrong on the territory of France, a wrong, the unintentional nature of which is apparent, but which is the cause of harm to the [International League against Racism and Anti-Semitism] LICRA as well as the UEJF [Union of French Jewish Students] which both have the mission of pursuing in France any and all forms of banalization of Nazism, regardless of the fact that the litigious activity is marginal in relation with the entire business of the auction sales service offered on its . . . Yahoo.com site;

Whereas Yahoo! Inc. claims that it is technically impossible to control access to its auction service or any other service, and that therefore it cannot prohibit any surfer from France from visualizing . . . [the material] on his screen;

Whereas it wishes nevertheless to emphasize that it warns all visitors against any uses of its services for purposes that are “worthy of reprobation for whatsoever reason,” such as for purposes of racial or ethnic discrimination (*cf.* its user’s charter);

But whereas Yahoo! Inc. is in a position to identify the geographical origin of the site which is visited, based on the IP address of the caller, which should therefore enable it to prohibit surfers from France, by whatever means are appropriate, from accessing the services and sites the visualization of which on a screen set up in France, and in some cases teledischarging and reproduction of the contents, or of any other initiative justified by the nature of the site consulted, would be likely to be qualified in France as a crime and/or constitute a manifestly illegal nuisance within the meaning of articles 808 and 809 of New Code of Civil Procedure, which is manifestly the case of the exhibition of uniforms, insignia, emblems reminiscent of those worn or exhibited by the Nazis;

Whereas as regards surfers who navigate through sites which guarantee them anonymity, Yahoo! Inc. has fewer means of control except for example through refusing systematically access to such sites to all visitors who do not disclose their geographical origin;

Whereas the real difficulties encountered by Yahoo do not constitute insurmountable obstacles;

That [Yahoo!] will therefore be ordered to take any and all measures of such kind as to dissuade and make impossible any consultations by surfers calling from France to its sites and services in dispute the title and/or contents of which infringe upon the internal public order of France, especially the site selling Nazi objects;

That Yahoo will be given two months to enable it to formulate proposals of technical measures likely to lead to a settlement of this dispute;

Whereas, as regards Yahoo France, it bears mentioning that its site Yahoo.fr does not itself offer surfers calling from France access to the sites or series the title and/or the contents of which constitute infractions of French law; that therefore, it does not provide access to the site or services for auction sales of Nazi objects;

But whereas it offers surfers a link to Yahoo.com entitled “further research on Yahoo.com,” without any particular warning;

Or whereas, knowing what are the contents of the services offered by Yahoo.com, and in this case the service of auction sales including in one of its declensions the sale of Nazi objects, it behooves it to warn surfers, by a banner, prior to the surfer’s entry into the Yahoo.com site, that should the result of his search on Yahoo.com . . . point toward sites, pages or forums the title and or contents of which constitute a violation of French law, such as is the case of sites which, whether directly or indirectly, intentionally or unintentionally, make the apology of Nazism, it must interrupt the consultation of the site in question lest it incur the sanctions stipulated by French law or answer to legal actions which might be initiated against it; . . .

At a public audience and rendering its judgment in first instance, after having heard all the parties, the Court: . . .

Orders Yahoo! Inc. to take such measures as will dissuade and render impossible any and all consultation on Yahoo.com of the auction service for Nazi objects as well as any other site or service which makes apologies of Nazism or questions of the existence of Nazi crimes;

Orders [a subsequent hearing] during which Yahoo! Inc. shall submit the measures which it intends to implement to end the harm and the nuisance suffered by the plaintiffs and to prevent any new incidents of nuisance;

Finds Yahoo! Inc. liable to pay to the LICRA an amount of 10,000 Francs [approximately \$1,600 U.S. dollars in 2003].

As Professors Brilmayer, Goldsmith, and O'Hara O'Connor explain:

Following this ruling, the Paris court convened a panel of Internet experts who prepared a report about the feasibility of Yahoo! blocking access in France to its U.S. auction site. The report concluded that Yahoo! could block French users from accessing its U.S. auction site with a 90% success rate through a combined process of (a) tracing the computer user's Internet Protocol address to its geographical source, and (b) conditioning access to the auction site on a declaration of nationality. The court embraced this conclusion, and also noted that Yahoo! had already been identifying French users to some degree because French users visiting the Yahoo! auction site were greeted with French-language advertisements. . . . [T]he court affirmed its previous ruling, gave Yahoo! three months to comply, and ordered [an additional] fine of 100,000 francs (approximately \$13,300 [in U.S. dollars in 2003]) per day for noncompliance after that time. . . .

Thereafter, Yahoo! claimed that complying with the geolocation order was technically impossible and/or prohibitively costly. Shortly after the ruling, it changed its policy to prohibit the sale of Nazi memorabilia on its auction site. Some materials that could have violated the French court's order (for example, copies of *Mein Kampf*), however, remained on the website.

In addition, Yahoo! brought a declaratory judgment action against the French NGO plaintiffs in France, LICRA and UEJF, in a federal district court in California. Yahoo! asked the district court to find that the French court's orders were unenforceable in the United States because there was no practical way for Yahoo! to comply with them short of banning material from its auction site entirely. Yahoo! thus argued that the French court's order violated Yahoo!'s free speech rights under the First Amendment. The district court agreed, concluding that "the French order's content and viewpoint-based regulation of the web pages and author site on Yahoo.com . . . clearly would be inconsistent with the First Amendment if mandated by a court in the United States."

On appeal, the Ninth Circuit initially held that the court lacked personal jurisdiction over the French organizations and reversed and vacated the declaratory judgment. In 2006, the Ninth Circuit reheard the case en banc and dismissed Yahoo!’s case in *Yahoo! Inc. v. La Ligue Contre Le Racisme*. Three judges found a lack of personal jurisdiction over LICRA and UEJF. Another three disagreed, but concurred in the grounds that the action was not ripe given the uncertainties about what, precisely, the French court expected in terms of compliance; the capacity, technically, to comply in different ways with the court’s order; and what, if any, effect that efforts to comply with the order would have on U.S. users. The per curiam opinion explained:

We emphasize that the French court’s interim orders do not by their terms require Yahoo! to restrict access by Internet users in the United States. They only require it to restrict access to users located in France. . . . [A]s to the French users, Yahoo! is necessarily arguing that it has a First Amendment right to violate French criminal law by others. . . . [T]he very existence . . . of such an extraterritorial right under the First Amendment is uncertain. . . . [T]he First Amendment harm may not exist at all, given the possibility that Yahoo! has now ‘in large measure’ complied with the French court’s orders through its voluntary actions, unrelated to the orders.

The *Google Spain* case has prompted some to suggest that the geo-location measures that the *Yahoo!* court contemplated are insufficient, at least where fundamental rights are concerned. Two responses come from different perspectives—that of regulators in Europe and that of an expert council convened by Google. In 2014, the European Commission’s (EC) “Article 29 Data Protection Working Party” (an entity launched in 1996 and whose members include representatives from each EU country’s supervisory authorities, from EU institutions, and from the Commission) promulgated guidelines pursuant to its mandate to advise the EC on protecting individuals’ personal data and on the “free movement” of data. The Working Party concluded that, to give full effect to data subjects’ rights under the CJEU ruling, “de-listing should also be effective on all relevant domains, including [google].com.” The 2014 guidelines are not legally binding on search engines but are intended to instruct European Data Protection Authorities (DPAs) on how to assess complaints brought against noncompliant search engines. For example, in June of 2015, France’s data protection regulator relied on these guidelines and ordered Google to apply

delinking to the global google.com search engine or be subjected to financial sanctions.

Google convened a group of independent experts, who concluded that the competing interests on the part of users, especially if outside Europe, to access information via a name-based search in accordance with the laws of their country supports Google's current approach. Google experts also expressed concern about a global precedent that could be set by efforts to universally suppress links from search engines.

Article 29 Data Protection Working Party
Guidelines on the Implementation of the Court of Justice of the
European Union Judgment on *Google Spain and Inc v. Agencia*
Española de Protección de Datos (AEPD) and Mario Costeja
*González (2014)**

. . . 20. . . . The [*Google Spain*] ruling sets thus an obligation of results which affects the whole processing operation carried out by the search engine. The adequate implementation of the ruling must be made in such a way that data subjects are effectively protected against the impact of the universal dissemination and accessibility of personal information offered by search engines when searches are made on the basis of the name of individuals.

Although concrete solutions may vary depending on the internal organization and structure of search engines, de-listing decisions must be implemented in a way that guarantees the effective and complete protection of these rights and that EU law cannot be easily circumvented. In that sense, limiting de-listing to EU domains on the grounds that users tend to access search engines via their national domains cannot be considered a sufficient means to satisfactorily guarantee the rights of data subjects according to the judgment. In practice, this means that in any case de-listing should also be effective on all relevant domains, including .com.

* Excerpted from ARTICLE 29 DATA PROTECTION WORKING PARTY (OF THE EUROPEAN COMMISSION), GUIDELINES ON THE IMPLEMENTATION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION JUDGMENT ON GOOGLE SPAIN AND INC. V. AGENCIA ESPAÑOLA DE PROTECCIÓN DE DATOS (AEPD) AND MARIO COSTEJA GONZÁLEZ, C-131/12 9 (2014).

21. From the material point of view, and as it's been already mentioned, the ruling expressly states that the right only affects the results obtained on searches made by the name of the individual and never suggests that the complete deletion of the page from the indexes of the search engine is needed. The page should still be accessible using any other terms of search. It is worth mentioning that the ruling uses the term "name," without further specification. It may be thus concluded that the right applies to possible different versions of the name, including also family names or different spellings. . . .

The Advisory Council to Google on the Right to be Forgotten (2015)*

. . . Implementation of the Ruling does not have the effect of "forgetting" information about a data subject. Instead, it requires Google to remove links returned in search results based on an individual's name when those results are "*inadequate, irrelevant or no longer relevant, or excessive.*" Google is not required to remove those results if there is an overriding public interest in them "for particular reasons, such as the role played by the data subject in public life." . . .

The legal criteria for removing content altogether from the underlying source may be different from those applied to delisting, given the publisher's rights to free expression. If Google decides not to delist a link, the data subject can challenge this decision before the competent Data Protection Authority or Court. . . .

. . . A difficult question that arose throughout our meetings concerned the appropriate geographic scope for processing a delisting. Many search engines operate different versions that are targeted to users in a particular country, such as google.de for German users or google.fr for French users. The Ruling is not precise about which versions of search a delisting must be applied to. Google has chosen to implement these removals from all its European-directed search services, citing the CJEU's authority across Europe as its guidance. . . .

* Excerpts from a report commissioned by Google and written by members of its advisory council on the right to be forgotten, which includes the founder of Wikipedia, the editorial director of Le Monde, the former German Federal Minister of Justice, and a number of other notable public figures in law, journalism, and technology. The full report is available at http://www.cil.cnrs.fr/CIL/IMG/pdf/droit_oubli_google.pdf.

In considering whether to apply a delisting to versions of search targeted at users outside of Europe, including globally, we acknowledge that doing so may ensure more absolute protection of a data subject's rights. However, it is the conclusion of the majority that there are competing interests that outweigh the additional protection afforded to the data subject. There is a competing interest on the part of users outside of Europe to access information via a name-based search in accordance with the laws of their country, which may be in conflict with the delistings afforded by the Ruling. These considerations are bolstered by the legal principle of proportionality and extraterritoriality in application of European law.

There is also a competing interest on the part of users within Europe to access versions of search other than their own. The [Google Advisory] Council heard evidence about the technical possibility to prevent Internet users in Europe from accessing search results that have been delisted under European law. The Council has concerns about the precedent set by such measures, particularly if repressive regimes point to such a precedent in an effort to "lock" their users into heavily censored versions of search results. It is also unclear whether such measures would be meaningfully more effective than Google's existing model, given the widespread availability of tools to circumvent such blocks.

The [Advisory] Council supports effective measures to protect the rights of data subjects. Given concerns of proportionality and practical effectiveness, it concludes that removal from nationally directed versions of Google's search services within the EU is the appropriate means to implement the Ruling at this stage.

