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**Proportionality Balancing and Constitutional Governance**  
**Forthcoming, Oxford University Press**  
**Alec Stone Sweet and Jud Mathews**

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**Chapter 6:**  
**Global Constitutionalism and Transnational Governance**

This chapter examines the evolution of treaty-based human rights regimes in Europe, the Americas, and Africa. States may establish a transnational system of justice through the creation of (i) a charter of rights, (ii) a court to enforce it, and (iii) a means through which individuals can activate judicial review of state compliance with the charter. A highly contentious debate rages over whether a treaty-based international regime can be “constitutionalized” through the gradual accretion of “constitutional” characteristics and functions.<sup>1</sup> Our approach to this issue is primarily empirical. The evidence shows that,

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<sup>1</sup> Walker (2008); Dunoff and Trachtman (2009); Stone Sweet (2009).

under favorable conditions, the efforts of transnational judges to construct a relatively integrated, multi-level system of justice can enhance the effectiveness of *domestic* systems. This is a deep form of constitutionalization that may take place in a regional human rights regimes. The fate of constitutionalization will depend critically on the acceptance, by domestic officials, of the transnational court's authority to resolve disputes of an inherently constitutional nature in the domestic context. Today, the European and the Inter-American courts take pains to portray their role and function in constitutional terms, a posture the three African regional courts appear to be following. They insist on the binding *erga omnes* effects of their rulings, for example; and they routinely stipulate detailed guidelines with respect to how domestic legal arrangements must be reformed in order for a state to comply with the regional charter and its own constitution. Constitutionalization proceeds – it is, in effect, ratified – to the extent that state officials “incorporate” the regional charter of rights into the national legal order, as directly enforceable law with a rank at least above statute.

Each of the five courts under consideration insists on its own primacy with respect to the interpretation of charter rights; each considers such interpretations to be binding on all domestic judges; and each has either stated or strongly implied that states are under a duty to incorporate the regional charter. All have adopted proportionality, which the European and Inter-American courts, in particular, have prioritized as an instrument of transnational governance. National trustee courts can and do resist transnational courts; but an increasing number of have also held that international human rights – and respect for the jurisprudence of the regional court – are an integral part of their own domestic systems of justice. Today, domestic and treaty-based charters overlap, reflect, and reinforce one another; and trustee courts, at both levels, intensively interact with one another on the basis of shared doctrinal commitments to building the effectiveness of rights protection, including the enforcement of the proportionality principle. These facts support the view that a global, rights-based commons has emerged.

## **I Treaty Regimes and Trustee Courts**

In Chapter 1, we discussed the importance of incomplete contracting and imperfect commitment to explain ubiquitous features of domestic systems of justice. Regional conventions on human rights, too, are incomplete contracts, insofar as the member states – as the High Contracting Parties – decline to specify the content and scope of rights provisions. Regional charters resemble domestic charters. They announce a small number of absolute rights (e.g., the prohibition of torture, slavery, and inhuman treatment), before listing the qualified rights. Incomplete contracting, and copying from existing templates, facilitate interstate agreement at the drafting stage, while raising downstream problems of interpretation and enforcement. To resolve these problems, states delegated to trustee courts. The Europe, American, and African courts have used these powers to develop general principles of law in order to increase regime effectiveness. They have developed the proportionality principle, in particular, to enable the close supervision of the rulings of apex national courts. As their dockets have expanded, so has their willingness to give detailed guidance on how domestic systems must be reformed to meet treaty standards of protection.

### Trusteeship and Lawmaking

In the international context, a trustee court can be identified on the basis of three criteria.<sup>2</sup> First, the court is the authoritative interpreter of the regime's law. Its decisions are final; no appeal is possible; and the court holds the authority to resolve any dispute concerning the scope of its own competences. Second, the court exercises compulsory jurisdiction with respect to disputes concerning states'

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<sup>2</sup> Stone Sweet and Brunell (2013).

compliance with their treaty obligations.<sup>3</sup> Third, it is virtually impossible, in practice, for contracting states to reverse the court's important rulings.<sup>4</sup> In trusteeship situations, states are able to override judgments of the court only by revising the treaty, and revising an international treaty requires unanimity of the contracting parties. In this account, courts are trustees of the values – embodied in a charter of rights – placed in trust, and they discharge various “fiduciary” duties in the service of protecting rights (Chapter 1). Of course, courts that meet these criteria vary in the powers they possess, and the effectiveness of the regimes they oversee.

More generally, (i) incomplete contracting, (ii) the established sources of international law, and (iii) decision rules governing treaty revision combine in ways that trustees can exploit in efforts to build systemic effectiveness. By definition, incomplete contracting leaves gaps, both substantive and procedural. The representatives of the founding states of the European, Inter-American, and African Conventions were virtually silent on how rights would be interpreted and applied; and they chose not to elaborate judicial procedures. Each of these courts has used its powers to fill these gaps, not least, through promulgating and revising procedures, and by developing “general principles of law.”

The “general principles of law recognized by civilized nations” comprise one of the sources of law that international courts develop and apply.<sup>5</sup> At the same time, there is no codified statement of their content, and no authoritative, prescribed method for their identification or application. General principles are unwritten, doctrinal constructions curated by judges. Historically, general principles materialized in national judicial decisions, as more or less self-evident propositions, beginning in the late nineteenth century in Europe. Generated in the course of dispute resolution, national judges typically apply them as inherent, taken-for-granted, constituent elements of their legal systems. The proportionality principle first gained traction in exactly this way (Chapter 3). General principles fill gaps, often coming into play when basic texts are absent, including relevant constitutional law and statutes. Over the past half century, with the explosion of new international courts, international judges have become major sites for their development and use.<sup>6</sup>

There is an irony surrounding the “general principles of law recognized by civilized nations.” By definition, they are meant to be already embedded in well-functioning legal systems. Yet when judges identify new principles, reason outward from them, and then apply them broadly across a range of circumstances, they become architects of their own legal systems. Indeed, the development of general principles has catalyzed systemic transformation in a wide range of national and international judicial systems, not least because such principles are foundational norms. Consider how scholars have described their various functions. General principles, it is claimed, lay “down the essential elements of the legal order,”<sup>7</sup> express the “fundamental legal concepts and essential values of any legal system,”<sup>8</sup> and legitimate “all or any of the more specific [legal] rules in question.”<sup>9</sup> As we have emphasized throughout the book, these types of arguments firmly apply to proportionality, wherever apex courts have firmly embraced the principle as an overarching criteria of legal validity and legitimacy.

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<sup>3</sup> The first trustee court in global history – now called the Court of Justice of the European Union – dates only from the 1950s. As Alter (2012, 2014) has documented, compulsory jurisdiction enabling the judicial review of state measures by international courts has since become widespread.

<sup>4</sup> The “principal” in international regimes is a composite of all contracting states, not a unified entity. A composite principal comprising multiple states whose leadership will change periodically (e.g., through elections) is unlikely to possess stable policy preferences over time, further weakening the threat of override.

<sup>5</sup> Art. 38(1)(c) of the Statute of the International Court of Justice, which lists the sources of law that the International Court of Justice, and by extension all other international courts, are under a duty to apply.

<sup>6</sup> For an extended discussion, see Stone Sweet and Della Cananea (2013: 10).

<sup>7</sup> Von Bogdandy (2003: 10).

<sup>8</sup> Hilf and Goettsche (2003: 9–10).

<sup>9</sup> MacCormick (1978: 152).

As in the domestic context, trustee courts possess inherent authority to expand their own zones of discretion (Chapter 1). The Court of Justice of the European Union [CJEU] famously wrote into the treaty law of the EU the doctrines of direct effect, supremacy, and state liability, strengthening the legal system's capacities to deal with state noncompliance with regards to entitlements granted by the Treaty and EU statutes.<sup>10</sup> Each of these doctrines enables individuals to bring actions directly before national judges, who are required to give primacy to any EU legal norm that conflicts with ordinary national law, including statutes. The European Court of Human Rights (ECTHR) treats the convention as a "living instrument": rights are to be interpreted dynamically, and progressively, as European society evolves.<sup>11</sup> In fact, the ECTHR has steadily raised standards of rights protection binding on the members of the Council of Europe, not least through strategic use of PA.<sup>12</sup> For its part, the Inter-American Court of Human Rights (IACtHR) has copied the European approach, including the "living instrument" formulation.<sup>13</sup> The IACtHR combines progressive "evolutive" interpretive techniques with a strong commitment to fulfilling the *pro homine* principle.<sup>14</sup> As the Inter-American Court now reiterates time and again that:

The Court has established, as has the European Human Rights Court, that human rights treaties are living instruments, whose interpretation must go hand in hand with evolving times and current living conditions. ... In this regard, when interpreting [the Convention], it is always necessary to choose the alternative that is most favorable to the protection of the rights enshrined in said treaty, based on the principle of the rule most favorable to the human being.<sup>15</sup>

The African Union's organs (its human rights commission and court) have begun to develop a similar approach,<sup>16</sup> again, as a means of building systemic effectiveness.

### International Courts and Proportionality

The world's most important international courts have embraced proportionality as a general principle of law. In the 1970s and 1980s, under direct German influence, the CJEU, the ECTHR, and the World Trade Organization Appellate Body (WTO-AB) incorporated it without providing supporting legal argument, or citing to the case law of another court.<sup>17</sup> They then developed versions of PA for adjudicating "derogation" or "limitation" clauses, provisions that permit a state to claim an exemption from treaty obligations for measures "necessary" to achieve a sufficiently important public purpose. The adjudication of such clauses is the most controversial task a trustee performs, for three reasons. First, a state does not violate its treaty obligations if the court accepts its claim under a derogation clause. Second, as in the domestic context, courts cannot enforce the proportionality principle without delving deeply into the policy decisions of state officials. Third, a coherent jurisprudence of permitted exemptions establishes regime-wide guidelines for policy-making. In each of the regimes just mentioned,

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<sup>10</sup> Stone Sweet (2004: chapter 2); Stone Sweet and Brunell (2012).

<sup>11</sup> Letsas (2013).

<sup>12</sup> Stone Sweet and Ryan (2018: chapter 5).

<sup>13</sup> On the IACtHR's approach, see De Pauw (2015).

<sup>14</sup> As Mazzuoli and Ribeiro (2016: 94) neatly put it: "The *pro homine* principle ... sets two interpretative rules in international law. First, human rights norms must be extensively interpreted and, conversely, must be restrictively interpreted when they limit protected rights. Second, in case of doubt or conflict between different human rights norms, the most protective norm to the human person—the victim of human rights violations—must be adopted."

