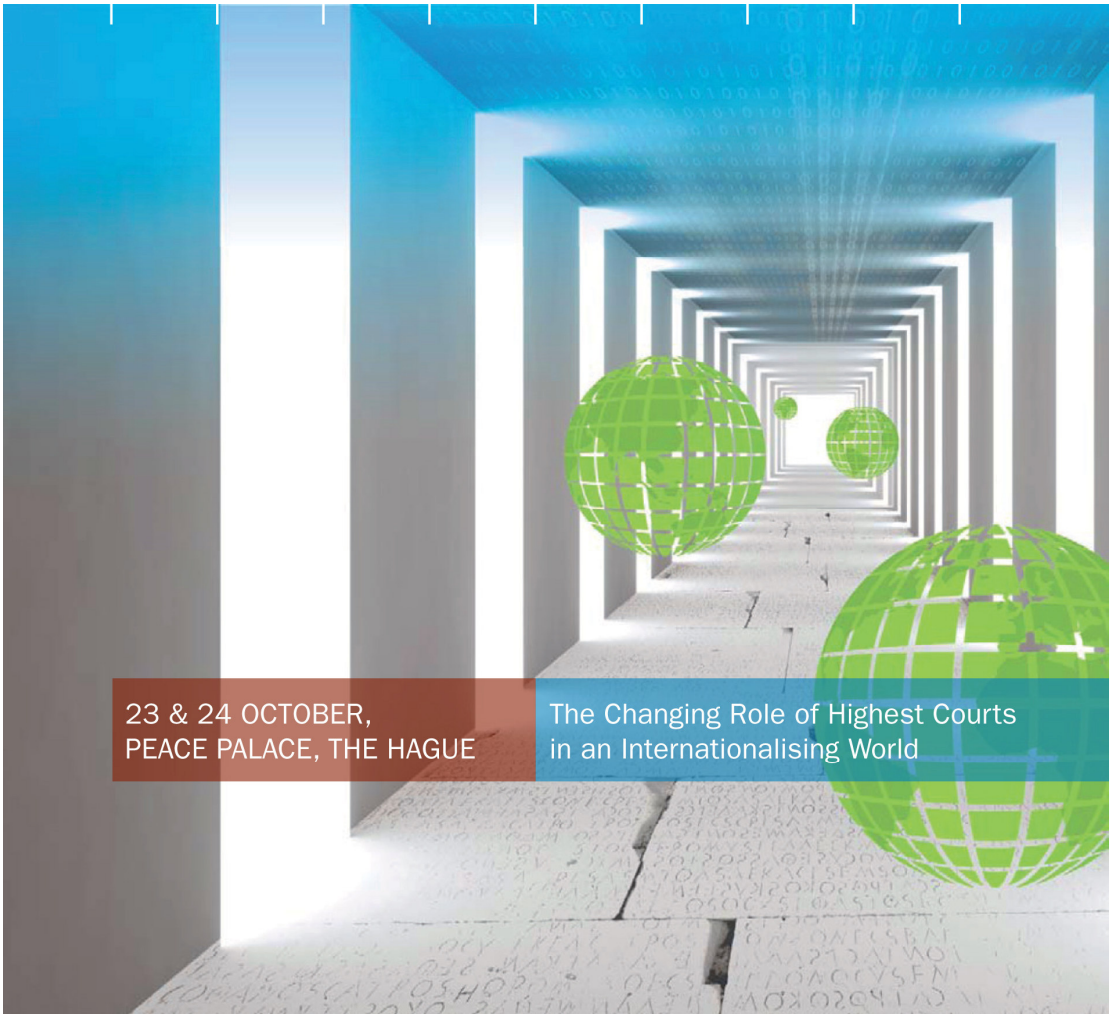
Law of the Future
HiiL – National law in a global society

Inventory and Bibliography
Conference Concept Paper and Outline of Workshops



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2008 Law of the Future Conference

The Changing Role of Highest Courts in an Internationalising World

Inventory and Bibliography
Conference Concept Paper and Outline of Workshops

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PREFACE

How did we get here?

This year, the Law of the Future conference of the *Hague Institute for the Internationalisation of Law* (HiiL) will deal with the changing role of highest courts in an internationalising world. The document before you contains an inventory of the principle challenges which the phenomenon of internationalisation is presenting to highest courts. In addition, the document contains a comprehensive bibliography, and two appendices containing a table of some of the judges' international networks we have found as well as an overview of U.S. Supreme Court decisions citing foreign material.

The conference comes at the end of a two year process in which initial ideas were first raised and then slowly refined. It forms part of a larger effort of the Institute to enhance research around the theme of highest courts and internationalisation.

The theme of 'Highest Courts' emerged within the *HiiL Forum* (where HiiL develops research ideas) in the course of 2006. The thinking process started with a colloquium with more or less the same title that was held in July 2006 in the impressive *Gotische Zaal* (Gothic Chamber) of the Dutch Council of State. The three sub-topics of the current conference originate from the exchanges of views of the impressive group of experts that took part in that event. The discussions have been collected in a publication, which is about to be issued. [1]

The idea for a conference to delve deeper into the issues that arose during the 2006 colloquium was formed towards the end of that year. A Steering Committee for the conference was constituted consisting of Professor John Bell, Professor Ewoud Hondius, Dr. Antoine Garapon, Professor Ton Hol, Professor Marc Loth, Professor Michiel Scheltema, and the undersigned. In the first few months, the group greatly benefited from the input of Judge Wilhelmina Thomassen of the Dutch *Hoge Raad*.

It took almost 9 months to complete this document. Under the general supervision of Ton Hol and the undersigned, a young team of highly talented researchers consisting of Morly Frishman, Youri van Logchem, Kees Quist, and Sidney Richards prepared the first drafts. Later versions of this document greatly benefited from the work of two HiiL team members: Lucy McKinstry and Wouter van Cleef. This assembly of very bright young scholars performed an incredible and very commendable task, covering a highly dispersed field in a relatively short period.

The initial drafts were discussed at a pre-conference workshop held in February of this year at Pembroke College in Cambridge in which the Steering Group and a number of external experts including Justice Michael Kirby, Professor Robert Post, Professor Tim Koopmans, Judge Willem Konijnenbelt, Professor Roel de Lange, and Professor Linda Senden. We are very grateful to the staff of the College and John Bell for all the work that was put into helping us put the event together. Clearly, in this internationalised age, a 'Hague workshop' in Cambridge is a real possibility.

Further comments were received at an internal seminar which was held at the *Hoge Raad* of The Netherlands. We are very grateful to all those who attended – judges and staff – for sharing their insights with us. In particular, we would like to thank the President of the Hoge Raad, Judge Willibrord Davids, Judge Willem van Schendel and Judge Fred Hammerstein.

[1] Muller and Loth (2008)

Highest Courts and Internationalisation is one of the five research themes which HiiL has decided to continue to focus on in the coming years. HiiL is in the final stages of putting together an international research project on the topic of highest courts and internationalisation. That project will start within the HiiL Academy before the year's end and will be principally funded by the Institute. It is also our intention to publish the proceedings of the conference. We will also work on further developing the network that we have been able to build up during the course of our work on the topic. In short: this conference is not a one-off as far as the Institute is concerned: the work will continue!

Finally, we extend our warmest gratitude to a number of organisations who have made significant financial contributions to this project: the Dutch Ministry of Justice, Maison Descartes and Caselex. In general, this project has depended on the continued support of many of HiiL's partners: we thank all who have helped us get to this point.

Sam Muller, *Director HiiL*
The Hague, September 2008

Part I: GENERAL INTRODUCTION

GENERAL INTRODUCTION

Positioning the judiciary in an internationalised world

1 Context of the debate

The context within which the social, economic and political spheres of human activity take place is becoming increasingly internationalised. As trivial as this assertion may seem, it raises serious obstacles for those coming to terms with this phenomenon, whether practically and conceptually. At one end of the spectrum, much intellectual energy is being expended in the search for conceptual and theoretical clarity in what remains an opaque field of inquiry. Despite these efforts, the difficulties posed to practitioners have become no less challenging. Because of globalisation, professionals within a variety of disciplines are seeing changes in the nature of their tasks.

National highest courts are amongst the actors that feel the exigencies of globalisation most keenly and urgently, for several reasons. First, these institutions are faced with the intellectual task of taking legal notions that have traditionally found their sole application within the domestic sphere and successfully transposing them to an internationalised environment. These notions (e.g. legal unity, judicial legitimacy and, more generally, the political ideals of democracy and accountability) are in need of critical re-examination in light of globalisation if they are to retain their foothold in the modern world. Second, and more importantly, highest courts are charged with the responsibility of dispensing justice at the national level within a world in which problems frequently transcend borders. Ultimately, the task incumbent upon highest courts is simply 'to deliver the goods', despite the changing contexts precipitated by globalisation. The expectations that these domestic institutions must meet therefore include certain standards of what might be called 'output legitimacy'. In other words, national highest courts are required continually to ensure an adequate measure of domestic justice, *despite* the increasing interconnectedness of legal orders.

The changing role of national highest courts within an internationalised world constitutes the central theme of the 2008 Law of the Future conference. The general focus of The Hague Institute for the Internationalisation of Law (HiiL) research programme on *National Law in a Global Society* (i.e. the challenges faced by national legal orders as a consequence of globalisation) is considered from the vantage point of national highest courts. This perspective was chosen because of the unique responsibility of these courts as organs and, in many ways, protectors of their respective legal orders. The complexity of the present subject matter and an extensive process of consultation with both academics and practitioners have led to a conceptual division of labour in the form of three parallel workshops, each of which aims to consider the present issues from a specific angle and within a workable scope.

The following section provides a general overview of the issues involved, after which the details of each workshop will be addressed in sequence. This document also contains a bibliography of relevant publications on the theme of judicial internationalisation.

2 Statement of purpose and objectives

One difficulty that is endemic to all scientific enterprise, and particularly to the present debate, involves the clear separation of descriptive statements from normative judgments. The framework of this inventory report is predicated on the desire to avoid prejudging the normative dimensions of judicial internationalisation, a term that is elaborated further in Section 3. At this point, the elements of a provisional definition include the incremental process whereby judges cite the decisions of their foreign counterparts, engage in transnational dialogues, attend conferences and

generally show themselves to be highly attentive to developments beyond their own national borders.

Similar to the voluminous body of texts on globalisation, the body of scholarship dealing with judicial internationalisation is replete both with studies documenting novel and significant empirical developments and with papers either praising or deriding the development on normatively informed grounds. This inventory report is not committed to the proposition that judicial internationalisation is a good thing, nor that it is a bad thing. This is also the view adopted by HiiL. It simply asserts that – for better or for worse – judicial internationalisation is *happening*, and it compels both legal practitioners and legal scholars to engage the phenomenon in an appropriate manner.

The first objective of the conference is therefore *empirical clarification*. What exactly is taking place under the heading of judicial internationalisation? Have the day-to-day activities of national highest courts changed as a result of judicial internationalisation and, if so, how and to what extent? Does judicial internationalisation pose new challenges to national highest courts and, if so, how are these challenges being addressed? Which developments are ephemeral, amounting to little more than the organic outgrowth of domestic practices, and which developments are uniquely attributable to processes of judicial internationalisation?

The second objective is *conceptual comprehension*. Assuming that it is possible to discern a distinct body of legal phenomena resulting from processes of globalisation, how can these phenomena be explained? Do models or theories exist that can shed light on the multitude of empirical data and reduce the overwhelming complexity of the legal world to manageable proportions?

The final objective is *critical evaluation*. Does the fact that judicial internationalisation *is* mean that it *ought to be*? Even though many facets of contemporary jurisprudence are unavoidably international, many facets are also quite avoidable. Judges are adopting an internationalised disposition, even when they are not formally compelled to do so by their national constituencies. How can these choices be justified? Are they even in need of justification, or are their normative foundations self-evident?

It is our firm belief that these objectives can be met only if practitioners and academics can find a mutually beneficial mode of dialogue. A good concept is one that has practical currency, and good practice is reflective and critical, as well as conceptually sound.

3 Central notions

The central notions within the present debate – globalisation, internationalisation, highest courts, and legitimacy – constitute an expansive array of concepts.[2] When understood in their broadest possible sense, these notions are poorly suited as a foundation for meaningful discussion. An overly general scope is likely to generate haphazard and wayward discussions. Phrases that are overly narrow, however, are likely to hinder the objective of bringing together participants from a wide and diverse range of backgrounds. Concepts must be tailored to allow for such cross-disciplinary exchange.

The objective of the following section is therefore to outline the way in which the central notions of this conference will be operationalised. Two points should be kept in mind. First, the objective of this inventory report is to provide a base for further discussion; it is not intended to advance any authoritative claims of its own. This general introductory section therefore provides a basic outline; it does not comprise a detailed and rigid definitional ambit. Second, even when the focus is not explicitly specified, this inventory report is concerned with national highest courts and their relation to the various concepts that are presented and discussed.

3.1 Globalisation

Although the term 'globalisation' eludes precise and exhaustive definition, the general sense of integration, interconnectedness and mobility that it conveys should be intimately familiar to almost anyone who considers it.[3] The various constituent elements of modern society – people, institutions, information and markets – are increasingly operative at regional and global levels. In almost every way imaginable, the world is becoming smaller. For some, this process holds out the promise of a more just and prosperous world that is capable of acting in concert to tackle collective problems at a global level. For others, however, globalisation may ultimately be a cause of calamity and affliction, increasing economic and social inequality in the world whilst adding a newly enlarged, global dimension to regional conflicts.

Despite the paradigmatic assumption of sovereignty in which nation-states effectively control the activity within their own borders, the possibility that this basic state capacity is diminishing as a consequence of globalisation is a source of there is a lingering uneasiness. This consequently gives rise to the fear that, if globalisation cannot be controlled, it can also not be halted should these fears prove well founded.

To a large extent, governance has become a concept that transcends borders. Despite all the far-reaching consequences (implicit or explicit, potential or real) of globalisation and the internationalisation of the domestic arena, however, it is important to realise that the national legal order is ultimately still of paramount importance. In the absence of a world government – and concomitantly a world legislature, executive and judiciary – domestic courts must dispense justice at the only level that is currently feasible: the national level. Indeed, the continuing relevance of national legal orders within an internationalised environment is the reason that HiiL exists. Nation-states continue to bear ultimate responsibility for 'delivering the goods' to citizens. The national legal orders in which they operate retain pride of place. Both complicating factors – the decreasing autonomy of nation-states and the continuing relevance of the national legal order – lie at the heart of the HiiL research programme.[4] Despite the continued relevance of national legal orders, however, the consequences of globalisation *are* far-reaching, and this fact complicates the core judicial task of reaching decisions on concrete contentious issues brought before the courts.

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[2] We refer the reader to the bibliography for relevant sources.
[3] For an operational definition of globalization as it relates to national legal systems, please see Paragraph 2 of the HiiL Research Programme (available at http://www.hiil.org/index.php?page=hiil-research-programme)
[4] HiiL Research Programme *National Law in a Global Society* (Section 3) (available at http://www.hiil.org/index.php?page=hiil-research-programme)

Highest courts currently face a number of concrete challenges. One involves the proliferation of legal sources and the resulting potential for conflict. Highest national courts are increasingly becoming actors of the international legal order, in the sense that they are frequently the *de facto* executive agents of international treaties. When conflicts arise between these twin responsibilities (with regard to the national as well as the international legal order), the task of finding an appropriate solution lies with the highest courts themselves. A further complication involves the sheer complexity of the problems brought before today's courts. In many instances, the law is simply silent, calling upon judges to deliver sound decisions in an uncertain environment. Globalisation has increased the likelihood that judges will be faced with cases that lack a clear precedent in either legislation or case law.

An additional challenge involves the fact that technological advances are now providing judges with convenient access to the decisions of their foreign counterparts. Conversely, these facilities are exposing national judicial decisions to the watchful eye of foreign legal professionals. Particularly in the realm of basic rights (e.g. rights related to such issues as abortion, euthanasia, privacy and terrorism prevention legislation) courts are being scrutinised by a global public, rather than one that is purely national. Furthermore, the notion of human rights is increasingly becoming more than mere rhetoric as constitutional and supranational courts all over the world are forcing governments to adapt and change their policies in light of human rights treaties. This aspect of globalisation involves an undeniable element of global normative pressure.

Economic integration, which is one of the driving forces behind globalisation, also pressures highest courts to be attentive to the consequences of their decisions for the position of their own countries within a global setting. Considerations of trade and investment are closely related to the suitability of particular national legal systems, with large corporations often diverting their business activities to countries in which the legal climate is most favourable. Insufficient harmonisation or integration hampers the ability of a country to retain a competitive edge as corporations opt to channel their business toward more hospitable areas of the globe.

As a corollary to the points raised above, highest national courts often have no choice but to consider the international dimension of their activities, whilst simultaneously balancing these considerations with their essentially domestic basis of legitimacy. As stated before, this inventory report (and HiiL) provides no judgment on the relative merits of globalisation. Instead, it aims to point out some of the difficulties that arise as a consequence of the empirical fact that globalisation is indeed taking place.

3.2 Highest courts

Up to this point, we have made liberal use of the term *national highest courts* without further specifying its precise meaning. This is due to the plain fact that institutional arrangements tend to vary significantly from country to country. In many cases, several of these courts co-exist within a single country, differentiated according to specific areas of law. Examples include constitutional courts (as in the German *Bundesverfassungsgericht*), administrative courts (as in the French *Conseil d'État*) and courts of cassation in civil and criminal matters (as in the Dutch *Hoge Raad)*. In some states, these functions converge in a single highest court (as in the US Supreme Court). Highest courts also vary in the extent to which they do or do not possess the power of judicial review.

One common feature of all these various models is that the primary task of the highest courts is to ensure the unity and integrity of their respective legal orders (or sub-orders). When international challenges are transposed onto the domestic legal sphere because of globalisation, national highest courts must ensure the effective implementation of such extra-domestic influences without

endangering the unity and integrity of the law, particularly as it pertains to the national legal orders in which they operate.

The rest of this inventory report proceeds from this basic shared feature of highest national courts. The sections addressing the individual workshops qualify this definition according to the needs of specific debates.

The shared feature noted above reflects the intimate relationship maintained between a highest court and its own distinctive national legal order. In conceptual terms, a highest court actually implies the existence of such a domestic constituency. The exigencies of globalisation impel highest courts to consider the fact that such notions as sovereignty and territoriality are becoming ever more diffuse. As a regulative ideal, however, highest courts must act upon the premise that the domestic legal order can be *conceived* of as a generally delineated legal sphere distinct from that of other countries and from the international order as such.

3.3 Legal system

As indicated above, and in conformance with the HiiL Research Programme, national legal orders retain their central role within today's legal universe.[5] Nevertheless, the underlying assumptions of a national legal order – most importantly, the idea that a legal order is tied to a single territory – is difficult to reconcile with the idea that national borders are becoming increasingly porous. The rigorous distinction between the domestic and the international legal order is clearly becoming increasingly difficult to make, as is the rigid separation between domestic legal orders themselves, leading toward what might be termed a 'transnational legal order'.

Against this backdrop, questions arise concerning the relevance of legal *systems* (i.e. species or types of legal orders, such as civil and common-law systems) relative to legal *orders* (i.e. particular instances of a legal system). For example, international and transnational forces could hypothetically have a homogenising force on legal systems, facilitating the convergence between civil and common-law systems. It is just as plausible, however, that such an influence would heighten domestic awareness of – and allegiance to –the principles of the domestic legal system.

A particularly interesting question for the purposes of this inventory report thus concerns whether and how different legal systems respond to internationalisation. As discussed in the following section, one of the contested practices is the citation of foreign precedents by domestic courts. Although such practices are an essential part of the normal activities of common-law judges, the borrowing of precedents could be controversial for continental European or US constitutional judges, in the light of such political doctrines as the separation of powers and related theories of interpretation (e.g. originalism in the United States).

This having been said, we do not wish to overstate the divide between legal systems, particularly between the traditions of civil law and common law traditions. One important reason is that, in many cases, the legal system as such is not the main source of difference. For example, the mode of operation of the US Supreme Court in constitutional matters resembles that of the German constitutional courts in many respects, despite the distinction between common and civil law.

[5] Moreover, the HiiL Research Programme understands legal systems 'to consist of the law itself (statutes, case law, procedures), institutions (legislature, courts, and other legal bodies), and the relevant actors (judges and other relevant (legal) actors)' (Section 1).

Legal systems are thus important to the present debate, primarily with regard to the extent to which they interact with forces of judicial internationalisation. The relevance of legal systems varies across the workshops, as should become apparent in the sections discussing the individual workshops.

3.4 Judicial internationalisation

Judicial internationalisation refers first to the momentum of a process that, in itself, is not without precedent. International law is not a recent legal phenomenon, nor is the process of looking to the decisions and law of foreign countries. The locus of interest lies not in the substance itself, but in its modalities and scope. Today's highest judiciaries are becoming increasingly adroit and comfortable with the notion of engaging the legal world beyond their own borders. The sheer frequency and ease with which extra-domestic law[6] now figures into processes of domestic adjudication is precisely what makes judicial internationalisation a remarkable process.

Highest courts regularly make use of non-domestic law on a voluntary basis. Although non-domestic law has always had a place in the ordinary operations of highest courts, its use has primarily been driven by the demands of the relevant situation (e.g. the application of treaty provisions, factual questions about foreign contracts, choice of forum disputes).

Current evidence suggests that national courts are increasingly turning to extra-domestic law in situations that have traditionally been considered paradigm cases of domestic adjudication.[7] Such endeavours are motivated by reasons ranging from simple expediency to more bulky normative purposes (e.g. global promotion of the rule of law). Conversely, an equally voluminous body of scholarship challenging this practice has accompanied the perceived advent of judicial internationalisation.

Despite these developments, the notion of judicial internationalisation is not limited to the above-mentioned references to foreign law. A considerable body of scholarship considers the question of whether the very role of the judiciary has changed in response to globalisation. It could be that a judiciary is no longer exhaustively defined by its role and responsibility to a domestic constituency. Courts may be international actors as well as national actors; they can be organs not only of the national legal order, but also of the international and (particularly) the ostensibly emergent transnational legal order.

An extensive lexicon of terms has been coined to capture the concept of 'judicial internationalisation'. The more prevalent phrases currently include the following:

- Transjudicialism[8]
- Judicial globalisation
- Constitutional comparativism
- Constitutional borrowing
- Transjudicial communication
- (Transnational) judicial dialogue

[6] In this context, 'extra-domestic law' refers primarily to foreign legal sources (e.g. statutes and decisions from foreign countries), although it can also encompass references to international law, particularly for cases in which it is non-binding). The specific content of such terms depends upon the needs of each individual workshop.
[7] Slaughter (2004)
[8] Slaughter (1994)

- Transnational legal order
- Globalised judiciary
- the invocation of transnational, foreign or extra-domestic legal sources

This proliferation of terms is largely attributable to the fact that 'globalisation', far from being a monolithic concept, is actually a multifarious phenomenon comprising a diverse array of interrelated but distinct developments. The number of social, political and (in this instance) legal consequences is therefore as varied as causes. As revealed by this brief overview, definitions tend to be tailored to the specific cases for which they were developed. Definitions therefore vary according to levels of abstraction and objects of analysis. 'Constitutional comparativism' and similar terms refer to a highly specific activity (i.e. the citation of foreign precedents in the interpretation by domestic courts). Phrases like 'transjudicialism' have a much wider ambit, as they also encompass a general sense or awareness among the judicial profession that their perspective and responsibilities at the domestic level must increasingly be reconciled with the international level.

Between these very specific and more general definitions are such phenomena as 'judicial dialogue', which focuses on the activities of judges (e.g. attending conferences, forming information networks) whilst emphasising the sociological effects of such practices (e.g. the forging of a 'common professional identity').[9]

4 Judicial internationalisation and judicial practice

The preceding sections have explained the main concepts used in this inventory report. This section provides a brief overview of the various dimensions of judicial internationalisation.

The lowest-level empirical determinant of judicial internationalisation is the way in which the primary output of the judicial process (i.e. judicial decisions) reflects the increasing relevance of international and transnational legal development. In this vein, one of the more striking and novel developments captured by the family of terms is the fact that domestic judges seem to be increasingly willing and able to give explicit consideration to the relevance of non-domestic legal sources in the adjudication of domestic matters.

This phenomenon is also not entirely without precedent. For example, many common-law judges would balk at the suggestion that citing foreign precedents is anything but remarkable or problematic. Especially under the jurisdiction of the Privy Council - the highest court of appeal for the Commonwealth of Nations - the core business of common-law courts consists partially of considering precedents from this body, as well as from their fellow Commonwealth jurisdictions. In the same way, such supranational environments as the European Court of Justice (ECJ) are, by their very nature, highly attentive to legal developments at a transnational and regional level. The alleged novelty of these phenomena is thus largely contingent upon contextual factors. Under certain circumstances, matters that are wholly unremarkable for a Law Lord can take on a highly controversial character for a continental European judge (or *vice-versa*).

One of the reasons that the subject under consideration merits closer attention is thus that judges are looking beyond their own borders, *even when they are not formally compelled to do so*. Indeed, a transnational or international orientation is required to solve the problems at hand in many instances (e.g. ensuring the uniform application of treaty, adjudicating trade agreements). In recent years, however, judges have shown an avid willingness to engage in this type of international excursions, even in cases that involve no immediately obvious reason for doing so.

[9] Slaughter (2004)

The poles of opposition are particularly clear in the debate concerning the US Supreme Court's use of 'constitutional comparativism'. The focal point of this debate is the recent willingness of certain US Supreme Court Justices to cite non-American legal sources in the interpretation and application of American constitutional rights. A relatively recent example is *Roper v. Simmons,*[10] in which the Court ruled that the juvenile death penalty constituted a breach of the Eighth Amendment to the US Constitution. In delivering the majority opinion of the Court, which held that the juvenile death penalty indeed constituted a form of 'cruel and unusual punishment', Justice Kennedy noted that:

> *It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty (…) The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions. (…) It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.*[11]

Reasoning of this sort has incurred the condemnation from Supreme Court justices (most notably, Justice Antonin Scalia), as well as from numerous legal scholars, arguing that it violates the strictures of their favoured paradigms of constitutional interpretation (e.g. originalism or majoritarianism).[12] For various reasons, it is argued that recourse to foreign precedents impermissibly widens the margins of judicial discretion and imbues the views of foreigners with unacceptable privilege over those of the domestic constituency. For other authors, however, the willingness to 'acknowledge the overwhelming weight of international opinion' is a sign of virtue, a welcome transcendence of legal particularism and a small victory for the cause of global (cosmopolitan) justice. These debates are addressed in more detail below.

Foreign law can be used to substantiate the claim that there is a growing moral consensus regarding a particular issue (a strategy that is particularly contested), that certain decisions produce certain social or economic effects or that foreign precedents can be used as *a contrario* arguments (i.e. in an effort to distance the court from the international community). Moreover, the citation of decisions by foreign courts may appeal to the authors' intrinsic rationality or cogency. Nonetheless, nowhere is foreign law openly and explicitly used as *binding* authority, capable of trumping domestic legislation. Detractors of judicial internationalisation, however, are likely to argue that, in some cases, this would amount to the same thing.

Constitutional comparativism carries specific weight in this instance, as it is often tied to the institution of judicial review. The use of foreign precedents is remarkable (and problematic, according to many) – precisely because it may be used to strike down democratically sanctioned laws, thus muting the public voice and voiding the possibility of overturning such decisions democratically. The aggravating factor is that this process purportedly takes place with reference to foreign or international legal sources, which may perform poorly according to standards of domestic democratic legitimacy and accountability.

An additional issue is that species of transjudicial borrowing are also discernible in several different legal arenas and at varying levels of jurisdiction. Some scholars point to the increasing reciprocity that supranational courts are demonstrating with domestic courts, in recognition of both their own dependence on these actors as enforcers of treaty regimes and their normative role in 'translating'

[10] *Roper v. Simmons*, 543 U.S. 551 (2005)
[11] *Roper v. Simmons*, 543 U.S. 551 (2005) under IV (Justice Kennedy)
[12] Overview in Alford (2005)

the occasionally indeterminate provisions of international law into workable and acceptable pronouncements at the domestic level.

5 Judicial internationalisation as a sociological force

Moving further along the various levels of abstraction, we can consider 'judicial internationalisation' as describing a general shift in the character of judicial institutions. In this context, the difference does not lie in what judges do (e.g. citing foreign precedents, attending conferences) but in the disposition that accompanies their activities. Whereas expeditions into international sources have traditionally been considered of somewhat peripheral importance to the core judicial task, which was all but exhausted by domestically focused adjudication, it is now argued that the domestic sphere has become one of many focal points within a larger 'global community of courts'.[13] In the context of transnational litigation, Anne-Marie Slaughter argues that the key conceptual shift is that:

> *[t]he institutional identity of all these courts, and the professional identity of the judges who sit on them, is forged more by their common function of resolving disputes before the law than by the differences in the law they apply and the parties before them. It stretches too far to describe them all as part of one global legal system, but they certainly constitute a global community of courts.*[14]

Historically, when judges have looked beyond their own borders in situations that did not formally compel them to do so, their actions may have been accompanied by a lingering sense of impropriety resulting from a certain 'us-against-them' dynamic. Absent the powerful integrating forces of globalisation and the sense that the world is becoming ever smaller, the idea that states were indeed solitary, impermeable 'black-boxes' was easier to maintain (although the impermeable state has obviously always been seen as more of a useful fiction than as a model of empirical politics).

The argument further states, however, that judicial isolation has become increasingly untenable. Not only are judges compelled to acknowledge regional and global developments, as many domestic matters involve transnational elements; this recognition is increasingly being acknowledged as essential and proper to the core judicial role. The central thrust of this insight is that the judicial role is not idiosyncratically determined by domestic parameters; instead, it exhibits significant commonalities across countries.

