

# *Tel Aviv University Law School*

Tel Aviv University Law Faculty Papers

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*Year 2008*

*Paper 59*

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## Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts

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## Abstract

It wasn't so long ago that the overwhelming majority of courts in democratic countries shared a reluctance to refer to foreign and international law. These courts conformed to a policy of avoiding any application of foreign sources of law that would clash with the position of their domestic governments. But as this Article demonstrates, in recent years courts in several democracies have begun to show a change of heart, often engaging quite seriously in the interpretation and application of international law and heeding the constitutional jurisprudence of other national courts. The Article explains this emerging jurisprudence as part of a reaction to the forces of globalization that are placing increasing pressure on governments, legislatures and courts to conform to global standards. The courts seek to expand the space for domestic deliberation and to strengthen the ability of national governments to withstand the pressure brought to bear by interest groups and powerful foreign governments. For this strategy to succeed, courts need to forge a united judicial front. This entails coordinating their policies with equally positioned courts in other countries, through the common language of international law and comparative constitutional law. The analysis also explains why the U.S. Supreme Court, which so far was not required to protect domestic political process from external pressures, is still not a part of this collective effort. Finally, and based on this insight into the driving force behind reliance on foreign law, the Article asserts that recourse to these sources is perfectly legitimate from a democratic theory perspective, as it aims to reclaim democracy from the debilitating grip of globalization.

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*Forthcoming in 102 American Journal of International Law (2008)*

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Abstract

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\* Professor of Law, Tel Aviv University. I thank Ziv Bohrer, Shai Dothan, George W. Downs, Alon Harel, Tally Kritzman, Ariel Porat, W. Michael Reisman, Anne-Marie Slaughter and Eran Shamir-Borer for their very helpful comments on previous versions, and Shay Gurion for excellent research assistance. This Article is based partly on research conducted since September 11, 2001, on the ways in which national courts cope with international terrorism, funded by the Israel Science Foundation and the Minerva Center for Human Rights at Tel Aviv University. The Article was written during a sabbatical leave enabled by the Humboldt Research Award, awarded by the Alexander von Humboldt Foundation. I thank my hosts in Germany, Georg Nolte and Ingolf Pernice, for their hospitality.



## I. Introduction

It wasn't so long ago that the overwhelming majority of courts in democratic countries shared a reluctance to refer to foreign and international law. These courts conformed to a policy of avoiding any application of foreign sources of law that would clash with the position of their domestic governments. For many jurists, recourse to foreign and international law is inappropriate.<sup>1</sup> But even the supporters of the reference to external sources of law share the thus-unexplored assumption that reliance on foreign and international law is inevitably in tension with the value of national sovereignty. Hence the scholarly debate is framed along the lines of the well-known broader debate on "the countermajoritarian difficulty."<sup>2</sup> This Article questions this assumption of tension. It argues that for courts in most democratic countries – even if not for U.S. courts at present – referring to foreign and international law has become an effective instrument *for empowering* the domestic democratic processes by shielding them from external economic, political and even legal pressures. Citing international law, therefore, actually bolsters domestic democratic processes and reclaims national sovereignty from the diverse forces of globalization. Stated differently, most national courts, seeking to maintain the vitality of their national political institutions and to safeguard their own domestic status vis-à-vis the political branches, cannot afford to ignore foreign and international law.

In recent years, courts in several democracies have begun to engage quite seriously in the interpretation and application of international law and to heed the constitutional jurisprudence of other national courts. The very recent demonstration of

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<sup>1</sup> The most passionate debate exists in the United States, most recently triggered by the decision in *Roper v. Simmons*, 543 U.S. 551 (2005). See, e.g., Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628 (2007); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006); Richard A. Posner, *The Supreme Court 2004 Term – Forward: A Political Court*, 119 HARV. L. REV. 32 (2005); Vicki Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Jeremy Waldron, *Foreign Laws and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005); Ernst A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005); Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193 (2005); Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004); T. Alexander Aleinkoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, AM. J. INT'L L. 91 (2004); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82 (2004).

<sup>2</sup> See Alford, *supra* note 1, at 59 (characterizing an "international countermajoritarian difficulty" that results from "the strategy to utilize international law to interpret the constitution").



this new tendency has been the judicial responses to the post-9/11 global counterterrorism effort: national courts have been challenging executive unilateralism in what could perhaps be a globally coordinated move. This Article describes and explains this shift, arguing that the national courts' chief motivation is not to promote global justice, for they continue to regard themselves first and foremost as national agents. Rather, the new jurisprudence is part of a reaction to the forces of globalization that are placing increasing pressure on the different domestic branches of government to conform to global standards. This reaction seeks to expand the space for domestic deliberation, to strengthen the ability of national governments to withstand the pressure brought to bear by interest groups and powerful foreign governments, and to insulate the national courts from inter-governmental pressures. For this strategy to succeed, courts need to forge a united judicial front. This entails coordinating their policies with equally positioned courts in other countries, by developing common communication tools consisting of international law and comparative constitutional law. The analysis also explains why the U.S. Supreme Court, which does not need to protect the domestic political or judicial processes from external pressure, is still not a part of this collective effort.<sup>3</sup> Based on this insight into the driving force behind reliance on foreign law, the Article proposes another outlook for assessing the legitimacy of national courts' resort to foreign and international legal sources. It asserts that recourse to these sources is perfectly legitimate from a democratic theory perspective, as it aims to reclaim democracy from the debilitating grip of globalization.

Only fifteen years ago it was the common practice of national courts across the globe to avoid any application of international law that would clash with the position of their governments thereby guaranteeing them complete latitude in external affairs.<sup>4</sup> Through an assortment of avoidance doctrines (such as standing, the "political question," and non-justiciability), the identification or misidentification of customary international law, and expansive or restrictive interpretation of treaties, national courts managed to align their findings and judgments with the preferences of their governments. Some courts acknowledged their reticence to deviate from the

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<sup>3</sup> For an earlier explanation of this court's retreat from international law during the Cold War era see Harold Hongju Koh, *Transnational Public Law Litigation* 100 YALE L. J. 2347, 2360-2366 (1991).

<sup>4</sup> Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Norms: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT'L L. 159 (1993).



government's position and explained this as deference to the executive's expertise in negotiating international relations, referring to the necessity for the state "to speak in one voice."<sup>5</sup> Harold Koh reminded us at the time that courts had not always been deferential. In his view, "transnational public law litigation" could and should become an effective tool for enforcing international law in the post Cold-War era.<sup>6</sup> My take was more pessimistic, due to the assessment that courts had more immediate, parochial concerns:

National courts are the prisoners in the classic prisoner's dilemma. If they could have been assured that courts in other jurisdictions would similarly enforce international law, they would have been more willing to cooperate. They might have been ready to restrict their government's free hand, had they been reassured that other governments would be likewise restrained. But in the current status of international politics, such cooperation is difficult to achieve, and rational judges act like the prisoner who cannot be sure that his or her fellow prisoner will cooperate.<sup>7</sup>

The courts' acquiescence specifically in the area of external affairs implied that international law was not rejected per se: In matters having no bearing on this foreign affairs, several national courts were willing to apply international law. For example, international human rights law was particularly influential in matters of only domestic consequence.<sup>8</sup> National courts' reference to one another's decisions on human rights issues has proved a highly effective tool of cross-fertilization. Anne-Marie Slaughter suggested that "[c]ourts may well feel a particular common bond with one another in adjudicating human rights cases ... because such cases engage a core judicial function in many countries around the world."<sup>9</sup> Some prominent judges actively involved in

<sup>5</sup> The *Arantzazu Mendi*, [1939] A.C. 256, 264: "Our State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another." See also Ralph Steinhardt, *Human Rights Litigation and the "One Voice" Orthodoxy in Foreign Affairs* in *WORLD JUSTICE? U.S. COURTS AND INTERNATIONAL HUMAN RIGHTS* 23 (MARK GIBNEY, ED., 1991), Benvenisti, *supra* note 4, at 173-74.

<sup>6</sup> Koh, *supra* note 3.

<sup>7</sup> Benvenisti, *supra* note 4, at 175.

<sup>8</sup> See Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 103-06 (1994). In fact, as Karen Knop has noted, the transjudicial dialogue on human rights has blurred the distinction between comparative constitutional law and international law: Karen Knop, *Here and There: International Law in Domestic Courts* 32 NYU J. INT'L L. & POL'Y 501 (2000).

<sup>9</sup> See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 79 (2004).



this inter-judicial dialogue on human rights issues shared this outlook.<sup>10</sup> Similarly, in matters of transnational civil litigation, which do not raise aspects governments are usually sensitive to, such as giving effect to foreign judgments and laws of recognized states, interpreting the liability of air carriers, according immunity to foreign states from litigation, or more recently questions of jurisdiction over internet service providers, courts have felt comfortable interacting with one another, invoking notions of inter-judicial comity.<sup>11</sup>

Fifteen years later, there are early but clear signs of courts that are venturing to take up issue with their governments even in matters that may restrict the governments' free hand in international bargaining and expose them to external pressure. National courts join forces to offer meaningful judicial review of governmental action, even *inter*-governmental action. In this quest to restrict executive latitude, international law looms large as a key tool alongside comparative constitutional law. In other words, references to foreign law and to international law are being transformed from the shield that protected the government from judicial review to the sword by which the government's (or governments') case is struck down. The purpose of this Article, then, is to describe this transformation and explain its underlying logic.

In this Article, I offer an explanation for the growing interaction amongst courts that claims that courts are motivated primarily by parochial, even selfish, concerns. They seek to resist globalization's threat to their own national democratic

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<sup>10</sup> Elizabeth L'Heureux Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rhenquist Court*, 34 TULSA L. J. 15 (1998-1999) (describing the increase of cross-pollination and dialogue between courts); Justice Michael Kirby of the Supreme Court of Australia goes further and envisions that "judges of municipal courts in this century will assume an important function in making the principles of international law a reality throughout the world." ("International Law – The Impact on National Constitutions" Seventh Annual Grotius Lecture, delivered to the Annual Meeting of the American Society of International Law, 2005 (available at <http://www.asil.org/pdfs/kirbygrotius050401.pdf> (last visited September 18, 2007)).

<sup>11</sup> See *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) ("The extent to which the law of one nation... shall be allowed to operate within the dominion of another nation, depends upon ... 'the comity of nations.'"). For recent U.S. Supreme Court judgments concerning foreign state's immunity and the interpretation of the Warsaw Convention see (respectively) *Mission of India v. New York City* 551 U.S. \_\_\_ (2007) and *Olympic Airways v. Husain* 540 US 644 (2004). Recently, the Supreme Court of Canada invoked "international comity" and "the objectives of order and fairness" in delineating Canada's jurisdiction over internet service providers: *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, [2004] 2 S.C.R. 427, at para. 60. See also August Reinisch, *The International Relations of National Courts: A Discourse on International Law Norms on Jurisdictional and Enforcement Immunity*, in THE LAW OF INTERNATIONAL RELATIONS – LIBER AMICORUM HANSPETER NEUHOLD 289 (AUGUST REINISCH AND URSULA KRIEBAUM EDS., 2007 (discussing inter-judicial dialogue in the areas of state immunity and the immunities of international organizations); Slaughter, *supra* note 9, 86-91 (discussing the emergence of judicial comity in transnational civil litigation).



processes, and to their own recent achievements to bolster their institutional independence.<sup>12</sup> Hence, when no such threats exists, they will refrain from cooperating with other courts.<sup>13</sup> The analysis here should clarify why courts in developing countries, facing immense external pressures, frantically cling to whatever international “soft law” they can cull from international documents, while the court of the strongest global power allows itself to treat international law and comparative constitutional law with puzzlement and even disdain. This explanation offers justification for the practice of the national courts from the perspective of democratic theory: courts invoke international law not because they defer to other communities’ values and interests but because they wish to protect or even reclaim the domestic political space that is increasingly restricted by the economic forces of globalization and the delegation of authority to international institutions. Under contemporary conditions, protecting domestic interests and, in particular, reclaiming the domestic democratic processes, often require that national courts forge a coordinated cross-boundary judicial resistance to the forces of globalization.

The classic American cases invoking international law – like *The Paquete Habana*,<sup>14</sup> *Hilton v. Guyot*,<sup>15</sup> and earlier *The Schooner Exchange*<sup>16</sup> – cases that inspired Harold Koh to envision a renaissance of judicial creativity and determination in giving effect to international law, cannot be regarded as precursors of the current phenomenon. Those impressive decisions applied international law, even on some occasions against the government, but those courts never engaged themselves in a coordinated and sustained effort to restrain their respective governments and the latter never tried to preempt such inter-judicial coalitions. The phenomenon that this Article describes and analyzes is novel. It is yet another demonstration of the consequences of the “disaggregated state”<sup>17</sup> as both the national government and the national court seek foreign allies in their quest to balance each other out.

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<sup>12</sup> On the expansion of judicial power (and judicial autonomy) in recent years see RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004) (explaining this phenomenon as resulting from elites’ attempt to secure their dominant positions against challenges of the majority through the political process); Alec Stone Sweet, *The Politics of Constitutional Review in France and Europe*, 5 *INT’L J. CONST. L.* 69, 80-81 (2007) (explaining the “juridical coup d’etat” in France during the 1980s as the result of the frequent alternation of power amongst the political parties).

<sup>13</sup> For an analysis of such non-cooperative behavior, see *infra* notes 146-150 and accompanying text.

<sup>14</sup> *The Paquete Habana*, 175 U.S. 677 (1900) (Prize law).

<sup>15</sup> *Hilton v. Guyot*, *supra* note 11 (enforcement of foreign judgments).

<sup>16</sup> *The Schooner Exchange v. M’Faddon*, 11 U.S. (7 Cranch) 116 (1812) (foreign sovereign immunity)

<sup>17</sup> Slaughter, *supra* note 9, at 12 (noting “the rising need for and capacity of different domestic





The Article begins with a theoretical explanation in Part II of the motivation behind this new judicial assertiveness. Part III provides the evidence of the phenomenon of inter-judicial cooperation, in three areas in which it can now be discerned: counterterrorism, the environment, and migration. Part IV discusses the potential, limits, and legitimacy of this evolving practice. Part V concludes.

## II. The Impact of Globalization on National Decision-Making Processes

I begin here by revisiting the fundamental assumptions that led national courts in the past to defer to their governments against contemporary conditions. The traditional judicial policy of ensuring that the state speak “in one voice,” that is, the voice of the government, rested on three premises.<sup>18</sup> First was that the murky world of diplomacy is detached from the domestic one, where the rule of law should prevail. The second assumption was that the government adequately represents the interests of its domestic constituency in its foreign diplomacy. The third premise was that the government can better conduct diplomatic affairs without the intervention of the judiciary. None of these assumptions can be claimed to be valid today. The spheres of global regulation increasingly affect the lives of potentially all citizens; governments are even more captured than ever by narrow domestic interests and, hence, unable to represent broad constituencies; and lastly, the contemporary world of diplomacy exposes governments to increasing pressure, where quite a few would actually benefit from domestic legal constraints that would tie their hands in the international bargaining process. National courts are left with only limited opportunities to restrain or at least slow down the drain of power from domestic institutions. Even more threatening to the courts are measures taken by governments – foreign governments as well as their own – that sap the courts of such opportunities and limit their independence. The newly evolving judicial approach may be interpreted, therefore, as

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government institutions to engage in activities beyond their borders, often with their foreign counterparts.”)