<sup>15</sup> Inter-American Court of Human Rights (2012a, *Riffo*).

<sup>16</sup> Shelton (2014: 117). On the importance of the *pro homine* principle to the management of constitutional pluralism in the ECHR, see Negishi (2017).

<sup>17</sup> Stone Sweet and Mathews (2008: 139–159).

judges have developed PA as a means of coordinating lawmaking at the domestic and international levels, if not always successfully. It is worth stressing that these courts could have adopted a more hands-off, deferential standard of review; after all, the contracting parties themselves legislated derogation and limitation clauses. Instead, they embraced an intrusive standard (PA), justifying the move, if at all, as a means of enhancing systemic effectiveness.<sup>18</sup>

The diffusion of PA to international courts reproduced the main features of the process found in the domestic context (Chapter 3). International judges that followed in the footsteps of the courts of the EU, the ECHR, and the WTO cited to those pioneers in support of the view that proportionality constituted an established general principle of law. For example, once treaty-based disputes between international investors and states became commonplace, in the 2000s, arbitration tribunals too began to use proportionality, invoking ECHR and WTO authority.<sup>19</sup> The IACTHR developed a full-blown version of PA in the context of a cluster of freedom of expression cases decided between 2004 and 2009, citing heavily to the ECTHR's case law.<sup>20</sup> And, beginning in 2013, the African Union's court – the African Court on Human and Peoples' Rights (ACTHPR) – too embraced PA,<sup>21</sup> citing to the jurisprudence of the ECTHR and the IACTHR plus the work of the UN Human Rights Committee<sup>22</sup> (UN HRC).

### Effectiveness

In Chapter 1, we discussed the conditions required for any system of justice to gain effectiveness over time: (i) a steady case load; (ii) an accreted jurisprudence, recording how judges have interpreted and applied the charter; and (iii) the acceptance, by state officials, that the court's important rulings possess precedential effects. In a regional human rights regime, the crucial factor is the extent to which officials – in particular, judges on national apex courts – accept the transnational court's evolving jurisprudence as authoritative, and adapt their own decision making to it. Unlike a domestic trustee, no regional human rights court possesses the authority to invalidate a national legal norm that conflicts with the charter, which weakens capacity to control outcomes. For a regional system of rights protection to gain in effectiveness, national officials must be willing to reinvest in its court, knowing that it will sometimes produce what will be, for them, undesirable outcomes.

Of all regional human rights courts, the ECTHR manages the most complete system of justice, processes the largest caseload, and curates the densest and most influential jurisprudence. The institutional development of the European regime closely tracks the consolidation of the “new constitutionalism” on the Continent. Of the original founders of the Council of Europe – of which the ECHR is the centerpiece – only Ireland had any meaningful experience with rights review. In 1950, states rejected creating a court with compulsory jurisdiction; they could, instead, opt-in through an optional protocol. When objections were levied against proposals to allow individual applications, they made the individual petition optional for states as well. They placed an administrative body, the Commission of Human Rights (which began operation in 1954), between applicants and the Court (which began operating only in 1959). Until it was abolished in 1998, it was the Commission's task to process applications, whether from states or individuals. Petitions reached the Court only after the Commission had completed its work, and only under certain conditions.<sup>23</sup>

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<sup>18</sup> Stone Sweet and Brunell (2013).

<sup>19</sup> Stone Sweet and Grisel (2017: chapter 5); Stone Sweet and Della Cananea (2013).

<sup>20</sup> Inter-American Court of Human Rights (2004a, *Herrera-Ulloa*; 2008, *Kimel*; 2009, *Donoso*).

<sup>21</sup> African Court on Human and Peoples' Rights (2013, *Tanganyika Law Society*).

<sup>22</sup> The UN HRC monitors the compliance of state signatories of the International Covenant on Civil and Political Rights. Through the First Optional Protocol, processes individual petitions, which it responds to in “observations,” which are now treated by courts around the world as an authoritative jurisprudence. The UN HRC routinely refers to proportionality in its jurisprudence on the qualified rights.

<sup>23</sup> Keller and Stone Sweet (2008: 13–14).

States transformed the regime through the ratification of Protocol no. 11, which entered into force in November 1998 and binds all 47 members of the Council of Europe. Protocol no. 11 confers upon the Court compulsory jurisdiction over petitions from individuals that claim a violation of Convention rights, after exhaustion of national remedies. If the Court finds a violation, it may award monetary damages. By 1998, new systems of constitutional justice had been established across Europe, in successive waves of democratization. The basic formula of the new constitutionalism – an entrenched, written constitution; a charter of rights; and a trustee court – was replicated in every new European constitution adopted since 1949. After the collapse of the Soviet bloc, with constitutional reconstruction in full swing, the Council of Europe offered admission to post-communist states on the basis of certain conditions, including a commitment to constitutional justice. Locking them into the ECHR, and placing them under the supervision of its Court, was an obvious means of securing that commitment.

The post-Protocol no. 11 reforms not only generated a steady case load: they caused the docket to explode, threatening to overwhelm the Court altogether. The Court registered 49 individual applications in the 1960s, 163 in the 1970s, and 455 in the 1980s. In 1999, the first full year after the reform, the Court received 8,400 petitions. The Court gathered 65,800 in 2013; and more than 150,000 in the latest three-year period. Today, fewer than 3% of all individual applications will result in a judgment on the merits. Through 1982, the Court had issued, in its history, only 61 merits rulings. In the 2001-2016 period, the Court rendered 17,861 fully-reasoned judgments, an average of more than 1,100 per year, more than 85% of which found at least one violation. As the end of 2016, some 79,750 cases were pending, 85% of which were produced by just ten states. The Court has developed, with the support of the member states (through the Committee of Ministers), a variety of means of coping with overload.<sup>24</sup> It relies heavily on precedent-based rulings that contain detailed summaries of its case law, for example, in order to limit redundancy while furnishing useful guidelines to domestic judges on how to enforce the Convention on their own. The Court insists that its important rulings bind all domestic courts; that is, its precedents produce *erga omnes* (not just *inter partes*) obligations. Nevertheless, it will abandon a line of case law in order “to ensure that the interpretation of the Convention reflects societal change and remains in line with present day conditions.”<sup>25</sup>

In summary, the European Court is well positioned to exercise effective trusteeship. On the input side, it can expect to see all important violations of Convention rights. On the output side, the ECtHR has produced a dense and elaborate case law that provides national officials with an authoritative construction of Convention rights. These points made, serious deficiencies in domestic systems have resulted in overload and crisis, threatening the Court’s mission in obvious ways.

In the Inter-American system, constitutional reconstruction has also heavily impacted the court’s evolution. At present, only 20 of the 35 members of the Organization of American States have accepted the compulsory jurisdiction of the IACTHR with respect to disputes referred to it under the American Convention on Human Rights. The scope of the Court’s trusteeship is, therefore, more limited than that of the (post-1998) ECtHR (wherein the acceptance of Protocol no. 11 is obligatory). Of these 20 states, 9 promulgated new constitutions in the 1980s as part of a democratization process that followed periods of authoritarian dictatorship or debilitating civil war (Argentina, Brazil, Chile, El Salvador, Guatemala, Honduras, Nicaragua, Suriname, and Uruguay); 3 states did so in the 1990s (Colombia, Paraguay, and Peru); and 2 more followed in the 2000s (Bolivia and Ecuador). Panama and Costa Rica extensively revised their constitutions in the 1980s, and Mexico transitioned from a one-party state to a pluralist party system in the 1990s. Thus, since the founding of the court, only Haiti and the Dominican Republic,

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<sup>24</sup> Stone Sweet and Ryan (2018: chapter 4).

<sup>25</sup> European Court of Human Rights (1990: para. 35, *Cossey*).

among the states that now accept the IACTHR's compulsory jurisdiction, failed to complete a major constitutional and political transition.

The IACHR continues to use a two-tiered system, with a Commission receiving, processing, and filtering applications (abolished in Europe by Protocol no. 11). In the 2008-2017 period, the Commission received 20,313 applications, accepting only 2,517 of them for "processing." Of these, it referred 146, or 6% of those processed and 0.7% of all applications, to the Court. The Court received its first individual petitions only in 1986, and until 1999, produced only 34 rulings (8.9 per year). Between 2000 and 2017, it issued 220 judgments (12.2 per year), 170 of which were produced during the past decade (2008-2017) (17 per year).<sup>26</sup>

While the IACHR's case load, in comparison to that of the ECTHR, is relatively modest, it has produced a sophisticated jurisprudence. The IACTHR cites routinely to the European Court on virtually all important points of human rights law; indeed, it uses the case law of the ECTHR (and, at times, that of the UN HRC), as a basic template for developing its own jurisprudence. Repeating the formula of the ECTHR, the Court approaches the American Convention as a "living instrument" to be interpreted progressively – in order to raise standards – in light of evolving social conditions and mores.<sup>27</sup> It too has sought to strengthen its trustee status by promoting strong doctrines of precedent. And, in 2013, the Court began to require all domestic apex courts to treat the Convention as if it were "an integral, fundamental, and hierarchically superior norm of the national domestic legal system" itself,<sup>28</sup> and to faithfully enforce the Convention as the Inter-American Court interprets it. This move, too, is reminiscent of the European Court's sustained effort to transform itself into a transnational, constitutional court, although it arguably pushes further. Today, both of these courts have fully embraced the notion that the best way to secure the effectiveness of the regime is to secure the "incorporation" of their respective Conventions into national legal orders at a rank above statute.

For its part, the African Court has struggled to find its legs, in the face of indifference and hostility to rights protection on the part of many of the African Union's 55 members. A 1998 Protocol to the African Charter on Human and People's Rights created the Court, which entered into force in 2004. Inaugural members spent their first years in office building infrastructure. As an official report notes:

[During the 2006-2008 period], the Court worked mainly on its administrative operationalization. At the time the judges assumed duty the Court had no registry, no offices or equipment and resources, no budget or any rules of Court. The judges [therefore] negotiated a host agreement for the seat of the Court in Tanzania, devised a registry structure and recruited registry staff, prepared and submitted budget proposals to fund the functions, and drafted and adopted its ... Rules of Procedure.<sup>29</sup>

Today, 30 states are parties to the 1998 Protocol, but of these, only South Africa possesses a relatively effective system of constitutional justice. Only 8 states – Benin, Burkina Faso, the Côte d'Ivoire, Ghana, Mali, Malawi, Tanzania, and Tunisia – have accepted the Court's jurisdiction with respect to applications from NGOs and individuals, Rwanda having withdrawn its declaration in 2016.<sup>30</sup> The Protocol establishing the Court confers on it jurisdiction over "all cases and all disputes ... concerning the interpretation and application of the Charter ... and any other relevant human rights instrument ratified by

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<sup>26</sup> Source: *Annual Reports* of the Inter-American Court of Human Rights.

