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Inter-judicial Coordination, Global De-fragmentation and Global Constitutionalism; Courts as International Political Actors and their impact on Human and Fundamental Rights

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Abstract

During the last decades, the predominant state-centric analysis of international relations has been challenged by the unexpected irruption of courts as game-changing actors: national and international courts have become the unexpected pitfall of national governments' international agendas. While international courts' potential to be international political actors has been traditionally acknowledged, national courts have a newly acquired leverage by collectively contradicting their governments' policies, even in areas traditionally reserved to the executive action and precluded from judicial review (such as international security or foreign affairs), and such power can reshape the international order. My thesis is devoted to elucidating national and international courts' collective potential as international political actors, this is as global trend-setters capable of changing the structural conditions for the international relations of states and international organizations, drawing from IR theory on norm-emergence, Legal Theory on fragmentation and Global Constitutionalism literature.

I posit that courts' increased capacity as international political actors ("IPAs") comes from *inter-judicial coordination*: a phenomenon in which courts from independent jurisdictions apply the same strategic approach to common rules in order to uphold a common stance regarding certain policies. In short, my argument is that, through inter-judicial coordination (that I define as a type of judicial dialogue), courts become international norm-entrepreneurs that create behavioral change in other IPAs and de-fragment the global legal order. Moreover, my thesis also enquires whether such structural change can amount to a constitutionalizing process capable of advancing the international rule of law: the expansion of judicial review to previously locked areas promotes the creation of a decentralized global system of checks and balances, while elevating the constitutional value of certain legal rules in the process of de-fragmentation and creating constitutional political norms or structures.

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-- Chapter I: Introduction --

During the last decades, the predominant state-centric analysis of international relations has been challenged by the unexpected appearance of courts as game-changing actors. While international courts' potential to be international political actors has been traditionally acknowledged, national courts seem to have found a new (and under-studied) source of political leverage in collectively contradicting their governments' policies, even in areas traditionally reserved to the executive action and precluded from judicial review. This thesis is devoted to elucidating courts' collective potential as international political actors, this is as global trend-setters capable of changing the structural conditions for the international relations of states and international organizations.

I posit that courts' increased capacity as international political actors (hereinafter, "IPAs") comes from *inter-judicial coordination*: a phenomenon in which courts from independent jurisdictions adopt the same strategic approach to common rules in order to uphold a common stance. In short, my argument is that, through inter-judicial coordination, courts become international norm-entrepreneurs that create behavioural change in other international political actors, de-fragment the global legal order and, eventually, advance its constitutionalizing process.

Consequently, coordinated courts become powerful international actors, not only because of their capacity to curtail the policymaking of governments and international organizations, but also because they create major changes in the structural conditions for international relations. The systemic changes born from inter-judicial coordination can amount, not only to the advancement of the rule of law, but also to the de-fragmentation and constitutionalizing of the global order: the expansion of judicial review to previously locked areas can be seen as advancing the creation of a global system of checks and balances, while elevating the constitutional value of certain international rules and standards in the process.

The paradigmatic example of this phenomenon's effects is the transformations undergone by the Security Council of the United Nations (henceforth, "UNSC") concerning the

targeted sanctions regime. For many years, the opacity of this powerful international organization has casted a very long shadow over its activity and legitimacy. Despite the multiple complaints and requests for an increased level of transparency, the UNSC remained set on its ways[1] until an unexpected series of reforms concerning targeted sanctions were introduced between 2005 and 2011 "as a part of its commitment to ensure that a fair and clear procedure exists for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions"[2].

Although the use of *targeted* or *smart sanctions* can be traced back to 1966 (Willis, 2011), and they are used in a wide array of issues (Giumelli, 2015), the extensive use of this breed of sanctions targeting individuals or entities responsible for a breach or threat to the international peace and security[3] started in the aftermath of the 9/11 terrorist attack (Willis, 2011; Biersteker, Eckert, Tourinho & Hudakova, 2018). Targeted sanctions are imposed on the subjects listed as responsible for a threat or violation of the international peace and security by a UNSC resolution. Each of these UNSC resolutions are based on the list provided by a special Committee created as a subsidiary organ of the UNSC for this specific purpose (the Counter-Terrorism Committee, henceforth "CTC").

Although the composition of such Committee may vary, it always reflects the composition of the UNSC, and it follows the same voting rules. As a consequence, the representatives of the member states sitting in such Committees have been highly reluctant to disclose any details concerning the listing process, in fear of being singled out for the decision or the origin of the information used as a basis for the sanction, since such revelations may negatively affect their international relations and affairs (Vlad, 2014). Hence, the UNSC did not provide listed individuals or entities with formal direct

[1] Although there has been some subtle reforms and improvement in terms of state-diversity and transparency in the UNSC, this institution remains very guarded when it comes to its working methods (Harrington, 2017) and has shown particular resistance to disclosing its sanctioning procedures.

[2] This goal is specifically stated in the official description of the "Focal Point for De-listing", whose creation was the first of the reforms undertaken. The description is available here: https://www.un.org/securitycouncil/sanctions/delisting [last visited on 21/04/23].

[3] The thinking behind such practice is that, while traditional military sanctions or comprehensive economic sanctions imposed over a country can have an indiscriminate effect over its population and can damage the country's economic and social tissue to the point of creating a humanitarian crisis, they do not necessarily tackle the source of the threat or breach of international peace and security, as proven by the case of the 1999 Iraq sanctions. See, in general: (Joyner, 2003).

means neither to apply for de-listing nor to access the evidence or learn the charges against them.

However, to the surprise of the international community, this situation changed in 2006: a Focal Point for De-listing was created in 2006[4], followed by the introduction of "Summary Narratives" explaining the causes of the sanctions in each of the sanctioning regimes in 2008, and the Office of the Ombudsperson was established in 2009[5]. Even though the final decision to list or de-list individuals and entities remains in the hands of the special Committee in charge of the listing procedure and the UNSC, these mechanisms have been progressively empowered with an increasing number of faculties[6] in order to turn the sanctioning process into a more public and accessible one. Considering the relentless efforts of the UNSC and its member states to avoid translucent procedures, the aforementioned innovations were remarkable transformations in the policymaking standards of a powerful international organization: the existence of review mechanisms concerning the UNSC's decisions is unprecedented.

More importantly, these transformations seem to go in the opposite direction to the current trend towards more informal and less trackable forms of international coordination identified by Slaughter (Slaughter, 2004) and the subsequent doctrine (Rogers, 2020; Rogers & Rowan, 2022). Thus, this change in the policymaking standards of such a strong international organization is not explained by the general evolution of international relations, but by an unexpectedly compelling factor: the pressure exerted by coordinated courts. Scholars have highlighted that "while it has generally been the case in the post-9/11 era that both executive and legislative branches in democracies have tolerated counterterrorism-related measures without demur, the [national courts] in several countries have resolved to review such measures" (Benvenisti & Downs, 2017, pp. 157-158), hence portraying their resolutions as the sole retaining wall protecting due process and restraining targeted sanctions (Johnstone, 2008).

[4] See UNSC Resolution S/RES/1730(2006).
[5] See UNSC Resolution S/RES/1904(2009).
[6] In relation to the Focal Point for De-listing, see UNSC Resolutions S/RES/2253(2015) and S/RES/2255(2015). In relation to the Office of the Ombudsperson, see UNSC Resolutions S/RES/1989(2011); S/RES/2083(2012); S/RES/2161(2014); S/RES/2253(2015) and S/RES/2368(2017).

The doctrinal analysis of the judicial pressure exerted on the UNSC tends to focus on international courts as the key actors behind the reforms concerning the targeted sanctions regime (Vlad, 2014; Busco, 2016; Fontanelli, 2016). Although this thesis does not deny the relevance of international courts' activism, my work highlights the often-overlooked role of national courts in setting international norms: I posit that only a critical mass of national courts can pose a judicial threat to the effectiveness of an international policy born from governmental coordination. In the case of targeted sanctions, the European Court of Justice (hereinafter "ECJ")[7], the Court of Justice of the European Union (henceforth "CJEU") as its successor[8], and the European Court of Human Rights (henceforth "ECtHR")[9] joined a pre-existing critical coalition of national courts and absorbed their critical approach to, not only targeted sanctions, but post-9/11 counterterrorism measures in general.

Rather than being an isolated key actor, I posit that the ECJ/CJEU crystalized and reinforced a pre-existing trend among national courts: the ECJ/CJEU's stance concerning targeted sanctions can only be explained in the context of the evolution of the judicial trend among national courts in relation to post-9/11 counterterrorism policies in general. In fact, the ECJ/CJEU chose to portray itself and the European legal system under the light of domestic regimes in order to fully embrace national courts' approach in the field of counterterrorism policies, as explained in the Empirical Chapter of this thesis.

Hence, this thesis conceives inter-judicial coordination as a process of norm-emergence driven by national courts and buttressed by international courts. In this regard, all coordinated courts become norm-entrepreneurs, but national and international courts fulfil different roles in the construction of the judicial trend born from inter-judicial

[7] Benvenisti & Downs point at the *Kadi I 2008 case* (Joint resolutions C - 402/05 P & C - 415/05 P, Yassin Abdullah Kadi and Barakaat International Foundation v. Council and Commission [2008] ECR I-06351) as the zenith of the inter-judicial coordination against targeted sanctions (Benvenisti & Downs, 2017).

[8] In addition to the impact of *Kadi I 2008 case*, the doctrine has also paid attention to the relevance of the *Kadi II 2013 case* (joint resolutions C-584/10 P, C-593/10 P and C-595/10 P, European Commission and Others v. Yassin Abdullah Kadi, OJ [2011] C72/9) in relation to the transformations undergone by the UNSC (Busco, 2016; Fontanelli, 2016).

[9] In this sense, beyond *Kadi I 2008 case*, Vlad also adds to the list of relevant cases the following: the *Kadi II 2013 case;* the *Nada 2012 case* (Nada v. Switzerland (Application no. 10593/08), Judgement of 12 September 2012) and the *Al-Dulimi 2013 case* (Al-Dulimi and Montana Management Inc. v. Switzerland (Application no. 5809/08), Judgement of 26 November 2013). While *Kadi I 2008 & II 2013* took place in the ECJ and the CJEU, *Nada 2012* and *Al-Dulimi 2013* are resolutions from the ECtHR (Vlad, 2014).

coordination. To begin with, the critical mass of norm-entrepreneurs depends, first and foremost, on national courts' enforcement powers to threaten the efficacy of the concerned policies: although inter-judicial coordination can take place among international courts, it will not fructify into the emergence of a constraining political norm without a critical mass of national courts.

In addition to this, especially influential domestic courts can be seen as *norm-enablers* capable of creating partial cascade effects in the diffusion of the emerging political norm: this is the case of the ECJ/CJEU in relation to targeted sanctions, but also of the German Constitutional Court or the UK House of Lords in relation to other counterterrorism policies, for instance[10]. For their part, international courts will act as *norm-disablers* that will halt the diffusion of a competing political standard when involved. Hence, while national courts are the main components of the necessary critical mass of norm-entrepreneurs, international courts can filter the process of norm-emergence and expel competing norms from the resulting judicial trend.

In the case at hand, the UNSC noticed the increasing judicial rejection towards unchecked counterterrorism policies and attempted to prevent the targeted sanctions regimes from going into failure by bending to the courts' demands. Hence, the 2006 Focal Point for De-listing mechanism was introduced as a remedy-alike figure before the rising tide of judicial rejection could reach the ECJ and transform into a wave threatening to flood the rest of the world. I posit that both the ECJ/CJEU (acting as a domestic court) and the ECtHR (as a traditional international court) followed the path paved by national courts, hence joining their inter-judicial coordination. The coordinated courts proved to be more persistent than expected in their fight to protect due process and kept pushing for higher standards in the UNSC's listing process. As a result, subsequent reforms were put in place in the following years, as mentioned before.

In a nutshell, the UNSC was forced to change its sanctioning standards due to the activism of an unexpectedly strong group of international actors: coordinated national and international courts. In other words, when acting in a coordinated manner, courts probed their capacity to curb powerful international organizations' policymaking standards, in addition to curtailing their own governments' margin of political discretion both at the

[10] See the Empirical Chapter.

national and international level. Hence, inter-judicial coordination[11] holds the key to unfold national and international courts' full potential as international political actors.

Although international courts are, as a matter of fact, international organizations and, hence, they have been portrayed by the IR literature as international actors, the idea of conceiving national courts under a similar light is far less conventional[12] since the state has traditionally been regarded as a rather unitary actor when it comes to international relations. Despite their role as the institutional counterweight of the government within the domestic system of checks and balances of a liberal democracy, national courts do not necessarily behave as an international political actor.

In the past, national courts have rejected to fulfil such role in the very same fields in which they are now deploying their coordinated activism, as proven by their earlier jurisprudence. Traditionally, national courts have not only shied away from challenging the authority of international organizations[13], but have also declined to review policies born from a strong governmental competency, such as national security (Benvenisti, 2004), or international affairs (Reinisch, 2007; Benvenisti & Downs, 2009a). In other words, judicial review seemed to be precluded in these policy areas.

Hence, courts' activism in the case of counterterrorism measures is highly puzzling because all the factors that have usually neutralized judicial action can be found in them: the post-9/11 counterterrorism policies belong to two policy fields in which judicial review was traditionally precluded (national security and foreign affairs), and they are born from the governmental coordination channelled through a powerful international organization. Yet, courts beat the odds and laid down the law by resorting to inter-judicial

[11] This phenomenon was firstly noticed by Benvenisti & Downs, although they refer to it as "inter-judicial coordination" or "inter-judicial cooperation", equally (Benvenisti & Downs, 2017). As it will be explained in the Conceptual Chapter, the term "inter-judicial coordination" will be used to describe the phenomenon under study in this research, since it is more consistent with its features.

[12] However, this is not a new approach in IR literature either. The literature covering this approach will be duly explored in this Introduction (in the Contribution Subsection), as well as in the Conceptual Chapter and the Theory Chapter.

[13] Reinisch provides an excellent account of courts' judicial strategies to decline their jurisdiction when it comes to reviewing international organizations' decisions, resolutions or activities (Reinisch, 2000).

coordination, hence reshaping executive discretion and international organizations' policymaking standards in the field.

Courts' newly acquired attitude has two political consequences of different scope: domestic and international. From a domestic point of view, national courts have proven their strength as a domestic political actor capable of constraining their governments' margin of discretion in the most unfavourable scenario for judicial review. However, the IR perspective is more concerned with its effects at the international level. To begin with, courts' curtailment of executive discretion in the aforementioned policy areas implies a limitation of the state's capacity to engage in international coordination and sets legal boundaries to its international relations. More importantly, inter-judicial coordination tackles the fragmentation in which the current interpretation of international law has been cemented because it reduces inter-systemic antinomies across different regulative levels (as explained in the Theory Chapter). From an IR perspective, this is the relevant question, because it turns courts into IPAs capable of changing the structural environment in which states engage in international governance.

As it will be explained in the Theory Chapter, neither international nor national courts can deploy their full potential as IPAs in isolation because of their institutional shortcomings: the lack of global jurisdiction and enforcement in the case of national courts, and international courts' legitimacy drawbacks. These limitations hinder their capacity to become global trend-setters. However, inter-judicial coordination provides them with the necessary collaborative instance to compensate for such limitations: I posit that courts become international norm-entrepreneurs through inter-judicial coordination because a critical mass of national courts can threaten the effectiveness of international policies. In the case of counterterrorism measures, the norm coined by inter-judicial coordination is that counterterrorism policies are conditional to the respect for core human and fundamental rights, even if such policies are inserted into the tissue of international law by UNSC's policymaking. However, as explained in the Theory Chapter and demonstrated in the Empirical Chapter, the effects of inter-judicial coordination are conditional to the maintenance of the critical mass of norm-entrepreneurs: the erosion of the mass will weaken or dissolve the norm, the behavioural constraint will disappear, and the de-fragmentation will paralyze.

Although the existing legal and IR literature has signalled the collective potential of courts to create structural change, several questions remain unsolved: What does inter-judicial coordination entail as a phenomenon? Which are the mechanisms leading inter-judicial coordination to constrain IPAs' behaviour and to de-fragment the global legal system? Under which conditions will this inter-judicial coordination advance the constitutionalizing of the global order? The goal of this research is to answer these questions and to shed light on the role of national and international courts as international actors when resorting to inter-judicial coordination. To this purpose, I will define the phenomenon, describe the process of emergence and identify and test the mechanisms behind the effects of the phenomenon.

1.1. Contribution.

Drawing on the insights of the previous literature concerning inter-judicial coordination and transnational judicial communication[14], this research aims at bringing this rather legal topic into the IR literature due to its remarkable effects on the state's capacity to engage in international relations and on international organizations' policymaking.

While legal scholars focus on the legal technicalities of such dialogue and its impact on international law (Tzanakopoulos, 2011; Tzanakopoulos, 2016) and constitutional mutation (McCrudden, 2000; Freitas Mohallem, 2017), most of them acknowledge the political roots and implications of the phenomenon (Ferrarese, 2009; Arnull, 2013).

From the late mid-1990s, some IR scholars began to point out the growing influence of courts in the construction of the international legal system (Slaughter, 1994-1995). Despite the growing interest, few scholars have tried to conceptualize and theorize transnational judicial dialogue from an IR perspective. IR scholars have focused on the exam of the actors involved. In this sense, some scholars have depicted courts as a nascent global community under the light of network theory (Slaughter, 2003; Slaughter, 2004), as an epistemic community (Benvenisti & Downs, 2010; Benvenisti & Downs, 2014), or

[14] The legal literature mainly addresses this phenomenon as "judicial dialogue". See the Conceptual Chapter for a detailed recollection of the different labels and variations of the phenomenon.

as an organizational field (Frishman, 2013). These strands of literature are concerned with the practical nuts and bolts of judicial communication: the effects of such communication on courts (Frishman, 2013), the intensity of the communication among courts (Slaughter, 1994-1995), the frequency of courts' cross-referencing (Groppi & Ponthoreau, 2014) and, especially, courts' motivation to communicate (Mattli & Slaughter, 1997; Alter K., 2001; Slaughter, 2004; Claes & de Visser, 2012). This literature has given birth to a very diverse array of accounts for courts' will to engage in judicial dialogue, which are seen as either competing or complementing explanations.

Either way, there seems to be a doctrinal agreement about the political international impact of transnational judicial communication. Slaughter, for instance, suggests that transnational judicial communication is leading national and international courts towards the creation of a global community of Human Rights Law that constitutes a "system of vertical checks and balances" (Slaughter, 2004, p. 82). This idea taps into some of Global Constitutionalism's core ideas and main findings. According to Peters, "Global constitutionalism […] contends that in fact, parts of international law—in their interplay with domestic law—can usefully be redescribed as indeed forming constitutional bits and pieces and roughly and tentatively fulfilling a constitutionalist program, shared explicitly or implicitly by numerous states" (Peters, 2014, p. 331). This program is reflected in "constitutionalist principles, notably the rule of law, human rights, and democracy" (Peters, 2014, p. 331).

IR literature is interested in Global Constitutionalism as the study of "constitutional orders, that is, systems of law and their associated institutions that perform functions that are constitutional" (Sandholtz, 2021, p. 441), because IR is concerned with the structural transformation of the environment in which states' international relations take place. Hence, while Global Constitutionalism may be primarily concerned with the rules that acquire a global constitutional value, IR should observe such changes in the global order's legal tissue (as suggested by Slaughter) and inquire about the mechanisms and actors behind such transformation. In this sense, while some scholars point at regional human rights courts (together with the Human Rights Committee) as the institutional structure of a global rights-based constitutionalism due to their frequent coordination through judicial dialogue (Sandholtz, 2021), other scholars also mention national courts as relevant actors (Benvenisti & Downs, 2017). This idea seems to connect with the view

that a rudimentary global system of judicial review capable of working as a global system of checks and balances is in the making (Slaughter, 2004; Benvenisti & Downs, 2009b).

Although the bodies of legal and constitutionalist literature mentioned above agree on the idea that the collective action of courts can have a structural impact on international politics, they have not produced an all-encompassing causal theory. This work ultimately brings forward and defines the role of national and international courts as IPAs capable of modifying the structural environment in which states conduct their international relations. According to the IR literature, an IPA is "an individual, group, state, or organization that plays a major role in world politics" and, hence, shapes "the trends that are transforming world politics" (Kegley & Wittkopf, 2009, pp. 11, 13): in inter-judicial coordination, courts act as norm-entrepreneurs that collectively set a constraining trends for other IPAs, de-fragment the global legal order and, eventually, advance its constitutionalizing process.

As previously stated, while international courts' capacity as IPAs is well-known in the IR literature (Alter, Helfer, & Rask Madsen, 2018; Alter K. J., 2014), the view of national courts as systemic game-changers is far less conventional. Nowadays' main models concerning the impact of national courts at the international level (Scelle's "dédoublement fonctionnel" theory (Cassese, 1990), Whytock's portrayal of national courts as "global governors" (Whytock, 2009) and Grady Schwartz' "direct influence" model (Grady Schwartz, 2015a)) analyse national courts' role as individual agents and, in the case of Scelle and Whytock, the models are inspired by the analogue comparison between the domestic system and the global order.

In Slaughter's model, however, the portrayal of a global judicial community highlights the collective political power of courts. This thesis shares this collective approach to the analysis of the international power of courts as international actors (although it does not specifically address the construction of such community). This work builds on the idea that, precisely because the global order is a multi-polar system of power and its legal system is fragmented, courts' international political power is better deployed in a collective way. In order to theorize courts' collective capacity as IPAs, this work draws on the insights of legal theory and IR theories on norm-emergence.

I specifically claim that the key to unfold both national and international courts' full potential as IPAs capable of systemic change is one specific kind of transnational judicial communication: inter-judicial coordination. As said before, inter-judicial coordination can be defined as the formal dialogue among non-related courts that uphold a common stance based on the same strategic approach to common rules. My argument, in short, is that through inter-judicial coordination courts create global trends that constrain international political actors by threatening the effectiveness of their policies, hence changing the structural conditions of international relations. I also posit that these structural changes can amount to the de-fragmentation of the international legal system and, potentially, advance the constitutionalizing of the global order.

While the causal mechanism behind the behavioural change of IPAs is the threat posed by a nascent political norm to their policies' effectiveness, the causal mechanism behind the de-fragmentation is the consubstantial nature of the legal rules involved in the coordination (*common rules*): these are rules whose substance is essentially coincident despite belonging to different levels of regulation (the international level and the national level) or to different domestic legal systems.

The material connection of these rules allows courts to import strategic approaches from other jurisdictions, the consistent reshaping of the national and international versions of the rule when a common strategic approach is embraced by a critical mass of courts and, as a result, the transference of elements between systems (acting as an *uploading mechanism*, as a *downloading mechanism* or as a *mixed mechanism*, as defined in the Theory Chapter). Thus, given a critical mass of coordinated national courts, inter-judicial coordination de-fragments the global order, not only because it provides a unified interpretation of international law, but also because it unravels the dysfunctionalities among the coexisting national and international regulative levels.

My theory on de-fragmentation does not contradict but connects with the postulates of Legal Pluralism: the international legal order is a complex entanglement of legalities (Krisch, 2022) born from the lack of a centralized system of legal production (Tamanaha, 2021) that poses a challenge to the rule of law (Swenson, 2022). Inter-judicial coordination manages to harmonize the conflicting legalities without concentrating power in the hands of one centralized international actor and, by virtue of the transference of

features between legal systems, the rule of law is reinforced within the domestic order and advanced at the international level.

Moreover, if underpinned by domestic constitutional rules, inter-judicial coordination will also advance the constitutionalizing process of the global order. In this regard, inter-judicial coordination works as an uploading mechanism transferring the constitutional character of the inward-looking version of the common rule to its corresponding outward-looking version. Therefore, the mechanism leading inter-judicial coordination to the de-fragmentation of the global order and to its constitutionalizing process is the same: the consubstantial nature of common rules that allows for the transference of features across systems and regulative levels. The difference lies, thus, in the constitutional character of the common rules.

In this sense, my thesis contributes to the debate on Constitutional Pluralism (Walker, 2002; Cohen J. L., 2008; Cohen H., 2012) that views authority as distributed horizontally among different constitutional actors, moves away from the dominant state-centric account and focuses, not on the formal requirements of international constitutional rules (Trachtman, 2006; Schwöbel, 2010), but on the values embedded in modern constitutional democracies in order to identify international constitutional rules (Gardbaum, 2008; Wiener, Lang, Tully, Maduro, & Kumm, 2012; Milewicz, 2020).

In terms of the creation of constitutional political norms, the constitutionalizing effects of inter-judicial coordination translate into the modification of what Reus-Smit defines as a constitutional structure: the norm of pure procedural justice (Reus-Smit, 1997). I posit that, while the norm of pure procedural justice does not necessarily encompass Human Rights, courts' activity as coordinated norm-entrepreneurs can modify its content to include them as part of the constitutional structure of states.

Therefore, this research draws on the constructivist understanding that, although the anarchy among states is the sempiternal framing of their international relations (Ashley, 1988; Wendt, 2006), this structural condition is not unchangeable and can be altered by the agents' behaviour: in this case, despite the fact that legal international fragmentation is the everlasting result of the anarchical inter-state relations, courts can manage to reduce such fragmentation through inter-judicial coordination.

Hence, without fully embracing the post-anarchy views of scholars such as Clark (2005), this work shares the views of the constructivist strand of literature that acknowledges the possibility of finding some degree of authority[15] within such anarchy (Finnemore, 1996; Barnett, 2001; Johnstone I., 2005; Hurd, 2007a). In this sense, this research moves away from the traditional state-centric approach of international relations theory (such as Waltz's three "levels of analysis" (Waltz, 1979)) in order to put micro-level actors such as national courts under the spotlight of international relations.

