

# International Courts and Democratic Backsliding\*

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## INTRODUCTION

In his 2017 Charles N. Brower Lecture on International Dispute Resolution at the Annual Meeting of the American Society of International Law, David Caron considered the role of international adjudicators in dealing with the various social functions that are implicated by courts.<sup>1</sup> Drawing on ideas associated with Martin Shapiro, he noted a fundamental distinction between the *functions* of courts—which scholars have characterized as including lawmaking, social control, legitimation, and regime construction, among many others—and the *task* of adjudicators, whose core job is resolving the dispute before them on the basis of the relevant law. There is a great temptation, as Shapiro noted, for adjudicators to take broader social functions into account, but there are also great risks when there is a misalignment between these functions and the limited task of dispute resolution, in which judges are to some extent agents of the parties. Caron urged adjudicators to focus on the *task* rather than the *functions*, arguing that only by doing so could they preserve the integrity of the institutions they inhabit. It is a call, in some sense, for professionalism, self-awareness, and humility, virtues David embodied but which are in painfully short supply today.

Caron's paradigm was a classical one of which he was fond, and the world he inhabited was the classic international law domain of interstate dispute resolution. Like Judge Thomas Buergenthal, David critiqued dicta in which the International Court of Justice expressed its sympathy for human rights victims, and urged the court to focus on the immediate legal task at hand.<sup>2</sup> This seems correct to me, especially when coming from a dispute resolution perspective. But we must also recognize that in some fields, the task of judges is not adjudicating between sovereign equals, but rather explicitly developing the law. Human rights

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\* In Memory of David Caron

1. David D. Caron, *The Multiple Functions of International Courts and the Singular Task of the Adjudicator*, 111 AM. SOC'Y INT'L L. PROCEEDINGS 231, 231 (2017).

2. *Id.* at 237.

law is one such area in which the law itself is open-ended and often vague. The job of judges is not just to adjudicate, but rather to develop the law and to make sure it tracks evolving understandings of rights. In such cases, the task and the function of judges tend to converge.

In this Article I examine one specific function of international courts, namely the promotion, support, and disciplining of democracy. It might seem odd to consider this as a kind of core function of international law, which, as classically defined, does not inquire into the internal political or governance arrangements of states.<sup>3</sup> Yet it is also the case that the expansion of international institutions, including courts, has typically occurred at moments of profound democratization, namely after World War II and the Cold War. While not all international institutions are democratic or liberal ones by any means, it is a longstanding view among international relations scholars that democracies are more likely than nondemocracies to cooperate across borders, an idea that can be traced all the way back to Immanuel Kant.<sup>4</sup> Because such governments would seek to rule justly, in Kant's view, they would cooperate to create international organizations that could extend just rule, and even "Perpetual Peace" (the title of Kant's essay) outside their own borders.<sup>5</sup>

As a preliminary matter, my definition of democracy is a simple one, drawn from my work with Aziz Z. Huq: government characterized by competitive elections, in which the modal adult can vote and the losers concede;<sup>6</sup> in which a minimal set of rights to speech, association, and the ability to run for office are protected; and in which the rule of law governs administration.<sup>7</sup> So defined, it is clear that some kinds of international institutions, chiefly but not limited to international human rights agreements, are designed in part to safeguard democracy. The question is whether they can actually do so. In David Caron's sense, I am suggesting that for some courts, the *task* is to preserve democracy, and they should engage in it. But what are their capacities to do so?

This Article will examine how international courts have done in securing the democratic gains of national polities. This is, I hope, a timely inquiry for at least a couple of reasons. Most notably, the rich industrial democracies of the world and many other countries have been facing a rise in populism, which has taken as its primary target the international institutions associated with

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3. See, e.g., U.N. Charter art. 2(4) ("[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state").

4. See generally IMMANUEL KANT, PROJECT FOR A PERPETUAL PEACE (1796); ALEC STONE SWEET & CLARE RYAN, A COSMOPOLITAN LEGAL ORDER: KANT, CONSTITUTIONAL JUSTICE, AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2018) (examining Kantian constitutional theory and the European system of right protection).

5. See KANT, *supra* note 4.

6. See ADAM PRZEWORSKI, DEMOCRACY AND THE MARKET 10 (1991) ("[d]emocracy is a system in which parties lose elections").

7. See TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 10 (2018).

globalization. European populists rail against Brussels; Venezuelans attack the Inter-American Court of Human Rights in Costa Rica. Donald Trump and Steve Bannon criticize “globalism.”<sup>8</sup> The antiglobalist backlash is, very largely, a backlash against the imposition of norms that originate from outside the territorial nation state, to be deployed by cosmopolitan elites at the expense of the decisional freedom of the sovereign people. Shadowy agreements made in shadowy foreign capitals are soft targets for political demagogues, and international institutions have thus far shown a mixed record at best in being able to defend themselves.

More broadly, as Huq and I have documented, democracy is in trouble in many kinds of countries.<sup>9</sup> The number of democracies in the world peaked in 2006, and has been steadily declining, a trend that may even be accelerating in the last couple of years.<sup>10</sup> Further, this process is proceeding through what we call erosion, a series of small and incremental steps that, on their own, may appear innocuous but add up to qualitative change.<sup>11</sup> Will international law facilitate or retard democratic decline? How have international courts handled the challenges of maintaining democracy? If international law is mainly a project of democracies, and we are entering an increasingly illiberal era, then we ought to be pessimistic about the prospects of international law. This invites an inquiry into whether the assumptions of liberal internationalism were in fact correct.

I proceed first in Part I by reminding the reader of the liberal theory of international law, which is the backdrop against which the inquiry proceeds. I then survey the developments in several supranational courts and legal regimes around the world. Part II looks at the European Court of Human Rights, and Part III considers the role of the various institutions of the European Union. Next, in Part IV, I look at the Inter-American Court of Human Rights and in Part VI examine the African Court on Human and Peoples’ Rights. I argue that, perhaps counterintuitively, it has been the African Court that may have been most successful to date, although I do not here develop a rigorous measure of success. The last Part draws preliminary conclusions.

## I. LIBERAL THEORY, INTERNATIONAL LAW, AND DEMOCRACY

Let us begin with a quick review of liberal theory as it has been applied to international law. Drawing on Kant’s ideas and the empirical studies of the

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8. See *Remarks to the United Nations General Assembly in New York City*, 2018 DAILY COMP. PRES. DOC. 4 (Sept. 25, 2018); see also David Weigel, *Steve Bannon’s Rise Points to Aggressive, Anti-‘globalist’ Trump Media Strategy*, WASH. POST (Nov. 14, 2016), [https://www.washingtonpost.com/news/post-politics/wp/2016/11/14/steve-bannons-rise-points-to-aggressive-anti-globalist-trump-media-strategy/?utm\\_term=.c9f068760c5c](https://www.washingtonpost.com/news/post-politics/wp/2016/11/14/steve-bannons-rise-points-to-aggressive-anti-globalist-trump-media-strategy/?utm_term=.c9f068760c5c).

9. GINSBURG & HUQ, *supra* note 7, at 26–30.

10. *Freedom in the World 2018: Democracy in Crisis*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/freedom-world-2018> (last visited Nov. 21, 2018).

11. GINSBURG & HUQ, *supra* note 7, at 43–47.

“democratic peace” (the finding that democracies do not go to war against each other), some modern thinkers have suggested that international law is likely to be particularly effective among democratic governments. This theory (known as liberalism in international relations) has been most developed in studies of European integration, and indeed, in one article two leading scholars argued that Europe provided a model for the future of international law, whose successes might be imitated.<sup>12</sup> Europe’s democracies, scholars have argued, joined together in the period immediately after World War II not only to integrate their economies and provide regional security but also to protect their own democracies from backsliding.<sup>13</sup> The European Convention on Human Rights makes specific reference to democracy as a predicate for human rights protection.<sup>14</sup> The European Union, while focused on trade, also served to protect democracy by tying economies together. In recent decades, each of these two important regimes has deepened its formal commitments to democratic governance, and has contributed to the spread of democracy in the region and beyond.<sup>15</sup> In short, democracies in Europe used international law to deepen their cooperation, and in turn helped guarantee their own democratic survival and spread democratic norms. Trade, human rights, and democracy were all mutually reinforcing.