<sup>18</sup> Koh, *supra* note 3, at 2383-2394, distinguishes between three types of judicial concerns: separation-of-powers concerns, judicial competence concerns, and comity concerns. The more frank judicial statements doubt whether their “engagement in the task of passing on the validity of foreign acts of state may hinder rather than further [their] country’s pursuit of goals,” (*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1963)), and mention “[t]he advantage of the diplomatic approach to the resolution of difficulties between two sovereign nations, as opposed to the unilateral action by the courts of one nation” (*United States v. Alvarez-Machain*, 504 U.S. 655 (1992), fn. 16).



aimed at facing up to globalization and revitalizing the authority of the national institutions.

In the following sections, I address the difficulties of the three basic assumptions of the judicial deference approach and then explain the underlying rationale of the contemporary approach.

*(a) Three Contemporary Difficulties with the Traditional Deferential Approach*

The first underlying premise of the judicial policy of deference was the disconnection between domestic politics and world politics. National courts were happy to allow their government complete leeway in international politics on the assumption that this sphere is essentially unrelated to the domestic legal system, at least directly. This assumption has lost its force over the years, in conjunction with the increasing permeability of the domestic legal system to external regulatory efforts. The formal delegation of authority to international institutions and the informal inter-governmental coordination render much of the domestic decision-making processes of most countries ineffectual. In many areas of regulation—encompassing not only economic activities but also matters of national security and, in recent years, the fight against global terrorism—at issue are no longer purely international affairs but matters that affect every individual. Many if not most economic matters are determined not by national legislatures but by foreign decision-makers, including powerful foreign governments, international institutions, and even private companies. Coordinated counterterrorism policies cut deeply across the fabric of the domestic regulation of daily life. External measures determine people’s levels of health and safety, influence their political freedoms and delineate their privacy, and in general shape their life opportunities.<sup>19</sup> The threat to the domestic democratic and legal processes has become tangible, and with this, a direct challenge to the very authority of the national court as the guardian of the basic rights of the citizen. Acquiescing to

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<sup>19</sup> J.H.H. Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy* 64 ZaöRV (Heidelberg J. Int’l L.), 547 (2004), available at [http://www.zaoerv.de/64\\_2004/64\\_2004\\_3\\_a\\_547\\_562.pdf](http://www.zaoerv.de/64_2004/64_2004_3_a_547_562.pdf) (last visited Jan. 10, 2008) (describing the emergence of the latest “layer” of international lawmaking – the regulatory layer); Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005) (elaborating on the different modalities of global regulation and the challenges they present).



the executive's demand for judicial deference means completely abdicating this role. But the challenge runs even deeper, for it is a challenge to the very idea of democracy. The ability of citizens to participate in decisions affecting them becomes merely formal as the domestic political branches fail to withstand the pressure brought to bear by domestic and foreign interest groups and foreign governments. In all but the strongest of nations,<sup>20</sup> the delegation of authority to international organizations threatens to undermine the effectiveness of the domestic systems of checks and balances.

The increasing vulnerability of the domestic legal system to external influence can be partly attributed to the burgeoning political power of certain interest groups who benefit from the reduced costs of investment across boundaries and of outsourcing. The influence of these groups on governments undermines the second assumption at the base of the deferential policy, that governments are the best representatives of national interests abroad. While this premise has always been (or should have been) somewhat suspect, in recent years more evidence has accumulated regarding small interest groups' exploitation of international politics to advance their narrow interests.<sup>21</sup> Using their economic leverage, they pressure their own governments or foreign governments to accept international agreements that are beneficial to them but detrimental to most other citizens of their countries. Moreover, the new modalities of global standard-setting by private actors have handed these groups direct authority to shape outcomes.<sup>22</sup> Thus, the assumption that the government knows best when it comes to foreign affairs and can be trusted to promote the entire nation's interests can no longer be compellingly asserted.

Finally, the third assumption, that international interaction should be free of legal restraints, has collapsed as well, in view of the increased "legalization of world politics"<sup>23</sup> and the dwindling bargaining power of many states. At least until the early

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<sup>20</sup> As Curtis Bradley observes, the three branches of the U.S. government have kept the domestic political and legal processes insulated from the direct influence of external policy and law-making through a variety of "non-self-execution filters." See Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1587-1595 (2003).

<sup>21</sup> Helen V. Milner, *INTERESTS, INSTITUTIONS, AND INFORMATION* (1997); Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167 (1999). On the influence exerted by domestic interests in negotiating trade agreements see GEORGE W. DOWNS & DAVID M. ROCKE, *OPTIMAL IMPERFECTION?* (1995).

<sup>22</sup> On the growing power of private actors in transnational regulation, see, e.g., Kingsbury *et al.*, *supra* note 19.

<sup>23</sup> LEGALIZATION AND WORLD POLITICS (Judith L. Goldstein et al. eds., 2001).



1990s, it was plausible to explain judicial passivity by noting the “advantage of the diplomatic approach to the resolution of difficulties between two sovereign nations, as opposed to the unilateral action by the courts of one nation.”<sup>24</sup> Since then, however, the ideal of equal sovereignty allowing governments to bargain freely has become increasingly questionable. Most governments lack such freedom. Developing countries can no longer pit one superpower against the other as they did during the Cold War. Their dependence on foreign investment has undercut their bargaining leverage considerably. More and more global standards are being created by coalitions of strong powers—most notably the G-8—acting through formal and informal institutions. Governments of powerful states form cartels of actors that set standards that all others are forced to follow. Moreover, international institutions govern many areas of interaction between states, while law replaces diplomacy. These institutions and tribunals have created a myriad of norms of general application. This has particularly been the case with regard to the post-9/11 global counterterrorism efforts, which effectively united national security agencies towards a common cause, acting both directly and through a network of international institutions (formal and informal), openly and clandestinely, legally and also illegally (for example, the practices of so-called extraordinary renditions and secret prisons).

In current conditions, then, deference to the government’s ability to conduct negotiations is a risky policy from the perspective of democracy. For most governments, and certainly for most legislatures, these new modalities of policy-making mean greater dependence on external forces and less room and opportunity for meaningful domestic democratic deliberations. This may also mean exposure to outcomes that are detrimental to many if not most citizens.<sup>25</sup> While these challenges to domestic decision-making processes and institutions, as well as to the very idea of a right to democratic participation, are significant, it is less clear how national courts

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<sup>24</sup> United States v. Alvarez-Machain, *supra* note 18.

<sup>25</sup> This is not to suggest that all international delegations result in undesirable consequences from the perspective of democracy. A responsible and effective international institution, such as the European Court of Human Rights, can improve democratic processes and promote individual rights in member states (see most recently Robert O. Keohane, Stephen Macedo and Andrew Moravcsik, *Democracy-Enhancing Multilateralism* IILJ Working Paper 2007/4, Global Administrative Law Series, available at [www.iilj.org](http://www.iilj.org) (last visited Jan. 10, 2008)). But such institutions constitute only a small part of the various formal and informal institutions that regulate our lives, and their performance often leaves much to be desired (see *infra* notes 158-159 and accompanying text). In the key areas of regulation discussed in this Article, the available international institutions failed to match the national courts’ level of scrutiny of inter-governmental cooperation.



can make a difference, empower citizens, enhance their government's bargaining power in the international arena, and secure their own independence vis-à-vis intergovernmental institutions. In what follows, I will argue that national courts have begun to explore the possibility of such a role.

*(b) The Motivations for Judicial Resistance*

Given the economic and political dynamics described above, national courts have come to realize that, under conditions of increased external pressures, allowing the government *carte blanche* to act freely in world politics actually impoverishes the domestic democratic and judicial processes and reduces the opportunity of most citizens to use these processes to shape outcomes. These courts, better insulated from external pressures, may have concluded that, by aggressively restricting their government, they can actually revive the domestic democratic processes and secure their own autonomy.

The courts may have also concluded that making stricter demands of the government does not necessarily jeopardize the latter's bargaining position vis-à-vis its negotiating partners (nor, hence, are national interests compromised and thus the government will not protest too strongly). In fact, under certain circumstances, a persistent court could actually strengthen its government's bargaining position. The logic of international negotiations clarifies this point. The complex interaction between domestic and international politics has been described as a "two-level game," namely, a game played simultaneously at the first, international level between a national government and representatives of a foreign state and at the second, domestic level, amongst representatives of domestic interest groups. Second-level negotiations are necessary to secure domestic ratification for international agreements negotiated at the first level. This game produces a paradox: all things being equal, the stronger the domestic support for Government A's policies, the weaker it is at the international level because its negotiations adversary, Government B, then knows it can play tougher and demand more and more concessions, which would still be acceptable to Government A's supporters at home. In view of these dynamics, negotiating



governments often “compete” over who is more vulnerable domestically.<sup>26</sup> Accordingly, all other things being equal, Government A will be in a weaker bargaining position vis-à-vis Government B if its national court is expected to remain deferential in the process. For example, were the court in Country A to intervene, say, by declaring (or hinting at its intention to declare) the negotiated treaty as impinging excessively on citizen rights, then presumably Government B would be prepared to concede in the negotiations so as to ensure ratification and implementation of the agreement by Country A. Thus, pressure from a disapproving court can, in fact, result in greater bargaining leeway for its government, as a constrictive court decision can be used to explain why it is prevented from bowing to the external pressure in the bargaining process. Needless to say, these dynamics rest on the assumption that B would still be interested in the agreement with A under the terms acceptable to the court. If B can find an alternative to A, the leverage facilitated by A’s court will be limited.

Not all courts need to be equally assertive in safeguarding the domestic political process. Courts in more powerful countries with relatively robust domestic democratic processes can be expected to show greater deference to their governments. Given American dominance in setting global standards, we can anticipate less involvement by the U.S. federal courts in the President’s conduct of diplomacy, and in fact, this is precisely what emerges from the rather hesitant jurisprudence of the U.S. Supreme Court in this context.<sup>27</sup>

An assertive court will bolster not only the domestic democratic processes but also its own authority to interpret and apply national and international law. For domestic courts, the new international judicial forums challenge their own authority as interpreters of the law and balancers of competing state interests against rights grounded in constitutional or international law. The most effective way to respond to this challenge is to engage in a dialogue with the international tribunals, for two reasons. As a purely doctrinal matter, national courts are directly and indirectly engaged in the evolution of customary international law: their decisions that are based on international law are viewed as reflecting customary international law,<sup>28</sup> and their

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<sup>26</sup> Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427 (1988); Helen Milner, *supra* note 21.

<sup>27</sup> See *supra* note 20, and *infra* notes 74-76, and accompanying text.

<sup>28</sup> See, for example, the International Court of Justice judgment in *Arrest Warrant of 11 April 2000* (Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14), available at <http://www.icj->



government's acts in compliance with their decisions will constitute state practice coupled with *opinion juris*. As such, international tribunals will have to pay heed to national courts' jurisprudence. Hence, the more the national courts engage in applying international law, the more their jurisprudence constrains the choices available to the international courts when the latter deal with similar issues. Moreover, from the perspective of the complex interplay between international and national courts, the international tribunals are, to a certain extent, dependent on national courts, because they need the latter's cooperation for implementation of their decisions.<sup>29</sup> A national court that engages in a serious application of international law sends a strong signal to international courts, that the national court regards itself an equal participant in the transnational law-making process and will not accept just any decision rendered by an international tribunal. Since the effectiveness of international tribunals depends on compliance with their decisions, they must anticipate the reaction of the national courts to those decisions and come to terms with their jurisprudence. In this sense, assertive national courts invoking international law can effectively limit the autonomy of international tribunals.

But this strategy lacks one crucial element for it to have effective impact: a united, coordinated judicial front. If only one national court were to adopt assertive policies, it would face the danger of being singled-out as the individual troublemaker, whose jurisprudence does not reflect general state practice. Its government could, therefore, be sidestepped when global forces seek out other governments, those unconstrained by their courts and, hence, more vulnerable to external pressure. Thus, courts seeking to enhance domestic institutions and processes must try to ensure a

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[cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm](http://www.icjwww/idocket/iCOBE/iCOBEframe.htm) (last visited Apr. 4, 2007) (examining national courts' jurisprudence to assess the extent to which heads of state enjoy immunity in foreign courts).

<sup>29</sup> On the interplay between a supreme court (as the principal) and lower courts (as its agents), see McNollgast, *CONDITIONS FOR JUDICIAL INDEPENDENCE* (Research Paper No. 07-43, Apr. 2006), available at <http://ssrn.com/abstract=895723>; McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631 (1995). The dependence of an international tribunal on national courts that are not formally bound by its decisions is even greater. The tense relations that developed between the European Court of Justice and some of the national courts, in particular the German and the Italian courts, confirm this theoretical observation. See Juliane Kokkot, *Report on Germany in THE EUROPEAN COURT AND NATIONAL COURTS – DOCTRINE AND JURISPRUDENCE 77* (ANNE-MARIE SLAUGHTER, ALEC STONE SWEET AND J.H.H. WEILER, Eds., 1998); Bruno de Witte, *Direct Effect, Supremacy, and the Nature of Legal Order*, in *THE EVOLUTION OF EU LAW 177-213* (PAUL CRAIG & GRAINNE DE BURCA, eds., 1999).



common interjudicial stance. The following section explains their cooperation strategy.

*(c) The Logic Underlying Inter-Judicial Cooperation*

As noted, a court that ties its government's hands in international negotiations will not strengthen the latter's position if its counterparts have viable alternatives. The example of the intervening court in Country A sought to illustrate that, presumably, Government A's partners in its international dealings will be prepared to concede to A's demands but only if they can find no alternative partner. Thus, the court's assertiveness will assure a strengthened position for Government A only if similarly-situated governments are similarly constrained by their courts. For example, governments in developing countries will hardly be able to withstand external pressure to maintain low environmental standards for dumping hazardous wastes in their territories unless they coordinate their activities or—if not—benefit from coordinated assertiveness on the part of their respective courts. Likewise, in the context of the fight against terrorism, constraints on counterterrorism measures imposed by a court in Country A but not by courts in other countries may expose A's citizens to an increased risk of terrorist attack. A country that refrains from deporting foreign citizens due to concerns regarding torture, or a country in which privacy rights are more strictly upheld, could become (or could be seen as having the potential to become) a haven for terrorists if other countries are less tolerant to migrants or have laxer privacy rights. Another factor is the international pressure that could be brought to bear on a government to circumvent its court's decisions, or force it into compliance, or else risk the loss of peer protection for failing to comply with the group's demands. The optimal response to all these possibilities is coordination amongst national courts. A transnational united front amongst the highest domestic courts would ensure that no country will become the dumping ground for imported waste or a terrorist haven or face collective sanctions and that less peer pressure will be exerted on governments to ignore their courts' judgments.