To this purpose, this work will take on the pending task of providing an accurate definition of inter-judicial coordination from which, not only IR scholars, but also legal theorists and constitutionalists will benefit. This is an inter-disciplinary topic whose implications span across many fields, but legal and IR literature can strongly benefit from a reciprocal exchange of knowledge concerning inter-judicial coordination.

1.2. Structure and Methodology.

As previously stated, inter-judicial coordination is a salient topic for International Relations. However, many doubts concerning its creation, functioning and effects as a phenomenon are under-studied from a social science point of view. Hence, the structure of this work is designed to unravel such questions and tackle the systemic study of the phenomenon with a positive approach, which will lead me to both theorise the causal effects behind inter-judicial coordination and to empirically test such theory.

However, a previous step must be taken before embarking upon such theoretical and empirical undertakings: providing a reliable definition for the phenomenon under study is a pressing matter. The pre-existing literature on the topic has focused rather on signalling its existence and pointing out its traces than on providing a scientific definition of inter-judicial coordination.

The upcoming Conceptual Chapter (Chapter II) presents the phenomenon at stake as a qualified form of judicial dialogue rather than as a completely disconnected event, and it

[15] Following Ruggie (Ruggie, 1998), Barnett and Finnemore (Barnett & Finnemore, 2004), I understand the notion of authority as a relation of legitimated power that creates a social environment in which subordinates must abide by their superiors' directives.

settles down on the use of "inter-judicial coordination" as the most suitable terminology to describe a phenomenon whose features are better explained by the paradigm of coordination than under the idea of cooperation. Consequently, the Conceptual Chapter introduces the notion of judicial dialogue (Section 2.1.), explores its common elements with inter-judicial coordination (Sections 2.1.1.; 2.1.2. and 2.1.3.) and finally addresses its definition (Section 2.2.) before moving on to the Theory Chapter. The Conceptual Chapter relies on an inductive analysis of a clear case of inter-judicial coordination in order to conceptualize the phenomenon.

The Theory Chapter (Chapter III) lays out the theory behind the causal chain linking inter-judicial coordination to its effects on the global order. Section 3.1. will provide the political and legal framework of my theory: Subsection 3.1.1. explains the fragmentation of the international order as a legal phenomenon with political roots, and Subsection 3.1.2. explores its impact on the domestic setting of powers and the rule of law. Sections 3.2. and 3.3. explore the limitations of international and national courts as trend-setters when acting alone in this international environment.

Finally, the theory behind inter-judicial coordination's mechanisms and effects is laid out in Section 3.4.: whereas the Conceptual Chapter provides the definition of the phenomenon and the taxonomy of its components, Section 3.4. examines it from an operational point of view. Subsection 3.4.1 explains the importance of a critical mass of national courts to the existence of inter-judicial coordination, while Subsection 3.4.2. examines the creation of such mass under IR norm-evolution theory and explains the role of international courts in the process. Although the constraining effects of inter-judicial coordination on IPAs are explained in this Subsection, Subsection 3.4.3. examines its legal effects concerning de-fragmentation.

Hence, the Empirical Chapter (Chapter IV) will test these theories on a "hard case": post-9/11 counterterrorism measures. Since inter-judicial coordination is a collective phenomenon, I am treating my analysis on this field as a Single Case Study with multiple observations in which each court is a unit of analysis. I deem this case a "hard case" for several reasons.

First, these policies are connected to national security and to international affairs, which are two policy fields strongly dominated by executive discretion in which judicial review

is traditionally precluded, as advanced in this Introduction. Second, unlike the case concerning environmental protection examined to conceptualize the phenomenon, inter-judicial coordination in the field of counterterrorism measures did not always entail explicit cross-referencing. Hence, although the existence of the coordination will be more difficult to trace, it will provide a strongly tested case of inter-judicial coordination if proven. Furthermore, since post-9/11 counterterrorism measures are partially rooted in the policymaking of the UNSC, this case allows for the testing of the effects of inter-judicial coordination on IPAs like international organizations, that are especially immune to the effects of judicial review.

In order to trace the existence of the inter-judicial coordination (the common Independent Variable of my theories) I will rely on the jurisprudential analysis of the resolutions included in my set of cases. To this purpose, I will focus on identifying the existence of a common approach to common rules, proving the different roles of national and international courts in the construction of the inter-judicial coordination. In relation to the Dependent Variables, I will process-trace the reaction of the most representative IPAs in relation to the emergence of the norm resulting from inter-judicial coordination and I will analyse the findings of the Chapter from a legal theory perspective. In this regard, my data primarily consists of judicial resolutions, complemented with secondary data like official documents from the IPAs mentioned in the analysis.

Next, the Normative Chapter (Chapter V) is built on the conclusions of the previous Chapters in order to provide a normative assessment of inter-judicial coordination's implications in the field of Global Constitutionalism. Hence, this Chapter also has the underlying purpose to reflect on the best theoretical framework in order to assess the progress of global constitutionalism as a process of structural change. In this regard, this Chapter will draw from both the legal and IR literatures on Global Constitutionalism.

Finally, the Conclusion of this thesis will summarise the main conceptual, theoretical and empirical findings of this work.

-- Chapter II: Conceptual Chapter --

Glendon has stated, regarding the topic of judicial communication, that courts around the globe sustain a "brisk international traffic in ideas […]" (Glendon, 1991, p. 158), implying that these courts have been expanding the horizon of their legal reasoning's universe to outline their political profile. Sharing the same premise, the subsequent literature highlighted the political profile of courts' decision to borrow or transplant certain foreign doctrines while rejecting others (McCrudden, 2000; Benvenisti, 2008b; Roberts, 2011); the creation of a transnational epistemic community of judges (Slaughter, 2003; Slaughter, 2004; Anderson, 2005; Sommer & Frishman, 2016); and the political transformations that judicial communication can create, (Koskenniemi, 2011; Benvenisti & Downs, 2014; Traisbach, 2021).

I posit that there is one specific form of transnational judicial communication that is salient for its systemic effects from a global perspective: inter-judicial coordination. I define inter-judicial coordination as the formal dialogue in which non-related courts uphold a common stance based on the same strategic approach to common rules.

In order to lay out my theory and answer the key questions about national and international courts' role within a coordinated judicial action and its effects, I explore in this chapter the concept of inter-judicial coordination in order to clarify its meaning. Since inter-judicial coordination relies on formal judicial dialogue (explicit or non-explicit), it has the same actors, pre-conditions and tools as any other type of transnational judicial communication. Hence, the first Section of this Chapter is devoted to exploring transnational judicial communication, the different categories enclosed within this broad field in relation to the actors' behaviour, the pre-conditions and tools for courts to communicate. The second Section of this Chapter addresses the specialties of inter-judicial coordination, taking as a frame the features of transnational judicial communication.

2.1. The broad field of transnational judicial communication.

Although "inter-judicial coordination" is a fairly new concept, it is framed within the broad field of judicial communication. Coordination among systemically independent bodies necessarily requires communication. Courts' communication is usually explored by the existing literature under the label of judicial dialogue (Golub, 1996; Ansuategui Roig, 2016; Tzanakopoulos, 2016; Lobba & Mariniello, 2017a; Jimenez, 2018).

Judicial dialogue is generally defined as an exchange of legal opinions among courts concerning specific legal topics. Although this is probably the most popular name of this practice, the existing literature has coined several alternative denominations: "transjudicial communication" (Slaughter, 1994-1995); "transjudicial dialogue" (Ferrarese, 2009; Moremen, 2006) "transnational judicial conversations" (McCrudden, 2000), "judicial comparativism" (Roberts A., 2011); and "comparative reasoning by courts" (Bobek, 2013)[1].

Drawing on other courts' previous arguments is not only a frequent but also a required practice when all of the courts involved belong to the same legal system[2]. However, courts are not required to look for guidance beyond the limits of their legal system, because they are not bound by the jurisprudence produced in independent jurisdictions. Despite this lack of legal bond, in judicial dialogue, courts reflect and respond to the legal arguments set forth by courts from independent legal systems. Hence, judicial dialogue implies that courts belonging to different legal systems acknowledge each other's legal opinions, not because they have to, but because they want to do it. Hence judicial transnational communication happens among non-related courts. Depending on how these actors interact, several categories of communication can be identified within this broad field. The following section is devoted to summarily explore such categories.

[1] For a more extensive review of the different names of this phenomenon see (Krotoszynski, Jr., 2006).

[2] The extent to which courts are bound by judicial precedents depends on whether they belong to a common law or civil law system, but even in the latter, courts use previous decisions produced within the system as a model to epistemically justify their resolutions. See (Spaic, 2018).

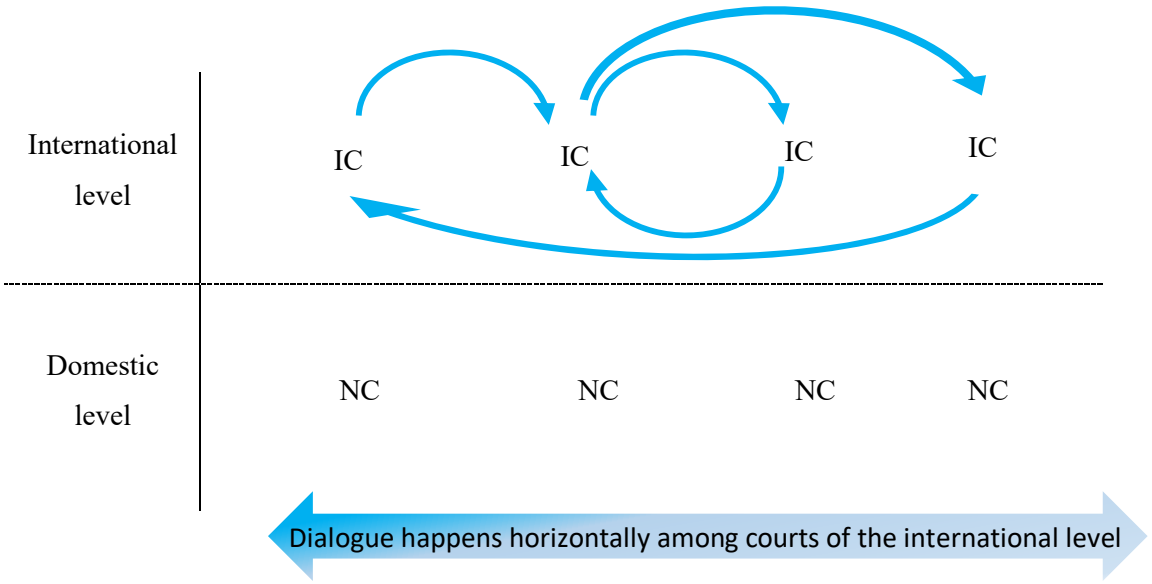
2.1.1. Actors and categories of transnational judicial communication.

As said before, the fact that courts acknowledge, endorse, or reject their peers' arguments is an entirely normal behaviour among courts of the same legal system, not only because they are bound by the hierarchical relationships connecting them within their system, but also because they all contribute to define the specific meaning of the set of rules that they all share within that system.

Contrary to this, judicial transnational communication happens among courts that are not bound by one another's jurisprudence because they lack this sort of formal relationship. Hence, the courts involved in formal judicial dialogue are non-related courts, meaning that they discuss one another's arguments in their resolutions despite the absence of any systemic obligation to do so. This lack of systemic relationship only takes place between the courts of independent legal systems: although the formal mandate to observe previous jurisprudence does not apply equally to all of the courts of the same legal system, within the same legal system courts still resort to one another's jurisprudence as useful means of interpretation for the same set of rules. The non-related nature of the courts is the key element of the actors of judicial dialogue which, beyond this feature, can be national or international courts.

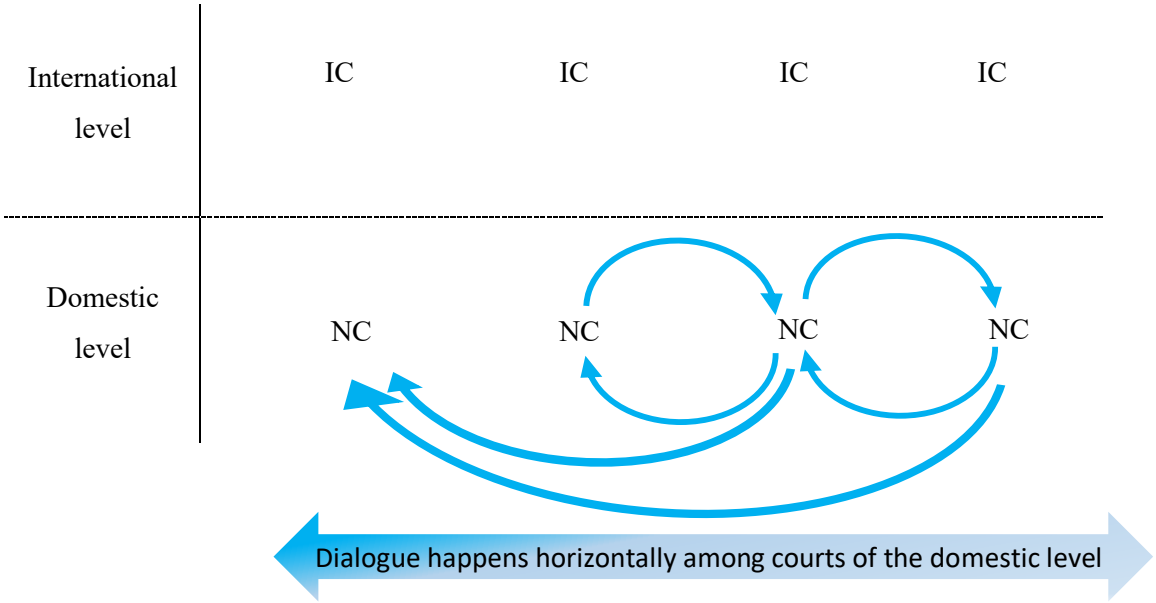
Depending on whether the courts involved in the judicial dialogue belong to only one of these spheres or to both of them, the judicial dialogue established among them will be labelled differently. In horizontal judicial dialogue non-related courts only communicate within the same territorial level: national (Waters, 2005) or international (Lobba & Mariniello, 2017a; Lobba & Mariniello, 2017b). Hence, horizontal judicial dialogue takes place among solely national courts (see *Figure 1*), between international courts (see *Figure 2*) or at both levels but not across them, which means that the dialogue still remains between courts of the same level even if both levels are experimenting judicial dialogue at the same time, as shown in *Figure 3*. Contrary to this, in vertical judicial dialogue the communication takes place across the two levels, but not within them (see *Figure 4*). Finally, judicial dialogue can also happen in both directions at the same time, as shown in *Figure 5*, forming what Slaughter has denominated as "mixed vertical-horizontal communication" (Slaughter, 1994-1995, p. 111).

Figure 1 – Horizontal Judicial Dialogue at the international level



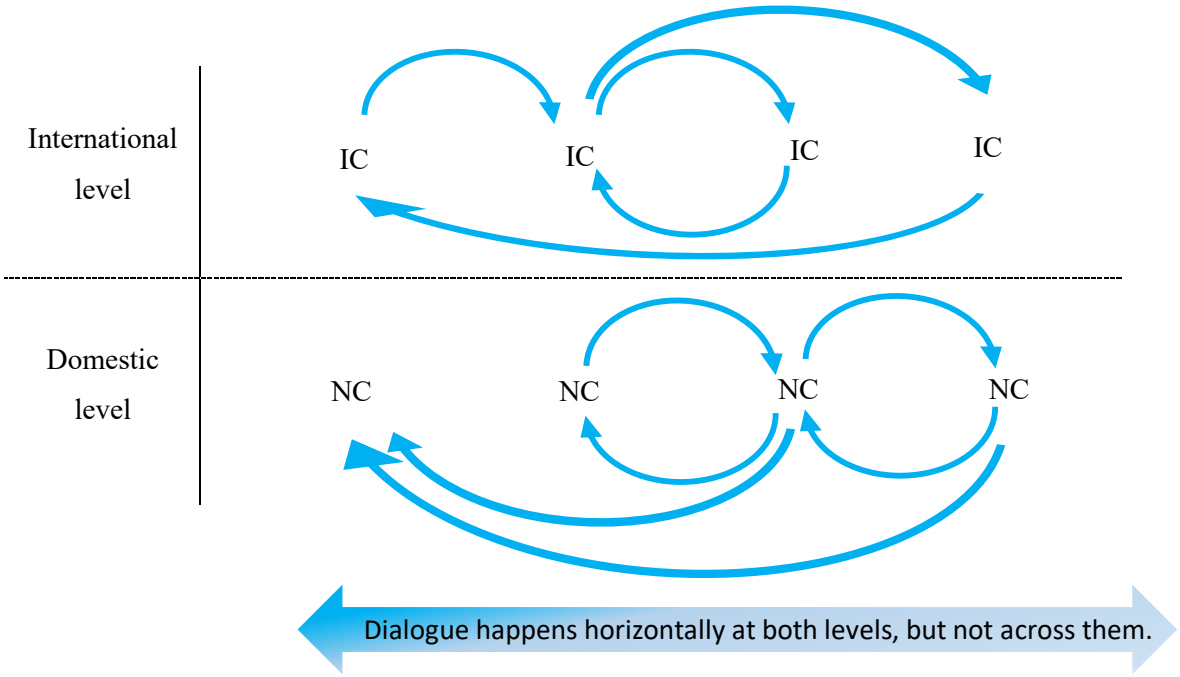
* The communicative interactions depictured in the figure are illustrative examples that do not represent any specific case.

Figure 2 – Horizontal Dialogue at the domestic level



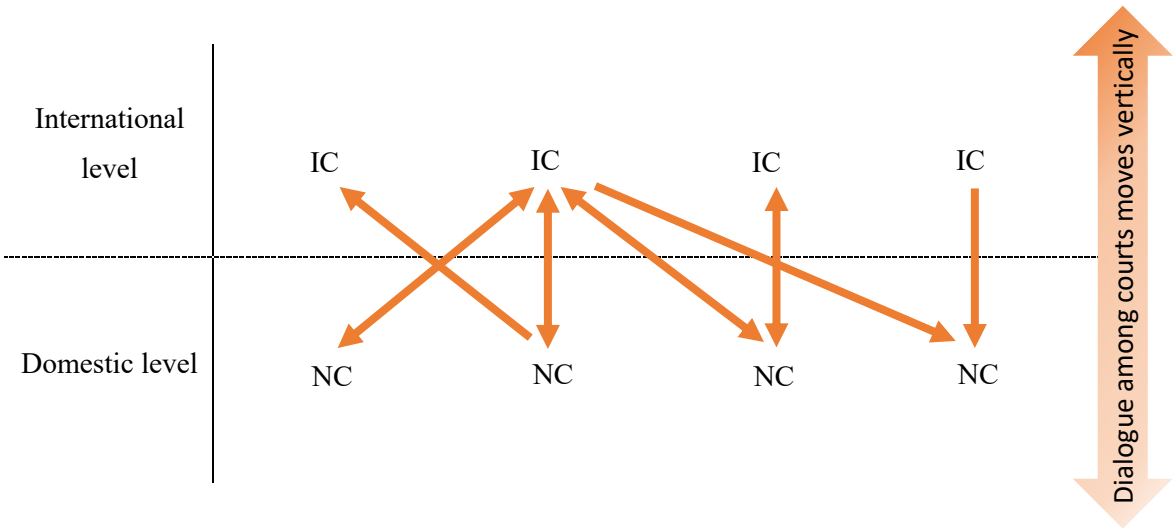
* The communicative interactions depictured in the figure are illustrative examples that do not represent any specific case.

Figure 3 – Horizontal Dialogue happening at the same time at both the domestic and the international level.



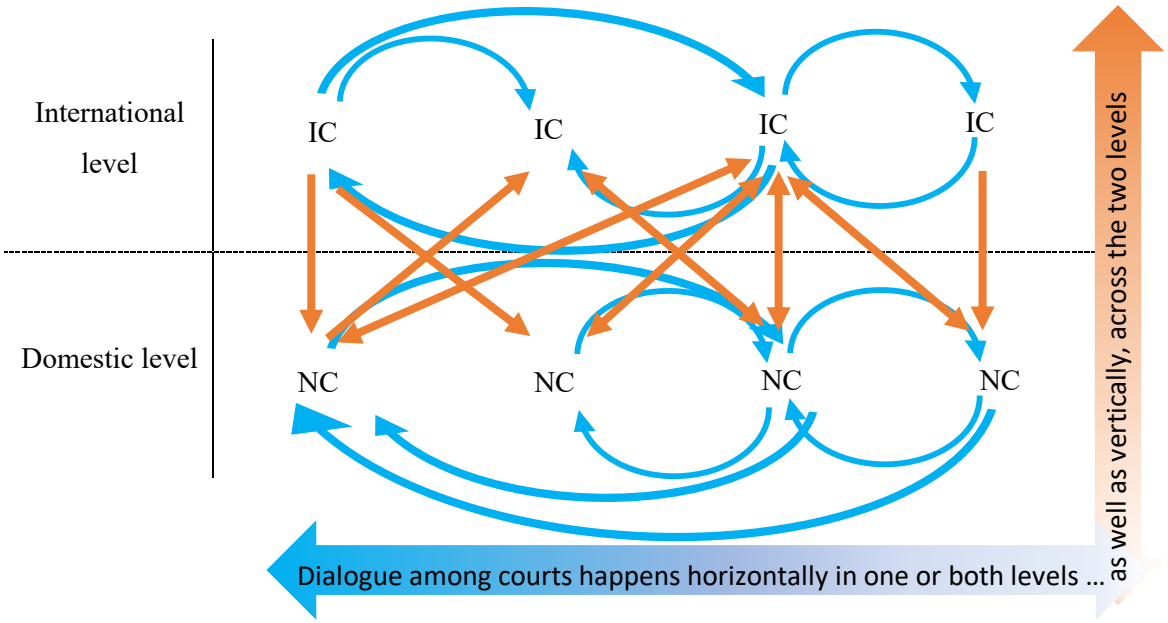
* The communicative interactions depictured in the figure are illustrative examples that do not represent any specific case.

Figure 4 – Vertical Judicial Dialogue.



* The communicative interactions depictured in the figure are illustrative examples that do not represent any specific case.

Figure 5 – Mixed Vertical-Horizontal Judicial Dialogue.



* The communicative interactions depictured in the figure are illustrative examples that do not represent any specific case.

In this last scenario, the exchange of legal stances happens among national and international courts within the same level and across levels, but not necessarily always with the same intensity. As a matter of fact, the irregular intensity in the exchange of legal opinions among courts can happen regardless of whether the judicial dialogue takes place horizontally, vertically or in its mixed version: courts do not necessarily engage in judicial dialogue with equal enthusiasm. For instance, Slaughter classifies this intensity depending on the degree of reciprocal engagement. In this regard, Slaughter distinguishes unilateral references from one court to another (she labels this kind of communication as a "monologue") from bilateral communication and also points out that, in turn, the latter can be "direct dialogue" or "intermediated dialogue", depending on whether the dialogue runs through a third court or directly (Slaughter, 1994-1995, ps. 112-113).

This exchange can take place through informal and formal means. Informal judicial dialogue takes place outside courts, when judges gather in conferences[3] or exchange

[3] Take as examples of venues in which informal judicial dialogue takes place the following: the International Association of Refugee Law Judges (see its web page: https://www.iarmj.org/ [last

opinions through papers and other academic publications that have no legal effects (Baudenbacher, 2003; Slaughter, 2004; Law & Wen-Chen, 2011; Frishman, 2013). Formal judicial dialogue involves courts themselves, when courts engage with each other's legal reasonings within their own resolutions and judgements. Hence, the main difference is that formal judicial dialogue is channelled through courts' legally binding resolutions.

In turn, formal judicial dialogue can be identified by explicit cross-referencing among courts (Moremen, 2006; Groppi & Ponthoreau, 2014; Tzanakopoulos, 2016), or with a less visible jurisprudential discussion in which courts consider, adapt, reject or embrace foreign jurisprudence without citing its source (Bobek, 2013; Groppi & Ponthoreau, 2014; Law, 2015). This non-explicit formal judicial dialogue can be signalled by the creation and assimilation of a common judicial grammar (Romano, 2009; Koskenniemi, 2011; Lobba & Mariniello, 2017b), or by the concordance of the arguments' weight by the courts (Podolska, 2019), regardless of the existence of a jurisprudential agreement.

In fact, judicial dialogue does not necessarily entail a jurisprudential convergence: courts can embrace or reject the foreign jurisprudence they take into account (Webb, 2014; Kunz, 2016; Frese & Olsen, 2019; Kunz, 2019). For instance, in 2004 the Italian Court of Cassation took upon its shoulders the task of examining and settling the discrepancies of different national judicial traditions in the matter of the judicial immunity of foreign states. While Anglo-Saxon jurisdictions had tended to grant such immunity (Bianchi, 2005), the Greek Supreme Court took the opposite stance in its 2000 resolution *Prefecture of Voiotia case*[4] (Gavouneli & Bantekas, 2001). In its *Ferrini case*[5], the Italian Court of Cassation thoroughly examined and weighted the arguments of different national and international courts in both sides of the question. The Italian court heavily criticized and rejected the arguments of both sides, although the outcome of the *Ferrini case* turned out to be very similar to the Greek decision in the *Prefecture of Voiotia case*. The divergent judicial dialogue did not end here, since the British House of Lords (hereinafter,

visited on 09/08/2021]); and the Global Constitutionalism Seminar (see its web page: https://law.yale.edu/centers-workshops/gruber-program-global-justice-and-womens-rights/global-constitutionalism-seminar [last visited on 08/08/2021]).

[4] Prefecture of Voiotia v. Federal Republic of Germany, Case No.11/2000 (Areios Pagos (Sup. Ct. of Greece), May 4, 2000.

[5] Ferrini v. Federal Republic of Germany. Italian Court of Cassation, Appeal decision, Case No. 5044/04, March 11, 2004.

"UKHL") criticized, in turn, the resolution of the Ferrini case in its 2006 *Jones case*[6] (Benvenisti & Downs, 2009b).