Liberal theory in the international sphere draws on the logic of “commitment.” By protecting fundamental rights and removing certain issues from ordinary politics, the logic goes, governments can focus on the kinds of issues for which ordinary politics are most effective.<sup>16</sup> This is captured by the famous metaphor of Ulysses and the masts: in order to ensure that he is not tempted by the harpies, Ulysses binds himself to the mast as he sails past, and in this way is able to achieve something by *limiting* his choices.<sup>17</sup> This function is central to the theory of constitutionalism, but also to the theory of international

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12. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 387 (1997) (discussing a “checklist” of imitable features from Europe).

13. ED BATES, *THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FROM ITS INCEPTION TO THE CREATION OF A PERMANENT COURT OF HUMAN RIGHTS* 6–8 (2010) (noting European Convention was focused on protecting democracy and to serve as an “alarm bell” against totalitarianism).

14. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *European Convention on Human Rights*] (“[r]eaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend . . .”).

15. See generally WOJCIECH SADURSKI, *CONSTITUTIONALISM AND THE ENLARGEMENT OF EUROPE* (2012) (discussing how the eastward enlargement of the Council of Europe and the European Union fostered the “constitutionalization” of both structures).

16. On constitutionalism, see Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY* 195, 195–240 (Jon Elster & Run Slagstad eds., 1988); Cass Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 637–38 (1991).

17. See generally JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1984) (expanding on the metaphor of Ulysses and limiting one’s choices).

legal commitments, whether it be in the field of human rights, investment law, or others.

In our context, consider a new democracy, like those that emerged in Eastern Europe after the fall of the Soviet Union. Led by young new leaders who support human rights, the government might promise not to commit the mistakes of the past. But even if their citizens believed them, why would they be confident that the *next* government that followed would be equally solicitous of human rights and democracy? After all, the only thing certain in democracy is that eventually the ruling party will be replaced. Faced with uncertainty about policy and the quality of local institutions, young democracies may seek to cooperate with each other so as to “lock in” their policies, and to make sure subsequent governments would not abuse their citizens.<sup>18</sup> Institutions like regional human rights courts were designed to impose costs on countries that deviated from promised protections. The costs could include financial penalties, reputational penalties, and even trade sanctions in extreme cases. The prospect of these costs, in turn, makes the promises more credible in the first place, allowing governments to achieve through international cooperation what they would be unable to on their own. The example above focuses on human rights, but the same logic applies to trade and investment.

Liberal theory had something of a teleological quality in terms of its predictions. As the number of democracies expanded, and as their economies became more integrated, liberal theory assumed that there would be further incentive for other states to join the club. The view suggested that international law would contribute to the expansion of democracy itself. When viewed from our current moment, this aspect of liberal theory appears naive. While the European Union soldiers on, it has faced unanticipated challenges in the past decade: financial crisis, waves of immigration, and populism that resulted in large part from the first two. The United Nations is in a financial crisis of its own, and seems to be reducing its footprint rather than expanding it.<sup>19</sup> The great international law project of the late 1990s, the International Criminal Court, is suffering from a backlash and defections. Several countries in Africa, for example, are threatening to withdraw from the jurisdiction of the Court.<sup>20</sup>

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18. Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 NYU J. INT'L L. & POL'Y 707, 757 (2006); Andrew Moravcsik, *A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 537 (1997).

19. Conor Foley, *The UN's Own Financial Crisis*, GUARDIAN (July 22, 2009), <https://www.theguardian.com/commentisfree/2009/jul/22/un-budget-shortfall-aid>; Mattha Busby, *UN is Running out of Money and Member States Should Pay What They Owe, Warns Secretary-General*, INDEP. (July 27, 2018), <https://www.independent.co.uk/news/world/un-budget-deficit-united-nations-money-cash-flow-member-states-antonio-guterres-a8465906.html>.

20. See Manisuli Ssenyonjo, *State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and The Gambia*, 29 CRIM. L. FORUM 63, 63–64 (2018). See generally Philomena Apiko & Faten Aggad-Clerx, *The International Criminal Court, Africa and the African Union: What way forward?*, Maastricht: ECDPM Discussion Paper 201 (2016).

## II. THE EUROPEAN COURT OF HUMAN RIGHTS

We now turn to examining how several international and regional courts have dealt with the challenges of our current era to democracy. We first examine the European Court of Human Rights, the principal judicial organ of the Council of Europe, and the main adjudicative body responsible for interpreting the European Convention on Human Rights. It is perhaps not too much to say that, like many of the international legal institutions that are central to the postwar era, the European Convention system was designed as a defense of democracy. The Convention declares in its very preamble that rights and freedoms are best maintained by effective political democracy.<sup>21</sup> As Ed Bates has shown, the creation of the Convention in 1950 was very much designed to help protect against the collapse of democracy.<sup>22</sup> Not only was it hoped that the Convention would serve as a basic membership criteria for a club of European democracies, but it was, to quote Sir David Maxwell-Fyfe, “a beacon to those at the moment in totalitarian darkness and will give them hope of return to freedom.”<sup>23</sup> Originally without any required right of individual petition, the Convention was not a particularly ambitious instrument—instead it was a kind of programmatic statement of aspiration, in keeping with the early Cold War context of its founding. It was also initially characterized by significant disagreement about the nature of the rights it enshrined.

It took several years for the States parties to set up the European Court of Human Rights (ECHR). After it was finally set up in 1959, the Court and its allies in national contexts gradually constructed a regime of rights, characterized by Alec Stone Sweet as a “Cosmopolitan Legal Order.”<sup>24</sup> As more countries came to join the Council of Europe, the European Court built up its jurisprudence, primarily in dealing with established democracies. The end of the Cold War prompted many new entrants into the Council of Europe regime, and the ECHR played a critical role in the hands-tying promoted by liberal theory.<sup>25</sup>

Of course, to play a role in hands-tying, the European Convention regime required someone to determine when a violation of fundamental rights had actually occurred, and this was the role played by the Court. In determining when rights violations occurred, the Court did more than indirectly police democratic institutions; it also played a critical role in *defining* the space of democratic deliberation in the negative, namely through its jurisprudence on limitations of

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<https://ecdpm.org/publications/international-criminal-court-african-union/> (analyzing the current relationship between the ICC and the AU).

21. European Convention on Human Rights, *supra* note 14, at 5.

22. BATES, *supra* note 13, at 6–8.

23. *Id.* at 5.

24. See generally STONE SWEET & RYAN, *supra* note 4.

25. *Id.* at 100–01; see also SPREADING DEMOCRACY AND THE RULE OF LAW?: THE IMPACT OF EU ENLARGEMENT ON THE RULE OF LAW, DEMOCRACY AND CONSTITUTIONALISM IN POST-COMMUNIST LEGAL ORDERS 27, 28 (Wojciech Sadurski et al. eds., 2006).

rights. Five core articles of the European Convention, namely those on the right to a public trial, private and family life, freedom of thought, conscience and religion, freedom of expression, and freedom of association, are explicitly subject to restrictions imposed by the state, to the extent the restrictions can be justified as necessary in a democratic society.<sup>26</sup>

In choosing these articles to be subject to a limitation clause, the Convention regime has allowed states some ability to experiment with restrictions on the rights, and has implicitly delegated to the Court the role of defining exactly what the outer limits of democracy are. Democracies cannot torture or deny anyone the right to fair trial, but other rights are subject to a kind of balancing between the rights of the individual and those of the society as a whole. In policing these boundaries, the European Court has come to utilize the proportionality test, which essentially requires democratic decision making to allow maximal possible freedom for the right-holder, while still advancing goals that are within the realm of democracy.<sup>27</sup> In so doing, the Court has also advanced the judicial role within national spheres that were not traditionally known for activist judiciaries. Since Article 13 of the Convention requires that everyone whose rights are breached has access to a judicial remedy, the ECHR has encouraged national courts to adopt their own proportionality analysis to evaluate restrictions. In this way, courts have become the boundary keepers of democracy throughout Europe.<sup>28</sup> Scholars believe that in doing so, they not only contribute to the functioning of the system, but the legitimacy of the European Court itself.<sup>29</sup>

Since its first case dealing with a limitations clause, the *Handyside* case of 1976,<sup>30</sup> the Court's jurisprudence in this area gives a large "margin of appreciation" to states to craft their own policies. The margin of appreciation is an idea that originated in German administrative law and has been applied by the Court in early cases dealing with states' invocation of emergency powers.<sup>31</sup> As it has developed, the margin of appreciation implies that there are core elements to a right, restriction of which will be disallowed. The Court's approach here is

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26. European Convention on Human Rights, *supra* note 14, at 9, 11–13.

