

# The Constitutional Role of Transnational Courts: Principled Legal Ideas in Three-Dimensional Political Space

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## INTRODUCTION

My remit on this panel is to discuss the constitutional role of transnational courts. This is a big topic that can be best approached by working through some concrete examples to a more general point. Given that our session will be held on September 11, it is particularly timely to use the relationship between transnational and domestic courts in the global anti-terrorism campaign for illustration.

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### THREE DIMENSIONAL DISTRIBUTION OF POWER AMONGST TRANSNATIONAL, NATIONAL AND SUBNATIONAL LEVELS

Here is the general argument: both national and transnational courts negotiate their relationships to each other in a larger “three-dimensional political space” that consists of more political actors than just courts. The idea of a three-dimensional space is a metaphor, of course, but it roughly tracks the common thought that the relationship between national and transnational bodies (or between national and sub-national bodies) is vertical while the relationships among courts and institutions within each level (transnational, national or sub-national) are horizontal. Considering horizontal and vertical relations together gives us a three-dimensional political space because each dimension comes with its own depth of complicated relationships, a depth provided by a history of interactions among political and legal institutions within each level.

Imagine playing chess on a three-dimensional chessboard where a piece from one level can knock out a piece from another or where a particularly important player can escape to another level for safety. Sometimes, moves on one level of the chessboard can be duplicated at other levels only after time passes. Sometimes moves on one level speed the moves on another. Transnational and national courts are both players in the game of transnational constitutionalism, but they do not exist simply in a hierarchical relationship to each other. They are somewhat differently positioned in this three-dimensional space with different sorts of opportunities for maneuver. National and transnational courts can and often do reinforce each other’s ideas. Both national and transnational courts can increase the commitment to constitutionalism present in the three-dimensional space by using principled legal ideas to counter political action that is inconsistent with these principles.

In this three-dimensional space, the pressures for both lawmaking and for normative control over this lawmaking come from many angles. Sometimes domestic laws are passed to comply with international or regional mandates, so the pressures for having these laws in the first place comes from the international to national level. Sometimes transnational law grows from the parallel actions of many national parliaments, causing the pressure to go the other way, from the national to the transnational level. These pressures (from national up and from transnational down) produce laws at all levels that are intertwined. The overlapping jurisdiction of courts across these levels is particularly intricate because national laws and practices under those laws can sometimes be adjudicated in transnational courts and national courts often have to interpret transnational law. Sometimes law is interpreted in

both sorts of courts at once, usually harmoniously but sometimes not. In general, though, transnational and national courts share a common commitment to methods and values that distinguish them in the political space from other political institutions.

#### RELATIONSHIP BETWEEN TRANSNATIONAL AND DOMESTIC COURTS IN THE GLOBAL ANTI-TERRORISM CAMPAIGN

All of this is very abstract. Let us make it more concrete by looking at the relationship between transnational and domestic courts in the global anti-terrorism campaign.

Before getting to the “courts” part, let’s first pause on the phrase the “global anti-terrorism campaign.” I use this rather novel phrase to make several points about contemporary terrorism law:

- The fight against terrorism is truly a global phenomenon. Since 9/11 almost every country in the world has passed new legislation or tweaked old legislation with the aim of fighting terrorism.<sup>1</sup> Many countries would have created such laws out of a national sense of threat in any event. But it is clear that a number of countries developed their legislation primarily in response to international mandates, coming from the UN Security Council and regional bodies like the European Union, the Organization of American States, the African Union, the Association of South East Asian Nations and others.<sup>2</sup> While these transnational bodies have pressed states to combat terrorism by being very aggressive in fighting terrorism, human rights bodies within many of these same transnational organizations (the UN, the EU and the OAS in particular) have attempted to prevent states from abusing human rights as they carry out this fight. Since 9/11, transnational bodies have played an immense role in coordinating international terrorism strategies. The anti-terrorism fight is global and globally coordinated.