While this is a theoretical model that suggests that judges would be behaving consistently with it even if they may not in fact be consciously following the logic of it, one finds several judicial remarks indicating that national courts are acutely aware





of the need for a coordinated stance.<sup>30</sup> Even the courts of the most powerful nations are concerned that “unilateral action by the courts of one nation”<sup>31</sup> would not produce the desired outcomes. The House of Lords, for example, has stated that “international treaties should, so far as possible, be construed uniformly by the national courts of all states”<sup>32</sup> and has even recently asserted that “it is not for a national court to ‘develop’ international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.”<sup>33</sup> In the context of coordinating migration policies, which is explored below,<sup>34</sup> judges from several countries went beyond statements and established an institution to ensure uniformity. Courts need assurances that courts in other jurisdictions will enforce similar rules.

Establishing a higher court to whose decisions national courts must adhere, such as the European Court of Justice, is surely one effective avenue for forging common judicial ground<sup>35</sup> (or, in more sinister scenarios, a means to curtail national courts’ authority). But this is not a prerequisite for transnational judicial coordination. Cooperation can evolve endogenously also amongst courts, even when they seek to promote national interests rather than global justice. Game theory demonstrates that indefinitely iterated prisoner’s dilemma games between two players are likely to induce cooperation, even absent external intervention. If the number of iterations is indefinite and the “shadow of the future” high enough (namely, the players assign a sufficiently high value to the expected payoffs from future iterations of the game), then each player is expected to choose the strategy of conditional cooperation in a “friendly tit for tat.” Using the implicit threat of retaliation against defection, the players can elicit cooperation. The same tit-for-tat strategy will produce cooperation

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<sup>30</sup> The lack of certainty regarding any such coordination lay at the basis of their earlier policy of deferment, *see supra* note 7 and accompanying text.

<sup>31</sup> Note the quote from the *Alvarez-Machain* judgment, *supra* note 18, about the “advantage of the diplomatic approach ... as opposed to the *unilateral action* by the courts of one nation” (emphasis added).

<sup>32</sup> *R. v. Bow St. Metro. Stipendiary Magistrate & Others, ex parte Pinochet Ugarte (No. 3)*, [2000] 1 A.C. 147, 244 (H.L.) (per Lord Hope of Craighead). *See also* Lord Hobhouse of Woodborough in *R v Secretary of State for the Home Department, ex parte Adan*; *R v Secretary of State for the Home Department, ex parte Aitseguer* [2001] 1 All ER 593, 616.

<sup>33</sup> *Jones (Respondent) v. Ministry of Interior (Kingdom of Saudi Arabia) (Appellants)*, 2006 U.K.H.L. 26 para. 63 (H.L.) (per Lord Hoffmann).

<sup>34</sup> *See infra* Part III(c).

<sup>35</sup> For an analysis of the active role played by national courts in strengthening the EU, see Joseph HH Weiler, *A Quiet Revolution: The European Court of Justice and its Interlocutors* 26 *COMPARATIVE POLITICAL STUDIES* 510 (1994).



also in a game played by a group larger than two players and even when some of the players choose to defect unconditionally. Such situations, which are the least likely to generate cooperation when played only once, are in fact potentially cooperative games when the players remain in the game for an indefinite period of time.

Hence, for courts to bolster their governments by restraining them and asserting their own authority, they must initiate cooperation with similarly situated courts. The only effective way for courts in developing countries to put a stop to the intensifying levels of pollution, environmental degradation, and imported waste is to take a united stand against external interests shopping for less restrictive jurisdictions. Courts that wish to maintain a higher level of human rights protection within their jurisdiction but without turning into a terrorist haven or target, or without diverting the world's asylum seekers to their shores, should also strive to forge a united front with their counterparts in other countries. In other words, inter-judicial cooperation can be a strategic choice for national courts determined to protect their own authority and to reclaim domestic democratic processes.

The optimal way for courts to initiate and maintain cooperation is through mutual exchange of information. Their judicial reasoning and outcomes convey information about their commitment to cooperating. More specifically, their reliance on the same or similar legal sources facilitates this communication and, to a considerable extent, signals their commitment. Both positive as well as negative messages can be communicated in this framework. Cooperative courts will be cited with approval and approbation by their counterparts, whereas courts that step out of line by either refusing to give force to a new standard or by setting a different standard will be criticized, sometimes quite severely, in judgments.<sup>36</sup> In other words, one court's decisions function as signals to other courts about the former's commitment to cooperation. These signals can embolden the other courts or weaken their resolve in the face of the same dilemmas. At times, specific judgments will have novel and eminently compelling statements that resonate amongst courts in other jurisdictions. One such example is the landmark *Minors Oposa* judgment rendered by

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<sup>36</sup> For example the Italian Court of Cassation criticized in 2004 (*Ferrini v. Federal Republic of Germany*) a decision of the Greek Court of Cassation of 2000 (*Prefecture of Voiotia v. Federal Republic of Germany*), while the House of Lords' criticized, in turn, the *Ferrini* judgment (in Jones, *supra* note 33, at paras. 22, 63). See Pasquale De Sena & Francesca De Vittor, *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, 16 *EUROP. J. INT'L L.* 89, 101-02 (2005).



the Philippines Supreme Court, which recognized the stake of future generations in a healthy environment.<sup>37</sup> A court in one jurisdiction can serve as the beacon for other courts, as has the Indian Supreme Court for the Indian subcontinent and elsewhere in the developing world in the area of environmental protection.<sup>38</sup>

Courts that wish to signal readiness to cooperate will tend to use the language other courts understand: comparative law (primarily comparative constitutional law) and international law.<sup>39</sup> The use of comparative analysis is a signal that courts are willing to learn from one another, or are seeking support from other jurisdictions for their judgments, or both. More significantly, they learn from each other's legal systems how to balance amongst the competing common interests and how to manage the conflicting common risks to their societies. They can compare statutory arrangements, such as, for example, conditions for detaining suspected terrorists, seeking the arrangement that minimally impinges on constitutional rights.<sup>40</sup> Even more accessible than specific statutes are the constitutional texts, which often have similar provisions regarding such issues as the right to life, due process, equality, and fundamental political rights. And indeed, courts seeking cooperation do engage in comparative analysis in their judgments. As will be shown in Part III below, comparative constitutional analysis has taken center-stage in the emerging jurisprudence on counterterrorism and in court decisions in developing countries concerning the right to healthy environment.<sup>41</sup> But even more significantly, international law, the source of collective standards, has become a most valuable coordination tool for national courts. The ability of these courts to rely on the same or similar legal norms (international treaties like the 1951 Geneva Convention Relating

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<sup>37</sup> *Minors Oposa v. Sec'y of Dep't Env't & Natural Res.*, 33 I.L.M. 174 (1994). This celebrated case was cited by the Bangladeshi and Indian courts (*Farooque v. Gov't of Bangladesh*, 17 B.L.D. (A.D.) 1 (Bangladesh Appellate Division 1997), available at <http://www.elaw.org/resources/printable.asp?id=139> (last visited Apr. 4, 2007); *A.P. Pollution Control Bd. (II) v. Nayudu*, [2001] 2 S.C.C. 62 (Indian Supreme Court) available at <http://www.commonlii.org/cgi-bin/disp.pl/in/cases/INSC/2000/679.html?query=Nayudu> (last visited Jan. 10, 2008)) and in numerous scholarly articles from across the globe.

<sup>38</sup> See Part III(b) *infra*.

<sup>39</sup> And indeed, judgments discussed in Part III are replete with references to comparative constitutional law and in particular to international law as interpreted by other courts. The discord within the U.S. Supreme Court towards comparative constitutional law and its relative reticence in recent years to cite international law may perhaps be influenced by the relative robustness of the domestic processes in the U.S., which currently do not require judicial support. On the debate in the U.S. on this matter see *supra* note 1.

<sup>40</sup> See the decisions of the Canadian, New Zealand and Indian courts, *infra* notes 61, 63 and 64 and accompanying texts.

<sup>41</sup> See *infra* Part III(a) and (b) respectively.



to the Status of Refugees,<sup>42</sup> or human rights treaties) facilitates harmonization amongst them. By making references to each other's interpretation of a shared text they not only signal readiness to cooperate, but also to certain extent impede the future retreat of one of them from the shared interpretation: As courts carefully watch each other, the one that backs away has to offer an explanation to its peers.

However, the fact that the same norm is being applied does not render its implementation unproblematic for the relevant court. First, the norm's content may entail deference to the national governments, the drafters of the international text in which the norm is anchored. Second, there is a significant variance amongst jurisdictions with respect to the status of international law within the domestic legal hierarchy. Third, the language of the domestic statute that incorporated the specific international treaty may have modified the specific obligation. But courts have devised ways to overcome these hurdles, if they so wish. They tap into the rich jurisprudence developed by international tribunals concerning "effective,"<sup>43</sup> "evolutive,"<sup>44</sup> or "systemic"<sup>45</sup> interpretation of treaties or rely on the tribunals' unsystematic ways of identifying customary norms.<sup>46</sup> Moreover, they interpret domestic legislation based on the premise that the legislature does not intend to contravene international obligations. Finally, even domestically unincorporated treaties and custom are often treated as a relevant consideration for the executive when exercising its discretion under domestic authorizing statutes.

### III. Judicial Cooperation—The Evidence

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<sup>42</sup> See *infra* Part III(c).

<sup>43</sup> HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE* 227-28, 267-93 (1958).

<sup>44</sup> See Rudolf Bernhardt, *Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights*, 42 *GERMAN YBK. INT'L L.* 11 (1999).

<sup>45</sup> C. MacLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 *INT'L & COMP. L.Q.* 279 (2005); D. French, *Treaty Interpretation and the Incorporation of Extraneous Legal Rules*, 55 *INT'L & COMP. L.Q.* 281 (2006).

<sup>46</sup> See, e.g., Theodor Meron, *Revival of Customary Humanitarian Law*, 99 *AM. J. INT'L L.* 817, 819-20 (2005). Meron comments on the ICJ's "complete failure to inquire whether *opinion juris* and practice support the crystallization of [the relevant Articles] into customary law." Meron salutes this "more relaxed approach" and views it as "essential ... to the effectiveness of customary law." (*Id.*).



The strategic uses of foreign and international law characterizes interjudicial cooperation that seeks to review and shape government policies. This collective empowerment process is not required in other areas of judicial cooperation, such as in transnational civil litigation, where governmental interests are not implicated.<sup>47</sup> This Part argues that this phenomenon is discernible so far at least in three areas: the judicial review of global counterterrorism measures, the protection of the environment in developing countries, and the status of asylum seekers in destination countries. These are three areas where courts apparently reacted to what they regarded as either too weak governmental responses to external pressures (in the contexts of counterterrorism and the environment) or too strong a response (against asylum seekers). This Part examines the evolution of judicial cooperation as the courts seek to balance out their governments in these three areas. The limited space cannot but offer a broad and sketchy outline of the emerging jurisprudence. The aim, of course, is to demonstrate the probability of the thesis, rather than to provide in-depth analysis of the specific areas. Therefore the focus here will be more on the means of communications – the increased use of comparative constitutional, and the creative use of international law – rather than on the specific content of the norms. Further and more in-depth research is necessary to explore more deeply these and possibly other areas of judicial cooperation.

(a) *Reviewing Global Counterterrorism Measures*

More than six years into the coordinated global effort against Al-Qaeda and its associated groups, it has become increasingly clear that the persistent attempts by the executive and legislative branches of a number of democracies to curtail judicial review of counterterrorism policies have, by and large, failed. These governments have not succeeded at convincing their courts to defer judgment and, in fact, have generated a counter-reaction on the part of the judiciary. Hesitant at first, the courts regained their confidence and are asserting novel claims that bolster their judicial authority.

In the wake of the September 11, 2001, terrorist attack, national courts faced a major challenge to their authority. Alarmed over the potentially devastating effects of

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<sup>47</sup> See *supra* note 11 and accompanying text.



global terrorism, national governments sought to intensify restrictions on rights and liberties perceived as facilitating terrorist acts or impeding counterterrorism measures. They insisted on broad, exclusive discretion in shaping and implementing these constraints as they see fit, based on the claim that the executive holds a relative advantage over the other branches of government in assessing the risks of terrorism and in managing those risks. The post-9/11 global counterterrorism effort effectively united national security agencies in a concerted effort towards a common cause. They began acting both directly in collaboration with one another and indirectly through a web of formal and informal international institutions. The central formal collective effort was founded on the authority of the UN Security Council;<sup>48</sup> the rather informal efforts ranged from the activities of such institutional entities as the Proliferation Security Initiative (“PSI”)<sup>49</sup> and the Financial Action Task Force (“FATF”),<sup>50</sup> to government-to-government exchanges, to complicity with illegal practices such as “extraordinary renditions” and “secret prisons.”<sup>51</sup>

Most legislatures submitted to these measures without demur. Far-reaching legislative changes, hurriedly introduced in most democracies in the weeks and months following the Al-Qaeda attack, sailed through legislatures with little public debate or scrutiny.<sup>52</sup> The immediate shock of 9/11 led many to view basic principles of due process, shaped by democratic societies’ preference to err in favor of liberty, as entailing unacceptable risks. This wave of acquiescence to national political leaders’ claims to absolute discretion in acting to guarantee national security swept the courts as well. In fact, conformity of this nature in times of war and national crisis has

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<sup>48</sup> The main UN body set up to curb terrorism is the Counter-Terrorism Committee (“CTC”). For its mandate and activities, see <http://www.un.org/sc/ctc/> (last visited Apr. 4, 2007).

<sup>49</sup> See the U.S. Government’s 2003 PSI available at <http://www.state.gov/t/np/c10390.htm> (last visited Apr. 4, 2007).

<sup>50</sup> See the FATF’s so-called Nine Special Recommendations concerning the financing of terrorism, at [http://www.fatf-gafi.org/document/9/0,2340,en\\_32250379\\_32236920\\_34032073\\_1\\_1\\_1\\_1,00.html](http://www.fatf-gafi.org/document/9/0,2340,en_32250379_32236920_34032073_1_1_1_1,00.html) (last visited Apr. 4, 2007).

<sup>51</sup> See the Report of the Committee on Legal Affairs and Human Rights of the European Parliament from June 12, 2006, on “alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states,” available at <http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc06/edoc10957.old.htm> (last visited Apr. 4, 2007).

<sup>52</sup> In some countries, this legislative process was brief and did not encounter any significant opposition. Bills were passed within a few weeks or days (or even hours in the case of Germany) of the September 11 events. On the legislative changes in the various democratic countries, see the comparative studies in *TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY?* (C. Walter et al. eds., 2004); KENT ROACH, *SOURCES AND TRENDS IN POST 9/11 ANTI-TERRORISM LAWS* (2006), available at <http://ssrn.com/abstract=899291> (last visited Apr. 4, 2007).



traditionally been a hallmark of judicial practice.<sup>53</sup> Suffice it to recall the decisions rendered by the U.K. and U.S. highest courts during the two World Wars and the early Cold War era, in which they deferred to the executive's discretion, based on the limited authority and institutional capacity of the judiciary to assess and manage the risks of war.<sup>54</sup> And thus, indeed, in the weeks following September 11th, the familiar rhetoric of judicial deference was repeated by an alarmed court.<sup>55</sup> The 9/11 attacks in some inexplicable way "proved" more clearly than ever the case for judicial silence.<sup>56</sup>

But three years later, the House of Lords turned to the tragic events to yield a wholly different lesson. The *Belmarsh Detainees* decision of December 2004, which declared parts of the British Antiterrorism Act as incompatible with the European human rights standards, was described by one of the Law Lords as countering "the public fear whipped up by the governments of the United States and the United Kingdom since 11 September 2001 and their determination to bend established international law to their will and to undermine its essential structures."<sup>57</sup> The transformation in judicial approach evident in this decision was not limited to the U.K. context. In light of the similar, if not as dramatic, changes in the ways in which national courts have reacted to their executive's security-related claims since

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<sup>53</sup> On this wartime jurisprudence, see WILLIAM REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998), A. W. BRIAN SIMPSON, *IN THE HIGHEST DEGREE ODIOS: DETENTION WITHOUT TRIAL IN WARTIME BRITAIN* (1994).