<sup>27</sup> Inter-American Court of Human Rights (2004a: para. 166, *Gomez Paquiyauri*).

<sup>28</sup> Dulitzky (2015: 47).

<sup>29</sup> African Court On Human and Peoples' Rights (2012: para. 8, *Report*).

<sup>30</sup> In addition, the Commission on Human and People's Rights may refer cases to the Court.



the States concerned.”<sup>31</sup> The AU Court issued its first judgment on the merits only in 2013; and there are currently 15 such rulings on the books. Ninety-seven cases are pending, the bulk of which were generated by petitions originating in two states: Tanzania (76) and Rwanda (12).<sup>32</sup>

Two other African regional courts have also developed their jurisdiction over rights claims. The Court of the Economic Community of West African States [ECOWAS], which began as a guarantor of economic liberties laid down by the ECOWAS treaty, was fundamentally transformed when member states conferred upon it compulsory jurisdiction over individual petitions, including complaints alleging violations of rights, in 2005.<sup>33</sup> The ECOWAS Court has since asserted its own authority to enforce, as directly applicable law, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the African Charter on Human and Peoples’ Rights. The East African Court of Justice, which awaits formal state approval of its authority to enforce human rights (see below), took it upon itself to render judicially enforceable Article 6 of the Treaty Establishing the East African Community (composed of six member states). This provision enumerates the “fundamental principles that shall govern the achievement of the objectives of the Community,” which include the “promotion and protection of human rights.”<sup>34</sup>

## II Proportionality and Transnational Governance

No regional court can build the effectiveness of a transnational system of justice without the support of the regime’s member states. States, acting in tandem, may curtail the powers of the court, cut its budget, elect judges who have no commitment to rights protection, or abolish the regime altogether. Unilaterally, a state may refuse to comply with rulings, or exit the regime. Why state officials tolerate judicial intrusion, and why they would comply with an unwanted judgment of the court, are complex questions. For any specific case, the factors that help to explain tolerance and compliance, combine in kaleidoscopic ways. Crucial domestic-level variables include the nature of the party and electoral system, the structure of government, the potency of judicial review, and the organization of public and private interests. At the regime level, important factors include the terms of the court’s jurisdiction, the density of its jurisprudence, and how it manages politically controversial cases. As we will see, a court obtains important advantages when it uses PA to adjudicate important cases involving qualified rights. Yet, in doing so, the court highlights its own intrusive powers of supervision and control, which can provoke member state resistance.

Scholars have emphasized two types of logics to explain why states might be induced to support a court determined to enhance the effectiveness of rights protection. The first operates within and through domestic politics.<sup>35</sup> The failure of national systems of justice stokes the demand for rights protection, activates lawyers and public interest groups, and incentivizes the creation of coalitions among actors and institutions (public and private) dedicated to bolstering domestic systems of justice. As a transnational rights regime develops effectiveness, it redistributes legal and political resources within domestic orders in ways that can strengthen the leverage of the regional court. A second set of mechanisms operates at the regime level. States may create trustee courts, and agree to increase their powers over time, as a relatively inexpensive means of monitoring and constraining their neighbors in the region. They may also

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<sup>31</sup> Rule 26 of the *Rules of Court, African Court on Human and Peoples’ Rights*, following from Art. 7, *Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights*.

<sup>32</sup> The source of the data is the Court’s website.

<sup>33</sup> Alter, Helfer, McCallister (2013).

<sup>34</sup> As described below, the Court has also used Article 7.2 as a source for its rights review power.

<sup>35</sup> Simmons (2009); Alter (2014: chapter 2); Sandholtz (2016).

do so in order to make their own commitments to rights credible, both to international and domestic audiences.

These (essentially political) logics plainly influence the behavior of courts and other institutions. Here, we will focus on three *legal* factors that combine to shape a regional human rights court's capacity to build effectiveness, acknowledging the connections between them and underlying political realities. The first is the degree of policy discretion the court grants to states when they act to limit the scope of a charter right. Does the court deploy PA when it adjudicates qualified rights? Or does it defer to state officials when they invoke limitation clauses in important cases? The second concerns the capacity of state judges to influence the decision-making of executives and legislators. Are rulings binding *erga omnes*, with precedential effect? The weaker any domestic system of rights protection, the less likely it will be for a state to implement properly the regional court's jurisprudence. The third involves the formal, legal status of the regional charter of rights within the national hierarchy of norms. In particular, does the charter take precedence over statutes that conflict with rights, and are those rights directly enforceable by domestic judges? A regional court will be in the best position to build the regime's effectiveness (i) if it uses PA while refusing to develop formal deference doctrines, (ii) where domestic courts routinely exercise authority to review the constitutionality of legislative and executive acts, and (iii) insofar as the regional charter has been fully incorporated in domestic legal orders.

### The European Convention

While the politics of rights protection in Europe remains understudied, scholars have nonetheless developed a coherent account of the regime's structure and operation.<sup>36</sup> The foundations of the system were fundamentally transformed by the combined effects of (i) Protocol no. 11, and (ii) the incorporation of the Convention into domestic legal orders. Protocol no. 11 conferred on individuals an unfettered right to petition the Court after exhausting domestic remedies; and incorporation made Convention rights directly enforceable by national judges, as domestic law. Viewed as a multi-level, transnational system of constitutional justice, the European regime is relatively complete. Protocol no. 11 made the decisions of national judges, and every other domestic official, reviewable by the European Court. Incorporation conferred on the judges of virtually every apex court (and most lower courts) a duty to protect Convention rights, decisions that are fully reviewable by the Strasbourg Court.

The Court has styled itself as a transnational constitutional organ with trusteeship responsibilities, which has at times provoked controversy.<sup>37</sup> It is nonetheless indisputable that the Court performs "constitutional" functions, when compared to a national constitutional court. It confronts cases that would definitively be classified as "constitutional" in domestic contexts; and it is likely to receive most important claims rejected by national judges. The Court resolves tensions between rights and state interests in light of the proportionality principle, just as the most powerful domestic rights-protecting courts in the world do. It has steadily raised standards with regard to every Convention right; it holds that its precedents bind all national judges in the system; and it routinely indicates how a state must reform its law, within a stipulated deadline, in order to avoid future violations.

The incorporation process, too, provides support for the constitutional view. Every member state of the Council of Europe has formally integrated the Convention into national hierarchies of norms, typically at a rank enforceable against ordinary statute.<sup>38</sup> Some domestic systems bestow on the ECHR express constitutional status, and still others a supra-constitutional rank. Domestication of the

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<sup>36</sup> Including Anagnostou, ed., (2013); Bjorge (2015); Dzehtsiarou (2015); Føllesdal, Peters, and Ulfstein, eds., (2013); Greer (2006); Keller and Stone Sweet, eds. (2008); Stone Sweet and Ryan (2018: chs. 3–6).

<sup>37</sup> Section based on Stone Sweet and Ryan (2018: chapter 4).

<sup>38</sup> For details, see Stone Sweet (2012b: Appendix 1).

Convention expanded judicial authority across Europe, while undermining classic separation of powers doctrines that had long constrained judicial review. Incorporation helped to complete, or positively instantiate, domestic systems of constitutional justice. These dynamics are most visible when we observe the evolution of national orders that (i) did not have a native and judicially-enforceable bill of rights, and/or (ii) whose courts had been prohibited from enforcing rights against statute. In such situations, the incorporated Convention constitutes the *domestic* charter of rights, filling the void.<sup>39</sup>

The European Court, like the most powerful domestic constitutional courts, enforces Convention rights as positive requirements of legality, binding on all state officials; and it has fully embraced proportionality, which requires domestic officials to justify their rights-regarding decisions with strong enough reasons, if they are lawfully to limit Convention rights. As important, the Court has insisted that all domestic apex courts use PA when individuals plead Convention rights before them. The use of formal deference doctrines – such as *Wednesbury* unreasonableness, political questions, or permissive rationality tests – is precluded, and in conflict with the right to an effective judicial remedy (Art. 13 of the Convention). In the ECHR, the Court explicitly conceptualizes PA as a tool for building effectiveness, and less intrusive alternatives as a hindrance to that same goal. As a result, the ECtHR has been the most important agent of proportionality’s diffusion both within Europe and globally. Of course, how domestic judges actually enforce proportionality varies widely. Generally, the relative effectiveness of domestic systems of justice is strongly correlated with the degree of robustness with which national judges enforce proportionality.

As noted, the European Court is critically overloaded. Unable to provide “individual justice” to every worthy applicant, the Court has steadily enhanced its capacity to render “constitutional justice.”<sup>40</sup> In conjunction with the Committee of Ministers (the executive body of the Council of Europe), it has developed the “pilot ruling,” which permits the Court to adjudicate a representative case, or a set of joined cases, while keeping hundreds or even thousands of similar, “clone” claims at bay. While pilot judgments vary in the specificity of the stipulated remedies, their defining feature is that they involve important, systemic failures of domestic systems, require the offending state to implement general measures capable of bringing the system into conformity with the Convention, and establish a precise time frame for doing so. The Court, again supported by the Committee of Ministers, has also revised its admissibility procedures, making it easier to reject petitions, including when a “well-established case law” is in place, and to focus on important new cases. Underwriting the Court’s strategies for dealing with overload is the constitutional principle of “subsidiarity,” which entails relying heavily on national courts to act as “faithful trustees”<sup>41</sup> of the regime, not least when they apply its existing precedents.

The Court systematically uses PA to adjudicate the qualified rights of the ECHR, which are enumerated in Articles 8-11. Although the terms of the limitation clauses vary slightly, states are permitted to “interfere with,” or “restrict” the “exercise” of, these rights, but only if interferences are “prescribed by law,” and only insofar as they are (in the formulation of Art. 8) “necessary in a democratic society in the interests of national security or public safety for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” In the ECtHR version of PA, the respondent state bears the burden of (i) justifying the interference under a “pressing social need” standard and (ii) showing that the means chosen to achieve the policy objective was “proportionate to the legitimate aim pursued.” The Court uses a rich variety of analytical techniques to adjudicate necessity-based limitation clauses. Most important for present purposes, it deploys the necessity prong of PA to determine the size of a state’s “margin of appreciation”: the zone of regulatory discretion within which domestic officials may lawfully act when they restrict a right under a limitation

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<sup>39</sup> This is the case for, among other states, France and the Netherlands.