27. See STONE SWEET & RYAN, *supra* note 4, at 103–08. See generally ALEC STONE SWEET & JUD MATHEWS, *PROPORTIONALITY BALANCING AND CONSTITUTIONAL GOVERNANCE: A COMPARATIVE AND GLOBAL APPROACH* (2019) (presenting a theory of proportionality that explains why constitutional judges embraced it).

28. See STONE SWEET AND RYAN, *supra* note 4, at 105 (discussing the UK's adoption of the proportionality standard after reversals at the European Court and noting that "the [European] Court became a powerful agent in [the proportionality test's] diffusion into national legal orders").

29. See generally KANSTANTIN DZEHTSIAROU, *EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS* 143–76 (2015) (exploring the legitimacy of the Court and its judgments).

30. *Handyside v. United Kingdom*, App. no. 5493/72, A/24, Eur. Ct. H.R. 5 (1976).

31. *The Margin of Appreciation: Introduction*, COUNCIL OF EUROPE, [https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2\\_en.asp](https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp) (last visited June 6, 2019).

generally a comparative law inquiry into the standards of other states in the Convention regime.<sup>32</sup> In the *Sunday Times* case of 1979, the Court identified “a fairly substantial measure of common ground” in states’ approaches to enjoining publications.<sup>33</sup> Insisting that the necessity criterion was to be judged at the European level, the inquiry then became a normative exercise in comparative law, by which European-wide standards on which a consensus had been achieved were identified, and outliers could be disciplined.<sup>34</sup> As articulated in the representative case of *A, B & C v. Ireland*, the margin will be wider when “there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly when the case raises sensitive moral or ethical issues.”<sup>35</sup> Part of the logic of the comparative law exercise is that democratic standards are transnational: if most states in the system are able to achieve a policy goal without restricting the right, then presumably the restrictions are not “necessary in a democratic society.”<sup>36</sup>

Stone Sweet and Ryan have documented the implementation of the margin of appreciation under Articles 8 through 11 of the European Convention, and have shown that the Court has found violations in around half of cases.<sup>37</sup> They find that the European Court has gradually become more consistent over time in their analysis of consensus.

For the most part, the Court has expanded the protection of minority rights, including the rights of the Roma, homosexuals, and transsexuals.<sup>38</sup> It has been less willing to protect religious minorities or to discipline state displays of Christian symbols.<sup>39</sup> Gradually the Court has come to play a role in policing the practice of democracy itself, including the structure of separation of powers, particularly judicial independence. The ECHR has developed an extensive jurisprudence under the right to a fair trial enshrined in Article 6.<sup>40</sup> Some of these considerations go to rule of law principles, like a public hearing and a timely proceeding. Others go to the independence of the tribunal, vis-à-vis other branches of government and the parties themselves.<sup>41</sup>

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32. This idea was first articulated in Case “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium” v. Belgium (Merits), App. No 1474/62, 11 Y.B. Eur. Conv. on H.R. 832 (1968).

33. *The Sunday Times v. United Kingdom*, 2 Eur. Ct. H.R. 245, ¶ 59 (1979).

34. *Id.* at ¶ 59.

35. *A, B & C v. Ireland*, 53 Eur. Ct. H.R. 429 (2010).

36. European Convention on Human Rights, *supra* note 14, at 9, 11–13. See STONE SWEET & RYAN, *supra* note 4, at 163.

37. STONE SWEET & RYAN, *supra* note 4, at 165.

38. *See id.* at 6.

39. *See id.* at 186–90.

40. *See generally* EUROPEAN COURT OF HUMAN RIGHTS, GUIDE ON ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2019), [https://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf).

41. *See id.* at 39–43.

In terms of decisions that directly affect the functioning of democracy, the key norm comes from Article 3 of Protocol 1 of the European Convention, which entered into force in 1954. Article 3 states that “[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”<sup>42</sup> In its jurisprudence on these political rights, the Court has distinguished between the right to vote (“passive” electoral rights) and the right to run for office (“active” electoral rights).<sup>43</sup> Relying on this provision, it has insisted on the extension of the franchise to prisoners,<sup>44</sup> those placed under guardianship for psychiatric care,<sup>45</sup> and those in the midst of bankruptcy proceedings.<sup>46</sup> It also held, in response to a complaint by a Turkish Cypriot who had been denied voter registration under a constitutional provision in Cyprus, that Cyprus had to allow Turks to vote after nearly forty years of disenfranchisement.<sup>47</sup> But the Court has not found a violation in limitations on expatriate or nonresident voting.<sup>48</sup>

In general, countries have complied with the ECHR’s decisions and modified their legislative frameworks in accordance with its orders. There are some exceptions however: The United Kingdom government introduced legislation to comply with the ruling in *Hirst v. United Kingdom* that prisoners have the right to vote.<sup>49</sup> However, the legislation failed in parliament and has not been passed. This seems to be a case in which national democracy has triumphed over a regionally defined right. Still, until recently, the core trajectory of rights adjudication seemed to be upward, and, from the point of view of our own narrow definition of democracy, adequate to count as backstopping democracy.

Still, it is not clear that the ECHR is in a position to effectively staunch large-scale backsliding because of its own backlog of more than 50,000 cases.<sup>50</sup> This has itself been the result of the inclusion of countries to the East, like Russia and Turkey, with poor records on human rights.<sup>51</sup> Furthermore, implementation of decisions is inconsistent. Formally, decisions are effectuated by the

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42. European Convention on Human Rights, *supra* note 14, at 7.

43. EUROPEAN COURT OF HUMAN RIGHTS, RIGHT TO VOTE (2016), [https://www.echr.coe.int/Documents/FS\\_Vote\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Vote_ENG.pdf).

44. *Hirst v. United Kingdom* (No. 2), 42 Eur. Ct. H.R. 849 (2006).

45. *Alajos Kiss v. Hungary*, 2010 Eur. Ct. H.R. 692 (2010).

46. *Albanese v. Italy*, App. No. 77924/01, Eur. Ct. H.R. (2006).

47. *Aziz v. Cyprus*, 41 Eur. Ct. H.R. 164 (2004).

48. *Oran v. Turkey*, App. No. 28881/07, Eur. Ct. H.R. 108 (2014).

49. *Prisoners to Get the Right to Vote*, GUARDIAN (Nov. 2, 2010), <https://www.theguardian.com/uk/2010/nov/02/prisoners-vote-european-court-human-rights>.

50. EUROPEAN COURT OF HUMAN RIGHTS, THE ECHR IN FACTS AND FIGURES 3 (2017), [https://www.echr.coe.int/Documents/Facts\\_Figures\\_2017\\_ENG.pdf](https://www.echr.coe.int/Documents/Facts_Figures_2017_ENG.pdf) (noting there were 56,250 pending applications as of December 31, 2017).

51. Mikael Rask Madsen, *The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash*, 79 L. & CONTEMP. PROBS. 141, 160–62 (2016).

Committee of Ministers,<sup>52</sup> but at the end of last year, there were more than 7000 matters on the Committee of Ministers' docket for failure to comply with ECHR judgements.<sup>53</sup> The Council of Europe's Parliamentary Assembly can call on countries to implement judgements and to undo backsliding reforms.<sup>54</sup> But at the end of the day, the system lacks teeth. In short, there may be an asymmetry at work: the European Convention regime is better at inducing up-front commitments that draw countries to *deepen* their democracy, than it is at enforcing commitments on the back-end.

There are several other procedural steps available to ECHR judges. Under Rule 61 of the Statute, the ECHR can use the so-called "pilot-judgment procedure" to take a sample case that stands for certain systemic and structural problems in the Member States.<sup>55</sup> During the resolution of the pilot case, other cases are put on hold. These have been used in contexts such as criminal justice and punishment, and seem to be available to help with backsliding issues like purges of judges or bureaucrats. But we do not yet have examples of their use.