<sup>54</sup> Recall Justice Jackson's opinion in *Korematsu v. U.S.*, 65 S. Ct. 193, 245 (1944): "In the nature of things, military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved . . . . Hence courts can never have real alternative to accepting the mere declaration of the authorities that issued the order that it was reasonably necessary from a military viewpoint."

<sup>55</sup> Lord Hoffmann of the House of Lords explained in *Sec'y of State v. Rehman*, [2001] 3 W.L.R. 877 para. 50, his approval of the Secretary of State's decision to deport a Pakistani national based on (disputed) evidence linking him to Islamic terrorist groups operating on the Indian subcontinent:

[T]he question of whether something is "in the interests" of national security is not a question of law. It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive.

Lord Slynn, *id.* para. 26, stated that "the Commission must give due weight to the assessment and conclusions of the Secretary of State in the light at any particular time of his responsibilities, or of Government policy and the means at his disposal of being informed of and understanding the problems involved. He is undoubtedly in the best position to judge what national security requires even if his decision is open to review. The assessment of what is needed in the light of changing circumstances is primarily for him." Lord Steyn, *id.* para. 29, in turn, asserted: "The dynamics of the role of the Secretary of State, charged with the power and duty to consider deportation on grounds of national security, irresistibly supports this analysis."

<sup>56</sup> As Lord Steyn added in the same judgment, *id.* para. 29, "[T]he tragic events of 11 September 2001 in New York reinforce compellingly that no other approach is possible."

<sup>57</sup> Lord Steyn, *2000-2005: Laying the Foundations of Human Rights Law in the United Kingdom*, 4 *Europ. Hum. Rts. L. Rev.* 349, 350 (2005).



September 11th, it is possible to now speak of a new phase in the way democracies are addressing the threat of terrorism: executive unilateralism is being challenged by national courts in what could perhaps be a globally coordinated move. The bold House of Lords decision in 2004 was not the first sign of judicial resistance. This should be attributed to the (much criticized<sup>58</sup>) Supreme Court of Canada decision from January 11, 2002.<sup>59</sup> Although the court found that, in principle, there is no prohibition on deportation to a country that may inflict torture on the deportee, the Court did, however, require the Minister to explain in writing the reasons for deporting a person to a country that is likely to torture him or her. This procedural requirement set a high enough bar to prevent such instances of deportation.<sup>60</sup> The most recent decision of the Canadian Supreme Court in a terrorism-related matter, from February 2007, significantly surpassed its 2002 judgment: the Court declared unanimously that the procedures allowing for the deportation of non-citizens suspected of terrorist activities on the basis of confidential information, as well as the denial of a prompt hearing to foreign nationals, are incompatible with the Canadian Charter of Rights and Freedoms.<sup>61</sup> This bold decision was replete with comparative references to foreign and international statutory and case law. The Court made specific reference to the British Antiterrorism Act as an example of hearing procedures for suspected terrorists that the Canadian legislature should consider adopting.

This emerging judicial dialogue has not been confined to the British and Canadian courts. It currently includes courts from several other jurisdictions, including France, Germany, Hong Kong, India, Israel, and New Zealand, all in the context of limiting counterterrorism measures.<sup>62</sup> These courts explore the international obligations of

<sup>58</sup> See, e.g., Kent Roach, *Must We Trade Rights For Security? The Choice Between Smart, Harsh, Or Proportionate Security Strategies in Canada and Britain*, 27 *CARDOZO L. REV.* 2151, 2194 (2006).

<sup>59</sup> *Suresh v. Canada* (Minister of Citizenship & Immigration), [2002] 1 S.C.R. 3, [2002] S.C.C. 1. (The Court deliberated the matter of Suresh, a member of the Tamil Tigers Organization, which was fighting against the Sri Lankan government. In its judgment, the Court approved in principle the decision to deport Suresh to Sri Lanka, despite the possibility that he would be tortured there.)

<sup>60</sup> See also the recent order of Deputy Judge MacKay of the Federal Court of Canada in the *Jaballah* case, rendered on October 16, 2006, available at [http://www.fct-cf.gc.ca/bulletins/whatsnew/DES-04-01\\_determinations.pdf](http://www.fct-cf.gc.ca/bulletins/whatsnew/DES-04-01_determinations.pdf) (last visited April 4, 2007), ruling that an Egyptian national who has resided in Canada since May 1996 can be deported from Canada but not to countries where he would face a serious risk of being tortured.

<sup>61</sup> *Charkaoui* decision (*Charkaoui v. Canada* (Citizenship & Immigration), [2007] S.C.C. 9).

<sup>62</sup> For a review of these decisions, see Eyal Benvenisti, *Inter-Judicial Cooperation to Secure Independent Review of Counter-Terrorism Measures*, in *DEMOCRACY, SEPARATIONS OF POWERS AND THE FIGHTS AGAINST TERRORISM* (Andrea Bianchi & Alexis Keller eds., forthcoming 2008).





their respective states, making references to the texts of treaties on human rights and the laws of armed conflict, and to customary international law.<sup>63</sup> They learn from each other's constitutional law's doctrines.<sup>64</sup> They cite each other extensively in this process of interpretation. For example, In a House of Lords decision concerning the admissibility of evidence obtained through torture by foreign officials, the Law Lords engaged in a comparative analysis of the jurisprudence of foreign courts, including Canadian, Dutch, French, German, and American courts.<sup>65</sup> Moreover, they compare statutory arrangements in different countries as a way to determine the measures that minimally impair constitutional rights.<sup>66</sup> They do so, being fully aware of their own role in the global effort to curb terrorism. As the Indian Supreme Court has acknowledged:

Anti-terrorism activities in the global level are mainly carried out through bilateral and multilateral co-operation among nations. It has thus become our international obligation also to pass necessary laws to fight terrorism. [...] in the light of global terrorist threats, collective global action is necessary.<sup>67</sup>

The Indian court supported this statement with a reference to Lord Woolf's emphasis that "Where international terrorists are operating globally ... a collective approach to terrorism is important."<sup>68</sup>

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<sup>63</sup> The prohibition on torture has been the focus of several decisions, including *Suresh*, *supra* note 59, *A (FC) & Others (FC) v. Sec'y of State*, 2005 U.K.H.L. 71, and *Zaoui v. Attorney-General (No 2)* [2006] 1 NZLR 289 (the New Zealand Supreme Court). The U.S. Supreme Court referred to the 1949 III Geneva Convention in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006), and the Israeli Court has been actively engaged in the interpretation and implementation of the law on armed conflict. On the jurisprudence of the Israeli courts related to counterterrorism, see Yigal Mersel, *Judicial Review of Counter-Terrorism Measures: The Israeli Model for the Role of the Judiciary During the Terror Era*, 38 N.Y.U. J. Int'l L. & Pol. 67 (2005); Daphne Barak-Erez, *The International Law of Human Rights and Constitutional Law: A Case Study of an Expanding Dialogue*, 2 Int'l. J. Const. L. 611 (2004).

<sup>64</sup> The Indian court, in the case of *People's Union for Civil Liberties v. Union of India* [2004] 1 LRI 1, *rep. in* <http://www.commonlii.org/in/cases/INSC/2004/18.html> (last visited January 10, 2007) (concerning the constitutionality of the Indian 2002 Prevention of Terrorism Act) refers (in para. 60) to the institution of the "independent counsel," appointed in New Zealand and elsewhere.

<sup>65</sup> *A (FC) & Others (FC) v. Sec'y of State*, *supra* note 63. See also Lord Carswell's opinion in the *Belmarsh Detainees* decision, *A (FC) & Others (FC) v. Sec'y of State*, 2004 U.K.H.L. 56 para. 150 (2004) (citing President Barak of the Israel High Court of Justice), on the need to follow the rule of law when combating terrorism).

<sup>66</sup> In the recent *Charkaoui* decision (*supra* note 61), the Canadian Supreme Court presented the procedure adopted in the United Kingdom as a model for the Canadian Parliament's consideration when it reenacts the statute (*see especially id.* para. 86: "Why the drafters of the legislation did not provide for special counsel to objectively review the material ... as... is presently done in the United Kingdom, has not been explained.").

<sup>67</sup> *People's Union for Civil Liberties v. Union of India*, *supra* note 64, at para. 10.

<sup>68</sup> *A and others v Secretary of State for the Home Department; X and another v Secretary of State for the Home Department* [2002] EWCA (Civ) 1502; [2004] QB 335, para. 44.



The fact that national courts can rely on the same or similar legal norms (international treaties such as the 1949 Geneva Conventions and international human rights law) facilitates harmonization among the courts.<sup>69</sup> This accumulation of defiant judicial decisions from various jurisdictions paints a distinct picture of an evolving pattern in national courts. This trend stands in clear contrast to the passivity of legislatures towards the executive and to previous judicial trends. National courts are refusing to simply rubberstamp the actions of the political branches of government. They have unmistakably signaled their intention to constrain counterterrorism measures they deem excessive. As reflected in the reasoning in the decisions of many courts, they are seriously monitoring other courts' jurisprudence, and their invocation of international law demonstrates knowledge and sophistication.

As opposed to the jurisprudence of the courts in the context of migration policies, discussed below,<sup>70</sup> in the context of counter-terrorism there is a discernible effort by the courts to engage their political branches rather than have the final say on the issues under debate. What characterizes many of the decisions on the lawfulness of the counterterrorism measures is their attempt to avoid as much as they can making a determination on the substance of the specific executive action, and instead to clarify the considerations that the executive must take into account in exercising its discretion,<sup>71</sup> or to invite the legislature to weigh-in on the matter, or to reconsider a hasty or vague authorization it had granted.<sup>72</sup> While focusing on these institutional levels, the courts have the opportunity to set higher barriers for legislative authorization by invoking the state's international obligations as relevant considerations for the legislature to consider. Direct limitation on the legislature

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<sup>69</sup> See Slaughter, *supra* note 9, Chapter 2.

<sup>70</sup> *Infra* Part III(c).

<sup>71</sup> See the *Suresh* decision, *supra* note 59 and accompanying text; Zaoui, *supra* note 63.

<sup>72</sup> In the *European Arrest Warrant Case*, the German Constitutional Court, the *Bundesverfassungsgericht*, examined the European Arrest Warrant Act passed by the German *Bundestag* to implement the Framework Decision on the European Arrest Warrant, which had been promulgated in view of facilitating inter-European cooperation in combating crime and terrorism. The Court found the Act to infringe on constitutional rights in a manner beyond what was necessary to meet the goals of the European policy. It thereby referred the matter back to the legislature to reenact the Act so that the restriction of the fundamental right to freedom from extradition would be proportionate. Judgment of 18 July 2005, 2 BvR 2236/04, available at [http://www.bverfg.de/entscheidungen/rs20050718\\_2bvr223604en.html](http://www.bverfg.de/entscheidungen/rs20050718_2bvr223604en.html). (last visited September 8, 2007). In 1996, the French *Conseil constitutionnel* sent back to the legislature certain measures concerning illegal entrants suspected as terrorists (criminalizing assistance to them and authorizing their search without judicial warrant). Decision 96-377 DC of 16 July 1996, English translation at <http://www.conseil-constitutionnel.fr/langues/anglais/essential.htm>. (last visited September 8, 2007). See also, the 2007 Charkaoui judgment of the Canada Supreme Court required the legislature to respond by reshaping the hearing procedures (*supra* note 61 and accompanying text).



based on constitutional grounds – the ultimate judicial sanction – has been used only sparingly.<sup>73</sup>

A good example of carefully climbing up the ladder of judicial review can be found in the U.S. Supreme Court jurisprudence regarding the treatment of post-9/11 detainees in Guantanamo and elsewhere. Referral back to the executive or legislature is the first stage of the Court’s involvement in this matter. The *Rasul*<sup>74</sup> and *Hamdi*<sup>75</sup> decisions assert the Court’s jurisdiction to review executive action with respect to unlawful combatants held on U.S. territory or territory under U.S. administration, and require the President to clarify its authority to act. The second round comes two years later with the *Hamdan* decision<sup>76</sup> that rejects the President’s response to the previous judgments. In *Hamdan*, the majority relied on international law as the standard for assessing the legality of the military commissions established by the President to determine the status of Guantanamo detainees. In its judgment, the Court diverged from the executive’s position in two important aspects: first, that Common Article 3 of the 1949 Geneva Conventions applies to the conflict with Al-Qaeda and, second, that the standards set by that Article are not met by the commissions.<sup>77</sup> The justices still use the referral technique when they indicate that the executive can still seek Congress’ approval for derogating from those requirements,<sup>78</sup> but four Justices hint that the Court may eventually examine the constitutionality of Congress’s

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<sup>73</sup> The French *Conseil constitutionnel* found unconstitutional a certain measure because it had retroactive force in overseas territories (Decision 96-377 DC of 16 July 1996, *supra* note 72). The German *Bundesverfassungsgericht* found the Air Security Act of 2005 unconstitutional because it violated *inter alia*, the principle of human dignity (BVerfG, 1 BvR 357/05 vom 15.2.2006, [http://www.bverfg.de/entscheidungen/rs20060215\\_1bvr035705.html](http://www.bverfg.de/entscheidungen/rs20060215_1bvr035705.html). (last visited September 8, 2007). See Nina Naske and Georg Nolte, *Case Note: “Aerial Security Law”* 101 AM. J. INT’L L. 466 (2007). In 2004, the Indian Supreme Court resorted to implicit constitutional review when it read into the 2002 Prevention of Terrorism Act (“POTA”) several additional conditions to a number of key provisions in the Act, viewing such conditions as constitutionally required (People’s Union for Civil Liberties v. Union of India, *supra* note 64).

<sup>74</sup> *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>75</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

<sup>76</sup> *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006).

<sup>77</sup> Justice Stevens, *id.* at p. 126: “Common Article 3’s requirements are general, crafted to accommodate a wide variety of legal systems, but they are *requirements* nonetheless. The commission convened to try Hamdan does not meet those requirements.”

<sup>78</sup> As Justice Breyer said in *Hamdan*, *id.* at pp. 135-36, “The Court’s conclusion ultimately rests upon a single ground: Congress has not issued the Executive a ‘blank check.’ ... Nothing prevents the President from returning to Congress to seek the authority he believes necessary. Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation’s ability to deal with danger. To the contrary, that insistence strengthens the Nation’s ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.”



intervention.<sup>79</sup> The pending petition to the Supreme Court questioning the constitutionality of the Military Commissions Act of 2006<sup>80</sup> is the ultimate stage of review.