<sup>40</sup> Greer and Wildhaber (2012); Stone Sweet and Ryan (2018: chapter 5).

<sup>41</sup> Bjorge (2015).

clause.<sup>42</sup> If the Court finds that a state measure under review is “necessary” to achieve its legitimate goals, the state will maintain its regulatory autonomy within this zone. But the Court may also reduce the margin of appreciation to nil, as when it declares that a right imposes a minimal standard of protection that no public policy interest can override. If it finds that a general measure, such as a statute, is the source of a violation, then the state will be subject to repetitive petitions, findings of violation, and enhanced supervision until it changes its law.

It is well understood that the ECtHR deploys two incompatible versions of the margin of appreciation doctrine, in *Letsas*’ terminology,<sup>43</sup> (i) a “substantive” and (ii) a “structural” version. In the first – which is far and away the dominant form – the Court uses PA to delineate the margin of appreciation. In *Von Hannover No. 2*, expressing the standard (substantive) formulation, the Court stipulated that:

The Contracting States have a certain in margin of appreciation in assessing whether and to what extent an interference with the freedom of expression protected by this provision is necessary. However, this margin goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those delivered by an independent court. In exercising its supervisory function, the Court’s task is not to take the place of the national courts, but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation are compatible with the [Convention].<sup>44</sup>

Thus, the substantive margin of appreciation functions as the transnational analogue of the domestic zone of proportionality (Chapter 5), and the latter can never be dissociated from the former in the multi-level European regime. The substantive version is decidedly *not* a formal deference doctrine: it does not render a legal dispute about rights non-justiciable; and it does not screen domestic acts judicial review by the ECtHR under PA. Indeed, because the substantive margin of appreciation is itself a product of proportionality analysis, the *margin of appreciation* concept adds nothing of interest to what actually takes place – PA – when qualified rights are adjudicated.<sup>45</sup> In contrast, the “structural” version of the margin facilitates a deference posture, albeit atypical, that the Court hides behind for prudential reasons.<sup>46</sup> It has been subjected to enormous criticism, insofar as the Court appears to invoke it in an arbitrary, *ad hoc*, manner in highly sensitive cases.<sup>47</sup> Looking forward, no other regional human rights court has followed the European Court in invoking a structural version of the margin of appreciation.

When the Court is in its normal, “substantive” review mode, PA accommodates what we will call “consensus analysis,” which involves a comparative assessment of the extent to which, and how, states have chosen to restrict rights under the limitation clauses of Articles 8-11. Now fully institutionalized,

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<sup>42</sup> The relationship between PA, consensus analysis, and the margin of appreciation has been the subject of intensive debate; see *Letsas* (2013), *Legg* (2012) and *Dzehtsiarou* (2015).

<sup>43</sup> *Letsas* (2006).

<sup>44</sup> European Court of Human Rights (2012a: 104–105).

<sup>45</sup> As *Candia* (2014 :9) puts the point: “When applying a [substantive] margin of appreciation, the ECHR does not ignore that the test to be employed is highly intrusive. In order to ameliorate a potential conflict with the states parties, the ECHR simultaneously invokes both the margin of appreciation and the principle of proportionality, as if they represented two faces of the same coin. Nevertheless, this use of the margin is merely rhetorical and it does not produce any normative impact on the decision ultimately reached by the Court. Therefore, the sole invocation of the margin of appreciation does not prevent the ECHR from carefully analyzing the merits of each case and balancing the interests involved in it under no specific criteria.”

<sup>46</sup> See the discussion of the religion and abortion cases in *Stone Sweet and Ryan* (2018: 184–196).

<sup>47</sup> *Føllesdal* (2017) and *McGoldrick* (2016) review these debates, and defend a deferential version of the margin of appreciation.

petitioners, the respondent state, and third parties (nongovernmental organizations and states filing as *amici*) collect and report evidence of state practice to the Court, and the Court’s staff undertakes its own investigations. This evidence can take the form of: (i) a count of member states that restrict, or no longer limit, a right in a particular way; (ii) a survey of relevant national legislation, case law, and criminal and administrative norms and practices; (iii) the positions taken by organs of the Council of Europe and the EU; and (iv) relevant global treaties to which states are parties. The Court will typically raise the standard of protection once a sufficient number of states have withdrawn public interest justifications for restricting a right, or committed to higher forms of protection in other ways. Whenever the Court raises the minimal obligatory standard, it puts the laggard states out of compliance. Nonetheless, the Court and its supporters can claim that gauging state consensus – which measures the extent to which states can be considered to have accorded “tacit consent”<sup>48</sup> to raising standards of protection – provides an objective and transnational perspective on the process of “weighing” the values to be “balanced” in any dispute. In our view, the bias towards raising standards over time is defensible in that it is *majoritarian*, *transnational*, and *rights protective*.

The Court’s methods for testing necessity rest on two strong presumptions. The first inheres in the proportionality principle itself: state officials should never be permitted to restrict a Convention right more than is necessary for them to achieve a significant public policy purpose. The second presumption animates “consensus analysis.” If most states in the regime can fulfill a pressing social need without restricting the right so much, or at all, *how can it be necessary for the outlier-laggards to do so?* The presumption is rebuttable, of course, on a showing of extraordinary facts or crisis. The key point is that consensus analysis enables the Court to pursue a strategy of majoritarian activism, which is, in turn, a fundamental mechanism for overcoming rights minimalism. Consensus analysis has its evident instrumental advantages, but it is also compatible with reasoning and principled policy assessment in that it focuses the Court on how moral questions involving rights have been resolved within the domestic orders it supervises.

PA underwrites majoritarian activism, enabling the court to transcend rights minimalism in a wide range of domains covered by each of the qualified rights. The Court has aggressively sought to dismantle discriminatory treatment of gay, lesbian, and transgender people, for example, and to remove restrictions placed on freedom of expression and rights to assembly based on local considerations of public security and morality.<sup>49</sup> Consensus analysis has its limits, however. In domains in which the Court has received few cases, and where state regulation of the rights widely diverges within the regime – freedom of religion, being a prime example – the Court has maintained a cautious posture.<sup>50</sup> In rare but controversial rulings (e.g., involving restrictions on access to abortions), the Court has found strong consensus for raising standards without finding a violation. As noted, in some of these cases, the Court deploys a “structural” version of the margin of appreciation, which has exposed it to strong criticism.<sup>51</sup> Such deference is incompatible with the view that rights constitute positive requirements of legality, and with the basic precepts of proportionality (Chapter 2).

Over the past decade, the notion of “dialogue” between the ECtHR and national courts – with PA providing the analytical vocabulary – has been institutionalized as a quasi-official mechanism of intra-

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<sup>48</sup> Dzehtsiarou (2015: 175–176).

<sup>49</sup> Helfer and Voeten (2014).

<sup>50</sup> Stone Sweet and Ryan (2018: 184–196).

<sup>51</sup> Dzehtsiarou (2015) has undertaken systematic analysis of all ECtHR cases featuring consensus analysis, and has conducted extensive interviews with members of the Court. While Dzehtsiarou is critical of the Court’s inconsistent application of consensus analysis, as we are, he finds that the Court’s methodology has become more consistent over time, and its comparative research more dependable (2015: 30–35).

regime coordination.<sup>52</sup> In a long list of important cases, the Court has strongly supported domestic courts when their rulings had been ignored by executives and parliaments.<sup>53</sup> Yet, there are also politically explosive instances in which the Court disagrees with how a constitutional court has balanced the interests at stake,<sup>54</sup> leading to a finding of violation and a subsequent corrective revision process.<sup>55</sup>

In sum, enforcing the proportionality principle is at the core of transnational governance, and is the basic tool for raising standards and building systemic effectiveness.

### The Inter-American Convention

From the beginning, the Inter-American Court has followed paths first cleared by the ECTHR. Mimicking Strasbourg, the IACTHR characterizes the Convention as a “living instrument,” which evolves, but only progressively, in a rights-protecting direction. The Court systematically engages the ECTHR’s jurisprudence, which it treats as a quasi-authoritative foundation for its own efforts at constructing a “universalistic” and “integrationist” approach to human rights. It insists on the *erga omnes* effects of its case law; indeed, it has pushed further down the path of “constitutionalization” than has its European counterpart. The IACTHR has stressed the formal primacy of the American Convention with respect to national law, asserted its own *bona fides* as a transnational constitutional court, and has refused to develop a deferential, “structural” version of the margin of appreciation.

For much of its existence, the most serious violations of fundamental rights have dominated the Inter-American Court’s docket: those of an “absolute” (or quasi-absolute) nature for which the application of PA is inappropriate. In Europe, such cases – involving the prohibition of torture and inhuman treatment, incarceration without due process, state sponsored killings and “disappearances,” and access to justice, for example – have emanated largely (but not only) from post-Communist states struggling to achieve minimal standards of rights-based constitutional democracy and rule of law. The Strasbourg Court, aided by the Committee of Ministers, has devoted enormous resources in an effort to help national officials confront such failures. In its first decades of existence, the Inter-American Court confronted a long series of complaints, brought against the regime’s largest and most powerful states, involving state-sponsored torture, executions, and disappearances, coupled with systematic failures on the part of domestic authorities, including prosecutors and judges, to hold perpetrators accountable. This experience has decisively contributed to the IACTHR’s refusal to afford states a deferential margin of appreciation, a posture it extended to the adjudication of the qualified rights. Instead, the Court *accords respect* to those domestic courts that demonstrate that they can be trusted to protect Convention rights in good faith.<sup>56</sup> In its rulings, the IACTHR has self-consciously sought to teach an “aggressive”<sup>57</sup> form of PA to domestic judges, which they are required to use when they adjudicate limitation clauses. The strategy implies that the Court is likely to afford some measure of *de facto* deference to those national judges when they demonstrate that they are able to adjudicate the qualified rights in good faith and with respect for its case law.

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<sup>52</sup> The ECTHR regularly invites apex court judges and leading academics from across Europe to annual seminars on inter-judicial dialogue, and issues papers and reports on the state of dialogue in the regime. On issues involving the implementation of its case law, see the European Court of Human Rights (2014; *Dialogue between Judges*).

