

A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe

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Abstract

The European Convention on Human Rights is rapidly evolving into a cosmopolitan legal order: a transnational legal system in which all public officials bear the obligation to fulfill the fundamental rights of every person within their jurisdiction. The emergence of the system depended on certain deep, structural transformations of law and politics in Europe, including the consolidation of a zone of peace and economic interdependence, of constitutional pluralism at the national level, and of rights cosmopolitanism at the transnational level. Framed by Kantian ideas, the paper develops a theoretical account of a cosmopolitan legal system, provides an overview of how the ECHR system operates, and establishes criteria for its normative assessment.

A cosmopolitan legal order [CLO] is a transnational legal system in which all public officials bear the obligation to fulfill the fundamental rights of every person within their jurisdiction, without respect to nationality or citizenship. In Europe, a CLO has emerged with the incorporation of the European Convention on Human Rights [ECHR] into national law. The system is governed by a decentralized sovereign: a community of courts whose activities are coordinated through the rulings of the European Court of Human Rights. While imperfect and still maturing, the regime meets significant criteria of effectiveness. It routinely succeeds in raising *national* standards of rights protection; it has been crucial to the success of transitions to constitutional democracy in post-authoritarian states; and it has steadily developed capacity to render justice to all people that come under its jurisdiction, even those who live, and whose rights are violated, outside the territory of the Convention. Today, the Court is the single most active and important rights-protecting body in the world. The purpose of this paper is to explicate and defend these claims.

The paper builds on three strains of scholarship. First, I argue that the CLO ought to be conceptualized in Kantian terms, in effect, as a formalization of Cosmopolitan Right. Moral and political philosophy has recently experienced a broad revival of interest in Kant's notions of cosmopolitanism (Brown 2009; Brown and Held, eds., 2010; Flikshuh 2008), including a sustained effort to build a broader, rights-based cosmopolitanism, in part by extending Kant's ideas (Anderson-Gold 2001; Benhabib 2004; Held 2010). While sharing these orientations, I provide an account of a cosmopolitan legal system and how it operates. In the field of international relations, following from Doyle's (1986) seminal paper, political scientists have subjected Kant's blueprint for "perpetual peace" to rigorous testing, with impressive results (Brown, Lynn-Jones, and Miller, eds., 1996; O'Neal and Russett 1999). This paper builds on this agenda, though its aim is to explain the emergence and operation of a CLO, not the absence of war between liberal states.

Second, the paper responds to a tenacious controversy concerning the nature and scope of human rights (Beitz 2001; Sajo, ed., 2004). Simplifying, the debate has focused on the tension between (1) the universalistic claims of rights, and (2) the diversity of culture and moral views in the world. This tension is typically resolved in one of two ways. Either one derives the content of rights from those elements that are common to moral systems, or conceptions of justice,

across cultural divides; or one concludes that practices that fail to meet predetermined standards established by human rights are indefensible and lack legitimacy.¹ The debate has produced a dominant view that rights can (or should) have only minimalist content (Ferrara 2003; Ignatieff 2001; Rawls 1999; Walzer 1994). The view has its detractors (Benhabib 2009; Pogge 2000), who worry that minimalism drains rights of their intrinsic moral and legal force. Cohen (2004: 192), a reluctant proponent of minimalism, puts it this way: “we can be tolerant of fundamentally different outlooks on life, or we can be ambitious in our understanding of what human rights demand, but we cannot – contrary to the aims of . . . activists – be both tolerant and ambitious.” One strong empirical claim of the paper is that the European Court has transcended rights minimalism while maintaining a meaningful commitment to principles of national diversity and regime subsidiarity.

Third, the paper follows in a line of research on how new forms of judicial authority emerge and evolve, with what political consequences (Stone Sweet 1999). Courts famously govern not through the sword or the purse, but through reason-based justification and the propagation of argumentation frameworks (doctrine), to the extent that they draw non-judicial actors into dynamic, “jurisgenerative” fields of action (Benhabib 2009; Shapiro and Stone Sweet 2002). The ECHR is both a source and product of jurisgenerative processes, and an expansive politics of rights protection has been the result. The CLO is also a novel legal system, constituted on the basis of a structural characteristic that the paper refers to as “constitutional pluralism.” International law scholarship now squarely confronts the question of how to understand both the “constitutional” and “pluralist” features of global governance arrangements (Dunoff and Trachtman, eds., 2009; Klabbers, Peters, and Ulstein 2009; Krisch 2010). Europe possesses an overarching “constitutional” structure, comprised of fundamental rights and the shared authority of judges to adjudicate individual claims. In this system, no single organ possesses the “final word” when it comes to a conflict between conflicting interpretations of Right; instead, the system develops through inter-court dialogue, both cooperative and competitive.

The paper proceeds as follows. Part I frames an account of the CLO in Kantian terms, and defines the key concepts to be deployed: *cosmopolitan legal order*; *cosmopolitanism justice*; *constitutional pluralism*; and *decentralized sovereignty*. Part II discusses how the evolution of European law enhanced constitutional pluralism within national legal orders, while fatally undermining legislative sovereignty and its corollary: the prohibition of judicial review of statute. In Part III, I provide an overview of how the CLO operates, focusing on the organ charged with managing the system: the European Court of Human Rights. Parts II and III give empirical content to the notion of a CLO, explain its emergence, and establish criteria for normative evaluation. Central to the account is the claim that two processes – the evolution of constitutional pluralism at the national level; and the development of rights cosmopolitanism at the transnational level – are causally connected to one another. The first process destroys traditional models of the national legal systems in which the notions of constitutional unity and centralized sovereignty overlap and reinforce one another. The second process generates a new, transnational legal system in which the judicial authority to develop and enforce fundamental rights is decentralized.

¹ The universalist may also seek to derive the content of rights from normative arguments that one would be required to accept regardless of one’s moral views or cultural standpoint (Finnis 1980; Nickel 1987).

I. Kantian Analogs

In “Perpetual Peace among States,” Kant (1994a [1795]) held that in a “state of nature,” nations would find themselves recurrently beset by conflict and war, and thus incapable of establishing international Right. Kant insisted that states, like individuals, could achieve peace and freedom only by subjecting themselves to “universally valid public laws,” which he associated with a “constitution” (whether codified or not). Existing constructions of sovereignty and international law, by contrast, supported the evils to be eradicated. In his essay, Kant outlined a blueprint for achieving peace and Right in the form of 6 preliminary and 3 definitive articles. The preliminary articles ban treacherous dealings among states, including preparation for war. States subscribing to these laws would form a security community in which the threat of armed conflict would be eradicated. The definitive articles establish factors deemed necessary for a cosmopolitan system to sustain itself over time. Partly for this reason, social scientists have treated these elements as variables, and Kant’s arguments as testable hypotheses.

The first factor (definitive article) concerns the political organization of the state, which must be “republican.” By republican, Kant meant a form of government in which executive and legislative powers are separated, “equality among citizens” secured, and tyranny avoided. Contemporary Kantians typically script the variable in terms of standard conceptions of “liberal democracy.” A nation that has established a competitive electoral system, independent courts and the rule of law, and basic market freedoms would be included.

The second factor is international organization, what Kant characterized as the building of a “federalism of free states.” Some states, weary with war, would choose to form a “league,” an association designed for the “maintenance and security” of its members. Kant stressed that the federation would constrain but not extinguish “the power of the state,” that is, its sovereignty. The league would not exercise coercive powers within any national order, and every state would be free to quit it at any time. Nonetheless, entering into federation is obligatory if states are to escape the state of nature:

For states in their relation to each other, there cannot be any reasonable way out of the lawless condition which entails only war except that they, like individual[s], should give up their savage (lawless) freedom, adjust themselves to the constraints of public law, and thus establish a continuously growing state consisting of various nations (*civitas gentium*), which will ultimately include all the nations of the world.