### III. THE EUROPEAN UNION

The European Union (EU) has not been particularly effective at confronting backsliding either. Article 2 of the Treaty on the European Union lays out fundamental values, but provides a very weak enforcement machinery that was developed in the aftermath of Austria's election of a far-right-wing government in 2000.<sup>56</sup> The Treaty of Nice introduced a process, outlined in Article 7, which has three escalating stages for disciplining Member States that violate core principles.<sup>57</sup> The first is a finding of a "Clear Risk of Serious Breach" of EU values, found by either the Commission, Parliament, or one-third of Member States. If such a finding is approved by two-thirds of the European Parliament, the country is then called before the European Council, which can identify a breach by a four-fifths vote. If that breach is then deemed "serious and persistent" the European Council can, by unanimous vote save the country concerned, so declare it. This step then allows a vote by a qualified majority to suspend rights

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52. European Convention on Human Rights, *supra* note 14, at 27.

53. COUNCIL OF EUROPE, SUPERVISION OF THE EXECUTION OF JUDGEMENTS AND DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS: 11TH ANNUAL REPORT OF THE COMMITTEE OF MINISTERS 62 (2017), <https://rm.coe.int/annual-report-2017/16807af92b>.

54. *See, e.g.*, COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, RESOLUTION 2188: NEW THREATS TO THE RULE OF LAW IN COUNCIL OF EUROPE MEMBER STATES: SELECTED EXAMPLES (2017), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24214&lang=en>.

55. EUROPEAN COURT OF HUMAN RIGHTS, RULES OF COURT: RULE 61, at 31–33 (2018), [https://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf).

56. Consolidated Version of the Treaty on European Union art. 2, Oct. 26, 2012, O.J. (C 326) 17 [hereinafter Treaty on the European Union].

57. Treaty of Nice, amending the Treaty of the European Union art. 7, Feb. 26, 2001, O.J. (C 80/01).

of the accused country.<sup>58</sup> (There is no specification of exactly which rights could be suspended but they presumably include voting through the European Council and participation in governance, and possibly some trade benefits managed through the EU).<sup>59</sup>

With the advent of populist governments in Hungary and later Poland, these mechanisms have slowly been triggered. A 2015 proposal to use the mechanism in Hungary failed, but in September 2018 the European Parliament voted to call for action against Hungary.<sup>60</sup>

In Poland, the government undertook judicial reforms that lowered the retirement age of Supreme Court justices from 70 to 65, leading to the potential replacement of 27 of the 72 members of the court.<sup>61</sup> The Polish system allowed judges to appeal to the president of the country to extend their terms, which was perceived to introduce potential for political loyalty tests. In reaction, in December 2017, the European Commission triggered Article 7 out of concern for the erosion of separation of powers.<sup>62</sup> This led to a finding of a Clear Risk of Serious Breach against Poland. The action is ongoing, but complicated by the fact that a unanimous vote in the Council of Ministers will be impossible given multiple backsliding governments. Rights will not be suspended under this mechanism, as a realistic matter.

The critical development with regard to Poland was the bringing of an action against it by the Commission in July 2018, for violation of Article 19(1) of the EU Treaty and Article 47 of the Charter of Fundamental Rights.<sup>63</sup> Article 19(1) requires Member States to “provide remedies sufficient to ensure effective legal protection in the fields covered by Union law[.]”<sup>64</sup> while Article 47 includes a right to a fair trial for European rights.<sup>65</sup> The idea underlying both Articles is that a threat to judicial independence will undermine judicial cooperation among EU Member States, as well as the implementation of EU law

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58. Treaty on the European Union, *supra* note 56, at art. 7.

59. *Suspension Clause*, EUROPEAN UNION, EUR-LEX GLOSSARY, [https://eur-lex.europa.eu/summary/glossary/suspension\\_clause.html](https://eur-lex.europa.eu/summary/glossary/suspension_clause.html) (last visited June 6, 2019).

60. See R. Daniel Keleman, *Europe’s Hungary Problem*, FOREIGN AFF. (Sept. 20, 2015), <https://www.foreignaffairs.com/articles/europe/2015-09-20/europes-hungary-problem>; see also Alistair Macdonald, *EU Parliament Pushes Hungary Sanctions Over Orban Policies*, REUTERS (Sept. 12, 2018), <https://www.reuters.com/article/us-eu-hungary/eu-parliament-opens-punitive-action-against-hungary-for-damaging-democracy-idUSKCN1LS1QS>.

61. Michal Broniatowski, *Warsaw Defies EU with Proposed Changes to Judiciary*, POLITICO (Dec. 1, 2017), <https://www.politico.eu/article/poland-supreme-court-warsaw-defies-eu-with-proposed-changes-to-judiciary/>.

62. Maia De La Baume, *Brussels Puts Warsaw on Path to Sanctions over Rule of Law*, POLITICO (Dec. 20, 2017), <https://www.politico.eu/article/frans-timmermans-brussels-puts-warsaw-on-path-to-sanctions-over-rule-of-law/>.

63. Joe Stone, *EU Launches Legal Action Against Poland for Undermining Independence of its Courts*, INDEP. (July 2, 2018), <https://www.independent.co.uk/news/world/europe/eu-poland-court-independence-government-control-populist-government-a8427106.html>.

64. Treaty on the European Union, *supra* note 56, at art. 19(1).

65. Charter of Fundamental Rights, art. 47, Dec. 18, 2000, O.J. (C 326/01) 20.

in Poland. The Commission focused on Poland's introduction of the mandatory retirement age for judges. In response to the Commission's request, the European Court of Justice (ECJ), which had led the Transformation of Europe in the 1970s and 1980s,<sup>66</sup> ordered the suspension of the law on the judiciary that had purged the courts.<sup>67</sup> A few weeks later, Poland introduced amendments to the law on the judiciary in parliament, essentially backing down on this particular issue.<sup>68</sup> However, other aspects of Poland's capture of the judiciary had not been directly at issue. The governing party had already appointed the majority on the Constitutional Tribunal, and had essentially taken control of the National Council of the Judiciary, which was responsible for nominating judges.<sup>69</sup>

In short, the idea of judicial independence has been an important hook for international intervention to limit backsliding. Two other cases are relevant in this regard. One case had been brought by Portuguese judges, who argued that the pay cuts they received in the aftermath of the financial crisis undermined the rule of law.<sup>70</sup> The ECJ rejected this claim on the grounds that the measures were general in character and not targeted at judges, but provided some dicta about the importance of judicial independence within the EU, which provides a unified legal system.<sup>71</sup>

Following this first case, in March 2018, an Irish judge declined to enforce a request under the common European Arrest Warrant to send a suspect to Poland because of the country's lack of judicial independence.<sup>72</sup> The case was referred to Luxembourg, and a judgement was rendered in July 2018 in the so-called *Celmer* case.<sup>73</sup> The legal issue in the case involved something called "the principle of mutual trust" between Member States, which underpinned the European Arrest Warrant framework. The principle provides a presumption of trust in the quality of another country's rules and regulations, based on the

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66. J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2413 (1991) (arguing that the European Court led the transformation of Europe toward more integration, including by "constitutionalizing" Europe).

67. Matthew Day, *EU Court tells Poland to Reinstate Judges or Face Fines*, DAILY TELEGRAPH (Oct. 19, 2018), <https://www.telegraph.co.uk/news/2018/10/19/eu-court-tells-poland-reinstate-judges-face-fines/>.

68. Matthew Day, *Poland Bows to EU Pressure on Controversial Judicial Reforms*, DAILY TELEGRAPH (Nov. 21, 2018), <https://www.telegraph.co.uk/news/2018/11/21/poland-bows-eu-pressure-controversial-judicial-reforms/>.

69. *Poland Reverses Law on Removing Judges Following EU Court Ruling*, BBC (Nov. 21, 2018), <https://www.bbc.com/news/world-europe-46296859>; see also *Beating a 'Tactical Retreat' over Judges is Just the Eye of the Storm. What's Next for Poland?*, EURONEWS (Nov. 23, 2018), <https://www.euronews.com/2018/11/22/beating-a-tactical-retreat-over-judges-is-just-the-eye-of-the-storm-what-next-for-poland-v>.