A recent Canadian case takes the remedial questions beyond a right to delisting and invites consideration of how judges are to evaluate the harms and the interests at stake. The plaintiffs in the case, Equustek Solutions, who designed and manufactured industrial engineering products, alleged that the defendants, Morgan Jack and others involved in the Datalink Technologies Gateways business, were illegally selling and deceptively marketing similar goods online. Equustek sued under trade secret law, and as a remedial matter, asked the court to enjoin Google from maintaining links to these websites. Equustek argued that by refusing to block the uniform resource locators (URLs) from worldwide search results, Google was facilitating Jack and others' continued breach of a court order prohibiting them from conducting online sales.

Equustek Solutions Inc. v. Google Inc.
Court of Appeal for British Columbia
2015 BCCA 265 (June 11, 2015)

[Justice GROBERMAN wrote the decision for the court, in which Justice Frankel and Justice Harris concurred.]

. . . 1. This is an appeal by Google Inc. (“Google”) from an interlocutory injunction that prohibits it from including specific websites in results delivered by its search engines.

2. Google is not a party to the underlying litigation, nor is it alleged to have acted unlawfully or in contravention of existing court orders. The injunction granted against it is ancillary relief designed to ensure that orders already granted against the defendants are effective.

3. Google contends that the injunction ought not to have been granted because the application did not have a sufficient connection to the Province to give the Supreme Court of British Columbia competence to deal with the matter. It also argues that the injunction represents an inappropriate burden on an innocent non-party to the litigation. Further, it contends that the extraterritorial reach of the injunction is inappropriate and a violation of principles of comity. Finally, Google contends that the injunction should not have been granted because of its effect on freedom of speech. . . .

15. The plaintiffs design, manufacture and sell industrial network interface hardware. Their products allow different pieces of complex industrial equipment to communicate with one another.

16. At one time, the defendants were distributors of the plaintiffs’ product. The plaintiffs allege that the defendants began to re-label the product and pass it off as their own. Later, the defendants are said to have unlawfully acquired confidential information and trade secrets belonging to the plaintiffs and used the information to design and manufacture a competing product, the “GW1000”. The defendants continued to advertise the plaintiffs’ product for sale, but filled orders with their own competing product. The plaintiffs say that the defendants continue to sell the GW1000, and in doing so violate the plaintiffs’ trade secrets and trademarks.

17. In 2011, when the plaintiffs commenced their lawsuit against the defendants, the defendants’ operations were based in Vancouver. A number of interlocutory orders were made early in the litigation, including orders that the

defendants cease referencing the plaintiffs' products on their websites, that they publish a notice on their websites redirecting the plaintiffs' customers to the plaintiffs, and that they disclose customers' names to the plaintiffs. The defendants did not comply with the orders. . . .

18. The defendants have changed their business operations since the lawsuit was commenced. They no longer operate from Vancouver. They offer their product for sale through a number of websites that they appear to control. They fill orders from unknown locations, apparently outside Canada. . . . It appears that the locations have changed from time to time. The chambers judge described them as a "virtual company." As the product that they sell is a physical one which must be delivered to customers, it may be more accurate to describe their operations as "clandestine" than as "virtual."

19. Web-based businesses, such as that now operated by the defendants, must have some method for directing potential customers to their websites. The defendants rely on web search engines to perform this function. . . .

20. Google is incorporated in Delaware and headquartered in California. It says that it does not have a physical presence in British Columbia, by which it means that it does not have offices or resident staff here, and that none of its servers are located in the Province. . . .

24. In 2012, the plaintiffs sought an injunction against Google to force it to remove a number of websites used by the defendants from its search indexes. Google voluntarily removed some 345 URLs from search results on google.ca, but it was not willing to go further. In early 2013, the plaintiffs indicated that they were not satisfied with the arrangement, and the matter returned to court.

25. The main problem initially identified by the plaintiff with the voluntary arrangement was that the defendants simply moved objectionable content to new pages within their websites to get around the voluntary de-indexing of specific pages. The plaintiffs described the effect as being like a game of "Whack-A-Mole," in which the defendants were nimble enough to circumvent Google's voluntary arrangement. Later, the plaintiffs became aware that the voluntary arrangement applied only to searches conducted on google.ca, and they also identified that as a problem. It is clear that the majority of sales of GW1000 devices are to purchasers in countries other than Canada. An arrangement limited to google.ca, therefore, is of limited value to the plaintiffs.

26. The plaintiffs pressed their application to a hearing. After a lengthy hearing and further written submissions, the chambers judge granted an order, the operative part of which is as follows:

Within 14 days of the date of this judgment, Google Inc. is to cease indexing or referencing in search results on its internet search engines the websites listed in Schedule A, including all of the subpages and subdirectories of the listed websites, until the conclusion of the trial of this action or further order of this court.

27. . . . According to the plaintiffs, the injunction has been effective in decreasing the number of the defendants' websites that show up in search results, and (as importantly) the ranking of those sites within the search results. While the defendants are, to some extent, able to circumvent the order by setting up websites under domain names that are not included in the order, the pace of such activity is necessarily much slower than simply moving web content to a new page within an existing domain. . . .

29. The first issue on this appeal is the "territorial competence" of the Supreme Court of British Columbia over the injunction application. Pursuant to s. 2(2) of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 (the "*CJPTA*"), "[t]he territorial competence of a British Columbia court is determined solely by reference to [Part 2 of that statute]." The parties are agreed that the territorial competence of the Supreme Court to issue an injunction in this case depends on an assessment to be made under s. 3(e):

. . . A court has territorial competence in a proceeding that is brought against a person only if . . . (e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based. . . .

52. . . . Google submits that it merely offers a passive website to residents of British Columbia who wish to search the internet. . . .

54. While Google does not have servers or offices in the Province and does not have resident staff here, I agree with the chambers judge's conclusion that key parts of Google's business are carried on here. The judge concentrated on the advertising aspects of Google's business in making her findings. In my view, it can also be said that the gathering of information through proprietary web crawler software ("Googlebot") takes place in British Columbia. This active process of obtaining data that resides in the Province or is the property of individuals in British Columbia is a key part of Google's business. . . .

56. Google raises the specter of it being subjected to restrictive orders from courts in all parts of the world, each concerned with its own domestic law. I agree with the chambers judge that it is the world-wide nature of Google's business and not any defect in the law that gives rise to that possibility. As well, however, the threat of multi-jurisdictional control over Google's operations is, in my opinion, overstated. Courts must, in exercising their powers, consider many factors other than territorial competence and the existence of *in personam* jurisdiction over the parties. Courts must exercise considerable restraint in granting remedies that have international ramifications. I turn, then, to consider the nature of that restraint. . . .

81. Google suggests that the limits on granting an injunction with extraterritorial effect are as follows:

As a matter of law, the court is not competent to regulate the activities of non-residents in foreign jurisdictions. This competence-limiting rule is dictated both by judicial pragmatism and considerations of comity. The pragmatic consideration is that the court should not make an order that it cannot enforce. The comity consideration is that the court refrains from purporting to direct the activities of persons in other jurisdictions and expects courts in other jurisdictions to reciprocate. . . .

83. I accept . . . the importance of both pragmatic considerations and of comity in determining the extent to which the Supreme Court will grant orders with extra-territorial effect. On the other hand, I do not accept that the case law establishes the broad proposition that "the court is not competent to regulate the activities of non-residents in foreign jurisdictions."

84. While British Columbia courts will generally have *in personam* jurisdiction over residents of the Province, the inverse—i.e., that British Columbia courts will not have *in personam* jurisdiction over non-residents—is not true. Courts may have *in personam* jurisdiction over non-residents in a variety of situations. The chambers judge found that she had *in personam* jurisdiction over Google on the basis that it does business in the Province.

85. Once it is accepted that a court has *in personam* jurisdiction over a person, the fact that its order may affect activities in other jurisdictions is not a bar to it making an order.

86. At one time the courts of this Province refrained from granting injunctions that enjoined activities outside of British Columbia. In 1988, however, the English Court of Appeal held that it had jurisdiction to issue a worldwide *Mareva* injunction. It is now over 25 years since the Supreme Court of British Columbia first issued a worldwide injunction. The jurisdiction to do so was re-confirmed in *Mooney v. Orr* (1994), and is, today, well-established. . . .

91. I have already noted that this case exhibits a sufficient real and substantial connection to British Columbia to be properly within the jurisdiction of this Province's courts. From a comity perspective, the question must be whether, in taking jurisdiction over this matter, British Columbia courts have failed to pay due respect to the right of other courts or nations. The only comity concern that has been articulated in this case is the concern that the order made by the trial judge could interfere with freedom of expression in other countries. The importance of freedom of expression should not be underestimated. As the Canadian Civil Liberties Association has said in its factum:

A nation's treatment of freedom of expression is a core part of its self-determination, rooted in the nation's historical and social context, and the ways in which its constitutional values (whether written or unwritten), norms and legal system have evolved.

92. For that reason, courts should be very cautious in making orders that might place limits on expression in another country. Where there is a realistic possibility that an order with extraterritorial effect may offend another state's core values, the order should not be made.

93. In the case before us, there is no realistic assertion that the judge's order will offend the sensibilities of any other nation. It has not been suggested that the order prohibiting the defendants from advertising wares that violate the intellectual property rights of the plaintiffs offends the core values of any nation. The order made against Google is a very limited ancillary order designed to ensure that the plaintiffs' core rights are respected.

94. I note, as well, that the order in this case is an interlocutory one, and one that can be varied by the court. In the unlikely event that any jurisdiction finds the order offensive to its core values, an application could be made to the court to modify the order so as to avoid the problem.

95. I note that the courts of many other jurisdictions have found it necessary, in the context of orders against Internet abuses, to pronounce orders that have international effects. . . .

96. I do not suggest that these rulings have been without controversy or problems . . . [Here the court cited to the four decisions related to the litigation in France and in the United States about Yahoo!]. The extensive case law does indicate, however, that international courts do not see these sorts of orders as being unnecessarily intrusive or contrary to the interests of comity.

97. Apart from the issue of comity, Google also argues that the order that was made is unenforceable. It takes umbrage with the trial judge's suggestion that Google might be prevented from using the courts of British Columbia as a penalty for non-compliance with the order.

98. I tend to agree with Google that barring it from access to the courts of the Province would be a draconian step, and not one that needs to be contemplated at this juncture. Given that Google does business in the Province, however, British Columbia courts are entitled to expect that it will abide by their orders. It is also likely that, in the event of non-compliance, there will be consequences that can be visited on the company. . . .

106. With respect to extraterritorial effects, Google has, in this Court, suggested that a more limited order ought to have been made, affecting only searches that take place on the google.ca site. I accept that an order with international scope should not be made lightly, and that where an order with only domestic consequences will accomplish all that is necessary, a more expansive order should not be made. In this respect, the jurisprudence dealing with freeze orders is helpful—where a domestic *Mareva* injunction will freeze sufficient assets, the court should refrain from granting a more expansive world-wide injunction.

107. The plaintiffs have established, in my view, that an order limited to the google.ca search site would not be effective. I am satisfied that there was a basis, here, for giving the injunction worldwide effect. . . .

108. Finally, I note concerns . . . [about] the openness of the World Wide Web, and the need to avoid unnecessary impediments to free speech.

109. The order made in this case is an ancillary order designed to give force to earlier orders prohibiting the defendants from marketing their product. Those orders were made after thorough consideration of the strength of the plaintiffs' and defendants' cases. Google does not suggest that the orders made against the defendants were inappropriate, nor do the intervenors suggest that those orders constituted an inappropriate intrusion on freedom of speech.

110. There has, in the course of argument, been some reference to the possibility that the defendants (or others) might wish to use their websites for legitimate free speech, rather than for unlawfully marketing the GW1000. That possibility, it seems to me, is entirely speculative. There is no evidence that the websites in question have ever been used for lawful purposes, nor is there any reason to believe that the domain names are in any way uniquely suitable for any sort of expression other than the marketing of the illegal product. Of course, if the character of the websites changes, it is always open to the defendants or others to seek a variation of the injunction.

111. The ability of parties and others with identifiable legal interests to apply to vary the terms of the injunction is an important safeguard to ensure that it is not more restrictive than necessary. . . .