Social scientists typically operationalize the variable with reference to state membership in international organizations, and in the type of organizations to which states belong.

The third factor concerns the duty, born by all republican states in the league, to provide “hospitality” to non-citizens. Kant defined the definitive article narrowly: “Hospitality means the right of a stranger not to be treated as an enemy when he arrives in the land of another.” Strangers are to be welcomed, but they do not possess an entitlement to permanent settlement or citizenship; and, in contrast to citizens, a state may expel foreigners who do not abide by its laws.

In other writings, Kant suggested that a wide range of individual rights were implicated in the notion of hospitality and cosmopolitan Right (Brown 2006). These include the freedom: “to establish a community with all”²; to engage in trade and commercial transactions³; and “to make public use of one’s reason.”⁴ To be fully enjoyed, these freedoms would seem to require the provision of civil rights more generally. Thus, some cosmopolitans (Anderson-Gold 1988; Benhabib 2009) extend the concept of hospitality to cover the norms and discursive politics of the international bill of rights.⁵ I treat “hospitality” as the basis for recognizing fundamental rights in this more expansive interpretation of Kant.⁶ As Benhabib (2011) puts it, rights cosmopolitanism flows from “the recognition that human beings are moral persons equally entitled to legal protection in virtue of rights that accrue to them not as nationals, or members of an ethnic group, but as human beings as such.”

I.A. The Democratic Peace and the Cosmopolitan Constitution

Over the past 25 years, political scientists have generated a massive research project designed to test Kant’s ideas. Although scholars continue to refine methods and debate findings, the “democratic peace” has been shown to be remarkably robust, and the independent causal influence of the three variables (liberal democracy, international organization, and economic interdependence) on the outcome (the absence of war between liberal states) has been impressively demonstrated (O’Neal, Russett, and Berbaum 2003).

Peace among nations, although crucial, was not Kant’s only priority. Without a stable peace, achieving cosmopolitan Right – a rights-based, “international rule of law” (Huntley 1996:49) – would not be possible. Kant defined Right as “the sum of the conditions under which the choice of one can be united with the choice of the other in accordance with a universal law of freedom.”⁷ These conditions are “constitutional” in that they ground the legitimacy of all political arrangements, including treaty-based organizations, in a rights-based conception of the rule of law⁸:

Public Right is ... a system of laws for a people, that is, a multitude of human beings, or for a multitude of peoples, which, because they affect one another, need a rightful condition under ... a constitution ... so that they may enjoy what is laid down as Right.⁹

² *The Metaphysics of Morals* (Kant 1996 [1797]: 121).

³ *Ibid.*

⁴ *What is Enlightenment?* (Kant 1994b [1784]: 55).

⁵ Including (Appendix to Benhabib 2009: 702) the United Nations Declaration of Human Rights (1948); the International Covenant on Economic, Social, and Political Rights (1966, entry into force in 1976); and the International Covenant on Civil and Political Rights (1966, entry into force in 1976).

⁶ In the international relations literature, the hospitality variable is commonly operationalized as economic interdependence between states.

⁷ *The Metaphysics of Morals* (Kant 1996: 24).

⁸ “A constitution allowing the greatest possible human freedom in accordance with laws which ensure that the freedom of each can coexist with the freedom of all the other[s], is at all events a necessary idea which must be made the basis not only of the first outline of a political constitution but of all laws as well,” *ibid.*, 89.

⁹ *Ibid.*, 89.

The cosmopolitan constitution is a set of “normative and juridical principles of ... cosmopolitan Right” (Brown 2006: 674). We can understand these principles, once codified as positive law, as a code for universal justice that states voluntarily establish to realize Right.

Because individuals must live together in a limited space with finite resources, freedom of choice will inevitably lead to social conflict; while conflict can be debilitating, it also provides opportunities for generating stable, legitimate governance.¹⁰ Kant conceived of the domain of justice (and of the rightful exercise of public authority, more generally) as those arrangements whose purpose is to determine the acceptable reasons for using state power to restrict an individual’s freedom in specific contexts.¹¹ It follows that, with few exceptions (for example, the prohibition of slavery, torture, and the right of access to justice), rights are not absolute. Rather, they will be “qualified,” their enjoyment subject to limitation when necessary to fulfill legitimate public purposes. The CLO’s primary mission is to render justice in this Kantian sense. Most of the rights that comprise the international bill of rights and the ECHR are, in fact, qualified by limitation clauses; indeed, the qualification comprises part of the norm itself. The task of the European Court is to evaluate the reasons proffered by states to justify infringements of an individual’s Convention rights. The techniques which the Court has developed to do so have been crucial to the regime’s viability (Part III below).

I.B. Transformation

Europe has experienced a deep, structural transformation since the end of World War II. The steady expansion of a zone of “liberal peace” created the conditions necessary, at the international level, for the CLO to materialize. In this variation of Kant’s model, the three definitive articles constitute requirements for the achievement of cosmopolitan right within a zone of liberal peace.

The institutionalization of this transformation broadly conforms to Kant’s model. Under NATO, Western Europe became a security community, in alliance with the U.S. and Canada. NATO membership expanded from 10 members in 1949, to 28 states today; 22 more European states are “partner countries.” The European Coal and Steel Community (1952), followed by the establishment of the European Community (1958), and then the European Union [EU] (1993) grounded the construction of market federalism, a supranational regulatory system, and a corpus of fundamental rights. Today, the EU trades more with the rest of the world than does any other member of the World Trade Organization; and each of its 27 Member States exports more to markets within the EU than to all global markets combined. The Council of Europe, founded by ten states in 1949, completed negotiations of the ECHR in 1950, and the Convention entered into force in 1953. With Protocol No. 11 (entry into force on November 1, 1998), all of the High Contracting Parties accepted the right of individuals to petition the Strasbourg Court, as well as the compulsory jurisdiction of the Court to adjudicate these claims. Today, the Convention system is truly pan-European, covering 47 states with a population exceeding 800 million people.

¹⁰ *The Metaphysics of Morals* (Kant 1996: 121-22).

¹¹ *Ibid.*, 25.

At the national level, the change that matters most concerns the status of fundamental rights. Prior to World War II, only a handful of high courts in the world had any meaningful experience with constitutional judicial review: the authority to invalidate statutes and other acts of public authority that conflict with constitutional norms. After World War II, Western Europe became the epicenter of a “new constitutionalism” (Stone Sweet 2010b) which, with successive waves of democratization, spread across the Continent. The basic formula – an entrenched, written constitution; a charter of rights; and a mode of constitutional judicial review (typically a specialized constitutional court) to protect those rights – was replicated in every new European constitution adopted since 1949.¹²

Kant’s model is dynamic: important outcomes – including peace, economic interdependence, and cosmopolitan justice – can be reached only through learning and adaptation (Cederman 2001). The momentous changes just discussed interact with one another in complex ways, one result of which being an increasingly structured interface between national and international politics. As rights-based constitutionalism diffused to States in Southern Europe, and then across Central and Eastern Europe, membership in NATO, the EU, and the ECHR expanded. As the ECHR evolved into a CLO, the impact of the Convention, too, was registered on multiple levels at once, including the activities of individuals, the decision-making of governmental organs, and the content and dispositions of national and international law.¹³

I.C. Concepts

While framed in Kantian terms, my account of the CLO in Europe is meant to stand on its own.¹⁴ Most important, I argue that constitutional pluralism and rights cosmopolitanism have been co-constitutive of one another in ways that can be charted and assessed. Before turning to the empirics, further elaboration of concepts is in order.

By *rights cosmopolitanism*, I mean the recognition of a legal duty to provide justice under the cosmopolitan constitution. A CLO is a legal system in which all public officials bear an obligation to respect the fundamental rights of every person within their jurisdiction. For courts, this obligation entails rendering justice in the Kantian sense just discussed. The ECHR occupies a central strategic position in the CLO, given that individuals have an unfettered right to petition the Court once national remedies have been exhausted.