70. Case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, 2018 E.C.R. 117.

71. *Id.* at ¶¶ 32–37.

72. *Minister for Justice and Equality v. LM* [2018] I.E.H.C. 154 (H. Ct.) (Ir.) [hereinafter *Celmer*].

73. Case C-216/18 PPU, *Minister for Justice and Equality v. LM*, 2018 E.C.R. sec. V [hereinafter *Celmer E.C.R.*].

assumption that all EU Member States shared fundamental values. There were, to be sure, some exceptions, as an earlier line of cases involving Hungary and Romania had provided for minimal levels of human rights notwithstanding the principle of mutual trust.<sup>74</sup> But in the *Celmer* case, the ECJ emphasized that Article 7 of the Treaty for European Union, with its emphasis on the role of the European Council, was the primary mechanism for monitoring and enforcing democracy and the rule of law.<sup>75</sup> Courts were thus dependent on findings of the Council with regard to the principle. Absent a general finding of the Council suspending the presumption of mutual trust, or a showing of judicial nonindependence in a particular case, the arrest warrant would have to be executed. The Court asserted that the litigant asking the Court to deny the arrest warrant provide the information showing the lack of independence and impartiality. While this was not a major limitation on a government that was in the process of attacking its own courts, the decision did have some significance in terms of providing a roadmap for the Council. Of course, the need for unanimity at the Council, save the state concerned, under Article 7(2) is a threshold unlikely to be reached at this point in the life of the EU.

The bottom line is that EU institutions have been relatively slow to respond to attacks on core features of democracy in backsliding countries. Attacks on the judiciary have been the primary terrain on which there has been significant action, and the response has been mixed. Certainly, a country that was considering following the path of Hungary and Poland would now know that some actions—for example, lowering the retirement age of judges—are unacceptable, but that others, such as subtly targeting judicial appointments in favor of political allies, are within the bounds of acceptable behavior. The mechanisms available to the EU institutions are relatively limited, and difficult to calibrate to the magnitude of the threat of democratic erosion.

#### IV. THE INTER-AMERICAN COURT OF HUMAN RIGHTS AND DEMOCRACY

After a wave of democracy began to take hold in the region in the 1980s and 1990s, the Inter-American Court of Human Rights emerged as a robust defender of human rights in the Americas and became a prominent player in the region's democratic development.<sup>76</sup> The Court was established to implement the American Convention on Human Rights, initially adopted in 1948, but it took several decades for a robust system of rights protection to emerge in practice.<sup>77</sup> The Court has played a very active role in the region, even going so far as to find,

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74. See Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru*, 2018 EU:C:2016:198.

75. *Celmer E.C.R.* at para. 37–45.

76. See generally THE INTER-AMERICAN COURT OF HUMAN RIGHTS: THEORY AND PRACTICE (Yves Haeck et al. eds., 2015) (exploring crucial developments before the Inter-American Court).

77. American Convention on Human Rights, "Pact of San Jose, Costa Rica," at ch. 4, Nov. 22, 1969, O.A.S.T.S. No. 36 [hereinafter American Convention].

in one case, a Chilean constitutional provision incompatible with the Convention.<sup>78</sup> In other cases it has ordered the revision of national laws, including amnesty laws in several countries.<sup>79</sup>

How has the Court done as a defender against democratic backsliding? Of particular relevance in terms of democratic quality is Article 23 of the American Convention on Human Rights, which provides for the right to political participation. Article 23(1) grants every citizen the rights:

- a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
- b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
- c. to have access, under general conditions of equality, to the public service of his country.<sup>80</sup>

Each of these three prongs has its own jurisprudence, both at the Inter-American Court and at the domestic level in several countries that hold the Convention to be directly binding. National courts that are partial to incumbents have used these rights to upend term limits,<sup>81</sup> and have held that term limits interfere with the international rights to political participation and to be elected.<sup>82</sup> In Honduras, for example, the country's Supreme Court noted that since the American Convention preceded the Honduran Constitution, the country was bound to observe the Convention in its formulation of all national law, and thus struck a constitutional provision on the basis of international human rights law.<sup>83</sup> A similar decision striking constitutional term limits on the basis of the regional right has been adopted in Bolivia.<sup>84</sup> Remarkably, in Bolivia, the Plurinational Constitutional Tribunal went to the original draft of the Constitution, and rejected term limits on the grounds that they had only been agreed to as a political compromise.<sup>85</sup> These decisions, while sounding in the preservation of

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78. Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile (Merits, Reparations, and Costs), Judgment, Inter-Am. Ct. H.R. (ser. C) No. 73, ¶ 103(4) (Feb. 5, 2001).

79. JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 322 (2013).

80. American Convention, *supra* note 77, at art. 23.

81. Mila Versteeg et al., *The Law and Politics of Presidential Term Limit Evasion* (unpublished manuscript) (on file with author).

82. See, e.g., Supreme Court of Justice, Constitutional Chamber, Decision of Apr. 22, 2015 [Hond.], <http://www.poderjudicial.gob.hn/Documents/FalloSCONS23042015.pdf>.

83. See *The President of Honduras Starts His Second Term under a Cloud*, *ECONOMIST* (June 27, 2018), <https://www.economist.com/the-americas/2018/01/27/the-president-of-honduras-starts-his-second-term-under-acloud>.

84. Tribunal Constitucional Plurinacional, Sentencia Constitucional Plurinacional No. 0084/2017, Nov. 28, 2017, at 3 (Bol.). See Versteeg et al., *supra* note 81, at 39–40.

85. Tribunal Constitucional Plurinacional, Sentencia Constitucional Plurinacional No. 0084/2017, at 3.

democracy, in fact may pose a threat to it, as they are being used to facilitate executive entrenchment by particular individuals.

Article 23(c) on its face might not seem to touch on political participation directly, so much as the public service institutions. The provision implicitly recognizes that some element of the rule of law in public administration is essential for democratic participation. The Inter-American Court cases regarding this provision to date have focused on judicial independence, particularly efforts by “Bolivarian” governments to pack the courts with their own supporters by dismissing judges appointed in prior regimes. But as will be shown below, the cases that come to the Court tend to be individual cases brought after particular dismissals, and do not go to the deep structural problems faced by the judiciaries as a whole.

Venezuela was the harbinger of Bolivarian success, and the drama has now played out with the end of democracy as we know it, leading to censure from the heads of state of the Organization of American States.<sup>86</sup> The judiciary was an early target of Hugo Chavez. After passing a new Constitution in December 1999, Chavez’s allies in Congress created a Commission for Functioning and Restructuring the Judicial System (CFRJS) which had the power to appoint and discipline judges.<sup>87</sup> This provided Chavez and his allies a sword to hold over the head of the judiciary. By 2014, a vast majority of judges held their office under temporary mandates.<sup>88</sup>

On September 12, 2000, five justices—Juan Carlos Apitz Barbera, Ana Maria Ruggeri Cova, Evelyn Margarita Marrero Ortiz, Luisa Estela Morales, and Perkins Rocha Contreras—were appointed to the First Court of Administrative Disputes.<sup>89</sup> They heard a variety of cases during their tenure, occasionally issuing rulings which displeased the administration at the time. This is reflected in comments made about the First Court by then-president Hugo Chavez, who urged the public to disregard the First Court’s “Plan Barrio Adentro” ruling and advocated for the plurality that made the decision to be removed.<sup>90</sup>

The tension between the judges and the administration came to a head in June of 2002 when the judges handed down a unanimous decision annulling an administrative act issued in the state of Miranda.<sup>91</sup> Under Venezuelan law, a judicial Chamber for Political and Administrative Matters (CPAM) has the authority to remove cases from the First Court under certain circumstances.<sup>92</sup>

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86. Nicholas Casey, *O.A.S. Issues Rebuke to Venezuela, Citing Threats to Democracy*, N.Y. TIMES (May 31, 2016), <https://www.nytimes.com/2016/06/01/world/americas/venezuela-oas-maduro.html>.

87. INTERNATIONAL COMMISSION OF JURISTS, VENEZUELA: COURT STRUCTURE (Nov. 26, 2014), <https://www.icj.org/cijlcountryprofiles/venezuela/venezuela-introduction/venezuela-court-structure/>.