Regardless of the differences and nuances between the different categories or types of judicial dialogue, they are all different types of transnational judicial communication and, hence, they all share the same necessary pre-conditions. The following Section is devoted to exploring such pre-conditions.

2.1.2. Transnational judicial communication's pre-conditions.

I posit that transnational judicial communication always requires the existence of certain legal and institutional conditions (courts' common identity and methodology and common rules) and the tools involved in the construction of the dialogue are the same (international law and comparative constitutional law). However, while the explanations provided in the current Section (concerning the aforementioned pre-conditions) apply to any kind of transnational judicial communication, the explanations provided in the following Section (concerning the tools to communicate) are focused on formal judicial dialogue. As important as informal judicial dialogue may be to shape judges' legal standards of reference, only formal judicial dialogue transcends to the political arena, since it is through their formal resolutions that courts can coerce governments into modifying their policies. Hence, as far as the tools to communicate are concerned, this work focuses on formal judicial dialogue with the purpose of later explaining inter-judicial coordination, since the systemic impact that this work aims to explain will only arise when such coordination is articulated on the basis of formal judicial dialogue (explicit or non-explicit).

Courts' common identity.

As said before, courts' dialogue is based on the mutual recognition as relevant authorities despite the lack of hierarchical bond between them. Slaughter points out that this recognition implies courts' consideration of their interlocutors as their counterparts from

[6] Jones (Respondent) v. Ministry of Interior (Kingdom of Saudi Arabia) (Appellants) [2006] UKHL 26. [2007] 1 All ER 113 (HL).

other jurisdictions (Slaughter, 1994-1995). Courts' recognition of their peers is based on their common institutional identity which, in turn, should translate into shared methodological principles.

For instance, in terms of institutional identity, courts of liberal democracies would never recognize as a fellow court any institution that is not formally committed to the requirements of the "rule of law" principle: independence from the other branches of the government, full submission to the legal framework, etc. There can be variations and different degrees of commitment to these specific requirements, but in order to be considered a court under the tenets of liberal democracy there must be "evidence of commitment to, an understanding of, the rule of law" (Slaughter, 1994-1995, p. 125). For instance, Sharia Courts (such as the Sharia Courts of Malaysia and Nigeria) are completely isolated from the western circuit of judicial dialogue, not only because of their legal limitations to embrace external jurisprudence, but also because these two groups of courts do not share a common identity (Amoloye-Adebayo, 2017). Likewise, courts from different legal traditions would never establish a formal dialogue with other institutions unless they fulfil a common identarian profile.

Courts' common methodology.

Alongside "judicial identity", methodology is the other signal of institutional similarity for courts and, hence, these are the two institutional pre-conditions of judicial dialogue[7]. The judicial process and procedural rules are the key-factors that allow courts to perform their functions according to their institutional identity. Taking courts in liberal democracies as an example, the "rule of law" principle comes together with the inextricable need for "due process" and all of the judicial safeguards stemming from it: legal security, the right to defence and legal counselling, presumption of innocence, the use of legal reasoning to motivate the ruling, the reliance on a legitimate system of legal sources, etc. These are general requirements linked to the "rule of law" principle, which

[7] Slaughter also identifies two more "preconditions for transjudicial communication" (Slaughter, 1994-1995): Court's persuasive authority and courts' role as autonomous international actors. However, I believe that the persuasive authority is precisely the outcome of combining the legal and institutional features that I have identified: courts will listen to, dialogue with and be persuaded by other courts with a shared institutional identity applying common fundamental rules. I understand this so-called persuasive authority as a part of the essence of judicial dialogue, not as a condition. For its part, whether courts can behave as international actors depends on how they use judicial dialogue, as examined in the Theory Chapter.

is the central feature of their identity. Hence, courts sharing this common judicial identity and methodology can dialogue regardless of other features such as, for instance, their affiliation to the common law or the civil law traditions.

Courts' common rules: a common language for non-related courts.

Even if a group of courts share a common identity and methodology, they will still not be able to engage in a judicial dialogue unless they also have common rules. In other words, in order to establish a dialogue, courts need to speak the same legal language. Common rules are the common language courts use to communicate with each other because these are the legal concepts that they all identify as common pieces of the legal systems to which they belong.

Common rules are those national and international legal rules regulating the same issue and whose substance is essentially coincident despite being independent norms belonging to different levels of regulation (the international level and the national one) or to two different legal systems within the same regulative level (to different national legal systems, for instance). Hence, this is a legal pre-condition.

For instance, according to Tzanakopoulos[8], this is the case of "constitutional rights that in substance reflect internationally protected rights, or more generally domestic rules that are in substance reflective of an existing international rule." (Tzanakopoulos, 2011). In other words, common rules (such as the ones concerning torture), can be found in two different manifestations: inward-looking rules (the national rules forbidding torture within the national borders) and outward-looking rules (international law imposing the international obligation to prevent torture on states). Logically, inward-looking rules from different domestic systems also have powerful similarities between them, despite being formally independent, since they all resemble their common international outward-looking version. Conversely, outward-looking international rules also undertake a process of domestication in which they are infused with domestic-law concepts. Hence, the connection in content of this sort of rules creates a special linkage between the different regulative levels.

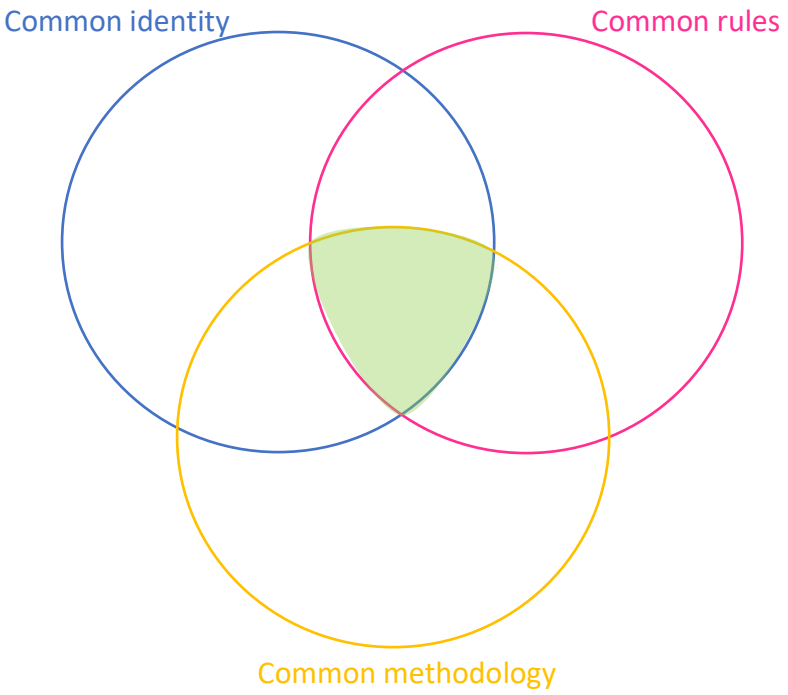
[8] Tzanakopoulos calls this kind of rules "consubstantial norms" (Tzanakopoulos, 2016, pp. 86-88).

It is important to understand that common rules do not necessarily entail an overlap of rules belonging to different legal systems. Although common rules belonging to an international legal system and to a national legal system indeed create an overlap of rules (such as the one created in between Article 2 European Convention on Human Rights ("ECHR" henceforth) and Article 15 of the Spanish Constitution, both concerning the right to live), there is no overlap between "common rules" belonging to different national legal systems (such as Article 15 of the Spanish Constitution and Article 2.2 of the German Constitution, also concerning the right to live). Hence, rules belonging to different legal systems are common rules as long as they share a common substance: common rules are characterized by their consubstantiality.

In other words, their content is similar enough to be considered the same regulation over the same topic in different legal systems regardless of the existence of an overlap of rules. It is not the possible overlap of rules but their common content that substantiates the judicial dialogue. Consequently, formal judicial dialogue can be found in a multiplicity of topics (death penalty, trade, administrative law, etc.) because it is possible as long as the regulations used by the courts are comparable despite belonging to different legal systems. These regulations must be, thus, common rules within different states and/or in the international order.

Summing up, transnational judicial communication can happen as long as independent courts can identify as peers based on their identity and methodology and have common rules to substantiate their dialogue, as shown in *Figure 6*, in which the green area shows the space created by the concurrence of the pre-conditions for transnational judicial communication.

Figure 6 – Transnational judicial communication pre-conditions



Area in which transnational judicial dialogue is posible due to the concurrence of the 3 necessary pre-conditions

2.1.3. Courts' tools to engage in a judicial dialogue.

Because courts must ground their binding decisions within the legal systems that belong to their jurisdiction, in order to import foreign jurisprudence into the system, courts draw content parallels between the common rules of different legal systems. This is how courts justify the suitability of following and applying the criteria of extraneous jurisprudence: if the content of the foreign rule applied by the foreign court is similar enough to a rule within their own system, the legal interpretation established by the foreign court can be transferred into the legal system.

Hence, formal judicial dialogue is, in essence, a creative exercise of comparative constitutional law (if the parallelism is drawn between rules of different domestic systems) or an innovative reading of international law (if the parallel is drawn with the international system). Even when courts' aim is not to translate but to reject the foreign

jurisprudence set forth by the parties to a trial, they also engage in a formal judicial dialogue in order to deny the analogical character of the rules.

It is easy to understand that national courts dive into an exercise of creativity in order to defend the legal relevance of arguments born from a different set of domestic rules, because courts are exclusively bound by and concerned with the rules existing within their jurisdiction. However, it is more counter-intuitive to say that judicial dialogue also requires courts to embrace an innovative take on international law, because international law virtually enters national courts' universe of rules once the state has agreed to be bound by it, and there is no evident obstacle for national courts to apply international law from that moment on.

This theoretical assumption concerning the absorption of international law within domestic systems is not that simple, however, in practice. Because international law is fragmented and undetermined, it is not always clear what its legal entailment is[9]. Hence, governments will try to adjust the legal outcomes of international law to their national agendas, expanding, reducing, embracing, or denying its effects to the government's liking[10]. Consequently, when the binding effects of an international rule are under discussion, courts willing to apply such rule against the government's wishes will have to come up with a creative alternative interpretation beyond the domestic understanding of the concerned international rule[11].

The creative exercise of comparative constitutional law and/or international law is the necessary tool for formal judicial dialogue even if this takes places in a non-explicit way. For instance, a good example of non-explicit formal judicial dialogue is the one concerning the principle of mutual trust upon which EU instruments of judicial cooperation are set up. These instruments (such as the European Arrest Warrant[12], for example) find their raison d'être in the need to match the extension of the national rule of law with the confines of the European freedom of movement, so wrongdoers cannot escape the national judiciary's grasp by simply crossing intra-European borders. EU

[9] In this regard, see the explanations presented in Section 3.1. of the Theory Chapter.
[10] This point is further explained in Section 3.1 of the Theory Chapter.
[11] On how national courts resort to judicial dialogue to overrule their governments' interpretation of international law, see (Tzanakopoulos, 2016, p. 18).
[12] The framework for the European Arrest Warrant is set in the Council decision No. 2002/584/JHA on the Arrest Warrant and the surrender procedures between the member states.

instruments of judicial cooperation are based on the assumption of an equivalent level of protection of fundamental rights among all EU member states that allows for the mutual recognition of their judicial resolutions[13]. However, despite the assumptions, principles and regulation concerning EU instruments of judicial cooperation, the limits of the principle of mutual recognition (and the strings attached to it) is a controversial topic among European courts.

In a case of extradition, the German Federal Constitutional Court (henceforth, "BVerfG") refused to hand over an American citizen to the Italian Justice because the BVerfG ruled that the Italian criminal proceedings did not provide the criminal guarantees required by the German Constitution[14]. By setting the German Constitution against the Italian criminal procedural law, the BVerfG immerged in a comparative constitutional exam of the Italian legal and judicial system of protection of fundamental rights. Moreover, by establishing the prevalence of the German Constitution, the BVerfG also domestically redefined the limits of, not only the mutual recognition principle, but European law itself.

The immediate conclusion of the BVerfG's resolution is that the principle of mutual recognition finds its limit in national fundamental rights. However, since such principle is rooted in EU law, even more important is the implication that EU law itself finds its natural limit in constitutional fundamental rights: the BVerfG challenged, once more, the so-called principle of primacy of the EU law through this resolution (known for this reason as *Solange III case*[15]). In fact, this resolution is the third of a saga known as the "Solange saga"[16] in which the German Constitutional Court has repeatedly stated that EU law would only prevail over national German law as long as it does not undermine the level of protection provided by the German system of fundamental rights.

Hence, the Solange saga is the BVerfG's response to the ECJ's jurisprudential line establishing the principle of primacy of the EU law, starting with the legendary 1964 *Costa v. E.N.E.L. case*[17] and nuanced by the 2013 *Melloni case*[18], in which the ECJ

[13] See Art. 67, 70, 81(1), 81(2), 82(1) and 82(2) of TFEU.
[14]Case 2 BvR 2735/14, veredict dated 15 December 2015.
[15] For a deeper exam of the resolution, see (Hong, 2016).
[16] In fact, the name "Solange" comes from the expression "as long as" in German.
[17] Judgment of the Court of 15 July 1964. - Flaminio Costa v E.N.E.L. - Reference for a preliminary ruling: Giudice conciliatore di Milano - Italy. - Case 6/64.
[18] ECJ (Grand Chamber), 26 February 2013, Case C-399/11, Melloni v Ministerio Fiscal.

specifically pointed out that the national constitutions of the member states must not interfere with the Framework Decision on the European Arrest Warrant, because this would "undermine the principles of mutual trust and recognition which that decision purports to uphold"[19], for the sake of protecting the primacy of EU law. The political implications of the BVerfG's challenge were remarkable: not only did it put one of the EU law tenets into question, but it also gave away with the political presumption of equality of protection of fundamental rights among the member states.

Finally, 4 months after the *Solange III case*, the CJEU addressed the question of EU law's primacy, as a Grand Chamber, in a preliminary ruling in the two joined cases *Aranyosi and Căldăraru*[20], at the request of the German Higher Regional Court of Bremen. Far from simply repeating the doctrine of the *Melloni case* to dismiss the existence of any limitation to the EU law's primacy, in the *Aranyosi and Căldăraru case* the CJEU establishes that fundamental rights are indeed a limit to the efficacy of European Arrest Warrants. However, the CJEU does not ground this limit on national constitutional regimes, but on the Framework Decision of the European Arrest Warrant itself: Article 1(3) explicitly states that the Framework Decision "shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6".

This allowed the CJEU to absorb the BVerfG doctrine concerning fundamental rights without undermining the principle of primacy. In fact, despite the 180-degree spin between the *Melloni* and the *Aranyosi and Căldăraru cases*, the CJEU seemed to present the latter as a clarification or extension of the doctrine set in the first, and although the court reflects on the German legal frame, no reference to the Solange resolutions or the BVerfG are included (although the CJEU does quote the ECtHR, for instance)[21].

Summing up, the BVerfG engaged in an explicit formal judicial dialogue not only with the ECJ, but also with other constitutional courts whose doctrine was enlisted by the BVerfG in its interpretative exercise of comparative constitutional law[22] in order to read international law (European law). Furthermore, the ECJ/CJEU engaged back with the

[19] *Melloni case*, paras. 59, 63-64.
[20] CJEU (Grand Chamber), 5 April 2016. Joined Cases C-404/15 and C-659/15 PPU.
[21] For a deeper analysis of the judicial dialogue surrounding the European Arrest Warrant in relation to human rights, see: (Douglas-Scott, 2011, ps. 277-282).
[22] Case 2 BvR 2735/14, verdict dated 15 December 2015, para. 44.

BVerfG in a non-explicit formal judicial dialogue (adding the ECtHR to the mix). This resulted in a mixed vertical-horizontal formal judicial dialogue (sometimes explicit and sometimes non-explicit) among courts, oscillating between the disagreement and the agreement, about the extension of fundamental rights (understood as both inward-looking constitutional rights and outward-looking European rights) and one of the core principles of EU law that sustains the legal structure of the EU as a political project.

The next Section is devoted to clarifying the concept of inter-judicial coordination as an evolved form of judicial dialogue. Judicial dialogue and inter-judicial coordination involve the same kind of actors and share the aforementioned necessary pre-conditions and tools, but inter-judicial coordination's outcome is more specific.

2.2. Inter-judicial coordination.

As a matter of fact, judicial dialogue and inter-judicial coordination should not be seen as completely independent and different phenomena: the latter can be seen as a specific form of judicial communication qualified by its outcome. While judicial dialogue mainly implies an exchange of ideas, inter-judicial coordination goes one step beyond as it builds up a transnational coalition of non-related courts with a uniform approach to a concrete topic. So, to sum up, I define inter-judicial coordination as the formal dialogue in which non-related courts uphold a common stance based on the same strategic approach.

As explained in the Introduction, this is an interdisciplinary topic whose latest literature navigates in between Global Constitutionalism, IR and International Legal Theory to point out the global systemic effects of judicial coordination. Although the nascent literature seems to focus on the analysis of courts' will to coordinate in order to define the phenomenon, I posit that inter-judicial coordination is better spot out by focusing on its content: the existence of a common approach in courts' argumentative strategy. The following Subsections will examine the nascent literature on the topic and then provide a practical analysis of the definition.

2.2.1. Nascent literature on inter-judicial coordination.

The term inter-judicial coordination has been used to loosely define coalitions of courts taming the effects of international law's fragmentation and transforming the international order. Inter-judicial coordination has been said to uphold democratic values amidst the fragmentation of the international order (Benvenisti & Downs, 2014), to unlock policy areas precluded from judicial review due to fragmentation (Reinisch, 2000), and to advance the constitutionalizing of the international order (Sandholtz, 2021).

The framing of the phenomenon within the larger topic of international legal fragmentation seems to be connected to the legal strand of literature that theorises judicial dialogue's potential to de-fragment the international order (Tzanakopoulos, 2011; Fauchald & Nollkaemper, 2014; D'Aspremont, 2014). Indeed, I posit that inter-judicial coordination (as a qualified form of formal judicial dialogue) has the potential to de-fragment the international order and change the structural conditions of states' international relations. However, the existing literature does not provide a generalizable theory on how the de-fragmentation is obtained: the notion of judicial coordination is often used as a vague reference to some sort of jurisprudential convergence (Reinisch, 2000).

In order to offset the theoretical shortcomings of the legal literature, some scholars have tried to analyse courts' interaction in inter-judicial coordination under the light of IR models such as cooperative game theory: courts would resort to inter-judicial coordination in order to review domestic policies without incurring into the political costs of placing the country in a competitive disadvantageous position in relation to other countries. For instance, according to this view, "governments in developing countries will not be able to withstand external pressure to maintain low environmental standards for dumping hazardous wastes in their territories unless they coordinate their activities or -if not- benefit from coordinated assertiveness on the part of their respective courts. Likewise, in the context of the fight against terrorism, constraints on counterterrorism measures imposed by a court in Country A but not by courts in other countries may expose A's citizens to an increased risk of terrorist attacks." (Benvenisti & Downs, 2017, p. 117).

This attempt to account for courts' coordination relies on evidence of the courts' jurisprudential alignment in certain fields (Benvenisti & Downs, 2017), but such evidence

does not manage to prove courts' specific will to avoid competitive disadvantages. In addition to the lack of empirical evidence supporting this approach, the traditional IR understanding of coordination deployed by theories of collective action or in game theory is also unsuitable to analyse inter-judicial coordination because "[i]n those literatures, coordination refers to games in which the existence of a common standard is more important than the substantive content of the standard." (Sandholtz, 2021, p. 1). Although courts are used to balance different arguments and interpretations, and they can be convinced by the persuasive authority of their foreign peers (Slaughter, 2004), courts would not sacrifice what they deem to be the rightful interpretation of the law just for the sake of coordinating with their peers, since courts' belief in their role of guardians of the legal order is hard-wired into their identity.

In other words, courts would not coordinate themselves if they perceived it as conceding their primary role as legal gatekeepers. Keeping in mind the limitation of this trade-off, the primary goal of this coordination cannot be the achievement of a common stance at all costs, but rather the achievement of a common stance in order to perform their functions. Hence, Global Constitutionalism's literature also defines judicial coordination as the "degree of jurisprudential compatibility or consistency [achieved through judicial dialogue] in some areas" (Sandholtz, 2021, p. 1).

Although I agree with the reasons to turn away from the traditional IR understanding of coordination in this field, I also believe that Sandholtz's definition does not point out the particular element that qualifies for coordination beyond the broad notion of jurisprudential convergence that judicial dialogue can eventually raise (different scholars have identified this convergence under different names: "constitutional cross-fertilization" (Slaughter, 2004), "constitutional empathy" (Jimenez, 2018), "harmonization between jurisdictions" (Hart N., 2017)).

It can be read into the analysis mentioned above that, if not by the primary goal to achieve a jurisprudential agreement (over the content of such agreement), perhaps the coordination could be singled out by the existence of a common goal to pursue through such coordination. For instance, Global Constitutionalism signals the existence of a common purpose among coordinated regional human rights courts: courts coordinate in order to fulfil their function which, in this case, is the adjudication of international human rights (Sandholtz, 2021). The obstacles that regional human rights courts face in order to

fulfil their function are systemic: they cannot count on domestic courts' level of legitimacy, autonomy and enforcement power (Shapiro, 1981). Thus, regional human rights courts (and international courts in general) will engage in judicial dialogue, and try to coordinate as much as possible with other courts, in order to be endorsed by national courts' legitimacy (Müller, 2018), to create an international judicial network to support them (Sandholtz, 2021), or to feed from other international courts' acknowledgement of their persuasive authority (Voeten, 2010).

All in all, international courts allegedly coordinate to compensate the systemic drawbacks hindering their function. As true as these insights concerning international courts' motivation to coordinate may be, these explanations would not account for national courts' will to coordinate (since they do not have the same institutional shortcomings)[23]. More importantly, this approach still does not explain the qualifying element of inter-judicial coordination: its empirical observation is explicit cross-referencing, which simply points out the existence of explicit formal judicial dialogue.

Indeed, what all strands of literature seem to agree on is that inter-judicial coordination is forged on the basis of formal judicial dialogue. Although this work aligns with this idea, it must be pointed out that the literature mentioned above focuses on express formal judicial dialogue, while I posit that non-express formal judicial dialogue can also abut inter-judicial coordination. Consequently, once the requirement of express formal judicial dialogue is removed from the equation of coordination, considerations related to courts' need for cross-referencing are not critical for inter-judicial coordination and courts' motivation to cross-reference their foreign peers cannot be taken as the defining feature of the phenomenon.

Summing up, the aforementioned accounts of inter-judicial coordination form a nascent body of literature that signals the existence of a particular kind of transjudicial communication with singular effects on the tissue of the international legal system. However, further research is required to conceptualize and theorise inter-judicial coordination's effects (Benvenisti & Downs, 2017). In this sense, this thesis is devoted to advance the literature on inter-judicial coordination on the grounds of empirical research. As it will be explained in the following Subsection, inter-judicial coordination

[23] In this regard, see Sections 3.2. and 3.3. of the Theory Chapter.

defining feature is courts' creation of a common stance based on the same strategic approach concerning common rules, and this is the empirical observation to identify the phenomenon.

2.2.2. Inter-judicial coordination's defining feature: a common strategic reasoning concerning common rules for a common stance.

Inter-judicial coordination shares some common traits with other forms of transnational judicial communication, but also have a singularity that singles it out. The common features are the pre-conditions (common identity, common methodology and common rules), the character of the actors (non-related courts), and the tools to sustain the dialogue (international law and comparative constitutional law). The singularity is that it entails a common approach to common rules. Hence, I define inter-judicial coordination as the formal dialogue among non-related courts that develop a common stance based on the same strategic approach concerning common rules.

- I define non-related courts as those courts that are not bound to each other by a hierarchical relationship. Hence, just like in any other type of judicial dialogue, in inter-judicial coordination courts' communication can be vertical, horizontal or mixed vertical-horizontal as defined in the previous Sections, depending on whether it involves only national courts or international courts as well.
- I define formal dialogue as the kind of transnational judicial communication that takes place through courts' resolutions. As explained in the previous Sections, formal judicial dialogue can entail explicit cross-referencing among courts, or non-explicit assimilation of judicial grammar and/or reasonings.
- I define common stance as the common decision to reject, validate or amend the same kind of policy.
- I define strategic approach as the core elements structuring courts' argumentative strategy. The nature of these key elements will depend on the goal that the courts are trying to achieve, but they are always related to the substance of the law applicable to adjudicate the case (hence, related to what is known as substantial law as opposed to procedural law).

The adherence to the same strategic approach is the key feature singling out inter-judicial coordination: the keystone supporting the reasoning behind the judicial decision of the coordinated courts is the same. Hence, literature's broad reference to jurisprudential convergence is narrowed down to the strategic approach in my analysis. Because these strategical reasonings are the cornerstone supporting the overall decision of the court, they are presented as the starting point that unfolds a legal chain leading to the court's stance. My definition of inter-judicial coordination has been inductively obtained from a clear case of inter-judicial coordination concerning environmental protection.

When it comes to environmental regulations, many countries will not agree to enter into international agreements unless they stay in the realm of soft law. This reluctance is mainly explained by two reasons. First, environmental protection is an expensive endeavor that requires a substantive investment of resources and structural changes in the state's economic and productive model. Secondly, rising the national bar of environmental protection will come with competitive disadvantages in front of other states with lower standards. Developing countries are specially concerned with these economically adverse consequences, and some of their governments have found a common strategy to claim the states' lack of liability in front of pro-environmental civil activism: they have been reluctant to pass national regulation on environmental issues in the absence of strong international law forcing them to comply with international obligations concerning them.