Slaughter enumerates several consequences of these commonalities:

> *the cross-fertilization of legal cultures in general and solutions to specific legal problems in particular; the strengthening of a set of universal norms regarding judicial independence and the rule of law (however broadly defined); the awareness of judges in every country and at every level of participation in a common judicial enterprise; and the increasing ability for transnational disputes to be resolved either in one forum or in several forums that are coordinating with one another. (…) Even when they are interacting with one another within the framework of a treaty or national statutes, their relations are shaped by a deep respect for each other's competences and the ultimate need, in a world of law, to rely on reason rather than force.*[15]

[13] This influential phrase was coined by Anne-Marie Slaughter. See Slaughter (2003).
[14] Slaughter (2003, 192)
[15] Slaughter (2004, 102)

One significant dimension of judicial internationalisation therefore lies in a perceived shift within the judicial mindset. Whereas it was formerly assumed that the parameters of domestic legal culture circumscribed the professional self-understanding of judges quite narrowly, the emphasis now lies on the commonality of the task of adjudication itself. This shared feature has been complemented by technological advances in communication and increasing professional mobility, which have strengthened the transnational and international dimensions of this type of understanding.

It should also be stressed that the judiciary is not the only relevant agent of judicial internationalisation. The legal profession is responsible for infusing domestic proceedings with non-domestic elements, thus forcing judges to consider the international dimension. Although this report focuses on the role of highest courts, the legal profession itself is a crucial actor in the process of judicial internationalisation.

As indicated before, such developments remain contested. The thesis regarding the emergence of a transnational legal order is particularly controversial. Slaughter also qualifies the strength of this order. 'It is closer in some ways to a global "community of courts," in the sense that judges around the world interact with one another aware of their membership and participation in a common enterprise – regardless of their actual status as state, national, regional or international judges'.[16]

In summary, one important dimension of judicial internationalisation involves the declining influence of particular national identities in favour of an enlarged, internationalised identity or 'global community of courts'. Although it does not replace fidelity to the national constituency, judicial internationalisation does complement this national allegiance somewhat with certain transnational and international commitments and responsibilities.

6 Judicial internationalisation and evolving institutional mechanisms

A crucial corollary to the aforementioned developments involves the nature of changes that are (or are not) taking place in practice. If we accept that judges are increasingly looking beyond their own borders, we might subsequently ask *how they are doing so.* What instruments do the world's judiciaries have at their disposal with which to obtain the required information, and what mechanisms have been created to facilitate judicial dialogue?

This question is intended to prompt a highly determinate and empirical response. For example, it is conceivable that the allocation of resources has evolved to allow specific accommodation of the need for transnational communication. Such measures might include employing translators or interpreters to deal with foreign precedents, subscription to foreign law and jurisprudence reviews and subscription to electronic database systems, among other activities.

Many such methods have been developed out of necessity within the European Union and the Commonwealth. From a practical point of view, these experiences might be of significant aid to other judicial institutions that feel a need or desire to apportion their own resources to become more accommodating of the various forms of judicial dialogue. From an academic perspective, an inventory of such mechanisms could shed light on the extent to and manner in which judicial internationalisation is significantly different from more traditional modes of operation among judicial institutions.

The day-to-day experiences of judges when confronted with judicial internationalisation are therefore a key focal point of the conference.

[16] Slaughter (2004, 101)

7 In summary: outline of a provisional definition

The preceding overview should make it abundantly clear that it would be impossible to deal with all the wide-ranging aspects of judicial internationalisation within the constraints of time and resources of a two-day conference. For the purposes of the subsequent workshops, judicial internationalisation will refer to certain highly specific dimensions of the concept that broadly correspond to the elements that have been touched upon in this section.

First, from the perspective of judicial decision making, we consider the practice of citing non-domestic legal sources in cases that involve no formal requirement for a judge to make such citations. A paradigm case of what may be called 'transjudicial borrowing' arises in situations in which judges, of their own volition and within their margins of discretion, choose to employ non-domestic legal material as heuristic aids or persuasive arguments in the adjudication of essentially domestic disputes.

There are obviously more subtle forms of transjudicial borrowing as well. These forms may emerge within particular legal contexts that demand transnational or international involvement (e.g. the interpretation of treaty law). In such instances, transjudicial borrowing may be veiled behind such terms as 'harmonisation' or 'uniform application'. It is quite plausible that, transjudicial borrowing has a significant role to play in these legal contexts, even though the use of non-domestic precedent may remain unacknowledged.

The definition of 'transjudicial borrowing' itself therefore remains quite broad, and it may denote various instances in which highest courts are faced with the proliferation of extra-domestic legal sources in all their forms: foreign precedent, international statute, arbitration, and so forth. This facet relates to the more sociologically informed meaning of the term. Judicial internationalisation is a fact of life for highest courts, inasmuch as they are required to acknowledge some or all of the aforementioned developments in order to discharge their basic duties, particularly within the context of ensuring and maintaining the unity and efficacy of their respective national legal systems.

The second aspect of our definition therefore takes into account the way the professional ethos of highest courts has changed because of judicial internationalisation. Do judges consider the proliferation of non-domestic legal sources as somewhat peripheral to their core responsibilities, or is there a discernible trend towards acknowledging that a court has a duty to a transnational or international legal order in addition to fidelity to its own domestic constituency? If so, how are they related? This introduction has suggested that the proliferation of non-domestic legal sources places domestic legal unity under pressure. The question then arises regarding the manner in which highest courts conceive of their role and responsibility in the face of these pressures.

In summary, the underlying question regards whether the international dimension of adjudication is accidental or essential to the core judicial task. Is it a task that judges must perform in order to fulfil their primary duties (i.e. ensuring domestic legal unity), or is there an autonomous basis for the international dimension distinct from their responsibilities to their domestic legal orders?

Finally, in conjunction with these abstract issues, the conference will consider judicial internationalisation at a more practical level. As mentioned in the previous section, the empirical dimension of these issues is of paramount importance. Which judicial networks, legal databases, conferences and other entities currently exist?

Having thus outlined the basic concepts and provided an outline of the general objectives of the conference, the subsequent parts of this inventory report will specify the general objectives of each of the workshops.

PART II: THE WORKSHOPS

WORKSHOP I:

Maintaining legal unity in an internationalising world.

1 Introduction

1.1 Core question

Building upon the contours outlined in both the introductory section to this inventory report, as well as in the (general) HiiL Research Programme,[17] this workshop will consider the issue of *legal unity* as it pertains to the activities of highest national courts. The central question of workshop I is as follows:

> ***What is the role of highest courts in maintaining legal unity in the internationalising world of today?***

The point of departure of this workshop is constituted by the assumption that the proliferation of legal sources and the complex interplay between international, transnational, foreign and national law imposes new pressures on the unity of the national and transnational legal orders concerned. In light of this, two specific issues will be a subject of inquiry within workshop I.

We will consider the notion of legal unity (to be further defined below) first from the perspective of the domestic legal order. Acting on the premise that non-domestic legal sources[18] are in some shape or form playing a role of incremental importance within the domestic legal order, the question can be subsequently posed whether this will have consequences for unity of the domestic legal order. Are the effects on domestic legal unity salutary, detrimental or negligible? This workshop will explore *inter alia* the status of non-domestic legal sources vis-à-vis legal sources traditionally accepted by legal doctrine. Such an inquiry will seek to determine the importance, weight, role and other modalities of non-domestic legal sources over and against the unity of the domestic legal order. When considering this dimension, it should be emphatically stressed that legal unity is here considered in its function on primarily the domestic level, although subject to non-domestic influences.

In the second place, one can ask a related yet sufficiently distinct question concerning legal unity, this time in the context of the so-called 'transnational legal order' which is said to be emerging. In this regard, the workshop will seek to identify evidence in support of the thesis that there is a distinct body of legal sources which defies classification within the traditional taxonomies of legal doctrine, presumably being placed somewhere between the spheres of national law and international law; and if such new legal order is emerging indeed, is there a role for national highest courts in creating, maintaining or enhancing the scope of that order. Alternatively, the workshop will also seek to actively engage arguments to the effect that talk of an emerging transnational legal order is undesirable, premature or simply manifestly unfounded, as well the arguments whereby a role for national judges cannot exist but in the national context.

In more general terms, both dimensions of this workshop will seek a way to theoretically locate non-domestic legal sources and judicial internationalisation within the firmly established legal paradigms based primarily upon the assumption of relatively isolated and self-contained domestic legal orders.

[17] See for a general description of the process of globalisation, par. 2 of the HiiL Research Programme.
[18] We conceive of 'non-domestic legal sources' in a broad way, encompassing both international as well as foreign legal sources, such as decisions by foreign national courts.

1.2 Problem statement: legal unity and highest courts

The general strategy underlying the design of this workshop is that the starting point for discussion should reflect a functional, problem-oriented approach. Essentially, the vantage point of this workshop is that of highest court judges and the way they perceive their role in the national legal order. Although the notion of legal unity may sound somewhat opaque initially, it is defined here as a very basic concept. Subject to the particular features of any given national legal order, it seems plausible to assume that there certain basic functions which highest courts must perform by virtue of their institutional and functional character.

In the first place, there are several ways in which highest courts serve basic requirements of the rule of law. The most important of these functions is to ensure equal and uniform application of the law. As a matter of definition, highest courts stand at the apex of a (usually geographically) decentralized hierarchy. The multitude of courts lower in the hierarchy and the volume of disputes under the law may precipitate widely divergent manners of interpreting and applying the law. Highest courts thus need to ensure legal unity by giving interpretive guidance to lower courts as to the 'proper' way to interpret and apply the law. Moreover, a highest court is an avenue of final appeal, thus constituting a legal remedy for litigants.

In the second place, highest courts are formally tied to the territory of a nation-state and their competencies are granted by virtue of formal legislation. Domestic courts generally apply 'the law of the land', and the appropriate jurisdiction is determined not by courts themselves but by the branches of government which, through acts of legislation (or constitutional acts), institute highest courts. Thus, highest courts generally have jurisdiction only within certain areas of law or for a certain type of disputes. Without formal legislation highest courts have no formal authority to adjudicate disputes.

To put the previous two points more succinctly: highest courts are primarily concerned with binding law. And binding law is the law of the nation-state, and any other form of law which it chooses to formally recognize (such as treaties). Legal unity is thus not intended to denote a substantive or normative conception of law and its application. Rather it is a thin concept which is almost tautologically related to the institution of a highest court, being as it is an ultimate arbiter within a certain hierarchy based upon formally binding legal sources.

The task of ensuring legal unity will often raise a number of characteristic problems, such as determining the relevant weight and importance of competing values, rights and interests. The way in which this task is dispensed will obviously depend to a large degree on various normative, moral and political conceptions peculiar to a particular legal order as well as specific institutional relations between the judiciary and the legislative and executive branches.

Significantly however in the context of globalisation is that highest courts are faced with sources of normativity and regulation which are not binding in the same way as the formal legislation of a national legal system.

These debates, although by no means settled, have by now become quite familiar. Globalisation has affected these traditional debates in various ways as non-domestic legal sources appear to be playing an increasingly significant role. This seems to be partly due to a complex interplay between two processes.

On the one hand, highest national courts appear to be increasingly *confronted* with these non-domestic legal sources. The ever-growing degree of regulation on the international level as a consequence of globalisation presents highest national courts with a similarly expanding body of international legal sources. Similarly, the fact that the nature of the cases to be adjudicated is taking on an ever more transnational character – prominent examples include cases dealing with cross-border trade or the environment - impels courts to also take foreign law into account. This development is primarily a passive process from the perspective of highest national courts. They are developments which must be reckoned with because they are simply a fact of the modern legal universe.

On the other hand, a more active process may also be discerned. The proliferation of legal sources that highest national courts are confronted at the same time provides judges with a number of instruments which can be employed to deal with the complex problems of an internationalised world. Increasingly, non-domestic legal sources present themselves as plausible aids to tackle the complicated problems with which today's judges are faced. Thus, to a certain extent, non-domestic legal sources can all -in different ways- be seen as a kind of 'tool' forming part of the judicial 'toolbox' for solving new and challenging problems. In this context, the following passage written by Justice Albie Sachs of the South-African Constitutional Court is illustrative:

> *In just about every case that came before us, the Constitution obliged us to make value judgments on issues of major social and moral importance. The problem was not whether to make value judgments, but how to do so in a principled and dignified way. […] We had to establish the context which triggered the engagement with constitutional rights; analyse the public objectives sought to be served by the law in question; and, above all, determine whether the extent of the limitation was proportionate. In doing this balancing exercise we had to give considerable weight to the discretion that should properly be granted to government in its choice of the means to be used to achieve a legitimate purpose. […] This discretion would be particularly relevant in sectors where the impact of a measure could be polycentric, that is, have a wide, and not easily calculable effect on many spheres of life. At the same time, we had to always gauge the measure concerned with the constitutional measuring rod that determined what would be permissible in an open and democratic society based on human dignity, equality and freedom.* ***To apply this criterion we ranged far and wide, deriving as much benefit as we could from legal reasoning and legal practice in other societies****.* [19]

In relation to workshops II and III, it should be noted that this workshop is not immediately concerned with the legitimacy of using non-domestic legal sources (the topic of workshop II) nor the precise manner in which judges engage the legal universe beyond their own borders (a more empirically-informed question which constitutes the theme of workshop III). Of course, this division is of a pragmatic nature only, intended to organize the debates over the period of this conference. The themes are neither disparate nor disconnected and must ultimately be considered in unison. Nevertheless, workshop I shall narrow its analytical focus to the wider theoretical implications of the empirical phenomenon of judicial internationalisation.

While the starting point reflects, as indicated above, a pragmatic problem-oriented approach, this naturally leads to the need for a theoretical framework concerning the nature of the transnational legal order, the use of foreign sources of law and the role of the notion of 'coherence' vis-à-vis legal unity.

1.3 Legal Unity and Legal Coherence

Next to the notion of legal unity, it seems necessary to examine the meaning and the significance in the current context of another classic concept, that of legal coherence. Both notions relate to holistic perspectives on legal orders; as these notions are not one and the same, however, legal unity ought to be discerned from the concept of legal coherence.

As noted above, legal unity is intended to convey the most basic tasks which any highest courts must perform *qua* being a highest court and is related to the basic requirements of the rule of law and the institutional *raison d'être* of highest courts: applying formally binding laws.

Legal coherence goes further than this. It considers legal unity not only with reference to the requirements of ensuring uniform application and interpretation of the law, but entertains a much broader conception of law.

For example, when a court takes coherence into account it will also pay attention to general principles of law, and how a certain decision acquiesces with an entire body of legal culture and accumulated doctrine. Considerations of coherence may also require courts to anticipate the wider

[19] Sachs (2008, chapter 6) emphasis added.

social consequences of their decisions, or the legal consequences reaching beyond their own jurisdiction. Are the principles used to adjudicate claims about basic rights in conformance with principles used in civil law? What is the relation between accountability in criminal law on one hand and tort law on the other? Will a certain decision concerning commerce law have implications for the economical well-being of one's country? Strictly speaking, highest courts are not formally compelled to take such issues into account. In practice however, it seems plausible that such considerations can and often do determine the outcome of a decision.

As regards the essential difference between the basic notions of legal unity and legal coherence, it can perhaps be concluded that the former denotes a less controversial and more traditional understanding of highest courts and their institutional responsibilities, requiring the concerned legal system to demonstrate a uniform and consistent interpretation and application of the law; while coherence depends upon a broader and richer, though perhaps more contested, understanding of law.

More importantly, coherence is focussed on the substantive properties of law where legal unity is concerned more with the formal properties of national law. Coherence can thus exist across jurisdictions. The private regulatory regimes of multi-national corporations are an example of (quasi-)legal norms which are coherent across jurisdictions. Human rights law is said to be another field which is becoming more alike across in jurisdictions in substance, if not in fact sharing the same sources of formal legislation.

How must highest courts deal with these forms of pressures originating from outside their own borders? Must the dealings of foreign jurisdictions be heeded? Is 'transnational coherence' (to be discussed later) a relevant consideration vis-à-vis the task of highest courts to interpret and apply formally binding legal sources?

These and related issues are reflected in this workshop's core question.

1.4 Related debates within legal theory

In legal theory there has been - and still is - an extensive debate about the role of coherence in law. One basic prominent idea that seems fruitful here is that legal rules are coherent to the extent that they emanate from, are reducible to, or converge in a set of interlocking underlying principles. This notion suggests an intimate link between legal coherence and fundamental principles of law.[20] To the extent that a legal system can be reduced to a core of fundamental general principles, it can be deemed coherent.

Conceptualising the notion of coherence is of course much more complex than that. Within the confines of this inventory report it is impossible to do justice to the very nuanced (and in a technical respect, very developed) coherence debate within legal theory. It shall suffice for the current purpose to briefly sketch four basic perspectives with regard to the possibility and desirability of legal coherence within law. These descriptions are of course very broad and global in nature and should, therefore, be considerably nuanced and qualified; but their function here is nothing more than to provide some quick reminders to stimulate debate.

1. Global coherence as constitutive for law (Dworkin)

According to Ronald Dworkin, the value of integrity in law requires the law to speak univocally to the highest possible degree. The point of reference from which the law speaks is that of the community as a whole. This implies that the judge should as much as possible 'constructively' interpret the law as a coherent whole. He should (at least as an idealized aim) try to formulate a coherent set of principles underlying the legal institutions and materials and extrapolate from that to the case at hand.

In Dworkin's theory, the notion of global coherence (i.e. within the legal system as a whole) functions as what may be called a regulative ideal. Although Dworkin readily concedes that there are tensions and conflicts in the legal system he is quick to emphasize that, before the skeptical conclusion is drawn that coherence is not possible, all approaches to achieve

[20] See also Ton Hol's contribution in Muller and Loth (2008).

coherence ought to be exhaustive. Until proven otherwise by the sceptic, a resolution of the tensions and conflicts might be possible at a deeper level of unifying, underlying principles.

2. A limited role for local coherence only (Raz)
For reasons that have to do with his exclusive or 'hard' positivist position, Raz rejects coherence in so far as it plays a role in identifying the content of the law.

This does not mean that he does not see any role for coherence at all. After the judge has identified the relevant law -in a purely analytical division of stages in the judicial decision making process anyway- he has to apply to the case at hand. In this phase a lot of considerations can come into play, one of which is coherence (the so-called 'adjudicative coherence').

At this point, Raz gives a rather surprising turn to the debate by placing the burden of proof on the proponents of coherence. Why, he asks, should coherence be the decisive factor in determining a judge's decision? One might just as easily stipulate that a judge is required to do what is 'good' – the positive evaluation of coherence is not self-evident. In other words, what reasons does the judge have for coherence as a possible ground for deviating from what he otherwise considers to be the 'best' outcome? Therefore, Raz recognizes some role for adjudicative coherence, but only as a aprt of a more encompassing balance for judges to strike.

Apart from these considerations, Raz argues that global coherence is not in any way realistic. Because of the fact that the law is the result of fundamentally conflicting political forces and because of fundamental underlying value pluralism, only local coherence (namely within a separate part of the legal system) is feasible to some extent.

3. Coherence is unimportant (neo-realism)
Although the following position may be something of a straw-man, a very global and strongly idealized rendering of the (neo-) realist position holds that adjudication is all about solving practical problems. On this view, legal rules are only marginally capable of constraining a judge anyway. Therefore, the whole question of coherence is mostly irrelevant and not of much practical importance for the practice of adjudication.

4. Coherence is impossible (critical perspective)
The critical perspective (Critical Legal Studies, postmodernism and other cognate schools of thought) is even stronger: coherence in law is impossible. The legal system is fundamentally contradictory and based upon irreconcilable political premises. Striving for coherence is, therefore, an exercise in futility.

In some critical strands of thought, one could even wonder whether this striving for coherence is desirable at all owing to the possibility of abuse. That is to say, coherence could be used as a totalitarian tool in the service of ideologically legitimizing and perpetuating existing exploitative and oppressive societal conditions.

It appears from the foregoing that two questions are of particular relevance when the notion of legal coherence is used as a guiding principle for the formulation of theoretical models to capture the multitude of legal phenomena under more abstract and basic headings.

The first relates to the *desirability* of coherence. To what extent is striving for coherence is desirable? The second relates to the *possibility* of coherence. To what extent is it at all possible to achieve coherence? The four perspectives briefly described above also reveal that in the scholarly debate both the possibility and desirability of coherence are contested.

The workshop, however, will deal not only with the intra-systemic significance of unity and coherence (against the background of internationalisation), but also with the inter-systemic aspect of these notions. This brings us to the more controversial subject of the *transnational legal order*. One may certainly wonder whether there are essential differences in character between unity and coherence within the national legal order, on the one hand, and on the transnational level, on the other. As to the role of highest courts, it may be concluded that enhancing the unity of the national legal order is undoubtedly a primary task for them. Could it however also be said that highest courts have a role in promoting and ensuring a degree of coherence across jurisdictions? We shall return to this question later on.

2 Problem statement: challenges from internationalisation

In the previous sections it has been argued that maintaining legal unity within national legal systems has always been a core function of the respective highest national courts.[21] The structure enabling this process is the basic principle of territorial jurisdiction. Territorial jurisdiction, the right and ability of domestic courts to administer justice and enforce the law of the land, is made possible by virtue of a stable government functioning effectively and efficaciously within its defined boundaries. This critical component of internal sovereignty is a characteristic shared by all properly functioning states.

Two elements of globalisation in particular threaten the capacity of highest courts to exercise territorial jurisdiction and secure national legal unity in today's fast-paced world. First, actors under the law are no longer constrained by geography. Dynamic movement of people, information, goods and services around the world is a pervasive characteristic of modern society. Consequently, the national jurisdictions inherently limited by territorial boundaries prove insufficient in scope to successfully engage extra-territorial actors and apply the law in both a comprehensive and consistent manner.

Second, the proliferation of legal sources resulting from the processes of globalisation dilutes the authority of the national legal system, serving to further stricken the national legal unity. In response to global challenges shared by state governments increasing in number and intensity, a panoply of bilateral and multilateral treaties, international governance organizations and tribunals as well as numerous resolutions and agreements have emerged. This has blurred state boundaries and legal authority to the point that, in some cases, highest courts national courts consult with foreign or international law before exerting their own power to interpret and enforce the law. Moreover, this often occurs without indication as to the hierarchical relationship between the various sources used.

There are further subtle ways in which the infusion of non-domestic legal sources may end up complicating the task of maintain legal unity. If such sources constitute an authoritative interpretive source within one area of domestic law (e.g. civil law), this may have 'knock on' effects in other areas of law. Under the influence of non-domestic legal sources the underlying normative framework of a legal system may unwittingly be transformed, or less strongly, subtly reconfigured in unpredictable ways. Basic legal values such as individual autonomy are widely shared but they are equally contested and the precise substantiation will vary from jurisdiction to jurisdiction. The interpretation of such basic values is also susceptible to non-domestic influences, yet a value such as individual autonomy is so ubiquitous – salient in a wide variety of cases such as abortion and freedom of contract – that a shift in the way it is understood may have repercussions for a legal system as a whole.

The multifaceted nature of non-domestic law has left domestic highest courts with an uncertain identity. No longer is the role of domestic highest courts in all cases either substantively clear or authoritatively supreme. In short, globalization has shaken the dimensions and efficacy of the domestic legal system by altering the nature of both subjects and sources of modern law, leaving domestic highest courts with neither comprehensive nor independent jurisdiction.

[21] As Muller and Loth (2008, 1) state, '[t]raditionally highest courts have the task of safeguarding the unity of law within the territory of their jurisdiction, thus serving basic principles of law, such as equality before the law and legal certainty.'

Some of the issues discussed here may be illustrated by considering some examples drawn from practice.

In the United Kingdom, the cases of *White v Jones*[22] and *Fairchild v Glenhaven Funeral Services Ltd*[23] are prime examples of candidly referring to foreign law. This pair of private law cases stands out from other examples of English case-law where reference was made to foreign law[24] because it was not used for ornamental purposes nor to bolster the thrust of an 'English' argument.[25] But even when one studies these cases it will become apparent that beneath the surface both judgments diverge on various points. In *Jones* it was Lord Goff who drew heavily from German law to construct a model of liability. In the end, though, the Lordship overturned these efforts to substitute them for – in the words of Samuel – '…a typically English 'practical justice''.[26] One might, in this context, inquire as to the meaning of 'typically English' in this context. There is no question that law and culture are closely related, and that this may prove an obstacle to utilizing foreign legal sources in domestic adjudication. The implication may be that law which is not typically English will not easily fit into English law, even if only as a heuristic aid. This might be construed as an issue of legal unity.

In *Fairchild* comparative law was used in a different manner. Of their own accord the Lordships requested to be informed of solutions adopted by civil law systems.[27] It was the litigants themselves, rather than the Lordships, who were requested to research and advance arguments derived from legal systems of a civil law tradition. As a consequence of this approach, foreign law was scrutinized and discussed openly in court.[28] Therefore, it is apt to say that comparative law provided guidance to the Lordships in seeking a proper solution to the problem under consideration. In conclusion, it seems that although comparative law was used and had a share in the processes of decision-making in both cases, the forms in which foreign law was used was noticeably different.

One might ask why these two examples of using foreign law differed. What were the problems as perceived by the acting Judges? How does the judiciary view the relation between such comparative methods and the integrity and unity of the own legal order? These and other issues occupy a central point of interest within this workshop.

2.1 The transnational legal order?

The aforementioned concept of legal unity is closely related to the thought that legal norms deriving from formally enacted legislation are privileged over other legal sources. And, as noted, national borders and territorial jurisdiction are a vital component in this picture of national law. Yet, as outlined in the introductory section, this view of law is becoming problematic. An emerging 'transnational legal order' serves to address the aforementioned challenges emerging directly from globalization.

As society increasingly operates unencumbered by national borders, domestic legal systems are correspondingly seeing a rise in cross-border legal problems in which courts of various countries must coordinate. Moreover, this increased global exchange adds pressure and demand for government coordination on various 'global common goods.' Examples of such range from fields of historic international character such as maritime law to regulation of entirely new areas of commerce and society such as intellectual property, internet, and climate change. Therefore the transnational legal order comprises both the increasing body of international law as well as a newer practice of direct legal relations between foreign countries. It is here where the notion of coherence between legal orders is relevant because there is no single institution charged with ensuring the integrity of law at the transnational level.

[22] [1995] 2 AC 207.
[23] [2002] 3 WLR 89.
[24] For instance: JD (FC) v East Berkshore Community Health NHS Trust and Others, Greatorex v. Greatorex, and Campbell v. Mirror Group Newspapers Ltd.
[25] Markesinis and Fedtke (2006, 67-68).
[26] Samuel (2004, 255).
[27] Markesinis and Fedtke (2006, 69 and 315).
[28] The same occurred in *A and Others v National Blood Authority*.

Law is not necessarily something tied to the authoritative commands of a legislator, but it is understood more broadly as a set of general principles, social phenomena and so forth. For example, one might speak of a global human rights jurisprudence, or a convergence of constitutional principles across multiple jurisdictions. The challenge then becomes how to theoretically conceive of this coherence, a question which belongs in this workshop.

2.2 Contemporary approaches: Patrick Glenn and Jeremy Waldron

Two prominent authors who have expressed views on these matters are Jeremy Waldron and Patrick Glenn.

Waldron takes a position which points out similarities between the present situation and the status of Roman law before the ascendancy of the nation state. It is this conception of *ius gentium* as a sort of common law of mankind that forms the basis of Waldron's justification -in principle-[29] of the use of foreign law. Just like the (near) consensus between his colleagues functions as a reference point for scientists (in the sense that it would be foolish for them not to take this accumulation of experience and wisdom into account), judges when confronted with a difficult question should consider the practical experience and wisdom contained in the established legal (near) consensus in the world. But, just as scientists are free to eventually disagree with that established consensus in their field -as consensus does not imply or guarantee truth- the authority of *ius gentium* functions 'not to pre-empt [already existing municipal] law but to guide its elaboration and development'[30].

Waldron develops the analogy with science further with a specific public health scenario. Suppose a new disease or epidemic appears in America. One would expect the public health authorities not only to consult American science in order to deal with it but also the experience of and tested strategies in other countries, though it would of course be possible that American geographic or cultural peculiarities would give reason for a specific, divergent approach.

> *In the public health analogy, we would certainly expect our scientists to look only to findings we had reason to trust; they would not look to the work of suspect or disreputable laboratories. Similarly, a ius gentium inquiry may restrict itself to consensus among "civilized" or "freedom-loving" countries.*

As already stated, this approach presupposes a conception of law as a problem-solving enterprise, in contrast to a view of law 'as purely a matter of will'.[31] 'The real contrast between those who oppose and those who defend the use of foreign law in American legal reasoning is *not* that jurists in the first group are parochial and the second cosmopolitan. It is rather this contrast between law as will and law as reason. Those who approach the law as a matter of will do not see any reason why expressions of will elsewhere in the world should affect our expressions of will in America. But those who see law as a matter of reason may well be willing to approach it in a scientific spirit that relies not just on our own reasoning but on some rational relation between what we are wrestling with and what others have figured out.'[32]

Patrick Glenn, in his article 'A Transnational Concept of Law', also emphasizes what he calls the 'denationalization of law'.[33] A key phenomenon inherent in contemporary law seems to be the decreasing importance of the 'will theory of law' and a move toward a plurality of authoritative and persuasive legal sources. Glenn points out that a key consequence of globalisation is that the model of the self-contained nation-state, with its unity of authoritative legal sources (even if this model itself ever existed in a pure form), is rapidly becoming an untenable model of reality. Under the header of a developing 'transnational law',[34] there are a variety of different sources of normativity in the contemporary legal universe. A particularly visible instance of this phenomenon is the rise of private actors and NGOs as agents of novel regulatory regimes.