<sup>53</sup> Including European Court of Human Rights (2004, *Broniowski*); (2009, *Burdov no. 2*); (2012b, *Centro Europa 7*).

<sup>54</sup> For a statistical overview and discussion of the review of domestic apex court decisions by the Grand Chamber, see Stone Sweet and Ryan (2018: 172–174).

<sup>55</sup> For example, European Court of Human Rights (2012a, *Von Hannover*) and its consequences; Stone Sweet and Ryan (2017: 198-201).

<sup>56</sup> Tsereteli (2016: 1098–1100).

<sup>57</sup> Candia (2014: 11).

The American Convention enumerates a long list of rights which are qualified by a diverse set of such clauses. A formulation that first appears in Art. 12 (freedom of conscience and religion) is the basis of slight variations limiting thought and expression (Art. 13), freedom of assembly (Art. 15), association (Art. 16), and freedom of movement (Art. 23):

Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.

The right to equal protection (Art. 24) contains no limitation clause:

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

Article 13 declares the right to privacy, which states may not interfere with in an "abusive or arbitrary" manner. The Court applies a standard form of PA to both the equality and privacy provisions, despite the absence of a limitation clause.<sup>58</sup>

The IACTHR gave priority to proportionality in its first advisory opinion concerning a qualified right (1985),<sup>59</sup> asserting that the ECTHR's approach to freedom of expression was "equally applicable" to the American Convention. It did not receive its first cases in the area, however, until the 2000s. In *Herrera-Ulloa v. Costa Rica* (2004),<sup>60</sup> the Court discussed and then applied "la jurisprudencia constant" [the settled case law] of the ECTHR on press freedoms, holding that the government had failed to demonstrate a "pressing social need" to use criminal sanctions against journalists in order to protect a public official's honor and reputation. It did so on the basis of reasons set out in rulings of the ECTHR. In *Kimel v. Argentina* (2008), the Court made it clear that disputes in which freedom of the press comes into conflict with the "right to have one's honor respected"<sup>61</sup> must be settled through PA, this time more confidently citing to its own jurisprudence, including to the *Herrera-Ulloa* decision. One year later, the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights would summarize the regime's approach to balancing in terms that echo the accounts of Alexy and Barak (Chapter 2):

[I]n order to establish the proportionality of a restriction when freedom of expression is limited for purposes of preserving other rights, three factors must be examined: (i) the degree to which the competing right is affected (serious, intermediate, moderate); (ii) the importance of satisfying the competing right; and (iii) whether the satisfaction of the competing right justifies the restriction to freedom of expression. There are no *a priori* answers or formulas of general application in this field. The results of the analysis will vary in each case; in some cases, freedom of expression will prevail, and in others the competing right will prevail [citing to *Kimel*].

And in *Tristan Donoso v. Panama* (2009), the Court extended the coverage of PA to the right to privacy and, impliedly, to any other qualified right:

The right to privacy is not an absolute one, and, so, it may be restricted by the States provided that their interference is not abusive or arbitrary; accordingly, such restriction

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<sup>58</sup> Rather than testing for "arbitrary and abusive" (privacy), or treating the right to equality as inherently absolute.

<sup>59</sup> Inter-American Court of Human Rights (1985, *Compulsory Membership*).

<sup>60</sup> Inter-American Court of Human Rights (2004b).

<sup>61</sup> Inter-American Court of Human Rights (2008: para. 51).

must be statutorily enacted, serve a legitimate purpose, and meet the requirements of suitability, necessity, and proportionality which render it necessary in a democratic society.<sup>62</sup>

The formulation mimics the “canonical version”<sup>63</sup> of PA developed by the ECTHR.

As in Europe, the adoption of proportionality has provoked a process of deep structural transformation. In the Inter-American regime, only the Colombian Constitutional Court and the Mexican Supreme Court had adopted and developed PA on their own. Today, all high court judges in the regime know that they are required to use PA – as the IACTHR does – when they adjudicate the qualified rights. Not only have the IACTHR organs made this obligation clear, both have taken pains to document, and to comment upon, the enforcement of the proportionality principle in domestic jurisdictions. In the area of freedom of expression, the consolidation of the primacy of PA can be tracked through the recurrent reports of the Commission’s Special Rapporteur. While the first report, of 2002, did not mention proportionality at all, the 2009, 2012, and 2016 editions document how national apex courts deploy PA and cite to the IACTHR’s case law. The high courts of Argentina, Brazil, Colombia, Costa Rica, the Dominican Republic, Panama, Peru, and Uruguay, for example,<sup>64</sup> have been praised for explicitly adopting the Court’s three-part proportionality test.<sup>65</sup>

In the IACHR, as in the European regime, domestic apex courts are required to apply PA when they adjudicate qualified rights; when the latter comply, they engage in a form of doctrinal incorporation. State officials may also incorporate the Convention and accompanying case law directly through interpretation of the constitutional rules governing the relationship between treaty law and national law. In contrast to the European situation, no systematic, comparative scholarship on incorporation of the American Convention, and its impact on law and politics, yet exists. As a formal matter, some constitutions (either explicitly or by way of judicial interpretation) bestow the Convention a rank above statute in the domestic hierarchy of norms (including Brazil, Ecuador, El Salvador, Guatemala, Haiti, Honduras, and Nicaragua). Others confer on the Convention (and other forms of treaty law) a “constitutional” rank (Argentina, Chile, Colombia, the Dominican Republic, Mexico, Panama, Paraguay, Peru, Uruguay), and even “supra-constitutional” status (Bolivia and Costa Rica). As in Europe, the crucial factor for building systemic effectiveness is the willingness, on the part of national apex courts, to enforce the Convention and the IACTHR’s case law at a rank above statute. While the present situation appears a bit of a patchwork, some of the regime’s most important national courts (including in Argentina, Colombia, Mexico, Panama, and Peru) have strongly incorporated the Convention into their own charters of rights.<sup>66</sup>

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<sup>62</sup> Inter-American Court of Human Rights (2009: paras. 56, 76).

<sup>63</sup> Sadurski (2016).

<sup>64</sup> Inter-American Commission of Human Rights (2009a).

<sup>65</sup> “As it has been interpreted in the case law of the inter-American system, Article 13.2 of the Convention requires that the following three conditions be met in order for a limitation to freedom of expression to be admissible: (1) the limitation must have been defined in a precise and clear manner by a law, in the formal and material sense; (2) the limitation must serve compelling objectives authorized by the Convention; and (3) the limitation must be necessary in a democratic society to serve the compelling objectives pursued, strictly proportionate to the objective pursued, and appropriate to serve said compelling objective”; Inter-American Commission of Human Rights (2009b: chapter 3, para. 68).

<sup>66</sup> In a 1996 ruling, the Supreme Court of Argentina “unanimously held that the Constitution includes not only the treaties on human rights, but also the case-law of international tribunals; Lorenzetti (2010). Since at least 1999, the Colombian Constitutional Court (1999) has treated the Convention as a formal part of the Colombian Constitution, binding on the legislature; and it gives special weight to the IACTHR jurisprudence. In 2011, the Supreme Court of Mexico (2011) directed all Mexican judges to ensure that their decisions would be compatible with the American Convention, as interpreted by the IACTHR, provoking further incorporation through constitutional amendments



In contrast as well, the IACTHR does not consider the consensus of the regime’s member states as a substantial factor in determining whether to raise regime standards. The Court, scholars agree, views the relevant practices in most of the states to be a hindrance to effective rights protection, rather than as guidance for raising standards. It does, however, engage in an analogous form of consensus analysis, but on a wider, *global* scale. As noted, the Court systematically engages relevant ECTHR rulings, often using the findings of the European Court as dispositive with respect to foundational questions concerning the scope and content of qualified rights. It routinely invokes the jurisprudence of the UN Human Rights Committee, adopting the latter’s legal definitions and findings as authoritative in cases before it. And the Inter-American Court regularly surveys the rulings of the most important constitutional courts in the world as evidence that directly bears on the question of whether there exists a global consensus on the scope and application of the right in question. The Court’s strategy of legitimation – the deployment of selective “external referencing” to raise standards – depends crucially on PA. In virtually all of the important rulings on qualified rights decided since the late-2000s, the Court insists on the proper use of proportionality because external jurisdictions do; and it takes pains to harmonize its approach with those of judges from around the world. It is important to stress that the Court gives precedence to materials that support raising standards: (i) rights-protecting landmarks of the ECTHR; (ii) the soft law and treaty instruments produced by other international organizations working to raise standards; and (iii) the jurisprudence from higher-standard domestic trustee courts. The IACTHR will also positively reference the rulings of apex courts of the regime’s member states – in particular, of the Colombian Constitutional Court – when they support its own preferred positions.

Two recent landmark cases are illustrative. *Riffo v. Chile* (2012)<sup>67</sup> involved a custody battle between divorced parents, which the Chilean courts settled in favor of the father, given that the mother had entered into a lesbian relationship. Two lower courts had accepted as fact, in findings that the Chilean Constitutional Court did not subject to serious scrutiny, that homosexual relationships were not “normal,” posed “risks” to childhood development, and exposed the children to social “ostracism and discrimination,” as well as to sexually transmitted diseases.<sup>68</sup> In a long and complex ruling, the IACTHR declared that “the principle of equality and non-discrimination had entered the realm of *jus cogens*,” thereby producing positive duties of protection, including for sexual orientation.<sup>69</sup> The Court based much of its analysis on the jurisprudence of the ECTHR and UN HRC.<sup>70</sup> The Court also addressed rights to

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adopted in 2011. The Panama Supreme Court has incorporated the American Convention into its own bill of rights, and has committed itself to “systematically” interpreting the latter in synergy with the former; Panama National Report (2010: para. 73). In 2007, the Constitutional Tribunal of Peru (2007) ruled that all of the judgments of the IACTHR “form part of domestic law under ... the Constitution,” and are binding on all state officials. On the other side of the spectrum, the courts of the Dominican Republic and Venezuela (which denounced the Convention in 2012), are empowered to review the legality of rulings rendered by the IACTHR with respect to the national constitution.

<sup>67</sup> Inter-American Court of Human Rights (2012b).

<sup>68</sup> *Ibid.*, paras. 42–56.

<sup>69</sup> *Ibid.*, paras. 79–90.