88. *See id.*

89. Jenna Eyrich, *Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*, 36 LOY. L.A. INT’L & COMP. L. REV. 1477, 1480 (2014).

90. *Id.* at 1481.

91. *Id.*

92. *Id.* at 1482.

This is an extreme measure in Venezuelan law, and it is generally reserved for cases in which the ruling directly affects the public interest or is flagrantly unjust. Nonetheless, the Chavez administration asked the CPAM to declare the First Court's judgment null and void, and it did so claiming that the justices of the First Court made an inexcusable legal error in their interpretation. The case was then sent on to the Inspectorate General of Courts (IGC) to determine if the judges should face punishment for their error.<sup>93</sup>

The IGC opened an investigation into the judges on July 17, 2003, and gave the judges of the First Court notice that they would be investigated by September 12 of the same year.<sup>94</sup> On October 30, 2003, at the recommendation of the IGC, the CFRJS removed four out of the five justices from the First Court over their judicial error in the Junior Registrar's Office case.<sup>95</sup> Judge Marrero and Judge Morales, who dissented in part in the judgment in question, had their sanctions suspended once they agreed to retire from the First Court.<sup>96</sup> They were later appointed to the Supreme Court.

Mr. Apitz Barbera and Mr. Rocha Contreras petitioned the Supreme Court to reconsider their removal, on the grounds that the CFRJS did not have authority to remove them from office.<sup>97</sup> They also filed an administrative appeal and measure for *amparo*, a special remedy to overturn rights violations in individual cases,<sup>98</sup> with the CPAM for an annulment of their removal, to no effect. In light of these circumstances, Mr. Apitz Barbera, Mr. Rocha Contreras, and Ms. Ruggeri Cova (the third justice sanctioned) brought a case before the Inter-American Court of Human Rights.

In *Apitz Barbera et al. v. Venezuela*, the Court found that Venezuela violated Article 23(1) of the Convention by dismissing several judges from the First Court of Administrative Disputes. However, in this case, the Court did not find a violation of the individual right to political participation. Instead, the decision rested on the failure of Venezuela to provide fair judicial recourse to the judges, as required by Articles 8 and 25 of the Convention. Article 8 of the Convention provides a right to judicial hearings, while Article 25 provides for a right to judicial protection of fundamental rights.<sup>99</sup> The case thus held that the

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93. *Id.*

94. *Id.*

95. *Id.* at 1483.

96. *Id.* at 1484.

97. *Id.*

98. See ALLAN R. BREWER-CARÍAS, CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN LATIN AMERICA: A COMPARATIVE STUDY OF AMPARO PROCEEDINGS 85–86 (2009).

99. American Convention, *supra* note 77, at art. 8 (“[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature”); *id.* at art. 25 (“[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention”).

law which led to the dismissal was itself acceptable, so long as it was applied fairly and equally, under general conditions of equality.<sup>100</sup>

The Court did not find that the petitioners had a “right to democracy” that had been violated by the actions of Venezuela, as the petitioners claimed under Article 29 of the Convention. Article 29(c) requires that the Convention be interpreted in a manner so as not to preclude any “other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government.”<sup>101</sup> Arguing that the erosion of the judiciary as a whole had contributed to the dismissal of the petitioners, the judges claimed that Venezuela had denied the petitioners’ rights by eroding democracy and the rule of law through their “ideological cleansing” of the Courts, violating the guarantees put forth in Article 29(c) of the Convention.<sup>102</sup> Though the Convention was developed to protect democratic values, the Court held that the protections afforded to the petitioners under the aforementioned articles were sufficient to protect those values. Furthermore, the Court noted that there was no precedent for affording individuals a “right to democracy” in prior rulings involving Article 29.<sup>103</sup> In this way, the argument of the representatives under Article 29(c) was wholly rejected. The Court’s framework then, focused on individual cases rather than the overall structure of the judiciary

This decision cited and followed *Constitutional Court v. Peru* which had dealt with a similar fact pattern: some justices were removed from the Peruvian Constitutional Court after making a decision that limited President Fujimori’s ability to remain in power for multiple terms.<sup>104</sup> The case concerned itself with the dismissal of three justices—Manuel Aguirre Roca, Guillermo Rey Terry, and Delia Revoredo Marsano—from the Constitutional Court of Peru over their handling of a decision regarding Peruvian Law No. 26,657, which dealt with presidential term limits.<sup>105</sup> President Fujimori’s allies sought to use this law to influence the interpretation of the Constitution, which limited the President to two terms, so as to allow him to run again. When members of the Lima Bar Association challenged the law at the Constitutional Court, the justices decided that the law was inapplicable, with two of the justices abstaining.<sup>106</sup> An

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100. Eyrich, *supra* note 89, at 1496.

101. American Convention, *supra* note 77, at art. 29(c).

102. Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 182, ¶ 216 (Aug. 5, 2008) [hereinafter Apitz Barbara].

103. *Id.* at ¶ 223.

104. Calvin Sims, *Peru’s Congress Is Assailed Over Its Removal of Judges*, N.Y. TIMES (May 31, 1997), <https://www.nytimes.com/1997/05/31/world/peru-s-congress-is-assailed-over-its-removal-of-judges.html>.

105. *Constitutional Court v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 55, ¶¶ 56.1–56.5 (Jan. 31, 2001).

106. *Id.* at ¶ 56.10.

investigation committee was formed and the justices were impeached on May 28, 1997.<sup>107</sup> Their request for *amparo* was ultimately denied.<sup>108</sup>

The justices alleged violations of Article 8 and Article 25, and the Inter-American Commission agreed with them. With regards to Article 8, the justices argued that they had been denied due process during their impeachment proceedings.<sup>109</sup> Regarding Article 25, they argued that a delay in proceedings violated their rights and that in Peru impeachment was not subject to *amparo* because it was a political act.<sup>110</sup> Finally the Commission argued that Article 23 was implicated by the wrongful dismissal.<sup>111</sup>

Drawing on the United Nations Principles on Judicial Independence and case law from the European Court of Human Rights, the Court ultimately decided that the Peruvian justices were denied their right to a fair trial, and that Peru had violated its obligations under Articles 8 and 25 of the Convention.<sup>112</sup> It noted that some of the members of Congress who had been involved in the impeachment proceedings had themselves communicated with the Court during the case's hearing.<sup>113</sup> And it found a violation of Article 25 in Peru's assertion that impeachment proceedings were not protected by rights to defense.<sup>114</sup> However, the Court rejected the Article 23 argument. Dismissal under these circumstances did not violate the rights of petitioners to hold public office under conditions of equality.<sup>115</sup> Together with *Apitz Barbera et al. v. Venezuela*, wherein the Court cited *Constitutional Court v. Peru* as the source for the legal requirement that States "conceive[] strict procedures for both the judges' appointment and their removal,"<sup>116</sup> these decisions suggest that the Inter-American Court views the rule of law as instantiated in an independent judiciary primarily through the lens of one's right to a fair trial under Articles 8 and 25 of the American Convention. These rights are lynchpin rights, necessary for the protection of other rights under the Convention.<sup>117</sup>

Consider also the situation in Ecuador. In a pair of cases in 2013, *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador* and *Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, the Inter-American Court clarified its standards under Article 23(1)(c) with regards to the dismissal of judges. The

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107. *Id.* at ¶¶ 56.19–56.27.

108. *Id.*

109. *Id.* at ¶ 4.

110. *Id.* at ¶110.

111. *Constitutional Court v. Peru*, at ¶ 4.

112. See Chelsea Zwart, *Constitutional Court v. Peru*, 36 LOY. L.A. INT'L & COMP. L. REV. 2703, 2716 (2014).

113. *Constitutional Court v. Peru*, at ¶ 56.11.

114. *Id.* at ¶¶ 88-97.

115. *Id.* at ¶ 207.

116. *Apitz Barbera*, at ¶ 44 ("the authority in charge of the procedure to remove a judge must behave impartially and allow the judge to exercise the right of defense").