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[29] Waldron obviously develops a justification as part of a guiding theory and, as he explicitly states, ' not a justification of the actual use that American courts have made of foreign law.'; Waldron (2006, 146).
[30] Waldron (2006, 139).
[31] Waldron (2006, 145).
[32] Waldron (2006, 146-147).
[33] Glenn (2003)
[34] Glenn (2003, 846)

Admittedly, such forms of normativity are not binding in the traditional sense of the word. Yet this is precisely the point, and the difficulty for modern nation-states. Because these novel forms of normativity possess varying degree of *de facto* bindingness by virtue of the fact that they are border transcending and thus escape the sovereign jurisdiction of any one nation-state. Glenn touches upon the changing nature of state power:

> *The increase in non-state activity over national boundaries places states, and international law, in a less controlling position than has previously been the case. […] The exclusive authority of a state sovereign to control external affairs is challenged by a new 'transgovernmentalism', characterized by horizontal relations amongst sub-units of national governments, which form in the absence of centralized and authoritative national decisions.'*[35]

Glenn notes that, as is often the case when relating practice to theory, 'this process [transnationalisation of law] has been occurring more rapidly than the development of its theoretical justification.'[36] A key point in this search for theoretical accommodation is the non-systemic and non-binding character of, what Glenn is inclined to call the 'post-state' character of transnational law. 'Pre-state and post-state law, however, share the general characteristic of being suppletive law, law which is at the disposition of parties as opposed to binding them.'[37] Indeed, pre-statist models of law, such as the status of the *ius gentium* in the middle ages, may prove to be fruitful tools in understanding the present developments, as evinced in Jeremy Waldron's approach just discussed.

Glenn too emphasizes that it is precisely the formalistic and positivist understanding of law which modern jurists have inherited that must be eschewed to come to terms with transnational law. 'Western state law is said to be exclusive, positive, binding law, though we have seen that contemporary positivist legal theory denies its ability to create obligations, to effectively bind.' [38] But formal institutions and sanctions are not the sole, nor even the primary medium of normativity for Glenn. Rather, 'The laws of the world thus exist as living traditions and highly normative ones. […]The oldest law of the world, that of chthonic or aboriginal peoples, exists most clearly as oral tradition, since it is neither articulated nor supported by formal institutions. It is nevertheless highly normative (though not usually said to be 'binding').'[39]

Transnational law is normative, but it is not binding in the traditional sense. One may ask if 'binding' can be applied to transnational law. Its normativity is based on *inter alia* persuasiveness, expedience, substantive consensus or voluntary adherence. But its persuasiveness is based above all on substance rather than form. State law is binding by virtue of formal properties, transnational law is normative by virtue of its substantive properties. Glenn concludes that 'Transnational law thus adds a new form of normativity to Western law in bridging national laws. The law is no longer national, but nations share in its application. It is, moreover, substantive law, and not a law which is inter-national.'[40] This should be adequately reflected in our theoretical ambitions. Exhaustive, exclusive and comprehensive dogmatic and systematic accounts may well prove to be unfit to the subject-matter. Transnational law may simply be too dynamic, fluid and haphazard. 'There is no uniformity in the emergence of transnational law. There is no unicity of its sources and no systemic form of justification. It does not conform to a general or universal model, other than speaking to contemporary need on the basis of some measure of past experience.'[41]

2.3 Conclusion: the role of highest courts?

At this point it is useful to recall the notions of coherence and unity. The latter, as a matter of definition, exists only within the formal institutions of a state. Highest courts are such institutions. They exist by virtue of nation-states, and they are concerned largely, although not solely, with binding law.

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[35] Glenn (2003, 847)
[36] Glenn (2003, 849)
[37] Glenn (2003, 849)
[38] Glenn (2003, 850)
[39] Glenn (2003, 850)
[40] Glenn (2003, 860)
[41] Glenn (2003, 860)

As both the positions of Waldron and Glenn make clear, what is not formally binding may still posses a normative force of its own which is independent of state sanction. There are several factors for this, many of which have been glossed over in this paper.

A very prominent factor is simply the gigantic increase of transnational activity in virtually all spheres of human activity. Particularly in the realm of commerce and trade, the frequency and intensity of transnational activities has increased dramatically and with this, regulation has organically developed as a correlate outside of the formal structures of legislation within the nation-state. When problems and activities become border-transcending, regulation must follow. And where the nation-state alone cannot act to address such issues, novel and internationalised forms of regulation step in to fulfil this need.

Another crucial factor is that normativity itself is global. Democracy, the rule of law and human rights are concepts which have ubiquitous purchase within the Western world at least. Whilst globalisation has at the same time enhanced awareness of particular cultural identities – and with that certainly strengthened the thought that certain areas of law must remain solely within the purview of the idiosyncrasies of a particular (legal) culture – it has had an opposite effects in many areas. At a basic and abstract level, it can be said that there is something of a consensus on the value of basic human rights, rule of law and democracy. Intuitively it is not immediately apparent why such issues must differ from one jurisdiction to the next. In other words, the burden of proof in some areas of law is on those who stake claims to strong legal particularity.

Again, this is certainly not true in all areas of law. Many will assert that controversial issues such as abortion, euthanasia and stem cell research ought to remain exclusively within the jurisdiction of nation-states. But wherever there seems to be a consensus, even if only fragile or merely 'converging', it may be argued that the logical course of action will involve common deliberation with those sharing similar values and, importantly, similar problems. Perhaps, in such areas, transnational coherence ought to be something which ought to concern highest courts. As Michiel Scheltema writes:

> *The highest national courts have a crucial role in the process to more transnational coherence. (…) If they take that role, they will not be only the highest court within their national jurisdiction. They will also share a responsibility with other highest court[s] for transnational coherence of the law. And they have a role in connecting their own legal system with the outside world.*[42]

Is this perhaps putting the point too strongly? Do highest courts indeed have such a role, or is this role more limited than it appears? We thus return to the key question of this workshop concerning the role of highest courts in an internationalising world:

> ***What is the role of highest courts in maintaining legal unity in the internationalising world of today?***

[42] Muller and Loth (2008, 5 – 6).

WORKSHOP II

The legitimacy of highest courts in an internationalising world

1 Introduction

1.1 Core question

Judicial internationalisation encompasses a host of crosscutting formal and informal legal relations that are largely unprecedented in terms of frequency and visibility.[43] Significantly, the fluidity of boundaries between domestic and international legal orders is primarily the product of domestic judicial agency. Judges and other legal actors cite each other's decisions, engage in transnational dialogue, attend conferences, exchange best practices and generally becoming increasingly aware of and attentive to both transnational and international legal developments. As described in the general section, these phenomena occupy a middle ground between the domestic and the international legal order, being neither wholly domestic nor wholly international.

The objective of this workshop is to discuss and elaborate upon the implications of judicial internationalisation for the legitimacy of highest courts in light of the following question:

> ***Is the separation of powers a measure of judicial legitimacy that can successfully accommodate the exigencies of a globalised world, or does judicial internationalisation compel us to find additional or novel paradigms for anchoring this legitimacy?***

1.2 Problem statement: traditional and novel approaches to judicial legitimacy

The central intuition that underpins the core question set out above is that the processes of judicial internationalisation have an impact on the legitimacy of judicial institutions. Some scholars argue that judicial internationalisation poses a grave affront to this legitimacy, according to the models that have traditionally been employed to operationalise the concept of judicial legitimacy. Scholars at the opposite end of the spectrum claim that judicial internationalisation falls perfectly within the existing boundaries of our paradigmatic notions of legitimacy, and that the phenomenon may actually serve to enhance legitimacy.

Between these extremes, other authors are sympathetic to judicial internationalisation, even though they argue that novel paradigms of legitimacy are required in order to provide a firm foundation for judicial internationalisation. In essence, judicial internationalisation *is* normatively suspect according to many existing models of legitimacy, but these models themselves may be anachronistic and in need of revision in light of globalisation and other contemporary developments.

To appreciate the relative force of these claims, it is necessary to circumscribe the precise nature of the problem. Rather than framing the narrative of these issues in abstract concepts, a brief review of several of the concrete positions taken within the debate could be instructive.

[43] For examples and overviews, see: Slaughter (2004), Shany (2007), Ahdieh (2005), Baudenbacher (2003a), Flaherty (2006), Whytock (2006), Wismer (2006), Slaughter (1996), Williams (2004), Tushnet (2003), Slyz (1996), Slaughter (2003), Buxbaum (2004a)

The question of judicial legitimacy is often tied to a particular conception of the judicial role. What judges *must* do largely determines what they are *permitted* to do. In somewhat conscious violation of the Humean principle, which specifies that an *ought* cannot be derived from an *is,* jurisprudence generally proceeds from some conception of what is required of judges in order to circumscribe the means and instruments of which they may consequently avail themselves. In general, legal positivism holds that judges must apply the law as posited by an authoritative legislator. The legitimacy of the judiciary consequently depends upon its fidelity to the enacted laws, which is often translated into theories of interpretation that emphasize a restrictive set of interpretive sources (a prominent example in this context would be the US constitutional doctrine of originalism).

The focus on the duties incumbent upon highest court judges is a salient point throughout this conference. In general, the question then becomes as follows: 'What in the nature of the judicial function compels judges to consult non-domestic legal sources or to confer with their foreign peers? If such a normative requirement for an extra-domestic orientation can be discerned, what are its permissible limits? Is this orientation essential or accidental to the judicial office?

Answers of a more pragmatic nature (i.e. the task of a judge is to deliver good, qualitatively solid decisions) tend to have no inherent bias against the appropriate instruments of adjudication. There is no *a priori* reason to assume that the practice of borrowing foreign precedents or consulting foreign colleagues would detract from the quality of judicial decisions.

Many authors are slightly more cautious than this ideal type suggests. The transnational legal universe is *sometimes* relevant for domestic adjudication. The question concerns the precise modalities of this 'sometimes': are foreign legal sources relevant only for very practical, means/ends types of disputes, or are they equally relevant to the adjudication of basic rights disputes, as in wrongful life or anti-terrorism cases? If we borrow precedents, from which jurisdiction do we borrow them? How can we properly understand foreign legal decisions outside of their particular domestic contexts?

1.3 The importance of legal context

In the context of highest courts, these issues are often treated with particular urgency because of the power of judicial review. When highest courts have the authority to void democratically enacted legislation, and when legislators subsequently lack the *de facto* or *de iure* power to overturn such decisions (e.g. because of supermajority requirements), the burdens of judicial justification are significant, and the use of non-domestic legal sources is particularly conspicuous, especially when their relevance is not immediately apparent. The introduction of judicial review into the equation raises the familiar 'counter-majoritarian' difficulty as articulated by Alexander Bickel. A paradigmatic example of a debate centring this issue is currently being conducted within US constitutional circles. Without a doubt, the issue of the US Supreme Court's use of foreign materials is responsible for the majority of scholarship focusing on these issues, as will become apparent in the remainder of this paper.

A further point that can be made in this vein is that the urgency of these issues is highly context dependent. For example, in addition to its concern with the counter-majoritarian character of judicial review, US legal culture has also been described as quite particularistic. In settings in which the term 'democracy' has very strong republican overtones, foreign legal materials may appear to particularly suspicious as sources of judicial inspiration. On the other hand, many continental European judges may perceive this entire debate as a storm in a teacup. In settings that involve a strong tradition of foreign inspiration in instances of domestic adjudication and in which the legal culture is thus accustomed to this practice, concerns of legitimacy are not likely to rise to the level of prominence that is exhibited in the US debate. Jurisdictions within the common-law tradition are

also likely to be comfortable with the consultation of non-domestic legal sources, particularly those from jurisdictions having a Commonwealth heritage.

It would therefore be a mistake to assume the existence of one central, overarching problem of legitimacy is associated with judicial internationalisation and that this over-arching problem is uniformly applicable to all legal cultures. This inventory report proceeds from this basic premise. In this context, it is also important to note that the literature discussing the normative dimension of judicial legitimacy is also not strongly unified. Many arguments are applicable only to the legal cultures or areas of law to which they are directed. Others are of a general nature but are not geared toward any comprehensive, generally applicable normative doctrine of judicial internationalisation. In essence, the art is in a state of infancy, in which a rough patchwork of interrelated yet distinct arguments is made, but in which the unifying factors are still difficult to discern.

Workshop II will endeavour to address this noticeable lack of unity within the debate and identify certain salient points that are relevant to a wide variety of cases.

Even for those practitioners for whom the preceding discussion may seem irrelevant, this undertaking may prove fruitful. Accepting that an extra-domestic orientation is permissible should not blind us to the empirical consequences that this entails. Moreover, knowledge of the various normative arguments for and against such an orientation may improve and enrich the methodology of individual judges, allowing them to be more attentive to the various parameters that are implicated in the use of non-domestic legal sources.

1.4 Roadmap of the debate

This workshop is concerned with the manner in which the process of judicial internationalisation affects our understanding of judicial legitimacy. A survey of the various positions within this debate reveals that there are essentially two ways in which the correlation between judicial internationalisation is being reconciled with judicial legitimacy.

In very basic terms, the opposition is between those who defend and advocate for a conception of judicial legitimacy, as it is traditionally understood (i.e. as a function of the separation of powers), and those who see scope for additional grounds for legitimacy.

According to the first school of thought, the judicial branch is largely an organ of national sovereignty, and it is accountable to the national constituency from whence its constitutional authority flows. As a democratically unelected organ, its charge is to ascertain the meaning of the law, and not to promulgate its own or replace democratically sanctioned laws with judicial caprice. In this view, the rule of the people is prized over and above the rule of judges, and judicial internationalisation results in juristocracy of the worst kind: judges who not only exceed their position within the separation of powers, but who do so by privileging the views of foreign, non-elected bodies in the adjudication of domestic matters.[44] According to this argument, the fact that judicial internationalisation is indeed taking place does not mean that it is legitimate. Assuming its legitimacy would amount to the basic argumentative fallacy of confusing an *is* with an *ought*. The mere fact that judicial internationalisation *is* does not mean that it *ought to be*.

[44] The main proponents of this view include Kersch (2004), Kersch (2005), Rabkin (2005), Justice Scalia in his debate with Justice Stephen Breyer at the U.S. association of constitutional law on the subject "constitutional relevance of foreign court decisions" (hereafter: ACL (2005)), Young (2003), Paulus (2004), Kochan (2006), Aleinikoff (2004), Baudenbacher (2003b)

The second approach approvingly recognises the changing activities of an internationalised judiciary as consistent with a transformed understanding of the judicial role. Particularly in its more dogmatic incarnations, the separation of powers is becoming something of an anachronism. Globalisation has caused many legal problems to transcend borders because of increasingly integrated economies, more mobile individuals and ever more voluminous and instantaneous information streams. Highest courts are subject to a number of different forces. Far from being the sole agents of the domestic legislative will, judges are facing pressure to ensure such values as the rule of law, the protection of human rights, the uniform interpretation of international law and acquiescence with the moral sentiments of the international community at large. Moreover, global interdependence creates strong pragmatic incentives to ensure uniformity across domestic legal orders in the interests of expediency and efficacy. In light of these and other factors, it is not plausible that judicial legitimacy can and ought to be based on an insulated, domestic understanding of the separation of powers.

If this is the case, however, what should replace the separation of powers as the cardinal measure of judicial legitimacy?

Although the process of judicial internationalisation has been widely defended by its proponents, their arguments have often remained somewhat diffuse, in the sense that few, if any, call for abandoning the separation of powers completely in favour of a novel paradigm of judicial legitimacy. This paucity is remarkable, however, when compared to the overwhelming abundance of literature dealing with global governance as such (e.g. the democratic deficit of the EU and international institutions, the role of global society, accountability at a global level, cosmopolitan rights). Although all advocates argue that judicial internationalisation is conducive to judicial legitimacy, broad and sweeping statements that call for the revision of the separation of powers paradigm are conspicuous primarily in their absence.

Arguments in favour of judicial internationalisation tend to emphasise specific points, contexts or areas of law in which non-domestic legal sources may contribute to the efficient and just functioning of domestic legal orders. A typical claim is that, within the area of commercial law, transnational standardisation is essential to maintaining a competitive position within a globalised economy. Moreover, for cases in which empirical data are particularly relevant (e.g. the socio-economic effects of certain types of regulatory legislation), foreign jurisdictions may provide a useful and illustrative case studies that can be used to anticipate the effects at home. Because the case in favour of judicial legitimacy is diffuse by nature, the debate presented therefore follows a thematic approach.

Section 2 begins by considering the basic objections to the use of non-domestic law from the perspective of traditional separation-of-powers theory. Section 3 provides an overview of various novel approaches that have been offered for conceptualising sources of judicial legitimacy. Finally, Section 5 considers other contemporary objections to the use of non-domestic law.

2 The traditional approach: judicial internationalisation as a problem of interpretive theory

2.1 The judge as '*la bouche de la loi*' or the judge as Hercules?

By far the most ubiquitous approach to the normative implications of judicial internationalisation is contained in the key of interpretive legal theory.[45] With specific reference to judicial legitimacy, the basic dilemma concerns the degree of interpretive theory that can legitimately be accorded to the judiciary. This involves the question of whether judicial legitimacy is best served by Montesquieu's '*la bouche de la loi*' (the mouth of the law), Ronald Dworkin's 'Hercules' or something in between.

The basic polarisation juxtaposes democratic decision making against the importance of individual rights. Whilst self-government generally requires that the laws governing society be the product of democratically sanctioned, inclusive decision-making procedures, we also recognise a commitment to a more substantial understanding of the rule of law. Such an understanding includes a strong concern for the notion of individual rights and their insulation from the contingency and unpredictability that often characterise the political process through the enshrinement of basic rights in a constitution, enforced by judicial review. The basic difficulty with bringing the separation of powers into practice therefore involves balancing the demand of majoritarian decision-making with the necessity of protecting individual rights.[46]

As always, the devil is in the details; the boundary between politics and judicial review is notoriously difficult to demarcate. Several strategies have been proposed in recent decades.[47] Habermas, Ely and other authors (including Justice Stephen Breyer) emphasise the judiciary's role in fostering conditions that enable democratic participation, leaving more substantive policy issues to the political process. Notably, constitutionalists in the tradition of Dworkin accord a strong degree of autonomy to the judiciary in determining the content of individual rights, arguing that a pure procedural understanding of the rule of law is not only impracticable, but also implausible due to the interconnection between law and morality. This view has recently been defended during a roundtable discussion between a number of pre-eminent judges and scholars (Stephen Breyer, Dieter Grimm, Robert Badinter, and Ronald Dworkin. These experts were nearly unanimous in accepting that judges are essential for checking the excesses of democratic government, and that they are instrumental in securing its enabling conditions: individual liberties, civil and political rights and the rule of law.[48]

> *In sum, the panelists effectively turn the question of judicial legitimacy on its head. Rather than a judiciary needing and desperately seeking some sort of democratic mandate to legitimate its work, the panelists propose a new paradigm in which it is the judges who legitimate the functioning of the more democratically accountable branches of government. Under this understanding, it would be harder to justify democracy without judges or constitutional courts; the real cause for concern should not be the legitimacy of judicial review but rather the fundamental fairness and justice of unchecked majoritarianism.*[49]

Such views have obviously been subject to trenchant criticism in other quarters, most vocally by the originalist school of interpretive theory in the United States.[50] Robert Bork is representative of a

[45] Kersch (2006, 103), Kersch (2006, 103)
[46] On this more general topic, see Meyerson (2004), Mullender (1998), Hirschl (2004), Freeman (1999)
[47] For a comprehensive overview, see Dommelen (2003)
[48] Review article by Krotoszynski (2004)
[49] Krotoszynski (2004, 1347)
[50] Bork (2003), Kochan (2006)

tradition that derides judicial empowerment through judicial review for leading toward judicial activism and 'juristocracy': rule by judges in place of rule by the people. Bork claims:

> *The malady [of judicial imperialism] appears wherever judges have been given or have been able to appropriate the power to override decisions of others branches of government the power of judicial review. […] Increasingly, the power of the people of Western nations to govern themselves is diluted, and their ability to choose the moral environment in which they live is steadily diminished*[51]

When judicial review is not met with outright opposition, it is constrained by highly determinate principles regulating its mode of exercise. In this way, textualist and originalist theories of interpretation reconcile the counter-majoritarian character of judicial review with majoritarian decision-making by interpreting constitutional provisions restrictively in accordance with the original intent of its framers and the plain meaning of the text. This limited mandate serves to curb the worst excesses of juristocracy and subjective judicial policy-making by narrowing the range of available interpretations of rights.

Whatever the merits of these two positions, the basic framework of the separation of powers stands. In principle, democratically elected legislatures decide on substantive issues. The judiciary has the power to override these decisions if they are deemed to conflict with the constitution and the fundamental civil and political rights protected therein. The extent and autonomy accorded to this process is heavily disputed, but the basic narrative of popular sovereignty with domestically oriented institutional relations remains.

2.2 Judicial internationalisation and legal theory

In light of the issues presented above, two basic arguments are made against judicial internationalisation.[52] The first is an extension of the originalist position, which fears that the use of foreign law could open a source of arguments so vast that it could be used and abused to justify almost any degree of personal whim or caprice by a judge. This is succinctly articulated in a public debate between Justices Scalia and Breyer concerning the relevance of foreign law to constitutional interpretation.[53]

The sheer abundance of non-domestic legal sources has prompted metaphors to the effect that selecting foreign law is like picking out your friends in a crowd at a cocktail party or 'cherry picking'.[54] What other criteria do we have for selecting one over the other besides subjective agreeableness? According to legalism/originalism, looking beyond domestic borders can have one of two results. One possibility is that the decision of a foreign court exactly mirrors the intent of the domestic constitution's framers, although such an outcome would amount to nothing more than jurisprudential serendipity, finding a needle in a very large haystack. Foreign case law is an odd place to begin a determined quest for the original meaning of a text. Another possibility is that a judge will find the most socially efficacious, economically efficient and morally satisfying argumentative construction, although it cannot be reconciled with the constitutional text and associated historical records. In such cases, judges have been seduced by the allure of a good argument to the detriment of their duty toward faithful interpretation. Bork is even more scornful of the practice:

[51] Bork (2003, 1)
[52] Parrish (2007, 650). Kersch (2006, 103)
[53] ACL (2005)
[54] Kochan (2006, 509)

> *The internationalisation of law is happening with phenomenal speed and comprehensiveness. With that development comes law's seemingly inevitable accompaniment: judicial activism. […] internationalisation will magnify many times over the defects […] the loss of democratic government, the incursion of politics into law, and the coerced movement of cultures to the left.*[55]

It is thus argued that foreign law becomes the thin end of a wedge, the fatal blow to what little judicial restraint is left in a world ruled by judges.

A second, closely related objection is concerned with the *a priori* applicability of foreign law to the adjudication of domestic legislation. In addition to creating additional avenues for judicial activism, judicial internationalisation is doubly deplorable, as it does so by referring to values that are foreign to the domestic constituency. Particularly in United States, opposition to the borrowing of foreign precedents has been widespread on the grounds of legal particularism.[56] The idea is that the use of non-domestic legal sources is especially abhorrent because, unlike alternative extra-legal sources, every pretension of domestic loyalty is disregarded in favour of overt, anti-democratic, anti-majoritarian decision-making. According to Justice Scalia, 'we don't have the same moral and legal framework as the rest of the world, and never have'.[57]

One issue that emerges from this debate is that disapproval of the practice of judicial internationalism is due less to the fact that it is foreign than it is to the mere fact that it is an additional nail in the coffin of judicial restraint. Noga Morag-Levine notes that 'Supreme Court opinions are replete with references to extra-legal sources such as philosophical treatises and social science research. Why single out foreign case law as deserving of special condemnation?'[58] Indeed, as presented above, the debate has prompted a number of metaphors questioning whether the whole debate can be reduced to 'old wine in new bottles'[59] or 'a storm in a teacup'.[60]

Framing the debate solely in terms of the opposition between legalism and interpretivism apparently does not fundamentally alter the terms of the debate by introduction of judicial internationalisation. In essence, the introduction of judicial internationalisation does not preclude discussion of the ever relevant but, for the purposes of this workshop, distinct issue of majoritarian rule as opposed to anti-majoritarian judicial review. Foreign law is an interpretive source like any other, and its admissibility in domestic adjudication depends on the individual's general position concerning the appropriate extent of judicial interpretation. Consensus appears to be growing that the debate cannot be resolved within the narrow confines of legal theory.[61]

In order to keep the problems in accurate perspective, it is necessary to consider the possibility that judicial internationalisation may affect the very basis upon which the separation of powers is founded: the supremacy of the legislative branch or constitutional texts and the primacy of popular sovereignty. This strategy is discernible within the burgeoning literature that is sympathetic to judicial internationalisation, which constitutes the subject matter of the following section.

[55] Bork (2003, 15-16)
[56] Parrish (2007, 649-652)
[57] ACL (2005)
[58] Cited in Whytock (2006, 1)
[59] Baudenbacher (2003b)
[60] Parrish (2007)
[61] E.g. Flaherty (2006), Kersch (2006b), Benvenisti (2008), Slaughter (2004)

3 Novel approaches to judicial legitimacy and judicial internationalisation

3.1 Lacunae: asymmetry between global governance studies

A wealth of conjecture currently exists with regard to the course that democratic governance is likely to take in a globalised world. According to the most salient articulations of democratic theory, a baseline requirement is that 'legislative and chief executive offices are filled through regular, competitive, multiparty elections with universal suffrage'.[62] Such minimalist formulations of democracy express the notion that rule by the people requires efficacious structures of representation and accountability. Democratically elected representatives are agents on behalf of the people, and procedures are in place to hold them accountable, the most vital of which are elections. This is obviously the same notion that underlies the separation of powers. From a more conservative perspective, the judiciary fails to meet either of these baseline democratic requirements, and it should therefore exercise a significant degree of restraint in order to avoid encroaching upon the other branches. Even those conceding that the judiciary has an autonomous role in curbing the tyranny of the majority rarely question the principle of domestic separation of powers.

Globalisation is intrinsically problematic when considered from this domestically informed paradigm of democracy. One phenomenon that is at least partially related to internationalisation is that '[i]n modern democracies unelected bodies now take many of the detailed policy decisions that affect people's lives, untangle key conflicts of interest for society, resolve disputes over the allocation of resources and even make ethical judgments in some of the most sensitive areas'.[63] Although not solely attributable to internationalisation (the rise of administrative power has long since been recognised as a significant domestic phenomenon), it has acted as a catalyst for the devolution of political power to unelected, technocratic institutions. Many of today's problems transcend borders, and it is becoming increasingly necessary to address them at a regional and global level. Moreover, such problems often involve areas of a technical nature, including economics, health, security and technology. These factors have precipitated the massive rise in the number of international institutions and the incremental growth in both their formal and informal power.

In the absence of a true cosmopolitan world government (i.e. global institutions that perfectly mirror the structure of their domestic counterparts), the question of the 'democratic deficit' within world politics 'is emerging as one of the central questions – perhaps the central question – in contemporary world politics. Whatever their underlying motivations, critics these days ranging from the extreme right to the extreme left, and at almost every point in between, couch criticisms of globalization in democratic rhetoric'[64]

A discernable development within the burgeoning field of globalisation and global governance argues that the domestic model of democracy is unfit to serve as a blueprint for global governance. Robert Keohane contends, '[u]nfortunately, such a vision [global democracy analogous to domestic democracy] would be utopian in the sense of illusory – impossible of realization under realistically foreseeable conditions'.[65] Instead, there has been a proliferation of alternative models of global governance that attempt to reconcile the basic principles and demands of domestic democracy with the practical necessities of a globalised world. In fact, this body of literature is rapidly becoming one

[62] Diamond (1999, 10)
[63] Vibert (2007, 1)
[64] Moravcsik (2004, 336). See also Bodansky (1999), Cerny (1999)
[65] Keohane (2006, 77): *'A system of democratic accountability in world politics would be one in which power-wielders would have to report to people whose actions they profoundly affected, and be subject to sanctions from them (Held 2004, chapter 6). For someone who believes in liberal democracy like me, it would be pleasant to imagine that such a system could be constructed for world politics unfortunately, such a vision would be utopian in the sense of illusory – impossible of realization under realistically foreseeable conditions'.*

of the most voluminous in the field of political science.[66] Novel alternative approaches to democracy and global governance tend to emphasise the role of pluralistic accountability mechanisms between various domestic and international actors,[67] institutional reform at the international level to incorporate more traditional democratic elements,[68] indirect accountability through domestic institutions[69] and legitimisation through technical expertise.[70]

The quantity of these general studies, however, stands in contrast to the paucity of studies dealing directly with the question of *judicial legitimacy* in a globalised world, and this asymmetry is one of the defects that this workshop intends to remedy. The following sections therefore focus on various attempts to ground judicial legitimacy in a globalised context. One crucial feature of these approaches is that they form part of an attempt to move beyond the domestically informed paradigm of the separation of powers, which has traditionally been dominant within the discipline.

3.2 Judicial legitimacy in a globalised world: patchwork legitimacy?

As noted in the introduction, many of the aforementioned objections have been raised in the context of the US Supreme Court, a context that differs in many respects from other jurisdictions around the world. The *objections* are therefore not always equally applicable or equally strong when applied to other legal contexts.

Many would argue that there is no negative legitimacy problem associated with judicial legitimacy. The validity of this argument depends on numerous legal and extralegal variables. The presence of judicial-review powers is important, as are many issues of historical and cultural context, dominant political ideology and similar matters. The goal of this section is not to delve directly into these modalities, but to consider them in a more indirect way. Moving away from the issue of negative legitimacy, this section considers the question of *positive* legitimacy. This survey shows that the positive legitimacy is very much a patchwork legitimacy; to date, it would be difficult to find a single coherent statement of the relation between legitimacy and judicial internationalisation. Instead, there are numerous discrete but interrelated arguments, emphasising particular elements that are subsequently relevant under particular circumstances. These circumstances may include such variables as political or legal culture, as well as social and historical background.