Whereas the U.S. Congress was not deterred to inflict “a stinging rebuke to the Supreme Court,”<sup>81</sup> by stripping the courts from habeas corpus jurisdiction with respect to non-U.S. citizens determined by the executive to be enemy combatants,<sup>82</sup> and immunizing the executive from judicial review based on the 1949 Geneva Conventions,<sup>83</sup> other executive bodies and legislatures have demonstrated stronger commitment to international standards as interpreted by their courts, despite the fact that they could, if they wanted to, have the last word.<sup>84</sup>

(b) *Environment Protection in Developing Countries*

It is not necessary to travel to India or Pakistan to realize the extent to which their environments are at risk. Indeed, it is sufficient to read the many court decisions rendered in those countries to get a sense of the health threats to the citizens due to environmental degradation. The courts in several developing countries<sup>85</sup> are responding to the deficient environmental laws and institutions, striving to ameliorate

<sup>79</sup> Justice Kennedy (joined by Justices Souter, Ginsburg, and Breyer): “Because Congress has prescribed these limits, Congress can change them, requiring a new analysis *consistent with the Constitution* and other governing laws.” *Id.* at p. 164 (emphasis added).

<sup>80</sup> *Boumediene v. Bush* (appeal pending before the U.S. Supreme Court). The Military Commission Act [S 3930], was passed by the U.S. Senate on September 28, 2006, and by the U.S. House of Representatives on September 29, 2006 in a response to the decision in *Hamdi*.

<sup>81</sup> John Yoo, Op-Ed, *Sending a Message: Congress to Courts: Get out of the War on Terror*, Wall St. J., Oct. 19, 2006, <http://www.opinionjournal.com/editorial/feature.html?id=110009113>

<sup>82</sup> *Id.* s. 950j(b).

<sup>83</sup> *Id.* s. 948b(f).

<sup>84</sup> This is particularly the situation in the United Kingdom, where according to the Human Rights Act of 1998, the courts have only the authority to declare a legislative act as incompatible with the European Convention on Human Rights (“ECHR”) without invalidating it.

<sup>85</sup> The list includes the courts in India, Nepal, Pakistan, the Philippines, Sri Lanka, Turkey, South Africa, Tanzania, Uganda, Brazil, Chile, Costa Rica, Ecuador, and Peru. For a review of the practice of these courts, see William Onzivu, *International Environmental Law, the Public's Health, and Domestic Environmental Governance in Developing Countries*, 21 AM. U. INT'L L. REV. 597, 665-72 (2006); Carl Bruch et al., *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 COLUM. J. ENVTL. L. 131, 132-35, 150-88 (2001); Sheetal B. Shah, *Illuminating the Possible in the Developing World: Guaranteeing the Human Right to Health in India*, 32 VAND. J. TRANSNAT'L L. 435 (1999); Vijayashri Sripati, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)*, 14 AM. U. INT'L L. REV. 413, 470-71 (1998); Daniel Bodansky & Jutta Brunnée, *The Role of National Courts in the Field of International Environmental Law*, 7 RECIEL 11 (1998); Michael J. Andersen, *International Environmental Law in Indian Courts*, 7 RECIEL 21 (1998).



the situation as much as they can. These courts transform themselves into lawmakers by opening up their gates to potential petitioners with lenient standing requirements and by reading into the constitutional right to life a host of environmental obligations on the part of the state. They even intervene proactively in the executive's sphere of discretion, establishing institutional mechanisms to assess and monitor environmental damage as a form of relief for petitioners.<sup>86</sup> Judge Sabharwal of the Supreme Court of India hinted at this self-assigned role of the Indian courts, when he explained why the Supreme Court must depart from traditional common law doctrines of tort law to address contemporary environmental hazards:

Law has to grow in order to satisfy the needs of the fast-changing society and keep abreast with the economic developments taking place in the country. Law cannot afford to remain static. The Court cannot allow judicial thinking to be constricted by reference to the law as it prevails in England or in any other foreign country. Though the Court should be [open to enlightenment] from whatever source ... it has to build up its own jurisprudence. It has to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialized economy.<sup>87</sup>

As this quote implies, aggressive judicial activism is not required in countries, particularly developed ones, where public awareness of environmental issues is translated into effective political action and modern environmental legislation replaces ancient doctrines of tort law. Where public demand prompts legislators to enact legislation, courts can take a back-seat. This may explain the distinction between the Indian Court's activism in environmental sphere, where existing legislation was viewed as "dysfunctional,"<sup>88</sup> and its criticized passivity in promoting

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<sup>86</sup> See Shikhar Ranjan, *Legal Controls on the Transboundary Movements of Hazardous Wastes into India – An Evaluation* 41 INDIAN J. INT'L L. 44 (2001) (describing the Indian government's response, primarily by introducing new legislation, as coming only after the courts have acted on public petitions).

<sup>87</sup> Research Found. for Sci. Tech. & Natural Res. Policy v. Union of India, W.P. 657/1995 01/11/2005 (Supreme Court of India), available at <http://www.judis.nic.in/supremecourt/qrydisp.asp?tfnm=26698> (last visited Apr. 4, 2007).

<sup>88</sup> C. MATHEW ABRAHAM, ENVIRONMENTAL JURISPRUDENCE IN INDIA 62 (1999). See also Shah, *supra* note 85, at 483-84 (the Indian Court justified its interventions in the environmental sphere by asserting that it is temporarily filling the void created by a lack of strong executive and legislative branches).



employee rights, narrowly interpreting statutes intended to improve those rights.<sup>89</sup> This may also explain why courts in developed countries continued to defer to the domestic political process in the environmental context and refrain from implementing international standards.<sup>90</sup> Indeed, the activist Indian Court declined to intervene in a petition against the damming the Narmada River in view of the robust decision-making processes that led to the decision to dam the river.<sup>91</sup>

In the absence of specific domestic legislation, courts in environmentally threatened jurisdictions can ground their formal authority to expand and enforce environment-related procedures and standards on two sources: their national constitutions and international law. These two sources enable communication with the courts of other nations, through cross-citing of one another's judgments. And in fact, inter-judicial communications proved to be the hallmark of the jurisprudence of these courts, with the Indian Supreme Court leading the way. In 1994, the Pakistani Supreme court made references to Indian cases.<sup>92</sup> In 1997, Judge Rahman of the

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<sup>89</sup> In *Steel Authority of India Ltd. v. Nat'l Union of Waterfront Workers*, [2001] 7 S.C.C. 1, *rep. in* <http://www.commonlii.org/in/cases/INSC/2001/445.html> (last visited January 10, 2007), the Indian Supreme Court refused to interpret expansively provisions of the Contract Labour (Regulation and Abolition) Act, 1970, finding them to be "clear and explicit." The Court failed to find any flaw in the Act, which, it stated, "was passed to prevent the exploitation of contract labour and also to introduce better conditions of work." Labor unions in India have been successful in securing legislation designed to protect their interests, although ultimately their victories lead to the increase of the informal sector (Timothy Besley and Robin Burgess, *Can Labor Regulation Hinder Economic Performance? Evidence from India*, 119 QUARTERLY J. ECON. 91 (2004)).

<sup>90</sup> See, for example, the House of Lords decision in *Dep't for Env't, Food & Rural Affairs v. ASDA Stores Ltd.*, [2003] U.K.H.L. 7, *available at* <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd031218/asda-1.htm> (last visited May 18, 2007), where the Lords determined that the contravention of European Community marketing standards does not as such create criminal responsibility. Lord Nicholls of Birkenhead trusts Parliament (*id.* para. 26).

<sup>91</sup> See, e.g., *Narmada Bachao Andolan v. Union of India*, [2000] 10 S.C.C. 664 *available at* <http://judis.nic.in/supremecourt/qrydisp.asp?tfnm=17165> (last visited Apr. 4, 2007) (approving the displacement of indigenous and tribal populations due to the construction of a dam on the Narmada River, with the court considering, *inter alia*, the Indigenous and Tribal Peoples Convention of 1957 (ILO Convention 107) and principles of international environmental law). An alternative explanation of the judicial preference to protect the environment but not labor rights would be class differences. Upendra Baxi criticizes the *Steel Authority* decision (*supra* note 89), as an example of the Indian courts' inclination to "generate a tender solicitude for the rights (guaranteed by multilateral trade agreements of which the WTO is an example) of the multinational corporations and of the 'community' of direct foreign investors even at the cost of the not so 'benign neglect' of the fundamental rights of Indian citizens." (Upendra Baxi, "A Known but an Indifferent Judge": *Situating Ronald Dworkin in Contemporary Indian Jurisprudence*, 4 INT'L J. CONS. L. 557, 568 (2003)); Usha Ramanathan, in his *Illegality and the Urban Poor* 41 *Economic and Political Weekly* 3193 (2006), *available at* <http://www.epw.org.in/epw/user/viewAbstract.jsp> (last visited Jan. 10, 2008), suggests that Indian courts give precedence to urban developers over slum dwellers and interpret narrowly laws that protect the poor.

<sup>92</sup> *Shehla Zia v. WAPDA*, P.L.D. 1994 Supreme Court 693, *available at* <http://www.elaw.org/assets/word/Zia%20v.%20WAPDA.doc> (last visited Apr. 4, 2007).



Bangladesh Appellate Division presented the Indian jurisprudence as a model for emulation.<sup>93</sup> In 2000, Sri Lanka Supreme Court referred to an Indian judgment with approval.<sup>94</sup> The Indian Supreme Court itself made references to the judgments of the courts in the Philippines, Colombia, and South Africa and of the European Court of Human Rights, as well as to a decision of the American Commission on Human Rights, noting, with evident satisfaction, that “the concept of a healthy environment as a part of the fundamental right to life, developed by our Supreme Court, is finding acceptance in various countries side by side with the right to development.”<sup>95</sup>

The absence of clear text relating to environmental protection in many constitutions has meant that courts must derive such protection from the basic right to life, which is anchored in all constitutions. The Supreme Court of India relied heavily on the constitutional right to life as including the right to enjoyment of pollution-free water and air necessary for the full enjoyment of life.<sup>96</sup> To develop the scope of this right the Indian court, as well as other courts, found inspiration and even authority in international law. But recourse to international law encounters tricky impediments. International environmental law is fragmented, with many of the provisions little more than hortatory declarations. The status of these norms in the internal domestic legal order often presents an additional obstacle to their judicial invocation. But faced with impending environmental disasters, courts in several countries have waved all doctrinal concerns and embraced whatever guidance they can derive from the stock of diverse international documents dealing with the environment. The Supreme Court of

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<sup>93</sup> *Farooque v. Gov't of Bangladesh*, *supra* note 37 (“If we look to the cases recently disposed of by the Supreme Court of India then we find that there is a trend of judicial activism to protect environment through public litigation in environmental cases. In Bangladesh such cases are just knocking at the door of the court for environmental policy making and the court is being involved in this case. There is a trend to liberalize the rules of standing through out [sic] the world in spite of the traditional view of the locus standi. The Supreme Court of India initially took the view that when any member of a public or social organization so espouse [sic] the cause of the poor and the down-trodden, such member should be permitted to move the Court even by merely writing a letter without incurring expenditure of his own. [...] The operation of Public Interest Litigation should not be restricted to the violation of the defined fundamental Rights alone. In this modern age of technology, scientific advancement, economic progress and industrial growth the socio-economic rights are under phenomenal change. New rights ... call for collective protection and therefore we must act to protect all the constitutional, fundamental and statutory rights as contemplated within the four corners of our Constitution.”)

<sup>94</sup> *Bulankulama v. Ministry of Indus. Dev.*, 7(2) South Asian Env'tl. Rep. (2000), available at <http://www.commonlii.org/lk/cases/LKSC/2000/18.html> (last visited Apr. 4, 2007).

<sup>95</sup> *A.P. Pollution Control Bd. (II) v. Nayudu*, *supra* note 37 (Indian Supreme Court).

<sup>96</sup> *Subhash Kumar v. State of Bihar*, 1991 S.C.C. 598, *rep. in* <http://www.commonlii.org/in/cases/INSC/1991/3.html> (last visited January 10, 2008); *Narmada Bachao Andolan*, *supra* note 91.



India has taken the lead in tapping these international legal sources. Its decisions refer to the Declaration of the 1972 Stockholm Conference on Human Environment as the "Magna Carta of our environment"<sup>97</sup> and import into domestic law concepts and principles such as "sustainable development,"<sup>98</sup> "the pollution pays" principle,<sup>99</sup> and the "precautionary principle,"<sup>100</sup> all mentioned in international "soft law" instruments.<sup>101</sup> The Court often does not explain the legal significance of these international documents, for instance, at times referring to declarations such as the 1992 Rio Declaration on Environment and Development as "agreements" that were "enacted."<sup>102</sup> The multiplicity of such non-binding documents and the fact that they have been endorsed by a great number of governments at high-profile gatherings have been the apparent basis for the Court's reference to them as having transformed into "customary international law though [their] salient features have yet to be finalized by the international law jurists."<sup>103</sup> The Indian Court has grounded its decisions on standards set in unincorporated international agreements based on the premise that these conventions "elucidate and go to effectuate the fundamental rights guaranteed by our Constitution [and therefore] can be relied upon by Courts as facets of those fundamental rights and hence enforceable as such."<sup>104</sup> Other courts in the region (in Pakistan,<sup>105</sup> Sri Lanka,<sup>106</sup> Nepal,<sup>107</sup> and Bangladesh)<sup>108</sup> have concurred with the Indian

<sup>97</sup> *Essar Oil Ltd. v. Halar Utkarsh Samiti*, [2004] 2 S.C.C. 392, available at <http://www.commonlii.org/in/cases/INSC/2004/31.html> (last visited January 10, 2007).

<sup>98</sup> *Vellore Citizens' Welfare Forum v. Union of India*, [1996] 5 S.C.C. 647, *rep. in* <http://www.commonlii.org/in/cases/INSC/1996/1027.html> (last visited January 10, 2007).

<sup>99</sup> *Indian Council for Environ-Legal Action v. Union of India*, [1996] 3 S.C.C. 212, *rep. in* <http://www.commonlii.org/in/cases/INSC/1996/244.html> (last visited January 10, 2007)

<sup>100</sup> *Vellore Citizens' Welfare Forum*, *supra* note 98; *Mehta v. Union of India*, [1997] 2 S.C.R. 353, *rep. in* <http://www.commonlii.org/in/cases/INSC/1997/769.html> (last visited January 10, 2007).

<sup>101</sup> See in general the India Supreme Court decision in *Karnataka Indus. Areas Dev. Bd. v. Kenchappa*, A.I.R. 2006 S.C.W. 2546, available at <http://www.elaw.org/resources/printable.asp?id=3133> (last visited Apr. 4, 2007). See also *Narmada Bachao Andolan*, *supra* note 91.

<sup>102</sup> *Karnataka Indus. Areas*, *supra* note 101, at para. 54 (emphasis added): "The Earth Summit held in Rio de Janeiro in 1992 altered the discourses of environmentalism in significant ways. Sustainability, introduced in the 1987 Bruntland Report—Our Common Future—and enacted Rio agreements, became a new and accepted code word for development."