Constitutional pluralism is a structural characteristic of a legal system. Within the domestic constitutional order, the term refers to a situation in which two or more sources of enforceable rights, occupying a rank above statute, co-exist. In many national legal systems, three such sources – national constitutional rights, EU rights, and the ECHR – overlap. Individuals have a choice of which source to plead, and judges have a choice of which right to enforce. These choices have consequences, as when national judges prefer to apply European rights, rather than their own constitution law, as a means of raising standards of protection.

¹² The exception is the Constitution of the French Fifth Republic (1958) which did not contain a charter of rights. Beginning in 1971, the Constitutional Council began incorporating rights into the constitution, and this process was completed by the end of the 1970s (Stone 1992).

¹³ These dynamics are documented, for eighteen ECHR States, in Keller and Stone Sweet (2009).

¹⁴ That is, the account does not depend upon its derivability from, or fidelity to, Kantian arguments.

The term, *constitutional pluralism*, also refers to systemic features of the CLO. The fact that ECHR maps onto rights found in national systems undergirds the notion of a multi-level constitutionalism (see Petersmann 2006): no act taken by any public authority, at any level of governance, can be considered lawful if it violates a fundamental right.¹⁵ The structure of authority within this presupposed constitution is pluralistic, in that the system is comprised of discrete hierarchies, national and Treaty-based, each of which has a claim to autonomy and legitimacy. In Europe today, judges intensively interact with one another across jurisdictional boundaries with reference to questions of rights adjudication that they collectively confront.

This paper examines the construction of a pluralistic, constitutional system, a momentous outcome given legacies of the past. In Europe, traditional models of the juridical State are grounded not in notions of legal pluralism, but *sovereignty*.¹⁶ These models depict the legal system as hierarchically organized, with one organ positioned to defend the integrity of the hierarchy of norms that constitutes it. This organ is considered to be the repository of *centralized sovereignty*, to the extent that it possesses a monopoly on the authority to resolve legal questions. In the archetypal cases, a constitutional court (under rights-based constitutionalism) or a parliament (under a regime of legislative sovereignty) are assumed to have the “final word” on questions involving the validity of, or conflict among, legal norms within the system.

A CLO is a legal system in which fundamental rights are enforced by a “decentralized sovereign.” The system is not hierarchically constructed, with one jurisdiction positioned to render a “final word” on the question of legal validity. Rather, what makes the system “constitutional” is an overarching normative structure: a code of rights that national officials are under a legal duty to enforce. In the decentralized model, as Smith puts it, “there is no single hierarchy that encompasses the entire political order, but instead a series of related hierarchies” (Smith 2008: 423). In Europe, states have pooled and then distributed sovereignty in such a way as to create a layered set of nodes of judicial authority to protect rights. Each of these nodes is autonomous; yet the cosmopolitan order exists only in so far as national judges credit their roles in a common project.

¹⁵ This notion, too, can be tied to Kant. As Flikshuh (2000: 170) emphasizes: “Kant does not share the widespread view that we can turn our attention to the issue of cosmopolitan Right only *after* we have settled the matter of domestic justice. The grounds of cosmopolitan justice are identical with those of domestic justice: both follow from the claim to external freedom of each other under conditions of unavoidable empirical constraints. Instead of distinguishing between different theories of justice for the domestic and international contexts, Kant refers to different *levels* of institutionalizing his cosmopolitan conception of Right.”

¹⁶ I define *sovereignty* in narrow, juridical terms, as the formal capacity to make and enforce legal norms. In the international system, states are sovereign in that they are enter into binding agreements with other states and incur duties under international law. Domestically, sovereignty refers to the authority to make and enforce legal norms within the jurisdictional boundaries of the state. The constitutions of liberal states distribute sovereignty among governmental organs, specify procedures for making and enforcing law, and stipulate restrictions on the exercise of public authority through rights. Treaties of the kind discussed in this paper “pool” state sovereignty in order to achieve common purposes. In the EU and the Council of Europe, states have endowed supranational organizations, including the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR) with compulsory jurisdiction over state acts that come within the purview of rights found in EU law and the Convention respectively.

A system of decentralized sovereignty suffers from two generic coordination problems that centralized sovereignty was meant to resolve (see Smith 2008: 427-29). The first problem concerns the source of systemic order which is resolved by the pre-supposed constitution: the overarching framework of fundamental rights that underpins cosmopolitan constitutionalism. The second problem is one of overlapping competences: each high court is under a duty to resolve disputes within the same domain, that of the cosmopolitan constitution. In the CLO, overlapping competences counts as a good in so far as individuals (a) have multiple points of access to the decentralized sovereign, and (b) healthy competition among nodes of authority serves to upgrade, rather than reduce, a collective commitment to rights protection.

II. Constitutional Pluralism and National Legal Systems

The CLO in Europe is comprised of three interlocking elements. First, individuals are able to plead fundamental rights before national judges. Today, all 47 states have incorporated the ECHR into the domestic order, making it binding on public authorities and enforceable by national judges (Appendix 1). Second, national systems of rights protection are formally linked to a legal realm beyond the state, and every individual, regardless of nationality or citizenship, may petition the European Court. Third, the ECHR comprises an autonomous source of rights doctrine. The Court treats the Convention as a “living” instrument, which is interpreted and applied in order to secure the effectiveness of rights, as society evolves.¹⁷ States have no means of blocking applications or the Court’s rulings, which are final (there is no appeal).

In this section, I describe the development of constitutional pluralism within the *domestic* order, a process that removed obstacles to the emergence of the CLO. Most important, it destroyed the constitutional dogmas associated with legislative sovereignty, crucially, the prohibition of judicial review.

II.A. The Supremacy of EU Law and Judicial Review

Constitutional pluralism first emerged in Europe with the consolidation of the doctrines of the *direct effect* and *supremacy* of EU law, announced by the European Court of Justice (ECJ) in the 1960s. As a massive scholarly literature has demonstrated, acceptance of these doctrines by national courts integrated the EU and national systems in complex ways, “constitutionalizing” the regime in all but name.¹⁸ The EC Treaty originally contained no supremacy clause, and the Member States did not provide for the direct effect of Treaty provisions or directives. The doctrine of direct effect entitles individuals to plead entitlements found in the treaties and in directives (EU statutes that Member States are obliged to “transpose” into national law) before national courts. The doctrine of supremacy requires that national judges resolve any conflict between domestic law and EU law with reference, and deference, to the latter. The ECJ justified these moves on the grounds that the Treaty constituted an “autonomous” legal order conferring rights onto individuals.¹⁹

¹⁷ *Loizidou v. Turkey* (Preliminary Objections), Application no. 15318/89, ECHR Judgment of March 23, 1995.

¹⁸ The impact of constitutionalization on European integration has been the focus of extensive empirical research. For a survey of the literature, see Stone Sweet (2010b).

¹⁹ For a review of the ECJ’s “constitutional” case law, see Stone Sweet (2004: ch. 2).