This paragraph will thus outline four dominant approaches to the question of judicial legitimacy in a globalised world.[71] One common feature of these approaches is that they (i) reject the notion that judicial legitimacy is almost exclusively a function of observing the appropriate separation of powers as mandated by the separation-of-powers doctrine and (ii) either wholly or partially invoke circumstances that are either consequences or corollaries of processes of globalisation.

Although not all of the authors explicitly claim to displace the separation of powers as a model for judicial legitimacy, their arguments can be read as indicating possible directions in which a novel paradigm of judicial legitimacy may evolve. Defending and advocating judicial internationalisation requires arguing why a judiciary that operates partly in the international and transnational sphere is desirable. Moreover, arguing that judicial internationalisation is desirable also requires arguing that it is legitimate.

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[66] For an overview of the various approaches, see Moravcsik (2004), Cichowski (2006), Shapiro (2005), Thompson (1999)
[67] E.g. Keohane (2006)
[68] E.g. the work of David Held and Daniele Archibugi. For a review see Scheuerman (2002)
[69] Often involving some version of Principal-Agent theories, see Moravcsik (2004, 354-355)
[70] Most prominently, Vibert (2007)
[71] See also Kersch (2005)

3.2.1 The judiciary as the executive agent of global human rights regimes

As discussed in the previous section, in which the strict version of separation of powers arouses suspicion toward the practice of judicial review, the practice has often been defended on the grounds that the judiciary is best equipped to curb the excesses of majoritarian rule and to ensure the observance and political salience of individual rights. In contrast to the notion that judicial legitimacy is primarily a function of its constitutional relationship to the legislative and executive branches of government (i.e. a function of the separation of powers), these accounts offer a more substantive alternative to judicial legitimacy. This alternative renders judicial legitimacy contingent on its effectiveness in securing a level of protection for basic rights with regard to the legislature and the democratic process in general. In summary, '[f]undamental rights must have a higher status than legislation. They must be protected from ordinary amendment and repeal. And it is the judiciary who must enforce the higher order status of fundamental rights—unreviewed by the legislature'.[72]

The advent of regional and global human rights regimes is undoubtedly an important source of judicial empowerment, and it conceptually reinforces the notion that judges have an autonomous role as protectors of individual rights. Human rights treaties are thus seen as further entrenching, consolidating and amplifying the status of domestic judicial review. Judges do this by broadening their mandate as upholders of constitutional rights and as upholders of human rights treaties. As such, the rise of supranational constitutional and human rights norms has ensured that '[c]ourts are increasingly given the powers to constrain, shape, and dismantle government action and acts'.[73] This is particularly visible under the legal regimes of both the European Court of Human Rights (ECHR)[74] and the European Court of Justice (ECJ),[75] where it is argued in certain quarters that the judiciary has been an agent of European integration as well as of the European rights culture.

Slaughter has drawn attention to the fact that one central consequence of this international dimension, which moves beyond the domestic paradigm, is that the emergence of global human rights law has a strong socialisation effect on individual judges. According to Slaughter, 'Courts may well feel a particular common bond with one another in adjudicating human rights cases, however, because such cases engage a core judicial function in many countries around the world'.[76] The core judicial function – the protection of individual rights – is buttressed by the development of crosscutting links amongst various domestic courts, as well as between domestic courts and supranational courts.

Nonetheless, the symbiosis between human rights treaties and constitutional norms is not uncontested. For example, Yuval Shany argues that domestic courts are often reluctant to import treaty norms into constitutional adjudication.[77] Elsewhere, Janet McLean highlights the difficulty of incorporating human rights treaties as supreme (i.e. as overruling domestic legislation and constitutions) in the US, as well as in the common-law legal systems. In the US, the supremacy of the constitution is considered imperative to the efficacious protection of rights; under common law, problems arise in relation to the doctrine of parliamentary sovereignty.[78]

Slaughter suggests that judges are conscious of the need to engage their professional counterparts in foreign countries and actively ensure a degree of uniform interpretation and application of human rights across borders, as long as doing so does not grossly violate domestic moral sentiments. From the perspective of judicial legitimacy, this suggests that courts currently have responsibilities to

[72] McLean (2004, 168)
[73] Cichowski (2006, 51)
[74] Cichowski (2006), Slaughter (2004, 79-82)
[75] Stone Sweet (2004)
[76] Slaughter (2004, 79)
[77] Shany (2006)
[78] McLean (2004, 167-171)

both a domestic constitutional order and *de facto* to an emerging global constitutional order (although Slaughter does not specifically argue to this effect). This argument appears to be affirmed by the increasing degree to which sovereignty is being made contingent upon the observance of basic standards of human rights, the rule of law and democracy (e.g. the ICISS' Responsibility to Protect Report).[79] Despite empirical evidence to the contrary, Shany also extols the virtues of the nexus between domestic constitutions and international human rights law, identifying such benefits as the 'limitation of unchecked judicial discretion, protection of the power of the executive to conduct foreign policy, necessity of harmonising domestic law with self-executing international norms, promotion of the desirable social values reflected in IHR norms, confirmation of an emerging cosmopolitan identity, minimisation of international criticism, etc.'[80] All of these factors can ultimately be considered to enhance legitimacy.

Nonetheless, most of the arguments can be read as echoes of the same sentiments. Judicial legitimacy can be enhanced by judicial internationalisation. Globalisation raises new questions of legitimacy, and many authors have thus proposed new answers. These developments suggest, but do not unambiguously assert, that the domestic judiciary is evolving into a 'funnel' between domestic constitutional orders and global human rights regimes. This mediating role is necessary to strengthen core constitutional values in a world in which domestic insularity is becoming less and less tenable. Internationalisation thus seems a necessary judicial strategy to ensure the effectiveness of constitutional values, which are being placed under pressure domestically by globalisation.

The situation described above raises several questions: do the aforementioned considerations constitute sufficient grounds for abandoning the separation of powers, or at least for moving beyond its strict, domestically oriented form? To what extent does the judiciary have an identifiable loyalty to an emerging global constitution, in addition to or even in the place of domestic constitutions? Are domestic constitutions losing their foothold in a globalised world? At a more fundamental level, can we attribute an autonomous role to the judiciary in counteracting the exigencies of globalisation, or should this be left to parliaments or other organs? These questions and others must certainly be answered if the separation of powers is to be replaced by alternative models of judicial legitimacy.

3.2.2 The judiciary as the guardian of democracy with regard to the forces of globalisation

Interestingly and perhaps counter-intuitively at first glance, some authors have argued that the global entrenchment of fundamental rights allows an internationalised judiciary to counteract the destabilising consequences of globalisation. In particular, it is argued that *domestic* democracy is best protected by a *globalised* judiciary.

The nexus of this claim is informed by the understanding that the devolution of political power to various non-elected bodies constitutes an important consequence of globalisation. In addition to a strong preference for the executive branches of government as the central organ charged with conducting foreign policy, a veritable mass of non-government organisations, inter-governmental organisations, technocratic bodies, supranational courts and other bodies have been established to address the border-transcending nature of contemporary politics.

From this perspective (as mentioned in the introduction to this section), the threat to democracy comes not from an overzealous judiciary, but from an all-powerful executive, which is insulated from the traditional checks of democratic oversight that are typically provided by parliaments and other domestic agencies. If it acts in a coordinated unitary fashion, the judiciary may counteract this

[79] ICISS (2001)
[80] Shany (2006, 399)

deficit by ensuring that the executive is scrutinised by domestic courts as well as courts everywhere, at least tacitly united in their understanding that it is necessary to place a check on unrestrained executive supremacy.

Martin Flaherty thus proceeds from the domestic understanding of the separation of powers, arguing that, if we concede that globalisation tends to favour the executive branches of government at the expense of the legislature and the judiciary, thereby disrupting the institutional balance, judicial internationalisation is a salutary force, as it restores this balance by relatively strengthening the judiciary. This subsequently does indeed lead to a 'global separation of powers'.[81]

In a similar vein, Eyal Benvenisti argues that judicial internationalisation creates more assertive domestic courts, as their position is strengthened by a new form of global judicial solidarity. This new-found leverage empowers the judiciary to act against the encroachment of global, unelected bodies on domestic politics by pressuring national governments to ensure representativeness to their domestic constituents.[82] Specifically, it shows how executives and legislatures face a certain 'pressure to conform', a pressure that would be less potent within a truly independent judiciary. These findings are echoed in a case study of the South African constitutional court, which notably has a constitutional mandate to reference non-domestic law and, despite its counter-majoritarian decisions, enjoys a significant degree of popular legitimacy.[83]

These and other similar arguments echo the observation that was made at the beginning of this section that democracy has always been a fluid concept; this is particularly true when considered in a global context. The dynamics of democratic governance, especially in its institutional manifestations, are transforming under the influence of globalisation. This suggests that classical anti-majoritarian and separation-of-powers type theories are themselves in need of revision, as the general parameters have changed.

3.2.3 The judiciary as a foreign policy agent

An alternative line of reasoning suggests that judicial internationalisation is legitimated partly by an appeal to its conduciveness to the promotion of the rule of law, democracy, human rights and constitutionalism at home and abroad.[84] Indeed, this notion informs much of the literature arguing in the direction of judicial internationalisation.

Concluding an analysis of judicial globalisation, Slaughter notes, '[i]n sum, judges around the world are coming together in various ways that are achieving many of the goals of a formal global legal system: the cross-fertilization of legal cultures in general and solutions to specific legal problems in particular; the strengthening of a set of universal norms regarding judicial independence and the rule of law (however broadly defined)'.[85] In this context, it is often noted that judicial internationalisation is conducive to the consolidation of independent judiciaries in recently established and consolidating democracies. Through judicial internationalisation, newly established judiciaries benefit from the expertise, support, status and persuasive authority derived from global judicial networks. This socialisation '[i]s important for convincing judges to try to uphold global norms of judicial independence and integrity in countries and at times when those are under assault'.[86] Justice Breyer also considers this consequence of judicial internationalisation to be generally desirable:

[81] Flaherty (2006)
[82] Benvenisti (2008)
[83] Gibson and Caldeira (2003)
[84] Kersch (2005), Kersch (2006), Mills and Stephens (2005)
[85] Slaughter (2004, 102)
[86] Slaughter (2004, 99)

> *(…) in some of these countries there are institutions, courts that are trying to make their way in societies that didn't used to be democratic, and they are trying to protect human rights, they are trying to protect democracy. They're having a document called a constitution, and they want to be independent judges. And for years people all over the world have cited the Supreme Court, why don't we cite them occasionally? They will then go to some of their legislators and others and say, "See, the Supreme Court of the United States cites us." That might give them a leg up, even if we just say it's an interesting example.*[87]

Indeed, Ken Kersch argues that several US Supreme Court judges, in referencing foreign law, both consciously and subconsciously subscribe to the core tenets of liberal internationalism, holding that:

> *[w]hen judges from well-established, advanced western democracies enter into conversations with their counterparts in emerging liberal democracies, they help enhance the status and prestige of judges from these countries. This is not, from the perspective of either side, an affront to the sovereignty of the developing nation, or to the independence of its judiciary. It is a win-win situation which actually strengthens the authority of the judiciary in the developing state. In doing so, it works to strengthen the authority of the liberal constitutional state itself. Viewed in this way, judicial globalisation is a way of strengthening national sovereignty, not limiting it: it is part of a state-building initiative in a broader, liberal international order.*[88]

The notion that judicial internationalisation promotes such values as democracy and the rule of law is prominent in an article by Flaherty, who asserts that:

> *Looking forward, judicial globalisation becomes not just permissible but imperative once the hoary doctrine of Separation of Powers is itself considered in a global context. Global Separation of Powers theory views globalisation as enhancing the powers of the executive in any particular country. It follows that any form of globalisation that works to enhance the authority of a corresponding judiciary (or legislature) works to maintain and restore the goal of balance among the principal branches of government that is the definitive feature of Separation of Powers doctrine.*[89]

Somewhat paradoxically, Flaherty argues that by abandoning a strictly domestic understanding of the separation of powers and thus accepting judicial internationalisation as a permissible (and even desirable) practice, the new global separation of powers can actually strengthen the separation of powers at the national level. Karel Wellens underscores the same accountability-reinforcing function externally, through such activities as acting as a watchdog with regard to international organisations. In this respect, international courts are the primary actors, although domestic courts are gaining ground as International Organisation (IO) immunity is becoming the subject of increasing debate.[90]

[87] ACL (2005)
[88] Kersch (2006, 115)
[89] Flaherty (2006, 479)
[90] Wellens (2004)

In this view, a judiciary that actively works to promote and streamline liberal democracy abroad by engaging in transnational relations is not weakening its legitimacy, but strengthening it. Both this section and the previous section suggest that the notion that a judiciary is blind beyond its borders, dealing solely with domestic matters, has become chimerical. In a globalised world, the judiciary must recognise that its moral responsibility includes attentiveness to extra-domestic factors, including global constitutionalism and the export of the rule of law.

3.2.4 Judges as problem-solvers: technocratic competence as a basis for judicial legitimacy

Slaughter refers to global governance as a paradox: '[w]e need more government on a global and regional scale, but we don't want the centralization of decision-making power and coercive authority so far from the people actually to be governed'.[91] The result has been the rise of NGOs, international institutions, international civil society, and so forth rather than a world government. What many of these organisations have in common is their technical or professional character.

For a significant portion of NGOs and autonomous bodies that are charged with specific public regulatory functions, political value judgments are not the only questions to be addressed in this regard; questions of a technical nature are of equal (or perhaps greater) significance. This is particularly true for bodies involved in regulating the economy, health, harmonisation and safety.[92] This problem obviously predates the post-Cold War interest in globalisation. The rise of bureaucratic agencies within domestic borders has long been a part of political life and has facilitated the growing demand for government regulation in ever more spheres of public life. The novelty lies in the fact that globalisation has lead to new types of problems (i.e. global threats) that require regional and global cooperation, in addition to a homogenisation of domestic problems due to the growing interdependence in economic and (because of mass media and communication) even cultural terms.

Slaughter argues that one significant way in which government officials have responded to these problems is to form cross-national information networks to facilitate the exchange of technical expertise between groups of professions. Significantly, this means that the black-box view of the state as a unitary actor is being replaced by a 'disaggregated view of sovereignty', in which sub-state actors autonomously establish inter-state relations. The nexus of this argument is formed by the empirical fact that government officials from all branches are increasingly seeking out quasi-formal and quasi-institutionalised information exchanges with their professional counterparts in foreign territories. When solving essentially domestic problems, such officials draw upon the expertise and similar experiences of others to reduce transaction costs and increase domestic efficiency. A globalised world it is accompanied by global problems, which elude effective domestic regulation. Global epistemic networks are an instrument that allows for efficacious cooperation on problems of a border-transcending scale whilst avoiding the perceived perils of world government.

The prime consequence of the establishment of global professional networks, indeed one of the features that set contemporary developments apart from traditional forms of transnational communication, is its socialising effect. Slaughter explains, "[i]t is closer in some ways to a global "community of courts", in the sense that judges around the world interact with one another aware of their membership and participation in a common enterprise – regardless of their actual status as state, national, regional or international judges'.[93] Slaughter often alludes to the development that globalisation has been a homogenising force with regard to the legal problems faced by domestic courts, assigning increasing privilege to technical, problem-solving approaches over overtly political solutions. In other words, the idea that domestic legal problems are necessarily idiosyncratic is in decline, as 'the focus shifts from the dispute-resolvers to the disputes themselves, to the common

[91] Slaughter (2004, 8)
[92] Vibert (2007, 30-32)
[93] Slaughter (2004, 100-101)

values that all judges share in guaranteeing litigant rights while also safeguarding an efficient and effective system'.[94]

This is due in no small part to the nature of contemporary policy-making, according to Frank Vibert:

> *In modern democracies unelected bodies now make many of the detailed policy decisions that affect people's lives, untangle key conflicts of interest for society, resolve disputes over the allocation of resources and even make ethical judgments in some of the most sensitive areas. By contrast, our elected politicians often seem ill-equipped to deal with the complexities of public policy, lightweight in the knowledge they bring to bear, masters not of substance but of spin and presentation and skilled above all in avoiding being blamed for public mishaps.*[95]

Admittedly, this legitimation hinges on whether the cases presented to judges are indeed 'problems' in a technical, value-neutral sense or whether they imply an undue degree of judicial influence over essentially political decisions. At first glance, it is plausible that certain legal questions (i.e. those involving the relation between means and ends and the probable effects of certain decisions) can benefit strongly from foreign experiences. In cases of fundamental human rights, however, the nature of the problems involved may also be converging, even if the solutions are not. Justice Breyer, a prominent advocate for a pragmatic, problem-solving approach to constitutional interpretation, argues that, across the globe, there are:

> *human beings, called judges, who have problems that often, more and more, are similar to our own. They're dealing with these certain texts, texts that more and more protect basic human rights. Their societies more and more have become democratic, and they're faced not with things that should be obvious – should we stop torture or whatever – they're faced with some of the really difficult ones where there's a lot to be said on both sides. Hard to decide. I said, "If here I have a human being called a judge in a different country dealing with a similar problem, why don't I read what he says if it's similar enough? Maybe I'll learn something".*[96]

In summary, the pivotal point in the argument for judicial internationalisation is that extra-domestic legal sources can be a powerful heuristic aid in domestic adjudication. The legitimating element of judicial internationalisation lies in quality-enhancing aspects of domestic decision-making. Looking abroad will either yield well informed, reasoned and considered decisions or give cause for 'reasoned divergence'[97]: the rejection of non-domestic legal sources after having engaged and refuted the substance of the arguments. Viewed in this way, judicial internationalisation is arguably a force that enhances legitimacy.

3.3 Some critical remarks

One important point to remember when considering any normative analysis is the basic distinction between contexts of discovery and contexts of justification. A cogent argument can be made for the normative permissibility of judicial internationalisation within certain parameters whilst leaving open the question of whether judges consciously subscribe to these parameters.

[94] Slaughter (2004, 102)
[95] Vibert (2007, 1)
[96] ACL (2005)
[97] Slaughter (2004, 103)

One frequent claim[98] is that basic expediency is the central motivating force behind the use of foreign precedent. In many jurisdictions, highest courts are heavily strained in terms of time and resources. The consultation of foreign precedents as well as the formation of judicial networks can alleviate such problems. It is worthwhile to note that actual motivations may be informed by either very mundane or very lofty considerations. This workshop, however, does not immediately address the more empirical question of what compels judges to look beyond their own borders. These and related issue will be considered in Workshop I of the conference.

3.4 Conclusions

The preceding inventory of arguments offered in favour of judicial internationalisation implies that these arguments are in some way conducive to judicial legitimacy. In many cases, the arguments are more implicit than explicit; the defence of a practice, however, implies commitment to its legitimacy. Few authors have attempted to offer a comprehensive theory of judicial legitimacy in a globalised world, opting instead to underscore developments that may be leading in such a direction. Although not entirely discrete, these arguments fall broadly into three camps: the emergence of global human rights regimes as a basis for enlarged judicial autonomy and hence legitimacy; the autonomous role of judges in advancing certain legal and political values in the foreign policy arena; and the shift toward technical decisions, coupled with the homogenisation of legal problems as a legitimising force of judicial internationalisation. The common unifying element seems to be that the judiciary cannot be conceived solely as a domestic actor. In this way, contemporary judges can legitimately claim the right to operate beyond their own borders.

The arguments above raise further questions: Can the factors mentioned above, alone or in tandem, offer a paradigm of judicial legitimacy to supplement or replace that of the original separation of powers? How do the various factors relate to each other? In short, how can judicial internationalisation be coherently accommodated in the existing paradigm of the separation of powers, and, if not, what paradigm of legitimacy presents itself as a viable alternative?

4 Contemporary objections to judicial internationalisation

The scholarship extolling the virtues of judicial internationalisation – the subject of the previous section – has received much criticism in recent years. The premises on which the proponents of judicial internationalisation build their arguments (a converging global consensus on values, the foreign policy role of judges and the professional competency of the judiciary in technical matters) have been critically questioned by a number of authors.[99]

The core of these criticisms tend to refer back to the basic elements of the separation of powers: all that is said in favour of judicial internationalisation obscures the fact that the unelected judiciary is increasingly and dangerously encroaching upon fundamentally political matters that, in the final analysis, must fall to democratically elected legislatures. Judicial internationalisation potentially endangers the values of national sovereignty and democratic self-government. In their view, the separation of powers is as solid a prescription as it ever was, and judicial internationalisation is nothing more than an attempt to dismantle it. Kersch summarises the point as follows:

[98] Benvenisti (2008) specifically makes this point, as does Breyer in the Breyer/Scalia debate.
[99] In general: Rabkin (2005), Kersch (2005), Kersch (2006), Kochan (2005), Paulus (2004), Young (2003), Mills and Stephens (2005), Bork (2003)

> *Constitutions – longstanding, stable and successful democratic constitutions, like that of the United States – are defined by their relatively clear (or, at least, advisedly balanced) and transparent lines of responsibility and authority. The deliberate blurrings of offices and authorities championed by proponents of judicial globalization are, as such, moves in an anti-legal and anti-constitutional direction.*[100]

The following sections consider their arguments as a response to the positions outlined in the previous section.

4.1 Opposing judicial internationalisation

4.1.1 A denial of global technocracy and moral consensus

Advocates of judicial internationalisation tend to treat the emergence of global human rights jurisprudence and the increasing need for technical competence within the judiciary as overlapping but essentially distinct phenomena. The detractors of judicial internationalisation, however, tend to treat these issues as two sides of the same coin. On the one hand, they claim that human rights rhetoric is a veil behind which political choices are defused and surrendered to unelected bodies. This alleged convergence, in turn, lends support to the proposition that judges are indeed technocrats or problem-solvers. Absent deep moral disagreement, adjudication can indeed be more plausibly viewed as a technical-legal rather than a moral-political endeavour.

The views presented in this discussion are united in their conviction that the stakes of judicial internationalisation are too high. Judicial internationalisation inevitably leads to the loss of legislative autonomy and with it, the foundations of democratic self-government (i.e. rule by democratically elected representatives). Bork argues:

> *[o]ne telling indication of the judicial activism and uniformity of outlook among judges is the way that legal interpretations of constitutions with very different texts and histories are now giving way to common attitudes expressed in judicial rulings. (…) The trend to transform political and moral questions into legal issues, and thereby transfer power from elected legislatures and executives to unaccountable courts, continues.*[101]

This uniformity of outlook is not limited to domestic judges; it is gaining international adherence as well. According to Kersch, '[i]t is hard not to conclude that many of the discussions of these issues, in their fussing over narrow, technical points, are either deliberately or in their effects, throwing a smokescreen over the profound issues of constitutional self-government that, at bottom, are at stake'.[102]

In a more extended passage, Jeremy Rabkin identifies the alleged 'inescapable moral truth' of internationally shared values accompanying the emergence of technocratic bodies, to the detriment of legislative autonomy:

[100] Kersch (2004, 21-22)
[101] Bork (2003, 11)
[102] Kersch (2004, 21)

> *Global governance rests on the quite different premise that legislative consent to law is not so important to the authority of law. After all, in the perspective of advocates for global governance, there are no great choices left to make. Judges must embrace international standards, most notably in the realm of human rights, because what most nations have affirmed (or at least what many advocacy groups have asserted) is something approaching an inescapable moral truth. So, too, global governance encourages the delegation of rule-making powers to international organizations, in which the agreement of national representatives – representatives of the national executive – can bind whole nations to new international regulatory standards. Systematically left out is the power of a legislature to determine a state's own law.*[103]

Kersch's reference to internationalised judges as 'cosmopolitan administrators'[104] tellingly reveals the deep connection between globalisation, the rights culture, judicial activism and judges as 'problem-solvers'. The problem of human rights is apparently an administrative problem, not a political one. All of these issues, however, amount to nothing more than an intricate sleight of hand by judicial imperialists. Andreas Paulus also laments the 'reliance on and trust in apolitical, functionalist solutions to value-conflicts between different legal orders'.[105] Indeed, Scalia's assertion about the absence of a common moral and legal framework that was mentioned earlier[106] fits well into this debate.

Although it is not the root cause of judicial activism, judicial internationalisation can be skilfully manipulated by the judiciary to create the illusion of consensus. They can be used to cultivate the idea that the basic moral contours of society have been fixed, thus giving rise the notion that adjudication is primarily a technocratic endeavour, that it is truly a problem-solving activity. Overlooking the political and controversial nature of many purportedly 'technical' problems threatens democratic accountability. Unlike Keohane, Moravcsik and other authors, the authors under consideration in the present section deny the imperative to adapt extant paradigms of democratic accountability. Instead, we must judge the effects of internationalisation by our traditional normative standards. According to this argument, doing so will reveal that democratic accountability is waning due to the process of globalisation. Accountability ultimately requires identifiable, elected representatives. Rabkin reminds, however, that:

> *The whole logic of global governance subverts the claim of a legislature to make its own decisions for its own constituents. Global governance requires us to acknowledge that 'we' – the constituents of a particular legislative authority – do not have different interests from the others, so we don't really need distinct institutions to define these interests. Of course, there can still be legislative action in local matters, if such decisions do not threaten the larger scheme.*[107]

In summary, the argument thus holds that judicial internationalisation *can* be a legitimating force *if* a global consensus is so strongly shared that there is no logical necessity for domestic institutions and domestic legislatures. This premise is mistaken, according to those opposing judicial internationalisation; there is no such global consensus, and such is not expected in the near future. Once this point is conceded, the notion of judges as problem-solvers falls apart. Problems imply technical expertise, means-ends relationships, and value-neutral calculations. According to the views presented here, however, this is far from the case. Political choices should be made by political actors; more specifically, they should be made by elected legislatures, and not by officials who have not been elected.

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[103] Rabkin (2005, 41), emphasis added.
[104] Kersch (2004, 19)
[105] Paulus (2004, 1056)
[106] ACL (2005)
[107] Rabkin (2005, 43)

4.1.2 The role of the judiciary in international relations

What remains of the proposition that the judicial role includes the export and consolidation of democracy and the rule of law? Judicial internationalisation is conducive to this end, as it fosters uniformity across liberal democracies and serves to consolidate the judicial understanding of what it means to apply these principles in conformance with regional or global standards. As Kersch explains, 'American judges citing foreign precedent and practices (both when they follow those and when they reject them) will see themselves as doing their part. They will understand themselves as engaging in a process aimed at the desirable objective of bringing liberal rule of law values (that is, American values) to formerly non-liberal non-democratic states'.[108]

In the same spirit, which favours legislative authority and democratic accountability over strong judicial autonomy, some have argued that advancing the rule of law and democracy confuses procedural with substantive values. Alexander Mills and Tim Stephens explain:

> *The principles Slaughter specifies reveal that a characteristically liberal focus on procedure lies at the heart of her approach. A shared acceptance of procedural rules, however, is no substitute for a set of shared values. […] However, an implicit, unwritten, unacknowledged 'consensus' on procedural norms makes a flimsy foundation for a transnational community. […] Slaughter's transnational community of courts is in fact not a site of global consensus, but of conflicting norms, including in particular a conflict between transnational norms and domestic liberal democratic values.*[109]

Nonetheless, the confusion of means (judicial internationalisation) with ends (the global promotion of democracy and the rule of law) is not the only factor that forms an affront to the critics of judicial internationalisation. There are many principled reasons for not condoning the practice, and all of them involve a strict traditional understanding of sovereignty. One of the more vociferous advocates of the 'sovereigntist' movement, Rabkin, goes to some lengths to argue that the heart of liberal democracy is the recognition of value pluralism. Particularly in foreign affairs, sovereignty is premised on the notion that the appropriate means to deal with this diversity is to allow each government the authority to conduct its affairs in accordance with the sentiments of its own constituency. On the topic, Rabkin says:

> *A legislature is an institutional monument to differences among voters as well as to their willingness to be bound, in the end, by a common rule. Global governance not only thwarts or distorts the policy impulses of legislatures, but denigrates the principles that stands behind legislative authority – that a diverse electorate will accept the results of an ultimately legislative decision so that "we" can be governed in common.*[110]

If the judiciary adopts a substantive understanding of the rule of law and democracy whilst dabbling in foreign affairs, it violates legislative supremacy. The very notion of the judiciary as a foreign policy agent, however, is debarred on the classical understanding of sovereignty, which states that each government (specifically, foreign legislatures) reigns supreme in its own territory. By using judicial internationalisation as a tool to foster convergence in substantive values, judges who subscribe to this view actually accomplish the opposite of what they set out to do; they create a loss of democratic accountability and the rule of law through bypassing democratically elected legislatures in favour of global governance networks and similar entities. Rabkin argues, '[t]here is

[108] Kersch (2006, 123)
[109] Mills and Stephens (2005, 20-23)
[110] Rabkin (2005, 42)

no obvious reason why outsiders would care whether any particular people does organize itself under liberal institutions, if that people does not threaten others'.[111] In other words, the non-intervention principle, as once championed by the UN, argues forcefully against interfering in another nation's sovereignty (with one important and difficult qualification: 'if that people does not threaten others'). In any case, should such interference be required, the judiciary has no place in making such decisions.

In summary, the authors of this section argue that an appeal to the salutary power of judicial internationalisation in establishing democracy and the rule of law is misguided. According to their argument, it is misguided because the rule of law and democracy are procedural values. By engaging in 'uniform interpretation', the judiciary necessarily oversteps its appropriate competency.

4.2 The problems of methodological indeterminacy

Not all objections to the judicial internationalisation turn on principles of sovereignty and democracy. A number of authors do not deride the use of foreign precedents in principle, arguing instead that there are methodological problems that may also 'spill over' into the realm of legitimacy. In particular, Vlad Perju and Robert Alford argue that the use of foreign materials is still significantly underdetermined from a methodological perspective.