POLITICAL SOVEREIGNTY AND SURVEILLANCE: INTELLIGENCE GATHERING, INDIVIDUAL RIGHTS, AND TRANSNATIONAL STANDARDS

We turn from questions of individual claims of privacy in the context of private party dissemination such as through search engines to efforts to assert privacy rights against governments collecting personal data in the context of national security. As in the first section, discussing the weights to be accorded to privacy and to the free flow of information, the materials in this segment also focus on balancing personal privacy claims, now weighed against arguments of the need to obtain information to protect national security and about the promise of governments not to republish information unnecessarily.

The Snowden revelations exposed a multitude of programs, used by the U.S. National Security Agency and its international partner agencies, to gather vast quantities of telephony metadata, content of emails, private photographs and videos sent over the Internet, browser searches, Skype calls and other voice-over-internet data flows—and more. Many countries participated in the US programs that have been the subject of much discussion and/or developed their own programs. In the last months, some courts have reached questions about the permissible scope of information gathering. The 2015 federal appellate decision of *ACLU v. Clapper* examines the statutory authority for collection—read against the backdrop of constitutional concerns. The High Court of Kenya’s 2015

decision and the German Constitutional Court's 2013 ruling put the questions squarely in the context of constitutional rights.

ACLU v. Clapper

United States Court of Appeals for the Second Circuit
785 F.3d 787 (May 7, 2015)

Gerard E. LYNCH, Circuit Judge:

This appeal concerns the legality of the bulk telephone metadata collection program (the “telephone metadata program”), under which the National Security Agency (“NSA”) collects in bulk “on an ongoing daily basis” the metadata associated with telephone calls made by and to Americans, and aggregates those metadata into a repository or data bank that can later be queried. Appellants challenge the program on statutory and constitutional grounds. Because we find that the program exceeds the scope of what Congress has authorized, we vacate the decision below . . . [that dismissed] the complaint without reaching appellants’ constitutional arguments. We affirm the district court’s denial of appellants’ request for a preliminary injunction. . . .

In the early 1970s, in a climate not altogether unlike today’s, the intelligence-gathering and surveillance activities of the [National Security Agency] NSA, the [Federal Bureau of Investigation] FBI, and the [Central Intelligence Agency] CIA came under public scrutiny. The Supreme Court struck down certain warrantless surveillance procedures that the government had argued were lawful as an exercise of the President’s power to protect national security, remarking on “the inherent vagueness of the domestic security concept [and] the necessarily broad and continuing nature of intelligence gathering” [*United States v. U.S. Dist. Court (Keith)* (1972)]. In response to that decision and to allegations that those agencies were abusing their power in order to spy on Americans, the Senate established the Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the “Church Committee”) . . . [which] expressed concerns that the privacy rights of U.S. citizens had been violated by activities that had been conducted under the rubric of foreign intelligence collection.

. . . [These events] prompted Congress in 1978 to enact comprehensive legislation aimed at curtailing abuses and delineating the procedures to be

employed in conducting surveillance in foreign intelligence investigations. That legislation, the Foreign Intelligence Surveillance Act of 1978 (“FISA”), . . . , established a special court, the Foreign Intelligence Surveillance Court (“FISC”), to review the government’s applications for orders permitting electronic surveillance. Unlike ordinary Article III courts, the FISC conducts its usually *ex parte* proceedings in secret; its decisions are not, in the ordinary course, disseminated publicly.

. . . We must confront the question whether a surveillance program that the government has put in place to protect national security is lawful. That program involves the bulk collection by the government of telephone metadata created by telephone companies in the normal course of their business but now explicitly required by the government to be turned over in bulk on an ongoing basis. As in the 1970s, the revelation of this program has generated considerable public attention and concern about the intrusion of government into private matters. As in that era, as well, the nation faces serious threats to national security, including the threat of foreign-generated acts of terrorism against the United States. Now, as then, Congress is tasked in the first instance with achieving the right balance between these often-competing concerns. To do so, Congress has amended FISA, most significantly, after the terrorist attacks of September 11, 2001, in the PATRIOT Act. The government argues that § 215 of that Act authorizes the telephone metadata program. . . .

Before proceeding to explore the details of § 215 . . . , we pause to define “telephone metadata,” in order to clarify the type of information that the government argues § 215 authorizes it to collect in bulk. Unlike what is gleaned from the more traditional investigative practice of wiretapping, telephone metadata do not include the voice content of telephone conversations. Rather, they include details about telephone calls, including, for example, the length of a call, the phone number from which the call was made, and the phone number called. Metadata can also reveal the user or device making or receiving a call through unique “identity numbers” associated with the equipment (although the government maintains that the information collected does not include information about the identities or names of individuals), and provide information about the routing of a call through the telephone network, which can sometimes (although not always) convey information about a caller’s general location. According to the government, the metadata it collects do not include cell site locational information, which provides a more precise indication of a caller’s location than call-routing information does.

That telephone metadata do not directly reveal the content of telephone calls, however, does not vitiate the privacy concerns arising out of the

government's bulk collection of such data. Appellants and amici take pains to emphasize the startling amount of detailed information metadata can reveal—"information that could traditionally only be obtained by examining the contents of communications" and that is therefore "often a proxy for content." For example, a call to a single-purpose telephone number such as a "hotline" might reveal that an individual is: a victim of domestic violence or rape; a veteran; suffering from an addiction of one type or another; contemplating suicide; or reporting a crime. Metadata can reveal civil, political, or religious affiliations; they can also reveal an individual's social status, or whether and when he or she is involved in intimate relationships. . . .

. . . [Revisions in 2001 to the PATRIOT Act] substantially revised § 215 to provide for the production not only of "business records" but also of "any tangible things," and to eliminate the restrictions on the types of businesses such orders can reach. . . . [T]he statute requires the Attorney General to "adopt specific minimization procedures governing the retention and dissemination by the [FBI] of any tangible things, or information therein, received by the [FBI] in response to an order under this subchapter." Because § 215 contained a "sunset" provision from its inception, originally terminating its authority on December 31, 2005, it has required subsequent renewal. Congress has renewed § 215 seven times, most recently in 2011, at which time it was amended to expire on June 1, 2015. . . .

Americans first learned about the telephone metadata program that appellants now challenge on June 5, 2013, when the British newspaper *The Guardian* published a FISC order leaked by former government contractor Edward Snowden. The order directed Verizon . . . , a telephone company, to produce to the NSA "on an ongoing daily basis . . . all call detail records or 'telephony metadata' created by Verizon for communications (i) between the United States and abroad; or (ii) wholly within the United States, including local telephone calls." . . . The order thus requires Verizon to produce call detail records, every day, on *all* telephone calls made through its systems or using its services where one or both ends of the call are located in the United States.

After the order was published, the government acknowledged that it was part of a broader program of bulk collection of telephone metadata It is now undisputed that the government has been collecting telephone metadata information in bulk under § 215 since at least May 2006, when the FISC first authorized it to do so

That order [to Verizon] specified that the items were to be produced to the NSA; that there were "reasonable grounds to believe the tangible things sought

[were] relevant to authorized investigations . . . to protect against international terrorism” The order required its recipient, upon receiving the “appropriate secondary order,” to “continue production on an ongoing daily basis . . . for the duration of th[e] order” and contemplated creation of a “data archive” that would only be accessed “when NSA has identified a known telephone number for which . . . there are facts giving rise to a reasonable, articulable suspicion that the telephone number is associated with [Redacted]”—presumably, with terrorist activity or a specific terrorist organization. . . .

. . . FISC orders must be renewed every 90 days, and the program has therefore been renewed 41 times since May 2006. . . .

The government explains that it uses the bulk metadata collected pursuant to these orders by making “queries” using metadata “identifiers” (also referred to as “selectors”), or particular phone numbers that it believes, based on “reasonable articulable suspicion,” to be associated with a foreign terrorist organization. . . . The identifier is used as a “seed” to search across the government’s database; the search results yield phone numbers, and the metadata associated with them, that have been in contact with the seed. That step is referred to as the first “hop.” The NSA can then also search for the numbers, and associated metadata, that have been in contact with the numbers resulting from the first search—conducting a second “hop.” Until recently, the program allowed for another iteration of the process, such that a third “hop” could be conducted, sweeping in results that include the metadata of, essentially, the contacts of contacts of contacts of the original “seed.” The government asserts that it does not conduct any general “browsing” of the data.

Section 215 requires that the Attorney General adopt “specific minimization procedures governing the retention and dissemination by the [government] of [information] received . . . [and] . . . the program is subject to oversight by the Department of Justice, the FISC, and Congress. The minimization procedures require audits and reviews of the program by the NSA’s legal and oversight offices, the Office of the Inspector General, attorneys from the Department of Justice’s National Security Division, and the Office of the Director of National Intelligence. The FISC orders that created the program require the NSA to provide periodic reports to the FISC. In the event of failures of compliance, reports must be made to the FISC, and, where those failures are significant, to the Intelligence and Judiciary Committees of both houses of Congress. FISA itself also imposes a system of Congressional oversight, requiring periodic reports on the program from the Attorney General to the House and Senate Intelligence and Judiciary Committees. . . .

. . . [A]mong the most notable are modifications to the telephone metadata program announced by President Obama in January 2014 . . . [that] (1) limited the number of “hops” that can be searched to two, rather than three, and (2) required that a FISC judge find that the reasonable articulable suspicion standard has been satisfied before a seed can be queried, rather than (as had previously been the case) allowing designated NSA officials to determine for themselves whether such suspicion existed. . . .

Legislation aimed at incorporating stronger protections of individual liberties into the telephone metadata program in a variety of ways (or eliminating it altogether) was introduced in both the House and the Senate . . . in recent weeks. . . .

Finally, the program has come under scrutiny by Article III courts other than the FISC. In addition to this case, similar cases have been filed around the country challenging the government’s bulk collection of telephone metadata. . . .

Although appellants vigorously argue that the telephone metadata program violates their rights under the Fourth Amendment to the Constitution, and therefore cannot be authorized by either the Executive or the Legislative Branch of government, or by both acting together, their initial argument is that the program simply has not been authorized by the legislation on which the government relies for the issuance of the orders to service providers to collect and turn over the metadata at issue. We naturally turn first to that argument.

Section 215 clearly sweeps broadly in an effort to provide the government with essential tools to investigate and forestall acts of terrorism. . . .

. . . The basic requirements for metadata collection under § 215, then, are simply that the records be *relevant* to an *authorized investigation* (other than a threat assessment). . . .

. . . [T]he parties have not undertaken to debate whether the records required by the orders in question are relevant to any particular inquiry. The records demanded are all-encompassing; the government does not even suggest that all of the records sought, or even necessarily any of them, are relevant to any specific defined inquiry. Rather, the parties ask the Court to decide whether § 215 authorizes the “creation of a historical repository of information that bulk aggregation of the metadata allows,” because bulk collection to create such a repository is “necessary to the application of certain analytic techniques.” . . .

Thus, the government takes the position that the metadata collected—a vast amount of which does not contain directly “relevant” information, as the government concedes—are nevertheless “relevant” because they may allow the NSA, at some unknown time in the future, utilizing its ability to sift through the trove of irrelevant data it has collected up to that point, to identify information that *is* relevant. We agree with appellants that such an expansive concept of “relevance” is unprecedented and unwarranted.

The statutes to which the government points have never been interpreted to authorize anything approaching the breadth of the sweeping surveillance at issue here. . . . The sheer volume of information sought is staggering; while search warrants and subpoenas for business records may encompass large volumes of paper documents or electronic data, the most expansive of such evidentiary demands are dwarfed by the volume of records obtained pursuant to the orders in question here.

Moreover, the distinction is not merely one of quantity—however vast the quantitative difference—but also of quality. Search warrants and document subpoenas typically seek the records of a particular individual or corporation under investigation, and cover particular time periods when the events under investigation occurred. The orders at issue here contain no such limits. The metadata concerning *every* telephone call made or received in the United States using the services of the recipient service provider are demanded, for an indefinite period extending into the future. The records demanded are not those of suspects under investigation, or of people or businesses that have contact with such subjects, or of people or businesses that have contact with others who are in contact with the subjects—they extend to every record that exists, and indeed to records that do not *yet* exist, as they impose a continuing obligation on the recipient of the subpoena to provide such records on an ongoing basis as they are created. . . .