<sup>103</sup> *Vellore Citizens' Welfare Forum*, *supra* note 98 (referring to the concept of sustainable development). The Kerala High Court viewed the other principles as part of customary international law based on the Indian Supreme Court's reasoning in *Soman v. Geologist*, [2004] 3 K.L.T. 577 para. 15, available at <http://www.elaw.org/resources/printable.asp?id=2680> (last visited Apr. 4, 2007).

<sup>104</sup> *Research Found. for Sci. Tech. & Natural Res. Policy v. Union of India*, *supra* note 87, para. 33.

<sup>105</sup> *Shehla Zia*, *supra* note 92, para. 9. Despite the fact that the international documents do not have the force of binding law,

the fact remains that they have a persuasive value and command respect. The Rio Declaration is the product of hectic discussion among the leaders of the nations of the world and it was





Supreme Court jurisprudence, by invoking these principles in a similar fashion in their judgments concerning the environment.

Clearly, these courts are fully aware of the potentially adverse economic implications of their pro-environment jurisprudence.<sup>109</sup> Inter-judicial cooperation must therefore be seen as a way to mitigate those adverse consequences. In fact, given the grave environmental threat hovering over the Indian subcontinent, these national courts may have just as doggedly pushed for reform even without backing from their counterparts in neighboring nations. But absent such cooperation, they might have been much less resistant to pressure brought to bear by domestic and foreign industry groups for whom lower environmental standards mean greater economic gain. These courts are not all-powerful in their quest to restrain the economic forces of globalization.<sup>110</sup>

מעוצב:תבליטים ומספור

(c) *Coordinating the Migration into Destination Countries*

Waves of asylum seekers from strife and poverty stricken regions, especially since the early 1990s, have prompted developed countries to modify their migration policies by restricting considerably the access of refugees and limiting their rights.<sup>111</sup>

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after negotiations between the developed and the developing countries that an almost consensus declaration had been sorted out. Environment is an international problem having no frontiers creating transboundary effects. In this field every nation has to cooperate and contribute and for this reason the Rio Declaration would serve as a great binding force and to create discipline among the nations while dealing with environmental problems. Coming back to the present subject, it would not be out of place to mention that Principle No. 15 envisages rule of precaution and prudence.

<sup>106</sup> *Bulankulama v. Ministry of Indus. Dev.*, *supra* note 94 (referring to the international declarations as “International standard setting instruments”).

<sup>107</sup> *Suray Prasad Sharma Dhungel v. Godavari Marble Indus.*, W.P. 35/1992 S.C. (1995) (Full Bench), available at <http://www.elaw.org/resources/printable.asp?id=2287> (last visited Apr. 4, 2007) (referring to the principle of sustainable development).

<sup>108</sup> *Farooque v. Gov't of Bangladesh*, *supra* note 37, (referring to the Rio Declaration on Environment and Development as a source of inspiration).

<sup>109</sup> See B.N. Kirpal et al, *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India*, at 372 (2004). The author suggests that in *Centre for Environment Law, WWF I v. Union of India* (1999) 1 SCC 263, the Indian Supreme Court ordered the closing of tanneries despite the fact that those tanneries were “a major foreign exchange earner for the country as leaders in the export of leather goods.”

<sup>110</sup> A prominent commentator has accused the Indian Supreme Court for “licit and illicit complicity with global capitalism”: Baxi, *supra* note 91, at 569.

<sup>111</sup> On the modifications introduced by destination states since the early 1990s see JANE MCADAM, *COMPLIMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW* (2007); Liza Schuster, *A Comparative Analysis of the Asylum Policy of Seven European Governments* 13 J. REFUGEE STUDIES



Such restrictions increased the importance of the minimal obligations states owed to refugees under international law. The courts in these destination countries have played an important role in the process of shaping the policies toward the various asylum seekers subject to *refoulement* or deportation. The migration policy adopted by one state had immediate effects on other states and the coordination of migration policies was of the essence for many states. The examination of the ways national courts in destination countries have interpreted and applied the international law on migration is therefore a key test to the thesis presented in this Article.

As opposed to the two areas of judicial creativity discussed earlier in this Part, the formulation of national migration policies has been an issue very high on the political agenda of many of the destination countries. In the sphere of migration policies, the courts were expected by their political branches to respect the domestic political processes and uphold the results of sustained deliberations and popular support. The possible costs of defying the popular will by abiding by the demands of international law was not only heavy criticism. A court that “cooperated” with international law’s strict requirements would have channeled refugees to its shores if other courts “defected” by interpreting international law in a less generous way toward the refugees.

By and large courts could not immediately reflect the transformation of national policies. The jurisprudence related to *refoulement* and expulsion to countries where torture could be committed against the expellee was too clear to be waived. The direct contact with the individual refugee and her or his painful life story, together with their self-confidence in their ability to distinguish genuine from bogus claims, probably also moved judges to adopt a critical stance toward new executive and legislative policies. Decisions of courts in the majority of destination jurisdictions reflect this sentiment.

Inter-judicial cooperation is necessary in this area in order to stand up to the domestic political process without incurring the “costs” of increasing the numbers of refugees. The stakes, however, were high, and it was ineffective, even irresponsible,

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118 (2000) and the special issue of Vol. 13 of the J. Refugee Studies devoted to the policies of European countries; Karin Oellers-Frahm & Andreas Zimmermann, *France's and Germany's Constitutional Changes and Their Impact on Migration Law: Policy and Practice*, 38 GERMAN Y.B. INT'L L. 249 (1995); James C. Hathaway, *Harmonizing for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration*, 26 Cornell Int'l L.J. 719 (1993), Gerald L. Neuman, *Buffer Zones Against Refugees: Dublin, Schengen, and the German Asylum Amendment*, 33 VA. J. INT'L L. 503 (1993).



for judges to rely only on the old practice of comparing decisions and intermittent exchanges. Perhaps such sentiments were behind the establishment in 1995 of the International Association of Refugee Law Judges (IARLJ). Dr Hugo Storey, then a Vice President of the UK Immigration Appeal Tribunal and a member of the IARLJ Council, explained in 2003 the *raison d'être* of this association:

[One] of IARLJ's principal objectives is the development of consistent and coherent refugee jurisprudence. Ideally a person who claims to be a refugee under the 1951 Convention should receive the same judicial assessment of his case whether he is in Germany, the USA, Japan or South Africa.<sup>112</sup>

The constitution of IARLJ reflects this ambitious program. Two of its preambles describe the extent of this challenge:

Whereas the numbers of persons seeking protection outside of their countries of origin are significant and pose challenges that transcend national boundaries;

Whereas judges and quasi-judicial decision makers in all regions of the world have a special role to play in ensuring that persons seeking protection outside their country of origin find the 1951 Convention and its 1967 Protocol as well as other international and regional instruments applied fairly, consistently, and in accordance with the rule of law;<sup>113</sup>

This constitution also asserts that one of its objectives is “[t]o foster judicial independence and to facilitate the development within national legal systems of independent institutions applying judicial principles to refugee law issues.”<sup>114</sup>

Membership in the IARLJ is open to judges or “quasi-judicial decision makers” of which there were in August 2007 332 members from 52 countries. The members can benefit also from a web-based database containing court decisions in asylum law of different countries and a members-only newsletter and forum. A leading expert in

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<sup>112</sup> Hugo Storey, *The Advanced Refugee Law Workshop Experience: An IARLJ Perspective* 15 INT’L J. REFUGEE LAW 422 (2003)

<sup>113</sup> IARLJ website at <http://www.iarlj.nl/> (last visited September 9, 2007).

<sup>114</sup> *Id.*, Article 2(2).



refugee law, James Hathaway, praised the association, viewing it as an alternative to the "more vigorously collaborative and formalised models" of international enforcement mechanisms known in other areas of international human rights law including international tribunals.<sup>115</sup>

During the 1990s national courts dealing with asylum seekers began citing each other's interpretation of the 1951 Convention Relating to the Status of Refugees, in particular its key provision regarding the definition of a "refugee."<sup>116</sup> This Convention provided a basis for coordinating a shared judicial position that often enabled these courts to strike down restrictive governmental policies without risking the influx of immigrants. This is not to suggest that the courts were always unanimous on each and every aspect of the elaborate qualifications of a "refugee." But what comes clear when reading several key decisions of the highest courts of the majority of the destination states is the judicial effort to offer a contemporary meaning to the 1951 convention, that would expand the definition of a "refugee" beyond the one envisioned in 1951, and despite the concerns of contemporary governments. This effort is captured in the following statement by Lord Carswell:

The persecution of minorities and the migration of people seeking refuge from persecution have been unhappily enduring features, which did not end with the conclusion of the Second World War. [...] The vehicle [for balancing the states' international obligations against their concerns] has been the [1951 Geneva Convention], which was the subject of agreement between states over 50 years ago, when the problems of the time inevitably differed in many respects from those prevailing today. That a means of reaching an accommodation suitable to cater for modern conditions has been achieved is a tribute to the wisdom and humanity of those who have had to construe the terms of the Convention and apply them to multifarious individual cases.<sup>117</sup>

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<sup>115</sup> James C. Hathaway, *Developments -- A Forum for the Transnational Development of Refugee Law: The IARLJ's Advanced Refugee Law Workshop* 15 INT'L J. REFUGEE LAW 418, 418 (2003).

<sup>116</sup> In particular the qualification for refugee status was discussed. See Article 1A(2) of the Convention relating to the Status of Refugees, 189 U.N.T.S. 150 (1951): "For the purposes of the present Convention, the term 'refugee' shall apply to any person who: ... (2) ... owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; ... ."

<sup>117</sup> *Januzi (FC) et al v. Secretary of State for the Home Department* [2006] UKHL 5, at para. 62



In their wisdom, the courts turned to construe the terms of the Convention collectively. This judicial dialogue can be traced to the early 1990s, as a 1993 judgment of the Canadian Supreme Court<sup>118</sup> cites a 1985 decision of the United States Board of Immigration tribunal,<sup>119</sup> to be later cited by the High Court of Australia in 1997,<sup>120</sup> the New Zealand Refugee Status Authority (1998),<sup>121</sup> and the House of Lords (1999).<sup>122</sup> In that 1999 judgment, the House of Lords commends the New Zealand Refugee Status Authority for its “impressive judgment” that draws on “the case law and practice in Germany, The Netherlands, Sweden, Denmark, Canada, Australia and the USA.”<sup>123</sup> In 2000 the United States Court of Appeals for The Ninth Circuit retreats from its prior interpretation,<sup>124</sup> which these other courts refused to follow, and endorses the evolving common position, acknowledging that this is also the position of the neighboring Canadian court.<sup>125</sup> This inter-judicial exchange necessarily involves also disagreements on particular aspects of the definition,<sup>126</sup> but the dialogue is conducted with the utmost respect and careful attention.<sup>127</sup> As

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<sup>118</sup> Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689.

<sup>119</sup> In re Acosta, 19 I. & N. 211 (U.S. Board of Immigration Appeal 1985). It is noteworthy that the decision takes into account “various international interpretations” of the term “refugee” in the Convention, explaining that “[s]ince Congress intended the definition of a refugee in [the implementing legislation] to conform to the [Convention], it is appropriate for us to consider various international interpretations of that agreement. However, these interpretations are not binding upon us in construing the elements created by [the implementing legislation], for the determination of who should be considered a refugee is ultimately left [...] to each state in whose territory a refugee finds himself. [...] While we do not consider the [Office of the United Nations High Commissioner for Refugees’] Handbook to be controlling, the Handbook nevertheless is a useful tool to the extent that it provides us with one internationally recognized interpretation of the [Convention].” (pp. 23-25 of the opinion).

<sup>120</sup> A v Minister for Immigration and Ethnic Affairs (1997) 2 BHRC 143. Further Australian decisions citing foreign judgments include the High Court in Al-Kateb v Godwin [2004] HCA 37; Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1; 187 ALR 574; 67 ALD 577[2002] HCA 14; Applicant S v Minister for Immigration and Multicultural Affairs (2004) 217 CLR 387; 206 ALR 242; 77 ALD 541[2004] HCA 25, as well as the Federal Court in Minister for Immigration & Multicultural Aff. v. Applicant Z., 116 F.C.R. 36 (2001), 2002 WL 3645 (FCA), [2001] FCA 1823; Applicant S v Minister for Immigration & Multicultural Affairs [2001] FCA 1411.

<sup>121</sup> In Re GJ [1998] INLR 387.

<sup>122</sup> Islam (A.P.) v. Secretary of State for the Home Department; Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah, [1999] 2 AC 629, 643 [1999] available at <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990325/islam01.htm> (last visited 4 May, 2007) (H.L. 1999);

<sup>123</sup> Shah & Islam, *id.*, *id.*

<sup>124</sup> Sanchez-Trujillo, 801 F.2d at 1576 (1986).

<sup>125</sup> Hernandez-Montiel v. Immigration and Naturalization Service, 225 F.3d 1084, at 1093 (2000).

<sup>126</sup> For example, the House of Lords in Januzi, *supra* note 117, prefers the English and Canadian approach to that supported by some courts in New Zealand and Australia.

<sup>127</sup> The judgment of the United States Supreme Court decision in Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 183 (1993), is an example of narrow interpretation, based on a textual reading of the 1951 Convention in light of its *travaux preparatoire* (concluded that the *non-refoulement* obligation did not apply to individuals situated outside the territorial jurisdiction of the state). For criticism of this interpretation see Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*



evidenced by the Ninth Circuit's 2000 judgment,<sup>128</sup> this deliberation is ultimately capable of yielding general agreement.

In 2001 the House of Lords openly addressed the role of national courts in preventing "gross distortions" in the implementation of the 1951 Geneva Refugees Convention through "a uniformity of approach to the refugee problem."<sup>129</sup> Lord Steyn insisted on a joint judicial effort to look beyond national peculiarities when interpreting a shared text:

In principle therefore there can only be one true interpretation of a treaty. If there is disagreement on the meaning of the Geneva Convention, it can be resolved by the International Court of Justice (art 38 of the Geneva Convention). It has, however, never been asked to make such a ruling. The prospect of a reference to the International Court of Justice is remote. In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning.<sup>130</sup>

But this very decision also demonstrated the limits of judicial independence, as well as the limited ability of the written word to withstand domestic political pressures. Some courts, most notably in France and Germany, operated since the early 1990s in a political environment increasingly concerned with the influx of refugees. Restrictive policies were adopted in both countries by constitutional

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103 YALE L.J. 2391 (1994). This interpretation, however, was endorsed by the House of Lords in *R. v. Immigration Officer at Prague Airport and another ex p. European Roma Rights Centre and others* [2004] UKHL 55, para. 17, and by the Australian High Court (*see Khawar, supra* note 120, at para. 42). Lord Bingham of Cornhill emphasized that "The House was referred to no judicial authority to contrary effect." (*id., id.*)"

<sup>128</sup> *Supra* note 125.