Supremacy challenged the prohibition of judicial review in that it required judges to refuse to apply any norm, including statutory provisions, found to be in conflict with EU law. By 1989, every high court in the EU had accepted supremacy, and the courts of new Member States quickly joined them. The result: all judges acquired the power of judicial review of statute, albeit only in areas governed by EU law, authority otherwise denied to most courts under national constitutional law. In systems in which a constitutional court defends the primacy of the constitution and rights, the ECJ's case law fatally undermined the presumed monopoly of the constitutional judge to determine the conditions under which statutes could be disapplied by the ordinary (non-constitutional) courts.²⁰

The politics of supremacy involved significant inter-judicial conflict (Alter 2000; Slaughter, Stone Sweet, and Weiler, eds., 1998). The ECJ had placed no limits on the doctrine's scope: the most banal provision of an EU directive trumps every conflicting statute, as well as the most sacred provisions of the constitution. Under a regime of supremacy, each extension of EU law would potentially create a gap in national law governed by constitutional courts. In 1974, the German Constitutional Court reacted, declaring that it would review the implementation of directly effective EU law, upon referrals from the ordinary courts and individuals, "so long as the integration process has not progressed so far that Community law also possesses a catalogue of rights ... of settled validity, which is adequate in comparison with a catalogue of fundamental rights contained in the [German] constitution."²¹ In response, the ECJ actively developed such a catalogue, in the guise of (unwritten, judge-made) general principles inspired by the ECHR and "the constitutional traditions common to the Member States." In 1986, the German Court withdrew its objections "so long as the [EU], and in particular the ECJ, generally ensures an effective protection of fundamental rights."²² These "dialogues," and others that followed, did not destroy supremacy; rather, they served to upgrade standards of protection and the authority of courts at both the national and EU levels of governance.

While it may be argued that the supremacy doctrine constituted a sovereignty claim on the part of the ECJ, no national constitutional court has accepted supremacy as the ECJ understands it. The ECJ, in effect, holds that all national judges are agents of the EU legal order, not the national order, whenever they act in domains that fall within the scope of EU law. The ECJ further asserts that it alone has the "final word" when it comes to determining the compatibility of EU law with fundamental rights.²³ National constitutional courts assert that EU law – including the doctrine of supremacy – enters into national law through their own constitution, and does not deprive them of their own "final" authority to control the constitutionality of EU acts. This "jurisprudence of constitutional conflict" (Kumm 2005) is a manifestation, probably permanent, of the pluralistic structure of EU law.

On the ground, most ordinary courts, including supreme courts, routinely behave as faithful agents of the EU order when they adjudicate EU law.²⁴ Some go further, overtly

²⁰ Following from *Simmmenthal II*, ECJ 106/77 [1978] ECR 629.

²¹ *Solange I*, BVerfGE [1974] 34: 269.

²² *Solange II*, BVerfGE [1987] 73: 339.

²³ *Foto Frost*, ECJ 314/85 [1987] ECR 4199.

²⁴ With the enormous expansion of EU law over the past 40 years, national legal autonomy has been all but extinguished in many important policy domains (Kelemen 2010).

leveraging the ECJ in order to expand their own authority and to subvert that of the domestic constitutional order. In the area of workplace discrimination, for example, the German labor courts successfully engaged the ECJ in a joint effort to raise national standards of rights protection. The German Constitutional Court, which had chosen not to aggressively confront discrimination based on sex and age, lost these skirmishes and was forced to adapt, along with every other court in the EU (Stone Sweet and Stranz forthcoming). Today, across Europe, EU fundamental rights are a more important source of non-discrimination law than are national constitutions.

Although elected officials have at times sought to constrain the courts, these efforts failed. In the end, governments too adapted. With the Maastricht Treaty on European Union (1993), the Member States revised the Treaty of Rome, echoing the Court's seminal case law: "the Union shall respect fundamental rights as guaranteed by the European Convention on Human Rights ... and as they result from the constitutional traditions common to the member states as general principles of Community law." In 2009, the Member States promulgated a Charter of Rights (Lisbon Treaty), and accepted (for the first time) the basics of the supremacy doctrine.²⁵ As part of this reform, the EU began formal negotiations to accede to the ECHR in 2011. Accession will further strengthen the ECHR and its Court, adding another layer of pluralism to EU law, and formally integrating the EU's multi-level system into the CLO.

II.B. The Domestification of the Convention

In 1950, when the ECHR was signed, Ireland was the only High Contracting Party with any meaningful experience with rights review. The constitutions of Belgium, France, Luxembourg, the Netherlands, and the UK either did not contain such rights, or they prohibited the judicial review of statutes. The German and the Italian constitutional courts were still being designed. Not surprisingly, a majority of States rejected proposals to grant individuals a right of petition, and to accept the compulsory jurisdiction of the European Court (which began operation only in 1959). With Protocol No. 11 (1998), States embraced a robust legal regime. Two factors are crucial. First, the development of EU law gave national officials, including judges, a chance to adjust to new forms of judicial power under constitutional pluralism. By the end of the 1980s, every high court in the EU had accepted supremacy, and judicial review of statute under the supremacy doctrine had become routine. Second, the Soviet bloc collapsed. In the 1990s, with constitutional reconstruction in full swing, the EU and the Council of Europe offered admission to post-Communist States on the basis of certain conditions, including a commitment to rights protection. Locking them into the ECHR, and placing them under the supervision of its Court, was an obvious means of securing that commitment.

Protocol No. 11 confers upon the Court compulsory jurisdiction over individual petitions that claim a violation of Convention rights, after extinguishing national remedies. If the Court finds a violation, it may award monetary damages. Unlike a national constitutional court, the Court has no authority to invalidate a national norm that conflicts with the Convention. In the 1970s, the regime received only 163 individual petitions, rising to 455 in the 1980s. Under Protocol No. 11, the number of petitions exploded. In 1999, the Registry of the Court received

²⁵ While the ECJ's fundamental rights jurisprudence remains in place, rights-oriented litigation under the Charter is likely to increase substantially.

8,400 complaints, a figure that has increased every year thereafter. In 2010, the Court registered 61,300 applications. Although some 96% of all petitions will be ruled inadmissible for one reason or another, the Court is overloaded. The annual rate of judgments on the merits shows the same trend. Through 1982, the Court had issued, in its history, only 61 full rulings pursuant to applications by individuals. In 1999, it rendered 250 judgments; 1,200 in 2005; and 2,607 in 2010.²⁶ Under Protocol No. 11, the Strasbourg Court is the most active rights protecting court in the world.

The necessary conditions for the CLO to appear were satisfied by the terms of Protocol No. 11 coupled with the wide-spread incorporation of the ECHR into domestic legal orders. As Appendix 1 details, domestication proceeded via different routes: express constitutional provision (some post-Communist states); judicial interpretation of constitutional provisions not mentioning the ECHR (most States in Western Europe); or special statutes (UK, Ireland, and Scandinavia). With incorporation, all national courts in the system are capable of enforcing the Convention: individuals can plead the ECHR at national bar; judges are under a duty to identify statutes that conflict with Convention rights; and high courts may refuse to apply statutes that conflict with Convention rights, with the notable exception of those in the UK and Ireland.

Incorporation is an inherently constitutional process: it subverted centralized sovereignty at the national level, while provoking dynamics of systemic construction at the transnational level. The Convention quickly developed into a “shadow,” or “surrogate,” constitution (Keller and Stone Sweet 2008) in every State that did not possess its own judicially-enforceable charter of rights (including Belgium, France, the Netherlands, Switzerland, and the UK). Finland, Norway, and Sweden enacted new Bills of Rights, closely modeled on (and invoking) the ECHR, in order to fill gaps in their own constitutions. In those States that possess, at least on paper, relatively complete systems of constitutional justice, incorporation provides supplementary protection. We find this situation in Germany, Greece, Ireland, Italy, Portugal, Spain, Turkey, and in the post-Communist States. To take an important example, the Spanish Constitutional Tribunal enforces the ECHR as quasi-constitutional norms (Candela Soriano 2008). The Tribunal will strike down statutes that violate the Convention as *per se* unconstitutional; it interprets Spanish constitutional rights in light of the ECHR, wherever possible; and it has ordered the ordinary courts to abide by the Strasbourg Court’s jurisprudence as a matter of *constitutional* obligation, including case law generated by litigation not involving Spain. If the judiciary ignores the Court’s jurisprudence, individuals can appeal directly to the Tribunal for redress. The German Federal Constitutional Court has recently taken a similar position (Hoffmeister 2006). In many post-Communist States, as well, constitutional judges invoke the Strasbourg Court’s jurisprudence as authority, in order to enhance the status of fundamental rights – and hence their own positions – in the national constitutional order (Hammer and Emmert, eds., 2011).