We conclude that to allow the government to collect phone records only because they may become relevant to a possible authorized investigation in the future fails even the permissive “relevance” test. . . . Put another way, we agree with appellants that the government’s argument is “irreconcilable with the statute’s plain text.” Such a monumental shift in our approach to combating terrorism requires a clearer signal from Congress than a recycling of oft-used language long held in similar contexts to mean something far narrower. . . . The language of § 215 is decidedly too ordinary for what the government would have us believe is such an extraordinary departure from any accepted understanding of the term “relevant to an authorized investigation.” . . .

For all of the above reasons, we hold that the text of § 215 cannot bear the weight the government asks us to assign to it, and that it does not authorize the telephone metadata program. We do so comfortably in the full understanding that if Congress chooses to authorize such a far-reaching and unprecedented program, it has every opportunity to do so, and to do so unambiguously. . . .

In addition to arguing that the telephone metadata program is not authorized by § 215, appellants argue that, even if the program is authorized by statute, it violates their rights under the Fourth and First Amendments to the Constitution. The Fourth Amendment claim, in particular, presents potentially vexing issues.

. . . This dispute touches an issue on which the Supreme Court's jurisprudence is in some turmoil.

In *Katz v. United States* . . . (1967), the Supreme Court departed from the property-based approach to the Fourth Amendment that had governed since *Olmstead v. United States* . . . (1928), which depended upon whether an actual physical trespass of property had occurred. As explained in Justice Harlan's concurring opinion, the Court held in *Katz* that a search occurs where "a person ha[s] exhibited an actual (subjective) expectation of privacy, and . . . the expectation [is] one that society is prepared to recognize as 'reasonable.'" . . .

The Supreme Court has also long held, however, that individuals have no "legitimate expectation of privacy in information [they] voluntarily turn[] over to third parties." . . . In *Smith v. Maryland*, the Court applied that doctrine to uphold the constitutionality of installing a pen register at a telephone company's office that recorded the numbers dialed from a criminal suspect's home telephone. . . . The Court held that the installation of the pen register was not a search for Fourth Amendment purposes, [arguing that] . . . [t]he subscriber cannot reasonably believe that the records are private, because he or she has voluntarily exposed the information contained in them to the telephone company, which uses them for its own business purpose of billing the subscriber. . . .

Appellants argue that the telephone metadata program provides an archetypal example of the kind of technologically advanced surveillance techniques that, they contend, require a revision of the third-party records doctrine. Metadata today, as applied to individual telephone subscribers, particularly with relation to mobile phone services and when collected on an ongoing basis with respect to all of an individual's calls (and not merely, as in traditional criminal investigations, for a limited period connected to the investigation of a particular crime), permit something akin to . . . 24-hour

surveillance Moreover, the bulk collection of data as to essentially the entire population of the United States, something inconceivable before the advent of high-speed computers, permits the development of a government database with a potential for invasions of privacy unimaginable in the past. Thus, appellants argue, the program cannot simply be sustained on the reasoning that permits the government to obtain, for a limited period of time as applied to persons suspected of wrongdoing, a simple record of the phone numbers contained in their service providers' billing records.

Because we conclude that the challenged program was not authorized by the statute on which the government bases its claim of legal authority, we need not and do not reach these weighty constitutional issues. The seriousness of the constitutional concerns, however, has some bearing on what we hold today, and on the consequences of that holding. . . .

This case serves as an example of the increasing complexity of balancing the paramount interest in protecting the security of our nation . . . with the privacy interests of its citizens in a world where surveillance capabilities are vast and where it is difficult if not impossible to avoid exposing a wealth of information about oneself to those surveillance mechanisms. Reconciling the clash of these values requires productive contribution from all three branches of government, each of which is uniquely suited to the task in its own way.

[Judge Vernon S. Broderick, sitting by designation, concurred in the opinion. The concurring opinion by Judge Robert D. Sack is omitted.]

On June 1, 2015, soon after the Second Circuit issued its decision in *Clapper*, and in the midst of heated political and news commentary, Congress permitted several sections of the PATRIOT Act to expire, including Section 215. On June 2, 2015, Congress enacted a revised statute, called the “Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015 (“USA FREEDOM Act of 2015”), which the President signed immediately into law.

The June 2, 2015 Act extends the expired sections of the PATRIOT Act, but substantially revises the procedures on the bulk collection of telephony metadata by requiring intelligence agencies to get a warrant before requesting such data and ensuring that the data is stored with telecommunications companies instead of the government itself. The new law pertains only to the collection of

bulk telephony metadata and does not alter other programs authorized by Section 215 in which bulk collection of online voice communications and business transactions continues. On June 9, 2015, the Second Circuit stayed its order and requested supplemental briefing in *Clapper* on the effects of the expiration of Section 215 and of the new provision's amendments.

In late 2013 a terrorist attack on an upscale shopping mall in Kenya left 67 dead and more than 175 wounded. Within a few days, the Kenyan government enacted the Security Laws Amendment Act, which among other provisions permitted nearly unlimited surveillance of potential terrorists by the security services. The law was challenged, and on January 2, 2015, George Odunga, sitting as a single judge on the High Court of Kenya, held parts of the Act invalid and referred the case to a bench of "an uneven number of judges." That bench's decision, excerpted below, focused on its upholding of the surveillance provisions. In parts not reproduced here, the court struck down a number of clauses that curbed media freedoms and that restricted the numbers of refugees and asylum seekers permitted in the country. Thus, while permitting the surveillance program to continue, this decision was also seen as a significant check on the government's exercise of power in the wake of the terror acts at the mall. Press reports indicated that the government intended to appeal the ruling and, pending the outcome, took the position that the law's disputed sections remained in effect. In April of 2015, Kenya again suffered a major terrorist attack at Garissa University, where 147 died.

Coalition for Reform and Democracy v. Attorney General
High Court of Kenya at Nairobi
Petition No. 628 of 2014 (Feb. 23, 2015)

[Judges Isaac Lenaola, Mumbi Ngugi, Hedwig Ong'udi, Hillary Chemitei, and Joseph Louis Onguto.]

1. We are living in troubled times. Terrorism has caused untold suffering to citizens and greatly compromised national security and the security of the individual. There is thus a clear and urgent need for the State to take appropriate measures to enhance national security and the security of its citizens. However,

protecting national security carries with it the obligation on the State not to derogate from the rights and fundamental freedoms guaranteed in the Constitution of Kenya 2010. It is how the State manages this balance that is at the core of the petition before us.

2. In the wake of the terrorist attacks in Kenya in the last months of 2014, the State enacted the Security Laws (Amendment) Act, No 19 of 2014 (“SLAA”). . . . It amends the provisions of twenty two other Acts of Parliament concerned with matters of national security, and it is these amendments that have precipitated the petition now before us.

3. The petition challenges the constitutionality of SLAA . . . [as] violat[ing] the Bill of Rights or . . . otherwise inconsistent with the Constitution of Kenya. Should the court find such limitation, violation or inconsistency, then it must determine whether the limitation is justifiable in a free and democratic society. . . .

95. . . . [W]e are . . . guided by the principle . . . to the effect that there is a general presumption that every Act of Parliament is constitutional. The burden of proof lies on any person who alleges that an Act of Parliament is unconstitutional.

96. However, we bear in mind that the Constitution itself qualifies this presumption with respect to statutes which limit or are intended to limit fundamental rights and freedoms. Under the provisions of Article 24 . . . , there can be no presumption of constitutionality with respect to legislation that limits fundamental rights: it must meet the criteria set in the said Article. . . .

99. The case of *Re Kadhis’ Court: The Very Right Rev. Dr. Jesse Kamau & Others vs The Hon. Attorney General & Another Nairobi* . . . [2004] . . . offers some guidance . . . in so far as the provisions of the Bill of Rights are concerned. . . .

“The general provisions governing constitutional interpretation are that in interpreting the Constitution, the Court would be guided by the general principles that; (i) the Constitution was a living instrument with a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must therefore endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. A timorous and unimaginative exercise of judicial power of constitutional interpretation leaves the Constitution a stale and sterile document; (ii) the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously

protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed.” . . .

206. Through the provisions of the Constitution, the people of Kenya have provided that the rights and fundamental freedoms guaranteed under the Constitution, with the exception of four rights set out in Article 25*, are not absolute. They are subject to limitation, but only to the extent and in the circumstances set out in Article 24 of the Constitution

4. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including— (a) the nature of the right or fundamental freedom; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. . . .

Article 25 expressly provides that the rights set out therein shall not be limited. . . .

210. We are also guided by the test for determining the justifiability of a rights limitation enunciated by the Supreme Court of Canada in the case of *R vs Oakes* (1986) The . . . test requires [first] that the limitation be one that is prescribed by law. It must be part of a statute, and must be clear and accessible to citizens so that they are clear on what is prohibited.

211. Secondly, the objective of the law must be pressing and substantial, that is it must be important to society. . . . The third principle is the principle of

* Article 25 of the Constitution of Kenya provides: “Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

- (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
- (b) freedom from slavery or servitude;
- (c) the right to a fair trial; and
- (d) the right to an order of habeas corpus.”

proportionality. It asks the question whether the State, in seeking to achieve its objectives, has chosen a proportionate way to achieve the objectives that it seeks to achieve. . . .

213. The . . . [test] set out above echo the requirements of Article 24 of the Constitution. This Article expresses the manner of considering the constitutionality of a limitation on fundamental rights by requiring that such limitation be reasonable and justifiable in a free and democratic society, and that all relevant factors are taken into account, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to balance the rights and freedoms of an individual against the rights of others, and the relation between the limitation and its purpose, and whether there are less restrictive means to achieve the purpose. . . .

254. It cannot be disputed that the fight against terrorism is an important purpose. The State has an obligation to protect its citizens from internal and external threats, and . . . it must maintain the delicate balance between protecting the fundamental rights of citizens and protecting them from terrorists by providing national security

282. The petitioners . . . asserted that the new part [of the statute] is likely to violate the right to privacy guaranteed under Article 31. The new part states: . . .

(2) Where the Director-General has reasonable grounds to believe that a covert operation is necessary to enable the Service to investigate or deal with any threat to national security or to perform any of its functions, the Director-General may, subject to guidelines approved by the Council, issue written authorization to an officer of the Service to undertake such operation.

(3) The written authorization issued by the Director-General under subsection (2)- . . .

(c) may authorize any member of the Service to . . . monitor communication; . . .

(d) shall be specific and accompanied by a warrant from the High Court in the case of paragraph (c)”

283. The petitioners . . . also contended that Section 69 . . . infringes on the right to privacy as it allows interception of communication by the National

Security Organs. . . . [This section] introduces Section 36A to the Prevention of Terrorism Act as follows:

36A (1) The National Security Organs may intercept communication for the purposes of detecting, deterring and disrupting terrorism in accordance with procedures to be prescribed by the Cabinet Secretary[.]

(2) The Cabinet Secretary shall make regulations to give effect to subsection (1) and such regulations shall only take effect upon approval by the National Assembly.

(3) The right to privacy under Article 31 of the Constitution shall be limited under this section for the purpose of intercepting communication directly relevant in the detecting, deterring and disrupting terrorism. . . .

285. The right to privacy is guaranteed under Article 31 of the Constitution which provides as follows:

Every person has the right to privacy, which includes the right not to have—(a) Their person, house or property searched. (b) Their possessions seized. (c) Information relating to their family or private affairs unnecessarily required or revealed; or (d) The privacy of their communications infringed.

286. The right to privacy has also been expressly acknowledged in international and regional covenants on fundamental rights and freedoms. . . .

290. . . . [W]e are clear in our mind that surveillance in terms of intercepting communication impacts upon the privacy of a person by leaving the individual open to the threat of constant exposure. This infringes on the privacy of the person by allowing others to intrude on his or her personal space and exposing his private zone. . . .

300. The need to monitor communication . . . has one purpose; to enhance national security by ensuring that national security agents, through their covert operations and monitoring of communication, can be one step ahead of terrorists, and are thus able to thwart terrorist attacks. This, we are convinced, is an extremely important purpose, recognised world over as justifying limitations to the right to privacy.