This is true, first, from a normative perspective. As noted above, if we can accept the legitimacy of judicial internationalisation under certain circumstances, we still need *workable* directives to guide judges in particular cases. How can judges determine whether particular instances of adjudication may benefit from comparison to non-domestic legal sources? This question is relevant in the context of methodological difficulties that may result from the unreflective and uncritical use of foreign legal sources. This section addresses some of the more obvious methodological problems at stake.

The problem of selection bias is an example of these methodological problems. Because it is virtually impossible to consider every piece of jurisprudence ever produced in the world, it is often easiest to look towards those that are most readily available. This could lead to a bias in favour of more prominent jurisdictions, such as the US Supreme Court, which has been a 'net exporter' of decisions for many years. The problem of such piecemeal comparison may lie in the fact it stifles the diversification of views, given that certain sources of decisions are over-privileged, to the detriment of a more inclusive mode of judicial deliberation.

Related to this point is the problem of language. This bias is undoubtedly enhanced by referring only to those decisions that are published in a familiar language. Courts lacking the means to have their decisions translated on their own initiative may find their voices dwindling in the 'global community of courts'.

An additional problem concerns what it actually means to 'use' foreign precedents. As Perju argues, merely citing non-domestic legal sources is often simply an exercise of 'nose counting'.[112] A court may question what persuasive force derives from the mere fact that other courts have made decisions that are similar or dissimilar to its own decisions. Normative arguments are necessary to the further definition of the appeal that is actually being made when non-domestic legal sources are cited as persuasive authorities. Why are they persuasive? The discussion above demonstrates several possible grounds upon which non-domestic legal sources may constitute persuasive authority. The problem is more mundane, however, and it lies in the fact that judges who fail to make explicit why they cite particular foreign precedents do nothing more than create the illusion of persuasiveness sustained by the veil of authority.

[111] Rabkin (2005, 255)
[112] Perju (2007, 179)

The problems outlined above are not principled but pragmatic objections to judicial internationalisation. Alford contrasts the well-defined poles of opposition in the methodology of US Constitutional interpretation with the vacuity that surrounds the comparative methodology of courts. Although many of these issues properly belong in Workshop III of this conference, it is important to be aware that pragmatic objections also have some bearing upon the question of legitimacy.

4.3 Alternatives to judicial internationalisation

The tenor of these arguments suggests that those opposing judicial internationalisation have placed the burden of proof on its advocates. In the final analysis, our entire mode of thinking about democracy, accountability, the rule of law and, most importantly, judicial legitimacy has proven itself over the last two centuries. Why should these models be suddenly left behind because of globalisation?

Thus far, the various answers to this question have been failed to convince these authors. The central thrust of this school of thought is thus that attempts to conceptualise accountability in non-electoral terms are misguided. Accountability and legitimacy derive from the popular consent of the people, as expressed in their constitutions and legislation. 'States continue to be the main units of legitimacy and of, ideally democratic, debate and decision-making. For this role of the State, no substitute appears on the horizon'.[113]

Constitutions, parliaments and elections are the currency in which legitimacy is valued. This currency involves sovereignty, not in the qualified, post-modern sense, but as it was articulated by its intellectual progenitors: Hobbes, Rousseau and Locke. 'Sovereignty is the first bulwark of constitutional government – as it implies the right to say no to outsiders. Without that, it may be hard to say no at all, because it becomes so hard to determine who has the right to utter the no and in whose name. […] If the power of national governments rests on their respect for certain constitutional standards and limits, undermining those governments almost necessarily puts at risk the authority of those standards and limits'.[114]

Judicial internationalisation is thus deemed detrimental to judicial legitimacy. 'A nation should have the freedom to control the development of its own laws. The elected branches, which develop U.S. law, lose that control if judges are able to import extraterritorial and extra-constitutional sources for the determination of legally applicable standards. […] If Congress has not chosen to reduce a norm to legislation it is presumptuous for the courts to pretend they know better'.[115]

This is a strong re-affirmation of the separation of powers. It is also an attack on the assertion that global governance is, on the whole, a good thing. According to these authors, judicial internationalisation is far from harmless, as it obscures the real issue: democratic legitimacy and accountability. Rather than re-interpreting our normative framework in light of (judicial) internationalisation, we should resolutely do the opposite. We should cling to the separation of powers as the tried and tested foundation of legitimate government and judicial internationalisation, and it must be treated with considerable caution in most understandings of the practice.

[113] Paulus (2004, 1048)
[114] Rabkin (2005, 69-70)
[115] Kochan (2006, 541-542)

5 Conclusion: proposals for debate

The discussion above has endeavoured to portray the normative problems of judicial legitimacy in the narrative of a larger debate concerning the changing nature of politics itself within a globalising world. Some voices advocate (whether implicitly or explicitly) for a transformation in our standards of legitimacy. A globalised world cannot make do with normative paradigms that are rooted in the 'fiction' of a Westphalian system. Globalisation requires global governance, and global governance requires global categories of legitimacy. As Keohane asserts, '[…] the domestic analogy is unhelpful since the conditions for electoral democracy, much less participatory democracy, do not exist on a global level. Rather than abandoning democratic principles, we should rethink our ambitions'.[116]

Rethinking our ambitions could very well mean that we must embrace judicial internationalisation as a favourable and legitimacy-enhancing phenomenon. Judicial legitimacy is no longer defined in terms of the rigid, anachronistic separation of powers, with its slavish deference to the legislative will. This is a new world order, one in which sovereignty is limited and in which human rights and the rule of law are universal, or at least global. More importantly, it is a world in which judges across the globe have a responsibility to protect these basic values. Judicial globalisation is a highly valuable corollary to this task, and it will help give the judiciary a global voice, thus fostering the development of the international rule of law.

Moreover, it is possible that the traditional understanding of the judiciary as an organ of national sovereignty has been transformed. Perhaps the domestic constituency now exists alongside several other constituencies (e.g. the transnational legal order, global human rights regimes) to which judges have autonomous responsibility.

For others, leaving behind the domestic analogy constitutes a craven and perilous attempt to obscure the true lines of democratic accountability, which are always based on constitutions and elected bodies. Globalisation does not mandate a paradigm shift; instead, it compels us to defend ever more strongly the separation of powers and national sovereignty against intrusion by technocratic, unelected bodies. As Donald Kochan professes, 'The foundation of democratic governance lies in the people's ability, responsibility, and power to create law or control the mechanisms by which it is created. Democratic control is lost when sources outside the domestic political processes serve as the bases of decision'.

Finally, Kersch rejects all talk of global governance, information networks and the like as a façade for what is actually the usurpation of political power by a bureaucratised judiciary. The separation of powers and domestic lawmaking are as strong as ever, and they are in dire need of protection from movements such as judicial globalisation:

> *Constitutions create a government; they do not launch quasi-autonomous "networks" of "governance." Rule by networks of governance that have succeeded in cultivating a quasi-autonomy through a constructed legitimacy is not constitutional government as Americans have traditionally understood it. This process should not be allowed to proceed without considerably more scrutiny than it has received.*[117]

[116] Keohane (2006, 75)
[117] Kersch (2004, 22)

In sum, and against the background of the overview provided above, this workshop seeks an answer to the following question:

> ***Is the Separation of Powers a measure of judicial legitimacy that can successfully accommodate the exigencies of a globalised world, or does judicial internationalisation compel us to find additional or novel paradigms for anchoring that legitimacy?***

WORKSHOP III

Transjudicial dialogue in an internationalising world

1 Introduction

1.1 Core question

This workshop focuses on the ways in which judicial internationalisation manifests itself at the level of the practitioner. The principal focus is on the empirical and institutional facets of judicial internationalisation rather than the theoretical and the normative dimensions; what *is* happening and what *could* possibly happen in the years to come?

> ***In what ways do national courts to engage in transjudicialism, what processes, mechanisms and practices exist and how are these processes, mechanisms and practices likely to develop?***

These phenomena are considered mostly from the perspective of the practitioner: what does judicial internationalisation mean for the day-to-day activities of judges in highest national courts and other relevant actors (e.g. attorneys) in the field?

With reference to Part I of this inventory, it is important to re-emphasise that the present approach provides no judgment on the inherent desirability of transjudicialism.[118]

In empirical terms, although assessments of the nature and extent of these developments may vary, it is widely accepted that the phenomena of transjudicial dialogue and transjudicial borrowing are actually taking place. They are taken as a 'given' in the context of this workshop, and the question is asked how these phenomena are likely to develop in the immediate future.

Existing empirical work and the potential for further research form an important starting point. With regard to the transjudicial dialogue, this involves paying attention to the forums (both formal and informal) in which dialogue takes place, as well as the related institutional practices that facilitate it. With regard to transjudicial borrowing, we consider primarily methodological and practical questions. Methodological questions involve such issues as the selection criteria for deciding which foreign case law should be considered and which interpretive strategies should be used to employ them effectively, along with the difficulties that are associated with using foreign law in a responsible manner. The issues to which the practical questions relate include language barriers and the possible role of information technology in providing instruments for engaging foreign bodies of legal knowledge.

[118] In normative terms, propositions on the desirability of these activities – or the circumstances and argumentative and interpretive parameters under which they are appropriate – differ significantly. Explicit normative concerns with these developments are addressed in Workshops I and II.

1.2 Problem statement

In addition to an empirical inquiry into the current state of affairs concerning judicial internationalisation, the core question of this workshop, as stated above, contains a reference to what 'the next generation' of transjudicialism might look like. How might transjudicialism develop further, keeping in mind that the basic normative appraisal of these phenomena may vary across individuals?

Two other important components of this main theme, which will be outlined in the following sections, are:

(1) The institutional question of whether an empirical investigation of the practices currently being used as part of the transjudicial dialogue lends itself to the identification of certain 'best practices' that might function as signposts for future developments

(2) The question of whether the difficulties inherent in transjudicial borrowing merit the development of a 'modest' or auxiliary methodology for the use of foreign legal sources.

These themes are examined against the background of a discussion surrounding alternative factors that influence transjudicialism, including the role of different legal cultures and styles of reasoning.

1.3 Roadmap to the debate

As previously stated, this workshop is focused upon two intimately related transjudicial phenomena: *transjudicial dialogue* and *transjudicial borrowing*.

With regard to transjudicial dialogue, the primary focus is on that form of transjudicial communication to which Slaughter refers as 'horizontal communication'; in other words, the focus is on the dialogue between courts of similar hierarchical standing,[119] in this case, between highest national courts. This is not to say that communication between national courts and supranational courts is irrelevant, particularly when such dialogue is indeed dialogical and voluntary rather than mandated by formal arrangements.

As indicated in the section about Workshop II, the term *transjudicial borrowing* refers to cases in which judges are confronted with particular problems and in which they *voluntarily and of their own accord* widen their views and look abroad to consider how other judges have addressed similar problems.

This means that certain modes of using foreign legal sources fall outside the scope of this workshop. The situation in which a court is duty-bound to engage in a study of foreign law (e.g. when national statutes or unwritten customary laws prescribe that the court is obliged to decide a case in conformity with foreign law) falls outside the current analysis.[120] The same applies to situations in which international private law dictates choosing the jurisdiction that offers the best solution to the case under consideration, according to the *favour* principle.[121] Finally, cases in which courts are

[119] Slaughter (1994, 103) defines horizontal communication as taking place 'between courts of the same status, whether national or supranational, across national or regional borders.' She distinguishes this from 'vertical communication' between national and supranational courts. Besides those, she also discerns 'mixed vertical-horizontal communication', in which both forms combine in different ways.
[120] Hartkamp (2004, 230).
[121] Hartkamp (2004, 230).

dealing with international conventions or other supranational sources that explicitly require the studying of foreign documents are excluded.[122] All of these cases are concerned with the *involuntary* or prescribed use of foreign sources.[123]

2 Transjudicial dialogue

Given the background described above, this workshop seeks to ascertain which media of communication are being employed by highest court judges to conduct transjudicial dialogue. This section presents a number of factors and considerations pertaining to the manner in which transjudicial dialogue is conducted.

2.1 Face-to-face meetings, institutions and databases

A general inventory of face-to-face meetings, institutions and databases related to judicial internationalisation, prepared by HiiL, is presented in an annex to this inventory. A preliminary taxonomy of the various modes of dialogue currently in existence is provided in this section.

Slaughter recognises face-to-face meetings between judges as one of the processes forming part of 'judicial globalisation', a term referring to the 'diverse and messy process of judicial interaction across, above and below borders'.[124] According to Slaughter, judges participating in such dialogue (whether directly or indirectly) share a 'deep sense of participation in a common global enterprise of judging', a notion highly valued by Slaughter, who argues that this awareness of judges, seeing each other as 'fellow professionals in a profession that transcends national borders'[125] provides the foundation for a global community of law.

Various forms of this face-to-face dialogue can be distinguished by examining the following factors:

- At whose initiative do the meetings take place? (e.g. judges themselves, academic institutions)
- To what extent are the meetings formal and/or official? (i.e. with judges representing the judiciary of their states rather than attending in a personal capacity)
- To what extent are such meetings institutionalised?
- What are the declared purposes of such gatherings?
- Are the meetings universal, as opposed to regional meetings and/or meetings between judges from similar legal system
- Are the meetings general, as opposed to gatherings of judges specialising in a specific field of law

Additional factors or types of face-to-face meetings may emerge during the workshop, and HiiL is eager to include this input in its inventory.

Once additional insight has been gained into the types of face-to-face meetings, empirically based conclusions can be drawn regarding the prevalence of such meetings, their proliferation (or lack thereof) and their general development over time and in particular directions.

[122] Hartkamp (2004, 230-231).
[123] Van Erp (1999, 235) and Hartkamp (2004, 230).
[124] Slaughter (2000, 1104 and 1120-1123).
[125] Slaughter (2000, 1124).

It will be interesting to explore whether and how these meetings influence other facets of transjudicialism, which take the form of cross-references in judgments and decisions. If such meetings are desirable, in principle, there could be a way to examine whether certain types of meetings are more useful than others are, taking into account the factor of legal cultures and other issues. Another relevant question involves the existence, in addition to those who support activities that widen the horizons of judges and contribute to cross-fertilisation, of critics who oppose such practices and doubt their legitimacy in the same way that they criticise the legitimacy or utility of considering foreign judgments in the domestic adjudication of particular cases.

2.2 Actors involved in transjudicial dialogue

Who are the principal actors in the transjudicial dialogue and what factors may determine their propensity to engage in transjudicialism?

Judges

Until recently, the element of foreign law was generally absent from legal training.[126] In current times, the opposite seems to be true. For example, Bernard Rabatel notes that '[t]he *Ecole de la Magistrature*,[French National Magistrates' College] which has ensured the initial and continuing training of French judges for over forty years, has developed programmes with the primary objective of raising awareness of the legal systems of other countries.'[127] It is obviously necessary, however, to remember that there is a difference between (merely) raising awareness of foreign law and actually using it. That having been said, it would not be surprising if an age factor turns out to play a role with regard to the willingness to engage in dialogue.

In some cases it is recognised that some assistive entity could be helpful in the task of ascertaining the true meaning of foreign legal rules and preventing misinterpretation. The 'liaison magistrate' is an institution in this spirit.[128] The main purpose of a liaison magistrate is to improve judicial assistance and strengthen cooperation between legal systems. Judges coming from one legal system are appointed to posts within the judicial authorities of another. For instance, in 1993, the first French judge was appointed as liaison magistrate in Italy.[129]

Role of the bar

It is plausible that the world's bar associations are important agents of judicial internationalisation. As an institution, a national bar association is in a position to exert a certain degree of influence on the dominant methods of operation within the legal profession. If a national bar association were inclined to view transjudicial dialogue as a favourable phenomenon, it might affect the way such practices are viewed within a certain jurisdiction. More specifically, because the role of the bar association is directed by policy, it may actively choose to address the question of transjudicial dialogue, either endorsing or rejecting the practice. Nonetheless, bar associations are in a better position than are individual judicial actors (e.g. judges and lawyers) to provide authoritative management for the process.

[126] Rabatel (2004, 49).
[127] Rabatel (2004, 49).
[128] Rabatel (2004, 49-50).
[129] Rabatel (2004, 50).

Law firms

In many cases, the members of bar associations (i.e. attorneys) are the agents that bring comparison with other jurisdictions before highest courts in their pleadings. What networks do they have for finding non-domestic precedents? How do they formulate their arguments when bringing them forward? Does the receptiveness of a particular national jurisdiction to transjudicialism affect the forum choice?

The 'political actors'

The freedom to engage in transnational judicial dialogue, the degree of openness towards the phenomenon and the manner in which it is organised are also determined by the space and the general atmosphere that is created by the political side of the national system. A fundamental question concerns whether the Constitution encourages the practice. In South Africa, the Constitution specifies that judges should seek guidance from relevant and further developed systems elsewhere. Within the EU and the Council of Europe environment, a common 'political space' has been created in which transnational dialogue (whether judicial or not) is a key element.

2.3 Theoretical Models

In addition to the empirical dimension, it is also important to advance our theoretical understanding of the transjudicial dialogue through the development of theoretical models.

This section gives primary consideration to the work of Slaughter, due to its prominent status within the field. Nevertheless, a central purpose of this workshop is to introduce alternative approaches that may be relevant in this regard.

Slaughter: Global Community of Courts

Slaughter argues that the merging of legal systems shapes a common institutional identity for judges across nations.[130] This merging of legal systems dispenses with the idea that judges operate solely within national frontiers. Judges around the world must focus on commonalities – the essentials of what the profession embodies. This does not mean that judges lose their national character when they become conscious of the fact that they are part of a transnational system.[131] As a collective, judges must address and solve disputes under rules of law.[132] According to Slaughter, '…it stretches too far to describe them all as part of one global system, but they certainly constitute a global community of courts'.[133] In short, courts *qua* courts pay due respect to each other's decisions as part of 'judicial comity'.[134]

This viewpoint presupposes the awareness of each court that it is similarly placed in functional terms, striving towards a common goal.[135] Slaughter acknowledges the gradual expansion of practices related to transjudicial dialogue. [136] Hypothetically, if something approaching a global legal system actually came into being, one plausible consequence would be the establishment of an actual hierarchy, in which judgements that are most consistent with communal values would take precedence (notwithstanding the possible emergence of 'bad practices'). Slaughter acknowledges that a community requires more than dialogue; a community shares a common valuation of a

[130] Slaughter (1994, 133) and Slaughter (2003, 192).
[131] Slaughter (2003, 194).
[132] Slaughter (2003, 192).
[133] Slaughter (2003, 192).
[134] Slaughter (2000, 1112).
[135] Slaughter et al. (1998, 711).
[136] Slaughter (2003, 194).

particular normative framework. Nonetheless, empirical observation shows the entire process is still in its infancy, a position that Slaughter does not dispute.[137]

The hierarchy mentioned above is informal rather than formal, and this fact has two important ramifications. First, the interaction is predominantly voluntary in nature and based on convincing through reason.[138] Second, a risk that is inherent in these types of endeavours is that actors with greater economically or politically resources tend to gain a disproportionate degree of influence in the global community of courts.

Other difficulties have been raised as well. The solely pragmatic justification (in the sense of being driven by similar purposes) is not tantamount to an 'active and ongoing dialogue'.[139] Judges participating in particular judicial networks have diverging concepts of law, its function and the interrelationship between law and the position of the judge in society.

3 Transjudicial borrowing

3.1 The empirical dimension

As it stands, quantitative empirical data of transjudicial borrowing is scarce.

In 2004, the Sixth World Congress of the International Association of Constitutional Law (IACL) devoted a plenary session to this matter, titled 'Comparative Constitutionalism in Practice'.[140] The cardinal question presented to a roundtable was as follows: 'Do judges in their countries make use of or reference to foreign materials in constitutional adjudication?' None of the participants denied that this actually happens, probably more frequently than before.[141] More recently, the Eighth World Congress of IACL (which took place in June 2007) included a plenary session on the 'internationalisation of constitutional law', and much of the discussion was once again devoted to the practice of considering foreign decisions. In this discussion as well, the clear conclusion was that courts all over the world are involved in this practice, albeit to varying degrees and in different ways.[142] In the US, a number of fairly recent and high-profile decisions included references to decisions by foreign courts,[143] rekindling a vigorous discussion on the legitimacy and desirability of this practice, while also showing that it was happening.[144]

3.2 Types of transjudicial borrowing

The following section enumerates several factors and modalities that may prove relevant to understanding the various manifestations of transjudicial borrowing:

1. Judges may use foreign sources either consciously or unconsciously. The practice is not always intentional. Even those who tenaciously oppose the use of foreign law come into contact with ideas from abroad. Is it unreasonable to assume that certain influences will unavoidably occur (whether

[137] Slaughter (2003, 215-219).
[138] Perju (2005, 471).
[139] Slaughter (2004, 66).
[140] The proceedings were published in ICON (2005).
[141] Furthermore, while not unanimous on all aspects of the phenomenon, all but one of these judges shared the view that the practice of considering foreign decisions is useful. Only Lord Justice Stephen Sedley of the United Kingdom Court of Appeal expressed the view that 'comparative constitutional law is of infinite interest but of little or no practical value in constitutional adjudication' (ibid, p. 569).
[142] The panellist in this session who confirmed this conclusion came from constitutional courts in Columbia, South Africa, South Korea, Germany and the UK.
[143] For example, see *Lawrence et al. v. Texas*, 539 U.S. 558 (2003) (on the criminalization of homosexual sodomy); *Roper v. Simmons* 125 S.Ct. 1183 (2005).
[144] For example, the subject has been debated by Justice Breyer and Justice Scalia Dorsen (2005). For another contribution by an American judge, see Ginsburg (2005). In addition, there American scholars have made many contributions on these issues in recent years.

consciously or unconsciously)? According to Konrad Schiemann, every judge worldwide has made use of – and uses – foreign input to reach a decision.[145]

2. A second, important distinction to be made is that between the *heuristic* and *legitimising* uses of foreign judicial decisions. In the case of the heuristic use, foreign judicial decisions are used as points of inspiration to find possible solutions to legal problems. In the case of the legitimising use, the court relies on foreign law to bolster a conclusion that it has already reached on different grounds. The foreign source of law either provides further authority or affirms the reasonableness of the envisaged solution to the problem at hand. These uses are obviously not mutually exclusive, but often occur simultaneously. If a foreign judicial decision is used to find a solution to a particular problem, it is only natural to refer to that decision to help motivate the outcome of the case (as practice shows, however, it is not inevitable).

3. Within the heuristic use of foreign judicial decisions, a further distinction can be made between a *content-based* and an *effect-based* approach. On average, courts refrain from assessing the effects of foreign rules and focus exclusively on the contents. Nevertheless, there are a few notable exceptions to this observation. Drobnig draws attention to two cases decided by the German Federal Constitutional Court, in which foreign sources are consulted for the sole purpose of ascertaining the likely social effects of a particular decision.[146] Both cases dealt with the constitutionality of German statutes.[147] The court tried to gain insight into the possible consequences of striking down these statutes as unconstitutional. In *Washington v. Glucksberg*, the US Supreme Court considered Dutch experience with physician-assisted suicide to assess whether the recognition of this practice would precipitate calls for further-reaching forms of euthanasia.[148] In all three cases, foreign knowledge was gathered to resolve local disputes of a factual nature.[149]

4. A court can *overtly* refer to foreign sources or use them in a more *hidden* way.[150] The Italian, French, Greek and Dutch courts are part of the group of courts that do not openly cite foreign sources in their judgments.[151] Their German and British colleagues do cite foreign sources overtly. In some cases, the reference to the foreign judicial decisions concerned can be found only in other documents, such as an annexed opinion by the advocate-general.

3.3 Towards a methodology for transjudicial borrowing?

Methodological deficiencies

Our survey of the literature suggests a number of difficulties with regard to the ways in which judges actually use foreign decisions; it could be useful to group these difficulties and conceptualise them as deficiencies of a methodological nature.[152]

1. One important example is the fact that the selection of the foreign decisions to use often seems to take place haphazardly rather than systematically. There is often no clear rationale to justify the selection of one case or country over another.

[145] Schiemann (2006, 262–263).
[146] Drobnig (1999b, 142-143).
[147] BverfG 11 June 1958, BverfGE 7, 375 on the freedom of establishment of pharmacists and BverfG 25 February 1975, BverfGE 39, 1 on abortion.
[148] *Washington et al. v. Glucksberg et al*. 521 US 702
[149] Young (2005, 150).
[150] Van Erp (1999, 243-244).
[151] Markesinis and Fedtke (2006**,** 62-66) and Drobnig (1999a, 4).
[152] In addition, it is important to remember that the methodological problems of transjudicial borrowing are obviously related closely to those of comparative law in general. As much as possible, therefore, the focus should be on the distinctive difficulties inherent in transjudicial borrowing.

2. A related risk involves the practice of 'cherry picking', in which foreign decisions are selected on the sole criterion that they concur with a particular choice that has already been made on other grounds (i.e. as *ex post facto* justification). Dealing with foreign sources can be an arduous task. The process of selecting relevant jurisdictions may often be biased.[153] Judges with *a priori* knowledge of the case law of particular countries could be tempted to include cases that happen to coincide with the outcomes that they had already envisioned.

3. Obviating these objections requires the development of a well-reasoned criterion for selecting the decisions to be considered. This is no easy task. Relevant questions include whether the search should be restricted to countries with a similar legal culture, to countries of the same legal system, to countries with the rule of law or to countries that also have democracy as well, or whether global consensus should be the main factor to be considered.

4. The difficulties generally inherent in comparative law (e.g. language barriers and the acquisition of sufficient familiarity with the legal culture concerned) take on an even more pressing character within the context of transjudicial borrowing because of the limited time available to judges due to heavy caseloads.

5. A further issue of concern is an apparent lack of systematic theorising about the types of cases that do and do not lend themselves to fruitful transjudicial borrowing.[154] It is plausible that certain areas of law (e.g. commerce law or legislation dealing with technical issues) lend themselves more easily for comparison than do others. For example, such areas as criminal law have typically been considered as exhibiting a strong particularistic character.

Towards a methodology for transjudicial borrowing?

In light of the deficiencies mentioned above, it could be desirable to formulate a systematic methodology for transjudicial borrowing.

The following *desiderata* formulated by the legal philosopher Jeremy Waldron for an (American) general theory of the citation and authority of foreign law are relevant in this regard:

> *The theory that is called for is not necessarily a complete jurisprudence. But it has to be complicated enough to answer a host of questions raised by the practice; about the authority accorded foreign law (persuasive versus conclusive), about the areas in which foreign law should and should not be cited (private law, for example, compared to constitutional law), and about which foreign legal systems should be cited (only democracies, for example, or tyrannies as well). The theory has to be broad enough to explain the use of foreign law in all appropriate cases: too many scholars call for a theory that will explain the citation of foreign law only in constitutional cases. The theory has to be persuasive enough to dispel the serious misgivings that many Americans have about this practice: why should American courts cite anything other than American law? Above all, it has to be a theory of law. The argument cannot just be that good diplomacy requires us to ingratiate ourselves with the Europeans. It must explain why American courts are legally permitted (or obliged) to cite to non-American sources and how that practice connects with the status of courts as legal institutions.*[155]

[153] Waters (2004, 157).
[154] One exception is a useful list compiled by Markesinis and Fedtke (2006), which is discussed below.
[155] Waldron (2006, 129-130) (footnotes omitted).

It is clear that the scope of such a theory is much broader than the narrower sense in which this paper considers methodology (which is more practically oriented).

There are obviously important considerations that would argue against the desirability or even the possibility of an all-inclusive methodology. On the one hand, the pluralism of legal sources exacerbates the need to design an overall methodology for the use of foreign law. On the other hand, this plurality also suggests that any attempt to formulate such a universally applicable methodology might be futile. Another complicating factor is that the factual use of foreign law by judges depends on the degree of persuasiveness accorded to particular decisions by judges, leading them to cite only those cases that they consider consistent with their own opinions. This estimation could vary by case, and it is subject to the discretion of individual judges. The unique circumstances of particular cases may compel courts to come to different conclusions in seemingly homogenous situations. Because of the varying nature of situations presented to courts, this effectively reduces the possibility of devising a dogmatic theory. Judges might then become overly constrained by methodology, a position difficult to reconcile with the more discretionary role to which they have become accustomed. Framing an overall methodology claiming to be based on trans-jurisdictional and trans-cultural norms of rationality might result in a situation of deadlock.

The considerations outlined above do not provide irrefutable proof that providing a methodological base is categorically impossible. Such a methodological base could consist of a 'modest' companion that could be consulted in cases in which judges decide to bring foreign law into play. This type of solution could also counterbalance the objections raised by opponents of the use of foreign law that a basic theoretical foundation is lacking. The ultimate destination of a more 'modest' methodology might thus be to identify and articulate indicators, pointers and general guidelines that could help judges to use foreign law in a more clearly defined manner.

Indications and contra-indications for transjudicial borrowing

As stated above, Basil Markesinis and Jörg Fedtke have compiled and elaborated a very useful list of answers to the question of '[w]hen (…) such [transjudicial] dialogue [should] take place (…)'[156].

1. When the court has to discover 'Common principles of law'
2. When local law presents a gap, ambiguity or is in obvious need of modernisation, and guidance would be welcome
3. When a problem is encountered in many similar systems and it is desirable to have a harmonised response
4. When foreign experience (aided by empirically collected evidence) help disprove locally expressed fears about the consequences of a particular legal solution
5. When the foreign law provides 'additional' evidence that a proposed solution has 'worked' in other systems
6. When the statute that is interpreted comes from another legal system or has its origins in an international instrument
7. When a court is confronted with law regulating highly technical matters rather than value-laden issues[157]

[156] Markesinis and Fedtke (2006, 109-138).
[157] This quotation consists of the headings of the subsections of Chapter 3 of Markesinis and Fedtke (2006, 109-138). For clarification and elaboration of the different 'answers', see the passages concerned.