Strikingly, some States give the Convention constitutional rank (e.g., Albania, Austria, Slovenia); and, in the Netherlands, the ECHR enjoys supra-constitutional status. In Belgium, the Constitutional Court has determined that the ECHR possesses supra-legislative but infra-constitutional rank, whereas the Supreme Court holds that the ECHR possesses supra-constitutional status, thereby enhancing its autonomy *vis à vis* the Constitutional Court.

²⁶ Statistics reported on the Court’s website: <http://www.echr.coe.int/echr/>.

One could continue in this vein, but the basic point has been made. The incorporation of the ECHR generated constitutional pluralism and inter-judicial competition within the national order²⁷; it destroyed the doctrines that underpinned centralized sovereignty (e.g., legislative supremacy, the monopoly of constitutional courts over the domain of rights protection); and it enhanced judicial power with respect to legislative and executive power.

II.C. Transformation

Constitutional pluralism expands the discretionary authority of courts. Many judges will now refuse to apply law that conflicts with the Convention; at the same time, they are rapidly abandoning traditional methods of statutory interpretation. Instead of seeking to discern legislative intent, judges increasingly favor the purposive construction of statutes in light of fundamental rights jurisprudence. In systems in which multiple, functionally-differentiated, high courts co-exist (the majority of States), pluralism means that the supreme courts of ordinary jurisdiction are likely to evolve into *de facto* constitutional courts whenever they review the *Conventionality* of statutes (Adenas and Bjorge 2011). France, which for two centuries famously embraced and propagated the dogmas of the General Will (parliamentary sovereignty and the prohibition of judicial review), is now a robust example of pluralism. From the point of view of the rights claimant, the Supreme Civil Court (*Cour de Cassation*) and the Council of State (the supreme administrative court) function as the “real” constitutional courts; and litigants and judges treat the Convention as the “real” charter of rights. The outcome is dictated by the fact that individuals have no direct access to the Constitutional Council; and it is the European Court, not the Constitutional Council, that supervises the rights-protecting activities of the civil and administrative courts. Today, three autonomous high courts protect fundamental rights on an ongoing basis; there is no formal means of coordinating rights doctrine, or of resolving conflicts, among these courts. Without constitutional revision or exiting the ECHR, French officials are now locked into a system of judicial review.

There are two partial exceptions to these trends – Ireland and the UK – States that incorporated the ECHR through special statutes (Besson 2008). Pursuant to the ECHR Act (2003), Irish officials are under a duty to respect and enforce the Convention, and individuals can plead it against all acts of public authority, except those of Parliament and the courts. Under the UK Human Rights Act (2000), individuals may challenge all acts, including Parliamentary legislation; if a Parliamentary statute is found to be incompatible with the ECHR, the high courts are obligated to issue a judgment of incompatibility – but they may not set aside the offending legislative provisions. Declarations of incompatibility are addressed to the Parliament, which must indicate what remedial legislation, if any, will be proposed. In Ireland, the high courts are also required to issue rulings of incompatibility, although Parliament is not obliged to respond to them. Although a surface commitment to Parliamentary sovereignty survives, constitutional

²⁷ The most obvious cases of internal constitutional pluralism are systems in which one finds both (1) a constitutional court which, as a matter of national constitutional law, alone possesses the authority to invalidate statutes that conflict with constitutional rights, and (2) one or several supreme courts which may refuse to apply statutes in conflict with rights found in EU law or the Convention. Today, classic distinctions between the constitutional and ordinary courts, themselves derived from traditional models of legislative sovereignty, are on the verge of extinction (see Garlicki 2005).

pluralism has nonetheless emerged. The courts may apply EU law, including EU fundamental rights and the Charter, against conflicting legislation; the Parliament, however, has the final word with respect to conflicts between statutes and the Convention.

While the dynamics of incorporation are heavily mediated by legal structures and doctrine, strategic interests are always at play. In post-Communist States, the ECHR has played a crucial role in democratic transitions (Hamilton and Buyse, eds., 2011; Hammert and Emmer, eds., 2011). New bills of rights were modeled on the ECHR, with an eye towards future membership in the EU and the Council of Europe; and some States even signed the ECHR prior to ratifying new constitutions (including Albania, Armenia, Azerbaijan, Georgia, Poland, Slovakia, and Ukraine). In the 1990s, incorporation constituted a formal means of committing to the massive institutional reforms being demanded by Western States. For the core States of Western Europe, folding the post-Communist States into the ECHR also fulfilled important strategic interests. Protocol No. 11 reconstructed the regime, making it an extraordinarily efficient mechanism for monitoring the functioning of post-Communist States. For Western States, the cost of Protocol No. 11 is enhanced supervision of their own rights-regarding activities, a cost they have thus far been willing to pay. In today's CLO, there is virtually no State norm or decision that is immune from judicial review.

III. The ECHR as a Cosmopolitan Legal Order

The European Court performs three governance functions. It (1) renders justice to individual applicants, beyond the state (a justice function); (2) it supervises the respect for fundamental rights on the part of State officials (a monitoring function), and (3) it determines the scope and content of Convention rights, in light of state practice within the Cosmopolitan commons (an oracular, or lawmaking, function). The CLO is a pluralistic: sources of rights and jurisdiction overlap. The Court regards the ECHR as a type of transnational constitution,²⁸ but it does not exercise sovereignty within national orders. The Court's case law gains influence domestically only through the complicity of national officials.

III.A. Beyond Minimalism

The CLO has successfully transcended "human rights minimalism." The Court routinely generates new rights and expands the scope of existing ones, placing even powerful States out of compliance with the Convention. This outcome has not influenced the philosophical discourse on rights, which remains dominated by minimalist precepts, and there are good reasons for wonderment. Most of the original signatories of the Convention assumed that the treaty enshrined minimalism, thereby affording substantial latitude in how States would balance public interests and rights (Nichol 2005). One might also suppose that a transnational court would have weaker political legitimacy in comparison with national courts. After all, the typical national judge is embedded in a liberal democratic order, and s/he is a native of the legal system in which the rights conflict has taken place. The transnational judge's gaze, in contrast, is an alien presence. Why has this situation not led to a jurisprudence of rights minimalism?

²⁸ The Court has itself called the ECHR "a constitutional document" of European public law, *Loizidou v. Turkey*, *op cit*.

The answer lies in how decentralized sovereignty operates. Three factors deserve emphasis. First, the Court expends great resources to convince its audience that it fully understands the richness and particularity of the dispute, as well as variation in the relevant national law across the regime. In its rulings, the Court carefully traces the process through which individuals exhausted remedies, and it dwells on the arguments briefed by the defendant State and others filing as *amici*. Findings of violation may not convince States, but it is not plausible to argue that the Court has ignored domestic law and context. The practice also helps the Court provide guidance on how violating States should change their laws, which it now does routinely when the source of a violation is a general legal norm or practice (Sadurski 2009).

Second, the Court has developed an analytical framework – proportionality analysis (PA) – to adjudicate virtually all Convention rights, and it insists that all national courts use it as well. PA is tailored-made for the adjudication of qualified rights in a pluralist setting, and it is the crucial mechanism of coordination in the cosmopolitan order (Kumm 2004; Stone Sweet and Mathews 2008). In the standard sequence, once a judge determines that a right is in play, s/he then verifies (a) that the measure under review was properly designed to achieve a stated purpose (means are rationally related to ends), and (b) that the measure does not infringe more on the right than is *necessary* to achieve objectives (a test for least-restrictive alternatives). Even a law that passes the first two prongs of the test may nonetheless fail a third phase of PA: balancing in the strict sense. In the balancing phase, the judge weighs the cost to the right claimant against the benefits of the measure in light of the facts.²⁹ Thus, how any qualified right is actually enforced will always be contingent upon local law and context, while the State that would infringe a right bears the burden of justifying the necessity of the means chosen. What is common across the national systems that comprise the CLO is not a list of lowest common-denominator norms, but a mode of argumentation, justification, and adjudication: the proportionality framework.