<sup>70</sup> Indeed, it cited the ECTHR’s case law as a direct source of authority: “Bearing in mind the general obligations to respect and guarantee the rights established in Article 1(1) of the American Convention, the interpretation criteria set forth in Article 29 of that Convention, the provisions of the Vienna Convention on the Law of Treaties, and the standards established by the European Court and the mechanisms of the United Nations (*supra* paras. 83–90), the Inter-American Court establishes that the sexual orientation of persons is a category protected by the Convention. Therefore, any regulation, act, or practice considered discriminatory based on a person’s sexual orientation is prohibited. Consequently, no domestic regulation, decision, or practice, whether by state authorities or individuals, may diminish or restrict, in any way whatsoever, the rights of a person based on his or her sexual orientation”; *Ibid.*, para. 91.

privacy and family, holding that sexual orientation is covered by both, and declaring Chile to be in violation of the Convention on proportionality grounds.<sup>71</sup>

In *Murillo v. Costa Rica* (2012),<sup>72</sup> the IACTHR confronted a decision of the Constitutional Chamber of Costa Rica's Supreme Court, which had overturned an executive decree permitting in-vitro fertilization on right to life grounds. The Constitutional Chamber, considering the right to life of embryos to be of an absolute nature, had determined that freezing fertilized eggs for future use would expose embryonic life to unacceptable risks. The IACTHR disagreed, declaring that the right to life applied only once an ovum had been implanted in the woman's uterus. As important, the Court stressed that PA – as informed by the analysis of “comparative constitutional law” – would determine the “adequate” balance between a woman's rights to reproductive freedom and the right to life of the implanted embryo.<sup>73</sup> It then marched through the subtests of proportionality, discussing how the ECTHR, the CJEU, the German Federal Constitutional Court, the Spanish Constitutional Tribunal, the U.S. Supreme Court, and the high courts of Argentina, Colombia, and Mexico had balanced, along the way. In the end, the IACTHR found that the prohibition of *in vitro* fertilization failed all three subtests on various grounds. Moving to issues of indirect discrimination, it found that the Chamber's decision would disproportionately impact women, the disabled, and the poor.<sup>74</sup>

In *Riffo*, the Court pointedly refused to consider the absence of regime consensus as a constraint on its decision-making:

With regard to [Chile's] argument that, on the date on which the Supreme Court issued its ruling there was a lack of consensus regarding sexual orientation as a prohibited category for discrimination, the Court points out that the alleged lack of consensus in some countries regarding full respect for the rights of sexual minorities cannot be considered a valid argument to deny or restrict their human rights or to perpetuate and reproduce the historical and structural discrimination that these minorities have suffered. The fact that this is a controversial issue in some sectors and countries, and that it is not necessarily a matter of consensus, cannot lead this Court to abstain from issuing a decision.<sup>75</sup>

In contrast, in *Murillo*, the Court found that regional consensus supported its key determinations:

[E]ven though there are few specific legal regulations on IVF, most of the States of the region allow IVF to be practiced within their territory. ... The Court considers that this practice by the States is related to the way in which they interpret the scope of [the right to life], because none of the said States has considered that the protection of the embryo should be so great that it does not permit assisted reproduction techniques and, in particular, IVF. Thus, this generalized practice is associated with the principle of gradual and incremental – rather than absolute – protection of prenatal life and with the conclusion that the embryo cannot be understood [to be] a person.<sup>76</sup>

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<sup>71</sup> *Ibid.*, paras. 141–146 and 161–172.

<sup>72</sup> Inter-American Court of Human Rights, (2012a).

<sup>73</sup> *Ibid.*, para. 260.

<sup>74</sup> *Ibid.*, paras. 285–304.

<sup>75</sup> Inter-American Court of Human Rights (2012b: para. 92).

<sup>76</sup> Inter-American Court of Human Rights (2012a: para. 256).

In neither ruling does the margin of appreciation feature. Indeed, in *Murillo*, the Court bluntly stated that it “does not consider it pertinent to rule on the State’s argument that it has a margin of appreciation to establish prohibitions such as the one established by the Constitutional Chamber.”<sup>77</sup>

Unlike the ECTHR, the Inter-American Court is competent to render advisory opinions, which it has exploited to underscore its position as the regime’s trustee. In November 2017, the Court issued an important advisory ruling on a reference from Costa Rica, which asked the Court to establish guidelines for the development of legal arrangements capable of adequately protecting the rights of transgender persons and same sex couples, given its ruling in *Riffo*. In response, the Court produced detailed prescriptions for legislative, administrative, and judicial reform. Again, the Court heavily relied on the jurisprudence of the ECTHR and the UN HRC, surveyed the rulings of the region’s apex courts with which it approved, and required the use of PA to evaluate the legality of differences in treatment. In this opinion, and many other recent rulings, the Court’s tenor is one of a full-fledged, transnational constitutional court that commands the obedience of domestic officials. As the Court put it in preliminary remarks, the thrust of which is reiterated throughout the decision:

The Court ... finds it necessary to recall that ... this treaty is binding for all its organs, including the Judiciary and the Legislature, so that a violation by any of these organs gives rise to the international responsibility of the State. Accordingly, the Court considers that [state authorities] must carry out the corresponding conventionality control, which must be based also on the considerations of the Court in the exercise of its non-contentious or advisory jurisdiction.<sup>78</sup>

While firmly entrenched in the Court, the “doctrine of conventionality” – which demands an exceptionally high degree of incorporation – remains controversial, and is not fully supported by all members.<sup>79</sup>

### The African Conventions

In Africa, a minority of states have opted in to regional human rights regimes and, outside of South Africa, few systems of justice are well established on the domestic level. The extant literature on proportionality, incorporation, the impact of regional courts on national law and politics is scant or non-existent for virtually every African state. This point made, the courts of the African Union, the East African Community, and the ECOWAS have steadfastly refused to adopt a “structural,” deferential margin of appreciation doctrine. Each insists that their important rulings produce binding, *erga omnes* effects; and each adopted proportionality during the 2013-2018 period.

The African Union’s Charter on Human and Peoples’ Rights contains a general limitation clause, Art. 27.2, stating: “The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.” Most rights are also subject to an additional form of qualification. Some are to be exercised “within” (freedom of expression) or “accordance with” (right to property) the law; others are “subject” to the requirements of “law and order” (freedom of conscience and religion), or “necessary restrictions” – such as those “enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others” (freedom of association). These differences do not affect how the ACTHPR approaches qualified rights. Instead the African Court

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<sup>77</sup> *Ibid*, para. 316. Dissenting Judge Perez Perez argued that the Court should have deployed a systemic version of the margin of appreciation in deference to Chile, on the basis of a lack of consensus; *Ibid.*, paras. 10-17.

<sup>78</sup> Inter-American Court of Human Rights (2017: para. 26, *Gender Identity*).

<sup>79</sup> See the Separate Opinion of Judge Eduardo Vio Grossi, *ibid.*

holds that Art. 27.2 authoritatively limits all qualified rights, to the exclusion of every other limitation clause, and that it contains an implied proportionality requirement.<sup>80</sup>

The ACTHPR adopted proportionality in its first ruling on the merits, *Tanganyika Law Society v. Tanzania* (2013).<sup>81</sup> The case involved a challenge to the compatibility with the Charter of an amendment to the Tanzanian constitution prohibiting independent candidates from competing in elections. Tanzania agreed that the prohibition restricted the freedom of association and expression, and the right to participate freely in the government (Art. 13); but it claimed that these constraints were “necessary” for reasons of “good governance and unity” – not least to avoid “tribalism” – and thus contributed to “national security, defense, public order, public peace and morality.”<sup>82</sup> The Court responded by asserting that existing “jurisprudence” meant that, once the applicant “has established that there is a *prima facie* violation of a [charter] right,” the state bore the burden of demonstrating that the restriction (i) was covered by Art. 27.2, (ii) was “effected through a ‘*law of general application*,’” and (iii) was ‘*proportionate with and absolutely necessary for the advantages which are to be obtained.*’ [emphases in original].<sup>83</sup> In support, it cited to decisions of the African Commission, the ECTHR, and the IACTHR.<sup>84</sup> After applying each of these subtests, the unanimous Court found for the applicants, and it ordered Tanzania “to take constitutional, legislative and all other necessary measures within a reasonable time to remedy the violations found by the Court and to inform the Court of the measures taken.”<sup>85</sup>

The Court’s choice of remedy in *Tanganyika* raised the linked issues of primacy, compliance, and incorporation. The Tanzanian government retorted with a declaration to the effect that the case was incorrectly decided, “wrong because it [ran] contrary to prevailing [domestic] law.”<sup>86</sup> Officials have refused to comply. The fact that only 8 of the African Union’s 55 members have accepted the Court’s compulsory jurisdiction limits its leverage and means that noncompliance carries little stigma. Yet the Court has not backed down. It reiterated its commitment to robust enforcement of the proportionality principle in two subsequent rulings,<sup>87</sup> while insisting that it would interpret the Charter in light of the human rights standards established in the jurisprudence of the ECTHR, the IACTHR, and the UN Human Rights Committee.<sup>88</sup> In the most recent of these cases, *Umuhoza v. Rwanda* (2017), Rwanda pleaded a “structural” version of the margin of appreciation doctrine, which it claimed was required by the principle of subsidiarity. While the Court touched on subsidiarity considerations with regard to legitimate purpose,<sup>89</sup> it justified the move to full-fledged PA in these terms:

[T]he laws in question should not be applied ... in a manner that disregards international human rights standards. The legitimate exercise of rights and freedoms ... is as important as the existence and proper application of such laws, and is of paramount significance to ... the purposes of maintaining national security and public order. In all circumstances, it is important that restrictions made on the fundamental rights and freedoms of citizens are warranted by the particular contexts of each case and the nature of the acts that are alleged to have necessitated such restrictions.<sup>90</sup>

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<sup>80</sup> African Court on Human and People’s Rights (2013a: para. 107.1, *Tanganyika Law Society*), following the African Commission’s jurisprudence.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*, para. 90.1.

<sup>83</sup> *Ibid.*, para. 106.1

<sup>84</sup> *Ibid.*, paras. 106.1-106.5.

<sup>85</sup> *Ibid.*, paras. 126.3.

<sup>86</sup> Enabulele (2016: 18).

<sup>87</sup> African Court on Human and People’s Rights (2013b, *Konaté*); (2017, *Umuhoza*).

<sup>88</sup> E.g., African Court on Human and People’s Rights (2017: para. 136, *Umuhoza*).

<sup>89</sup> *Ibid.*, para. 138.

<sup>90</sup> *Ibid.*, paras. 148–149.

The African Court has embraced PA, as a tool for building systemic effectiveness, in a regime that remains fragile and largely ineffective.