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1. Evidence for this proposition can be found in the country reports submitted to the UN Security Council’s Counter-Terrorism Committee (CTC) which has been charged with ensuring the enforcement of the wave of resolutions, starting with S.C. Res. 1373, U.N. SCOR, 57th Sess., 4385th mtg., U.N. Doc. S/Res/1373 (2001). For additional information on the CTC, see United Nations, Security Council Counter-Terrorism Committee, <http://www.un.org/sc/ctc/>. For additional information regarding the country reports, see United Nations, CTC: Reports Submitted by Member States, <http://www.un.org/sc/ctc/countryreports/Creports.shtml>.

2. For an early review of the transnational efforts, see Kim Lane Scheppele, *Other People’s Patriot Acts: Europe’s Response to September 11*, 50 LOY. L. REV. 89, 91-97 (2004).

- While most commentators talk about “counter-terrorism,” I prefer “anti-terrorism” because “anti-terrorism” does not presuppose that terrorism has already happened and needs therefore to be countered. The term is meant to highlight that the efforts are focused against a thing called terrorism, even though it may not have appeared yet in the particular space where the laws are generated to fight it. For example, Vanuatu,<sup>3</sup> which passed a giant new terrorism package in the face of no particular threat, may find that the primary effect of these laws is to gain approval from the international community.
- Instead of calling the global effort a “war” against terrorism or even a multinational effort against organized crime, the term “**campaign**” better captures the spirit of the post 9/11 legal space. Post-9/11 anti-terrorism efforts started with a “you’re with us or against us” framework<sup>4</sup>—much like a political or a cause-related campaign. States around the world have signed on, even states that have experienced very little threat of terrorism from either domestic or transnational sources, just to demonstrate that they are on the right side of the fight. As with many campaigns, it is at least as important to appear to be doing something as to actually be doing whatever it takes. And it is important to cheer on the efforts of others as they join the campaign too.

After eight years of the anti-terrorism campaign, the world is now full of transnational binding resolutions, legal frameworks and plans of

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3. See The Prime Minister of the Republic of Vanuatu, *Report by the Republic of Vanuatu to the Counter-Terrorism Committee, Made Pursuant to Security Council Resolution 1373 (2001) of 28 September 2001*, U.N. Doc. S/2003/497 (Apr. 28, 2003), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/347/86/PDF/N0334786.pdf?OpenElement>; *Report of the Republic of Vanuatu on the Actions Taken by the Government to Implement Security Council Resolution 1373 (2001)*, U.N. Doc. S/2007/139 (Mar. 12, 2007) [hereinafter Vanuatu 2007 Report], available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/267/84/PDF/N0726784.pdf?OpenElement>. As Vanuatu reported in 2007, “Since the [comprehensive anti-terrorism law] commenced effect in February 2006 no cases have been identified by authorities in Vanuatu requiring investigation or prosecution for offences contained in the Act. However, authorities continue to place a high priority on the investigation and prosecution of any suspected offences and on improving their operational readiness to enforce the legislation.” Vanuatu 2007 Report, *supra* note 3, at 4.

4. *You Are Either With Us Or Against Us*, CNN, Nov. 6, 2001, <http://archives.cnn.com/2001/US/11/06/gen.attack.on.terror/> (quoting then-President George W. Bush).

action that are being pushed down to the national level. National governments have by and large been quite speedy about bringing these ideas into national law. But the influence goes the other way too. National governments—particularly the US after 9/11, European governments after the attack on the London tube and the Madrid train bombings, and Russia after the Moscow theater siege, and the Beslan school hostage-taking in North Ossetia—have pressed transnational bodies to require of all governments the same actions they are taking themselves. It is no coincidence that UN Security Council Resolution 1373, passed on 28 September 2001, mirrors almost exactly the strategy for fighting terrorism that one sees in the USA PATRIOT Act, which the US was drafting at the same time as it was urging the Security Council to act.<sup>5</sup>