<sup>129</sup> *R v Secretary of State for the Home Department, ex parte Adan & Aitseguer, supra* note 32, *id.* (Lord Hobhouse of Woodborough): "The scheme of the Geneva Convention is that any such differences should be referred to and resolved by the International Court of Justice under art 38 of that convention. However there is no prospect that the presently relevant difference (which has existed now for many years) will be resolved in that way. So long as such differences continue to exist, the intention of the Geneva Convention to provide a uniformity of approach to the refugee problem will be frustrated and the scheme of the international response will remain grossly distorted."

<sup>130</sup> *Adan, supra* note 32, at 617.



amendments.<sup>131</sup> During the 1990s, many if not most refugees were fleeing countries affected by civil wars and inter-communal strife, and European courts were called upon to decide whether “persecution” in the sense of the 1951 Geneva Convention could be effected also by non-state agents. While the majority of courts, including the courts in the United Kingdom, recognized that also non-state agents could be deemed “persecutors,” some other courts, including those of Germany and France, refused to follow suit.<sup>132</sup> As a result, German courts would not recognize as “refugees” asylum seekers from countries such as Afghanistan, Bosnia, Sri Lanka or Somalia, who suffered from the hands of non-state actors, and French courts would similarly reject the applications of Algerians persecuted by militias, lacking evidence that the Algerian state neither encouraged nor tolerated the persecution.<sup>133</sup> The lesser protection afforded to such refugees in these two countries prompted the House of Lords to quash the Secretary of State’s decision to send refugees from Somalia and Algeria to Germany and France respectively, due to the concern that they might be deported and face persecution.<sup>134</sup>

The judicial “defections”<sup>135</sup> by the French and the German courts were based on the traditional justifications: these courts gave precedence to the peculiarities of their national constitutions and laws (those laws that implemented the international obligations), they interpreted the international obligations narrowly, invoking governmental practice rather than the jurisprudence of the foreign courts, and they distinguished seemingly pertinent decisions of international courts. The French *Conseil Constitutionnel* and the German *Bundesverfassungsgericht* examined

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<sup>131</sup> See Oellers-Frahm and Zimmermann, *supra* note 111, at 260-263 (noting that the constitutional amendment in France was designed to circumvent the outcome of a previous decision of the *Conseil Constitutionnel*).

<sup>132</sup> On the differences of interpretations see Catherine Phuong, *Persecution by Non-state Agents: Comparative Judicial Interpretations of the 1951 Refugee Convention* 4 EUROPEAN JOURNAL OF MIGRATION AND LAW 521 (2003). The EU Qualification Directive of 2004 resolved these differences, recognizing non-state actors as potential persecutors. See GUY S. GOODWIN-GILL AND JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 98-100 (3<sup>rd</sup> Ed., 2007). On the “long battle” in Germany over legislation that would *inter alia* adopt this interpretation see Marion Schmid-Drüner, *Germany’s New Immigration Law: A Paradigm Shift?* 8 EUROPEAN JOURNAL OF MIGRATION AND LAW 191 (2006).

<sup>133</sup> Adan *supra* note 32, at p. 600.

<sup>134</sup> Adan, *supra* note 32. Most recently, the Canadian Federal court, following the House of Lords’ approach, refused to allow the return of a Colombian asylum seeker to the US: Canadian Council for Refugees v. The Queen (2007), 2007 FC 1262, available at <http://www.canlii.org/en/ca/ctf/doc/2007/2007fc1262/2007fc1262.pdf> (last visited Jan. 10, 2008).

<sup>135</sup> “Defection” in the sense of failing to adopt the position of the majority of courts, which, as Goodwin-Gill and McAdams suggest (*supra* note 132, *id.*), seems to be the more plausible interpretation of the text.



domestic legislation in light of their recently amended constitutions.<sup>136</sup> The German Federal Administrative Court gave precedence to a domestic act that incorporated the international obligation to protect refugees, interpreting that act in light of the German Basic Law.<sup>137</sup> The same court did acknowledge the different interpretation of other courts that had recognized the refugee status of those persecuted by non-state agents (referring to the jurisprudence in the United States, United Kingdom, France, Canada and Australia). It even asserted the interpretation of the same treaty by other courts usually carries “special weight” for the interpreting court, but not when the intention of the national legislator was as clear as it was in this case. In a subsequent decision this court added that its understanding of international law reflected also the understanding of most of the *governments* of the state parties of the Convention.<sup>138</sup> The court refused to accept an “expansive” and “creative” conflicting interpretation, noting:

It is not the task of the courts to expand the boundaries of the member-states ability and willingness to absorb [refugees] through creative interpretation of treaties and thereby to disregard the constitutionally protected sovereignty of the national lawmaker and constitution-maker.<sup>139</sup>

The German constitutional Court, when reviewing the constitutionality decisions of the Federal Administrative Court expanded somewhat the opportunities of asylum

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<sup>136</sup> See Oellers-Frahm and Zimmermann, *supra* note 111.

<sup>137</sup> BVerwG January 18, 1994, BVerwGE 95,42; NVwZ 1994, 497. Article 16a(1) of the Basic Law provides: “Persons persecuted *on political grounds* shall have the right of asylum” (my emphasis). The German legislation, according to this court, was in line with 1951 Convention, since the convention too insisted on state-sponsored persecution as a condition for “refugeeness.” Such interpretation was based, according to established rules of treaty interpretation, on the ordinary meaning of the text, in light of its object and purpose. The convention, recalled the court, was drafted in 1951 with the persecutions by regimes such as Nazi Germany or the Soviet Union in mind. See Berthold Huber, *The Application of Human Rights Standards by German Courts to Asylum-Seekers, Refugees and other Migrants* 3 EUROPEAN JOURNAL OF MIGRATION AND LAW 171, 174 (2001).

<sup>138</sup> The same court ruled further that the obligation, under the European Convention of Human Rights, not to expel individuals to jurisdictions where they may face inhumane treatment, was also confined to situations where such treatment was expected from the ruling state authority or, exceptionally, the quasi-state authority. See decision of April 15, 1997, BVerwGE 104, 254.

<sup>139</sup> “*Es ist nicht Aufgabe der Rechtsprechung, die Grenzen der Aufnahmefähigkeit und Aufnahmewilligkeit der Vertragsstaaten durch eine rechtsschöpferische Auslegung der Konventionsbestimmungen weiter auszudehnen und dadurch die auch als Verfassungsentscheidung geschützte Souveränität des nationalen Gesetzgebers und des Verfassungsgesetzgebers außer acht zu lassen.*” (decision of April 15, 1997, BVerwGE 104, 265, 272). Another explanation given to the disregard of the ECHR ruling was that it was *obiter dictum* (Federal Administrative Court, decision of September 2, 1997, BVerwGE 105, 187; NVwZ 1999, 311. See Huber, *supra* note 137, at 176.





seekers who fled non-state persecution. However, it did not refer to international law in its interpretation of the relevant provisions in the German law.<sup>140</sup>

The coalition of courts determined to develop a consistent interpretation of the 1951 Convention, and the opposition of those courts who insisted on a different outcome, are two sides of the same coin, the coin being the use of international law as a strategic tool by national courts. For courts that seek to establish a common front, a shared text is an asset they cultivate. At the same time, however, this story suggests that international law may be important also for the courts that seek to protect their domestic political process from external pressures. The German Federal Administrative Court offers an example of a court that uses the language of international law to explain why the common standard should not apply in Germany.

Note that a common judicial front may not always be beneficial to asylum seekers. As Gerald Neuman noted, a common position privileges the status quo, since changes require consensus and careful coordination, and asylum seekers could benefit from divergence between national policies defining their status and rights.<sup>141</sup> But in the trade-off between the common position of the governments and that of the courts, the latter has so far proved more beneficial for the refugees.

מעוצב:תבליטים ומספור

(d) *The Potential and Limits to further Cooperation*

The picture that emerges from reviewing the way courts employ foreign and international law is complex, but it indicates that foreign and international law have become effective tools for inter-judicial coordination, and that courts tend to resort to such tools either to protect the independence of the domestic political branches from external pressures or protect their own independence (from encroachment by their

<sup>140</sup> BverfGE, decision 260/98 of August 10, 2000, available at [http://www.bundesverfassungsgericht.de/entscheidungen/rk20000810\\_2bvr026098.html](http://www.bundesverfassungsgericht.de/entscheidungen/rk20000810_2bvr026098.html) (last visited September 18, 2007). It should be noted that according to the prevailing German law at the time, if an asylum-seeker was neither recognized as entitled to asylum under Article 16a(1) of the Basic Law nor granted the status of a refugee under section 51 of the Aliens Act then he or she might still enjoy so called “subsidiary protection,” which satisfied the ECHR (TI v UK [2000] INLR 211) and the House of Lords (that approved the removal of Tamil refugees from the UK to Germany: R (on the application of Yogathas) v Secretary of State for the Home Department; R (on the application of Thangarasa) v Secretary of State for the Home Department [2002] UKHL 36).

<sup>141</sup> See Neuman, *supra* note 111 (referring to the potentially adverse consequences of convergence in Europe in the early 1990s).



governments). What is significant is that the courts have identified international law as a tool that no longer governs the relations between states only, but as a tool that can regulate the relations between governments and courts, and can be used – by both sides – for their common or diverging purposes.

In theory, we can expect cooperation in other spheres where judicial alliances could facilitate the confrontation with foreign actors that seek to preempt the domestic political processes or to pressure them into compliance.<sup>142</sup> Cooperation among courts of developing countries can, for example, develop in the area of trade law, in reaction to pressures from foreign companies to enforce trade or trade-related norms through decisions of international institutions or pressure on governments. Resisting courts could invoke other international norms, such as human rights or environmental law, or constitutional principles such as the right to life, to counter claims based on general trade law or specific treaties. A possible harbinger of this trend is the recent decision of the High Court in Madras in the case of *Novartis v. India*,<sup>143</sup> where the court refused to adjudicate Novartis's claims that the changes to the Indian patent law violated India's obligations under the TRIPS Agreement. The court reasoned that the TRIPS agreement was essentially a contract between state parties who had an agreed venue where disputes could be resolved. This seemingly technical reasoning did hint at the underlying concern, the constitutional right to health:<sup>144</sup> at stake was the patentability of Gleevec, a life saving drug for leukemia patients, and the continued supply of the much cheaper generic version by Indian companies to patients in India and other developing countries.<sup>145</sup>

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<sup>142</sup> It is noteworthy that currently it is not possible to trace inter-judicial cooperation in the sphere of labor law. National courts do cite international standards, including ILO conventions, but not each other. For a compendium of national judgments referring to international labor law see *Use of International Law by Domestic Courts*, available at [http://training.iticilo.it/ils/CD\\_Use\\_Int\\_Law\\_web/Additional/English/default.htm](http://training.iticilo.it/ils/CD_Use_Int_Law_web/Additional/English/default.htm) (last visited December 31, 2007).

<sup>143</sup> Judgment of August 6, 2007. Available at <http://judis.nic.in/chennai/qrydisp.asp?tfnm=11121> (last visited September 17, 2007).

<sup>144</sup> “We have borne in mind the object which the Amending Act wanted to achieve namely, [...] to provide easy access to the citizens of this country to life saving drugs and to discharge the [legislature's] Constitutional obligation of providing good health care to it's [sic] citizens.” (*id.* at para. 19).

<sup>145</sup> This decision follows an aborted attempt of international pharmaceutical corporations to sue against a South African legislation that authorized the compulsory licensing of life-saving drugs, claiming that this was a violation of South Africa's TRIPS-based obligations. The case was dropped in 2001 after the court allowed NGOs to present affidavits (Case Number 4138/98, High Court of South Africa). On this litigation see David Barnard *In the High Court of South Africa, Case No. 4138/98: The Global Politics of Access to Low-Cost AIDS Drugs in Poor Countries* 12 KENNEDY INSTITUTE OF ETHICS JOURNAL 159 (2002).



But the logic of inter-judicial cooperation has its limits. Courts remain sensitive to the national interest. Inter-judicial cooperation will be confined to those areas where the courts would deem that from a nationalist perspective the benefits of inter-judicial cooperation outweigh their costs. For example, despite an initial willingness to adjudicate suits against foreign officials for alleged war crimes or crimes against humanity – exemplified in the *Pinochet* case<sup>146</sup> – many courts ultimately saw the costs outweighing the benefits, and decided to defer to their governments: While trials of fallen dictators like *Pinochet* may not incur excessive risks for the forum state, it is far riskier for most economies – again, not perhaps to the United States<sup>147</sup> – to allow suits against incumbent heads of state or senior government officials of affluent states who had invested heavily in the forum state.<sup>148</sup>

Courts are also unlikely to cooperate when foreigners are suing their government for war crimes. An example of a recent judicial conflict is the confrontation between the Greek and Italian supreme courts, on the one hand, and the German supreme court, on the other, regarding suits for damages for German war crimes in World War II.<sup>149</sup> Reading these cases reminds one of the jurisprudence of the earlier generation, when courts ingeniously interpreted international law to uphold

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<sup>146</sup> House of Lords' judgment in the *Pinochet* case, *supra* note 32.

<sup>147</sup> In this respect, the U.S. courts again stand out: inasmuch as they are not particularly anxious to protect their domestic processes from external influence (*see supra* notes 3, 27 and accompanying text), they are the least perturbed by the potential adverse consequences of rendering judgments against foreign violators of international law, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004).

<sup>148</sup> Compare the *Pinochet* decision, *supra* note 32 (no immunity for former heads of state against prosecution for acts of torture), with its judgment in *Jones*, *supra* note 33 (immunity against prosecution for acts of torture for incumbent officials of a foreign state (Saudi Arabia)), and with the case against Ghaddafi, as analyzed by Salvatore Zappalà, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation*, 12 *EUROP. J. INT'L L.* 595 (2002) (the French court relied on customary law to suggest vaguely that Ghaddafi enjoyed immunity, but without explaining which type of immunity and whether it would expire when he is no longer in power).

<sup>149</sup> The Greek Court of Cassation rendered a default judgment against Germany for war crimes during World War II, awarding damages (*Prefecture of Voiotia v. Federal Republic of Germany*, Areios Pagos [Supreme Court], Case No. 11/2000, May 4, 2000, *reported by* Maria Gavouneli & Ilias Bantekas, 95 *Am. J. Int'l L.* 198 (2001)), but the German Supreme Court refused to recognize the Greek judgment (*Bundesgerichtshof [BGH] [Supreme Court], Distomo Massacre Case*, BGH – III ZR 245/98 (June 26, 2003)). The Italian Court of Cassation reached a conclusion similar to that reached by the Greek court in a suit brought by Italian citizens against Germany (*Ferrini v. Federal Republic of Germany*, Cass., sez. un., 11 Mar. 2004, *Rivista diritto internazionale* 87, 539, *reported by* Andrea Bianchi, 99 *Am. J. Int'l L.* 242 (2005)), but in a parallel decision, the same court refused to consider a suit brought by Serbian citizens against Italy for war crimes during the 1999 NATO Kosovo campaign (see the decision of the Grand Chamber of the European Court on Human Rights in *Markovic v. Italy*, App. No. 1398/03 (2006), *available at* <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=markovic&sessionid=10168527&skin=hudoc-en> (last visited May 19, 2007).



their government's position.<sup>150</sup> Indeed these decisions are standing proof that inter-judicial cooperation is a strategy of choice, pursued purely for parochial ends. And when these ends change, we can expect the cooperation to end with them.