By no means am I suggesting an absolute absence of evolution in this field. On the contrary, as documented by Onzivu, the institutional and legal innovations of developing countries in the field of environmental protection are remarkable (Onzivu, 2006), and there has been a crescendo governmental engagement in the protection of the environment over the decades (Onzivu, 2006, ps. 637-664). My claim is that national courts have substantially contributed to this evolution (Onzivu, 2006, ps. 665-672), especially in those countries in which the government neglected this policy-field, since courts coordinated to reinforce and enforce whatever scarce legal framework they could find and work with (Bodansky & Brunnee, 1998; Boyd, 2011a).

Hence, the executive branches of some developing countries have exploited the fragmentation of the international legal order (and the weakness of the international law stemming from it) to ensure the absence of national law that could burden them. Although

this lack of domestic regulation also used to prevent national courts from stepping in, judicial activism spurred in the decade of 1990[24] and prompted many national courts from developing countries to coordinate themselves in order to defy their governments' understanding of the legal framework concerning environmental issues, forcing them to change their policies.

Faced with the inexistence of domestic regulation in this field, these domestic courts used the same strategic approach to review environmental-related cases: they stated that the state's legal obligations regarding the protection of the environment exist without the need of explicit domestic regulation, because they are embedded within an expanded understanding of the constitutional right to life. Although the right to life is one of the most well-known, well-founded, and undeniable fundamental rights in most countries, the interpretation rendered by these national courts was certainly non-traditional and innovative, so in order to set it out without national precedents they relied on their peers from other countries: these national courts used as a legal precedent the resolutions of other national courts belonging to different legal systems where the right to life also exists. In other words, because the right to life is a common rule for all of them, they could import this innovative interpretation (which is a sophisticated exercise of comparative constitutional law).

This coordinated action to curb the executive discretion of the government in the field of environmental protection was led by the Indian Supreme Court and was followed by its peers from other developing countries such as Pakistan, Bangladesh, Sri Lanka and many others that enthusiastically referred to Indian cases with the same intent. The Indian Supreme Court's resolutions also relied on foreign jurisprudence to come up with its reasoning: as shown in its landmark resolution of 2000[25], the Indian Supreme Court has

[24] Among the courts involved in this movement there could be found the courts of Brazil, Chile, Costa Rica, Ecuador, India, Nepal, Pakistan, Peru, the Philippines, South Africa, Sri Lanka, Tanzania, Turkey, and Uganda, for instance. For a deeper account of their activity, see (Bodansky & Brunnee, 1998).

[25] A.P. Pollution Control Bd. (II) v. Nayudu, [2000] INCS 679, [2001] 2 S.C.C. 62 (Indian Sup. Ct.).

resorted to judgments from the Philippines[26], Colombia[27], South Africa[28], the ECJ[29], the ECtHR[30] and even a decision passed by the American Commission on Human Rights[31] to engineer this creative reading of the right to life.

These national courts reinforced their manoeuvres of comparative constitutional law with an appeal to the scarce international law they could count on. In other words, beyond cross-referencing each other's creative interpretation of the constitutional right to life, they also reinterpreted the force of the international rules that were previously deemed as non-binding or "soft law" to strengthen their claim concerning the environmental obligations of the state. National courts referred to these international regulations arming them with a newly gained sense of binding law. Thus, when the Indian Supreme Court referred to the Declaration of the 1972 Stockholm Conference on Human Environment as the "Magna Carta of our environment" and consequently imported from it key concepts for the legal protection of the environment such as "the polluter pays" principle or the "precautionary principle", it provided such Declaration with the binding force of domestic law. Furthermore, when many other Supreme Courts from other countries followed its lead, they opened the path to consider the content of this Declaration as a truly binding piece of hard international law, not because it was written down in such Declaration, but because of the repeated jurisprudence of national courts in this sense.

Although the 1972 Stockholm Declaration inspired the constitutional recognition of the right to a healthy environment as a fundamental right in many countries (Boyd, 2011b), it was inter-judicial coordination that ignited the change in many others. In Argentina[32],

[26] Minors Oposa Vs. Department of Environment and Natural Resources, 33 I.L.M. 173 (1994).
[27] Fundepúblico Vs. Mayor of Bugalagrande and others, Corte Constitucional, Expediente T-101, June 1992, Sentencia No. T-415/92, June 1992 (on appeal).
[28] Wildlife Society of Southern Africa & Ors. Vs. Minister of Environmental affairs and Tourism of the Republic of South Africa and Ors,1996(9) BCLR 1221 (Tk); 1996 SCLR LEXIS 30.
[29] Portugal Vs. E.C. Council, 3 C.M.L.R.331, 1997.
[30] Lopez Ostra Vs. Spain (303-C, Eur.Ct.H.R.(Ser.A) 1994).
[31] Yanomani Indians Vs. Brazil; Inter- Amer.C.H.R. 7615 OEA/Ser.L.V/II/66 Doc.10 rev. 1 (1985).
[32] The most representative resolution is Margarita v. Copetro (1993), ruling of 10 May 1993, Cámara Civil y Comercial de La Plata.

Costa Rica[33], El Salvador[34], Greece[35], Kenya[36], Nepal[37], Peru[38] and Romania[39], courts' activism lead to the eventual recognition of the right to a healthy environment in the Constitution, while in others such as Bangladesh[40], Guatemala[41], India[42], Israel[43], Italy[44],

[33] The jurisprudential turning point of the country can be found in: Presidente de la Sociedad MARLENE S.A. v. Municipalidad de Tibás Marlene, Decision 6918/94 (November 1994), Sala Constitucional de la Corte Suprema de Justicia.

[34] See Resolution No. 242-2001, Sala Constitucional de la Corte Suprema de Justicia: San Salvador (26 June 2003); and for a comment concerning such resolution: (Mejía, 2009). This resolution extends the right to a healthy environment to the whole population, since it that was already included in the Constitution but only for children.

[35] See, for instance: (Sioutis, 2002).

[36] See, for instance: P.K. Waweru v. Republic of Kenya (2006), High Court of Kenya,Misc. Civil Application No. 118 of 2004, 1 KLR (Environment andLand) 677; Rodeers Muema Nzioka and Others v. Tiomin KenyaLimited (2001), HCCC No. 97 of 2001.

[37] In Suray Prasad Sharma Dhungel v. Godavari Marble Industries and others (1995), WP 35/1991 (Supreme Court of Nepal), the Courts says that "[S]ince a clean and healthy environment is an essential element for our survival, the right to life encompasses the right to a clean and healthy environment".

[38] In this sense, see the case: Sociedad Peruana de Derecho Ambiental v. Dirección Regional del Ministerio Pesquería et al., (1993) Action No. 1058-92, Supreme Court of Justice (17 February 1993).

[39] Decision No. 148 of 16 April 2003 on the legislative proposal to revise the Constitution of Romania (Constitutional Court of Romania). In this decision, Romania's Constitutional Court instructed the government to include the right to a healthy environment as a fundamental right in the Constitution.

[40] The most representative resolution is: Dr. M. Farooque v. Bangladesh et al. (1997), 49 Dhaka Law Reports, 1, at paragraph 101.

[41] The most representative resolution is: Concesiones otorgadas por el Ministerio de Energía y Minas a Empresas Petroleras. Resolución en Conciencia del Procurador de los Derechos Humanos de Guatemala en Materia Ambiental. Exp.002-98/D.S. (10 October 1998); Acción de inconstitucionalidad total. Promovido contra el congreso de la República Corte de Constitucionalidad. Decision 575/98 (23 February 1999).

[42] See: Virender Gaur v. State of Haryana, (1995) 2 SCC 577; M.C. Mehta v. Union of India (2002) 4 SCC 356.

[43] The most representative resolution is: Adam, Teva ve' Din (Human Being, Nature and Law) v. Prime Minister of Israel et al. (2004) No. 4128/02 (16 March 2004) (Supreme Court). More specifically, this court establishes that the complainant's right to a healthy environment is "based on the constitutional right to 'honor of his [human] being and his freedom'".

[44] The most representative resolution is: Review of the constitutionality of Law No. 349, Establishment of the Ministry of Environment and standards of environmental damage, 8 July 1986, Decision 210/1987, Constitutional Court (22 May 1987).

Malaysia[45], Nigeria[46], Pakistan[47], Sri Lanka[48], and Tanzania[49] the constitutional character of the right to a healthy environment as a fundamental right remains a judicial construction vested, nevertheless, with full enforceability. The coordinated action of the national courts mentioned above managed to interfere in the policies set down by the government, establishing institutional mechanisms to evaluate environmental damages and oversee the government's response to it.

This is a case of inter-judicial coordination through express formal judicial dialogue in which the common approach of the courts is a wide interpretation of the right to life as to encompassing the right to a healthy environment. Due to the fact that the right to life is a common rule across national and international systems of human/fundamental rights, this interpretation virtually bridged the formal gap between systems: the content of the right to life has been standardized across systems under an expansive interpretation that encompasses the right to a healthy environment. In overall, inter-judicial coordination expanded and strengthened the catalogue of human/fundamental rights.

Hence, inter-judicial coordination entails one specific kind of jurisprudential convergence: the jurisprudential alignment on a common strategic approach to common rules that unfolds a common stance among the courts. The strategical approach, in this case, is to argue that the right to a clean environment belongs within the natural content of the right to life. Because of this strategic approach welding the right to life and the right to a clean environment, the latter became part of the national legal system, even without a legalizing act on the part of the executive or the legislative branches of the state. The legal chain of consequences then finishes establishing national mechanisms of

[45] The most representative resolution is: Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan (1996) 2CLJ 771, at 801 (Court of Appeal). This resolution clearly follows the Indian Supreme Court's jurisprudence.
[46] For instance: Jonah Gbemre v. Shell Petroleum Development Company Nigerian Limited and Others, Judgment of 14 November 2005, Suit No. FHC/B/CS/53/05 (Federal High Court of Nigeria, Benin Division).
[47] The most representative resolution is: Shehla Zia v. WAPDA (1994) PLD 693 (SC).
[48] The most representative resolution is: Lalanath de Silva v. Minister of Forestry and Environment (1998), Fundamental Rights Application 569/98, Supreme Court of Sri Lanka.
[49] The most representative resolution is: Festo Balegele et al v. Dar es Salaam City Council (1991) CivilAppeal No. 90 of 1991 (High Court); Joseph Kessy et al. v. Dar es Salaam City Council (1998), 4 IELR 445 (High Court of Tanzania).

protection to ensure the right to a healthy environment, hence reviewing the domestic policies established by the government in this field.

While the pre-conditions, tools and defining characteristics of inter-judicial coordination have been explained in the current Chapter, the extension of its effects over the global order and the mechanisms behind such effects are still an unsolved conundrum. This Chapter's goal is to delineate the phenomenon and to provide a definition that will allow its empirical measurement (by identifying the common strategic approach). However, this Chapter has neither explained how inter-judicial coordination is created nor identified the mechanisms leading to its political and legal effects. The following Chapter (the Theory Chapter) is devoted to unravelling the answers to these questions.

-- Chapter III: Theory Chapter --

As said in the previous Chapter (the Conceptual Chapter), I define the phenomenon of inter-judicial coordination as the formal dialogue among non-related courts that uphold a common stance based on the same strategic approach to common rules. However, the questions concerning the dynamics of such coordination and the mechanisms behind its effects, remain unsolved. This chapter is devoted to providing such answers.

The overarching goal of this thesis is to explore the full potential of courts as international political actors (hereinafter, "IPAs"). I understand IPAs in terms of their capacity to shape "the trends that are transforming world politics" (Kegley & Wittkopf, 2009, p. 13). Although international courts' role as IPAs has been examined from many different perspectives (see Section 3.2), national courts' potential has been largely understudied and reduced to their incidental impact on specific countries' international relations (see Section 3.3.). I posit that both national and international courts reach their fullest potential as IPAs through inter-judicial coordination. On the one hand, because national courts can only become trend-setters through their coordinated collective action. On the other, because inter-judicial coordination maximizes international courts' capacity to create systemic changes. My main argument, in short, is that inter-judicial coordination threatens the efficacy of the global policies under review, hence constraining other IPAs through the creation of global trends that have an impact on global IR.

Moreover, since the trends created by inter-judicial coordination are legal trends in essence, this phenomenon also has an impact on the legal framework in which states' international relations unfold. In this regard I also posit that inter-judicial coordination de-fragments the global legal order insofar as the courts involved apply the same approach to their common rules. Although this claim belongs to the realm of legal theory, to the extent that law is a relevant condition to the international relations of states, courts' capacity to de-fragment the global legal order amounts to their capacity to modify the structural conditions of states' international relations as well. In other words, courts' capacity to constrain other IPAs is proportional to their capacity to de-fragment the global order and vice versa. Hence, both the legal and IR perspectives are necessary to provide an all-encompassing account of courts as IPAs.

International lawyers tend to understand the de-fragmentation of international law as the transnational standardization of its meaning (process of "legal integration") (D'Aspremont, 2014; Nordeide, 2014). However, standardizing the meaning of international law across borders implies the clarification of the relationship among the different rules of the system as well. This is especially true when it comes to the de-fragmentation produced by courts, because it is at the core of the judicial function to balance conflicting norms. Consequently, when courts apply the same strategical reading to international legal rules, this will standardize their meaning, clarify the hierarchical relations among the different rules of the system and, in short, de-fragment international law as a system.

However, in an increasingly interconnected world shaped by globalization, most international regulative challenges have domestic ramifications, the domestic and international legal domains grow interwoven (Stewart, 2014) and national and international courts are often faced with antinomies that lie, not within one of these regulative levels, but across them. Therefore, a world in which the content and order of the international legal systems clash with the content and order of the domestic legal systems is still a world shaped by legal fragmentation and its politics. Consequently, the phenomenon of international legal de-fragmentation should be examined from a global perspective as the cumulative effect of three factors: the standardization of international law's meaning, the creation of hierarchical relations among the rules of the international system and the coordination of the international and domestic legal systems. In other words, the de-fragmentation of the global order requires international law's content and order to be consistent with the content and order of the domestic legal systems.

Consequently, this thesis puts forward two interwoven theories related to inter-judicial coordination: an IR theory on courts' coordinated capacity to constraint other IPAs and a legal theory on courts' coordinated capacity to de-fragment the global order. These two theories are as interconnected as intertwined are the political and legal aspects of international fragmentation. To begin with, the fragmentation of the international system is a legal phenomenon with political roots since it is the product of the political anarchy of the global order. In addition to this, such fragmentation widens the policy-options available to IPAs such as national governments and international organizations. Hence, the fragmentation of the international legal order is a prominent current feature given by

the anarchy of the international order. It is then necessary to understand its nature and consequences in relation to both the international and domestic orders before laying out the IR and legal theories concerning the creation and effects of inter-judicial coordination.

In this sense, the first Section of this Chapter (Section 3.1.) will provide the political and legal framework of my theory: Subsection 3.1.1. explains the political causes of the fragmentation of the global order (using as an example counterterrorism policies, since this will also serve as a frame for the Empirical Chapter), and Subsection 3.1.2. explores its impact on the domestic setting of powers and the rule of law. Following this framing Section, Sections 3.2. and 3.3. explore the limitations of international and national courts as trend-setters when acting alone: in isolation, they can neither constrain other IPAs nor tackle the global fragmentation in which these other IPAs entrench their policies.

The IR and legal theories behind inter-judicial coordination's mechanisms and effects are laid out in Section 3.4.: while the Conceptual Chapter provides the definition of the phenomenon and the taxonomy of its components, Section 3.4. examines it from an operational point of view. In other words, the Conceptual Chapter offers a description that allows us to recognise the phenomenon and distinguishes it from similar phenomena within the field of transnational judicial communication, and Section 3.4. examines under which conditions will the phenomenon constrain other IPAs and advance the de-fragmentation of the international order.

In this regard, both the legal and IR perspectives are brought together in order to provide the most encompassing account of the creation and effects of inter-judicial coordination. On one hand, the legal tradition concerning international custom is brought forward in order to explain the importance of a critical mass of national courts to the existence of the phenomenon (Subsection 3.4.1.). On the other, IR norm evolution theory is necessary to explain both the creation of such critical mass of national courts, the role of international courts in the process and the mechanism behind the behavioural change of IPAs (Subsection 3.4.2.). Subsection 3.4.3. explores the different kinds of inter-judicial coordination from a material point of view (this is, depending on the kind of rules it relies on) and their effects on the de-fragmentation of the global order.

3.1. Structural framework.

This Section of the Theory Chapter will explore the structural environment in which inter-judicial coordination takes place and, hence, this Section serves as a frame for the theories presented in this thesis. While Subsection 3.1.1. will explore the structural features of the international order in relation to the international legal system, Subsection 3.1.2. will consider their impact on the domestic order.

3.1.1. The impact of international legal fragmentation on the international order.

In an anarchical international order, the authority to create, interpret and apply legal rules is decentralized in a plurality of agents whose competencies are neither well-demarcated nor fully organized in a hierarchical sense: because these agents' regulative activity unfolds in an anarchic way, international law is hindered by antinomies and lacunas.

Hence, as a result of the anarchy surrounding states' international relations, the international legal system is fragmented1: it resembles a very diverse patchwork of rules stemming from an amalgam of creators and appliers of different nature, working in an anarchical manner, without necessarily taking into account each other's legal production or the coherence of the system. Consequently, the fragmentation of the international legal

[1] It is profuse the legal and IR literature concerning the fragmentation of the international law. For its part, legal literature focuses on the international legal order's departure from the iuspositivist tenets concerning Law as a system: tainted by the absence of a clear system of sources of International Law, the international legal system lacks unity, coherence and completeness. Precisely because of its fragmentation, legal theorists of the mid-twentieth century chose either to deny the legal nature of international law or, when asserting it, to assume that the international legal system was at its primitive stage (Kelsen, 2017). Since "unity", "coherence" and "completeness" became the key aspirations of the iuspositivist archetype of legal system after domestic systems overcame their own fragmentation between the end of the XVIII century and the beginning of the XIX century, the next generation of legal theorists assumed that the international legal order would follow the same path once the political tensions of the Cold War would have been overcome. However, the arrival of globalization simply replaced the traditional East-West polarization of the aftermath of the Second World War with a new mosaic of multifaceted tensions that increases the environment of global competition from which the fragmentation of the international legal order is born (Koskenniemi & Leino, 2002). Faced with the permanent presence of international fragmentation, legal literature seemed to transit from the pessimism of legal philosophers until the 1980 decade (Weil, 1983) to the more positive view of practitioners who described it as the logic response to the changing needs of a global market (Charney, 1996). Hence, most of the legal doctrine underestimates or simply ignores the political roots and consequences of international law's fragmentation.

order takes place both in its creation and in its application, and it maintains a close two-way relationship with the legal indeterminacy imprinted in international rules by the political struggle from which international law is born.

Unlike domestic law, international law does not flow from a hierarchically organized system of sources, in which the legislative function is clearly allocated. As a consequence, the legal international arena is very much that: an arena in which different political forces strive to impose their will upon adversaries, to pull allies under their influence and to align any other international actor with their preferences when it comes to the governance of a transnational phenomenon. Consequently, international law is not only a legal regime, but also a political project born from an ongoing and hectic political negotiation. All states go into this negotiation trying to maximize the benefit they could obtain from a tailored international system to their national interests (Koskenniemi, 2007): states are as concerned with holding others accountable as they are with ensuring themselves an "exit route" from international obligations, in order to protect their sovereignty and international leverage.

As a result of the aforementioned political negotiation, international law is very often intentionally open to interpretation, without specific obligations, sanctions or enforcement mechanisms, since states struggle to agree beyond the "agreement to leave such determination for decision as the situation arises (with the hope, of course, that they will then be in position to decide for oneself)" (Koskenniemi, 2007, p. 10). Hence, the indeterminacy of international law stems from the political scenario created by the fragmentation of the international legal order. Interestingly enough, such indeterminacy also fuels, in turn, international legal fragmentation. Both states and international organizations exploit this circular relationship between legal indeterminacy and fragmentation.

To begin with, it is not unusual for states to avoid the grip of international obligations by exploiting international legal fragmentation: the indeterminacy and fragmentation of the international law allow them to drift away toward more accommodating special regimes[2], which further fragments the legal international order. The indeterminacy of international

[2] International law's branching off to special regimes is thoroughly examined in (Koskenniemi & Leino, 2002).

rules allows for their resignification as appropriate, and the existence of an unorganized plurality of regulative bodies allows states to select the normative framework that suits their national interest the best (strategy known as forum shopping). The combination of these two features provide states with a very wide margin of interpretation in order to argue that an exception or a new rule must be created since the matter at stake is not comprehended by the pre-existing international rule.

For their part, international organizations are not necessarily fighting against international law's indeterminacy. The assumption is that if the rule is general enough and leaves room for interpretation, it will be more difficult to argue that such rule includes too many or too few cases, so a legal answer can be found without lex specialis. This way, the usual political bargaining concerning the content of international law could go on without the need to create new venues, forum shopping would virtually decrease, and a smaller number of bigger international institutions would not have to compete for the states' attention and would retain a significant amount of power.

Thus, both pre-existing and new-born international regimes try to take advantage of fragmentation and legal indeterminacy. Pre-existing international regimes capitalize their legal indeterminacy to attempt to channel international relations their way and to avoid leaks of power in the field of international regimes. For their part, special regimes fully embrace indeterminacy to flourish as lex specialis in the margins of pre-existing regimes. However, as seen before, formulating regimes in an open-ended manner has proven to be the wrong strategy when it comes to preventing exceptions and special regimes from blooming into a more fragmented international order: the unavoidable wide range of interpretation this strategy comes with actually paves states' way with fragmentation, as mentioned before.

Hence, this perfect storm for international legal fragmentation comes from the fact that the existing international institutions want to keep their share of international relevance as much as new-born international institutions want to grasp their own. But most importantly, it also comes from the fact that this is a turf battle that states can instrumentalize to remain in control of their sovereign power and international influence.

Thus, the indeterminacy and fragmentation of the international law are deeply related: they both find their common cause in the political struggle underlying the international law's processes of creation and application amidst international anarchy. More importantly, in addition to their political roots, these legal phenomena also have strong political implications, not only at the international level, but also in the national sphere. In this regard, it is well-acknowledged, for instance, that states exploit this combination of indeterminacy and fragmentation of the international law in order to either deepen fragmentation (Koskenniemi, 2007) or to pursue their prevalence in the field of international relations3. However, it is less known that the fragmentation of the international order also expands national governments' discretion at the expense of shrinking national judicial review. This constitutes an over-dimensioning of the executive branch of the government that erodes the principle of separation of powers and the system of checks and balances informing the liberal state[4].

As it will be explained in the following Section, maintaining the fragmentation of the international legal order allows national governments to avoid both international and national institutional mechanisms to overview their international regulative choices and their consequences at the national level. Because the fragmentation of the international order implies the avoidance of a supranational authority with a centralized power to regulate and interpret international law, states can coordinate to favour the creation (or inexistence) of rules suiting their needs, to re-signify them to their convenience and to shield their policymaking activity from national judicial review, especially when an international organization is involved in the crafting of the international rule at stake.

[3] See: (Benvenisti & Downs, 2017, pp. 19-23). For a more general account on how states instrumentalize international law to establish their hegemony, see: (Krisch, 2005).

[4] Beyond the erosion of the institutional mechanism to overview the executive branch of the government, Benvenisti & Downs also point out the erosion of the social mechanisms constraining executive policies, such as public opinion (Benvenisti & Downs, 2009a). However, since this work posits that the coordination of national and international courts is critical to the de-fragmentation of the international legal order and the overall constitutionalizing of the global order, the following Section focuses on the effect of international fragmentation on judicial review.

3.1.2 The impact of international legal fragmentation on the domestic order.

Channelling policymaking through international venues provides states with not only the opportunity to redefine the regulative framework of their choice amidst the fragmentation and indeterminacy of the international legal system, but also allows governments to expand their executive discretion since the resulting policies are virtually *immune* to national judicial review.

First of all, international policies and decisions enjoy what could be defined as an *immunity of origin* when they are produced through an international venue. On the one hand, since international organizations are independent bodies without any specific nationality, national courts used to deflect the review of their decisions, rules and resolutions under the assumption that such organizations' activity falls outside their jurisdiction (Reinisch, 2000)[5]. On the other, the international order has also failed to develop review mechanisms: because of the constant threat posed by forum shopping, states have managed to hamper the creation of international courts or, when unavoidable, they carefully restrict these courts' jurisdiction and enforcement powers in order to shelter their sovereignty (Hurd, 2017). Hence, the policies produced by international organizations are rarely legally reviewed in origin, which is fully consistent with the fragmentation and anarchy affecting the international order. For their part, policies forged under more informal forms of international governance (Slaughter, 2004; Vabulas & Snidal, 2013; Vabulas, 2019) are even better shielded under this immunity, as the informality of the venue does not provide for a clear subject to be hold accountable for the origin of the decision.

In addition to this immunity of origin, such policies are also sheltered by some sort of *immunity of application*, since they do not necessarily face national judicial review once they have descended to the national level either: any judicial attempt to review the executive's interpretation of the existence and transposition of an international obligation

[5] Reinisch describes the policies affected by the *immunity of origin* as "precluded policy areas": fields in which courts are barred from undertaking policy analysis in order to try the case. Reinisch mentions the fields of "international immunities" and "international organizations" as examples of precluded policy areas.

is usually neutralized by the government's appeal to its *auctoritas* as the branch of the state in charge of international affairs[6].

Moreover, the stronger the government's powers concerning the matter at stake are, the wider this immunity of application becomes. National security is the policy field that better exemplifies this effect. By the end of the Cold War, national courts had turned their conformity with executive policies concerning national security into a hallmark of their judicial practice. When it comes to national security, courts would argue their institutional shortcomings and lack of authority in order to assess the threats to national security and uphold the government's wide margin of discretion (Rehnquist, 2000), even at the expense of fundamental and civil rights (Waldron, 2003).