The Court uses PA, in part, to determine how much discretion – the “margin of appreciation” in the jargon – States should have in infringing a right for public purposes. In practice, the Court combines PA with a simple comparative method for determining when “new” rights have emerged in the system. Typically, the Court will raise the standard of protection in a given domain of law when a sufficient number of States have withdrawn public interest justifications for restricting the right. The margin of appreciation thus shrinks as consensus on higher standards of rights protection emerges within the regime, shifting the balance in favor of future applicants. The move will always put some States out of compliance. Nonetheless, the Court can claim that there is an external, “objective” means of determining the weights to be given to the values in conflict, and the Court’s supporters can usually assert that the Court’s bias is majoritarian, transnational, and pro-rights. A State that chooses not to comply is left to defend a lower standard of rights protection, on idiosyncratic or nationalistic grounds. Although States may drag their feet when it comes to implementing controversial judgments, they eventually comply in the vast majority of cases.

²⁹ The European Court often balances within necessity analysis, collapsing the second and third stages.

The saga of *Smith and Grady v. UK* (1999)³⁰ illustrates these dynamics. The case involved a lesbian air force nurse and a gay naval officer who were dismissed pursuant to policy prohibiting homosexuals from serving in the armed forces. Each had been highly recommended for promotion prior to being “outed” by anonymous sources. Smith and Grady sued, pleading Article 8 ECHR (privacy). Although their claims were rejected, presiding judges indicated that the plaintiffs would have prevailed but for the fact that UK judges were bound by the “Wednesbury Reasonableness” test. A deference doctrine derived from the prohibition of judicial review, the test restricts courts from reviewing the merits of a public policy decision unless plaintiffs can show that no rational person would have taken it. (In its ruling, the Strasbourg Court characterized the test as the rights-claimant’s burden “to show that the policy-maker had ‘taken leave of his senses.’”). Clearly uncomfortable with the outcome, the Court of Appeal urged the claimants to go to Strasbourg.

The Court found that the dismissals violated the applicants’ privacy rights, and ordered the UK to pay them £59,000 and £78,000 respectively (the justice function). The Court also took the opportunity to declare the “Wednesbury Reasonableness” test unlawful under the Convention, holding that failure of the courts to use PA had violated the applicants’ right to an effective judicial remedy (Art. 13 ECHR). In this and subsequent cases, the Court required national judges to abandon such deference doctrines. PA is an analytic procedure that requires judges to evaluate the merits of public policy decisions that infringe upon fundamental rights; judges that adopt it are thus fully positioned to render justice in the Kantian sense (the monitoring function). Finally, the Court expanded the scope of the right to privacy (the oracular function): homosexuals may not be excluded from military service. It did so by methodically rejecting each of the UK’s arguments in support of its policy. At the same time, the Court stressed that those “European countries operating a blanket legal ban on homosexuals in their armed forces are now in a small minority.” Although protests were heard, the UK lifted the ban in 2000.³¹

Smith and Grady is just one of hundreds of important cases in which the Court has explicitly rejected a strategy of rights minimalism. It has steadily raised standards of protection with regard to every Convention right, thereby requiring ongoing adjustment on the part of laggard States.

Third, the incentives facing national judges push them toward implementing the Court’s progressive rulings, as well as raising standards on their own (see Bjorge forthcoming). Simplifying a complex topic, there are several basic logics at work. The first is an “avoidance of punishment” rationale: enforcing Convention rights will make the State – in practice, the judiciary – less vulnerable to censure in Strasbourg. This logic is especially pronounced in national systems that otherwise prohibit the judicial review of statute, or do not have a national charter of rights. A second dynamic is embedded in domestic politics. Individuals and NGOs may seek to leverage the ECHR to alter law and policy, and national judges may work to

³⁰ *Smith and Grady v. United Kingdom*, Applications nos. 33985/96 and 33986/96, ECHR Judgment of September 27, 1999.

³¹ The UK had defended the ban as necessary to preserve “unit cohesion,” “morale,” and “operational effectiveness,” to ensure retention of homophobic soldiers, and to protect gay and lesbians from harassment. Commissions charged with reviewing the reform found no significant negative effects.

entrench Convention rights in order to enhance their own authority with respect to legislators and executives. Third, as the CLO gains in effectiveness, the interest high courts have in seeking to influence the evolution of the ECHR increases. Even for a court that is relatively jealous of its own autonomy, constructive engagement is more likely to constrain the Court than the more costly alternatives: defection and open conflict. With regard to domestic arrangements, exercising power within the CLO may well be more attractive than submitting to the authority of the legislature or constitutional court.

III.B. Beyond Individual Justice

Protocol No. 11 fully exposes States to the supervisory machinery of the ECHR, but the reform did not transfer sovereignty to the Court. The Court's formal powers remain tailored to its primary mission: rendering justice to individual claimants. The Court may declare a State violation and order compensation in individual cases, but it exercises no direct authority within national legal orders. Nonetheless, the European Court performs many of the same functions that most national constitutional courts do, using similar techniques, with broadly similar effects (Sadurski 2009; Stone Sweet 2009). The Court confronts cases that would be classified, in the context of national legal systems, as inherently "constitutional." Like national constitutional courts, the Court has consistently held that its precedents bind all judges in the system; it resolves alleged conflicts between rights and State interests through balancing, using PA; and it routinely indicates how a State must reform its law in order to avoid future violations. Moreover, the Court's most important rulings place national policymakers "in the shadow" of future litigation, provoking a politics of adaptation akin to the rights-based jurisgenerativity one finds in national systems of constitutional justice.³²

Appendix 2 provides basic data on applications and rulings for each member of the ECHR since the entry into force of Protocol No. 11 through 2010. The huge number of applications to the Court comprises a fairly direct measure of the enormous social demand for rights protection under the Convention.³³ Pursuant to more than 400,000 petitions, the Court rendered some 10,577 findings of violation, and 588 rulings of no violation; the Court allowed a further 995 cases to be settled by States with the accord of the applicant. Thus, while competition for the Court's attention is fierce, petitioners prevail in more than 95% of cases ruled admissible. The majority of applications are generated by structural deficiencies in a handful of national systems of rights protection.³⁴ Indeed, the Court is flooded by "clone" cases: multitudes of similar applications are chronically reproduced by the same laws or practices. The Court typically uses individual cases to shed light on general problems; it then self-consciously works to help national authorities resolve them. It would therefore be a serious mistake to read the Convention literally so as to conclude that the Court's major function is to render individual justice.

³² Systematic research on the impact of the Court on national law and policy has recently taken off, including Bjorge (forthcoming), Hamilton and Buyse, eds., 2011; Hammert and Emmer, eds., 2011; Helfer and Voeten (2011), Keller and Stone Sweet (2009), and Von Staden (2009).

³³ Petitioning the Court is simple and virtually cost-free: the required forms and easy-to-follow instructions are posted online, and applicants do not need legal counsel, at least not initially.

³⁴ As of the end of 2010, there were 139,630 cases pending before the Court, more than two-thirds of which were generated by just six States: Russia (40,295); Turkey (15,206); Romania (11,950); Ukraine (10,434); Italy (10,208); and Poland (6,452). Data reported by the ECHR in its *Annual Report* (Strasbourg, 2010).