301. As O’Higgins C.J [of the Supreme Court of Ireland] commented in *Norris v. Attorney General* (1984), a right to privacy can never be absolute. It has to be balanced against the State’s duty to protect and vindicate life. . . .

302. To our collective mind, and taking judicial notice of the numerous terrorist attacks that this country has experienced in the last few years, we are of the view that the interception of communication and the searches contemplated under the two impugned provisions of law are justified and will serve a genuine public interest. The right to privacy must be weighed against or balanced with the exigencies of the common good or the public interest. In our view, in this instance, the scales tilt in favour of the common good. . . .

308. The upshot of our findings is that while Section 56 of SLAA and the new Section 42 of the [National Intelligence Service] NIS Act, as well as Section 69 of SLAA and Section 36A (which it introduces to the Prevention of Terrorism Act) do limit the right to privacy, they are justifiable in a free and democratic state, and have a rational connection with the intended purpose, the detection, disruption and prevention of terrorism. We are also satisfied that given the nature of terrorism and the manner and sophistication of modern communication, we see no less restrictive way of achieving the intended purpose and none was advanced by any of the parties in the course of submissions before us. . . .

461. Let this judgment therefore send a strong message to the Parties and the World; the Rule of Law is thriving in Kenya and its Courts shall stand strong; fearless in the exposition of the law; bold in interpreting the Constitution and firm in upholding the judicial oath.

Germany has strictly separated intelligence gathering from criminal investigation. As a result, the intelligence services and the police have different levels of regulation and therefore different rules about the kind of information each can collect and use. After 9/11, however, both federal and state-level agencies as well as police and intelligence services, were given legal permission to share terrorism-related information. In April 2013, the German Federal Constitutional Court reviewed the constitutionality of the centralized database combining both police and intelligence information that had been created to keep track of terrorism suspects.

Joint Counter-Terrorism Database Case
Federal Constitutional Court of Germany (First Senate)
1 BvR 1215/07 (Apr. 24, 2013)

[The First Senate of the Federal Constitutional Court, with the participation of Justices Vice-President Kirchhof, Gaier, Eichberger, Schluckebier, Masing, Paulus, Baer, and Britz, delivered the following:]

In the proceedings on the constitutional complaint of Mr S. . . . , [t]he constitutional complaint concerns the constitutionality of the Counter-Terrorism Database Act. The complainant challenges the Act on Setting up a Standardised Central Counter-Terrorism Database of Police Authorities and Intelligence Services of the Federal Government and the *Laender* (Counter-Terrorism Database Act – ATDG) . . . of 22 December 2006. . . .

1. The Counter-Terrorism Database Act laid down the legal basis for the counter-terrorism database, a joint database of the police and intelligence services of the Federal Government and the federal states, or *Laender*, serving to combat international terrorism. This database facilitates and accelerates the transfer of information between the participating police and intelligence services by allowing certain information related to the fight against international terrorism, which is held by the individual agencies, to be found more quickly and accessed more easily by all participating agencies. . . .

2. The provisions of the Counter-Terrorism Database Act of 22 December 2006 as amended . . . 26 February 2008 which are relevant for this case read as follows [*Translation from Ministry of the Interior*]:

Section 1: Counter-terrorism database

(1) To discharge their legal duties of investigating and fighting international terrorism affecting the Federal Republic of Germany, the participating authorities, i.e. the Federal Criminal Police Office (BKA), the federal police authority designated in the regulation enacted pursuant to Section 58(1) of the Federal Police Act, the *Land* Criminal Police Offices (LKA), the Federal and *Land* Offices for the Protection of the Constitution, the Military Counter-Intelligence Service (MAD), the Federal Intelligence Service (BND) and the Customs Criminological Office (ZKA), shall run a joint standardized central counter-terrorism database (counter-terrorism database).

(2) Other police authorities, in consultation with the Federal Ministry of the Interior, shall be entitled to participate in the counter-terrorism database if

1. they are assigned tasks of fighting international terrorism affecting the Federal Republic of Germany not only in individual cases,

2. they need access to the counter-terrorism database to discharge their duties pursuant to no. 1, and if this is appropriate with regard to the protected interests of the persons concerned and the security interests of the participating authorities.

Section 2: Contents of the counter-terrorism database and storage obligation

If data pursuant to Section 3(1) have already been collected, the participating authorities are obliged to store these data in the counter-terrorism database if the authorities have information from the police or intelligence services (intelligence) which clearly indicates that the data refer to

1. persons who participate in or support

a) a terrorist organization [as defined by federal law] . . . or

b) a group which supports [a terrorist organization]

2. persons who unlawfully use violence to enforce political or religious interests or who support, prepare, advocate or intentionally incite such use of violence,

3. persons when there is evidence that they have more than superficial or coincidental contact with persons under no. 1(a) or no. 2, and through whom further information for investigating and fighting international terrorism can be obtained (contact persons), . . .

4. . . . and knowledge of these data is necessary to investigate and fight international terrorism affecting the Federal Republic of Germany. . . .

Section 3: Types of data to be stored

(1) The following types of data, if available, shall be stored in the counter-terrorism database:

1. Personal data

a) . . . surname, first name, previous names, other names, aliases, divergent spellings of names, sex, date of birth, place of birth, country of birth, current and previous nationalities, current and previous addresses, special physical features, languages, dialects, photographs, name of the category pursuant to Section 2, and information on identity documents (basic data) if this does not violate other legal provisions and is necessary to identify a person.

b) the following types of data (extended basic data) [for defined categories of persons] . . . : [telephone numbers, devices in their possession, e-mail addresses, banking data, safe deposit boxes, cars registered to or used by them, marital status, ethnic origin, religious affiliation if necessary, special skills, school qualifications, work in a vital institution, data about a threat posed by the person, driving or pilot's license, travel, contacts and assessments of the evidence.] . . .

3. . . . information about the authority possessing the intelligence, the file reference or other reference codes, and the classification, if available. . . .

Section 6: Further use of the data

(1) The requesting authority may use the accessed data solely for the purpose of checking whether the hit matches the person . . . and to request intelligence in order to discharge its duties in relation to investigating or combating international terrorism. Data may be used for purposes other than investigating or combating international terrorism only if

1. this is necessary to prosecute a serious crime or to prevent a threat to the life, limb, health or freedom of a person, and
2. the authority which entered the data authorizes such use.

(2) In case of an emergency, the requesting authority may use the data it has accessed only if this is vital to prevent a current threat . . . in connection with combating international terrorism.

(3) If data are used . . . , they shall be labelled accordingly. After transferring the data the recipient shall maintain the labelling. . . .

Section 10: Data protection monitoring, provision of information to the data subject

(1) Pursuant to Section 24(1) of the Federal Data Protection Act, the Federal Commissioner for Data Protection and Freedom of Information shall be responsible for monitoring data protection. The protection of data entered and requested by a *Land* authority shall be governed by the data protection act of the respective *Land*. . . .

Section 13: Restriction of fundamental rights

The fundamental rights to privacy of correspondence, posts and telecommunications (Article 10 of the Basic Law) and to the inviolability of the home (Article 13 of the Basic Law) shall be restricted under the terms of this Act.

[End of translation provided by the Ministry of the Interior]

III. . . .

1. The Federal Government holds the view that the constitutional complaint is inadmissible, or at least unfounded. . . .

gg) With reference to the facts, the Federal Government states the following: storage primarily concerns persons living in other countries, the spelling of whose names is not always unambiguous. In August 2012, 17,101 data records on persons were stored in the counter-terrorism database, some 920 of which were duplicate mentions or duplicate records, so that approximately 16,180 different persons were affected by the stored records. Of these persons, 2,888 had their residence in Germany and 14,213 persons resided abroad. The large number of persons residing abroad is explained by the participation of the Federal Intelligence Service. . . . The participating authorities exercise great restraint in entering contact persons without known terrorist activities in the counter-terrorism database. In August 2012 the database contained only 141 data records

for contact persons without indications of malicious intent, entered primarily by *Land* police officials.

The existing data records, the Federal Government states, contain hardly any entries in the extended basic data. Only 44% of the data records include any extended basic data at all. Hardly any data record includes an extended basic data record that is even approximately complete. . . .

From March 2007 to the autumn of 2012, a relatively constant 1,200 search requests per week, or a total of some 350,000 search requests, were recorded. This shows, the Federal Government says, that the counter-terrorism database is being used more as a “specialised telephone book,” and not for a general matching of sources. During this period a request for extended basic data was placed in less than 1% of cases. As a rule, the Federal Government says, it makes more sense for the agencies to directly contact the agency maintaining the record than to ask for extended basic data, which are only in special situations helpful as a first and rapid assessment of dangerousness. Access to extended basic data was refused in an estimated one out of every three or four requests.

To permit a reasonable limit on the results, the Federal Government says, the system currently ensures that release is refused through technical means for any request with more than 200 matches. The number of matches resulting from a search averages four to five. . . .

According to the Federal Government, a total of some 7.7 million data records are stored on the log data server; each data record reflects the database transactions triggered by one activity in the counter-terrorism database. . . .

B. . . .

I. The complainant claims a violation of his fundamental right to informational self-determination under Art. 2 sec. 1 in conjunction with Art. 1 sec. 1 GG [Grundgesetz – German Constitution], the secrecy of correspondence and telecommunications under Art. 10 sec. 1 GG, the inviolability of the home under Art. 13 sec. 1 GG and, in conjunction with the above fundamental rights, a violation of the guarantee of the protection of rights under Art. 19 sec. 4 GG. . . .

II. The complainant is concerned directly, individually, and presently by the challenged provisions.

1. The complainant does not lack the necessary direct concern. . . . [O]ne must presume a direct concern if the complainant cannot seek recourse to the competent courts because he or she has no knowledge of the respective

implementing measure. . . . [H]e cannot seek—as he does—protection against the possibility that such data are stored at any time without him being able to influence this or to become aware of it. . . .

D.

The constitutional complaint is, in part, well-founded. . . .

III. The counter-terrorism database, which was established by the challenged provisions, is in its fundamental design compatible with the right to informational self-determination under Art. 2 sec. 1 in conjunction with Art. 1 sec. 1 GG. The principle of proportionality does not fundamentally oppose such a database, which, in the context of investigating and combating international terrorism, serves to initiate the receipt of information, and in emergencies also serves to defend against dangers. However, also its individual provisions detailing the structure of the database must comply with the principle of proportionality.

1. The counter-terrorism database has a legitimate aim. It is primarily meant to inform security agencies quickly and easily of whether other security agencies have relevant information about certain persons associated with international terrorism. It thus aims to provide preliminary information with which these agencies can initiate searches of information from other authorities faster and more expediently, and that in emergencies can also permit a first assessment of a threat so as to guide further action. The legislature does not seek a general exchange of personal data among all security agencies, or the elimination of all bounds on information between these agencies; this would circumvent the principle of purpose limitation, and would therefore be from the outset impermissible. What the legislature intends to provide is only a limited facilitation of information transfer. This transfer of information is to leave the various agencies' rules on transfers in force, and its subject matter is to remain restricted to combating international terrorism. Although the term "terrorism" is not unambiguous in itself, the Counter-Terrorism Database Act uses § 129a of the Criminal Code as guidance. . . . "Terrorism," in this context, thus means specifically defined, serious criminal offences directed at the intimidation of the public or against the fundamental structures of a state or of an international organisation. This does not raise any constitutional objections.

2. The challenged provisions are also suitable and necessary to achieve this purpose. The data storage obligations under §§ 1 to 4 ATDG create a basic data inventory that is made available to the participating authorities . . . so that they can prepare further requests for information, and that is intended to provide them with information to protect against specific threats in particularly urgent

cases. . . . No other set of instruments that ensures these goals with comparable efficacy and less interference with rights is evident.

3. In its fundamental design, the Counter-Terrorism Database Act is also compatible with the principle of proportionality in the narrow sense.

The principle of proportionality in the narrow sense requires that in an overall assessment, the severity of legislative restrictions on fundamental rights must not be disproportionate to the significance of the reasons that provide the justification for such restrictions. Here a fair balance must be established between the severity of interference with rights under the provision, and the intended legislative goal; between the individual interest and the public interest. . . .