4. Factors influencing transjudicialism

This section contains a discussion of several factors that influence transjudicialism: legal cultures, styles of reasoning, the role of transjudicialism within existing systems, areas of law and the role of language and information technology.[158]

4.1 (Legal) cultures

One obvious factor that affects transjudicialism is (legal) culture. Recourse to a legal culture that is familiar is more likely for a number of reasons. First, it is simply familiar territory in terms of where to find things and whom to consult. Second, it is easier to contextualise matters in a legal culture that is familiar, making it easier to assess whether the 'borrowing' makes sense in the case at hand. Finally, some legal cultures may provide a supportive environment to the practice, while others may not. Within the Anglophone countries of the Commonwealth, considering precedents from outside a judge's own country is considered entirely acceptable. No more or less institutionalised practice exists amongst civil law jurisdictions.

The Council of Europe, the European Union or similar 'systems' could also constitute factors that enhance transjudicialism around certain objectives (e.g. a unified marketplace or basic human rights; see more below).

Language is another factor in this category. The availability of a common language within the Commonwealth or the French-speaking world could also have an affect on the level of transjudicialism.

The divide between common law and civil law is also often brought up in the context of transjudicialism. As previously stated, transjudicial borrowing has long been a normal part of the job for common-law judges; it is simply part of the search for precedent, falling within the definition of the 'the common law'. On the other hand, the differences should not be overstated, and the growing convergence between the two systems should not be overlooked. In Europe, the House of Lords of the United Kingdom and the French Court of Cassation (*Cour de Cassation*) can and do refer to each other.

A number of these elements are examined more closely in the sections below.

4.2 Human rights law

A number of commentators argue that transjudicialism figures most prominently in human rights law.[159] The atrocities committed during the Second World War marked a turning point with regard to the concept of the sovereignty of nation states. States were no longer regarded as autonomous in the treatment of their citizens. Numerous legally binding instruments on human rights were concluded, and an extensive legal framework has now come into existence. The expansion of international legal sources dealing with human rights has affected national constitutional law as well. Elements of an international origin gradually seep into the national legal orders, where their effects are increasingly being felt. With some hesitation, it could be said that constitutional law is

[158] In some cases, limits of a procedural nature (stemming from the national legal system) also play a role (*cf.* Drobnig (1999a, 4)). These obstacles take various forms. For example, the Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*) is statutorily barred from reviewing decisions of lower courts in cases where national or international private law prescribed the use of foreign law (Art. 79 Para. 1 litt b Judiciary (Organisation) Act (*Wet op de Rechterlijke Organisatie*); Hartkamp (2004, 230). Another example is that Italian courts are prohibited by statute (art. 118.3 of the Rules Concerning the Application of the Code of Civil Procedure) from the actual citation of foreign law (Markesinis and Fedtke 2006, 62).

[159] Tawfik (2007, 574-575).

internationalising, although the obvious question of the extent of internationalisation remains unanswered.

4.3 European law

European law is also a system with a considerable impact upon transjudicialism. After all, courts acting in an inter-jurisdictional setting and composed of members of different nationalities could be expected to be particularly prone to engage in comparativism.[160] This seems consistent with the very nature of such bodies.[161] Two examples come to mind: the European Court of Justice (hereafter: ECJ) and the European Court of Human Rights. Both the jurisprudence of the ECJ and the European Court of Human Rights have a substantial influence upon the judicial processes in the legal systems concerned, in a substantial as well as a procedural sense.

In its daily proceedings, the ECJ is continuously confronted with values originating from member states.[162] The judges from the various countries constituting the European Union inevitably bring their own set of legal baggage to the ECJ. Attention must be drawn to the fact that the Court speaks with one voice – as a unity.[163] Although divergence in orientation is inevitable in such a varied assembly of judges is unavoidable, differences must be overcome in order to address the problems at hand. Failing to address these problems would result in an unsolvable deadlock. In practice, divergent national heritages of the judges have not proved a determining factor in the work of the Court. Schiemann confirms this view by stating, 'The national background of the writer [of a draft-judgement] is not remotely a determining factor'.[164] Instead of perceiving every legal system that lies beyond the confines of their own countries as foreign, judges are imbued with the idea of being part of an epistemic community of EU member states.[165] When comparative study reveals extensive commonalities among member states on how to solve a problem, the court has proven willing to transpose these solutions to the European level in the shape of a general rule. The contrary holds, however, if profound differences exist.

4.4 Other areas of law

The fact that national legal systems are composed of a wide diversity of legal fields raises the question of whether significant differences exist between the ways in which transjudicial phenomena play out in these different areas of law. In this section, we discuss constitutional and administrative law, private law, criminal law and maritime law

In general, the interpretive scheme at the disposal of constitutional judges leaves a wider window of opportunity for including foreign law than is the case in private law. In constitutional law, the applicable standards of adjudication and judicial review are usually less restrictive, and the general principles are formulated more abstractly.

Two distinguishing features of public law could impede an exchange of foreign legal ideas. The first revolves around to the particular institutional configuration within a jurisdiction. National institutions are tailored to fit local idiosyncrasies, and they are firmly rooted in history and culture, according to this argument. The second impeding factor relates to the heterogeneity of constitutions, which are (more so than with statutes in general) imbued with sympathies, philosophies and ideas of national origin.[166]

[160] Markesinis and Fedtke (2006, 109).
[161] Schiemann (2006, 360) confirms this view with respect to the European Court of Justice.
[162] Schiemann (2006, 360) and Lenaerts (2003, 905).
[163] Schiemann (2006, 365).
[164] Schiemann (2006, 361).
[165] Schiemann (2006, 361).
[166] Frankenberg (2006, 440).

On the other hand, private law is more prone to being affected by the exigencies of globalisation. The existence of a global market – one of these exigencies – exacerbates the need for a continuing harmonisation in the fields of commercial and private law.

In civil litigation, foreign law can find its way into the courts in one of two ways. The parties to the dispute could bring it to the attention of the court, or judge could do so on their own accord. In this matter, common law and civil law countries appear to occupy somewhat different universes. A slight simplification in the interest of clarity would be to say that civil law judges are bound to the maxim *jura novit curia* (the court knows the law). For this reason, the responsibility or duty to introduce foreign law rests with the courts. In contrast, common law judges would generally consider foreign law only when parties plead its pertinence to the case at hand. Parties that do so are obliged to enlighten the court on the content of foreign law.

An *ex officio* application of foreign law signifies the autonomous choice of a civil law judge or court to consult foreign sources. Civil law judges have more leeway for taking an active stance in applying to the facts legal rules (which may include non-domestic law) that were not introduced by parties to the dispute.

In the area of criminal law, the maxim of *nulla poena sine lege* (no punishment unless by law) is of non-derogatory, absolute nature. What are the precise implications of this for the possibilities of transjudicial adoption of foreign solutions in this field? Does the principle pose obstacles that cannot be overcome, and does it effectively bar the migration of foreign notions of criminal law?

To determine whether a defendant is guilty or innocent requires substantive examination of more than legal rules alone. Because of the open texture of the law or conflicting rules, gaps may emerge that must be filled. Are legal rules ordained by the legislature sufficient, or is it necessary for legislators to have a say in how the gas are to be filled? Auxiliary trends in international criminal law may exert an influence that compels them to consult outside their national legal systems. International tribunals have borrowed heavily from the legal figures or elements of national legal orders to try cases and build their own body of case law. The often-fragmented legal order that has thus been built is being cited at the national level.

Several examples of a more horizontally oriented dialogue on elements of criminal law have occurred in the common law regions. Questions pertaining to criminal sentencing have amassed quite some trans-border discussion. These questions centre on the role of juries in cases in which 'other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt'.[167] This excerpt is taken from the hallmark decision of the US Supreme Court in *Apprendi v. New Jersey.* The Australian High Court and the Supreme Court of Canada have had to deal with questions of similar nature.[168] Further discussion of the merits and technicalities of these cases lies beyond the scope of our enquiry.[169] The Australian and Canadian cases are worth mentioning in this context, however, as their respective decisions reflect a lively polemic on this issue.

[167] *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).
[168] *Kingwell v. The Queen*, [1985] 159 C.L.R. 264 (Australia) and *R. v. Lyons* [1987] 2 S.C.R. 309 (Canada).
[169] Lefler (2001, 182-190).

4.5 The role of language

In conversation, some judges from highest national courts point out that the seemingly mundane fact of the divergence of languages used in the different legal systems in the world (even when considering Europe alone) frequently poses a substantial obstacle to the study of the foreign decisions concerned.

A vast body of judicial decisions and scholarly articles are either inaccessible or accessible only with difficulty to those who have not mastered a particular language. A possible wealth of information therefore remains hidden. Deciphering the content of a foreign source without sufficient knowledge of the language (and the legal system in its country of origin) is an impossible task. Even those with a rudimentary understanding of these matters, however, face another hurdle. Succinctly stated, the art of translation and linguistic interpretation should not be underestimated. It is important to be aware that some legal terms native to a legal order are extremely difficult to translate in their fullest meaning.[170] For example, it is appropriate to question whether the basic terms 'rule of law', '*rechtstaat*' and '*état de* droit' all refer to the same notion.

The contextualisation of a specific legal norm is arguably the only (and probably the best) way out of this maze of semantics. Aware of the attendant circumstances is therefore an integral part of the proper contextualisation of a national legal norm and the assessment of its fitness for import to another legal system.

4.6 Styles of reasoning

Another important factor stems from how the actual decisions by the various highest courts are committed to paper. In broad terms, courts draft their decisions briefly and concisely at one extreme and produce lengthy and highly well reasoned decisions at the other. For example, the French courts, which are known for their concise decisions, occupy one of these poles. The Dutch courts, which confine themselves to argumentative structures in favour of particular decisions, form an example of systems that occupy the middle ground. .[171] The German and British courts are the antipodes of their French counterparts, as they provide extensive explications of all facets pertaining to the case under consideration.

It is plausible to argue that the more 'visible' the reasoning, the 'easier' it is to use it as a precedent. The work of Lasser on judicial deliberation can provide illuminating background information on this point.[172]

4.7 Information technology

Another important factor influencing transjudicialism is the role of the internet and information technology in general. Quite a few courts publish their decisions online, and a wealth of other legal documentation is freely accessible on the internet. Initiatives to streamline the gathering and exchange of data online have emerged. The Caselex database (www.caselex.com) is a recent interesting example in the area of EU law.

[170] Markesinis (1997, 198-199).
[171] Hartkamp (2004, 229).
[172] Lasser (2004).

5 The 'next generation' of transjudicialism

The foregoing discussion leads to the central research question:

> ***In what ways do national courts engage in transjudicialism; what processes, mechanisms and practices exist; and how are these processes, mechanisms and practices likely to develop?***

It is obviously important to remember that the answer to this question depends largely upon individual normative orientations with regard to the matter at hand.

Those who are sceptical of transjudicial dialogue and transjudicial borrowing will naturally be cautious about further strengthening or even institutionalising these phenomena. Strengthening existing institutional practices or devising new ones is not likely to be an inviting prospect, and the development of a methodology is likely to be seen as irrelevant. For those who would prefer not to reverse these developments completely, what might be a more nuanced approach? The formulation of a rather restrictive set of pro-indications and of an extensive set of contra-indications could be a promising avenue to pursue.

For those more positively disposed towards transjudicialism, two questions of central importance arise:

The first concerns the possibility of further institutionalisation. To what extent can the identified 'best practices' function as signposts for the further development of existing institutions or establishing new ones? What is the best way to facilitate future judicial dialogue in an institutional and a practical sense? What role might information technology play in this respect?

The second question relates to methodological issues. Would it be desirable to pursue the path of conceiving a 'modest', auxiliary methodology? Would such be possible? If so, should pro- and contra-indications for transjudicial borrowing be further developed or elaborated?

PART III: APPENDICES AND BIBLIOGRAPHY

APPENDIX A:

Inventory list of Face-to-Face Judicial Dialogue

1 Inventory of Face-to-Face Judicial Dialogue

(references to existing forms or examples of direct transnational judicial interaction)

I. International Judicial Organizations

- **THE INTERNATIONAL ASSOCIATION OF JUDGES**

(http://www.iaj- uim.org/ENG/frameset_ENG.html)

The International Association of Judges was founded in Salzburg (Austria) in 1953 as a professional, non-political, international organization, grouping not individual judges, but national associations of judges.

The main aim of the Association is to safeguard the independence of the judiciary, as an essential requirement of the judicial function and guarantee of human rights and freedom.
Within the framework of this association, judges from around the globe co-drafted the "Universal Charter of the Judge", approved in 1999. Article 12 of this Charter states that "*the right of a judge to belong to a professional association must be recognized in order to permit the judges to be consulted, especially concerning the application of their statutes, ethical and otherwise, and the means of justice, and in order to permit them to defend their legitimate interests*".

- **THE WORLDWIDE JUDGES CENTER**

(http://judgescenter.org/)

A global Internet resource for judges, judicial administrators, and judicial educators of all systems of jurisprudence. When fully established, the Center will establish a full range of resources for all those implementing the Rule of Law through the courts and other dispute resolution entities. Much of the contents of the Center will come from those who use it.

- **THE INTERNATIONAL ORGANIZATION FOR JUDICIAL TRAINING**

(http://judgescenter.org/pages/iojt/History.htm)

On March 17 - 21, 2002, following several planning meetings in South America and Israel, the International Organization for Judicial Training (IOJT) was established in Jerusalem. Over 100 educators and judges from 25 countries and the Council of Europe assembled to create the organization. Countries creating the IOJT included Cameroon, Canada, Chile, China. Colombia, Czech Republic, Ecuador, Estonia, France, Georgia, Ireland, Israel, Kenya, Latvia, Lithuania, Madagascar, Mexico, Moldova, Norway, Philippines, Poland, Romania, Sweden, Togo, and the United States of America.. Dr. Shlomo Levin, then Deputy President of the Supreme Court of Israel, who conceived the organization, proposed that it have the following objectives:

- Sharing successful methods of addressing issues of common interest regarding judicial training, and
- Establishing an international mechanism to enable training institutes from one country to learn from another.

- **INTERNATIONAL ASSOCIATION OF WOMEN JUDGES**

(http://www.iawj.org/)

The International Association of Women Judges (IAWJ) is a non-profit, non-partisan organization of more than 4,000 members at all judicial levels in 87 nations. Since forming in 1991, the IAWJ has

united women judges from diverse legal-judicial systems who share a commitment to equal justice and the rule of law.

It holds an international conference every two years.

- **THE INTERNATIONAL ASSOCIATION OF LESBIAN AND GAY JUDGES**

(http://home.att.net/~ialgj/)

Founded in 1993, the objectives of this Association are:

- To provide an opportunity for judicial officers to meet and exchange views and to promote education among its members and among the general public on legal and judicial issues related to the gay and lesbian community.
- To increase the visibility of lesbian and gay judicial officers so as to serve as role models for other lesbian and gay people and to bring to the attention of the general public the prominence of these judicial officers.
- To aid in ensuring the equal treatment of all persons who appear in a courtroom, as a litigant, attorney, juror, staff person or in any other capacity.
- To coordinate the sharing of information between lesbian and gay judicial officers and others in the gay community or the general community.
- To serve as a resource for other lesbians and gay men who are interested in seeking judicial office.

- **THE INTERNATIONAL ASSOCIATION OF SUPREME ADMINISTRATIVE JURISDICTIONS (IASAJ)**

(http://www.iasaj.org/)

The International Association of Supreme Administrative Jurisdictions (IASAJ) was found in 1983 and assembles today approximately 100 high jurisdictions and international organisations in all five continents.

The purpose of the International Association of Supreme Administrative Jurisdictions (IASAJ) is to promote exchanges of ideas and experiences between jurisdictions empowered to adjudicate, in last instance, disputes arising from the action of public administrations. It seeks to encourage cooperation on questions of law pending before these courts or related to their organization and functioning.

In order to achieve its mission, the Association may initiate, promote or undertake law studies ; it gathers all relevant information on the organization, functioning and case law of the supreme administrative jurisdictions and diffuses or contributes to diffuse it to any interested party. Furthermore, it favours contacts between the members of the different courts involved.

The IASAJ organizes, generally every three-year, a congress dealing with issues falling within its scope. It may admit on these occasions, as observers, representatives of jurisdictions which are not members of the Association.

The Association conceives, carries out and publishes a compendium of decisions and judgements in comparative law, dealing will the topic of its triennial congress; therefore, it contributes to promote, in an international perspective, the understanding of administrative law.

- **INTERNATIONAL ASSOCIATION OF REFUGEE LAW JUDGES**

(http://www.iarlj.nl/general/)

Established in 1997, this association now holds a biannual World Conference as well as other (smaller) conferences and workshops.

- **COMMONWEALTH MAGISTRATES' AND JUDGES' ASSOCIATION**

(http://www.cmja.org/)

The Commonwealth Magistrates' and Judges' Association (CMJA) is a unique international association which brings together judicial officers from over 68 jurisdictions in the Commonwealth and beyond. It is a registered charity in the United Kingdom.

Conferences are regularly organized (next one - "Constitutional Independence for the Magistrate and Judge with reference to separation of powers").

- **INTERNATIONAL ASSOCIATION OF YOUTH AND FAMILY JUDGES AND MAGISTRATES**

(http://www.judgesandmagistrates.org/eng.htm)

The IAYFJM is an NGO (Non-Governmental Organisation) with consultative status at the United Nations and the Council of Europe. It was founded in 1928 and registered in Brussels, Belgium. It represents worldwide efforts to deal with the protection of youth and family and with the criminal behaviour and maladjustment of youth. Its membership is comprised of national associations and committed individuals from all parts of the globe, who exercise functions as youth and family court judges or functions within professional services directly linked to youth and family justice or welfare.

- **INTERNATIONAL JURISTS ACADEMY**

(http://www.ijaworld.org)

The International Judicial Academy (IJA) is a non-profit educational institution chartered in the District of Columbia, established in October, 1999 to provide the highest quality education programs for judges, court administrators, justice ministry officials, and other legal professionals from countries around the world. It provides instruction on how judges and court personnel should function in a modern, fair, efficient, accessible and transparent court system.

IJA programs include seminars, conferences, study tours, symposia and exchange/intern projects. In Washington, program agendas include visits to federal and state courts and government agencies involved in the administration of justice, such as the Administrative Office of the U.S. Courts, the Federal Judicial Center, the U.S. Department of Justice, and the U.S. Patent and Trademark Office.

- **JOINT COUNCIL ON CONSTITUTIONAL JUSTICE (VENICE COMISSION)**

(http://www.venice.coe.int/site/main/Constitutional_Justice_E.asp)

The establishment of the Joint Council on Constitutional Justice was probably the most important achievement in the area of constitutional justice in 2002. On the basis of article 3 of the revised Statute of the Commission, this body replaces the meetings of the Sub-commission on Constitutional Justice with the liaisons officers from constitutional courts and equivalent bodies. The institution of a presidency of the Joint Council, representing the constitutional courts and the Sub-commission on Constitutional Justice respectively, further underlines the important role of the participating courts in this co-operation.

- **NETWORK OF THE PRESIDENTS OF THE SUPREME JUDICIAL COURTS OF THE EUROPEAN UNION**

(http://www.network-presidents.eu/)

The Presidents of the Supreme Judicial Courts of the Member States of the European Union decided to form an Association whose Constituent Assembly was held on March 10, 2004 at the Cour de cassation with the financial support of the European Commission (AGIS program).
The Network of the Presidents provides a forum through which European Institutions are given an opportunity to request the opinions of Supreme Courts and to bring them closer by encouraging discussion and the exchange of ideas. The members gather for colloquiums to discuss matters of common interest.
Since 2005, stages are organized for the Members of the Supreme Courts, as part of the Exchange Programme of European judicial authorities with the support of the European Judicial Training Network.

Since 2006, the Network develops a Common Portal of jurisprudence which will allow its members to question all the national case law databases, with the financial support of the European Commission.
The Presidents of the Supreme courts of Norway, Iceland and Liechtenstein have been admitted as observers.
The Presidents of the European Community Court of Justice and the European Court of Human Rights have accepted the invitation to participate in the general assemblies and colloquiums of the Network.

- **THE EU FORUM FOR JUDGES FOR THE ENVIRONMENT**

(http://www.eufje.org/presentation_eng.php)

The European Union Forum of judges for the environment was created in Paris on February 28, 2004, on the initiative of Mr Guy Canivet, Premier President of the Cour de cassation (France), Amedeo Postiglione, Judge of the Corte Suprema di Cassazione (Italy), Luc Lavrysen, Judge of the Cour d'arbitrage (Belgium) and Lord Justice Robert Carnwath, Judge of the Court of Appeal (England and Wales).

- **EUROPEAN JUDICIAL NETWORK IN CRIMINAL MATTERS (EJN)**

The purpose of the European Judicial Network (EJN) in criminal matters is to facilitate mutual judicial assistance in the fight against transnational crime. It originates in a Joint Action adopted by the Council on 29 June 1998.
The judicial network is made up of contact points designed to enable local judicial authorities and judicial authorities in the other Member States to establish direct contacts between themselves. These contact points also provide the legal or practical information necessary to help the authorities concerned to prepare an effective request for judicial cooperation.

- **THE EUROPEAN JUDICIAL NETWORK IN CIVIL AND COMMERCIAL MATTERS**

The European Union currently has a wide variety of national legal systems, and this diversity often creates problems when litigation transcends national borders.
In the autumn of 1999, the Council held a special meeting at Tampere in Finland, devoted to the establishment of an area of freedom, security and justice in the European Union. The Heads of State or Government wished the European Commission to take a number of initiatives to improve access to justice for individuals and firms in Europe, one of which was the establishment of a network of national authorities with responsibility for civil and commercial law.
In September 2000, the Commission presented a proposal for a decision establishing the network which the Council then adopted in May 2001.
The network consists of representatives of the Member States' judicial and administrative authorities and meets several times each year to exchange information and experience and boost cooperation between the Member States as regards civil and commercial law.

The main objective is to make life easier for people facing litigation of whatever kind where there is a transnational element - i.e. where it involves more than one Member State.

- **THE EUROPEAN ASSOCIATION OF LABOUR COURT JUDGES**

(http://www.ealcj.org/home.htm)

The European Association of Labour Court Judges is an independent body committed to the promotion of information and contacts in the field of employment law and judicial practice. Membership is open to all countries of the European Union and European Economic Area.

The main activities of the Association consist of an annual Conference at which we discuss a topic of general interest to Labour Judges.
The inaugural Conference was in Bath, England in 1996.

- **ASSOCIATION OF EUROPEAN ADMINISTRATIVE JUDGES**

(http://www.aeaj.org/)

The association has defined the following aims:

- to further the legal protection of the individuals against public violence, as well as to further the lawfulness of administrative actions and thus contribute to the coming together of Europe in freedom and justice
- to respect the aims of laws in the member states
- to contribute to the national expansion of the of the knowledge of European administrative judges in the member states of the European Union and for this purpose to exchange information about the legislation and jurisdiction in the domain of administrative legal protection
- to strengthen the position of administrative judges in a Europe that is coming together and to further their professional interests in the national and European domain arena

- **THE CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS**

(http://www.confcoconsteu.org/)

The Conference of European Constitutional Courts was set up in 1972 by the constitutional courts of Germany, Austria, Italy and the Federal Republic of Yugoslavia. Many other constitutional courts joined the Conference, particularly in the last decade. The association currently numbers 34 European constitutional courts and other similar European institutions exercising constitutional jurisdiction. The Conference owes its existence to the intention of the Presidents of constitutional courts to organize regular specialized conferences with a view to sharing experience as regards constitutional practice and jurisprudence in a general European context and to maintaining regular contacts between these courts and institutions, on the basis of mutual respect and with due regard to the principle of judicial independence.

- **ASSOCIATION DES COURS CONSTITUTIONNELLES AYANT EN PARTAGE L"USAGE DU FRANCAIS**

(http://www.accpuf.org/)

L' ACCPUF est une association réunissant des cours constitutionnelles ou institutions équivalentes membres de l'espace francophone.

- **INTERNATIONAL COMMISSION OF JURISTS (CENTRE FOR THE INDEPENDENT OF JUDGES AND LAWYERS)**

(www.icj.org)

Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights

(www.ejp.icj.org)

An initiative of the International Commission of Jurists, the Eminent Jurists Panel is examining the compatibility of laws, policies and practices, which are justified expressly or implicitly as necessary to counter terrorism, with international human rights law and, where applicable, with international humanitarian law

- **THE ASSOCIATION OF THE COUNCILS OF STATE AND SUPREME ADMINISTRATIVE JURISDICTIONS OF THE EUROPEAN UNION**

(http://193.191.217.21/en/home_en.html)

The Association is composed of the Court of Justice of the European Communities and the Councils of State or the Supreme administrative jurisdictions of each of the members of the European Union.

The jurisdictions and institutions similarly empowered of States which are engaged in negotiations with a view to their actually joining the European Union can be admitted as Observers.

- **THE UNION OF THE ARAB CONSTITUTIONAL COUNCIL & COURTS**

(http://www.uaccc.org/English/home.htm)

The Union seeks to achieve the following aims:

1. Organizing & developing cooperation between its members and strengthen relations between them.
2. Exchang idias, experiences & information in the field of the constitutionality control .
3. Encouragment of researches & legal studies concerning the constitutionality control, specially concerning the human rights.
4. Organizing & developing cooperation between the Union and similar organisations at the other states.
5. Participation in international conferences concerning the constitutionality control.

The Union will achieve its aims by the following ways:

1. Publishing periodical magazine that includes researches , legal constitutional studies & all judgments and decisions issued by Constitutional Councils and Courts.
2. Exchange judgments and decisions sendered by the institutions effecting the constitutionality control.
3. Convene confrences and seminars to discuss researches and constitutional studies.
4. Exchange visits.
5. Encouragment writing , translation and publishing in the field of cnstitutionality control .
6. Establishing a legal library in the Unions seat, provided with arab and comparative legal publications and bulletins specialy concerning the constitutionality control.

- **LATIN AMERICAN JUDICIAL SUMMIT**

(http://www.cumbrejudicial.org/eversuite/GetRecords?Template=defaulten&app=cumbres)

The **Latin American Judicial Summit** is an organisation which coordinates and unites the Judiciaries of twenty three countries of the Latin American Community of Nations, creating a single forum for the main governing bodies of the Latin American judicial system. It includes the Presidents of the Supreme Courts and Tribunals of Justice and the main offices of the Latin American Councils of the Judiciary.
The primary objective of the Latin American Judicial Summit is "the adoption of projects and actions based on the conviction that the existence of a common cultural heritage is a privileged instrument which, while respecting differences, contributes to the strengthening of the Judiciary and by extension, the democratic system".
In its present format, the Latin American Judicial Summit is the result of the merger or convergence in June 2004 of two previous structures, the Latin American Summit of Presidents of the Supreme Courts of Justice and the Latin American Meeting of the Councils of the Judiciary.
The Latin American Summit of **Presidents of Supreme Courts of Justice** had in turn resulted from a process initiated in Madrid in 1990, and which continued in successive editions in 1993 and 1997 (both events held in Madrid), 1998 and 1999 (in Caracas), 2000 (in the Canary Islands), 2002 (in Cancún) and 2004 (in El Salvador). The Meeting of Latin American Councils of the Judiciary was held in Honduras, in 2004, which was its IV plenary session following previous events in Sucre (1998), Barcelona (2000) and Zacatecas (2002).

- **THE SUPREME COURTS OF THE AMERICAS ORGANIZATION (OCSA)**

- **CONFERENCIA IBEROAMERICANA DE JUSTICIA CONSTITUCIONAL**

(http://www.cijc.org/Paginas/Default.aspx)

Se encuentra Vd. en la página web de la Conferencia Iberoamericana de Justicia Constitucional. La Conferencia integra en su seno a todos los Tribunales, Cortes y Salas que imparten la justicia constitucional en los países de habla española y portuguesa de América y Europa. A partir de previas reuniones y experiencias (Conferencias de Lisboa -1995-, Madrid -1998- y Guatemala -1999-), la Conferencia se institucionalizó en Sevilla en octubre de 2005, aprobándose sus Estatutos en Santiago de Chile en octubre de 2006.

- **THE ASSOCIATION OF AFRICAN JUDGES**

The constituting conference of this association took place in August 2004, in Maputo, Mozambique.

- **SOUTHERN AFRICAN JUDGES COMMISSION (SAJC)**

(http://www.venice.coe.int/SAJC/)

The persons eligible for membership of the Commission shall be the incumbent Chief Justices or equivalent officers, including Acting Chief Justices (where applicable). The objects of the Commission are as follows:

1. to promote contact and co-operation among the courts in the southern African region;
2. to promote the rule of law, democracy and the independence of the courts in the region;
3. to promote and protect the welfare and dignity of judges in the member countries;
4. to establish a website at which judgments of the highest courts in the region can be collected;
5. to provide assistance to courts and to promote cooperation among judicial training institutions;
6. to arrange colloquia at which links between courts in the region can be strengthened and matters of common interest discussed;
7. to maintain contact and exchanges with other institutions in Africa and elsewhere having similar objects;
8. to encourage the publication and dissemination of judgments of the superior courts and the use of information technology; and
9. generally to promote the interests of the judiciaries of member countries and, where it is considered appropriate to do so, of any other country in the region.

- **ORGANISATION POUR L'HARMONISATION EN AFRIQUE DU DROIT DES AFFAIRES (OHADA)**

(http://www.ohada.org/)

L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) a été créée par le Traité relatif à l'Harmonisation du Droit des Affaires en Afrique signé le 17 octobre 1993 à Port-Louis. Ce Traité a pour principal objectif de remédier à l'insécurité juridique et judiciaire existant dans les Etats Parties. L'OHADA regroupe aujourd'hui les 14 pays de la Zone franc CFA, plus les Comores et la Guinée Conakry et elle reste ouverte à tout Etat du continent africain.