The types of cases the Court faces varies widely.³⁵ The regime's monitoring function is fully engaged when it deals with States that generate serious rights violations (right to life, access to justice, prohibition of torture) and that are all but incapable of maintaining minimal standards of rights protection. Following World War II (e.g., Greece and Turkey), and then again after the collapse of the Soviet Bloc (e.g., Georgia, Romania, Russia, Serbia, and the Ukraine), the Council of Europe chose to admit important States that could not be expected, at least in the near term, to meet the minimal standards of judicial independence and rights protection normally expected for membership. These decisions placed a huge burden on the Court. Today, it regularly confronts cases concerning the organization of elections, high-level malfeasance, and military operations both at home and abroad, without reliance on a "political questions" doctrine, or other deference doctrines that would be anathema to the very notion of a CLO. Prominent examples include dozens of torture and right to life cases involving Russia's response to the insurgency in Chechnya³⁶; laws excluding incarcerated individuals from voting³⁷; and direct executive interference with the operation of the judiciary.³⁸

What the data do not show are the myriad ways in which ECHR membership bolsters weak domestic systems of rights protection. Even the worst "problem" States, such as Russia and the Ukraine (Nußberger 2008), Turkey and Greece (Kaboğlu and Koutnatzis 2008), and many other post-Communist States (Emmert and Hammer, eds., 2011), have undergone massive legal reforms, major progress that would not have been made without ECHR membership and incorporation. The Court is the crucial agent of the CLO within national orders. As Buyse and Hamilton (2011: 300) put it: "Through its jurisprudence and its ripple effects, the Court fosters the values of democracy, plurality, openness and the rule of law. In doing so, it maps the transitional goals to be pursued and helps [post-Communist] societies, through the interplay with national institutions and civil society actors, [to address] current and future threats to democracy and human rights."

States boasting robust systems of domestic rights protection (e.g., Germany, Ireland, and Spain) generate important cases in areas in which the protection offered lags behind that of other important systems, or is absent altogether. The perception of a differential in relative standards across jurisdictions not only attracts applications; it also animates the Court's majoritarian activism and the dynamic of inter-judicial competition that enable the CLO to transcend rights minimalism. Perhaps counter-intuitively, the Court's oracular, law-making function is often most prominently exercised when it deals with high-standard States. Participation in the CLO helps them "fine-tune" rights-protection on the margins. The CLO fills gaps in national protection and demands continuous adjustment on the part of all of its members.

The CLO imperfectly protects rights. It is activated, after all, by the inadequacies of national protection. As Kant recognized, the process of achieving Right is a gradual one.

³⁵ The majority of all cases processed by the ECHR concern the functioning of the judiciary (Arts. 5 and 6 ECHR). Many States, including Western States like France and Italy, are unable to provide final judicial decisions in a reasonable time period, and thus fall afoul of Article 6.

³⁶ *Isayeva v. Russia*, Application no. 57950/00, ECHR Judgement of February 24, 2005; *Khashiyev and Akayeva v. Russia*, Application nos. 57942/00 and 57945/00, ECHR Judgement of February 24, 2005.

³⁷ *Hirst v. the United Kingdom* (No. 2), Application no. 74025/01, ECHR Judgment of October 6, 2005.

³⁸ *Sovtransavto Holding v. Ukraine*, Application no. 48553/99, ECHR Judgement of July 25, 2002.

Constructing a cosmopolitan commons – those norms, procedures, and dispositions that enable a decentralized sovereign to fulfill the rights of persons – is a necessary first stage. But how the CLO will evolve, and the substantive outcomes it will generate, is not predetermined. As Brown (2006: 683) suggests:

Kantian cosmopolitanism has no particular predictive institutional complexion, only the requirement that the process must be the result of a free consensus in line with a priori principles of universal public right. Consequently, a Kantian cosmopolitan constitution should be seen as attempting to establish the legal conditions necessary to facilitate an order of consensual cooperation, enlightenment, coexistence and individual toleration. How complex this cooperative system will ultimately become will be solely determined by the *wills* of various federated states and their shared belief in broadening a condition of cosmopolitan public right.

III.C. Beyond Borders

Securing the rights of marginalized people and groups within national legal systems has become one of the central objectives of the ECHR regime (Dia Anagnostou and Psychogiopoulou, eds., 2010). The Council of Europe manages dedicated programs designed to ameliorate the plight of Roma and Travelers, for example; and the Court has become deeply engaged in supervising national treatment of Roma after findings of violation.³⁹ More generally, treatment of foreign nationals, oppressed minorities, and asylum seekers are major sources of applications and jurisprudence. While no one would claim that the Court, on its own, has the capacity to eliminate such discrimination, the jurisgenerative effects of the CLO on rights politics within States cannot be easily dismissed. Lawyers and NGOs operating at the national level, for example, now routinely leverage the ECHR and the Court's jurisprudence in efforts to change policy and improve the lives of individuals and groups, and these efforts often succeed. State officials may drag their feet on implementation, and they may seek to limit the scope of the Court's rulings. But they remain under the supervision of the Council of Europe and the courts under an expanding Cosmopolitan jurisprudence that shines a bright light on discriminatory practices.

To conclude, I will focus on two strands of Cosmopolitan law that impinge on a State's international relations. In the first, the Court has held that Article 3 ECHR, which prohibits torture and inhumane and degrading treatment, barred States from extraditing individuals to a non-ECHR country when "substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3."⁴⁰ In *Saadi* (2008), the Court, exercising authority to order interim measures under its Rules of Procedure, requested Italy to stay a decision to deport a Tunisian national to Tunisia, pending a ruling on the merits. Italy complied. The Court ruled that deportation of Mr. Saadi would violate Article 3, citing reports by Human Rights Watch, Amnesty International, and the U.S. State Department to the effect that torture and other forms of ill-treatment were routine in

³⁹ See the saga of *Moldovan and Others v. Romania* (no. 2), Applications nos. 41138/98 and 64320/01, Judgment July 12, 2005.

⁴⁰ *Saadi v. Italy*, Application no. 37201/06, ECHR Judgment of February 28, 2008.

Tunisian prisons. The Court pointedly rejected arguments made by the UK, as *amicus*, suggesting that States did not bear the same obligations under the Convention if the ill-treatment was “inflicted by the authorities of another State,” and that “this latter form of ill-treatment should be weighed against the [security] interests” of the community. Unlike most of the Convention, the Court ruled, Article 3 is not qualified by permitted derogations, and thus excludes balancing. The Court’s lack of deference contrasts sharply with the position taken by U.S. courts in cases involving official torture pursuant to “extraordinary rendition.”⁴¹

A second strand flows from a series of rulings that extended coverage of the Convention to State acts that harm people living outside of the territory of the Council of Europe (Gondek 2009). The most dramatic of these require the courts to review the conduct of armed forces acting abroad in wartime situations. In 2011, the Court rendered two major rulings, virtually unanimously on the important points of law. *Al-Skeini*⁴² concerned the deaths of six Iraqi civilians killed by UK patrols during the UK’s participation in the Coalition Provisional Authority (which governed Iraq in 2003-04). The UK Government had denied requests, brought by relatives of five of these victims, for an inquiry and for consideration of liability and compensation. The UK courts dismissed the application for judicial review of the Government’s position on two grounds: that the killings fell outside their jurisdiction, and that the Convention did not cover the relatives of victims. The European Court, echoing prior rulings, held that when a State, “as a consequence of military occupation ... exercises all or some of the public powers normally to be exercised by that Government,” then its responsibilities under the Convention are engaged. Further, “whenever the State through its agents exercises control and authority over an individual ... the State is under an obligation to secure to that individual the rights and freedoms ... that are relevant to the situation of that individual.” For its failure to undertake a formal investigation of the deaths, the relatives of five victims were awarded 40,000 Euros in costs (jointly) and 25,000 Euros each in compensation.