The severity of the challenged provisions' interference is substantial This, however, is counterbalanced by significant public interests A balancing does not lead to fundamental constitutional objections to establishing the counter-terrorism database, or to its nature; however, for the more detailed structuring of the database, clear legal provisions establishing adequate limits are necessary, including provisions for the effective supervision of its application

a) The transfer of information created by the challenged provisions is of considerable severity. . . .

aa) The severity of the interference by the counter-terrorism database is increased by the fact that it permits an exchange of information among a large number of security agencies, some of whose tasks and competences differ considerably from one another. It is particularly significant here that it also includes the transfer of information between intelligence services and the police.

(1) The authorisations for data collection and data processing conferred on each of the various security agencies are, so far as personal data are concerned, tailored to, and limited by, those agencies' specific tasks. Accordingly, the data are constitutionally subject to purpose limitations with regard to their use, and cannot automatically be shared with other agencies. Thus, the organisation of the security agencies according to their fields of specialisation and federal considerations also takes on a special dimension relating to fundamental rights where data privacy is concerned. . . .

. . . . In assessing the proportionality of a transfer of information between different agencies, it is particularly important whether the different informational contexts are comparable. The more the agencies' tasks, authorities and manner of performing tasks differ from each other, the greater the significance of the transfer

of related data. Therefore it is of particular significance for the constitutionality of such changes of purpose to what extent the limitations on data gathering by the transmitting agency, or in the present instance, the agency entering data into the database, coincide with those under which the requesting authorities are allowed to collect data. Accordingly, a change of purpose is not allowed if it circumvents fundamental rights-based restrictions on the use of certain investigative methods, or in other words, if under the Constitution, the information could not have been legally collected either in this way, or at all, for the revised purpose, even if there had been a corresponding legislative basis . . . Constitutional requirements for the gathering, storage and processing of data must not be circumvented by allowing agencies whose tasks place them under less rigorous standards to transmit data to agencies which, for their part, are subject to more rigorous standards.

(2) Accordingly, data pooling between the intelligence services and the police is of high significance and is, in general, subject to narrow constitutional constraints. This is because the police and intelligence services have tasks that differ sharply from one another. Accordingly, they are subject to fundamentally different requirements with respect to the openness with which they perform their tasks, as well as with respect to data collection.

(aa) The intelligence services have the task of gathering information even in advance of situations that pose a threat. . . .

In keeping with this range of tasks that is performed in advance of such situations, the intelligence services have extensive data-gathering powers that are neither clearly defined with reference to specific areas of activity, nor particularly detailed as to the means to be applied. For the authorities for protecting the Constitution, they include methods and instruments for covertly procuring information, including the use of confidants and sources, observations, video and sound recordings, fictitious identification papers and fictitious vehicle number plates . . . [The] Federal Intelligence Service may, in order to obtain information, and under certain circumstances, use strategic monitoring to filter international telecommunications connections for certain search criteria . . . [T]hese powers reflect the breadth of tasks of the intelligence services . . . and are characterised by relatively low thresholds for interference. Furthermore, the intelligence services generally gather data covertly. The principle of openness in data collection does not apply to them, and they are largely exempted from obligations of transparency and reporting to the persons concerned. The options for individuals seeking protection of their rights are correspondingly meagre. In part they are even entirely superseded by political supervision.

By contrast, and to compensate for the breadth of these data collection powers, the goals at which intelligence activities may aim are limited. Without prejudice to more detailed differentiations among the various services, the goals are essentially limited to observing and reporting on fundamental threats that might destabilise the community as a whole, in order to permit a political assessment of the security situation. . . . Accordingly, intelligence gathering by the authorities for protecting the Constitution does not aim directly to avert and prevent specific criminal offences or to prepare corresponding operational measures. In this case, as well, the services' tasks are limited to a duty to report to the politically responsible state organs, or to the public, as the case may be.

This task of the intelligence services, restricted to providing early political information, is also reflected in a restriction of the services' powers: they do not have police powers, and cannot ask the police, not even through inter-administrative assistance, to carry out measures for which they themselves have no authority. . . .

(bb) The profile of tasks and powers of the law enforcement authorities and security agencies differs fundamentally from this profile. These entities have the responsibility of preventing, impeding and prosecuting criminal offences, and of protecting against other threats to public security and public order. Their tasks are characterised by an operational responsibility, and in particular by the power to enforce measures against individuals, if necessary by force. At the same time, their tasks are circumscribed by law in a differentiated manner and supported by a wide range of powers with many gradations, both substantive and procedural ones. Even though these agencies also have certain tasks in advance of threats, their general powers to act against individuals are situation-specific; as a rule, there needs to be cause to suspect the perpetration of an offence, or a danger. This profile of tasks is also consistent with these agencies' powers to gather and process data. As these powers can ultimately be used to prepare and justify measures of compulsion up to and including interference with personal freedom, they are considerably more narrowly and more precisely defined by law than those of the intelligence services, and are quite diversely distinguished from one another. Accordingly, and with numerous gradations in detail, these powers on the handling of data also require the existence of a specific cause such as a danger or the suspicion of an offence. If the legislature allows, as an exception, for personal data to be collected without a specific cause as a precaution or merely to prevent threats or criminal offences, this is in particular need of justification, and is subject to heightened constitutional requirements.

Accordingly, the police normally act in the open, and likewise, their handing of data predominantly complies with the principle of openness. It is true

that to a considerable degree, the tasks of the police also involve investigations that are initially conducted covertly against the person concerned. However, this exception applies only to certain information-gathering measures or phases that are supported by specific suspicions, and it does not alter the fact that police work is in principle conducted in the open. . . .

The legal order therefore distinguishes between the police, which generally work in the open, are structured for the fulfilment of operational tasks, and [are] guided by detailed legal provisions; and the intelligence services, which generally work in secret, are limited to observation and information gathering for political information and consultation, and can thus act within a less complex legal framework. No provision is made for a secret police.

(cc) In light of these differences, provisions that make it possible to transfer data between the police and intelligence services are subject to heightened constitutional requirements. From the fundamental right to informational self-determination follows a principle of separation of information (*informationelles Trennungsprinzip*). Under this principle, data may generally not be exchanged between the intelligence services and the police. The separation of data may be relaxed only by exception. If exceptions are granted for operational tasks, they constitute a particularly serious interference. Transfers of data between the intelligence services and the police for use in potential operational actions must therefore normally serve a particularly important public interest which justifies the access to information under the laxer requirements that apply to the intelligence services. This must be ensured by sufficiently specific and qualified thresholds for interference based on clearly defined legal provisions; moreover, the thresholds for the interference with rights in the acquisition of data must not be circumvented.

bb) However, it mitigates the severity of the interference that the counter-terrorism database is structured as a joint database which is essentially limited to facilitating access to information . . . and stipulates that the data may be used for operational tasks only in urgent and exceptional cases.

(1) The challenged provisions design the counter-terrorism database as a set of instruments that—except in emergencies . . .—does not provide information so that the respective authorities can directly perform their tasks, and especially not their operational purposes, but provides it only as a basis for further data transfers. It is true that the counter-terrorism database itself enables a data transfer between the participating authorities by permitting searches of all basic data, and letting the requesting authorities have access to the simple basic data However, . . . the requesting authority may use these data only for reviewing

whether the data match the person being sought, and for requesting the transfer of findings so that it can perform its own tasks. The information thus obtained, therefore, may normally be used only to decide whether to seek further information, and from what agency, and to provide better reasons for such individual requests for data transfers. In contrast to this, in case of specific requests, and thus also when operational tasks are performed, the transfer of data from the databases maintained by the various agencies is controlled by their relevant specialised law. . . .

Consequently, the Counter-Terrorism Database Act relies heavily on each agency's legal bases for data transfers, from which it derives its legal limitations. As a result, it ensures that—aside from [specific exceptions]—an exchange of data for direct use in investigating and combating international terrorism is permissible only subject to the legal requirements of the transfer provisions for each of the agencies. It therefore balances the low requirements for initiating the receipt of information in advance of a threat—basically the question of necessity—with differentiated limits for the transfer of data. These restrictions must in turn meet the constitutional requirements and cannot be limited—at least not for data transfers between the intelligence services and the police—to comparatively minor requirements such as the data transfer being necessary for performing certain tasks or for preserving public safety.

(2) . . . [E]ven in this function, the severity of interference is still considerable. . . .

Being included in such a database can represent a substantial hardship for the persons concerned. Once somebody has been included in the database, this person must expect, in the event of a search, to be categorised as affiliated with terrorism and—through further investigative requests thus facilitated—to be subjected to associated burdensome measures. The consequences of such a categorisation can be substantial, and they can place individuals in difficult situations without their knowing about the categorisation or having any practical way of defending themselves against it. The significance of this interference is intensified by the fact that the data are recorded in the database in isolation from their respective specific backgrounds, and may in part be founded on mere prognoses and subjective assessments by the authorities, which are uncertain by their very nature. Ultimately, citizens may thereby be exposed to considerable adverse consequences without having given any cause for which they themselves are accountable. It is true that in general, burdensome measures cannot be based directly on a use of the data in the counter-terrorism database under the challenged provisions alone; instead, such measures loom as their indirect effect

in conjunction with further provisions. The fact remains, however, that the counter-terrorism database increases the probability of such measures. . . .

The great importance that effectively combating terrorism has for a democratic and free society must be taken into account in assessing the significance of such a database. Crimes with terrorist characteristics, at which the Counter-Terrorism Database Act is directed, aim to destabilise the community, and in so doing encompass attacks on the life and limb of random third parties, in a ruthless instrumentalisation of other human beings. They are directed against the keystones of the constitutional order and the community as a whole. It is a requirement of our constitutional order not to view such attacks as acts of war or states of emergency, which would be exempt from adherence to constitutional requirements, but to fight them as criminal acts with means that are within the rule of law. This means, on the other hand, that within the constitutional examination of proportionality, the fight against terrorism must be accorded considerable weight

c) In view of the conflicting interests, an overall assessment shows no constitutional objections against the fundamental design of the counter-terrorism database as an instrument for initiating the receipt of information and as a source of information for initiating action when assessing threats in serious emergencies. However, the provisions for the database only meet the requirements of the principle of proportionality in the narrow sense if these norms are unambiguous and sufficiently narrow in defining which data are to be recorded and how these data may be used, and are in fact sufficiently limited, and if qualified requirements for supervision both exist and are adhered to.

IV.

On the basis of these principles, the challenged provisions do not meet the requirements for a structure of the counter-terrorism database that is sufficiently specific and complies with the prohibition of disproportionate measures in a number of ways. They violate the right to informational self-determination.

1. The provision under § 1 sec. 2 ATDG for involving further law enforcement agencies in the counter-terrorism database is incompatible with the requirement of specificity.

a) . . . [T]he authorities participating in the counter-terrorism database must be defined either directly by legislation, or by a regulation based on legislation. . . .

2. Not in every respect compatible with the constitutional requirements are the provisions which determine the group of persons who[m] the database may cover. Some of these provisions violate the principle of specificity and the prohibition of disproportionate measures. Others are in need of an interpretation to narrow them in conformity with the Constitution. . . . [The law appropriately specifies that members of terrorist organizations and those affiliated with them are legitimate targets for inclusion in the database.]

bb) By contrast, that group is expanded further . . . [to those] persons who merely support a supporting organisation. No requirement for a subjective connection to terrorism can be found in the provision. . . . Such a broadening of the law to include even the remotest connections with terrorist organisations violates the principle of unambiguity of legal provisions . . . and is incompatible with the prohibition of disproportionate measures. . . .

c) § 2 sentence 1 no. 2 ATDG is not fully compatible with the Constitution. This provision, which is meant to cover individuals who might have an affinity to terrorism, combines a number of ambiguous and potentially broad legal terms. Because of a tie in the Senate's votes, the terms "unlawful use of violence" . . . and "intentional incitement of such use of violence" . . . cannot be declared unconstitutional. In the opinion of the four members of the Senate who carry this part of the decision, the use of these criteria is compatible with the Basic Law as long as they are not accorded an overly broad meaning. . . . In the opinion of the other four members of the Senate, which ultimately does not prevail for this decision, the provision would have to be declared unconstitutional in this regard. However, in the unanimous view of the Court, the mere "advocacy" of violence within the meaning of this provision is not sufficient for recording a person in the counter-terrorism database. To that extent, the provision violates the prohibition of disproportionate measures and is unconstitutional. . . .