The East African Court of Justice (EACJ) invented itself as a trustee of a transnational system of justice, in a series of rulings rendered since 2007. As noted, the treaty establishing the East African Community does not contain a justiciable charter of rights, which states promised to provide in a subsequent protocol. The Court nonetheless incorporated international human rights into the treaty, as a set of general principles, through broadly interpreting two provisions of the EAC treaty:

Art. 6: The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include ... good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

Art. 7.2: The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.

From these principles the EACJ<sup>91</sup> has derived (i) its own authority to enforce rights, as law binding on the member states,<sup>92</sup> (ii) the direct applicability of these principles in national legal orders (that is, the rights and principles may be pleaded before national judges who possess the authority to interpret and enforce them),<sup>93</sup> and (iii) the *erga omnes* authority of its interpretations.<sup>94</sup> These moves entail potentially momentous consequences. The Court, after all, does not require petitioners to exhaust local remedies; and the treaty contains a supremacy clause.<sup>95</sup> At a minimum, these elements will combine to make the EACJ the *de facto* court of first instance for many important disputes,<sup>96</sup> while stimulating the use of international human rights law in public interest litigation.<sup>97</sup> Meanwhile, the Court has ruled that the failure of the member states to confer upon it human rights jurisdiction, through the promised protocol, violated the principles of "good governance" and the "rule of law" enshrined in Art. 6 EAC.<sup>98</sup> Indeed, the Court has ordered the East African Community to "conclude the protocol" quickly, a command the Community has thus far ignored.<sup>99</sup>

As the ECTHR, the IACTHR, and the African Court had done earlier, the EACJ first developed PA to adjudicate disputes involving freedom of expression and the press. The first case, *Burundian Journalists' Union v. Burundi* (2015),<sup>100</sup> concerned a 2003 Press Law that required journalists to be accredited by the state, to reveal their sources when asked, and to restrict content in line with government

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<sup>91</sup> See Milej (2018) for an overview of the EACJ's foundational jurisprudence.

<sup>92</sup> The leading case is East African Court of Justice (2007, *Katabazi*).

<sup>93</sup> East African Court of Justice (2015a, paras. 53–68, *Reference by High Court of Uganda*). On the direct applicability of rights within national legal orders, the EACJ cited to the seminal rulings of the Court of Justice of the European Union, *ibid.*, para. 53.

<sup>94</sup> *Ibid.*, para. 58.

<sup>95</sup> Art. 33.2 of the Treaty for the Establishment of the East African Community stipulates that the rulings of the Court "on the interpretation and application of this Treaty shall have precedence over decisions of national courts on a similar matter."

<sup>96</sup> Milej (2018: 113–117).

<sup>97</sup> Oloka-Onyango (2015).

<sup>98</sup> East African Court of Justice (2013: para. 42, *Sitenda Sebalu* [no. 1]); (2015c: para. 84, *Sitenda Sebalu* [no. 2]).

<sup>99</sup> Milej (2018: 110).

<sup>100</sup> East African Court of Justice (2015b: paras. 74–84).

priorities, under pain of punishment through the criminal law. After discussing the importance of free speech and a free press to Art. 6 EAC (the principles of democracy, accountability, and transparency), the Court raised the question of how to adjudicate them:

The Treaty gives no pointer in answer to this question but by reference to other courts, it has generally been held that the tests of reasonability and rationality as well as proportionality are some of the tests to be used to determine whether a law meets the muster of a higher law. In saying so, it is of course beyond peradventure to state that Partner States ... are obligated to enact National Laws to give effect to the Treaty and to that extent, the Treaty is superior law.<sup>101</sup>

With little justification, the Court announced that it would apply the proportionality framework developed by the Canadian Supreme Court (citing to *Oakes* and *Big Mart*; see Chapter 3),<sup>102</sup> finding the Press Law to be a disproportionate limitation of the rights of journalists and readers.

In a second case, *Mseto v. Tanzania* (2018), the managing editor of a newspaper (and an opposition member of parliament) challenged an order issued by the Tanzanian Minister of Information “to cease publication ... for a period of three years,” having been accused of publishing “false” and defamatory news about the country’s president.<sup>103</sup> In response, the government explicitly invoked the proportionality of the measure, claiming that it was necessary for the maintenance of “peace and good order.”<sup>104</sup> The EACJ, building on *Burundian Journalists’ Union*, found a violation on proportionality grounds.<sup>105</sup> Yet the significance of the ruling goes deeper, providing perspective on how the Court sees its (potential) role as transnational trustee in a multi-level system of governance. Most important, the Court stressed the “contextually similar” limitation clauses found in the African Charter, the ICCPR, the ECHR, and the Tanzanian Constitution.<sup>106</sup> After applying PA, it declared the Minister’s order to have violated the charter of rights in the Tanzanian Constitution, in addition to the ICCPR and the African Charter, thereby breaching the principles of good governance, the rule of law, social justice, accountability, and transparency (Art. 6 EAC). The Court then addressed the Minister himself, demanding that he “annul the order forthwith and allow the Applicant to resume publication of *Mseto*.”<sup>107</sup> The Minister has, to date, refused to comply.

In Tanzania, which hosts the EACJ, the judiciary has begun to integrate the Court’s jurisprudence. In a 2018 ruling hailed as a “landmark” in legal circles,<sup>108</sup> Tanzania’s supreme court (Court of Appeal) struck down parts of the Criminal Procedure Act concerning bail procedures as disproportionate, while announcing several “principles governing constitutional interpretation.” The Court declared that the “Constitution is a living instrument having a soul and conscience of its own, and that the provisions of the Constitution touching fundamental rights have to be interpreted in a broad and liberal manner.”

The ECOWAS Court was the last to adopt proportionality, in 2018. The type of cases that dominated its rights-based docket in its formative years may provide part of the explanation. The Court

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<sup>101</sup> *Ibid.*, para. 85.

<sup>102</sup> *Ibid.*, paras. 85–86.

<sup>103</sup> East African Court of Justice (2018: para. 5).

<sup>104</sup> *Ibid.*, paras 32–36.

<sup>105</sup> *Ibid.*, para. 67–69.

<sup>106</sup> *Ibid.*, paras. 62–63.

<sup>107</sup> *Ibid.*, paras. 69–70, 74.

<sup>108</sup> FB Attorneys (February 5, 2018).

rightly considered claims involving slavery,<sup>109</sup> torture,<sup>110</sup> basic primary education for children,<sup>111</sup> the abduction and rape of women by police and military,<sup>112</sup> and the “unlawful deprivation” of life,<sup>113</sup> to involve absolute, not qualified, rights.<sup>114</sup> Nonetheless, NGOs regularly plead proportionality in *amici* briefs<sup>115</sup>; and state representatives to ECOWAS themselves produced a draft *Uniform Legal Framework on Freedom of Expression and Right to Information in West Africa* (2010) that expressly integrated proportionality.<sup>116</sup> The Court finally turned to proportionality in *The Federation of African Journalists v. The Gambia* (2018).<sup>117</sup> The case concerns the use of sedition and criminal libel statutes to fine and imprison journalists who had published articles criticizing the president and ruling party of the Gambia, some of whom were tortured. After invoking the jurisprudence of the UN HRC, the IACTHR, the ECTHR, the African Union Court, and domestic courts on three continents, it announced that:

Having critically examined the criminal laws of the Gambia, the Court [finds] that the criminal sanctions imposed on the applicants are disproportionate and not necessary in a democratic society. ... It is our view that the impugned provisions cast excessive burden upon the applicants in particular, and all those who would exercise their right of free speech, and violate the enshrined rights to freedom of speech and expression under Article 9 of the African Charter, Articles 19 of the ICCPR and Article 19 of the UDHR.

The Court then ordered the Gambia to revise its laws, in order to “decriminalize” journalism.<sup>118</sup> Since the ECOWAS Court, too, “faces an ongoing challenge of securing compliance with its judgments,”<sup>119</sup> the required reforms may not be forthcoming.

In sum, all of the African courts have aggressively asserted their status as trustee of the human rights regimes they manage. Each has committed to an integrationist jurisprudence of rights protection. And each has adopted proportionality to review the lawfulness of state measures, and to provide guidance for domestic reform. The African courts are, nonetheless, hampered by the lack of political will on the part of domestic officials, including judges, to comply with important rulings, and to incorporate the regime’s law into national orders.

### III The Structure of Global Constitutionalism

Throughout the book, we have emphasized that no two systems of constitutional justice are identical, and that there exists significant variation in how trustee courts protect rights and deploy PA. Our discussion here will highlight commonalities: elements of the global constitution that are made visible at a higher level of abstraction. We are also aware that many will find these claims controversial,

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<sup>109</sup> Economic Community of West African States Court of Justice (2008a, *Koraou*).

<sup>110</sup> Economic Community of West African States Court of Justice (2008b, *Manneh*).

<sup>111</sup> Economic Community of West African States Court of Justice (2010, *Rights and Accountability Project*).

<sup>112</sup> Economic Community of West African States Court of Justice (2017a, *Njemanze*).

<sup>113</sup> Economic Community of West African States Court of Justice (2017b, *Kwasu*).

<sup>114</sup> Curiously, as Helfer (2015: 11–12) points out, the ECOWAS Court did not develop a stable version of PA to process free movement claims, as the CJEU does.

<sup>115</sup> Amnesty International (2016).

<sup>116</sup> Art. 1.7 of which states: “Any restriction on freedom of expression shall: a) be provided by law; b) correspond to a necessary and legitimate purpose in protecting the rights of the individual or the public interest sufficiently pressing to outweigh the public interest in, and fundamental importance of, freedom of expression in a democracy; and c) be proportionate to the legitimate aim pursued or sought to be protected.” Economic Community of West African States (2010).

<sup>117</sup> Economic Community of West African States Court of Justice (2018).

<sup>118</sup> *Ibid.*, pp. 47–48.

<sup>119</sup> Alter, Helfer, McCallister (2013: 739).

on the basis of good reasons that have been explicated well elsewhere.<sup>120</sup> Most important, those who firmly object to the extension of the concept of a “constitution” to the international realm, or to a pluralist context, will not accept the conclusions that follow. That point made, our arguments are rooted in actual practice – how the most important courts in the world adjudicate rights and interact with one another – not on assumptions or *a priori* theorizing divorced from practice. At the very least, how courts actually protect rights requires rethinking “the constitutional,” conceptually and normatively, to include the importance of transnational processes of borrowing and external referencing. Proportionality became a principle of global constitutional law because of such processes; and, today, virtually no court in the world deploys PA without also surveying how other prominent courts have done so in similar cases.