#### IV. The Emergence of Transnational Checks and Balances

##### *(a) Realignment of Existing Systems of Checks and Balances*

As suggested above, there are areas of regulation where courts no longer agree to defer to their governments. These courts give new and quite revolutionary meaning to the call to "speak in one voice": this time, these are the different national courts that seek to form one voice vis-à-vis their respective political branches. The courts may wish to achieve a number of goals. In the counterterrorism sphere, courts have been aware to the external pressures on their governments that had effectively silenced the domestic political process, and so they have tried to revive it. Courts in developing countries may have been motivated by similar concerns, but they demonstrated less optimism about the capability of their respective political branches to step in and protect the local environment effectively. Courts in destination countries shared the worry that the domestic political processes may lead to migration policies that undermine justice toward asylum seekers. The cumulative message of these three examples is that courts are cooperating either to bolster their respective domestic political processes or to withstand what they view as coordinated inter-governmental assault on their own independence.

Broadly viewed, such instances of inter-judicial coordination may indicate a collective response to the trend in recent years to delegate authority to formal and informal international institutions.<sup>151</sup> But governments do not sit idly by. Some have already reacted to this challenge. There are clear signs of a collective inter-governmental responses, effectively preempting their respective courts or to restrain them. Take inter-governmental cooperation in the sphere of counterterrorism. Operating through the Counter-Terrorism Committee, under the aegis of Chapter VII of the United Nations Charter, governments limited judicial review by their national

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<sup>150</sup> See *supra* notes 4-11 and accompanying text.

<sup>151</sup> On this delegation see *supra* text to notes 19-26.



courts.<sup>152</sup> In the sphere of migration there is clear evidence of European governments preempting their courts by resorting to the apparatus of the European Union to regulate migration policies.<sup>153</sup> The fragmentation of international law and the move to informal regulatory mechanisms<sup>154</sup> may render the task of inter-judicial coordination more difficult. Another inter-governmental measure to preempt national courts is to provide competing judicial venues through adjudicative bodies in international organizations.<sup>155</sup> Perhaps counterintuitively, it should be noted that at least for the governments of stronger nations, international courts can be expected to be more acquiescent than their national courts are.<sup>156</sup> Such governments control nominations and budgets to international tribunals, and they also retain the ability to exit institutions they do not like if they are unhappy with the outcomes.<sup>157</sup> Moreover,

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<sup>152</sup> The possibility of judicial review by national courts of Security Council Chapter VII Resolutions is discussed in Erika de Wet & André Nollkaemper, *Review of Security Council Decisions by National Courts*, 45 GERMAN YBK. INT'L L. 166 (2002). The authors review three decisions of three different courts—the Dutch District Court (*Milosevic v. The Netherlands*, *trans. in* 48 *Netherlands Int'l L. Rev.* 357 (2001)), the Swiss Federal Supreme Court (*Rukundo*, applications nos. 1A.129/2001, 1A.130/2001/viz (2001), available at <http://www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm> (last visited May 19, 2007), and the U.S. Fifth Circuit Court of Appeals (*Ntakirutimana v. Reno*, 184 F.3d 419 (1999)). These three decisions demonstrate the variation in views regarding the authority to review such acts, but none of the courts was particularly willing to question the legality of those acts: the U.S. court found the issue to be beyond the scope of habeas review, while the Dutch and Swiss courts showed significant deference to Security Council resolutions. Similar deference was given by the British Court of Appeal (*R (on the application of Al-Jedda) v. Secretary of State for Defence*, [2006] EWCA Civ 327, (available at <http://alpha.bailii.org/ew/cases/EWCA/Civ/2006/327.rtf> (last visited September 18, 2007) para. 71), as well as by the Swiss Supreme Court in the case of *Nada v. SECO* (decision from November 14, 2007, not yet reported officially, available at [http://jcb.blogs.com/jcb\\_blog/files/tf\\_youssef\\_nada.pdf](http://jcb.blogs.com/jcb_blog/files/tf_youssef_nada.pdf) (last visited January 10, 2008)). But see the decision of the House of Lords in the *Jedda* case, *infra* note 158.

<sup>153</sup> See Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 2001 O.J. (L 304) 12; Council Directive 2001/55 of 20 July 2001 Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof, 2001 O.J. (L 212) 12, available at [http://www.ecre.org/eu\\_developments/temporary%20protection/tpdir.pdf](http://www.ecre.org/eu_developments/temporary%20protection/tpdir.pdf) (last visited May 18, 2007); S. Reynolds, *European Council Directive 2001/55/EC: Toward a Common European Asylum System*, 8 *Colum. J. Eur. L.* 359 (2002). For an earlier similar move, see James C. Hathaway, *Harmonizing for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration*, 26 *Cornell Int'l L.J.* 719 (1993).

<sup>154</sup> See Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 *STAN. L. REV.* (forthcoming 2007).

<sup>155</sup> Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts* 79 *NYU L. REV.* 2029 (2004) (discussing incidents where international tribunals examined the compatibility of national court decisions with the international obligations of their countries).

<sup>156</sup> See Tom Ginsburg, *Bounded Discretion in International Law Judicial Making*, 45 *Va.J.Int'l L.* 631, 656-668 (2005) (describing the various strategic limits on judicial discretion of international tribunals).

<sup>157</sup> This is inherent in the practice of fragmenting international law. See Benvenisti & Downs, *supra* note 154. On exit from treaties, an option unavailable in domestic law, see Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 *VA. J. INT'L L.* 631, 658 (2005); Laurence R.



national courts in most democracies enjoy greater domestic legitimacy than do international tribunals. Their basic source of authority – the national constitutions – are usually immune to law made by colluding governments. Indeed, both in the sphere of counterterrorism<sup>158</sup> and in that of migration,<sup>159</sup> national courts have made more strident steps to restrain governments than international tribunals have.

Thus we are witnessing the emergence of transnational checks and balances. As the state “disaggregates,”<sup>160</sup> the traditional maps of domestic checks and balances are also redrawn in the never-ending struggle to govern and to review government. In an era of inter-dependency, both the national government and the national court must forge coalitions across national boundaries to remain effective domestically. The redrawn institutional maps of checks and balances use the language of foreign and international law. Courts rely on this language to facilitate communications; governments use international law, international bureaucracies and judicial institutions to effectuate their understandings and to reduce the discretion of their own courts, although they may try to seek informal means of coordination, means that courts cannot utilize.

This analysis would suggest that one of the more crucial challenges in the ensuing struggle to redraw the maps of transnational checks and balances is the potential stand off between the national and international courts. So far, national courts showed deference to international tribunals. The House of Lords adopted willingly the parallel rulings by the International Court of Justice<sup>161</sup> and the European

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Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005).

<sup>158</sup> The European Court of Human Rights has been criticized for its timidity in reviewing governmental policies in situations of national emergencies. See OREN GROSS & FINNUALA NI AOLAIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* 268-89 (2006) (“[S]tates can rest assured, to some degree, that their overall sovereign rights to resort to exceptional measures in times of crisis are not affected, nor will their political reactions and measurements be undercut.” *Id.* at 289). The result is an ineffective review mechanism that endows governmental action with legitimacy: Gross & Ni Aolain, *id.* at 324; see also Ralph Wilde, *Legal “Black Hole”? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 MICH. J. INT’L L. 739, 783 (2005). Recently, the House of Lords indicated its readiness to review Britain’s compliance with its human rights obligations even when it operates under UN Security Council Resolutions: R. (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent) [2007] UKHL 58) available at <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd071212/jedda-1.htm> (last visited January 10, 2008).

<sup>159</sup> Christian Joppke & Elia Marzal, *Courts, the New Constitutionalism and Immigrant Rights: The Case of the French Conseil Constitutionnel*, 43 EUROP. J. POL. RES. 823, 837 (2004), suggest that national courts, rather than the European Court of Human Rights, were the ones to promote migrant rights.

<sup>160</sup> Slaughter, *supra* note 9.

<sup>161</sup> Arrest Warrant of 11 April 2000, *Congo v. Belg.*, 2002 I.C.J. 3 (Feb. 14), available at <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm> (last visited Apr. 4, 2007).



Court on Human Rights<sup>162</sup> concerning immunity for acting heads of state and other state officials for crimes against humanity, saying that the claimants “are obliged to accept” the ICJ’s ruling.<sup>163</sup> This deference may not last, especially once national courts realize that the international tribunals are, to a certain extent, dependent on them and therefore their coalition can withstand also the challenge of international adjudication. The experience in the European Union has shown that persistent reaction by national courts can have an effect on the international tribunal.<sup>164</sup>

(b) *Inter-judicial Coalitions and Democracy*

Is it legitimate for national courts to reach out beyond their respective jurisdictions and forge collective policies that diverge from their governments’ positions? Is it legitimate for them to rely on international law and comparative constitutional law, rather than using the norms promulgated by the domestic democratically elected bodies? Critics have thus far addressed the second, the more apparent, question. Foreign law, the familiar argument goes, has little role to play in a sovereign democracy. It is easy to imagine the criticism of the more recent and less apparent practice of using foreign law to form inter-judicial coalitions: the courts are overstepping their authority by their preemption of their respective political branches. These arguments build upon the theme of the “countermajoritarian difficulty,” the “obsession” or “fixation”<sup>165</sup> mainly of U.S. constitutional theory since Alexander Bickel’s *The Last Dangerous Branch*.<sup>166</sup> Evidence of inter-judicial cabals aimed at limiting the discretion of governments – as exemplified in the migration context – seems to add to this apprehension.

The analysis in this Article, however, suggests that the concern over the “countermajoritarian difficulty” is unwarranted at least in those spheres of judicial action that is aimed at strengthening domestic democratic deliberations. The debate

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<sup>162</sup> *Al-Adsani v. United Kingdom*, [2001] 34 E.H.R.R. 273.

<sup>163</sup> *Jones*, *supra* note 33, para. 24 (Lord Bingham of Cornwell), para. 48-49 (Lord Hoffmann).

<sup>164</sup> *See supra* note 29 and accompanying text.

<sup>165</sup> These terms are aptly used by Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153 (2002).

<sup>166</sup> *See supra* note 1. For an outline of the debate concerning the legitimacy of comparative constitutionalism, see Christopher McCrudden, *Transnational Judicial Conversations on Constitutional Rights*, 20 *OXFORD J. LEGAL STUDIES* 499, 528-29 (2000).



over the extent to which courts can legitimately get involved in the business of the political branches, especially in the context of legislation review, has proceeded based on the assumption that the polity is sovereign to make up its mind according to its citizens' wishes. Citizens could shape their lives through participation in the political process. But in an era of global interdependency, polities often lose this ability, and external actors seize the opportunity to shape outcomes the way they deem fit. With the possible exception of the U.S., most nations have yielded significant parts of their policy-making to external forces. Foreign governments and private actors increasingly leave national governments and legislatures little choice but to defer to their demands. The responses of governments and legislatures to the post-9/11 counterterrorism measures and the inaction of governments of developing countries to protect the environment, as described above, exemplify this predicament. National courts—again, with the exception of the U.S. courts, which, for obvious reasons do not share these concerns—react to what they identify as weakness on the part of the political branches to withstand pressure, especially from external sources, to comply with standards imposed by strong global powers or by the market forces. To the extent that courts are in fact doing their utmost to resuscitate this process, resorting to foreign and international law to resurrect domestic democracy, the Bickelian type of criticism is simply misguided. By seeking to coordinate their stances, national courts are not motivated by utopian globalism, but, rather, quite to the contrary: their coordination efforts are aimed at promoting domestic interests and concerns. This role is thoroughly justified in democratic terms.

Inter-judicial coordination can potentially contribute to the strengthening of democratic decision-making within international institutions. The available checks and balances to ensure the accountability of such institutions – that include self-regulation and “peer review” opportunities – leave much to be desired.<sup>167</sup> A coalition of national courts, less dependent on governments than many of the current alternatives, may prove a welcome addition to a robust global system of checks and balances and nurture transnational deliberations.

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<sup>167</sup> On global governance and democracy see John Ferejohn, Accountability in a Global Context, IILJ Working Paper 2007/5 (Global Administrative Law Series) available at [www.iilj.org](http://www.iilj.org) (last visited Jan. 10, 2008); Joshua Cohen And Charles F. Sabel, *Global Democracy?* 37 NYU J. Int'l L. & Pol'y 763 (2006); Ruth W. Grant and Robert O. Keohane, *Accountability and Abuses of Power in World Politics* 99 AM. POL. SCI. REV. 1 (2005); Kingsbury *et al.*, *supra* note 19; Weiler *supra* note 19.





There are obviously concerns with this inter-judicial collective self-empowerment: courts are ultimately also delegated institutions; they may suffer from class, gender and ethnicity biases; they do not have the expertise necessary to assess and manage risks; their intervention could burden global governance. These concerns, well-known in the debate about the legitimacy of domestic judicial review, are equally valid in the context of transnational review. Courts are aware of these concerns and at times exhibit self-restraints. As the discussion on the migration policies demonstrated, the French and German courts took seriously the public debate within their polities and “defected” from the judicial coalition over refugee status. Obviously, judicial self-restraint is not always effective, and excesses can be expected. Overall, however, it cannot be denied that national courts bring to the emerging global deliberation process a voice that may not be adequately heard but for their insistence.

## V. Conclusion

This Article has argued that the aspiration to “speak in one voice” is shared by a growing number of national courts across the globe. But as opposed to what prevailed only a decade ago, it is no longer the wish of these courts to speak in the voice of their governments, but rather to align their jurisprudence with other national courts. Comparative constitutional law and international law have proven to be the best tools for effectuating this strategy. The Article explains this strategy as a reaction to the delegation of governmental authority to formal or informal international institutions and to the mounting economic pressures on governments and courts to conform to global standards. The judicial reaction, in turn, can expand the space of domestic deliberation and bolster the national governments’ ability to withstand pressure brought to bear by interest groups and powerful foreign governments. Such motivation for trans-jurisdiction coordination is fully justified under democratic theories that conceive of the court as a facilitator of democratic deliberation.

As discussed, the coordination strategy is limited to situations in which courts observe that their government, their legislature, or they themselves have succumbed to or are threatened by economic or political powers that stifle the democratic process through coordinated supranational standards, be they formal (in treaties) or informal.

This suggests that courts might not be equally adamant when there are only local



dimensions to a given dispute, as, for example, would be the case in disputes over conditions for detaining local criminals or the displacement of indigenous inhabitants due to dam construction.

It is too early to assess the success of this emerging trend. Every collective action depends on a sufficient number of contributors to the effort. Changes in the domestic rules protecting judicial independence could put a damper on the willingness of the courts in the relevant countries to take on an assertive role. Governments may be pressured also to submit to intergovernmental efforts seeking to deprive courts of the authority or opportunity to act. But following the analysis in this Article, it seems safe to assume that courts will not sit idly by while their authority to review the actions of the political branches erodes away. In an era when governments are opting for alternatives to formal internal or international lawmaking, it is the national courts that are turning very seriously to comparative constitutional law and to international law. This is a surprising mirror image of the state of affairs that existed only a decade ago.