#### ANTI-TERRORISM LAWS AND RESULTING CONSTITUTIONAL CHALLENGES

Where are courts in all of this? The burst of lawmaking about terrorism has generated a corresponding burst of constitutional challenges to these laws around the world. High courts in the US, Canada, Spain, Germany, the UK, Indonesia, India, Pakistan, Peru, Colombia, Poland, Cyprus, the Czech Republic and others have had to rule on the constitutionality of anti-terrorism laws since 9/11, and most of these courts have found the anti-terrorism laws to be unconstitutional at least in part. For example:

- The European Arrest Warrant (EAW), created by the European Union Framework Decision of June 2002, ensures that a suspect located anywhere in the EU will be extradited to the EU country that seeks to put that suspect on trial.<sup>6</sup> The EAW is a document, which provides for general application. Passage of the EAW was hastened by the 9/11 attacks and the collective need to find a way to try suspected terrorists across Europe. Governments across Europe quickly enacted the EAW into domestic law, and those domestic laws were quickly challenged before constitutional courts. The

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5. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (USA PATRIOT Act).

6. For more on the European Arrest Warrant in general, see European Commission, Justice and Home Affairs, *European Arrest Warrant Replaces Extradition Between EU Member States*, [http://ec.europa.eu/justice\\_home/fsj/criminal/extradition/fsj\\_criminal\\_extradition\\_en.htm](http://ec.europa.eu/justice_home/fsj/criminal/extradition/fsj_criminal_extradition_en.htm). See also Council Framework Decision 2002/584/JHA, 2001 O.J. (L 190) I (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:190:0001:0018:EN:PDF> (bringing the EAW into effect in June 2002).

constitutional courts of Germany, Poland, and Cyprus found that the EAW violated their national constitutions. These national courts found either that their countries' constitutions expressly forbid such extradition (and would require an amendment to permit the EAW) or that national constitutional principles would not countenance a citizen of that country being sent for trial elsewhere without guarantees of fair process equivalent to those in the home country.<sup>7</sup>

- The Federal Constitutional Court of Germany struck down several post-9/11 laws as unconstitutional, some (like the European Arrest Warrant Case) with implications for European coordination of terrorism investigations. In the Dragnet case, the Federal Constitutional Court held that the use of data mining techniques to locate terrorism suspects violated the personality rights of those whose information was accessed, unless the police had a concrete suspicion about that particular individual before the data search was initiated.<sup>8</sup> The Court also issued a preliminary injunction against the application of the law based on the post-9/11 European regulations on data storage and information sharing, holding that use of the stored data for anything other than investigation of a serious criminal offense was not consistent with the German Basic Law.<sup>9</sup> In both cases, these decisions put a halt to German participation

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7. *See generally*, Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] July 18, 2005, 2 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 2236/04 (F.R.G.), available at [http://www.bundesverfassungsgericht.de/entscheidungen/rs20050718\\_2bvr223604en.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20050718_2bvr223604en.html); Trybunał Konstytucyjny (Polish Constitutional Court), Apr. 27, 2005, OTK ZU No. 4/A/2005, item 42 (P 1/05) (Pol.), available at [http://www.trybunal.gov.pl/eng/summaries/summaries\\_assets/documents/P\\_1\\_05\\_full\\_GB.pdf](http://www.trybunal.gov.pl/eng/summaries/summaries_assets/documents/P_1_05_full_GB.pdf); Cyprus Supreme Court, Nov. 7, 2005 (294/2005), available at [www.cylaw.org](http://www.cylaw.org) (Greek language). *See also* nálež Ústavního soudu (Czech Republic Constitutional Court) cj. 66/2004/Sbírka nálezů a usnesení Ústavního soudu (Collection of Court Decisions of the Constitutional Court) (Czech Rep.), available at [http://angl.concourt.cz/angl\\_verze/doc/pl-66-04.php](http://angl.concourt.cz/angl_verze/doc/pl-66-04.php). The Constitutional Court of the Czech Republic, however, upheld the domestic constitutionality of the European Arrest Warrant even though the constitution explicitly forbids the extradition of citizens to other countries to stand trial Czech Republic. Nálež Ústavního soudu (Czech Republic Constitutional Court) cj. 66/2004/Sbírka nálezů a usnesení Ústavního soudu, Conclusion.