117. See generally Zwart, *supra* note 112 (overview of the decision).

Court found that under Article 23(1)(c), governments must observe the tenure of judges and not treat them arbitrarily, as acting otherwise would violate the judges' right to serve in public office.<sup>118</sup> The cases arose nearly a decade ago, when in November of 2004, President Lucio Gutiérrez was facing impeachment charges for the crime of embezzlement, but Gutiérrez's party, the Patriotic Society Party, did not hold a majority in Congress at the time.<sup>119</sup> In addition, the head of the Ecuadorian Roldosist Party (PRE) and former President Abdalá Bucaram had recently fled to Panama to escape an arrest warrant issued by the Supreme Court of Justice. The Inter-American Court was informed (and the State did not contest) that because of these circumstances, President Gutiérrez cut a deal with a coalition of political parties (including PRE) to dismiss the judges currently sitting on the Supreme Court in exchange for ending impeachment proceedings.<sup>120</sup> He also announced the intention of the government to restructure the Constitutional Tribunal, the Supreme Electoral Tribunal, and the Supreme Court of Justice through congressional action.<sup>121</sup> Two days later, Ecuador's Congress adopted a resolution terminating the duties of the judges of the Supreme Court of Justice, claiming that their appointment was made in violation of Article 209 of the Ecuadorian Constitution.<sup>122</sup> On the same day, six judges were removed from the Constitutional Tribunal over the alleged illegality of their initial appointments.<sup>123</sup>

After their removal, various judges filed *amparo* motions over their treatment.<sup>124</sup> However, on December 2, 2004—before these motions were heard by the trial courts, the Constitutional Tribunal—now filled with new appointees—decided that it alone had the power to suspend a parliamentary resolution over claims of unconstitutionality, and so the *amparo* motions were

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118. The Court also found Ecuador in violation Articles 8(1) (right to a fair trial) and 25(1) (right to judicial protection) of the Convention. Arguments regarding Articles 9 (freedom from ex post facto laws) and 24 (equal protection) of the Convention were heard and dismissed by the Court in both cases. Constitutional Tribunal (Camba Campos et al.) v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 268, ¶ 222 (Aug. 28, 2013) [hereinafter *Camba Campos*].

119. *Ecuador Impeachment Drive Dropped*, BBC (Nov. 10, 2004), <http://news.bbc.co.uk/2/hi/americas/4001367.stm>.

120. Supreme Court of Justice (Quintana Coello et al.) v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 266, ¶ 64 (Aug. 23, 2013) [hereinafter *Quintana Coello*]. See also *Camba Campos*, at ¶ 55.

121. *Quintana Coello*, at ¶ 65; *Camba Campos*, at ¶ 56.

122. *Quintana Coello*, at ¶ 65.

123. *Camba Campos*, at ¶ 61. These judges on the Constitutional Tribunal were already facing censure charges over two unpopular decisions they had made previously: the “fourteenth salary” case and the “D’Hondt method decision.” However, none of these charges were heard before their termination, and they failed to pass when they were first heard by Congress. The Constitutional Tribunal judges were only formally impeached on December 5, 2004, after President Gutiérrez ordered a special Congressional session to vote on the impeachment procedures again. *Id.* at ¶¶ 74–98.

124. Shushan Khorozyan, *Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, 40 LOY. L.A. INT’L & COMP. L. REV. 1547, 1550 (2017).

denied accordingly over the course of the following weeks.<sup>125</sup> Judges from both courts filed independent petitions with the Inter-American Commission of Human Rights by February of 2005.<sup>126</sup>

Besides finding that the judges had been denied their right to a fair trial, the Inter-American Court also found that Ecuador arbitrarily enacted punishments against the petitioners in both cases, violating their right to hold public office under Article 23(1)(c) of the Convention.<sup>127</sup> The reasoning of the Court focused heavily on the political deal struck between President Gutiérrez and the Congress. Because the State did not contest the charge (and because of ample corroborating evidence), the Court took it as fact that a deal was made to remove the judges in exchange for the end of impeachment proceedings against President Gutiérrez.<sup>128</sup> This explanation for the judges' removal made it clear that the measures taken against them were aimed at weakening the judiciary as a whole, and that the legal explanations provided were pretextual. All this led the Court to conclude that the removal of the judges in both cases amounted to arbitrary legal action, violating their right to hold public office under Article 23(1)(c).<sup>129</sup>

Comparing the Ecuadorian Court decisions to the *Apitz Barbera* decision generates some insights into how the Inter-American Court applies Article 23 to the issue of judicial independence, and thus the connection between political rights and courts. In the *Apitz Barbera* case, the Court found the evidence supporting the petitioners' contention—that the removal of the judges from the First Court was politically motivated—was generally insufficient. Accordingly, the Court showed deference to Venezuelan domestic law and ruled that Venezuela had not violated Article 23 through its actions.<sup>130</sup> Though the process by which the judges were removed had its defects, the laws that affected the judges after their removal were applied fairly, preserving the “general conditions of equality” required of access to public office.<sup>131</sup> Conversely, in the 2013 Ecuadorian Court cases, the claim that the judges' dismissal was politically motivated was almost accepted as fact in light of Ecuador's failure to contest the charge.<sup>132</sup> Consequently, the Court treated the State's legal explanations for the dismissal with suspicion and eventually ruled that it had violated Article 23.<sup>133</sup> Based on these decisions, one could reasonably infer that an Article 23 violation of a right to hold public office becomes more likely when the dismissal is

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125. *Quintana Coello*, at ¶¶ 68–73; *Camba Campos*, at ¶¶ 99–108.

126. *Quintana Coello*, at ¶ 2; *Camba Campos*, at ¶ 2.

127. See Khorozyan, *supra* note 124, at 1557–58.

128. *Id.* at 1551.

129. *Quintana Coello*, *supra* note 120, at ¶¶ 177, 180; *Camba Campos*, *supra* note 120, at ¶¶ 219, 222.

130. *Apitz Barbera*, at ¶ 207.

131. *Id.* at ¶ 206. See also American Convention, *supra* note 77, at art. 23.

132. *Quintana Coello*, at ¶¶ 177, 180; *Camba Campos*, at ¶ 327.3.

133. *Quintana Coello*, at ¶ 284.3; *Camba Campos*, at ¶ 124.

apparently politically motivated. This obviously has implications for processes of democratic backsliding, which frequently target the courts.

#### V. THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

The African Court was established under the Protocol to the African Charter on Human and Peoples' Rights. As of January 2018, thirty states had ratified the Protocol, and eight of these have made special declarations under Article 34(6) to allow individual access to the Court.<sup>134</sup> While the Court was slow to get rolling, it has now become more expansive, and has quietly built up a jurisprudence on democracy. At the same time, the African Union has expanded its own normative framework related to democracy. At this writing, the African Charter on Democracy, Elections and Governance (ACDEG) has been signed by forty-six out of fifty-five Member States, and ratified by thirty-one.<sup>135</sup>

In one case the African Court has even found a constitutional provision to be a violation of the African Charter.<sup>136</sup> The legal hook for this was a provision of the Court protocol to issue "appropriate orders," a very expansive formulation of remedial power.<sup>137</sup> Tanzania's parliament had amended the constitution to prohibit nonparty independent candidates from running for electoral office, but the African Court ruled that this violated individual rights to freedom of association and political participation, as well as other provisions of the African Charter. The idea is that freedom of association includes freedom not to associate. It then ordered the country to take constitutional steps to remedy the situation.<sup>138</sup> Tanzania's review is pending.

In other cases, the Court also found that the Cote d'Ivoire's electoral rules, which allowed the ruling party and president to appoint the majority of members of the electoral commission, were incompatible with the ACDEG as well as the African Charter, and the Economic Community of West African States Protocol on Democracy and Good Governance.<sup>139</sup> The African Court is empowered to interpret not just the Charter but also "any other relevant instrument" that the state party has ratified.<sup>140</sup> The Court used these sources to implicitly hold that an

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134. Adem K. Abebe, *Taming Regressive Constitutional Amendments: The African Court as a Continental (super) Constitutional Court* (forthcoming) (on file with author).

135. Christina Murray et al., *Presidential Term Limits and the International Community*, 9 n.3 (U. Antwerp Inst. Dev. Pol'y Working Paper 2018), <https://www.uantwerpen.be/images/uantwerpen/container2673/files/Publications/WP/2018/wp-201809.pdf>.