Hence, when combined, the appeal to international affairs and national security is the most difficult scenario for courts to review national governments' decisions, because these fields have been traditionally dominated by the wide margin of executive discretion that was deemed necessary to protect national interests. This scenario materialised, stronger than ever, in the aftermath of the 9/11 terrorist attacks, when a global antiterrorism effort was coordinated by national governments across the world.

On 28 September, 2001, the UNSC adopted Resolution 1373[7], which stated that all states shall prevent and suppress the financing of terrorist acts and called upon them to become parties to the 1999 International Convention for the Suppression of the Financing of Terrorism. This resolution prompted a wave of far-reaching legislative changes in a multitude of states, promoted by the executive branches of the governments and accepted by the legislatures without hesitation (Roach, 2006). However, Resolution 1373 did not provide a definition of terrorism or any guidance to tackle the regulation of such concept.

Faced with the legal indeterminacy of this international obligation to counter international terrorism's financing (and taking advantage of the lack of a centralized regulative power that comes with a fragmented international order), states adopted the definition that suit them the best: the vast majority of the states took the exceptionally broad definition of

[6] This judicial doctrine can be found in different jurisdictions under different names: "non-justiciability doctrine" (United Kingdom), "acte de gouvernement doctrine" (France), "justizfreie Hoheitsakte" (Germany) or "political questions doctrine" (United States). In this sense, see (Reinisch, 2000, pp. 92-99). See also (Benvenisti, 1993) and (Benvenisti, 1999).
[7] S/Res/1373 (2001).

international terrorism embodied in the British Terrorism Act of 2000[8] as a base for their domestic regulations. Far from establishing legal constraints on the antiterrorist action of the state, the resulting definitions only granted a remarkable wide margin of discretion to their governments (Roach, 2006). As a result, democratic governments were entitled to issue deportation orders[9] and to incarcerate individuals without disclosing the evidence against them or providing any account for their decision beyond the vague quotation of the antiterrorist domestic regulation at hand[10].

However, as said before, the instrumentalization of the indeterminacy and fragmentation of the international legal order is not the exclusive province of national governments: international organizations also take advantage of them regarding international security. The UNSC, as the one international organization concerned with international peace, imposed targeted sanctions[11] on individuals allegedly posing a threat to the international security[12]. Similar to the national measures mentioned above, UNSC targeted sanctions are also imposed through a profoundly opaque procedure, in which the suspects do not know the charges or evidence against them[13]. Targeted sanctions are the result of a long academic search (sponsored by various states) for more humanely responsible and effective sanctions in the fight against international terrorism[14]. The innovations obtained

[8] Terrorism Act, 2000; C. 11.
[9] See, for instance, Canada's Anti-terrorism Act (Act, S.C. 2001, c. 41), Articles 43-46.
[10] See, for instance, the United States Military Commissions Act of 2006, whose purpose was to "authorize trial by military commission for violations of the law of war, and for other purposes" (according to the tittle of the act), hence circumventing national courts' authority and hampering the detainees' right to habeas corpus.
[11] Unlike the first generation of UNSC sanctions that sought to limit the resources of countries that violate international law, peace and security, these sanctions specifically target the individuals responsible for the violation. For a more detailed description of the characteristics of these sanctions see, (Willis, 2011, pp. 678-679) and in general (Giumelli, 2015).
[12] Giumelli performs an empirical analysis of the content of such sanctions (Giumelli, 2015). The targeted sanctions regime connected to international terrorism stems from UNSC Resolution 1267(1999), and it has been developed by subsequent resolutions: 1333 (2000), 1363 (2001), 1373 (2001), 1390 (2002), 1452 (2002), 1455 (2003), 1526 (2004), 1566 (2004), 1617 (2005), 1624 (2005), 1699 (2006), 1730 (2006), 1735 (2006), 1822 (2008). In 2011, the sanctions regime was divided in two tracks for the Taliban (UNSC Resolution 1988 (2011)) and al-Qaeda (UNSC Resolution 1989(2011)). For a review of the goals and effectiveness of these regimes as counterterrorist measure, see the Qualitative Dataset on Targeted Sanctions created by the Graduate Institute of Geneva in 2014, available at: https://www.graduateinstitute.ch/sites/internet/files/2019-10/TSC%20Qualitative%20Database%20(June%202014).pdf [last accessed on: 12/02/23].
[13] Concerning the opacity of the processes of listing and de-listing in the UNSC, see (Willis, 2011, pp. 682-688).
[14] Switzerland initiated the research in the so-called *Interlaken Process* and the American academy (specifically, the Watson Institute for International Studies at Brown University) took

definitely permeated the practice of the UNSC, but they have never been translated into a normative provision that could write down in black and white the legal limits of its actions. Once the UNSC issues these sanctions, the governments of the UN Members or the European Commission (as the executive branch of the European Union[15]) are in charge of enforcing them within their territory. In doing so, once again, they are shielded by their authority in international affairs and national security, as well as by the international origin of the decision.

Hence, those sanctioned under this lack of information (either by their national governments or by the UNSC), are deprived of the most basic requirements of due process: not only are they prevented from duly exercising their right to defend themselves during this special sanctioning process, but they are also stripped off the possibility to appeal afterwards. This is a clear violation of fundamental human rights and, in fact, according to Martin Scheinin (who was the first UN Special Rapporteur on human rights and counterterrorism from 2005 to 2011), "repeated calls by the international community for action to eliminate terrorism, in the absence of a universal and comprehensive definition of the term, may give rise to adverse consequences for human rights"[16].

upon itself to continue with the task: in 2001 its conclusions were synthesized, and this first draft was later amended by the *Bonn-Berlin Manual*, following the initiative of the German government. Between 2003 and 2004, the *Stockholm Process*, organized by the Swedish government, brought together politicians, political scientists and lawyers of very diverse paths and nationalities to turn the project into global.

[15] Although it has been legally disputed whether the EU must abide by the UNSC resolutions (since the EU itself is not a member of the UN), some scholars have argued that its legal bond to the UN comes as a delegation of European states' common belonging to both international organizations (Cot & Pellet, 2005; Vlad, 2014).

[16] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, UN document E/CN.4/2006/98, para. 27. Document available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/168/84/PDF/G0516884.pdf?OpenElement [last visited on 12/02/23].

Faced with the shortcomings of seeking judicial protection in the international sphere[17], the recipients of the aforementioned targeted sanctions[18] and other post-9/11 counterterrorism measures addressed their complaints to national courts. Initially, national courts used to declare the review of the origin and application of counterterrorism measures out of their jurisdiction given the following normative syllogism: the state has the inexorable international obligation to transpose UNSC resolutions (according to Articles 2(4), 24, 25, 39 and 103 of the UN Charter)[19], and their transposition always falls within the regular scope of discretion awarded to the government as the main authority in charge of, not only international affairs, but also national security.

In a progressively more interconnected global world, states are increasingly turning to the international arena in order to channel their regulatory needs (Stewart, 2014). However, as explained in previous Subsection, this increase in the international regulation is far

[17] The right to due process is not only a fundamental right in many states, but a human right recognized in multiple international legal bodies: for instance, in Articles 2(3) and 14 of the International Covenant on Civil and Political Rights (adopted by the United Nations General Assembly Resolution 2200A (XXI) on 16 December 1966, and in force from 23 March 1976) 999 UNTS 171 (henceforth ICCPR). However, the only international consequence that may derive from the violation of this or other human rights set forth in this legal text is the preparation of a report by the UN Human Rights Committee. It is worth noting that the enforcement mechanism presented by the ICCPR is one of the most sophisticated in the field of international human rights protection, since it is activated not only through inter-state complaints, but it also admits individual communications from victims (procedure developed in the First Protocol to the ICCPR). As remarkable as this normative system is, its allowance for individual complaints still is an exception within the international legal order (leaving aside some regional regimes like the European one), which attributes the status of subject of law and legal standing to states rather than to individuals. Hence, the instances offered by the international order to individuals in order to protect human rights are scarce.

[18] For the purpose of this work, we will identify as "targeted sanctions" all of the sanctions limiting individual freedoms without the observance of due process requirements, regardless of whether they were imposed by the UNSC or national governments, and regardless of whether they were enforced by national governments or the European Union (henceforth "EU"), but we will also take into account other counterterrorism policies born in the post-9/11 era as a response to the so-called "global war on terror".

[19] First of all, the UN is the ultimate international authority concerning international peace and security, as established by a joint interpretation of Articles 2(4), 24 and 39 of the UN Charter (approved on 26 June of 1945, and in force from the 24 October of 1945) 892 UNTS 119). As a result, membership to the UN comes with the transfer of the state's power to threat or attack other states to the UNSC. Thus, the UNSC will assess and determine the actions that pose a threat to the international security or peace, and it will establish the suitable remedies for such breach. Secondly, according to Article 103 of the same Charter, the obligations acquired by the members of the UN under the aforementioned Charter will prevail over any other international obligation. Finally, Article 25 of the UN Charter states that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter". Concerning the legal bound of the EU to the UNSC, see supra note 15.

from being the organized product of a hierarchical system of power. States take advantage of this fragmentation in order to not only promote the international rules of their interest, but also re-signify them as they deem fit. Consequently, despite the increase in international regulation, not all issues receive the same attention from international legislators.

The strength of international law is hindered by an unequal pattern in its different branches: global regulation aimed at promoting trade, investment and productivity establishes much stronger obligations and enforcement mechanisms than regimes related to social and environmental interests (Peters, 2017). Hence, while the catalogue of obligations that hang over citizens is expanded with new additions of international origin, the legal protection of their fundamental and human rights is not extended with the same firmness. Far from being a trivial issue, this is the main factor holding courts' captive of the government's claim for an expansive power, as perfectly exemplified in the case of post-9/11 counterterrorism measures: within a fragmented global system, the fundamental right to a due process used to systematically lose the judicial dispute because it had less muscle in the international system than the protection of international security, so the fundamental right could not compete with the strength of an international anti-terrorist obligation.

Take as an example of the judicial lenience in this scenario the words of Lord Hoffmann and Lord Steyn in the *Rehman* case[20], when assessing the sufficiency of the evidence provided by the UK Secretary of State in order to deport a Pakistani national accused of being connected to Islamic terrorist groups. Lord Hoffmann states that "[…] the question of whether something is "in the interests" of national security is not a question of law. It is a matter of judgement and policy", and that "[u]nder the constitution of the United Kingdom and most other countries, decisions as to whether something is or not in the interests of national security are not a matter for judicial decision" because "[t]hey are entrusted to the executive"[21]. Lord Steyn reinforces the strength of this domestic attribution of power to the executive with the statement that "the tragic events of 11

[20] Secretary of State for the Home Department v. Rehman, UKHL 47, [2001] 3 W.L.R. 877.
[21] Ibid., para. 50.

September 2001 in New York reinforce compellingly that no other approach is possible"[22].

Summing up, the fragmentation of the international law is also altering the existing hierarchal order of domestic legal systems to the point of hindering the supremacy of some key rules that were considered constitutional values for the system. Going back to the example of counterterrorism measures, from the generic list of measures that the UNSC can make use of[23] (that allows for the opacity of targeted sanctions) to its open-ended resolutions (such as Resolution 1373), this is a high degree of indeterminacy that governments can instrumentalize (in the absence of a hierarchical authority oversighting their actions) in order to shelter their policies as much as possible from review mechanisms both at the international and national level. This would not be a problem if it was not for the impact on the constitutional safeguards of the domestic order: fundamental rights as materially superior rules and national courts' role as the counterweight of the government within the liberal system of checks and balances.

However, courts eventually decided to turn the tables and reject the executive policies of the government. For instance, only four years after vigorously defending the judicial deference towards executive counterterrorist policies in the *Rehman case*, Lord Steyn would identify a general judicial will to countering "the public fear whipped up by the government of the United States and the United Kingdom since 11 September 2001 and their determination to bend established international law to their will and to undermine its essential structures" (Steyn, 2005, p. 349). This rejection implied a challenge to the concurrent interpretation of international law, upheld by national governments and underpinned by international organizations.

Courts' change of mindset poses two questions of different scope from a political point of view. The first question is whether national courts will succeed to take down the established interpretation and to constrain the governmental policies based on it. The political implications of this question are domestic: national courts would prove their strength as a domestic political actor capable of constraining their governments' margin of discretion in the most unfavourable scenario for judicial review. The second question

[22] Ibid., para. 29.
[23] Articles 41 and 42 of the UN Charter.

is whether courts can tackle the fragmentation in which the current interpretation of international law has been cemented. From an IR perspective, this is the relevant question, because it would turn courts into IPAs capable of changing the structural environment in which states engage in international governance.

In this regard, Sections 3.2. and 3.3. explore international and national courts potential as IPAs, this is as trend-setters capable of reining other IPAs' policymaking in and producing systemic change such as the de-fragmentation of the international order. I posit that, while international and national courts capacity as IPAs is limited when acting in isolation, through inter-judicial coordination they can create the global trends that constrain other IPAs and de-fragment the global order. Hence, inter-judicial coordination unlashes courts full potential as IPAs.

3.2. International courts as IPAs.

As previously stated, although international courts' portrayal as relevant international actors is frequent, I posit that they cannot display their full capacity as IPAs individually. This Section reviews the existing literature on the institutional design, legitimacy, authority, and effectiveness of international courts in order to explain how their potential as IPAs is incremented by their participation in inter-judicial coordination with national courts.

Initially, scholars regarded international courts as a political tool for states' coordination. This assessment derived from international courts' institutional design: states' exclusive prerogative to activate their non-compulsory jurisdiction turned the first generation of international courts into "voluntary interstate dispute settlement" tools (Alter, 2014, p. 6). Consequently, the most traditional approach to international courts' authority is the legal formalist study of their institutional design, that assumes that international courts' authority stems from a legal act of delegation[24]. Hence, the progressive expansion of international courts' activity (that can be identified by the growth of their judicial faculties

[24] See Posner and Yoo's discussion on how this delegation that provides the formal-legal origin of their authority turns international courts into subordinates of states' national interest (Posner & Yoo, 2005).

and areas of concern) is due to two major changes in their institutional design: over time, more international courts acquired compulsory jurisdiction through states' membership and nonstate actors were given access and legal standing to activate the courts' jurisdiction (Alter K. J., 2014).

Notwithstanding the truth of the considerations presented above, the legal formalist approach does not provide the full picture of international courts' political role, because this approach assumes that the only relevant factor that shapes international courts' authority is the institutional design established by the act of legal delegation. Despite the progressive strengthening of international courts' autonomy, they are still missing the enforcement power provided by states' sovereignty to national courts so, international courts' authority to impact the international order must be drawn from other factors beyond the legal design of the institution.

Hence, theorists turned to other possible variables explaining international courts' impact as political actors. The normative approach equates international courts' authority to the fulfilment of a certain moral benchmark that provides them with legitimacy. More accurately, normative scholars believe that the international courts' success in the achievement of normative goals is the variable explaining their capacity to have an impact. Legitimacy can stem from the "inner morality" of the court's institutional design (Brunnee & Toope, 2010), from the court's process to apply the law (Nollkaemper, 2012), or it may be inherited from the actors that delegated their power to the court (Cassese, 2012). In any case, the sense of legitimacy (or lack thereof) of international courts explains states' compliance and non-compliance: legitimacy, as a variable, can explain the gaps between delegated legal authority and effective authority.

Nevertheless, the relevance of this normative approach to international courts' authority has also been called into question: the reason why international courts' resolutions are taken into account (perhaps their legitimacy) is not as important as whether the relevant audience do abide by them, in fact. Thus, scholars began to assess international courts' authority based on its consequences, rather than focusing on its legal or normative origins.

The sociological approach to international courts' authority is based on Weber's claim that, although many factors may contribute to the sedimentation of international institutions' authority (tradition, charisma, rational-legal factors, among others), none of

them can be singled out (Weber, 1978). Hence, rather than focusing on finding out the normative origin of international courts' authority and deducing its effects, the sociological approach measures the necessary level of perceived legitimacy in order to create social change (Çali, Koch, & Nicola, 2013). This approach can lead us to fuse the concepts of authority and legitimacy of international institutions (Hurd, 2007b)[25]. However, there is also a breed of sociological scholars that reject the idea that international courts' authority is simply an exercise of legitimated power. On the contrary, these scholars "argue that one should not assume that [deference to an international court] means that authority is legitimate" (Alter, Helfer, & Rask Madsen, 2018, p. 11). In this sense, Alter, Helfer and Rask Madsen measure "how the audiences that interact with ICs embrace or reject IC rulings", and identify certain contextual factors that lead to such outcome (Alter, Helfer, & Rask Madsen, 2018, p. 3).

According to this sociological account, international courts' political authority is defined by the response of the relevant audience they interact with: the litigants, potential litigants, government officials, national judges, legal scholars, non-legal actors, civil society groups and the public at large (Alter, Helfer, & Rask Madsen, 2018, p. 3). Although I do not deny the importance of all of these audiences' interactions when it comes to assessing the social impact of international courts, I believe that national courts are especially relevant, because their interaction can offset the international courts' shortcomings identified by the perspectives mentioned above: international courts' enforcement shortcomings have an impact on their legitimacy, authority and overall effectiveness, but national courts have the enforcement power that international courts lack due to their institutional design and their lack of domestic affiliation.

In fact, even those institutional analysis that do not highlight international courts' lack of enforcement as their Achilles' heel recognise national courts' endorsement as a great asset to international courts' authority. For instance, according to Alter, "[i]nternational judges clearly do face political limitations", but their biggest challenge (and that of international law in general) is not the lack of enforcement but having to "compete with domestic rule of law conceptions" (Alter, 2014, p. 8). In this regard, national courts are a powerful ally because they can spread international courts' doctrine within their national jurisdiction

[25] The fusion of the notions of legitimacy and authority concerning international institutions can also be found in many other international relations theorists. See, for instance (Lake, 2013).

(as opposed to a competing account). Furthermore, in their role as the government's institutional counterweight, they will also constrain competing legal narratives coming from the legislative and executive branches of the government. Arguably, national courts' endorsement will also have a magnifying effect on international courts' authority over other audiences such as civil society groups, future litigants, governments, and even the public opinion.

On the contrary, national courts' rejection can damage the authority of even the most autonomous international court. This is clearly exemplified in the so-called "*Solange*" conflict between the CJEU and Germany's BVerfG. The "Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel" case[26] is a 1970 ECJ Resolution solving the potential legal conflict between EU law and German constitutional law. In this Judgement, the ECJ ruled that EU measures' validity cannot be challenged on the grounds of national legislation (not even national fundamental human rights provisions), because it "would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law"[27].

However, in 1974 the BVerfG declared that "[the Community] still lacks in particular a codified catalogue of fundamental rights, the substance of which is reliably and unambiguously fixed for the future in the same way as the substance of the Constitution. [....] Provisionally, therefore, in the hypothetical case of a conflict between Community law and [...] the guarantees of fundamental rights in the Constitution [...] the guarantee of fundamental rights in the Constitution prevails so long as the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanism"[28].

This BVerfG Judgement (known as *Solange I case* because the expression "so long as" translates into German as "solange") delivered two shattering blows to the legal

[26] Judgment of the Court of 17 December 1970. - Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel. - Reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main - Germany. - Case 11-70.
[27] Ibid., p. 1134.
[28] Internationale Handelsgesellchaft mbH v Einfuhr- & Vorratsstelle fur Getreide & Futtermittel; BVerfGE 37, 271 2 BvL 52/71 [1974] Solange I-Beschluß; paras. 23 and 24. Translation into English available in C.M.L.R., 1974, p. 540, 549.

infrastructure of the EU system. Firstly, it established national law's prevalence with regard to the minimum standards of protection of fundamental human rights. Secondly, the BVerfG virtually overruled the ECJ resolution by adding the notorious "solange" nuance. In the 1986 *Solange II case*[29], the BVerfG declared that "so long as the European Communities and in particular the case law of the European Court, generally ensure an effective protection of fundamental rights […] which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German civil courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law"[30]. Although this second BVerfG resolution seems to restore the ECJ's authority, it still is a conditional restoration that proves international courts' subservient authority to national court's approval.

This work does not dispute the claim that there is an evolved generation of international courts that has acquired new and more relevant judicial functions to the political development of states and international relations, such as administrative review and constitutional review (Alter K. J., 2014). Nevertheless, it is not less true that international court's authority to create systemic change depends on their institutional design, legitimacy and contextual interaction with the relevant audiences and, in this regard, recruiting national courts as partners is of the utmost importance for international courts.

Consequently, this work focuses on international courts' role as IPAs in the context of their relationship with national courts. However, unlike most compliance-based studies, this work does not solely take into account international courts' influence upon national jurisdictions, but also national courts' influence on their international peers. Compliance studies asses either state compliance (Hillebrecht, 2015) or national courts' reception of international courts' resolutions (Keller & Stone Sweet, 2008; Nollkaemper, 2011). However, I conceive the interaction of international and national courts as a circular

[29] Re Wünsche Handelsgesellschaft; BVerfGE 73, 339 2 BvR 197/83 [1987] Solange II-Beschluß; Translation into English available at: https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=572 [last accessed on 12/01/23].
[30] *Solange II case*, para. 380.

relationship: their coordination turns into a feedback loop in which both benefit from each other's strengths in order to overcome their limitations as IPAs. This is not to say that coordination is the only kind of interaction that can take place between international and national courts (as mentioned before). Nonetheless, it is in inter-judicial coordination where international and national courts reach their optimal performance as IPA's.

3.3. National courts as IPAs.

For their part, national courts have not been regarded as IPAs, traditionally, although the latest strand of literature on international legal theory has acknowledged national courts' relevance in the development of international law and IR scholars have pointed out their impact on international relations of particular states in that capacity. Without disagreeing with these observations, this thesis goes one step further in the analysis of national courts' political impact and analyses their capacity to become global trend-setters. This Section is hence devoted to explaining that, despite their remarkable capacity to develop international law, national courts can only become IPAs capable of re-shaping IR structural conditions through inter-judicial coordination.

It is worth noting that there is a unanimous doctrinal consensus about the steady and notorious increase of the frequency at which national courts' jurisprudence rests on international law over the last 40 years (Roy, 2004; Fatima, 2005; Shany, 2009; Nollkaemper, 2011; Roberts A., 2011). This growing activity has prompted the appearance of a strand of literature aiming at defining the international judicial function of national courts. In this sense and inspired by the Project on International Courts and Tribunals' symposium on "The International Judicial Function"[31], scholars have defined as "the main aspects of that function […] the aspect of dispute resolution and/or enforcement and the aspect of law-interpretation and/or development" (Tzanakopoulos, 2011, p. 134). Indeed, the most traditional body of literature in this field highlights the importance of national courts as enforcers of international law because the lack of enforcement mechanisms at the international level is the most traditional hindrance to

[31] Hold at the University of Amsterdam in March 2011.

fully recognise international rules as full-fledged law (Falk, 1964; Schermers, 1990; Conforti & Franconi, 1997; Franck & Fox, 1996; Conforti, 1993; Koh, 1998; Koh, 1999).

However, a second generation of scholars added another layer to this reflection by pointing out the importance of the interpretative exercise that comes with judicial enforcement[32]. Indeed, courts' activity always comes with the hermeneutical task of interpreting the law they apply to the case at stake and, in doing so, they cooperate to concretize the meaning of such law. Hence, because national courts are the primary enforcement agency of international law, they play an essential role in the development of international law (Methymaki & Tzanakopoulos, 2018).

As a matter of fact, national courts' jurisprudence can contribute to specify and fix the meaning of international law, in the same way in which they also specify the meaning of national law within the scope of their legal system. To the extent that domestic courts expand or constrain the content of international law through the interpretative task of enforcing it, domestic courts' decisions are not only declarative of international law, but also constitutive of it at the micro-level of nuancing the meaning of international law within the state (Lauterpacht, 1929; Scobbie, 1997).

Considering the increasing frequency of national courts' reliance on international law, it is worth mentioning its political impact, since one of national courts' functions beyond the judicial adjudication of cases is to act as a counterweight to the other branches of the state, this is, the political power of the state. While some scholars simply attribute this increase to Globalization, "the augmented permeability of domestic legal orders" and the growth of international regulation (Tzanakopoulos, 2011, p. 133), other scholars point to an evolutionary pattern in which national courts have gone from being particularly reluctant to applying international law when it was invoked to constrain the government (Benvenisti, 1993), to increasingly using international law as their sword to curve executive policies (Cohen A., 2006; Ragwen, 2007; Benvenisti, 2008a; Benvenisti, 2008b; Jabareen, 2010). However, as often as national courts may have swung the sword of international law against the government, there has also been instances in which

[32] The majority of this branch of literature connects the importance of courts' interpretative power to their capacity to create international custom, so this strand of literature will be more deeply explored in the following Subsection concerning inter-judicial coordination.

national courts have upheld executive policies by using international law as a shield (arguably, from public criticism)[33].

More arguably, beyond the fact that globalization provides more opportunities for national courts to delve into international regulation, national courts ground their reasonings on international law in order to draw from its legitimacy: by appealing to the cross-border political consensus vested in the forging of international treaties and other international regulation, national courts manage to legitimize unpopular, controversial or unconventional decisions (Slaughter, 1994-1995; Shany, 2006). Herein lies the transformative political power of national courts: in their role as law-enforcers, legal interpreters and counterweights of the government, they can re-shape the legal parameters ratifying or invalidating the political action of the government within the national scope[34] and, very often, international law is an incredibly useful resource in this sense (Grady Schwartz, 2015b; Grady Schwartz, 2015a).

The relevant question for the purpose of this work is whether, beyond their domestic political impact, national courts can change the parameters for political action at the international level as well. In this sense, national courts' decisions can sometimes have an impact on the international relations of the state. This is perfectly exemplified in the attempt of Greek[35] and Italian[36] national courts to waive Germany's state immunity, on the grounds of *ius cogens* connected to international human rights, in compensations suits for crimes committed by the Nazi regime. The political tension arisen by this episode led the German government to initiate a proceeding against the Italian government in front

[33] Take as an example the *Al-Jedda 2007 case* from the UKHL (Al-Jedda v. Secretary of State for Defence [2007] UKHL 58, 12 December 2007), in which the Lords ruled the UK government to be exempted from responsibility for the three-years-long detention undergone (without judicial supervision) by the appellant at the hands of the British troops in Iraq. The resolution grounds such exemption on the argued ineluctable character of the international obligation created by the UNSC Resolution 1546 (2004), and such unbreakable legal bond is cemented on the Lords portrayal of the legal supremacy of the UNSC decision, born from its legal faculties.