- **ASSOCIATION OF JUDGES OF THE BALTIC STATES**

- **CONFERENCE OF CHIEF JUSTICES OF ASIA AND THE PACIFIC**

Held biannually since 1985

- **THE BRANDEIS JUDICIAL COLLOQUIA**

http://www.brandeis.edu/ethics/international_justice/colloquia.html

The aims of the Brandeis Judicial Colloquia are to foster an exchange of experience and expertise between judges in national judiciaries and those on international courts, and to establish an ongoing dialogue on fundamental issues that affect them both.

In 2006 and 2007, Brendeis organized the first and second West African Judicial Colloquium.
In November 2008, the institute will organise the North American Judicial Colloquium, which will bring together 14 US and Canadian judges with four international judges.

- **Association des Hautes Jurisdictions de Cassation des pays ayant en partage l'usage du Français**

http://www.ahjucaf.org/

Created in 2001, the association aims to encourage mutual help, solidarity, and exchange of ideas and experiences between judicial institutions' members on issues related to their competence, interest, and functioning. The association promotes the role of Highest Jurisdictions in the consolidation of the Rule of Law, the strengthening of legal security, the regulation of legal decisions and the harmonization of law within member states. The association gives value to the jurisprudence of Highest Courts' members through a database of French jurisprudence that include more than 100 000 decisions.

The first congress was held in Dakar in 2004 in Marrakech, and was entitled "le juge de cassation à l'aube du 21ème siècle" ("Supreme court judge in the pre-21st century"). The second congress dealt with the independence of justice (November 2006)

- **Association des Cours Constitutionnelles ayant en Partage l'Usage du Français**

http://www.accpuf.org/

Created in 1997 to reinforce relations between members of the francophone area, ACCPUF gathers more than 40 Constitutional Courts and similar institutions from Africa, Europe, America and Asia.

The association aims to strengthen the rule of law in developing relations between institutions that share the use of French language and have competence to judge in last resort as well as to take binding decisions on litigations related to the conformity to the constitution. In this end, both exchange of ideas and experiences between association's members and training sessions are organized in order to develop better mutual knowledge and strengthen the authority of theses institutions.

- **International Judicial Academy**

http://www.ijaworld.org /

The International Judicial Academy (IJA) is a non-profit educational institution chartered in the District of Columbia, established in October, 1999 to provide the highest quality education programs for judges, court administrators, justice ministry officials, and other legal professionals from countries around the world. It provides instruction on how judges and court personnel should function in a modern, fair, efficient, accessible and transparent court system.
The Academy is a service organization that does not seek profits, and strives to provide the most informative and instructional programs for participants at the lowest possible cost. Since its beginning it has hosted program participants from Central and Eastern Europe, South America, Southeast Asia and China.
The Academy offers a variety of valuable programs designed to educate program participants about the most important principles and practices of successful judiciaries and courts and the relationships between judges and courts and other parts of the legal system and other segments of society.
IJA programs include seminars, conferences, study tours, symposia and exchange/intern projects. In Washington, program agendas include visits to federal and state courts and government agencies involved in the administration of justice, such as the Administrative Office of the U.S. Courts, the Federal Judicial Center, the U.S. Department of Justice, and the U.S. Patent and Trademark Office.
The Academy has developed a series of educational modules that cover all topics that relate to the function of courts, behavior of judges, and the ingredients of a successful court system. These educational modules are more fully described in the "Instructional Modules" section of this web site.

ACTIVITIES IN THE FRAMEWORK OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (HCCH)

- Francophone African Judges Seminar (27-31 August 2007), The Hague: Dialogue between judges and experts from the Francophone African Region to promote the Hague Conventions.
- the Judges' Newsletter (on international child protection)

II. Dialogue Initiated and hosted by academic institutions and/or NGOs (conferences, seminars, etc.)

International Associations inviting International Dialogue

- Judges' meetings organized by InterRights (see Slaughter)
- HiiL organized in 2006 a colloquium, with highest courts judges from various countries.
- Seminars and coferences on Constitutional Justice hosted by Venice Commission (http://www.venice.coe.int/site/dynamics/N_Seminar_ef.asp?L=E&TID=5)

National Associations inviting International Dialogue

- Yale Law School –The Global Constitutionalism Seminar is an annual event in which Supreme Court and constitutional court judges from around the world meet with faculty members to discuss issues of common concern. To date, ten seminars have been convened. While the proceedings are largely confidential, some events are open to the Law School community.
- NYU Law School's Center for International Studies and Institute of Judicial Administration organised in 1995 a major conference hosting judges from around the globe
- The American Society of International Law and Harvard Law School hosted a conference on 1-2 December, 2006 entitled "Transnational Judicial Dialogue: Strengthening Networks and Mechanisms for Judicial Consultation and Cooperation"
- National Association of Women Judges convened international panel of judges in round-table discussion on the topic of judicial independence. 9 October 2004.
- NYU Law School hosted Summit on Constitutional Adjudication (hosting Justice from Italy, Germany, Russia and US constitutional courts) in October 1997, as part of Global Law School Program. (http://www.nyu.edu/publicaffairs/newsreleases/b_NYU_S1.shtml)
- Harvard hosted part of the Anglo American Exchange (1995?)
- Judicial Conference of the United States has an International Judicial Relations Committee (established in 1993).

Articles in Judicial Publications

- Mihm, Judge Michael M. "Common and Eternal Values in the Development of Courts Around the World," International Judicial Monitor Vol. 1, issue 1 (American Society of International Law and the International Judicial Academy: March 2006).

Blogs and Blog Articles

- http://comparativelawblog.blogspot.com/2006/07/judicial-dialogue-jones-v-saudi-arabia.html

Technical Cooperation Programmes

International Human rights norms

- South Asian Regional Judicial Colloquium Series, and Regional state-level Judicial Exchanges (facilitated by International Center for the Legal Protection of Human Rights and the Commonwealth Human Rights Initiative) (http://www.humanrightsinitiative.org/jc/about/default.htm)
- 1988 Bangalore, India: High level judicial colloquium on Domestic Application of International Human Rights Norms (http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7BA2407AAC-A477-491D-ABA4-A2CADF227E2B%7D_BANGALORE%20PRINCIPLES.pdf)
- CIRDDOC organises judicial colloquia for judges and magistrates on the domestic application of International Human Rights Norms. This project also includes building and strengthening the resource base of those institutions. (http://www.cirddoc.org/projects.html)
- UN Regional judicial colloquia for judges and magistrates on the application of international human rights law, in particular the Convention, at the domestic level. (http://www.un.org/womenwatch/daw/TechnicalCooperation/tcprog_jc.htm)
- In 2004, CIRDDOC in collaboration with LRRDC and WACOL organised a judicial colloquium on domestic application of Reproductive Rights and Health rights standards in Niger (http://www.cirddoc.org/projects.html)

Cross-Border insolvency Issues

- Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, being the guidelines adopted by the American Law Institute in Washington in 2000.
- Networking through the judicial colloquia sponsored by UNCITRAL http://www.uncitral and INSOL www.insol.org
- Concurrently the World Bank has been working on a report on best practices, which is to harmonize with the efforts of UNCITRAL and INSOL – (www.worldbank.org)
- International Bar Association Concordat
- International Insolvency Institute provides many examples of protocols, which can be used as templates to be modified for your particular case including protocols between common and civil law jurisdictions. (www.iiiglobal.org)
- American Law Institute NAFTA project guidelines applicable to court-to-court communications in cross-border cases. These were developed by lawyers, academics and judges from Mexico, a civil code jurisdiction and the United States and Canada, two common law jurisdictions. (www.ali.org) these guidelines which may be modified as necessary or desirable, provide an absolutely pristine neutral way for the courts to communicate to ensure that the judges and the participants know the status of the case and where it is going. 12 languages.

ICC

- In 2005, CIRDDOC in collaboration with Nigeria Coalition on International Criminal Court (NCICC) organised a judicial colloquium on the Rome Statute of the International Criminal Court at Enugu, Enugu State. (http://www.cirddoc.org/projects.html)
- 2004: Pan African Judicial Colloquium: The African Human Rights System and The International Criminal Court (http://www.iccnow.org/documents/SouthAfricaNarrative%20Report_AFLAColloquium19Nov04.pdf)

Association of the Councils of State (list of member websites)
http://www.juradmin.eu/en/members/members_en.html)
Non-public forum for magistrates to exchange info/questions (http://www.juradmin.eu/forum/)
(colloquia reports http://www.juradmin.eu/en/colloquiums/colloq_en.html)
Reciprocal visits by judges

- 21st colloquium in Warsaw from 15th to 16th June 2008:
- "Consequences of incompatibility with EC law for final administrative decisions and final judgments of administrative courts in the Member States".
- 20th colloquium in Leipzig from 29th to 30th May 2006:
- "National road planning and European environmental legislation - A case study -".
- 19th colloquium in the Hague from 14th to 15th June 2004:
- "The quality of European legislation and its implementation and application in the national legal order".
- 18th colloquium in Helsinki from 20th to 21st May 2002:
- "Preliminary reference to the Court of Justice of the European Communities".
- 17th colloquium in Vienna from 8th to 10th May 2000:
- "The impact of Article 6 (1) of the European Convention for the protection of Human Rights and Fundamental Freedoms on the procedures of the Supreme Administrative Court and State Councils".
- 16th colloquium in Stockholm from 14th to 17th June 1998:
- "The legal review of administrative decisions : the respective role of administrative and civil or penal courts and their relationship".
- 15th colloquium in Brussels from 22nd to 24th April 1996:
- "The transposition of directives of the European Union into national legislation".
- 14th colloquium in Paris from 16th to 18th May 1994:
- "The study of two concrete cases concerning the situation of foreigners who have been refused residence permits or refugee status".
- 13th colloquium in Rome from 14th to 16th May 1992:
- "The regulation of the public administration - a few convergences in the E.E.C. as a result of the first achievements of the colloquium".
- 12th colloquium in Madrid from 6th to 9th June 1990:

- "The supreme administrative courts and the regulation of the quantity and duration of the procedures".
- 11th colloquium in Lisbon from 17th to 19th May 1988:
- "The execution of the individual administrative decisions and the intervention of the courts in the execution of the decisions".
- 10th colloquium in Athens from 14th to 17th May 1986:
- "The judicial review of the validity of secondary legislation by the administrative judge".
- 9th colloquium in Dublin from 16th to 19th May 1984:
- "The right to be heard before administrative tribunals and judges".
- 8th colloquium in Copenhagen from 12h to 15th May 1982:
- "The concept of interest in administrative litigation (personal interest, collective interest, actio popularis) especially in environmental matters".
- 7th colloquium in London from 28th to 31st May 1980:
- "The power of the Courts - both superior and inferior Courts and of bodies exercising quasi-judicial functions - to award damages in administrative actions".
- 6th colloquium in Luxembourg from 27th to 29th April 1978:
- "The scope and results of the annulment of an administrative act by the judge. A particular question arises: how can the new act be drawn up when the rule of law or the actual situation has changed?".
- 5th colloquium in The Hague from 27th to 31st October 1976:
- "Discretionary power and the advisability of administrative decisions; the extent and limitations of judicial control".
- 4th colloquium in Berlin from 16th to 20th October 1974:
- "The power of the judge to suspend the execution of the administrative decision referred to him and the means at his disposal to compel the administration to carry out the jurisdictional decisions in administrative proceedings".
- 3rd colloquium in Brussels from 19th to 21st October 1972:
- "The evidence in the procedure before administrative courts"
- "The sanctions in administrative proceedings".
- 2nd colloquium in Paris from 8th to 9th October 1970:
- "The review of the legality of administrative decisions taken with regard to firms in order to promote and regulate the economic development".
- 1st colloquium in Rome from 4th to 6th March 1968:
- "The consultative function of the Councils of State"
- "The drawing up process of administrative acts"

Seminar in Brussels on 28 january 2008:
"National administrative courts and Community Environmental law".
Seminar of research and documentation departments in Brno from 18th to 19th October 2007:
"The Association's information network"
Colloquium in Paris on 16 March 2007:
"Administrative Justice in Europe".
Seminar of Councils of State in The Hague from 7th to 8th December 2006:
"Organisation of the advisory function of Councils of State".
Seminar of research and documentation departments in Trier on 15 May 2006:
"The Association's information network".
Seminar in Trier on 12 december 2005:
"Administrative Justice in Europe".
Seminar in Brussels from 20th to 21st June 2005:
"Judicial procedures on disputes involving foreign nationals and refugees".
Seminar of research and documentation departments in Trier from 28th to 29th October 2004:
"The Association's information network".
Seminar for the new members in Trier from 22nd to 23th March 2004:
"The preliminary reference procedure".
Seminar of Councils of State in The Hague on 16 February 2004:
"Organisation of the advisory function of Councils of State".

Information Networks/International Informational Resources
http://www.law.duke.edu/lib/foreign

Court Information Distribution Systems

- Constitutional Court of South Africa: offers RSS Feeds and email subscription to notifications of latest court judgements and court roll upon release.

General Databases

- LexisNexis (including various versions: Academic, Africa news, Congressional, Environmental, Government periodicals, Statistical, etc.)
- Westlaw International- Westlaw provides direct access to the publications of the ICJ, PCA, ICTY, ICTR and the Iran-United States Claims Tribunal; it has also a large collection of U.S. statutes, case law materials, public records, law reviews, bar journals and other legal resources, along with current news articles and business information. It includes an important collection of legal material from different countries, including the European Union, U.K., and Australia. (http://www.westlaw.com/signon/default.wl?RS=UKIS1.0&VR=1.0&sp=intpeace-000)
- Westlaw ES- Westlaw ES gives access to regular updated Spanish legislation (Legislación), case law (Jurisprudencia) and a bibliography (Bibliografía). Also you can find legal news (Noticias) and some publications (Publicaciones). (http://www.westlaw.es/westlaw/login.jsp)
- International Law in Domestic Courts- English translation of case law from over 65 jurisdictions since 2000 (http://ildc.oxfordlawreports.com/public/login)
- Foreign Law Guide: Current Sources of Codes and Basic Legislation in Jurisdictions of the World provides information about primary and secondary sources of legal systems around the world and citations to their legal publications. Contains information on nearly 200 jurisdictions from major nations to crown colonies, semi-independent states and supra-national regional organizations (www.foreignlawguide.com)
- LawAfrica (http://www.lawafrica.com/)
- Commonwealth Legal Information Institute (http://www.commonlii.org)
- South African Legal Information Institute (http://www.saflii.org)
- Constitutional Court of South Africa online library (http://www.constitutionalcourt.org.za/uhtbin/webcat)
- Proceedings First- an index of worldwide conference proceedings. Includes over 74,000 citations to every published congress, symposium, conference, exhibition, workshop and meeting received by the british Library Document Supply Center. (http://www.oclc.org/home)
- Hein Online Foreign & International Law Research Database- covers international yearbooks and periodicals; U.S. law digests; international tribunals and judicial decisions; and other significant works related to foreign and international law. (http://heinonline.org/HOL/Welcome?message=Please%20log%20in&url=%2FHOL%2FIndex%3Fcollection%3Dintyb)
- Hein World Trials- Hundreds of historical trials from the Cornell University Law Library's rich collection of world trials. The first 100 titles were released in HeinOnline in April 2007, and new content for this collection will be updated on a regular basis.(http://www.heinonline.org/HOL/Welcome?message=Please%20log%20in&url=%2FHOL%2FIndex%3Fcollection%3Dtrials%26set_as_cursor%3Dclear)
- LLRX- This portal gives up-to-date information on a wide range of internet research and technology-related issues, applications, resources and tools. Includes 'resource centers' on comparative/ foreign law; international law, state/ federal legislation, and more (http://www.llrx.com/international_law.html).
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Codified Law

- Oceana- Constitutions of the Countries and Territories of the World (www.oceanalaw.com)
- UN Treaty Collection database (www.untreaty.un.org)

Case Law

- Global Courts- access to Supreme Court decisions of 129 countries, or a way of finding them. Most countries give direct access to decisions in their native language free of charge; others request an account or a password, or email information. The list of includes the Supreme Courts of the Australian Territories, the Canadian Provincial Court of Appeals, the

State Supreme Courts in the United States and the U.S. Court of Appeals, plus the Court of Justice of the European Communities and the Judicial Committee of the Privy Council in the United Kingdom. (http://www.globalcourts.com/)

- Federal Legal Information Through Electronics- Search and View Full Text of Supreme Court Decisions Issued between 1937 and 1975. Contains 7,407 decisions from volumes 300 to 422 of U.S. Reports (http://supcourt.ntis.gov/#FLITEinfo)
- Cornell University Law School, Legal Information Institute: Supreme Court collection. Search the opinions of the US Supreme Court (http://www.law.cornell.edu/supct/search/search.html), foreign and international law sources (http://www.law.cornell.edu/world/europe.html)
- Dec.Nat- National Decisions (http://www.juradmin.eu/en/jurisprudence/jurisprudence_en.lasso)
- Jurifast- Fast Information System- database for case law. (http://www.juradmin.eu/en/jurisprudence/jurifast/jurifast_en.php)
- Rule of Law Assistance Directory (http://www.idlo.int/ROL/external/ROLHome.asp)
- International Commission of Jurists- ICJ Legal Resource Center http://www.icj.org/news_multi.php3?lang=en
- CODICES- electronic publication of the Venice Commission with regularly reports on the case-law of constitutional courts and courts of equivalent jurisdiction - in Europe but also in other parts of the world - together with case-law of the European Court of Human Rights and the Court of Justice of the European Communities. (http://codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm)
- International Law in Domestic Courts- cases from over 60 countries are updated bi-monthly to include new cases and subsequent developments in already featured ones. Cases (currently 113) include full texts of judgments in their original language, and translations of key passages of non-English judgments into English. (http://www.ppl.nldatabasecount.php/?dbcount=ILDC)
- JURIST- World Law- This judicial portal of the University of Pittsburg School of Law has sections on Constitution, Government & Legislation, Courts & Judgments, Human Rights, Legal Profession and Law Schools. (http://jurist.law.pitt.edu/world/)
- JUTA Law- Case Law of Zimbabwe; Government Gazettes of South Africa; Index to the Government Gazettes of South Africa; Index to the South African Law Reports; Namibian Law Reports; Regulations of South Africa (as at 30 June 2005); South African Criminal Law Reports (1990-...); South African Law Reports (1947 - ...); Statutes of South Africa (as at 30 June 2005); Statutes of Zimbabwe; The Tanzania Law Reports; Trilingual Legal Dictionary (English Afrikaans Latin); Zambia Law Reports. (http://www.jutalaw.co.za/member/memberlogon.jsp)
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UN-specific

- United Nations Treaty Series- texts of over 50,000 bilateral and multilateral treaties and subsequent treaty actions in their authentic language(s), along with a translation into English and French (as appropriate). Database covers texts from December 1946. (http://untreaty.un.org/English/access.asp)
- UNILEX- "Intelligent" database of international case law and bibliography on the United Nations Convention on Contracts for the International Sale of Goods (CISG) and on the UNIDROIT Principles of International Commercial Contracts. (http://www.unilex.info/dynasite.cfm?dssid=2375&dsmid=14276)

EU-specific

- EUR-Lex European Union law database- Full text access to EU legal documents in all official languages. (http://eur-lex.europa.eu/en/index.htm)
- European Judicial Network in civil and commercial matters (http://ec.europa.eu/civiljustice/index_en.htm)
- Caselex- cases on EU commercial law from national supreme courts and the European courts, full text, with a case digest in English. (http://www.caselex.com/registration?r=5&choice=2)
- Droit UE Online (http://data.ellispub.com/scripts/ellison/hfclient.exe?a=fronline&ae1=)

- HUDOC- Database of the texts of the supervisory organs of the European Convention on Human Rights. udgments and decisions of the European Court of Human Rights, resolutions of the Committee of Ministers of the Council of Europe, and decisions and reports of the former European Commission of Human Rights. (http://echr.coe.int/echr/en/hudoc)
- OJ OnlinePlus- database to search for EU Treaties, Case Law, Preparatory Acts and the complete texts & consolidated versions of EU Documents. (http://data.ellispub.com/ojolplus/ojonlineplus.htm)
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Topic-specific

- WTO dispute settlement- Dispute Settlement Commentary service for legal research (www.WorldTradeLaw.net)
- Doing Business Law Library (http://www.doingbusiness.org/lawlibrary/LawLibrary.aspx)
- Environmental Law Reporter (http://www.elr.info/help.cfm)
- Domestic Jurisprudence on International Criminal Law (http://www.haguejusticeportal.net/eCache/DEF/6/579.html)
- Human Rights Documents- full text searchable online publication containing the documents filmed during the past 25 years. (http://hrd.idcpublishers.info/)
- ILOLEX- trilingual database containing ILO Conventions and Recommendations, ratification information, comments of the Committee of Experts and the Committee on Freedom of Association, representations, complaints, interpretations, General Surveys, and numerous related documents. (http://www.ilo.org/ilolex/english/)
- Integrated Database of Trade Disputes for Latin American and the Caribbean- access to full information and documentation on trade dispute process, from initial filing to final enactment. It includes WTO, MERCOSUR, NAFTA, CARICAOM, Andean Community, CACM and provides an option for an integrated search. Database also available in Spanish. (http://idatd.eclac.cl/controversias/index_en.jsp)
- Kluwer: Arbitration Online- A fully-searchable database of primary and secondary materials in the field of International Commercial Arbitration, with access to full-text downloads of materials. (http://www.kluwerarbitration.com/arbitration/)
- Kluwer: Competition Law- Kluwer's collection of primary source materials, commentaries and analysis on EU competition law, divided into Antitrust, Mergers and State Aid. Each topic consists of an Overview, Legislation and Notices, Commission and Court Decisions and Analytical Material. Liberalisation, the Internal Market, Services and Goods and Consumer Policy and the Environment are included as special sectors and the database also includes 25 country reports of National Legislation and Commentary. (http://www.kluwercompetitionlaw.com/)
- Lower IEL Labour Law Online- Fulltext documents on International and National Monographs, European Works Councils, Legislation, Case Law and Codex. (http://www.kluwerlawonline.com/toc.php?area=Looseleafs&mode=bypub&level=4&values=Looseleafs~~IEL+Labour+Law)
- Lloyd's Law Reports online- Authoritative and comprehensive collection of maritime and commercial case decisions available, through the fully searchable archive, containing over 17,000 key maritime and commercial cases and spanning more than eighty years of case law. (http://www.i-law.com/ipiportal/)
- OGEL- Global Energy Law Portal, with Bibliography of recently published secondary material relating to energy and natural resources law and policy; Reference Bank with modern energy laws, arbitral awards, treaties and voluntary guidelines; plus Ogel Newsletter (searchable archives). (http://www.gasandoil.com/ogel/)

Region-specific

- Law Info China- (http://www.lawinfochina.com)
- Kodeks: Russian Law Database (http://kodeks.mosinfo.ru/ev/)
- Beck Online- German language databases containing cases, statutes, and journal articles.
- Southern African Legal Information Institute- African Court Decisions (http://www.saflii.org)
- Manupatra- Database of Indian Legal and Business Policy(www.manupatra.co.in)
- Commonwealth Legal Information Institute (http://www.commonlii.org)
- U.S.: Nation's Courts Series- Your Nation's Courts Online (http://courts.cqpress.com/), Public Access to Court Electronic Records, Congressional Quarterly,

- Rechtsorde- Rechtsorde is one interface to search through Dutch law sources, EU law, international law and many official publications; direct access to the fulltext of the publications. (http://www.rechtsorde.nl/)
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Periodicals or periodicals databases

- HeinOnline- Law Journal Library collection
- Oxford Reference Online: Law (http://www.oxfordreference.com/pub/views/home.html)
- "Reflets"- ECJ review on new developments and interpretation of EU law. (http://curia.europa.eu/fr/coopju/apercu_reflets/lang/index.htm)
- International Judicial Monitor (http://www.judicialmonitor.org/current/ijadocket.html)
- Commonwealth Judicial Journal (http://www.cmja.org/publications.htm)
- International Justice Tribune (http://www.justicetribune.com/)
- Index to Foreign Legal Periodicals and Books- in-depth coverage of public and private international law, comparative and foreign law, and the law of all jurisdictions other than the United States, the U.K., Canada, and Australia. IFLP also analyzes the contents of approximately eighty individually published collections of legal essays, Festschriften, Mélanges and congress reports each year. (http://web5s.silverplatter.com/webspirs/start.ws?customer=vredespaleis)
- LALEY- El Diario LA LEY, decano de los diarios jurídicos publicados en España, ofrece a los profesionales su versión digital, poniendo diariamente al alcance de sus lectores la calidad de su cuidada información y selección de contenidos, junto al prestigio de las firmas de sus colaboradores. (http://diariolaley.laley.es/content/Inicio.aspx)
- Transnational Law Digest & Bibliography- This site is a knowledge and codification platform for transnational commercial law, containing a comprehensive digest of principles and rules on transnational commercial law, and including also an extensive bibliography. (http://www.tldb.net/)

Public Policy/Legislative

- LexisNexis Congressional
- PolicyFile
- Public Affairs Information Service (PAIS International)
- SSRN

Scholarly Full Text

- HeinOnline
- JSTOR
- Project Muse
- Worldwide Political Science Abstracts
- ProQuest

Indexes to Legal Materials

- Legal Trac (Legal Resource Index- to approx. 900 legal publications)
- WebSPIRS- Index to Foreign Legal Periodicals (The Index to Foreign Legal Periodicals, produced by The American Association of Law Libraries, provides access to legal literature worldwide, covering all forms of foreign (non-Anglo-American) law. This includes comparative law and legal systems, such as Islamic law; socialist law; public and private international law; and transnational commercial law. The data is not limited by country of publication, but rather type of publication. Thus, while publications concerning British and American law are not included, British and American publications concerning foreign law are included.The types of documents covered include journal articles, congress reports, essay collections, yearbooks, and book reviews. The database encompasses all languages. Materials in Greek, Cyrillic, and East Asian vernacular are Romanized according to Library of Congress standards. Arabic and Hebrew titles are translated into English or French.) (http://web5.silverplatter.com/webspirs/start.ws)
- Legal Journals Index (UK and EU)

Organization-Specific Databases

- International Commission of Jurists: ICJ Legal Resource Center (http://www.icj.org/news_multi.php3?lang=en)

APPENDIX B:

Survey of citations to foreign law in decisions of the US Supreme Court

The following list contains a list of US Supreme Court decisions where foreign legal material, or more general information relating to foreign jurisdictions, was referenced in an opinion. The list is intended as an illustration and a preliminary overview of the extent and scope to which judicial internationalisation is taking place. Obviously, the various ways in which foreign legal material was 'used' differs significantly from case to case and a fuller taxonomy will be called for in future research. However, it is our hope and belief that this overview can serve as a stimulant for further debate and research.