(2) Furthermore, § 2 sentence 1 no. 2 ATDG includes both persons who use, support and prepare violence, and those who merely advocate it or who intentionally incite it. This would open up disproportionately broad possibilities for interference if even conditional intent, as used in the terminology of criminal law, were viewed as sufficient for the intentional incitement of violence. However, if, in this context, the criterion of intentional incitement of violence is attributed a meaning whereby only the deliberate incitement of violence is covered, this complies with the principle of proportionality. . . .

cc) The criterion of "advocacy of violence" has an especially broad reach. Here the legislature only refers to an internal attitude that need not have resulted in any activity that encourages violence. The use of this criterion is incompatible

with the Constitution, and the provision is unconstitutional to that extent. The generally overly wide reach of this criterion can also not be remedied through an interpretation in conformity with the Constitution. . . . Linking to such a criterion, which focuses directly on the *forum internum* and therefore interferes with an individual's inaccessible inner sphere, is particularly capable to also have an intimidating effect on the exercise of legal freedoms, particularly the freedom of religion and the freedom of expression. In this case, the law uses subjective convictions per se as its yardstick and thus lays out criteria that an individual can only control to a limited degree and that cannot be influenced by law-abiding conduct. Including persons in the counter-terrorism database on the basis of such a criterion is incompatible with the prohibition of disproportionate measures. § 2 sentence 1 no. 2 ATDG is unconstitutional to that extent.

d) § 2 sentence 1 no. 3 ATDG is also unconstitutional. The inclusion of contact persons it provides for is incompatible with both the principle of specificity and the prohibition of disproportionate measures.

§ 2 sentence 1 no. 3 ATDG provides that even mere contact persons of the persons covered by the preceding clauses must be included in the counter-terrorism database. The law treats these as a separate group, whose data are made accessible to the participating authorities in the same way as those of the other persons included in the database. Also to be included in the database are those contact persons who know nothing about the principal's connection with terrorism—although in this case only their simple basic data are to be included. If these are contact persons who know of the relevant principal's connection with terrorism, the extended basic data are also to be entered in the database.

The provision that includes contact persons as a separate group in a data transfer that also incorporates unmasked information does not meet the requirements for specificity. On this basis one cannot predict which persons are in fact to be included in the database. Even if the legislature makes an exception for persons who have only a fleeting or chance contact, the provision includes everyone throughout the social living environment of the persons named under numbers 1 and 2 of the provision—both those in the private environment and those who have professional or business contacts with them. But evidently not all persons who thus come under consideration are actually supposed to be included in the database. . . . Rather, the determination of what data are to be stored is ultimately left up to [the authorities'] free discretion.

In view of the size of the group of persons covered by the provision, which is scarcely comprehensible, the provision also violates the prohibition of disproportionate measures. However, it is not generally prohibited by

constitutional law to make data of contact persons available in the counter-terrorism database. As a rule, such persons who are not covered by numbers 1 and 2 of the provision, and who therefore do not themselves count as potential supporters of terrorist activities, are, according to the database's purpose, only of interest to the degree they can provide information about the principal who is thought to have a close connection to terrorism. The design of the legislation must take its guidance from this fact. . . . This applies irrespective of whether such contact persons do or do not know about the principal's connection with terrorism.

3. There is no constitutional objection to the scope of data collected, as provided under § 3 sec. 1 nos. 1a and 1b ATDG. However, with regard to § 3 sec. 1 no. 1b ATDG, which already includes some requirements for further specification by the administration, supplementary provisions are needed.

. . . [P]articularly stringent requirements apply to recording [ethnic origin and religious affiliation], because they are covered by a special constitutional protection against discrimination . . . However, in view of the importance of an effective defence against terrorism, it is not completely impossible to consider these data, too. Nevertheless, the Constitution requires that their consideration be restrained. This must be taken into account by ensuring that such information can only be recorded for identification purposes. . . .

4. The provisions for the use of the data are not in every respect compatible with the prohibition of disproportionate measures.

a) However, the provisions on the request and use of the simple basic data under § 3 sec. 1 no. 1a ATDG are constitutionally unobjectionable [when searching for specific individuals to see if their names are in the database]. . . .

c) However, the authorisation of criteria-based searches of the extended basic data that do not send the searching agency merely a reference to further information in the event of a match, but provide direct access to the corresponding simple basic data . . . is not compatible with the prohibition of disproportionate measures. . . .

The informational content of the extended basic data under § 3 sec. 1 no. 1b ATDG is far-reaching, and can include highly personal information, as well as information that portrays the biography of the persons concerned. From the viewpoint of proportionality, therefore, access to such information must be substantially more limited than is the case for the simple basic data under § 3 sec. 1 no. 1a ATDG. . . . By linking a match message for extended basic data with the

individualised information in the simple basic data, the extended basic data searched also become individually attributable, and can be exploited as personal information. In this way, by searching for one or more criteria—for example, by searching for persons with a certain religious affiliation and qualification who frequent a certain meeting place . . .—agencies can perform a search and obtain, in the event of a match, not just the information about which agency holds relevant information, but all names, addresses, and other information . . . about everyone who matches the search criteria.

Such a far-reaching use does not take sufficient account of the significance of the content of the extended basic data. . . . Accordingly, a provision for use must be designed in such a way that if a search also reaches into extended data, only the file number and the agency holding the information will be displayed, but not the corresponding simple basic data.

d) By contrast, there are no constitutional objections to the use of extended basic data in emergencies [as provided by the statute] . . . , even in the case of a reverse search. . . .

The conditions under which such a use is permitted are, however, sufficiently narrowly defined to justify the interference. The data may be accessed and used only to protect especially significant legally protected interests—which means, first of all, to protect life, limb, health or freedom of human beings. . . . Insofar as the provision additionally includes the protection of property of substantial value, the legislature makes clear that this does not pertain to the protection of ownership or property *per se*, but goods “the preservation of which is in the public interest.” . . . This means, in the context of protection from terrorism, such property as significant infrastructure or other facilities of direct importance for the community. The provision also includes high thresholds for interference. The protected interests must be exposed to a present threat founded not just on factual indications, but on specific evidence. Here the data may be accessed and used only when this is indispensable and the requested data cannot be transferred in due time. Moreover, access to the data is procedurally safeguarded. . . .

5. The principle of proportionality also sets requirements for transparency, protection of individual rights, and supervisory oversight. Due to the purpose and functioning of the database, the Counter-Terrorism Database Act ensures transparency of the exchange of information only to a limited extent. Thus, only limited possibilities of legal protection are open to the persons affected; the supervision of its application is carried out principally through oversight by the Data Privacy Commissioners. This is compatible with the Constitution if the

conditions set out in constitutional law are adhered to when it comes to effectively organising the supervision

Since supervisory oversight has the function of compensating for the weak level of the protection of individual rights, regular supervision is particularly significant, and such supervision must be performed at reasonable intervals, the duration of which must not exceed a certain maximum of approximately two years. This must be taken into account in granting the associated powers. . . .

V. To the extent that the challenged provisions provide that data to be included in the counter-terrorism database may include data that are obtained by interferences with the secrecy of telecommunications or with the fundamental right to inviolability of the home, they violate Art. 10 sec. 1 and Art. 13 sec. 1 GG. . . .

E.

I. The partial unconstitutionality of the challenged provisions does not result in their being declared void, but only in a finding that they are incompatible with the Basic Law.

Until a new provision is enacted, but no later than 31 December 2014, the provisions may continue to be applied, subject to . . . [some] stipulations [listed by the Court]. . . .

II. The decision under C. is unanimous; otherwise there were partial dissents. . . .



One question is whether constitutional principles—such as privacy rights—are shared. Another is whether, even when relying on the same general constitutional principles, jurisdictions reach different results about the content of the right to privacy and the way it is balanced against national security. These variations make the transnational coordination complex. The problems echo those set forth in the first segment about valuing privacy as well as the free flow of information. For example, if personal data that is legally collected in country A under one set of rules might be blocked from collection in country B with stricter privacy rules, then may country A share the information it has collected with

country B? These are some of the legal questions making their way through regulatory bodies, including courts.

Ongoing waves of terrorist attacks and evidence of plots to do harm produce calls for more information sharing and more cooperation among the security services of different countries. The following segment provides illustrative efforts to respond to questions of surveillance and includes discussion of transnational standards framed in the context of ongoing concerns about data privacy. For example, the U.N. General Assembly approved a resolution on March 24, 2015 to create the position of a special rapporteur on the right to privacy, authorized to monitor states' respect for privacy rights. The closing essay proposes one approach for multilateral standards for surveillance reform.

One regulatory body is the U.K. Investigatory Powers Tribunal, which is a specialized court that “investigates and determines complaints of unlawful use of covert techniques by public authorities infringing our right to privacy and claims against intelligence or law enforcement agency conduct which breaches a wider range of human rights” (additional details come from the tribunal’s website at <http://www.ipt-uk.com/>). Excerpted below is an example, one of a series of its judgments in which the court considered the question of whether the receipt by UK intelligence services of information acquired by the U.S. National Security Agency violated Article 8 of the European Convention on Human Rights as applied within the UK through its Human Rights Act. The tribunal issued two additional findings on the lawfulness of the UK regime in February and in June of 2015. Those judgments can be found at <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/liberty-v-fco.pdf> and http://www.ipt-uk.com/docs/Final%20_Liberty_Ors_Open_Determination.pdf.

**Liberty and Others v. General Communications Headquarters
(GCHQ) and Others**

Investigatory Powers Tribunal, U.K.

[2014] UKIPTrib 13_77-H

[Before Mr Justice Burton (President), Mr Robert Seabrook QC, Mrs Justice Carr, The Hon Christopher Gardner QC, and his Honour Geoffrey Rivlin QC]

Mr. Justice BURTON (President):

2. The Claimants before the Tribunal are all Non-Governmental Organisations working in the field of defending human rights at both the national and/or international levels. Three of them, Privacy International (“Privacy”), Liberty and Amnesty International Limited (“Amnesty”) are based in the United Kingdom. The other organisations, . . . are international organisations based in a variety of countries, including the United States, Canada, Egypt, Pakistan and Ireland. . . . The Respondents, variously named as The Secretary of State for Foreign and Commonwealth Affairs and for the Home Department and various other bodies. . . .

3. The Claimants’ complaints allege the unlawfulness pursuant to Article 8 . . . of the European Convention of Human Rights (“the Convention”) of certain assumed activities of the Security Service (also, and colloquially, known as MI5), the Secret Intelligence Service (and similarly also known as MI6) and the Government Communications Headquarters (“GCHQ”), which we shall collectively describe as the Intelligence Services or Respondents. . . .

4. The activities are, as we have put it, assumed for the purpose of the resolution of agreed issues

5. The claim before us . . . [is] in respect of what has been called the “Prism issue,” i.e. referring to the NSA programme . . . or the “Intelligence Sharing issue” because it relates to the supply to the Respondents by the NSA of information, including information by way of communications intercepted either via Prism, or possibly via another programme called the “Upstream programme.” . . .

6. . . . The actions of the Respondents, which are not suggested to be unlawful save in the respects alleged by reference to Article 8 of the Convention, . . . are all taken, or assumed to be taken, in the interests of national security, and at a time when . . . the threat to the United Kingdom from international terrorism is ‘Substantial,’ indicating that an attack is a strong possibility; this has been recently upgraded to ‘Severe,’ meaning that an attack is highly likely . . . [T]he Claimants accept that different forms of intelligence gathering do raise different privacy interests, and the hearing before us has included consideration of where and how to place and evaluate those before us. . . .

12. . . . Article 8 . . . reads, under the Heading “Right to Respect for Private and Family Life,” . . . :

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, 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.” . . .