[34] For a deeper legal and political analysis of national courts as domestic political actors see: (Teat & Vallinder, 1995; Stone Sweet, 2000; Shapiro & Stone Sweet, 2002; Galnoor, 2004; Miller, 2004; Hirschl, 2006; Roberts C. L., 2007).

[35] *Prefecture of Voiotia case* (see f.n. 4 of the Conceptual Chapter); Germany v. Margellos, Case No. 6/2002 [2002].

[36] *Ferrini case* (see f.n. 5 of the Conceptual Chapter); Germany v. Mantelli and Others, Preliminary Order on Jurisdiction, Case No. 14201/2008, [2008] ILDC 1037 (IT 2008); Germany v. Prefecture of Vojotia, Case No. 11163/2011, [2011].

of the International Court of Justice (henceforth, the "ICJ") in 2008[37]. In 2011, the Greek government filled an Application to join the proceeding[38] after the Italian government reluctantly submitted a counterclaim in 2009[39]. The dispute was settled when the ICJ finally ruled in favour of Germany and against the national courts' interpretation of human rights in 2012[40]. Regardless of the fact that national courts' pretensions were finally overturned by the ICJ, the interpretation of such courts did cause a stir in the international relations between Greece, Italy and Germany.

Another good example is national courts' employment of the so-called "universal jurisdiction", which empowers domestic courts to prosecute criminal offences qualified as especially hideous violations of human rights beyond the borders of national jurisdiction. From the dispute between Belgium and the Democratic Republic of Congo over the arrest warrant pending over Abdoulaye Yerodia Ndombasi[41], to the arrest of General Pinochet in 1998 after his indictment for human rights violations by the Spanish Audiencia Nacional[42], national courts' universal jurisdiction has created waves of political tension among states complaining of unduly judicial attacks on their sovereignty (Grady Schwartz, 2015a).

The examples mentioned above have been deemed cases of "direct" influence on the states' international relations that qualify domestic Judiciaries as IPAs because they are "[t]aking a position on specific matters with IR-implications" (Grady Schwartz, 2015a, p. 113)[43]. Indeed, in these scenarios it can be understood that national courts are acting as "global governors" as devised by Whytock: national courts can both allocate power (their

[37] Application Instituing Proceedings (Ger. v. Italy), (Dec. 23, 2008). Available at: https://www.icj-cij.org/public/files/case-related/143/14923.pdf [last accessed on 12/02/23].
[38] Application For Permission By The Government Of The Hellenic Republic (Ger. v. Italy), (Jan. 13, 2011). Available at: https://www.icj-cij.org/en/case/143/intervention [last accessed on 12/02/23].
[39] Counter-Memorial of Italy (Ger. v. Italy), Counterclaim (Dec. 22, 2009). Available at: https://www.icj-cij.org/en/case/143/counter-claims [last accessed on 12/02/23].
[40] Jurisdictional Immunities of the State (Ger. v. Italy), Judgement, (Feb. 3, 2012). Available at: https://www.icj-cij.org/en/case/143/judgments [last accessed on 12/02/23].
[41] Arrest Warrant of 11 April 2002 (Democratic Republic of Congo v. Belgium), Judgement (Feb. 14, 2002). Available at: https://www.icj-cij.org/en/case/121/judgments [last accessed on 12/02/23].
[42] Auto del Juzgado Central de Instrucción Nº5 (España), de 3 de noviembre de 1998, por el que se solicita la extradición de Augusto Pinochet.
[43] Grady Schwartz also mentions cases concerning extradition and consular notification as instances of "direct impact".

own judicial power to adjudicate) and determine the rights and obligations of the parties involved in transnational disputes among different actors (provided they all accept their jurisdiction) (Whytock, 2009). Whytock relies on Keohane's definition of global governance[44] to assert that national courts perform two central functions of global governance (the jurisdictional function and the substantive function) in transnational relations among states.

Nevertheless, I claim that this so-called "direct influence" of national courts on states' IR policies cannot be seen as a full account for national courts' capacity as IPAs, because the defining feature of IPAs is their capacity to shape "the trends that are transforming world politics" (Kegley & Wittkopf, 2009, p. 13): as direct as these judicial resolutions' impact on some specific states' IR may be, the political changes produced by them are still particular and not necessarily systemic. Even though the aforementioned resolutions based on universal jurisdiction are rooted on the idea that international human rights must prevail over other international regulations (such as the ones regulating the immunity of current or former members of the government), individual and isolated decisions of particular courts do not necessarily turn international human rights' systemic primacy into a reality.

In fact, universal jurisdiction never fully spread as initially conceived and used by national courts, precisely because of the IR costs of its exercise (Langer, 2011). Most states hampered its judicial practice by adding procedural requirements and restrictions via legislative reform (de la Rasilla del Moral, 2009; Hwang, 2014; Su, 2019). Although universal jurisdiction is not necessarily disappearing[45], it is no longer the jurisdictional springboard of national courts to become "global enforcers" of law, but a safety net to ensure that the national domain does not become a "safe heaven" for the perpetrators of international human rights' crimes (Langer, 2015). In other words: in general, universal jurisdiction has gone from entitling national courts to prosecute special categories of

[44] Whytock defines ""global governance" as the process of guiding and restraining transnational activity" (Whytock, 2009, p. 71), and quotes Keohane's definition of governance as "the processes and institutions, both formal and informal, that guide and restrain ... collective activit[y]" (Keohane, 2002, pp. 202, 245-246).
[45] Despite the legal limitations, the number of cases initiated and adjudicated is growing (Langer & Eason, 2019).

crimes against human rights all over the globe to allowing such prosecution as long as the perpetrator is within the reach of national jurisdiction.

Summing up, the evolution of the universal jurisdiction leaves us with two revelations. The first one is that national courts direct political influence on the state's international relations is real. The second one is that national courts' influence over the international system cannot be achieved by individual national courts acting alone: although universal jurisdiction enhances the binding value of human rights within the domestic sphere, atomized judicial practice will not produce transformations on the global system of human rights. After all, national courts' hermeneutical influence is only acknowledged as a subsidiary source of international law by Article 38 of the ICJ Statute[46], and national courts' resolutions were traditionally regarded as constitutive of mere facts but not international rules (Jenks W., 1964).

Hence, the full potential of national courts as IPAs remains unexplained. However, scholars have hinted that there is a second layer to the international political influence of national courts. For instance, Whytock mentions that national courts' functions as "global governors" can also set a system of incentives that tacitly informs the behavior of other international actors (beyond the parties of a particular transnational relation)[47]. For her part, Grady Schwarts goes one step beyond and explores the possibility that national courts have an "indirect influence" on foreign governments' policies as well. While "[d]irect influence on international relations causes specific incidents with immediate foreign affairs implications between states, [i]ndirect influence affects states' behavior through a mediating factor—international law—that sets the "rules of the game" of the continuously-legalizing IR" (Grady Schwartz, 2015a, p. 104). The key to this global influence seems to be national courts' capacity to shape international law (Slaughter, 2004; Grady Schwartz, 2015a). Nevertheless, beyond this acknowledgment, the existing

[46] Despite the doctrinal controversy about the sources of international law, there is some consensus in the acceptance of Article 38 of the ICJ Statute as the formal list of international law's sources (Kennedy D. , 1987). Article 38 (1)(d) mentions jurisprudence as a subsidiary source of international law. The generic and indeterminate formulation of this precept, however, has also been the object of much legal debate. See, in general: (Pellet, 2019) and (Fitzmaurice, 2017).

[47] According to Whytock, "insofar as the ability of transnational actors to reach their goals depends on domestic court decisions, their behaviour will be partly a function of their expectations about how domestic courts will make those decisions" (Whytock, 2009, p. 98).

literature has not offered a detailed account concerning national courts' capacity to transform the tissue of international law.

This work shares the belief that the development of international law is at the heart of national courts' role as IPAs. At the end of the day, national courts' need to ground their resolutions on legally binding rules, so international law is their passage to the international order (since the extraterritorial effects of national law are limited and problematic, as shown in the case of universal jurisdiction). Regardless of national courts' specific motivation to delve into the international order (countering the executive, their genuine belief in human rights or simply their will to settle conflicts arising from an increasingly globalized world), it is in the interest of those courts willing to go down this path to strengthen the binding effects of the international law they intend to rely on[48].

Nevertheless, the only way in which national courts can produce such transformation beyond their jurisdiction's scope is by acting together, as explained in the following Section. In overall, I posit that national courts fully deploy their power as IPAs through inter-judicial coordination, because this phenomenon turns them into global trend-setters capable of constraining other IPA's policymaking and de-fragmenting international law: inter-judicial coordination fosters courts' capacities as norm-entrepreneurs.

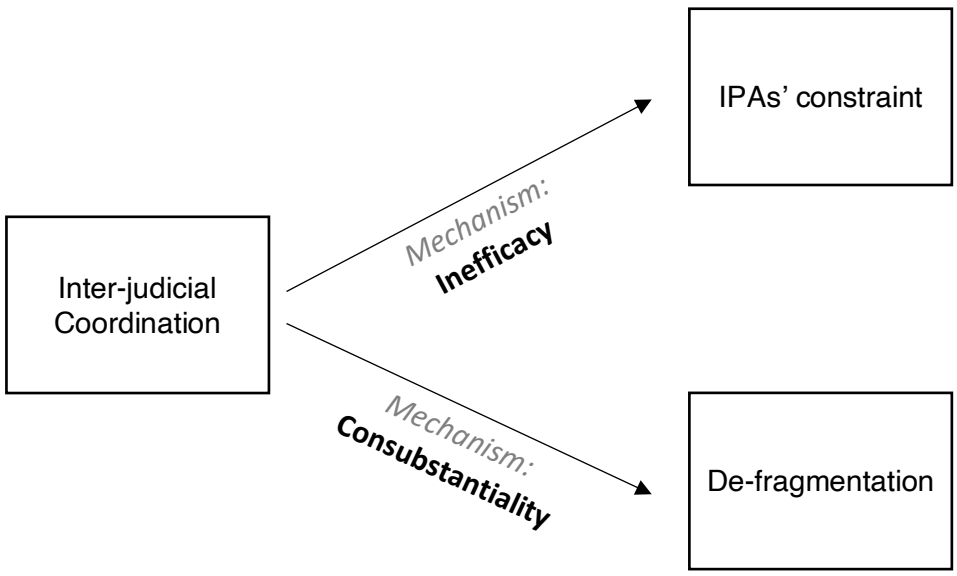
3.4. International and national courts' inter-judicial coordination.

As explained in the previous Sections of this work, international courts' authority highly benefits from national courts' endorsement, and national courts' power as IPAs cannot be unfolded individually (since their individual action will hardly transcend the national borders of their jurisdiction). I posit that inter-judicial coordination is the collaborative instance that allows them to set system-changing trends that constrain other IPAs by threatening the efficacy of their policies which, in turn, will necessarily unravel in the de-fragmentation of the international order. Courts' capacity to constraint other IPAs through inter-judicial coordination, and courts' capacity to de-fragment the global order through inter-judicial coordination are two sides of the same coin: courts as norm-entrepreneurs.

[48] In this sense, Grady Schwartz ties the legalization of international relations to its judicialization (Grady Schwartz, 2015a; Grady Schwartz, 2015b).

Consequently, the legal and IR theories concerning the creation and effects of inter-judicial coordination are fully intertwined.

Figure 7 -- Hypothesized Double Causal Chain from Inter-judicial Coordination to the Constraint of International Political Actors and the De-fragmentation of the International Order



As stated in the Conceptual Chapter, inter-judicial coordination is a phenomenon in which courts from independent jurisdictions uphold a common stance by adopting the same strategic approach to common rules. In short, my argument is that, through inter-judicial coordination, courts become collective international norm-entrepreneurs that create behavioural change in other international political actors and de-fragment the international global order.

Although the IR perspective of courts' capacity as global trend-setters is under-studied (as seen in Subsection 3.2), legal theorists have long envisaged its legal potential in relation to the idea of international legal custom. As explained in the following subsections, the legal theory concerning the judicial creation of international legal custom is too abstract to provide a measurable observation of courts' transformative power. However, this strand of literature has the virtue of pointing out that the source of courts'

power as global trend-setters lies in the collective transformation of the tissue of international law.

Hence, the following Subsection 3.4.1. draws on the insights of this strand of legal literature to understand the importance of a critical mass of national courts in the creation of inter-judicial coordination. Subsection 3.4.2. brings forward IR theory about norm evolution in order to account for the development of the coordination, the different roles of national and international courts and the mechanism leading to IPAs' behavioural change. Whereas these two subsections are focused on the description of inter-judicial coordination's dynamics as a collective act, Subsection 3.4.3 focus on the material side of the coordination and examines the mechanism leading to the de-fragmentation of the global legal order.

While the legal theory on the judicial international legal custom highlights the importance of judicial coordination in order to unchain courts' transformative power, IR theory on norm emergence and norm evolution provides an answer to the quantitative question of how many courts need to coordinate to produce the transformation (as many as necessary to threaten the efficacy of a policy or regime) and the conceptual design provided in our Conceptual Chapter manages to answer the qualitative question of to what extent must courts coordinate (to the extent that they are applying the same strategic approach to common rules).

3.4.1. National courts' trends: the critical mass of inter-judicial coordination.

As said before, national courts' capacity to develop and shape international law is at the center of their power as IPAs, and as explained in the previous Subsections, law-interpretation and law-development can be seen as different points on the same spectrum stemming from law-enforcement (Nollkaemper, 2003). Inasmuch as national courts are the primary enforcement agents of international law, they are also relevant agents in its development[49]. In other words, the "enforcement of international law is reflexive, rather

[49] The article is based on the Third ILDC Colloquium on Domestic Courts as Agents of Legal Development, held in Glasgow on 19 and 20 May 2011. The Third ILDC Colloquium, part of COST Action 0602 on International Law in Domestic Courts, was organized by the Amsterdam

than reactive [so] domestic courts' decisions are both part of the cause (sources) and of the effect (enforcement) of international law" (Methymaki & Tzanakopoulos, 2018, p. 813). By reflective, these scholars imply not only that national courts' activity is at the same time cause (as sources) and effect (as enforcers) of international law, but also that there is a circular relationship between these extremes: the creation of international law leads to its enforcement and, in turn, its enforcement lead to its creation (Methymaki & Tzanakopoulos, 2018).

Indeed, by applying international law to a domestic case, national courts participate in the forging of its specific meaning within the national scope. National courts' *reflexivity* is the key to national court's role as a domestic political actor and it is also behind their "direct influence" on states international relations. However, the question is whether national courts' reflective interpretation, linking law-enforcement and law-development, can foster systemic change at the international level as well. According to the strand of legal literature concerning the international interpretative function of national courts, this is possible when national courts produce international custom.

In the Western legal tradition, the notion of custom as a source of law entails the existence of unenacted rules born from practical necessity that have, nevertheless, the compulsory nature of legal sanctions. Much has been discussed about the birth and features of this breed of rules from the perspective of many different disciplines[50]. The literature of these disciplines is full of the discrepancies surrounding this controversial notion, being especially prominent the question of distinguishing legal custom from other non-legal practices in the absence of the sanctioning of statutory law[51]. However, Gény's conception of legal custom as a repeated action *plus opinio juris sive necessitates* ("an

Center for International Law of the University of Amsterdam and the School of Law of the University of Glasgow. See foot note 32 of this Chapter.

[50] For a thorough recollection of the doctrinal debate in the fields of legal ethnography, anthropology, legal theory, political philosophy, history, and economy, see, in general, (Bederman, 2010).

[51] See, for instance, Llewellyn and Hoebel desisting from qualifying custom as a source of law due to the ambiguity of the concept (Llewellyn & Hoebel, 1941). Austin believes that the qualifying element turning a simple usage into a legal custom is actually statutory codification or judicial decree (Austin, 1863, p. 222), which virtually turns the notion of legal custom into a technical redundancy. Contrary to this, after distinguishing between maxims and customs depending on the concurrence of the subjective element (Bentham, Hart, & Burns, 1977), Bentham reflected on the effects of legalizing the custom and asserted the legal value of non-legalized custom (Bentham, Hart, & Burns, 1977).

opinion of law or necessity") (Geny, 1919, p. 360)[52] became the most widespread and commonly accepted definition among legal scholars and practitioners.

In other words, the distinctive feature of legal custom is the juxtaposition of an objective element and a subjective element: the repetition of a practice by the majority of the members of the community (objective or factual element) in the belief that such practice belongs (or should belong[53]) to the set of binding rules organizing the community (subjective element also known as *opinio iuris*[54]). Summing up, legal custom is a practice repeated by the members of a community under the shared assumption of its legal nature.

The reception of legal custom as a source of international law was embedded within the general process of emergence and development of international law as a system, but it was not less controversial than its acceptance in domestic legal systems. The existing uncertainties about the nature and legal effects of customs conflated with the already controversial debate about the nature and legal effects of international law in general. However, custom was acknowledged as a primary source of international law in Article 38 (1)(b) of the ICJ Statute[55]: "[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply […] international custom, as evidence of a general practice accepted as law." Hence, this description contains the aforementioned objective and subjective elements, but it also requires evidence of the existence of the legal custom as such, which is not a minor issue in the case of international legal custom.

In fact, although the identification of the constituting elements of domestic custom is not absent of difficulties, the task is even more challenging in the case of international legal

[52] Althought Gény must be credited for synthetizing and popularizing the definition, he did not create it brand new. Gény rather distilled the atomized but concurrent pre-existing definitions (Kadens, 2016, p. 12).
[53] According to Tasioulas, "[i]n short, opinio juris involves the judgment that a norm is already part of customary international law and that (compliance with) it is morally justified […]); or that, as a moral matter, it should be established as law through the process of general state practice and opinio juris […]; or else some mixture of these two attitudes" (Tasioulas, 2016, p. 97).
[54] The mention of the subjective element as one of the indispensable elements of legal custom can be tracked back to the end of the eighteen century, when von Glück used the term *opinio obligationis* ("sense of obligation") in his commentary on the Roman law (von Gluck, 1790).
[55] As said before, Article 38 is generally accepted as the formal list of sources of international law (see supra note 47). Paragraph (1)(b) of this article mentions international custom as a primary source of international law, in opposition to the subsidiary role attributed to jurisprudence in paragraph (1)(d) of the same article.

custom. When it comes to international legal custom, the community of reference is the international community and the members whose behavior becomes relevant are the states, hence adding a second layer of complexity to the task of identifying the objective and subjective elements of the custom: which acts of the state are relevant as state practice and which ones reveal its opinion iuris? What happens in the case of contradictory behaviors? (Tasioulas, 2016, p. 101).

The aforementioned strand of legal literature devoted to explore the effects of national courts' interpretative faculties at the international level has made a remarkable contribution to this debate: although there are instances in which international legal custom is created outside the venue of national judiciaries, national courts' intervention as creators of international custom provides the international community with visible objective and subjective elements to account for such international custom. As said before, national courts are the primary enforcers of international law, hence contributing to its development through the interpretative task that comes with enforcement. Legal theory says that, when a substantial number of national courts coordinate to pass the same interpretation of a certain rule and they consequently force their respective national governments to abide by it and to modify their policies accordingly, they become a source of international custom (Moremen, 2006). The factual element of the custom would be provided by the repeated compliance of states with the rulings of their national courts, while the opinion iuris behind it are the courts' rulings themselves, since national courts are state organs (Tzanakopoulos, 2016; Methymaki & Tzanakopoulos, 2018).

This scenario is different from the one in which national courts simply acknowledge the existence of an international legal custom, although such recognition has its own value as a legalizing act within the state and it can be used as evidence of the custom's existence. In this scenario, national courts are actually adding something new to the bulk of international rules: rather than creating a brand-new rule, national courts more likely modify or add content to a pre-existing rule through its interpretation. It is also different from the scenario explored in Section 3.3, in which national courts' development of international law only had a domestic reach (despite the possible collateral impact on the state's international relations), in the absence of coordination with the courts from other jurisdictions. Hence, in the scenario explored here, national courts go beyond the

traditional subsidiary profile attributed by Article 38 (1)(d) of the ICJ Statute to become direct sources of law under Article 38 (1)(b), as creators of international legal custom.

This leads us to wonder how useful national courts' capacity to coin international custom is in order to become an international trend-setter. Although Hart stated that "[c]ustom is not in the modern world a very important 'source' of law because it is usually a subordinate one" (Hart, 2015, p. 39), within the global order, international custom "is arguably the most fundamental source of international law, at least insofar as treaty law is itself embedded within a customary framework" (Tasioulas, 2016, p. 95), given the absence of a centralized legislative power to enact statutory rules. Precisely because of this, the international legal system has frequently been qualified as primitive (Barton, 1949; Hart, 2015) and, thus, it seems only natural that international custom plays such an important part in its development (Bederman, 2010).

However, as appealing as this legal reasoning may be from a legal theoretical point of view, in practice it is not easy to clearly identify the birth of a new international custom: there is no clear answer to the question of how many courts and states are enough to fulfil the factual element and the difficulties to identify the *opinio iuris* are not smaller[56]. In other words, the legal theory on the judicial creation of international legal custom does not clarify how many courts are necessary, and to what extent must they coordinate in order to modify the tissue of international law as a global system. Therefore, this legal theory is clearly limited when it comes to explaining the courts' capacity for systemic innovation, although it rightly points out the need for their coordinated action and their impact on the international legal tissue.

In this regard, IR norm evolution theory can provide the answers that legal theory is missing: the judicial coordination signaled as necessary to modify the content of international law is better conceptualized as an evolving process in which the mass of national courts endorsing a new legal approach gradually mounts to a critical level and force the behavioral change in other international actors. Hence, the emergence of the rule is explained by the self-reinforcing loop created by the mounting support for the

[56] On whether both elements must be present and related questions such as whether a strong opinion iuris can make up for scarce state practice or whether opinion iuris can be inferred from state practice see (Tasioulas, 2016). See also Michael Wood, Special Rapporteur, International Law Commission, Second Report on Identification of Customary International Law (May 2014), at http://legal.un.org/ilc/sessions/66/a_cn4_672(advance).pdf [last accessed on 12/02/23].

nascent standard. In this progressive process of norm evolution, international courts will act as norm-disablers that will prevent the diffusion of competing norms with their rejection of alternative approaches.

Courts' general embrace of one approach above another implies not only the modification of the international rules concerned, but also a clarification of their hierarchical relationships between them and with regard to domestic legal rules. Bearing in mind that the international legal system is fragmented and indetermined, the settlement of the content and hierarchy of international rules amounts to a systemic change towards de-fragmentation.

However, not all inter-judicial coordination will manage to modify the global order: it depends on whether a critical mass of national courts embrace and enforce the new approach, so the efficacy of the regime or policy under review is threatened. The following Subsection is devoted to exploring the creation of judicially coordinated approaches according to IR norm evolution theory, and international courts' role in the process.

3.4.2. Inter-judicial coordination as a process of norm-emergence: *norm-enablers*, *norm-disablers* and IPAs' behavioural change.

As this Section will explain, inter-judicial coordination is a non-tiered process of norm-emergence in which courts engage in an on-going dialogue as norm-entrepreneurs and the mechanism behind the consolidation of the norm is the self-reinforcing loop created by the exponential rate of adhesions to the trend. Hence, the causal mechanism explaining the behavioral change of IPAs is the threat posed by the nascent norm to the effectiveness of their policies. In this regard, for such threat to exist, the critical mass of norm-entrepreneurs must be primarily composed of national courts due to their enforcement power. In addition to this, especially influential domestic courts will act as norm-enablers that will foster the diffusion and consolidation of the norm. For their part, international courts will act as norm-disablers that halts the diffusion of competing norms.

Norm evolution theory has been largely studied by IR scholars in order to explain the creation, maintenance and change of norms regulating the actions of international

political actors (Axelrod, 1997, p. 46), since the notion of "norm" has become a familiar IR tool to describe and analyse political behaviour. Although this ubiquitous term has been employed and developed by several theories[57], its origin is found in constructivist approaches. According to constructivism, norms are standards "of appropriate behaviour for actors with a given identity" (Finnemore & Sikkink, 1998, p. 891). Within this constructivist frame, norms take on a causal dimension because they shape the behaviour of political actors, informed by a "logic of appropriateness"[58]: as argued by March and Olsen (1989, p. 22), constructivists believe that "[a]ction is often based more on identifying the normatively appropriate behavior than on calculating the return expected from alternative choices."

Consequently, the existence of a norm is not merely defined by the repetition of a behaviour, but rather by the inter-subjective agreement that such behaviour adjusts to the adequate normative standard. Hence, the repetition of the conduct comes from this shared belief that creates a self-reinforcing mechanism of dissemination: the more agents embrace this belief, the stronger will be the inter-subjective agreement and the more likely it is that other agents will perceive the behaviour as the adequate standard to follow. For the same reason, the erosion of such inter-subjective agreement will decrease the standard's influence over other agents and the norm might disappear (Kratochwil, 1989; Katzenstein , 1996; Finnemore, 1996).

However, intersubjective agreements do not materialize overnight: "[n]orms do not as a rule come into existence at a definite point in time, nor are they the result of a manageable number of identifiable acts. They are, rather, the resultant of complex patterns of behavior of a large number of [agents] over a protracted period of time" (Ullman-Margalit, 1977, p. 8). Hence, according to the majoritarian doctrine, the process of norm-emergence can be conceived as a positive feedback loop created by the repeated compliance with the standard, the consolidation of the social expectations concerning such compliance and the creation of a self-reinforcement feedback loop born from increasing compliance

[57] For instance, rational or economically-oriented approaches are no strangers to the use of this term understood as a description of a repeated behaviour. See, for example, (Young P. , 1993).
[58] March and Olsen (1989) coined the term logic of appropriateness, but this concept has been vastly studied by the subsequent constructivist literature as a deontic logic in which actors are compelled by their sense of moral obligation which, in turn, depends on their identity. See, for instance, (Cioffi-Revilla, 1998).