136. Christopher R. Mtikila v. United Republic of Tanzania, No. 009/2011 and No. 011/2011, Judgment, Afr. Ct. Hum. & Peoples' Rts. (June 14, 2013).

137. *Id.* at ¶ 124.

138. *Id.* at ¶ 126.

139. *Actions Pour la Protection des Droits de l'Homme (APDH) v. The Republic of Cote d'Ivoire*, No. 001/2014, Judgment, Afr. Ct. Hum. & Peoples' Rts. (Nov. 18, 2016).

140. *Welcome to the African Court*, AFRICAN COURT, <http://www.african-court.org/en/index.php/12-homepage1/1-welcome-to-the-african-court> (last visited Nov. 26, 2018).

independent electoral commission was a human right of sorts.<sup>141</sup> And in other cases, the Court has found that criminal defamation is incompatible.<sup>142</sup> In these cases, the Court has been expansive, using its broad power of appropriate orders to require structural changes in the relevant laws.

One instance in which the African Court was called on directly to maintain the integrity of democratic institutions came when President Kagame of Rwanda proposed a referendum on allowing him another term in office.<sup>143</sup> Opponents appealed to the African Court, alleging a violation of the ACDEG, and asking for interim measures blocking the referendum.<sup>144</sup> The referendum was held before the case could be heard, illustrating that sometimes individual adjudication is too little too late.

In addition to the African Court on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights has also issued decisions that are relevant to the core of democracy, as we have defined it. As a separate body created by the African Charter, the Commission is responsible for the general promotion and protection of human rights, and it hears cases as well.<sup>145</sup> In one case, it found that Cameroon's judicial council, which had the president as chair, and the minister of justice as vice chair, violated judicial independence, implying some limit on the executive's role in judicial appointments.<sup>146</sup> This case goes directly to the threat to the rule of law posed by political interference with the judiciary, and thus falls within our minimal definition of democracy laid out above.

Why has the African regional system, including the Commission and Court, arguably been more protective of democratic processes and engaged more thoroughly on these issues than similar bodies in Europe or Latin America?<sup>147</sup> Part of the answer is legal. The Charter includes among its principles the separation of powers, which requires an independent election management body and autonomous institutions to support democracy.<sup>148</sup> The Charter requires that

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141. See *APDH v. The Republic of Cote d'Ivoire* (interpreting a number of instruments in its decisions).

142. Abebe, *supra* note 134, at 14.

143. Murray et al., *supra* note 135, at 12–13.

144. *Id.*

145. African Charter on Human and Peoples' Rights art. 62, June 27, 1981, 21 I.L.M. 58 (“[e]ach party shall undertake to submit . . . a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter”).

146. Kevin Mgwanga Gunme et al. v. Cameroon, Communication 266/03, Afr. Commission on Hum. & Peoples' Rts. [Afr. Comm'n H.P.R.] (May 2009). The Commission arrived at similar conclusions in a recent case against the DRC where it found that the African Charter guarantees the separation of powers. *Jose Alidor Kabambi and Others v. DRC*, Communication 408/11, Afr. Comm'n H.P.R., ¶¶ 81–90 (Nov. 15, 2016).

147. To be sure, it has not been unlimited. As Abebe notes, the Court has not been very good at policing incumbent takeovers or “soft” coups, such as occurred in Zimbabwe in 2017 and Egypt in 2012. See Abebe, *supra* note 134, at 17.

148. African Charter on Democracy, Elections and Governance arts. 3(5), 17(1), 15.

constitutional amendments be based on “national consensus” and specifically mentions a referendum, which turn out to be pursued frequently in the continent.<sup>149</sup> Thus the African Court has power to review constitutional amendments, which even many national constitutional courts do not have.

But there surely is a political story as well. National traditions of judicial independence and democratic functioning are weaker on the African continent than in other parts of the world. The European and Latin American experiences with fascism and military rule provoked a consensus, still strong today, on the need to preserve democratic governance. But paradoxically, this has led the regional bodies in Europe and Latin America to rely on national processes, allowing more room for experimentation, and potentially opening up their regions to democratic backsliding by creative political leaders.

Perhaps there are “advantages of backwardness” in democracy protection, just as there are for development.<sup>150</sup> In development theory, the advantages of backwardness imply the search for new markets and technologies, allowing the leapfrogging of earlier stages.<sup>151</sup> Consider, for example, the turn of Iberia outward to the New World, once trade routes cut off to the East with the rise of the Ottoman Empire. European city-states closer to the core of economic activity had no need to go searching for new trade routes to Asia. But the peripheral states did, and in doing so, discovered the New World.

In Africa, the nascent regional organizations have been much more aggressive in producing substantive requirements for democratic governance. Much of the new regionalism accelerated in reaction to high-profile efforts by the International Criminal Court, which was particularly aggressive when it came to African leaders such as Omar al-Bashir and Uhuru Kenyatta.<sup>152</sup> Oddly in an effort to insulate the continent from outside interventions, the history of colonialism led to several democracy enhancing efforts.

#### CONCLUSION

In reviewing the performance of various international courts and institutions in defending core features of democratic governance, I have in some sense put liberal theory on trial. Liberalism holds that international institutions constitute a kind of hands-tying mechanism for democratic governments, allowing them to pursue particular goals that might otherwise be impossible and to make more effective commitments to their citizens.<sup>153</sup> This story certainly made sense in an

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149. *Id.* at art. 10(2).

150. The term comes from Thorstein Veblen, a scholar in the early twentieth century. See Lars Sandberg, *Ignorance, Poverty and Economic Backwardness in the Early States of European Industrialization*, 11 J. EUR. ECON. HIST. 675, 675 (1982).

151. *Id.* at 676.

152. Mark Doyle, *African Union Urges ICC to Defer Uhuru Kenyatta Case*, BBC (Oct. 12, 2013), <https://www.bbc.com/news/world-africa-24506006>.

153. See Moravcsik, *supra* note 18, at 543.

era of democratic expansion. But the commitments are only really credible if costs are imposed on the back end.

It is in the nature of courts, whether national or international, that they tend to hear one case at a time, and to have trouble dealing with large structural issues, absent a strong political consensus. This limits the power of courts to staunch democratic backsliding when it reaches systemic proportions. Further, the case-by-case nature of the process means that agents of democratic erosion can act strategically to exploit holes in the jurisprudence to accomplish their ends. It is no accident that two of the leading backsliders, Hungary's Viktor Orbán and Poland's Jarosław Kaczyński, are themselves lawyers.<sup>154</sup> They have carefully pursued their reforms to capture the political system in a careful, legalistic, and methodical way.

The European institutions seem designed with the idea that backsliding risk would be limited to a single country. When, as it currently seems, democratic backsliding is spreading across several countries in the region, the political mechanisms of Article 7 of the Treaty on the European Union seem woefully inadequate. Instead, the best hope so far has been a set of actions brought to the ECJ. The major decision by the European Court to enjoin the application of the Polish law on the judiciary will be the biggest test of whether the system can actually work.

The ECJ's recent decision with regard to Poland illustrates another theme of this review. International courts seem particularly exercised by national violations of judicial independence. The alliance among judges, defending their profession across borders, is real and necessary, given the judiciary's lack of the proverbial purse or sword. An independent judiciary and the rule of law are necessary to make democracy work and so this cross-border, multilevel alliance is a welcome one. But will it be effective? The Inter-American Court of Human Rights has itself been most active on the issue of judicial independence, though it was not particularly effective in staunching the degradation and capture of the judiciary in Venezuela. Perhaps the lesson is that a sustained campaign of erosion is hard to resist, but that international courts can in some sense provide some space for domestic actors to mobilize and organize to contest backsliding. In this sense, the international situation is not that different from national constitutional orders, in which nondemocratic actors sometimes need to step in to slow down antidemocratic actors.<sup>155</sup>

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154. *Viktor Orbán*, BRITANNICA, <https://www.britannica.com/biography/Viktor-Orban> (last visited Nov. 26, 2018); *see also Jarosław Kaczyński*, BRITANNICA, <https://www.britannica.com/biography/Jaroslaw-Kaczynski> (last visited Nov. 26, 2018).

155. Tom Ginsburg & Aziz Huq, *Democracy's Near Misses*, 29 J. DEMOCRACY 16, 29 (2018).