In *Al-Jedda*,⁴³ the Court censured the UK for having imprisoned the petitioner in Iraq for more than three years without bringing charges. In its defense, the UK claimed that Mr. Al-Jeddah had “conspired” to commit acts of terrorism, that his incarceration was necessary for “imperative reasons of security,” and that it was acting lawfully, as an agent of the United Nations under a series of Resolutions of the UN Security Council.⁴⁴ The House of Lords dismissed the case, holding that State obligations under UN Security Council Resolutions overrode those of the ECHR. The European Court found for the petitioner and, in a move of extraordinary importance, positioned itself as a check on the Security Council:

[I]n interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must choose the interpretation

⁴¹ Indeed, the Court has declared admissible an application brought by a petitioner whose case was dismissed by U.S. courts, despite the direct involvement of U.S. government officials (*El-Masri v. Moldova*, Application no. 39630/09).

⁴² *Al-Skeini and Others v. the United Kingdom*, Application no. 55721/07, ECHR Judgment of July 7, 2011.

⁴³ *Al-Jedda v. the United Kingdom*, Application no. 27021/08, ECHR Judgment of July 7, 2011.

⁴⁴ *UNSC Resolution 1546* (8 June 2004), for example, confers authority on the multi-national force to take measures to prevent terrorism.

which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.

From the point of view of Cosmopolitan constitutionalism, *Al-Jeddah* adds another layer of governance to the pluralistic architecture of the CLO. Every public authority, including the UN, bears a duty to justify acts that would have the effect of violating the fundamental rights of individuals that all courts have a duty to protect.

IV. Conclusion

A CLO, which broadly conforms to Kantian notions of cosmopolitan Right and justice, has emerged in Europe. The system was instantiated by Protocol No. 11 [ECHR] and the incorporation of the Convention into national legal orders. The evolution of a pan-European, rights-based commons is the product of momentous, structural transformations. At the inter-State level, the conditions for “perpetual peace” had to be met, and States had to agree to strengthen the supervisory capacities of the European Court. At the national level, elected officials gradually abandoned dogmatic attachments to centralized sovereignty, while judges worked to institutionalize complex forms of constitutional pluralism, thereby enhancing the domestic effectiveness of Convention rights. While other forms of Cosmopolitan order are certainly possible, the ECHR has established significant, general criteria for evaluating a CLO normatively. In Europe, the CLO has transcended “rights minimalism,” grounded an expansive jurisgenerativity, and helped to consolidate constitutionalism in new, post-authoritarian democracies. Further, it renders justice to individuals without regard to nationality or the territory on which rights violations occur; and it admits to no gaps in protection under the guise of a “political questions” doctrine, even with respect to the conduct of war and international politics.

Appendix 1: The Incorporation of the ECHR into National Legal Orders

<u>State</u>	<u>Mode of Incorporation</u>	<u>Rank</u>	<u>Direct Effect</u>
Albania	Constitution	2	Yes
Andorra	Constitution	3	Yes
Armenia	Constitution	3	Yes
Austria	Constitution	2	Yes
Azerbaijan	Constitution	3	Yes
Belgium	Judicial	1, 2	Yes
Bosnia-Herzegovina	Mixed (C/L)	2	Yes
Bulgaria	Constitution	3	Yes
Croatia	Constitution	3	Yes
Cyprus	Legislative	3	Yes
Czech Republic	Constitution	3	Yes
Denmark	Legislative	3	Yes
Estonia	Constitution	3	Yes
Finland	Mixed (C/L)	3	Yes
France	Mixed (C/J)	3	Yes
Georgia	Constitution	3	Yes
Germany	Judicial	3	Yes
Greece	Constitution	3	Yes
Hungary	Judicial	3	Yes
Iceland	Mixed (C/L)	3	Yes
Ireland	Legislative	4	Yes
Italy	Judicial	3	Yes
Latvia	Mixed (C/L)	3	Yes
Liechtenstein	Constitution	3	Yes
Lithuania	Judicial	3	Yes
Luxembourg	Judicial	3	Yes
Macedonia	Constitution	2	Yes
Malta	Legislative	3	Yes
Moldova	Mixed (C/J)	3	Yes
Monaco	--	--	--
Montenegro	Constitution	3	Yes
Netherlands	Judicial	1	Yes
Norway	Legislative	3	Yes
Poland	Judicial	3	Yes
Portugal	Judicial	3	Yes
Romania	Constitution	3	Yes
Russia	Mixed (C/J)	3	Yes
San Marino	--	--	--
Serbia	Constitution	3	Yes
Slovakia	Constitution	3	Yes
Slovenia	Constitution	2	Yes
Spain	Judicial	3	Yes
Sweden	Legislative	3*	Yes
Switzerland	Judicial	3	Yes
Turkey	Constitution	3	Yes
UK	Legislative	4	Yes
Ukraine	Legislative	3	Yes

Key:

Incorporation can occur through a specific constitutional provision, legislation, and/or judicial rulings (typically interpreting the constitutional law as enabling domestication of the Convention).

Rank: Denotes the status, within domestic law, of the ECHR. Key: 1-Supra-Constitutional; 2-Equivalent to the Constitution; 3- Supra-Legislative (Trumps Statutes in Conflict); 4- Infra-Legislative (Does not enable Judges to Set Aside Conflicting Statutes).

Direct effect: "Yes" indicates that the ECHR is directly effective within the national legal order, that is, Convention rights can be pleaded by individuals at bar, and judges can enforce them (applying them to resolve the case).

* In cases in which a statute or ordinance "manifestly" conflict with the ECHR, the latter prevails.

**Appendix 2: The European Court and National Legal Orders under Protocol No. 11
(November 1, 1998-December 31, 2010)**

<u>State Party</u>	<u>Applications</u>	<u>Admissible</u>	<u>Judgments*</u>	<u>Settlements</u>	<u>Finding of Violation</u>	<u>Finding of No Violation</u>
Albania	476	26	24	1	23	0
Andorra	41	3	3	1	2	0
Armenia	1420	26	22	0	21	1
Austria	3849	212	203	17	169	17
Azerbaijan	2523	58	38	0	36	2
Belgium	1846	121	110	12	87	11
Bosnia-Herzegovina	3606	34	13	0	13	0
Bulgaria	8447	429	356	5	332	19
Croatia	6447	189	188	26	154	8
Cyprus	613	52	51	3	46	2
Czech Republic	9353	158	139	8	127	4
Denmark	837	32	22	11	5	6
Estonia	1665	25	23	1	14	2
Finland	2990	143	139	9	111	19
France	19048	736	672	51	537	84
Georgia	4749	40	39	6	32	1
Germany	14924	148	151	9	109	30
Greece	4045	570	533	19	503	11
Hungary	4382	216	206	6	196	4
Iceland	92	9	9	2	7	0
Ireland	468	14	14	1	9	4
Italy	19207	2431	1875	332	1508	35
Latvia	2350	47	45	3	37	5
Liechtenstein	63	5	5	0	5	0
Lithuania	3222	79	58	6	45	7
Luxembourg	303	35	35	3	28	4
Macedonia	2658	78	74	3	68	3
Malta	124	24	26	0	24	2
Moldova	6381	242	170	2	167	1
Monaco	44	1	1	0	1	0
Montenegro	878	3	3	0	3	0
Netherlands	4329	67	74	15	43	16
Norway	717	27	23	0	16	7
Poland	43106	849	829	40	730	59
Portugal	1819	331	183	54	125	4
Romania	34875	808	710	23	667	20
Russia	84775	1717	1007	13	958	36
San Marino	32	8	10	2	8	0
Serbia	6922	119	44	0	43	1
Slovakia	4857	262	238	20	213	5
Slovenia	6627	237	233	3	220	10
Spain	5901	85	68	1	45	22
Sweden	4406	52	51	19	23	9
Switzerland	2958	57	62	2	49	11
Turkey	35152	3113	2429	203	2174	52
Ukraine	30738	982	682	2	676	4
United Kingdom	11881	393	324	61	213	50

* The figure includes ratification of “friendly settlements” and judgments on the merits of the application, but excludes rulings concerning other questions (typically State objections involving remedy and jurisdictional issues).

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