(Kratochwil, 1989; Nadelman, 1990; Bicchieri, 1990; Katzenstein, 1996; Ensminger & Knight, 1997; Finnemore & Sikkink, 1998; Ostrom, 2000).

The feedback loop fostering the emergence of a norm seems to be based on the "principle that what works well for a player is likely to be used again, whereas what turns out poorly is more likely to be discarded" (Axelrod, 1997, p. 47). Hence, the contraposition drawn between the "logic of appropriateness" and the "logic of consequences" put forward by rational approaches in order to causally explain the behaviour of political actors is not as stark as portrayed by some scholars. The consequences of compliance or its lack thereof is relevant to the actors' assessment of the adequacy of the standard and, hence, to the emergence of the norm as a social structure informing the behaviour of actors.

Eventually, the self-reinforcing loop sedimenting the norm will elicit its institutionalization, because "norms may become so widely accepted that they are internalized by actors and achieve a 'taken-for-granted' quality that makes conformance with them almost automatic" (Finnemore & Sikkink, 1998, p. 904). The evolutionary character of the process has led some scholars to claim that norms transit along a range of stages throughout their process of creation or modification. For instance, Finnemore & Sikkink's model identifies an emergence stage followed by a cascade stage and a final stage of internalization (Finnemore & Sikkink, 1998). In the emergence stage, norm-entrepreneurs advocate for a new standard of adequate behaviour[59] and the level of conformance slowly increases until a critical mass of actors has embraced the new standard as the adequate norm. This is a tipping point that hastens the rate of adhesions to the norm during the cascade stage[60] which, in turn, is followed by the stage of internalization that institutionalizes the norm.

Contrary to this compartmentalized model, other scholars have depictured the emergence of norms as a more organic process that cannot be picked apart in different stages (Wiener, 2004; Krook & True, 2012; Stimmer, 2019; Deitelhoff & Zimmermann, 2020). For instance, Risse-Kappen, Ropp and Sikkink's well-known spiral model conceives the evolutionary character of norm-emergence as a progressive continuum in which domestic

[59] Lebow (1994), for instance, links the entrepreneurial spirit of these pioneers to their dissatisfaction with their social environment.
[60] Finnemore and Sikkink describe this rapid increase in the rate of norm acceptance as a "contagion" effect among the actors that are not comprised among the norm-entrepreneurs (Finnemore & Sikkink, 1998, p. 902). In similar terms, see also (Epstein, 1997) ch. 4-5.

support and opposition are the mechanisms explaining norm change (Risse-Kappen, Ropp, & Sikkink, 1999). Krook and True's theory rethinks the alleged cycles of international norms through a discursive approach to the process of norm-emergence (Krook & True, 2012). These models leave aside the stratification of the process of norm-emergence in order to focus on the role of the different actors involved, understanding that their interplay can be conceptualized as the mechanism of emergence.

The strand of literature focused on the analysis of the mechanisms of emergence or change has highlighted the complexity of the process of norm-formation. For instance, some scholars subscribe to the opinion that norms' evolution is the result of a multifaceted process whereby several sources of influence coin norms as a type of widely (if not universally) shared culture (Meyer, Boli, George, & Ramirez, 1997; Farrell, 2005). Although this thesis agrees on the complexity of the process of norm-emergence and does not rule out its multifactorial nature, it belongs to the strand of literature that focuses on studying the sedimentary faculties of one group of actors in particular[61]. Hence, this work zooms in courts as norm-entrepreneurs and catalysers of behavioural change and it subscribes to the view that the emergence of a norm is an organic process rather than a stepped evolution.

However, the staggered models devised by scholars like Epstein (1997) or Finnemore & Sikkink (1998) have the virtue of highlighting the non-uniform character of the evolutionary process of norm-emergence: neither the growth in the adhesions' rate, nor the material consistence of the rule is uniform throughout the different stages of the evolutionary cycle described by stepped models. In this regard, key concepts such as the idea of a tipping point are very useful to identify the characteristic changes of each stage.

For instance, Finnemore & Sikkink model could be seen as a driven threshold system[62] in which the norm emerges when a critical mass of actors has embraced the new-born norm (Finnemore & Sikkink, 1998, p. 901). Hence, in the emergence stage, norm-entrepreneurs fight against the resistance to change of the pre-existing norm. This resistance is born, not only from the fact that the norm-entrepreneurs are outnumbered,

[61] See, for instance, Keck and Sikkink's work on the role of non-state actors (such as advocacy networks) in the norm diffusion process (Keck & Sikkink, 1998).
[62] For a more detailed account of driven threshold systems, see: (Bak & Chen, 1991; Cederman, 1997).

but also from the lack of consensus on the specific content of the new norm among the entrepreneurs.

In this sense, I believe that the emergence stage is defined, rather than by the increase in the rate of adherence (which also takes place in the cascade stage at a faster pace), by the constant exchange of normative proposals among the entrepreneurs. Norm-entrepreneurs may advocate for different reforms or amendments within the normative system they live in but, by the time the critical mass is formed, norm-entrepreneurs rally around the normative proposal that generates consensus, thus consolidating the version of the standard that will be disseminated in the cascade stage as the new norm. Therefore, the tipping point is not only a bridge between the emergence and the cascade stages in which the rate of accessions accelerates, but also a milestone in which the norm takes its final form.

Non-tiered models of norm-emergence should also illustrate the lack of uniformity in the process of norm-emergence. In this regard, key concepts reflecting the non-uniform and eventful formation of a norm can be also useful to describe the dynamics within a more organic account of the process of norm creation, diffusion and evolution. Non-staggered models might also reflect the impact of events such as cascade effects or tipping points in the formation of a norm, for instance. However, unlike stepped models, non-tiered models do not see the formation of a norm as a straight-line development transitioning through non-communicating and distinguishable stages defined by well-established features. Non-tiered models describe a non-linear evolution in which the emergence of the norm is the result of the on-going dialogue fostered by several tipping points and partial cascade effects that feed the permanent exchange of ideas among the norm-entrepreneurs.

In this sense, inter-judicial coordination is, indeed, a non-tiered process of norm-emergence in which courts, acting as norm-entrepreneurs, can engage in a dialogue by quoting, copying, rejecting or discrediting their peers' resolutions (as explained in the Conceptual Chapter). Although their dialogue is directly based on legal rules, such dialogue will lead to the emergence of a socio-political norm if courts coordinate their legal approach to the topic, for legal rules convey the desirable standard of behaviour

within the social group[63]. Hence, courts' legal rejection of certain policies indirectly sends the message that such policies do not conform with the social standard conveyed within the legal system as interpreted under their coordinated approach and, provided such interpretation is embraced by a critical mass of courts, the message will reach even those political actors that are not under the direct review of those courts.

In other words, once the judicial rejection of a certain type of policies becomes foreseeable due to the existence of a judicial trend embracing one specific approach, political actors will attempt to protect the efficacy of their future policies by adjusting them to the emerging judicial standard and, their compliance will create a reinforcing feedback loop that will strengthen courts' stance, promote more compliance and, eventually, lead to the internalization of the norm as suitable. However, the current study is not as concerned with proving the eventual internalization of the norm as it is with elucidating the nuts and bolts of its emergence when it is a norm of judicial coining and, in this sense, this thesis posits that national and international courts serve different purposes in this process of emergence.

To begin with, inter-judicial coordination is a bifurcate process of norm-emergence in which the design of the norm lies at the hands of one particular group of actors (courts) and the compliance depends on other kinds of actors (governments and IOs). Both the design of and the compliance with the norm are indispensable for its emergence, but these two elements might not go together in inter-judicial coordination because governments might try to resist the newly acquired judicial constraints and IOs are rarely bound by judicial resolutions (as explained in previous Sections). Hence, ensuring the enforcement of the judicial resolutions upon the concerned political actors is indispensable to cement the threat to those policies that disregard the incipient approach. In this sense, only the direct enforcement of national courts can fulfil this task (at least with regards to their respective governments), so only national courts can constitute the aforementioned critical mass of norm-entrepreneurs threatening the efficacy of the concerned policies and forcing the behavioural change of IPAs.

[63] This is the idea that lies at the heart of Kelsen's distinction between the primary and secondary rules of a legal system, for instance. While primary rules convey the rejection of those conducts that receive a legal sanction, secondary rules embrace those other behaviours that are positively approved by the inverse reading of primary rules (Kelsen, 1960 [1934]).

While this study presupposes national courts' capacity to enforce domestic resolutions on their respective governments in abstract[64], it does acknowledge that some national courts are more influential than others among their peers. Hence, the resolutions of those national courts that are especially influential will become partial positive tipping points in the process of norm-emergence, creating a cascade effect within the courts' area of influence. In other words, influential national courts can accelerate both the rate of adhesions and the consolidation of the norm. In this sense, I define influential domestic courts as *norm-enablers* that foster the diffusion of the emerging norm.

However, since this effect is limited to the area of influence of norm-enablers, inter-judicial coordination as a process of norm-emergence does not have one single tipping point marking the end of the emergence stage, but rather several partial tipping points (connected to different norm-enablers) nourishing the emergence of the norm: if a non-staggered process of norm-emergence implies the constant exchange of ideas that eventually fructifies in a new norm, the involvement of influential domestic courts in inter-judicial coordination becomes a strong incentive to embrace the specific version of the norm upheld by them, but it is not necessarily the end of the on-going dialogue crafting the norm.

For their part, international courts' involvement in inter-judicial coordination does not only enlarge the judicial support for the trend but, more importantly, also provides the process of norm-emergence with an important system of depuration to distill the norm and filter competing interpretations out of the judicial trend. This is because, while national courts might or might not follow the specific version of the norm upheld by an international court that has coordinated its approach to that of a group of courts, it is very difficult for a national court to stick to an approach that has been expressly rejected by an international court. The relevance of international courts within inter-judicial coordination is not as promoters of the final version of the norm but as gatekeepers of the trend, for they can neutralize alternative approaches and prevent them from spreading among national courts. Hence, while the influential national courts work as norm-enablers

[64] It is important to bear in mind that, national courts without enforcement capacity would lack the common identity required to engage in successful judicial dialogue. However, the recalcitrant behaviours of certain governments are an independent issue from national courts' enforcement power: governments might develop different legal strategies to undermine, not the courts' enforcement, but their jurisdiction in order to avoid the judicial review of their policies.

and their embrace of the approach works as a partial positive tipping point within the process of norm-emergence in inter-judicial coordination, international courts are *norm-disabler*s whose rejection of an approach expels it from the on-going dialogue.

Take as an example the impact of international courts in relation to UNSC targeted sanctions against suspects of terrorism. In the *Sayadi 2008 case*[65]*,* the UN Human Rights Committee ('UNHRC') (which can be considered as an international quasi-judicial body) joined the growing judicial trend to consider UNSC resolutions as interpretable regarding the specifics of their domestic implementation and, hence, to state that the protection of international and national security is compatible with the observance of international and national human fundamental rights as central pieces of the legal system of reference. This way, as explained in the Empirical Chapter, the UNHRC inserted itself into the concomitant judicial debate about the suitable framework to judge the lawfulness of counterterrorism measures, joined the growing coalition of courts that stood by the centrality of human fundamental rights (as a common approach), and contributed to the emergence of the norm stating that counterterrorism policymaking is must respect fundamental human rights[66].

Nevertheless, the UNHRC supported one specific version of the norm in which the requirements of due process[67] are breached if the transmission of the names of suspects of terrorism for their UN listing takes place before the end of the on-going criminal investigation against them[68]. The UNHRC lack of weight as a norm-enabler within the general process of norm-emergence is showcased by the fact that its reproval of early listings was not embraced in the subsequent resolutions of national courts examining similar cases[69]. However, international courts' capacity as norm-disablers is clearly

[65] Sayadi and Vinck v Belgium, Merits, UN Doc CCPR/C/94/D/1472/2006, IHRL 3216 (UNHRC 2008).
[66] In this case, the UNHRC relied on the outward-looking version of fundamental human rights established in the International Covenant on Civil and Political Rights of 1966 ('ICCPR'): International Covenant on Civil and Political Rights (United Nations [UN]) 999 UNTS 171, UN Doc A/6316, UN Doc A/RES/2200(XXI), Annex, UNTS Reg No I-14668, Part III, Art.17.
[67] In fact, the encroachment of the right to due process is declared in relation to the right of freedom of movement (art. 12 ICCPR) and the right to privacy (art. 17 ICCPR). Hence, the reason why these two rights are violated, according to the UNHRC, is that they were limited by an administrative measure like the listing without observing the requirements of due process. See paragraphs 11 and 12 of the *Sayadi 2008 case*.
[68] *Sayadi 2008 case*, para. 10.7.
[69] In fact, the conclusions of the *Sayadi case* in this regard were rejected by the European Court of First Instance in paragraphs 40, 51 and 52 of the *El Morabit case* (Joined cases T-37/07 and T-

showcased by the ECtHR in the *Nada 2012 case*[70], for instance. The ECtHR rejection of *jus cogens* rules as the sole limits to the policymaking of the UNSC (and its corresponding domestic implementation) in this resolution put an end to the spreading of this approach to the lawfulness of counterterrorism policies among national courts.

Summing up, inter-judicial coordination as a process of norm-emergence will always require the existence of a critical mass of national courts embracing the nascent standard, while international courts are not indispensable. Nevertheless, international courts' involvement in the coordination will reduce the range of available approaches and push national courts to rally around the remaining ones, hence contributing to the creation of the standard as norm-disablers in the assembly of such critical mass. This will create a steady feedback loop of adhesions to the new legal doctrine that will only make more and more difficult for other national courts, national governments, and even other IPAs like international organizations to ignore the validity of the norm born from inter-judicial coordination.

In this sense, the acceptance of the norm as the suitable political standard resembles the *opinio iuris* requirement, for they are both described as intersubjective beliefs. However, unlike the legal theory concerning legal custom, the analysis of inter-judicial coordination under the parameters of IR theory on norm-emergence allows for the identification of the dissemination mechanism behind the consolidation of the norm (the self-reinforcing loop) and the causal mechanism explaining the behavioral change of IPAs (the threat of inefficacy).

3.4.3. Inter-judicial coordination and the de-fragmentation of the global legal order.

As said before, courts' capacity to constrain other IPAs' policymaking is related to their capacity de-fragment the international legal system through inter-judicial coordination,

323/07, Mohamed El Morabit v. Council, judgment of 2 September 2009). In addition to this, the UNHRC establishes that the remedy to the identified breach of international human rights was not the domestic removal of the measures deriving from the listing, but Belgium's obligation to pursue the de-listing. This conclusion was also in contradiction to the line of reasoning developed by the ECJ and the CJEU after the *Kadi I 2008 case*.

[70] See the mentions to this case in the Introduction Chapter and in the Empirical Chapter.

hence changing the structural conditions of international relations and revealing courts' capacity as IPAs. As recalled in the introductory paragraphs of this Chapter, the fragmentation of the international legal order is a familiar phenomenon among legal and IR theorists. However, the doctrinal consensus concerning the concept of international legal de-fragmentation is far scarcer. Although the concept is juggled in the IR literature concerning Global Constitutionalism, legal theory is its birthplace. International lawyers are divided between those who dismiss the concept's utility as a compass to trace the course of international law's evolution (Krisch, 2010) and those who tend to limit its definition to the transnational standardization of international law's meaning through a process of "legal integration" (D'Aspremont, 2014; Nordeide, 2014; Harbo, 2014) or "cross-fertilization" (Giorgetti & Pollack, 2022).

However, standardizing the meaning of international law across borders implies the clarification of the relationship among the different rules of the system as well. This is especially true when it comes to the de-fragmentation produced by courts, because it is at the core of the judicial function to balance conflicting norms. Consequently, it would be more accurate to state that courts' embrace of the same approach to international legal rules will not only standardize their meaning, but also clarify the hierarchical relations among the different rules of the system and, in short, de-fragment international law as a system. Howbeit, this definition does not reflect the full extension of the notion of legal de-fragmentation because it does not consider that, in an increasingly interconnected world shaped by globalization, most international regulative challenges have domestic ramifications, so the domestic and international legal domains grow intertwined (Stewart, 2014) but not necessarily harmonized (Krisch, 2022).

In this universe of entangled legalities and multi-level policies, national and international courts often deal with antinomies that sit, not only across legal systems, but also across regulative levels[71]. Therefore, a world in which the content and order of the international legal systems clash with the content and order of the domestic legal systems is still a world shaped by legal fragmentation and its politics. As explained in the introductory lines of this Chapter, the irregularities in the tissue of international law identified by

[71] In this sense, Rike Krämer uses the concept "diagonal conflict" to identify an antinomy between international *lex specialis* and domestic rules that belong to different legal sub-field, for instance. (Krämer, 2013).

scholars like Anne Peters (Peters, 2017) will also alter the structure of the domestic legal order insofar as international rules are expected to be implemented within the domestic domain (Lligadas Gonzalez, 2021).

Consequently, the phenomenon of international legal de-fragmentation should be examined from a global perspective as, not only the standardization of international law's meaning across countries and the creation of hierarchical relations among the rules of the international system, but also the coordination of the international and domestic legal systems in terms of content and order. To the extent that the coordination of two legal systems attempt to affix their structure and content, the coordination of the international and national legal orders will tend to clarify the structure and meaning of international law, rather than driving domestic law into anarchy and indeterminacy.

Anne Peters's work, for instance, suggests a catalogue of techniques to solve, in practice, the different conflicts of law arising from legal fragmentation across regulative levels (Peters, 2017, ps. 682-695). These techniques will resolve the antinomies faced by particular legal operators in specific cases and they are, thus, undeniably useful to tackle the practical challenges of international legal fragmentation. Nevertheless, this thesis posits that the overall level of fragmentation, as a structural condition, will not decrease unless courts reconcile the content and structure of legal systems between them and across regulative levels.

I posit that inter-judicial coordination provides such consistency since a mass of non-related courts upholds a common approach to the content and order of the legal systems of reference. What is more important, even if the courts involved in the coordination rely on rules belonging to formally independent legal systems, the consubstantial nature of such common rules will allow for the transference of interpretations between legal systems and, hence, coordinate their content and structure. In other words, inter-judicial coordination as a phenomenon implies, not only the institutional coordination among non-related courts, but also the resulting systemic coordination among legal regimes. In this sense, this work goes beyond the narrow definition of legal de-fragmentation that focuses on the systemic changes of international law, understanding that such systemic changes in the international sphere will also have an impact across regulative levels when orchestrated through inter-judicial coordination. Consequently, this thesis theorizes about

the effects of inter-judicial coordination in relation with the legal de-fragmentation of the global order.

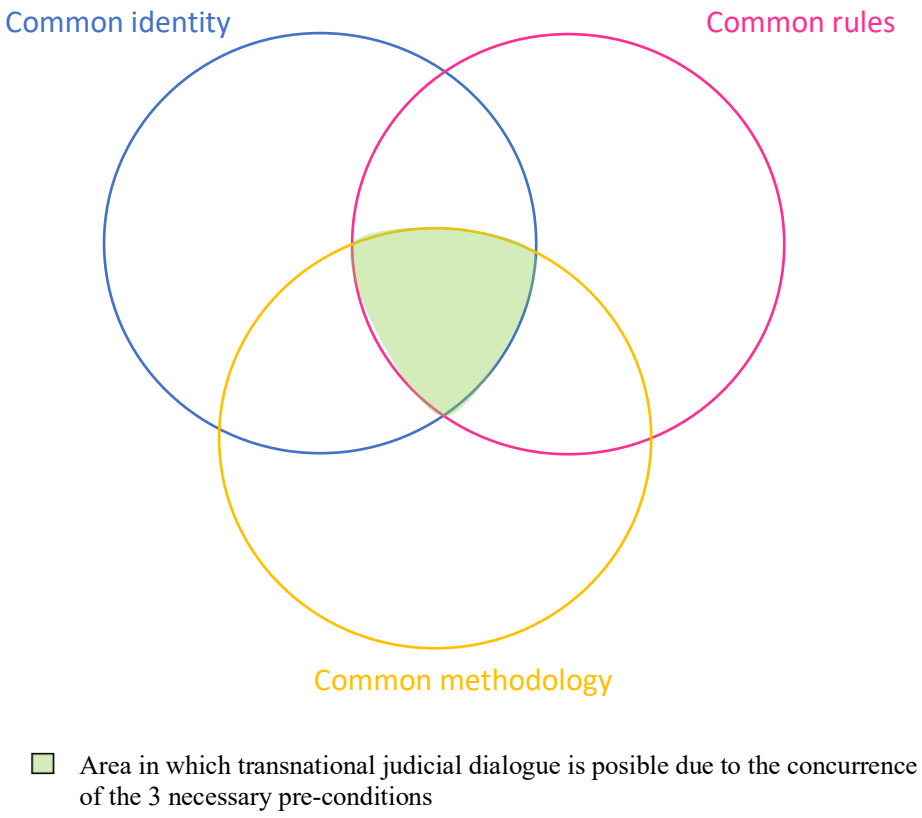
Therefore, while it has been noted many times that "the increasing use of international tribunals can be seen as [leading] to further fragmentation" (Fauchald & Nollkaemper, 2012, p. 4)[72], and individual national courts have a very limited reach as global trend-setters and IPAs, their inter-judicial coordination will necessarily lead to de-fragmentation provided a critical mass of courts embraces the resulting judicial trend: the content and order of international and domestic legal systems will be coordinated, explained in this Subsection. Summing up, inter-judicial coordination can compensate the lack of a centralized power to create, interpret and enforce international law by providing the institutional scaffolding to harmonize the inter-systemic dysfunctionalities across regulative levels.

As explained in the Conceptual Chapter, inter-judicial coordination shares some common traits with other forms of transnational judicial communication, but also have two particularities that singles it out. As shown in *Figure 6,* the common features are the necessary pre-conditions[73] (common identity, common methodology and common rules), the character of the actors (non-related courts), and the tools to sustain the dialogue (international law and comparative constitutional law). However, judicial dialogue will not amount to inter-judicial coordination unless the involved courts apply the same strategic approach to those common rules and, although international courts can contribute to the creation of the judicial trend, national courts are the indispensable actors to create the critical mass of norm-entrepreneurs coining a nascent standard due to their enforcement power. Hence, while from a dynamic point of view the main feature of this phenomenon is the coordination of the non-related actors (the mass of norm-entrepreneurs), from a material point of view the quintessential feature of inter-judicial coordination is the application of the same strategic approach to common rules.

[72] In this regard, see also: (Martineau, 2009; Rao, 2004). The logic behind this assertion is that, since international courts are not hierarchically connected or necessarily bound to each other's jurisprudence, the creation of new courts will only increase the atomization of the international judicial authority (especially when these courts are specialized in or promote the creation of new *lex specialis*) and could render contradictory or competing accounts of international law.

[73] This study is not concerned with finding the sufficient conditions for neither judicial dialogue nor inter-judicial coordination, since it is not devoted to examining courts' motivation to engage any kind of trans-judicial communication.

Figure 6 – Transnational judicial communication pre-conditions



Common rules are those national and international legal rules regulating the same issue and whose substance is essentially coincident despite being independent rules belonging to different levels of regulation (the international level and the national one) or to two different domestic legal systems. Hence, common rules do not necessarily imply an overlap of rules belonging to different legal systems and their defining feature is their common substance: common rules are characterized by their consubstantiality (Tzanakopoulos, 2011). In this sense, human rights (such as the right to due process or the right to life) are a paradigmatic case of consubstantial rules, since they are international rights outside the national borders and fundamental rights within them at the same time (Tzanakopoulos, 2016; Nollkaemper, 2011).

For its part, the strategic approach of a judicial resolution is the core element structuring courts' argumentative strategy and, hence, it is the cornerstone supporting the overall decision of the court. Bearing in mind that common rules formally belong to different legal systems and, potentially, even to different regulative levels (domestic or

international), it is not important for the coordination whether courts rely on national, international or both kinds of rules in their reasoning. From a material point of view, inter-judicial coordination depends on the two following cumulative factors:

- Courts' placement of the same common rule (or rules) as the corner stone of their reasoning, as the starting point of the causal chain that will lead to their final decision.
- Courts' adoption of the same strategic approach to the interpretation of the common rule.

Consequently, the inter-judicial coordination of national and international courts when the first rely on national rules and the second rely on international rules is possible as long as the rules are consubstantial and, hence, common rules despite belonging to different legal systems, for instance. Therefore, from a material point of view, there are many combinations of common rules that can be used as the base for inter-judicial coordination, as explained in the following paragraphs. Although inter-judicial coordination exists regardless of the kind of common rules it relies on, the transformations created in the tissue of the global legal order might be different.

To begin with, inter-judicial coordination can be based solely on national law: national courts place a common domestic rule as the cornerstone and starting point of their chain of reasoning and apply the same strategic approach to it. In this instance, the national courts of different countries are coordinating their interpretation of their respective national legal systems' rules that happen to share the same material substance. It is very unlikely that this kind of inter-judicial coordination will be joined by an international court, since international courts usually operate on the grounds of the international legal system they are connected to. Despite the lack of international rules in the strategic reasoning of the coordinated courts, this kind of inter-judicial coordination does modify the tissue of the global legal system provided there are enough courts involved and enough political actors abiding by the resulting interpretation: it results in the creation of a transnational trend and, hence, it increases the weight of domestic rules as an international constraint. Consequently, this kind of inter-judicial coordination results in the internationalization of domestic legal rules.