#	Date of Decision	Case Title	Case Number	Section of Document (and author)	Country Mentioned	Material Cited
1	26-Jun-08	D.C. v. Heller	128 S.Ct. 2783	Opinion of the Court (Scalia), Dissent (Stevens)	Scotland, England	Statute Law of Scotland; English case, English Bill of Rights, laws of England, English law, English Declaration of Rights,
2	25-Jun-08	Exxon v. Baker	128 S.Ct. 2605	opinion of the court (Souter)	Germany, Italian, Japan	German courts, Italian courts, Japanese courts
3	25-Jun-08	Giles v. California	128 S. Ct. 2678	Opinion of the Court (Scalia), Dissent (Breyer)	England	English cases, Law of England
4	23-Jun-08	Sprint Communications v. APCC Services	128 S. Ct. 2531	Opinion of the court (Breyer) ; Dissent (Roberts)	United Kingdom	English courts, English law
5	23-Jun-08	Rothgery v. Gillespie County	128 S. Ct. 2578	Dissent (Thomas)	England	English law
6	19-Jun-08	Indiana v. Edwards	128 S. Ct. 2379	Dissent (Scalia)	United Kingdom	British criminal jurisprudence
7	12-Jun-08	Boumediene v. Bush	128 S.Ct. 2229	Opinion of the court (Kennedy); Dissent (Scalia)	Canada, Cuba, England; Scotland?	"Canadian courts," "Cuban courts," Supreme Court of Judicature/British courts;

#	Date of Decision	Case Title	Case Number	Section of Document (and author)	Country Mentioned	Material Cited
8	12-Jun-08	Munaf v. Geren	128 S. Ct. 2207	Opinion of the court (Roberts)	Iraq; Japan; England; Cuba	Iraqi courts, Central Criminal Court of Iraq, Iraqi Court of Cassation; Japanese court; English courts: Cuban law, Laws of England
9	12-Jun-08	Philippines v. Pimentel	128 S.Ct. 2180	Opinion of the court (Kennedy); Partial Dissent (Souter)	Philippines, Switzerland; Panama	Phillipine court, Swiss Federal Supreme Court
10	23-Apr-08	Virginia v. Moore	128 S. Ct. 1598	Concurring- footnote (Ginsburg)	England	Laws of England
11	16-Apr-08	Baze v. Rees	128 S. Ct. 1520	Opinion of the court (Roberts); Concur (Alito), Concur (Thomas)	United Kingdom; Netherlands	cases from england, English bill of rights, English law; medical authorities in the Netherlands
12	25-Mar-08	Medellin v. Texas	128 S. Ct. 1346	Opinion of the court-footnote (Roberts)	Morocco; Netherlands, United Kingdom	moroccan domestic courts; laws of… the Netherlands; Britain treaty law
13	25-Jun-07	Morse v. Frederick	127 S. Ct. 2618		England	Laws of England, English common law
14	18-Jun-07	Powerex v. Reliant Energy Services	127 S. Ct. 2411	Opinion of the Court (Scalia), Dissent (Breyer)	Canada	British Colombia statutes
15	5-Mar-07	Sinochem International Co., LTD. V. Malaysia International Shipping Corp.	549 U.S. 422	Opinion of the Court (Ginsburg)	China	Guangzhou Admiralty Court in China
16	29-Jun-	Hamdan v.	548	Dissent (Thomas)	France;	French Military

#	Date of Decision	Case Title	Case Number	Section of Document (and author)	Country Mentioned	Material Cited
	06	Rumsfeld	U.S. 557		Netherlands	Tribunal at Marseilles; Netherlands military tribunal
17	29-Jun-06	Clark v. Arizona	548 U.S. 735	Opinion of the Court (Souter)	England	English case
18	28-Jun-06	Sanchez-Llamas v. Oregon	548 U.S. 331	Opinion of the court-footnote (Roberts); Dissent (Breyer)	Australia, Brazil, Canada; United Kingdom	two cases from Australia, Australia Crimes Act No. 12, 1914, British courts, English cases, Brazilian Constitution, Brazilian court, Canadian case
19	26-Jun-06	United States v. Gonzalez-Lopez	548 U.S. 140	Dissent (Alito)	England	English common-law rule
20	22-Jun-06	Laboratory Corporation of America Holdings v. Metabolite	548 U.S. 124	Dissent (Breyer)	England	English law
21	19-Jun-06	Davis v. Washington	547 U.S. 813	Opinion of the Court (Scalia), Dissent (Thomas)	England	English cases
22	1-May-06	Marshall v. Marshall	547 U.S. 293	Opinion of the Court (Ginsburg); Concurring (Stevens)	England	English courts of chancery
23	23-Jan-06	Central VA Community College v. Katz	546 U.S. 356	Opinion of the Court (Stevens)	England	English statutes, laws of England, English doctrines, English bankruptcy law
24	27-Jun-05	McCreary County v. ALCU	545 U.S. 844	Dissent (Scalia)	France	French Constitution
25	6-Jun-05	Spector v. Norwegian Cruise Line	545 U.S. 119	Dissent (Thomas)	England	laws…United Kingdom

#	Date of Decision	Case Title	Case Number	Section of Document (and author)	Country Mentioned	Material Cited
26	23-May-05	Deck v. Missouri	544 U.S. 622	Opinion of the Court (Breyer), Dissent (Thomas)	England	laws of England, English authorities, English cases
27	23-May-05	Medellin v. Dretke (Texas dept of Criminal Justice)	540 U.S. 660	Dissent (O'Connor)	Mexico	Mexican consul, Mexican consular authorities
28	26-Apr-05	Pasquantino v. United States	544 U.S. 349	Opinion footnote, Dissent (Ginsburg); Opinion of the Court (Thomas)	Canada; Ireland, England, Scotland	"Canadian courts;" Irish trial court, English courts, Scottish law
29	26-Apr-05	Small v. United States	544 U.S. 385	Opinion of the court (Breyer), Dissent (Thomas)	Japan, Russia, Singapore, Zambia, England	Japanese court; Soviet criminal law, laws of the Russian Soviet Federated Socialist Republic, Laws of the Republic of Zambia, United Kingdom Firearms Offenses Act
30	1-Mar-05	Roper v. Simmons	543 U.S. 551	Dissent (Scalia)	United Kingdom, Europe, netherlands, Germany, Australia	European courts; countries such as the Netherlands, Germany, and Australia
31	9-Nov-04	Norfolk Southern Ry. V. James N. Kirby, Pty Ltd.	543 U.S. 14	Opinion of the Court (O'Connor)	Australia; England	Foreign Court Records; an English case
32	29-Jun-04	Sosa v. Alvarez-Machain	542 U.S. 692	Opinion of the court-full text and footnote (Souter); Dissent-full text and footnote (Stevens)	Canada, Cambodia, Costa Rica, France; South Africa; Mexico; England	Court of France; Court of Appeal of South Africa, South African court; Mexican law, Criminal law of England

#	Date of Decision	Case Title	Case Number	Section of Document (and author)	Country Mentioned	Material Cited
33	28-Jun-04	Rasul v. United States	542 U.S. 466	Dissent (Scalia); Opinion of the Court (Kennedy)	England; Guernsey, Jersey	English courts, English law; cases in Guernsey, Jersey
34	28-Jun-04	Hamdi v. Rumsfeld	542 U.S. 507	Dissent (Scalia)	England	English courts
35	21-Jun-04	Intel v. Advanced Micro Devices	542 U.S. 241	Opinion of the Court (Ginsburg)	Europe, England	Court of First Instance, European Court of Justice , English law
36	21-Jun-04	Hiibel v. Sixth Judicial District Court of Nevada	542 U.S. 177	Opinion of the Court (Kennedy)	England	English vagrancy laws
37	14-Jun-04	Hoffmann-La Roche v. Empagran	542 U.S. 155	Opinion of the Court (Breyer)	Japan; England	Japanese governmental regulation; British law and policy
38	7-Jun-04	Republic of Austria V. Altmann	541 U.S. 677	Opinion of the Court (Stevens); Concurring opinion (Breyer); Dissent (Kennedy)	Austria; Singapore, England	Foreign Court Records; Singapore legislation; English common law
39	7-Jun-04	Department of Transportation v. Public Citizen	541 U.S. 752	Opinion of the Court (Thomas)	Mexico	Mexico's regulation
40	28-Apr-04	Vieth v. Jubelirer	541 U.S. 267	Opinion of the Court (Scalia)	England	English courts
41	31-Mar-04	Bedroc Limited v. United States	541 U.S. 176	Dissent (Stevens)	Israel	Israel Supreme Court Justice Aharon Barak
42	8-Mar-04	Crawford v. Washington	541 U.S. 36	Opinion of the court (Scalia), Concur (Rehnquist)	Spain, England	a certain tribunal in Spain; English authorities
43	24-Feb-	Olympic	540	Dissent (Scalia);	Australia;	Foreign Court

#	Date of Decision	Case Title	Case Number	Section of Document (and author)	Country Mentioned	Material Cited
	04	Airways v. Husain	U.S. 644	Footnote of opinion (Thomas)	England	Records, England's civil appellate court
44	26-Jun-03	Stogner v. California	539 U.S. 607	Opinion of the court (Breyer), Dissent (Kennedy)	England	British courts
45	26-Jun-03	Lawrence v. Texas	539 U.S. 558	Opinion of the Court (Kennedy)	England, Northern Ireland	English criminal laws, laws of Northern Ireland
46	23-Jun-03	Am. Ins. Ass'n v. Garamendi	539 U.S. 396	Opinion of the court (Souter)	Germany	German Courts
47	9-Jun-03	Nguyen v. United States	539 U.S. 69	Opinion of the court	Northern Mariana Island	district court for the northern mariana islands
48	7-Apr-03	Pacificare Health Systems v. Book	538 U.S. 401	Opinion of the Court (Scalia)	Japan	Japanese law
49	4-Mar-03	Moseley v. V Secret Catalogue	537 U.S. 418	Opinion of the court (Stevens)	Germany, England	German court, English common law
50	27-Jan-03	FCC v. Nextwave Personal Communications	537 U.S. 293	Dissent (Breyer)	England	British Courts
51	15-Jan-03	Eldred v. Ashcroft	537 U.S. 186	Dissent (Stevens)	England	Statute of Anne
52	14-Jan-03	Sattazahn v. Pennsylvania	537 U.S. 101	Dissent (Ginsburg)	England	English common-law rule
53	10-Dec-02	United States v. Bean	537 U.S. 71	Opinion of the court (Thomas)	Mexico	Mexican court
54	20-Jun-02	Utah v. Evans	536 U.S. 452	Dissent (Scalia)	England	British authorities
55	20-Jun-	Atkins v.	536	Dissent (Rehnquist)	England	law of England

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	02	Virginia	U.S. 304			
56	10-Jun-02	JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Limited	536 U.S. 88	Opinion of the Court (Souter)	British Virgin Islands, England	laws of the British Virgin Islands, United Kingdom authority, laws of the UK
57	13-May-02	Ashcroft v. ACLU	535 U.S. 564	Opinion of the Court (Thomas)	England	English courts
58	17-Apr-02	United States v. Craft	535 U.S. 274	Opinion of the Court (O'Connor), Dissent (Thomas)	England	English common law
59	27-Feb-02	Raygor v. Regents of Univ. of Minnesota	534 U.S. 533	Dissent- footnote (Stevens)	England	English courts
60	15-Jan-02	Equal Employment Opportunity Commisssion v. Waffle House	534 U.S. 279	Opinion of the Court (Stevens)	England	English common law
61	8-Jan-02	Great-West Life v. Knudson	534 U.S. 204	Dissent (Stevens)	England	English chancery court
62	28-Jun-01	Zadvydas v. Davis and Immigration and Naturalization Service	533 U.S. 678	Dissent (Kennedy)	Lithuania	Lithuanian law
63	11-Jun-01	Tuan Anh Nguyen v. Immingration and Naturalization Services	533 U.S. 53	Dissent (O'Connor)	France, Spain	the laws of Spain and France
64	11-Jun-01	Kyllo v. United States	533 U.S. 27	Opinion of the Court (Scalia)	England	laws of England
65	14-May-01	Rogers v. Tennessee	532 U.S. 451	Dissent (Stevens)	England	common law of England
66	24-Apr-01	Atwater v. City of Lago Vista	532 U.S.	Opinion of the Court (Souter)	England	English common law

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			318			
67	21-Mar-01	Circuit City Stores v. Adams	532 U.S. 105	Dissent (Stevens, Souter)	Israel	Israel Supreme Court Justice Aharon Barak
68	21-Feb-01	Lewis v. Lewis & Clark Marine	532 U.S. 105	Opinion of the Court (O'Connor)	England, France	limitation acts in England, France
69	26-Jun-00	Dickerson v. United States	530 U.S. 428	Opinion of the Court (Rehnquist)	England	courts of England
70	26-Jun-00	Apprendi v. New Jersey	530 U.S. 466	Dissent (O'Connor)	England	English courts, English cases, law of England
71	19-Jun-00	Crosby v. National Foreign Trade Council	530 U.S. 262	Opinion of the Court (Souter)	Myanmar (Burma)	English courts
72	12-Jun-00	Carter v. United States	530 U.S. 255	Dissent- footnote (Ginsburg)	England	English Doctrine
73	22-May-00	Geier v. Honda Motor Company	529 U.S. 861	Dissent (Stevents)	England	British regulations
74	22-May-00	Vermont Agency of Natural Resources v. U.S.	529 U.S. 765	Dissent (Stevens)	England	English Doctrine
75	1-May-00	Carmell v. Texas	529 U.S. 513	Opinion (Stevens)	England	English common law
76	12-Jan-00	Martinez v. Court of Appeal of California, Fourth Appellate District	528 U.S. 152	Opinion of the Court (Stevens)	England	British criminal jurisprudence
77	23-Jun-99	Alden v. Maine	527 U.S. 706	Dissent (Souter)	England	king's court, custom/law of England
78	23-Jun-99	Ortiz v. Fibreboard Corporation	527 U.S. 815	Opinion of the Court (Souter)	England	English law
79	17-Jun-	Grupo Mexicano	527	Opinion of the court	England;	English Court

#	Date of Decision	Case Title	Case Number	Section of Document (and author)	Country Mentioned	Material Cited
	99	de Desarrollo v. Alliance Bond Fund	U.S. 308	(Scalia); Dissent (Ginsburg)	Mexico	of Chancery, Court of Equity, English courts, Mexican Law
80	10-Jun-99	Lilly v. Virginia	527 U.S. 116	Concur (Breyer)	England	British statutes, cases
81	10-Jun-99	Chicago v. Morales	527 U.S. 41	Opinion of the Court (Stevens), Dissent (Thomas)	England	England "slavery acts," English vagrancy laws
82	10-Jun-99	Neder v. United States	527 U.S. 1	Dissent (Scalia)	England	English law, English Constitution
83	24-May-99	Monterey v. Del Monte Dunes	526 U.S. 687	Opinion of the Court (Kennedy)	England	English law courts, law of England
84	24-May-99	Wilson v. Layne	526 U.S. 603	Opinion of the Court (Rehnquist)	England	an English court
85	17-May-99	Ruhgas v. Marathon Oil Company	526 U.S. 574	Opinion of the Court (Ginsburg)	Norway	Norwegian Law
86	17-May-99	Saenz v. Roe	526 U.S. 489	Dissent- Footnote (Thomas)	England	British Constitution of Government
87	5-Apr-99	Mitchell v. Supreme Court	526 U.S. 314	Dissent (Scalia)	England	book: Crime and the Courts of England
88	24-Mar-99	Jones v. United States	526 U.S. 227	Opinion of the Court-full text and footnotes (Souter)	England	Libel Act in Britain
89	12-Jan-99	El Al Israel Airlines, LTD. V. Tsui Yuan Tseng	525 U.S. 155	Opinion of the court-footnote (Ginsburg)	Canada; New Zealand; Singapore	Supreme Court of British Columbia, Supreme Court of Ontario, New Zealand Court of Appeal, Singapore Court of Appeal

#	Date of Decision	Case Title	Case Number	Section of Document (and author)	Country Mentioned	Material Cited
90	1-Dec-98	Minnesota v. Carter	525 U.S. 83	Concur (Scalia)	England	English case, English common-law maxim, English Authorities
91	13-Oct-98	Elledge v. Florida	525 U.S. 944	Dissent (Breyer)	England	England bill of rights
92	25-Jun-98	U.S. v. Balsys	524 U.S. 666	Opinion of the court (Souter); Dissent (Breyer)	England, Spain; Lithuania	English courts, laws of Spain; Laws of the Republic of Lithuania
93	22-Jun-98	Gebser v. Lago Vista Independent School District	524 U.S. 274	Dissent (Stevens)	England	English common law
94	22-Jun-98	United States v. Bajakajian	524 U.S. 321	Opinion of the Court-full text and footnotes (Thomas)	England	English common law
95	15-Jun-98	Phillips v. Washington Legal Foundation	524 U.S. 156	Opinion of the Court (Rehnquist)	England	English common law
96	8-Jun-98	Muscarello v. United States	524 U.S. 125	Dissent- footnote (Ginsburg)	England	British gun laws
97	29-Apr-98	Calderon v. Thompson	523 U.S. 538	Opinion of the Court (Kennedy)	Mexico	Mexican authorities
98	29-Apr-98	United States v. Romani	523 U.S. 517	Opinion of the Court (Stevens)	England	English common law
99	22-Apr-98	Miller v. Albright	523 U.S. 420	Dissent (Ginsburg)	England	law of England
100	31-Mar-98	Feltner v. Colombia Pictures	523 U.S. 340	Opinion of the Court (Thomas)	England	English law courts
101	31-Mar-98	United States v. Scheffer	523 U.S. 303	Dissent (Stevens)	England	in England by statute
102	4-Mar-98	Chicago Steel v. Citizens for a	523 U.S. 83	Concurring-Footnotes (Stevens)	England	English common law

#	Date of Decision	Case Title	Case Number	Section of Document (and author)	Country Mentioned	Material Cited
		Better Environment				
103	26-Jun-97	Washington v. Glucksburg	521 U.S. 702	Opinion of the court-full text and footnote (Rehnquist);4Concurring (Souter)	Australia, Canada, Colombia, Netherlands, England	Supreme Court of Canada; Colombia's Constitutional Court; Laws and customs of England, English common law,
104	23-Jun-97	Idaho v. Coeur d'Alene Tribe of Idaho	521 U.S. 261		England	English law, English common law
105	28-Jun-96	Felker v. Turpin	518 U.S. 651	Opinion of the Court (Rehnquist)	England	English common law
106	24-Jun-96	Gasperini v. Center for Humanities	518 U.S. 415	Opinion of the Court (Ginsburg); Dissent (Stevens), Dissent (Scalia)	England	English common law trial courts, English courts, English cases, English common law, English law,
107	24-Jun-96	United States v. Ursery	518 U.S. 267	Concurring (Kennedy)	England	English statutes
108	13-Jun-96	Montana v. Egelhoff	518 U.S. 37	Opinion of the Court (Scalia), Dissent (O'Connor)	England	English case, laws of England
109	3-Jun-96	Loving v. United States	517 U.S. 748	Opinion of the court (Kennedy), Concurring (Thomas)	England	
110	20-May-96	BMW of North America v. Gore	517 U.S. 559	Opinion of the Court (Stevens)	England	
111	23-Apr-96	Markman v. Westview Instruments	517 U.S. 370	Opinion of the Court-full text and footnotes (Souter)	England	
112	16-Apr-96	Cooper v. Oklahoma	517 U.S. 348	Opinion of the court-full text and footnote (Stevens)	England	
113	27-	Seminole Tribe	517	Dissent-footnotes	England,	

#	Date of Decision	Case Title	Case Number	Section of Document (and author)	Country Mentioned	Material Cited
	Mar-96	v. Florida	U.S. 44	(Souter)	Turkey	
114	4-Mar-96	Bennis v. Michigan	516 U.S. 442	Dissent (Kennedy)	England	
115	16-Jan-96	Zicherman v. Korean Air Lines Co.	516 U.S. 217	Opinion of the court (Scalia)	Canada; France, England, Germany, the Netherlands	
116	9-Jan-96	Yamaha v. Calhoun	516 U.S. 199	Opinion of the Court (Ginsburg)	England	
117	19-Jun-95	Reaseguros v. Reefer	515 U.S. 528	Dissent (Stevens); Opinion of the Court (Kennedy)	Australia, Japan, England, South Africa, Norway	
118	19-Jun-95	United States v. Gaudin	515 U.S. 506	Opinion of the Court (Scalia)	England	
119	14-Jun-95	White v. United States	515 U.S. 389	Opinion of the Court (O'Connor)	Mexico; England	
120	12-Jun-95	Missouri v. Jenkins	515 U.S. 70	Concurring (Thomas)	England	
121	22-May-95	Wilson v. Arkansas	514 U.S. 927	Opinion of the Court (Thomas)	England	
122	22-May-95	U.S. Term Limits v. Thornton	514 U.S. 779	Opinion of the Court (Stevens); Dissent (Thomas)	England	
123	19-Apr-95	McIntyre v. Ohio Elections Commission	514 U.S. 334	Dissent (Scalia); Opinion of the Court (Stevens)	Australia, Canada, England	
124	18-Apr-95	Plaut v. Spendthrift Farm	514 U.S. 211	Opinion of the Court (Scalia)	England	
125	18-Jan-95	Terminix Int'l v. Dobson	513 U.S.	Opinion of the Court (Breyer)	England	

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126	20-Jun-94	Workers' Compensation v. Greenwich Collieries	512 U.S. 267	Opinion of the Court (O'Connor)	England	
127	23-May-94	BFP v. Resolution Trust Corp.	511 U.S. 531	Opinion of the Court (Scalia)	England	
128	23-May-94	Staples v. United States	511 U.S. 600	Opinion of the Court-footnote (Thomas)	England	
129	26-Apr-94	Landgraf v. USI Film Products	511 U.S. 244	Opinion of the Court-Footnote (Stevens)	England	
130	19-Apr-94	J. E. B. v. Alabama	511 U.S. 127	Opinion of the Court (Blackmun)	England	
131	7-Mar-94	Campbell v. Acuff-Rose Music	510 U.S. 569	Opinion of the Court (Souter)	England	
132	23-Feb-94	American Dredging Company v. Miller	510 U.S. 443	Dissent (Kennedy)	Canada, Russia, England, Scotland	
133	24-Jan-94	Albright v. Oliver	510 U.S. 266	Dissent (Stevens)	England	
134	19-Jan-94	Weiss v. United States	510 U.S. 163	Opinion of the Court (Rehnquist); Concurring in part (Scalia)	England	
135	28-Jun-93	United States v. Dixon and Foster	509 U.S. 688	Opinion of the Court (Scalia), Concur (Souter); Concur in part (Rehnquist)	Philippines, England	
136	28-Jun-93	Alexander v. United States	509 U.S. 544	Opinion of the Court (Rehnquist), Dissent in part (Souter)	England	
137	28-Jun-93	Austin v. United States	509 U.S. 602	Opinion of the Court (Blackmun), Dissent (Scalia)	England	
138	28-Jun-93	Hartford Fire Insurance v.	509 U.S.	Opinion of the Court (Souter)	England	

#	Date of Decision	Case Title	Case Number	Section of Document (and author)	Country Mentioned	Material Cited
		California	764			
139	25-Jun-93	TXO Production Corp. v. Alliance	509 U.S. 443	Dissent (O'Connor)	England	
140	24-Jun-93	Godinez v. Moran	509 U.S. 389	Concur (Kennedy)	England	
141	24-Jun-93	Heller v. Doe	509 U.S. 312	Opinion of the Court (Kennedy)	England	
142	18-Jun-93	Helling v. McKinney	509 U.S. 25	Dissent (Thomas)	England	
143	7-Jun-93	Minnesota v. Dickerson	508 U.S. 366	Concur (Scalia)	England	
144	21-Apr-93	Withrow v. Williams	507 U.S. 680	Concurring in part (Scalia)	England	
145	23-Mar-93	Saudi Arabia v. Nelson	507 U.S. 349	Opinion of the Court (Souter); Dissent (Kennedy)	Cayman Islands, Saudi Arabia	
146	8-Mar-93	Smith v. United States	507 U.S. 197	Dissent (Stevens)	England	
147	24-Feb-93	United States v. 92 Buena Vista Avenue	507 U.S. 111	Opinion of the Court (Stevens)	England	
148	25-Jan-93	Herrera v. Collins	506 U.S. 390	Opinion of the Court (Rehnquist)	England	
149	13-Jan-93	Crosby v. United States	506 U.S. 255	Opinion of the Court (Blackmun)	Philippines	
150	29-Jun-92	Planned Parenthood v. Casey	505 U.S. 833	Dissent (Stevens); Concurring in part and dissenting in part (Rehnquist)	Canada, Germany, England	
151	26-Jun-92	Two Pesos v. Taco Cabana	505 U.S. 763	Concur- footnote (Stevens)	England	

#	Date of Decision	Case Title	Case Number	Section of Document (and author)	Country Mentioned	Material Cited
152	24-Jun-92	Doggett v. United States	505 U.S. 647	Opinion of the Court (Souter)	Panama	
153	22-Jun-92	Sawyer v. Whitley	505 U.S. 333	Concur (Stevens)	England	
154	22-Jun-92	Medina v. California	505 U.S. 437	Opinion of the Court (Kennedy)	England	
155	15-Jun-92	Ankenbrandt v. Richards	504 U.S. 689	Concurring (Blackmun); Opinion of the court (White), Concurring-full text and footnotes (Blackmun)	Philippines, England	
156	15-Jun-92	U.S. v. Alvarez-Machain	504 U.S. 655	Opinion of the Court (Rehnquist), Dissent (Stevens)	Mexico, South Africa	
157	26-May-92	Evans v. United States	504 U.S. 255	Opinion of the Court (Stevens), Dissent (Thomas)	England	
158	4-May-92	United States v. Williams	504 U.S. 36	Opinion of the Court (Scalia)	England	
159	26-Feb-92	Franklin v. Gwinnett County Public Schools	503 U.S. 60	Opinion of the Court (White)	England	
160	4-Dec-91	Wooddell v. International Brotherhood of Electrical Workers	502 U.S. 93	Opinion of the Court (White)	England	
161	3-Dec-91	Griffin v. United States	502 U.S. 46	Opinion of the Court (Scalia)	England	
162	27-Jun-91	Harmelin v. Michigan	501 U.S. 957	Opinion of the Court (Scalia), Dissent (White)	Philippines, Spain, England	
163	24-Jun-91	Rechtor v. Bryant	501 U.S. 1239	Dissent (Marshall)	England	
164	20-Jun-91	Gregory and Nugent v. Ashcroft	501 U.S. 452	Opinion of the Court (O'Connor)	England	

#	Date of Decision	Case Title	Case Number	Section of Document (and author)	Country Mentioned	Material Cited
165	17-Jun-91	Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise	501 U.S. 252	Opinion of the Court (Stevens)	Philippines	
166	3-Jun-91	Exxon v. Central Gulf Lines	500 U.S. 603	Opinion of the Court (Marshall)	England	
167	30-May-91	Burns v. Reed	500 U.S. 478	Opinion of the Court (White)	England	
168	13-May-91	Gilmer v. Interstate/Johnson Lane Corp	500 U.S. 20	Opinion of the Court (White)	England	
169	23-Apr-91	California v. Hodari	499 U.S. 621	Opinion of the Court-Footnote (Scalia)	England	
170	17-Apr-91	Eastern Airlines, Inc. v. Floyd	499 U.S. 530	opinion of the court, also footnotes (Marshall)	Austria, France, Germany, Israel, Switzerland, England	
171	17-Apr-91	Carnival Cruise Lines, Inc. v. Shute	499 U.S. 585	Dissent (Stevens)	Belgium	
172	16-Apr-91	McCleskey v. Zant	499 U.S. 467	Opinion of the Court (Kennedy), Dissent (Marshall)	England	
173	4-Mar-91	Pacific Mutual v. Haslip	499 U.S. 1	Concurring (Scalia)	England	
174	26-Feb-91	Business Guides v. Chromatic Communications Enterprises	498 U.S. 533	Dissent (Kennedy)	England	
175	19-Feb-91	McDermott International v. Wilander	498 U.S. 337	Opinion of the Court (O'Connor)	England	
176	3-Dec-90	Moskal v. United States	498 U.S. 103	Dissent (Scalia)	England	
177	27-Jun-	Metro	497	Dissent (Kennedy)	South	

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	90	Broadcasting v. FCC	U.S. 547		Africa	
178	27-Jun-90	Walton v. Arizona	497 U.S. 639	Dissent- full text and footnote (Stevens)	England	
179	25-Jun-90	Cruzan v. Director, Mizzouri Department of Health	497 U.S. 261	Concur (O'Connor)	England	
180	25-Jun-90	Sisson v. Ruby	497 U.S. 358	Concur (Scalia)	England	
181	29-May-90	Citibank v. Wells Fargo Asia	495 U.S. 660	Opinion of the Court (Kennedy)	Philippines	
182	29-May-90	Taylor v. United States	495 U.S. 575	Opinion of the Court (Blackmun)	England	
183	29-May-90	Burnham v. Superior Court of CA, County of Marin	495 U.S. 604	Opinion of the Court (Scalia), Concur (Brennan)	England	
184	21-May-90	Davis v. United States	495 U.S. 472	Opinion of the Court (O'Connor)	England	
185	24-Apr-90	Whitmore v. Arkansas	495 U.S. 149	Opinion of the Court (Rehnquist)	England	
186	24-Apr-90	Stewart v. Abend	495 U.S. 207	Dissent-footnote (Stevens)	England	
187	17-Apr-90	Kaiser Aluminium v. Bonjorno	494 U.S. 827	Dissent-footnote (Stevens)	England	
188	20-Mar-90	Chauffeurs v. Terry	494 U.S. 558	Opinion of the Court (Marshall), Concur (Brennan); Dissent (Kennedy)	England	
189	20-Mar-90	United States v. Dalm	494 U.S. 596	Dissent (Stevens)	England	
190	28-Feb-	United States v.	494	Opinion of the Court	Mexico	

#	Date of Decision	Case Title	Case Number	Section of Document (and author)	Country Mentioned	Material Cited
	90	Verdugo-Urquidez	U.S. 259	(Rehnquist), Concurring (Kennedy)		
191	22-Jan-90	Holland v. Illinois	493 U.S. 474	Dissent- footnote (Stevens)	South Africa	
192	17-Jan-90	Kirkpatrick v. Environmental Tectonics Corp	493 U.S. 400	Opinion of the Court (Scalia)	Mexico	
193	11-Dec-89	United States v. Goodyear Tire & Rubber Company	493 U.S. 132	Opinion of the Court (Marshall)	England	
194	26-Jun-89	Browning-Ferris Industries v. Kelco Disposal	492 U.S. 257	Opinion of the Court (Blackmun), Dissent (O'Connor)	England	
195	23-Jun-89	Granfinanciera v. Nordberg	492 U.S. 33	Opinion of the Court (Brennan), Dissent (White)	England	
196	15-Jun-89	Will v. Michigan State Police	491 U.S. 58	Opinion of the Court (White), Dissent (Brennan)	England	
197	15-Jun-89	Michael H. v. Gerald D.	491 U.S. 110	Opinion of the Court (Scalia), Dissent (Brennan)	England	
198	12-Jun-89	Newman-Green v. Alfonzo-Larrain	490 U.S. 826	Opinion of the Court-footnote and full text (Marshall)	Venezuela	
199	22-May-89	Lauro Lines v. Chasser	490 U.S. 495	Opinion of the court (Brennan)	Italy	
200	15-May-89	United States v. Halper	490 U.S. 435	Opinion of the Court (Blackmun)	England	
201	1-May-89	Mallard v. U.S. District Court for Southern Iowa	490 U.S. 296	Opinion of the Court (Brennan)	England	
202	18-Apr-89	Chan et al. v. Korean Air Lines, LTD.	490 U.S. 122	Opinion of the Court (Scalia), Concurring opinion-footnote (Brennan)	Canada	
203	21-	Brower v. Inyo	489	Opinion of the Court	England	

#	Date of Decision	Case Title	Case Number	Section of Document (and author)	Country Mentioned	Material Cited
	Mar-89	County	U.S. 593	(Scalia)		
204	28-Feb-89	United States v. Stewart	489 U.S. 353	Opinion of the Court (Brennan)	Canada	
205	21-Feb-89	Bonito Boats v. Thunder Craft Boats	489 U.S. 141	Opinion of the Court (O'Connor)	England	
206		Honda Motors v. Oberg	512 U.S. 415	Opinion of the Court (Stevens); Dissent (Ginsburg)	England	
207		Printz v. United States	521 U.S. 898	Dissent (Breyer)	Switzerland, Germany, EU	
208	June 30, 1994	Holder v. Hall	512 U.S. 874		Belgium, Cyprus, Lebanon, New Zealand, West Germany, Zimbabwe	

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