8. *See* Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Apr. 4, 2006, 1 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 518/02, 115 (320) (F.R.G.), available at [http://www.bundesverfassungsgericht.de/en/decisions/rs20060404\\_1bvr051802.html](http://www.bundesverfassungsgericht.de/en/decisions/rs20060404_1bvr051802.html) (Rasterfahndung [Dragnet] Case) (German language).

9. *See* Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Mar. 11, 2008, 1 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 256/08 (F.R.G.), available at <http://www.bundesverfassungsgericht.de/en/press/bvg08-037en.html> (In the Matter of Data Retention).

in the creation and use of transnational databases in fighting terrorism across Europe. In 2003, the Constitutional Court of Peru declared the 1992 presidential decrees that had provided the framework for fighting domestic terrorism since that time to be unconstitutional.<sup>10</sup> Both the Inter-American Commission on Human Rights as well as the Inter-American Court on Human Rights found that arrests, trials, and convictions under these laws violated the American Convention on Human Rights.<sup>11</sup> The decision by the Constitutional Court, therefore, brought the decisions of the transnational courts directly into domestic law. But after the terrorism laws were struck down, the Counter-Terrorism Committee (CTC) of the UN Security Council pointedly asked Peru:

The CTC understands that the Peruvian Supreme Court [sic] declared four anti-terrorism laws enacted in the early 1990s as unconstitutional. Which laws have been declared unconstitutional and why? How will this affect the implementation of [UN Security Council Resolution 1373]? What plans are there for introducing new laws or revisions to the existing legislation? When is this likely to happen? How effective is the current legislation as it stands?<sup>12</sup>

Clearly, the Counter-Terrorism Committee was not amused by the Constitutional Court's judgment and has been pressing Peru to enact new anti-terrorism laws that will cover the same ground.

- Throughout the Commonwealth after 9/11, country after country has adopted Canada's strategy of using "security certificates" (sometimes under the British terminology of "control orders") to detain terrorism suspects.<sup>13</sup> Security

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10. *Marcelino Tineo Silva y más de 5,000 ciudadanos* [Marcelino Tineo Silva and More Than 5,000 Citizens], Exp. No. 010-2002-AI/TCLIMA Constitutional Court of Peru (Jan. 3, 2003), available at <http://www.tc.gob.pe/jurisprudencia/2003/00010-2002-AI.html> (Spanish language).

11. See Ralph Ruebner et al., *The War on Terrorism: Peru's Past and Present, A Legal Analysis* (Aug. 2004) (unpublished working paper, on file with The John Marshall Law School), available at <http://www.jmls.edu/facultypubs/ruebner/perureport.pdf> (discussing of the large number of rulings against these laws from the Inter-American Commission and the Inter-American Court).

12. See *Letter Supplementing the Report of the Government of Peru on Compliance with Security Council Resolution 1373 (2001)*, U.N. Doc. S/2004/589 (July 22, 2004), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/440/46/PDF/N0444046.pdf?OpenElement>. The CTC does not publish the questions it asks specific countries as it presses them to fight terrorism. One can only learn about these questions if the country includes them with its list of responses, as Peru did in this case.