### Charters of Rights

Modern charters of rights resemble one another in important ways. They list a small number of absolute rights, including the prohibition of torture, inhumane treatment, slavery, and access to justice; and they contain a longer list of rights qualified by one or more limitation clauses. Similarities in form are not surprising, given that the founders of new constitutions typically modelled charters of rights on existing international conventions and domestic bills of rights (Chapter 1). Constitutional doctrine, too, has converged on a number of foundational points, as trustee courts copy the approaches of their peers that are considered to be successful (Chapters 3, 5). No explanatory account of modern constitutional law can ignore the important role of mechanisms of isomorphism in generating such outcomes (Chapter 1). Trustee courts have mimicked one another, for example, in treating modern charters as “living instruments” – which is perfectly compatible with American-style “originalism”<sup>121</sup> – and in using PA to adapt rights to ever-evolving circumstances. As we have seen, regional human rights, too, enforce charters as “higher law,” while asserting the binding effects of their own jurisprudence on the domestic officials they supervise. As incorporation proceeds, international human rights instruments have been integrated into the “secondary rules” that comprise the domestic constitutional law (Chapters 1 and 2).

While a national charter of rights and the “international bill of rights” are distinguishable on a number of important dimensions, they also perform some broadly similar functions – as secondary rules. As Gardbaum puts it, the “international human rights system has become one of constitutional law in its own right,” not least, in that “the legal status of the protected rights has become similar within each system”:

[R]egardless of the precise legal status of the protected rights *vis-à-vis* other types of international law, the human rights system itself can properly be characterized as a constitutionalized regime *of* international law ... This perhaps parallels the domestic situation in which enactment of a bill of rights may be said to constitutionalize a system of public law ... and parallels the domestic situation in which a bill of rights constitutionalizes a legal system as a whole.<sup>122</sup>

Gardbaum also recognizes the importance of international and regional conventions as supplementary to, or substitutes for, national systems of justice, upon incorporation. The most influential national and

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<sup>120</sup> Walker (2002; 2008).

<sup>121</sup> Originalists have rejected a balancing approach to rights on the grounds that the enacted constitutional text already encodes the balance struck by the framers and ratified by the people, which is binding on courts. Justice Scalia made this argument in *Heller*, Supreme Court of the United States (2008: 634-635). Even accepting the premise of this argument – that courts are bound by the original meaning of a provision –balancing in adjudication is still appropriate if the right was understood as qualified rather than absolute when enacted. As we have seen, modern constitutions imply a duty of dynamic interpretation on judges (Chapters 1, 2, and above).

<sup>122</sup> Gardbaum (2008: 752).



transnational courts share a common approach to rights, as positive requirements of constitutional legality, binding on all public officials. This approach to rights – as the ultimate secondary rules that ground systemic legitimacy – is underwritten by the commitment to enforcing the proportionality principle.

It is a blunt empirical fact that (i) domestic-constitutional, and (ii) treaty-based charters, are increasingly embedded in one another. Many powerful national apex courts enforce international human rights directly, or interpret their own charters in light of the jurisprudence of international bodies, in particular, the ECTHR and the IACTHR. For their parts, the European, Inter-American, and African courts routinely survey the relevant case law of influential domestic courts, which they treat as important findings of fact, and often, applicable law. The IACTHR and the African courts, in particular, see themselves as enforcing a global constitution made up of multiple sources of (overlapping) law, both international and domestic. On the basis of such evidence, some scholars, including Kumm<sup>123</sup> and Stone Sweet,<sup>124</sup> assert the existence of a global constitution and a rights-based commons, which is comprised of shared normative structures (e.g., rights provisions) and practices (e.g., proportionality). Important to the argument is that judges increasingly behave *as if* a multi-level, rights-based constitution – constituted by multiple sources of law – exists. Judges on the world’s most powerful domestic courts are aware that they owe duties to the stakeholders and values of a greater, regional and global system of rights protection. And transnational rights courts are squarely in the business of identifying, and seeking to remedy, failures in national protection.

### Constitutional Pluralism

*Constitutional pluralism*<sup>125</sup> is a structural property of a multi-level system of rights protection that is produced when two situations are combined. The first is “source pluralism.” Within a domestic constitutional order, the term describes a situation in which two or more autonomous sources of judicial-enforceable rights co-exist. In many systems, national and international charters of rights overlap. Typically, when international instruments are incorporated into the domestic order, individuals will have a choice of which charter to plead, and judges may have a choice of which to enforce. Many enforce both, as if the national constitution and the treaty were meant to evolve in synergy. These choices have consequences, as when national judges prefer to apply international rights, as interpreted by an international court, as a means of raising standards of protection.<sup>126</sup> The second is “jurisdictional pluralism.” The fact that treaty-based charters map onto domestic rights undergirds the notion of a multi-level, transnational constitutionalism. The structure of authority within this regime is pluralistic: the “system” is comprised of discrete hierarchies, national and Treaty-based, each of which asserts its own autonomy and legitimacy to enforce rights on the basis of specific legal instruments.

As we have seen, the European and Inter-American systems mix strong doses of both types of pluralism, a situation which the African Courts appear to be eager to construct. Regional human rights courts are fully aware that their effectiveness depends critically on the extent of domestic incorporation and recognition of the authority of their jurisprudence. Put differently, the development of constitutional pluralism is a necessary condition for building the effectiveness of a transnational rights-protecting regime.

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<sup>123</sup> Kumm (2013).

<sup>124</sup> Stone Sweet (2013).

<sup>125</sup> More generally, see Walker (2002); Maduro (2009); Stone Sweet and Ryan (2018: chs. 3, 6).

<sup>126</sup> The German labor courts, for example, rebelled against the failure of the German Federal Constitutional Court to permit PA to adjudicated certain employment discrimination claims. The Court of Justice of the EU sided with the former, and the German Federal Constitutional Court was induced to follow. Case study in Stone Sweet and Stranz (2012).

A multi-level system of justice – wherein rights are enforced by multiple independent courts – will count as a good insofar as the dynamics of constitutional pluralism serve to raise standards of protection, and to domestic fill gaps in protection. Within the ECHR and the IACTHR, interactions among courts – both cooperative and competitive – have rendered systems of justice more effective at both the national and transnational levels. Constitutional pluralism organizes ongoing inter-judicial dialogues concerning the content, scope, and application of rights. In a system characterized by constitutional pluralism, by definition, no court has the “final word” as to how any right provisions is to be interpreted and enforce. At the same time, no court in the system is alone when it protects rights. Today courts routinely reference one another, across borders and levels, in order to bolster the legitimacy of moves to raise standards. In just the last two decades, the creation of a global, rights-based judicial commons has not only raised standards of protection, it has reduced the “fragmentation” of international human rights law, as courts at both levels participate in the development of shared norms, standards, and practices.<sup>127</sup>

### Proportionality and Effectiveness

The book documents the diffusion and institutionalization of proportionality as a general principle of constitutional governance, the reach of which is global. The outcome is a result of a cascade of discrete decisions made by judges operating in vastly different contexts, followed by the support (or at least, the acquiescence) of elected officials. Pioneering courts (in Germany, Canada, the European Union, and the ECHR) enshrined the principle without comment, as if its existence could be taken for granted. Courts that followed cited to their first-wave predecessors, and to one another, as to the existence and appropriateness of the principle. Today, PA is a centerpiece of constitutional adjudication in virtually every jurisdiction that has made progress in building systemic effectiveness.

We have discussed the advantages of adopting PA throughout the book, and will not rehearse those arguments here, beyond making the following summary points. Adopting PA helps judges construct and maintain institutional arrangements that make effective constitutional governance possible. First, PA is a mechanism for rendering qualified rights – which are textually open-ended – more determinate and, therefore, capable of being enforced in a principled way. Put differently, PA “fits” the structure of qualified rights, once a court is tasked with determining how, and under what conditions, officials may legitimately limit the scope of a right. Second, PA underwrites a distinctive juridical theory of rights: as positive constitutional requirements of legality, binding on all officials (Chapter 2). This theory presupposes that a trustee court has a duty to enhance the effectiveness of rights provisions. Third, the consistent use of proportionality will routinely generate a stable dialogic interface between trustee courts and the officials they supervise (Chapter 5, 6). A central mission of a trustee court, domestic or transnational, is to delineate the boundaries of the zone of proportionality within which all other lawmakers may freely exercise their policy discretion. Judges cannot do so without generating constitutional guidelines binding on policy makers (Chapters 2, 5). Fourth, and intimately related to the building of effectiveness, formal deference doctrines have no place in a proportionality-based system of constitutional governance. Such doctrines – including the “systemic” version of margin of appreciation, and doctrines of non-justiciability – are simply incompatible with the theory of rights and trusteeship that undergird modern system of justice. A court may well seek postures of deference in controversial cases, perhaps even to guarantee the viability of fragile systems of justice going forward. In fact, courts can and do build *de facto* deference into PA in myriad ways. But a court that institutionalizes formal deference doctrines that render judicial review ineffective not only abdicates its duties, it becomes complicit in undermining the commitments of the People in the first place.

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<sup>127</sup> See, more generally Andenæs and Bjorge, eds. (2015); Jakubowski and Wierczyńska, eds. (2016); Peters (2017).

## Conclusion

In conclusion, national and transnational trustee courts, through their efforts to enhance the effectiveness of their own systems of rights protection, have consolidated a rights-based constitution of global scope. This constitution, we will argue, possesses a relatively stable structure, comprised of three main components. The first concerns the substantive content of the global constitution: rights. Charters of rights at both the national and international levels resemble one another in form; they perform similar functions; and they overlap and mutually reinforce one another, not least, in formal doctrinal terms. Second, the constitution is enforced by a global polyarchy of courts, in contrast to a hierarchically-organized, domestic system of justice that is managed by an apex trustee court. Taken together, this legal system can be characterized as *constitutional*, *multi-level*, and *pluralist*. The third component is the commitment to enforcing the proportionality principle, as a general principle of law that inheres in modern charters of rights. Embracing PA, this book shows, is the single most important move any trustee court can make, if takes seriously its duty to enhance effective rights protection. Moreover, consistent use of PA will build a common doctrinal interface for cross-jurisdictional dialogues among judges, and inter-branch dialogues between a domestic courts and the policy-makers they supervise. Insofar as it does so, it PA will help to constitute and sustain constitutional governance.