14. The alleged factual premises agreed for the purposes of the Prism issue . . . are as follows:

“1. The US Government’s “Prism” system collects foreign intelligence information from electronic communication service providers under US court supervision. The US Government’s “upstream collection” programme obtains internet communications under US court supervision as they transit the internet.

2. The Claimants’ communications and/or communications data (i) “might in principle have been obtained by the US Government via Prism (and/or . . . pursuant to the “upstream collection” programme) and (ii) might in principle have thereafter been obtained by the Intelligence Services from the US Government. Thereafter, the Claimants’ communications and/or communications data might in principle have been retained, used or disclosed by the Intelligence Services (a)

pursuant to a specific request from the intelligence services and/or (b) not pursuant to a specific request from the intelligence services.”

The issue itself is formulated as follows:

“In the light of factual premises (1) and (2) above, does the statutory regime . . . satisfy the Art. 8(2) “in accordance with the law” requirement?”

15. The following matters are also in practice agreed between the parties as part of the agreed assumptions:

i) The NSA has a lawful basis for targeted interception pursuant to s.702 of the Foreign Intelligence Surveillance Act 1978 (as amended) (“FISA”), and to Executive Order 12333, pursuant to which Prism and “Upstream” are lawfully sanctioned for “the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information.” . . .

17. It is common ground that RIPA [Regulation of Investigatory Powers Act 2000] is not applicable to a case where there has not been interception of communications by the Respondents, but receipt of intercepted communications by the Respondents from the NSA derived from Prism or Upstream, which might, by dint of the degree of coverage by US interception, include intercepted product of an email which could have been sent and/or received in the United Kingdom. . . .

vii) By s. 3(2) of ISA, . . . [lawful functions of the intelligence services] are only exercisable:

“(a) in the interests of national security, with particular reference to the defence and foreign policies of Her Majesty’s Government in the United Kingdom; or

(b) in the interests of the economic well-being of the United Kingdom in relation to the actions or intentions of persons outside the British Islands; or

(c) in support of the prevention or detection of serious crime.” . . .

ix) . . . [S]pecific statutory limits are imposed on the information that each of the Intelligence Services can obtain, and on the information that each can disclose. Further, these statutory limits do not simply apply to the obtaining of

information from other persons in the United Kingdom or to the disclosing of information to such persons: they apply equally to obtaining information from or disclosing information to persons abroad, including foreign intelligence agencies. . . .

x) By s. 19(2) of the Counter-Terrorism Act 2008 (“CTA”):

“Information obtained by any of the intelligence services in connection with the exercise of any of its functions may be used by that service in connection with the exercise of any of its other functions.” . . .

19. . . . [The government] emphasizes that there are thus significant statutory limits imposed on the information that each of the Intelligence Services can obtain and disclose, which apply both to obtaining and disclosing information in the United Kingdom and to obtaining information from or disclosing it to persons abroad, including foreign intelligence agencies. . . . [In addition, the Data Protection Act 1998, which provides that “Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes . . .” and the Official Secrets Act 1989, which provides that members of the Intelligence Services commit offenses if they disclose such information, are additional parts of this statutory framework.] . . .

20. Thus the Intelligence Services can obtain information (including communications and communications data) from a foreign intelligence agency falling within their relevant remit, but by reference to arrangements for securing that the information is only obtained so far as necessary for one of the specified purposes . . . identical to those specified for the obtaining of a warrant under s.8 of RIPA, and insofar as proportionate for that purpose pursuant to s.6(1) of the [Human Rights Act]. . . .

25. All parties before us accept, and indeed assert, that, by reference to the jurisprudence of the ECtHR, the interference under Article 8 is not to be judged on exactly the same basis in relation to the receipt by the Respondents of product which has already been intercepted by another party as it is when the Respondents are responsible for such interception. . . .

37. The relevant principles appear to us to be that in order for interference with Article 8 to be in accordance with the law:

i) there must not be an unfettered discretion for executive action. There must be controls on the arbitrariness of that action.

ii) the nature of the rules must be clear and the ambit of them must be in the public domain so far as possible, an “adequate indication” given, so that the existence of interference with privacy may in general terms be foreseeable. . . .

38. It is quite plain . . . that in the field of national security much less is required to be put in the public domain, and the degree of foreseeability must be reduced, because otherwise the whole purpose of the steps taken to protect national security would be at risk. The views of the [European Court of Human Rights] [are contained] in *Leander v Sweden* (1987):

“However, the requirement of foreseeability in the special context of secret controls of staff in sectors affecting national security cannot be the same as in many other fields. . . . Nevertheless, . . . the law has to be sufficiently clear in its terms to give them an adequate indication as to the circumstances in which and the conditions on which the public authorities are empowered to resort to this kind of secret and potentially dangerous interference with private life.” . . .

39. We consequently bear carefully in mind the requirement to give adequate protection against arbitrary interference on the one hand, but on the other hand that foreseeability does not require all the rules which govern or exclude that arbitrariness to be disclosed, particularly in the field of national security. We thus approach this Prism Issue, in which it is, as we have set out, largely common ground that the . . . [disclosure] requirements do not need to be enforced in all their rigour, in relation to a case where the interception has already been carried out by others. . . .

41. We consider that what is required is a sufficient signposting of the rules or arrangements insofar as they are not disclosed. . . . We are satisfied that in the field of intelligence sharing it is not to be expected that rules need to be contained in statute . . . or even in a code. . . . It is in our judgment sufficient that:

i) Appropriate rules or arrangements exist and are publicly known and confirmed to exist, with their content sufficiently signposted, such as to give an adequate indication of it.

ii) They are subject to proper oversight. . . .

47. We have been greatly assisted by the substantial submissions in the open hearing, and in the closed hearings by sight of and understanding what . . . [the government witness] called the “arrangements below the waterline” and their explanation, and submissions by the Respondents and by Counsel to the Tribunal.

As a result of . . . [this process], the following Disclosure was made by the Respondents relevant to the Prism Issue[:]

“1. A request may only be made by the Intelligence Services to the government of a country or territory outside the United Kingdom for unanalysed interpreted communications (and associated communications data), otherwise than in accordance with an international mutual legal assistance agreement, if either:

a. a relevant interception warrant under the Regulation of Investigatory Powers Act 2000 (“RIPA”) has already been issued by the Secretary of State, the assistance of the foreign government is necessary to obtain the communications at issue because they cannot be obtained under the relevant RIPA interception warrant and it is necessary and proportionate for the Intelligence Services to obtain those communications; or

b. making the request for the communications at issue in the absence of a relevant RIPA interception warrant does not amount to a deliberate circumvention of RIPA . . . and it is necessary and proportionate for the Intelligence Services to obtain those communications. . . .

2. Where the Intelligence Services receive intercepted communications content or communications data from the government of a country or territory outside the United Kingdom, irrespective whether it is / they are solicited or unsolicited, whether the content is analysed or unanalysed, or whether or not the communications data are associated with the content of communications, the communications content and data are, pursuant to internal “arrangements,” subject to the same internal rules and safeguards as the same categories of content or data, when they are obtained directly by the Intelligence Services as a result of interception under RIPA.”

We considered that this Disclosure could be made open, and it was so made with the consent of the Respondents. . . .

50. . . . As for the balance of the Claimants’ submissions:

(i) We . . . conclude that the Tribunal is entitled to look below the waterline in order to be satisfied (a) that there are adequate safeguards (b) that what is described above the waterline is accurate and gives a sufficiently clear signpost to what is below the waterline without disclosing detail of it. . . .

54. . . . Nothing that we saw or heard in the closed hearings cast any doubt upon what is stated by the ISC [Intelligence and Security Committee], . . . [or] disclosed by the Respondents in other proceedings before this Tribunal . . . : “GCHQ treats all operational data as if it were obtained under RIPA.” There are rules and procedures, the nature and effect of which have been sufficiently disclosed, which result in the same requirements being applied to both those two categories, and indeed to all intercept, solicited or unsolicited, obtained pursuant to Prism and/or Upstream, as apply to intercept obtained under RIPA by the Intelligence Services themselves.

55. After careful consideration, the Tribunal reaches the following conclusions:

(i) Having considered the arrangements below the waterline, as described in this judgment, we are satisfied that there are adequate arrangements in place for the purpose of ensuring compliance with the statutory framework and with Article[] 8 . . . of the Convention, so far as the receipt of intercept from Prism and/or Upstream is concerned.

(ii) This is of course of itself not sufficient, because the arrangements must be sufficiently accessible to the public. We are satisfied that they are sufficiently signposted by virtue of the statutory framework to which we have referred . . . , and as now, after the two closed hearings that we have held, publicly disclosed by the Respondents and recorded in this judgment.

(iii) These arrangements are subject to oversight.

(iv) The scope of the discretion conferred on the Respondents to receive and handle intercepted material and communications data and . . . the manner of its exercise, are accordingly . . . accessible with sufficient clarity to give the individual adequate protection against arbitrary interference.

**Ian Brown, Morton H. Halperin, Ben Hayes, Ben Scott, and
Mathias Vermeulen**

*Towards Multilateral Standards for Surveillance Reform (2015)**

. . . [T]here is a vast gulf between national SIGNIT [signals intelligence] practices and international human rights law, significant variations among the national legal frameworks governing such surveillance . . . , and numerous unmet demands for surveillance reform. The global political and economic pressure generated by the Snowden revelations provides us with an opportunity to modernise standards across the democratic world in a manner that respects privacy and accounts directly for the way that information technology is transforming social and material life, and with it the capacity for surveillance. . . .

Any discussion of when surveillance may be authorised in a rule of law framework begins with an assessment of its impact on individual, civil and political rights. In open and democratic societies any infringement upon these rights can only be justified on the basis of the greater societal need. Historically we have become accustomed to a high bar: that is, judicial authorisation based on probable cause and due process demonstrating that the interception of communications is necessary and proportionate to the nature of the offense or conduct being investigated. . . . [T]he interception of foreign communications by intelligence agencies in the Internet age has a much lower threshold. Three fundamental issues must be addressed in order to establish a clear procedure for seeking authorization: the justification, scope and scale of communications surveillance for SIGINT purposes.

The first issue is the specific national security purposes for which surveillance may be justified. . . . [A]ny interference in the right to privacy on such grounds must be legitimate, proportionate, narrowly proscribed and necessary in a democratic society.

The second issue is the standard of privacy protection that applies extraterritorially to the communications of persons subject to foreign intelligence collection. Most states appear to routinely ignore the privacy rights of persons affected by SIGNIT collection, and current law and practice relies overwhelmingly on distinctions that technology has rendered more difficult if not

* Ian Brown, Morton H. Halperin, Ben Hayes, Ben Scott, and Mathias Vermeulen, *Towards Multilateral Standards for Surveillance Reform*, Oxford Internet Institute Discussion Paper (Jan. 5, 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2551164.

impossible to draw, between internal and external communications, citizens and non-citizens, content and traffic etc., all of which have the effect of imposing a lower standard of protection for communications data relating to foreign nationals. It is clear that international law places an obligation on states to recognise the right to privacy and security of communications of foreign surveillance targets, but a fierce debate now rages among international jurists as to the precise nature of those obligations and the best way of demarcating them within the international legal order. However, even if some clarity is provided by the United Nations Human Rights Council, it will be left to Member States to meet these commitments through domestic law and policy. . . .

The third issue is the amount of surveillance that is allowed. In the absence of meaningful standards, the authorisation for SIGINT operations in many nations appears to be almost automatic, allowing the interception, storage and subsequent analysis of the data as long as it is “relevant” to the national interest. This is where the largest disjunct between international human rights norms and the existing regulation of surveillance powers is located: SIGINT agencies have essentially been allowed to decide for themselves how much data they need in order to fulfil their mandates, and they have become accustomed to collecting this data. . . .

. . . The UN Special Rapporteur on Counter-Terrorism and Human Rights went as far as to call . . . [current SIGINT practices] “indiscriminately corrosive of online privacy and imping[ing] on the very essence of the right”

The need for some standards in this area is underscored by the tension that arises when one country has retention and access policies that violate the laws of another. Such standards must therefore address both the powers of national security agencies and the specific role of private sector actors mandated by law to participate in SIGINT operations, including the appropriate legal procedure for responding to intelligence requests.

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