13. States within the Commonwealth were encouraged to pass the draft model terrorism law. See MODEL LEGIS. PROVISIONS ON MEASURES TO COMBAT TERRORISM § 7

certificates are generally issued by a government minister in order to detain a terrorism suspect, potentially indefinitely, because the minister finds that the suspect in question is too dangerous to be left at large, but not capable of being prosecuted because of the nature of the evidence involved. In the case of non-nationals, detention may be justified because the country to which a suspect would be deported might torture him. Unfit for either prosecution or deportation and held in a sort of legal limbo, detainees in Canada, the UK, and Australia have brought legal challenges. The Canadian Supreme Court required the government to modify the procedures by which detainees were held;<sup>14</sup> the British Law Lords also required changes in the control order regime before the European Court of Human Rights (ECtHR) weighed in with even more changes to the system.<sup>15</sup> The Rapporteur on Protecting Human Rights while Combating Terrorism within the Office of the UN High Commissioner on Human Rights recommended that Australia voluntarily comply with the legal standards set by the British courts and European Court of Human Rights even though the country is not formally bound by decision of those courts.<sup>16</sup>

It is not just national constitutional courts that have issued a number of decisions on the legality of anti-terrorism measures after 9/11. Transnational courts have covered that ground too:

- In the *Kadi* and *al Barakaat* case, a Grand Chamber of the European Court of Justice ruled on the validity of a European

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(2002) (tracking the British law and practice with regard to the wording on control orders), available at [http://www.thecommonwealth.org/shared\\_asp\\_files/uploadedfiles/%7B32AF830D-F83A-4432-8051-750C789531A5%7D\\_final\\_terrorism\\_law.pdf](http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B32AF830D-F83A-4432-8051-750C789531A5%7D_final_terrorism_law.pdf).

14. See *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9 (Can.), available at <http://scc.lexum.umontreal.ca/en/2007/2007scc9/2007scc9.pdf>.

15. See *A v. Sec'y of State for the Home Dep't*, [2004] UKHL 56 (U.K.) (also known as *The Belmarsh Case*), available at <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&others.pdf>; *Sec'y of State for the Home Dep't v. AF*, [2009] UKHL 28 (U.K.), available at <http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090610/af.pdf>. For the European Court of Human Rights case, see *Case of A. and Others v. U.K.*, App. No. 3455/05 (2009), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (enter 3455/05 in the Application Number field).

16. U.N. Human Rights Council [HRC], Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *Australia: Study on Human Rights Compliance While Countering Terrorism*, UN Doc. A/HRC/4/26/Add.3 (Dec. 14 2006) (prepared by Martin Scheinin), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/155/49/PDF/G0615549.pdf?OpenElement>.

Union regulation that brought into European law the legal capacity required by the UN Security Council to immediately freeze the assets of suspected terrorists.<sup>17</sup> The European regulation, like many national regulations, provided for asset freezes as soon as a suspected terrorist was placed on the UN terrorism watch list, without any notification to the target before the freeze took place or any process after the freeze was in effect for the target to provide evidence that he should not be treated as a suspected terrorist. In a September 2008 judgment that has already generated much (mostly favorable) commentary, the ECJ prospectively voided the EU regulation because it failed to provide a fair process for the person affected to challenge the freeze.<sup>18</sup>

- In the *Öcalan* case, arising on pre-9/11 facts in a post-9/11 judgment, the European Court of Human Rights made it clear that 9/11 had not changed its views on the human rights standards to be applied in terrorism trials.<sup>19</sup> In this case involving one of Turkey's most notorious domestic terrorists, the ECtHR held that Öcalan's rights to fair judicial process to challenge his detention had been compromised, that a special tribunal including members of the armed forces was not adequate to guarantee the European Convention's requirement of an independent tribunal, and that his trial had therefore been so unfair that the resulting sentence of death violated the prohibition against inhuman and degrading punishment.

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17. Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi & Al Barakaat Int'l Found. v. Council of the European Union & Comm'n of the EC*, 2008 ECJ (Sept. 3, 2008), available at [http://curia.europa.eu/jcms/jcms/j\\_6/](http://curia.europa.eu/jcms/jcms/j_6/) (enter "C-402/05 P" in the Case No. field, then click on the link next to "Judgment").

18. See, e.g., Gráinne de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 HARV. INT'L L.J. 1 (2009); W.T. Eijsbouts & Leonard Besselink, 'The Law of Laws'—Overcoming Pluralism, 4 EUR. CONST. L. REV. 395 (2008); Stefan Griller, *International Law, Human Rights and the European Community's Autonomous Legal Order: Notes on the European Court of Justice Decision in Kadi*, 4 EUR. CONST. L. REV. 528 (2008); Daniel Halberstam & Eric Stein, *The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, 46 COMMON MKT. L. REV. 13 (2009); Bjørn Kunoy & Anthony Dawes, *Plate Tectonics in Luxembourg: The Ménage à Trois Between EC Law, International Law and the European Convention on Human Rights Following the UN Sanctions Cases*, 26 COMMON MKT. L. REV. 73 (2009).

19. *Öcalan v. Turkey*, App. No. 46221/99, Eur. Ct. H.R. ¶ 174 (2005), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (enter "46221/99" in the Application Number field).

- The Inter-American Commission on Human Rights has taken precautionary measures in favor of detainees at Guantánamo Bay, Cuba, holding first in a resolution on 12 March 2002 that the United States had an obligation to determine the legal status of the detainees in a competent tribunal. Later precautionary measures were issued that called upon the United States to investigate claims of torture. Taking note of the case of the US Supreme Court in *Hamdan v. Rumsfeld* (2006) as well as criticisms of Guantánamo by mandate holders of the Human Rights Commission and the official report of the Committee Against Torture, the Inter-American Commission passed resolution 2/06 in 2006, again calling upon the United States to provide the detainees with a competent tribunal and to investigate claims of torture.<sup>20</sup>

These cases from transnational judicial and quasi-judicial bodies could be multiplied, just as the cases from the national courts could be. There has been a great deal of judicial activity covering nearly all phases of the global anti-terrorism campaign.

#### MULTI-JURISDICTIONAL IMPACT OF JUDGMENTS ON NATIONAL AND TRANSNATIONAL LAW

What is crucial to note in all of these cases, however, is that each legal judgment operates in a space occupied both by other judicial bodies and by national as well as transnational law. In the European Arrest Warrant cases and the German post-9/11 data protection cases, European-wide efforts were stopped by national constitutional courts. In the Peruvian anti-terrorism law case, national law was voided by a national court, though only after a transnational court had first found the state practices under the law incompatible with the regional human rights treaty. In the Commonwealth security certificate cases, national court decisions that provided constitutional checks on executive discretion were urged upon other states for whom those decisions were not binding. International actors got into the act in urging courts to adopt decisions based on the rulings of other courts from outside their jurisdictions.

At the transnational level, the decisions of the European Court of Justice and the European Court of Human Rights provided models of legal argument for domestic actors within the states that are members of the European Union as well as the states that are members of the Council

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20. Inter-Am. Comm'n on Human Rights, Resolution No. 2/06, On Guantanamo Bay Precautionary Measures (July 28, 2006), available at <http://www.cidh.org/resolutions/resolution2.06.htm>.

of Europe. The Inter-American Commission decisions on Guantánamo attempted to influence a national government with its own authority, but also with the authority of the decisions of that country's highest court (the US Supreme Court) as well as report and recommendations of transnational bodies (the Committee against Torture and the Human Rights Commission). In each case, the transnational judicial bodies tried to supplement national courts to reinforce the same principles.

From these examples, we can see that the constitutional role of transnational courts is not so easy to describe. Transnational courts are not super appeals courts that hover above a national legal system ready to rule on the domestic law of those states. Nor are they bodies that primarily backstop national courts. Instead, transnational courts issue decisions that provide principled bases for the judgments of other political bodies, from transnational institutions to national governments to national high courts. National courts are also not purely national anymore, if indeed they ever were. Increasingly, national courts are being called upon to rule on matters that have implications far beyond a country's borders. It is much harder than it used to be to find a legal issue that is either purely national or purely transnational.

Constitutionalism in this complex three-dimensional political space is the application of principled legal ideas to the business of governing. Both transnational and national courts have been active carving out a space for constitutional judgment. It is clear that there is more principled legal argument across this three-dimensional political space because courts have been active at all levels.