Table 1 – Types of inter-judicial coordination based on the common rules involved

Common rules	**Strategy**	**Transformation**	**Inter-judicial coordination**
Inward-looking common rules (National Law)	- Approach based on NL solely - Opposing approach based on IL	Internationalization of National Law	Uploading Mechanism
Outward-looking common rules (International Law)	- Approach based on IL solely	Domestication of International Law	Downloading Mechanism
Inward and outward-looking common rules (National and International Law)	- Fusion of IL & NL - Analogy between IL & NL	Internationalization of National Law & Domestication of International Law	Mixed Uploading & Downloading Mechanism

The internationalization of domestic rules is even more evident when the coordinated national courts go for a common approach based on domestic common rules as opposed to an alternative approach based on international law. This is still an instance of inter-judicial coordination exclusively based on national law, since no international precept has been included in the strategic reasoning shared by the courts, but the relevance of domestic rules as an international constraint is more evident due to the contrast created by the rejection of the competing strategy entrenched in international law.

Inter-judicial coordination can also be exclusively based on international law. This kind of inter-judicial coordination can be joined by both national and international courts but, although international courts' role as norm-disablers is undeniably relevant to the norm-emergence process of inter-judicial coordination, it is the critical mass of coordinated national courts that produces the transformation of the tissue of the global legal order. As previously explained, national courts are the primary enforcers and, hence, interpreters of international law. The critical mass of national courts is important not only because they

participate in the standardization of the content and order of international law, but also because they have the capacity to enforce such standardized interpretation on their respective national governments. This results in the domestication of international law, which provides the international legal system not only with a more widespread standardized content and order, but also vests international law with the enforceability of the domestic order.

Finally, inter-judicial coordination can also rely on a common approach that combines both national and international common rules. This takes place when courts strategic reasoning consists in either fusing the content of national and international law or creating an analogy between national and international rules in order to transfer the approach given to one of them to the other. Both national and international courts can take part in this inter-judicial coordination that produces both the domestication of international law and the internationalization of domestic law.

In overall, the inter-judicial coordination that produces the domestication of international law works as a downloading mechanism that modifies the fabric of international law by standardizing its domestic meaning and transferring features from the international order into the domestic order. For its part, the inter-judicial coordination that results in the internationalization of the domestic rules constitutes an uploading mechanism that uploads domestic content attached to the inward-looking version of the common rule to its outward-looking counterpart in the international system. Since the most salient material feature of inter-judicial coordination is not the kind of rule the coordination relies on but the fact that all courts apply the same strategic approach to the common rules, the different modalities mentioned above can be combined or stand alone.

For instance, in the case of the inter-judicial coordination concerning the protection of the right to a clean and healthy environment, all of the courts applied the common approach to the same combination of rules: they fused the content of the domestic fundamental right to live and the content of international soft law concerning environmental protection as to upholding the idea that the right to a clean and healthy environment was included within the natural content of the fundamental right to life: as a result, the government had the obligation to protect the environment despite the lack of specific domestic regulation concerning this field. Thus, in this instance of inter-judicial coordination all the courts used the same combination of common rules: their domestic

fundamental right to live is a common rule since they all have it within their domestic systems and the international soft rule concerning the right to a clean environment can also be seen as a common rule because of its international reach.

However, in the inter-judicial coordination concerning counterterrorism measures courts sometimes relied on different sets of rules to join the coordination, as explained in the Empirical Chapter of this thesis. Taking as an example the right to a fair trial and due process (frequently restricted by counterterrorism policies), some national courts relied purely on their domestic fundamental right to a fair trial, some other national courts relied on a combination of the national and international rules concerning the right to a fair trial (this is the inward and outward looking versions of the same common rule), international courts generally relied on international rules recognising the right to a fair trial and, in addition to this, most of these courts expressly balanced their reasoning against the competing strategic reasoning based on international rules concerning national and international security.

Despite the different combinations of rules, this is an example of inter-judicial coordination because all these courts decided to approach the lawfulness of the concerned counterterrorism policies from the same standpoint: the centrality of human fundamental rights (which are common rules to them both in their inward and outward looking versions) within the legal system of reference and regardless of whether that legal system was the domestic one, the international one or both. Consequently, the usage of one or another kind of common norms is irrelevant in terms of determining the existence of inter-judicial coordination, since its key feature is the application of the same strategic approach to common rules regardless of the legal system those common rules belong to.

In fact, from a material point of view, it is the consubstantiality of the common rules that allows for the construction of the critical mass: since common rules share the same substance, they must be interpreted in a consistent manner despite their formal independence. This is the intersubjective belief that allows for the transference of judicial approaches across legal systems and regulative levels. Hence, national courts' embrace of the same strategic approach will modifying both versions (the inward-looking and the outward-looking version) of the common rule.

If the strategic approach is applied to the inward-looking domestic version of the consubstantial rule, the outward-looking rule also undergoes the same transformation, since they are the same rule from a material point of view. Similarly, if the strategic approach is applied to the outward-looking version of the rule, its domestic counterpart suffers the same transformation as well. In other words, the strategical reasoning transforms the domestic content of the national and international rules materially connected. Even more interestingly, this material connection implies the transference of elements from the international system to the national one, or vice versa, as the byproduct of their standardized transformation stemming from the common strategical approach.

Take the example of environmental protection used to illustrate inter-judicial coordination's definition in the Conceptual Chapter. The strategical approach was the idea that the right to a clean environment belongs within the natural content of the right to life. This approach entails a systemic modification of both the national and international legal orders, since they are now fused. As a consequence of this strategic approach welding the right to life and the right to a clean environment, the latter was considered to be part of the national legal system, even without a legalizing act from the government or the legislative power. The legal chain of consequences then finishes establishing national mechanisms of protection to ensure the right to a healthy environment, hence constraining the executive decision-making powers.

Among the national mechanisms of protection, national courts included principles (such as the "polluter pays" principle or the "precautionary principle") that come from the international (soft) regulation of the right to a healthy environment. In this sense, the coordinated courts transferred the content from the outward-looking version of the right to a healthy environment into its inward-looking version, since these are the same rule from a material point of view. However, due to the weakness of the right to a healthy environment within the domestic sphere, the courts connected such right to the domestic right to life in order to ensure the validity and enforceability of the measures. This way, the national order expanded its content, and the international order gained enforceability.

Hence, the inter-judicial coordination displayed in this case worked both as a downloading mechanism and as an uploading mechanism, for it fused two common rules (the right to a healthy environment and the right to life) whose inward and outward-looking versions allowed for the downloading of content and uploading of enforceability.

Consequently, in this case, this exercise of inter-judicial coordination modified both sides of both common rules since the courts involved transformed and aligned the content of their respective national rules and their international equivalent (all of them consubstantial and, hence, common rules): the right to a healthy environment left the aspirational realm of principles to become and actionable and effective right and the idea that the right to a healthy environment is embedded within the natural content of the right to life has been interiorized for both the inward and outward looking versions of the right to life, because these are the same rule from a material point of view.

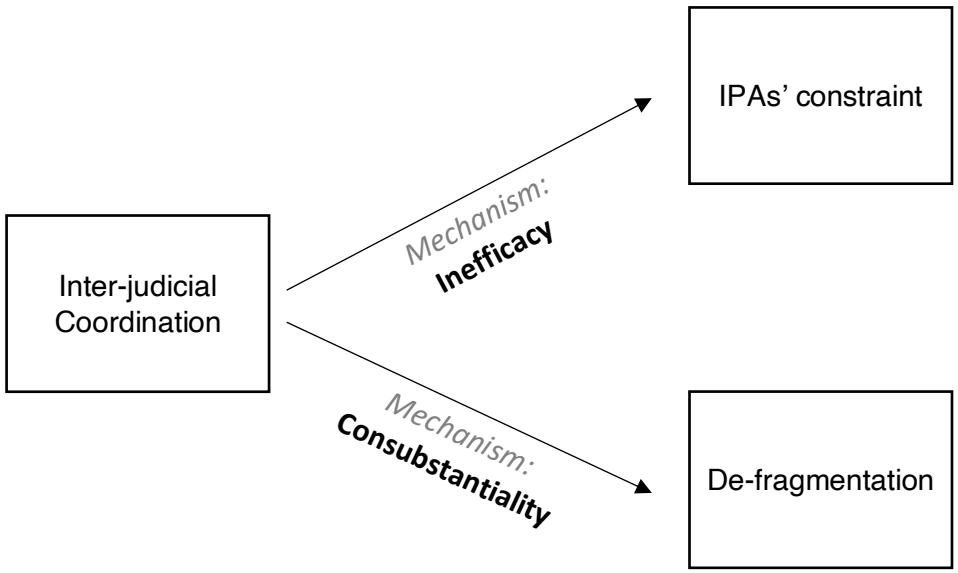
Summing up, the material connection of common rules (their consubstantiality) allows courts to import the strategical approach from other jurisdictions, allows the consistent reshaping of its national and international versions and, as a result, allows the transference of elements between systems as well. Thus, given a critical mass of coordinated national courts, a new interpretation of the common rule spreads across systems, re-shaping and harmonizing the inward-looking and outward-looking versions of it. Hence, inter-judicial coordination de-fragments the global order, not only because it provides a unified interpretation of international law, but also because it unravels the dysfunctionalities among the coexisting national and international regulative levels.

In this sense, the theory on de-fragmentation put forward by this thesis does not contradict but connects with the postulates of Legal Pluralism: the international legal order is rather complex (and sometimes contradictory) entanglement of legalities (Krisch, 2022) that coexist due to the historical lack of a centralized system of legal production (Tamanaha, 2021). Moreover, far from being limited to the international sphere, such entanglement also poses a challenge to the rule of law and democratic governance (Swenson, 2022). However, inter-judicial coordination manages to harmonize the conflicting legalities without the requirement of concentrating power in the hands of a centralized international actor and, by virtue of the transference of features operated by inter-judicial coordination between legal systems, the rule of law is reinforced within the domestic order and advanced at the international level.

-- Chapter IV: Empirical Chapter --

As stated in my Introduction, the purpose of my doctoral thesis is to elucidate whether national courts can be considered international political actors, understood as the actors that shape "the trends that are transforming world politics" and "take position on international issues" (Kegley & Wittkopf, 2009, pp. 11, 13). As established in my Theory Chapter, I posit that courts' increased capacity as IPAs comes from inter-judicial coordination: a phenomenon in which courts from independent jurisdictions apply the same strategic approach to common rules in order to uphold a common stance regarding certain policies (see the Conceptual Chapter). In short, my argument is that, through inter-judicial coordination, courts become international norm-entrepreneurs that can create behavioral change in other international political actors and de-fragment the global legal order. Hence, inter-judicial coordination can change the structural conditions for the international relations of states.

Figure 7 -- Hypothesized Double Causal Chain from Inter-judicial Coordination to the Constraint of International Political Actors and the De-fragmentation of the International Order



In the causal chain described in *Figure 7*, the causal mechanism leading to the behavioral change of IPAS is "Inefficacy". In other words, IPAs would adjust their policymaking to

the requirements of the coordinated courts because the existence of the judicial trend threatens the efficacy of their policymaking. For its part, the causal mechanism leading to the de-fragmentation of the global legal order is the "consubstantiality" of the common rules involved in the coordination. Hence, inter-judicial coordination reconciles the international and domestic orders by transferring the qualities of one order to the other, which homogenize both the content and hierarchical structure of both orders. As a result, inter-judicial coordination clarifies the content of international rules as well as the hierarchical relations among them and with regards to domestic rules. The overall hierarchical order is based on the material primacy of certain rules, rather than on a formal superiority based on its domestic or international origin.

Since this thesis aims at proving the existence of a phenomenon that had not been properly conceptualized before, the Conceptual Chapter has a descriptive purpose: the definition of inter-judicial coordination has been inductively obtained from the observance and analysis of a clear case of inter-judicial coordination (the coordination of developing countries' courts to promote environmental protection), due to the explicitness of the judicial dialogue behind it. However, the aim of this Empirical Chapter is to prove the explanatory theory of inter-judicial coordination's political and legal effects, hence moving from the descriptive side of my research into its explanatory side.

Inter-judicial coordination is a multi-actor phenomenon in which the action is necessarily collective. Therefore, although there should be several courts involved, I am treating the collective response to national and UNSC counterterrorist measures and policies as a Single Case Study with multiple observations. I have selected the case of *counterterrorism measures* because, first, I consider it to be a 'hard case'. As explained in the Introduction and Theory Chapters, national courts have traditionally employed a wide variety of avoidance techniques to grant their leniency to executive policies concerning the state's international relations, international organizations and national and international security.

Since counterterrorism policies are connected to all these fields (especially after the 9/11 attacks that globalized terrorism as an international issue to be tackled), this is an inhospitable environment for inter-judicial coordination because national courts' traditional behavior was the deflection of the review. Hence, the existence of a

coordinated review of counterterrorism policies would prove courts' capacity to coordinate in any policy-field if the conditions for judicial communication are met[1], regardless of the legal and political obstacles.

Furthermore, post-9/11 counterterrorism measures seem to be nested within a globally coordinated strategy that is partially rooted in the UNSC regulative activity (Roach, 2006; Roach, 2011). Hence, these counterterrorist regimes provide the opportunity to test the political effects of inter-judicial coordination on international organizations' policymaking. According to my theory, inter-judicial coordination turns courts into IPAs because this phenomenon allows them to set international trends that constrain other IPAs: through their coordination, courts become international norm-entrepreneurs.

Hence, for my theory to be correct, I must be able to observe not only the coordination of courts (which would be my Independent Variable), but also other IPAs' behavioral change in line with the trend established by inter-judicial coordination (the Dependent Variable): states' governments and international organizations. Since international organizations have proven to be especially resistant to national judicial review, the curving of their policymaking in line with the coordinated judicial review would be a strong indicator of inter-judicial coordination's impact on IPAs. The second kind of observation that would signal inter-judicial coordination's capacity to constrain IPAs would be the behavioral change of governments whose national courts have not joined the inter-judicial coordination. However, these observations must come with evidence linking the behavioral change of these two groups of IPAs to the jurisprudence of the coordinated courts. Hence, in order to confirm my theory, I must observe the behavioral change of IPAs that are not directly bound by the enforcement powers of the coordinated courts. In this scenario, the only explanation for the observance of the judicial trend is the birth of a norm dictating the appropriate behavior of policymakers in the field of counterterrorism.

I will use the case of counterterrorism measures to trace the existence of my Independent Variable (inter-judicial coordination), the presence of my first Dependent Variable (Constraint of IPAs policymaking) and the causal mechanism connecting them both (the

[1] In this regard, see the explanations provided in the Conceptual Chapter.

threat of inefficacy). Hence, I will apply, not only traditional process-tracing to determine the causal mechanism, but also Comparative Constitutional Law and International Law Analysis to trace the existence of a common approach and determine the existence of my IV. With regards to the causal chain explaining the legal effects of inter-judicial coordination, I will rely on the aforementioned analysis of the counterterrorism case in order to evaluate the impact of inter-judicial coordination in the fabric of the global legal order.

The findings of this Chapter reveal that an inter-judicial coordination upholding the centrality of human fundamental rights indeed existed and that the UNSC's reforms concerning targeted sanctions can be connected, not only to the ECJ, but to the critical mass of courts involved in such inter-judicial coordination. In this regard, the resulting norm spread through different counterterrorism regimes and jurisdictions, strengthening in a cumulative way: more courts progressively joined the coordination, and this increase came with a deepening of the norm.

In this regard, the *Kadi I 2008 case* is the culminating point of this inter-judicial coordination in which the critical mass of courts was stronger, and the resulting norm took its most advanced form. However, this critical mass of judicial norm-entrepreneurs was eventually eroded and, as a result, the evolution of the norm paralyzed, and the norm lost constrictive power. Hence, the erosion of the critical mass of courts limited the political and legal transformations produced by inter-judicial coordination. Thus, the findings of this Chapter are consistent with the legal and IR theories put forward in this thesis about inter-judicial coordination's capacity to constrain IPAs, de-fragment the global order and, in overall, change the structural conditions for states' international relations.

4.1. The existence of a coordination among courts in the relevant empirical field.

I am observing the reasoning patterns of several national and international courts in order to confirm the existence of inter-judicial coordination: each court is treated as a unit of analysis. As established by Roach, "[t]errorism was not invented with the September 11,

2001 (9/11), terrorist attacks on the United States. […] Although individual countries had panicked and reacted to terrorism with repressive and ineffective laws and measures before, the response to 9/11 was an unprecedented global phenomenon" (Roach, 2011, p. 1). In addition to portraying terrorism as a global threat, the 9/11 attacks added a general sense of urgency that spread across the globe, impregnated international governance and infiltrated into the different strata of states. The resulting wave of regulative reforms intended to fight global terrorism was ignited by the UNSC and its Committee (henceforth "CTC").

On September 28, 2001, right after the 9/11 attacks, the UNSC passed Resolution 1373[2], which urged all UN members to strengthen their legal framework to fight against the financing of terrorism. Although the resolution only required them to report on their progress to the newly-born CTC within 90 days, many states took the 90-days period as a deadline to reform their domestic legal system and rushed the enactment of new counterterrorism regulation that, very often, infused domestic immigration law with opaque administrative proceedings and cut down the domestic protection of fundamental rights outside the oversight of the public opinion and national courts (Roach, 2011, ps. 21-24). As a result, several UN members expanded their governmental discretion since the new counter-terrorist policies relied on executive or administrative policies without either parliamentary approval or judicial safeguards. This is an imbalance of power in which the increase of governmental discretion is proportional to the decrease of legislative and judicial supervision, which amounts to an erosion of the domestic system of checks and balances and the rule of law principle.

I am interested in judicial resolutions concerning counterterrorism connected to the so-called "global war on international terrorism"[3]. These courts might have reacted, in a coordinated way, to the coordinated executive fight against international terrorism. My selection criterion for judicial resolutions is not whether the court acquitted a suspect of terrorism, but whether the courts reviewed the legal framework of the policies, sanctions or counterterrorism measures in order to assess their possible shortcomings from the rule

[2] S/RES/1373 (2001).

[3] This is mainly counterterrorism policies developed in the aftermath of the 9/11 attacks, but I am also taking into account measures connected with UNSC Resolution 1267/1999, which is previous to the 9/11 attack, but that is connected to the same kind of jihadist terrorism and the seed of the subsequent UNSC resolutions concerning this topic.

of law point of view[4]: those courts that intended to set boundaries to the executive action in this field switched their traditional approach for that based on the centrality of international and/or domestic fundamental human rights within the legal system of reference. National courts relied on this approach to harness executive action under the rule of law by either directly quashing the validity of executive orders or regulations, asking for a legislative reform or reading requirements into the existing legal framework. In order to visualize the division between resolutions embracing the traditionally lenient approaches or the approach upholding human fundamental rights' centrality, I have created a chronological map of resolutions in which resolutions adopting a traditionally lenient approach are coded with a "1" and resolutions embracing the common approach concerning human fundamental rights' centrality are coded with a "2" (see *Map 1*)[5].

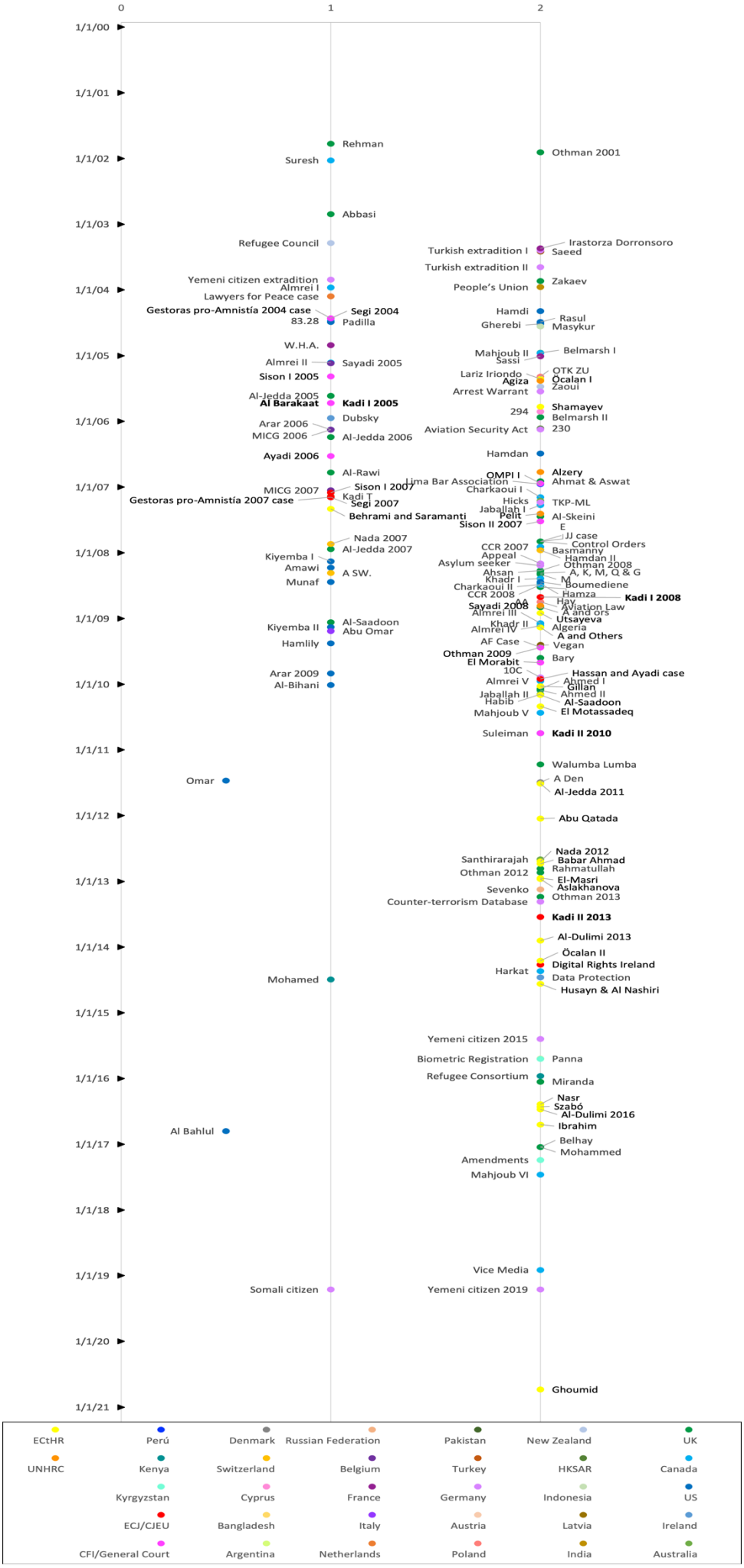
The goal, in this regard, is to check whether there is a mass of courts that followed the same approach (the centrality of fundamental human rights) for a common purpose: reinstating the balance of powers and upholding the rule of law. In this regard, I expect the first resolutions of the trend to reject the executive policy under review. However, as time goes by and the trend solidifies, I expect courts to validate executive policies under the new approach based on the centrality of fundamental human rights. This development can be explained by either the real re-adjustment of executive policies to the new standard or by the fact that lenient courts might deliver creative readings of the approach in order to accommodate executive policies within it. Either way, both options signal the strengthening of the trend, since even indulgent courts will feel compelled to anchor their reasoning within the new approach instead of resorting to the traditional one. In this sense, my analysis takes as positive observations those resolutions that base their analysis of the counterterrorist framework on the approach that places fundamental human rights as a central piece of the legal system, rather than focusing on whether the policies under review were rejected or accepted[6].

[4] For this purpose, I rely on the datasets and reports on international law available at the Oxford Law School Library: Westlaw, Lexis and Oxford Public International Law Reports. Hence, my search is limited to the jurisdictions covered by these datasets and the availability of resolutions in English, French, German and Spanish.

[5] Resolutions coded with a 0,5 are resolutions that acknowledge the loss of one or more pre-conditions to establish a judicial dialogue, as explained later in Section 4.2. The full citation of the resolutions included in the map can be found in Annex 1 of this thesis.

[6] The logic behind this is that even the most indulgent of resolutions, if based on the centrality of human and fundamental rights, will reject counterterrorism policies' immunity blanket, which will result in the strengthening of human fundamental rights and the rule of law.

Map 1 – Complete set of Judicial Resolutions concerning post-9/11 counterterrorism measures.



In terms of the legal actions that set the process of judicial review in motion, I am taking into account both direct challenges to the constitutionality or validity of the legal framework and complaints on individual measures and decisions that, nevertheless, indirectly amounted to the review of the general legal framework. In terms of the procedural stage of the case, I am focusing on resolutions that are final[7], either because they were decided in the last judicial instance or because they were never appealed. Finally, in terms of national courts, I am looking into both Common and Civil Law traditions to prove that my description of inter-judicial coordination is not restricted to one specific tradition and that, in fact, it can happen in both traditions and even across traditions[8].

While the effects of inter-judicial coordination will be explored in the following Sections, the current Section is devoted to confirming the existence of the IV: the judicial trend created by inter-judicial coordination and the coining of the norm according to which, counterterrorism measures are condition to the respect of the core minimum content of fundamental human rights. Hence, this Section starts by exploring the specific legal framework of counterterrorism measures and the challenges born from this fragmented regime to then explore the judicial reactions in this field.

Next, this Section illustrates the change of the courts' approach to the lawfulness of counterterrorism measures: whereas courts used to uphold the prevalence of national security, the superiority of UNSC resolutions and the non-justiciability of foreign affairs to validate unchecked executive measures in the aftermath of the 9/11 attacks, some courts slowly abandoned this perspective to embrace the centrality of fundamental human rights as the approach of reference in the evaluation of these policies within a rule of law-based system. Furthermore, this Section aims at highlighting the jurisprudential transferences between the courts involved in the inter-judicial coordination.

To this purpose, special attention is paid to the jurisprudential evolution of the UK, Canada and the US as the countries with the highest volume of cases. Furthermore, this

[7] Occasionally, some resolutions that are appealed are brought forward in order to illustrate particular features or facts concerning the creation of the judicial trend.
[8] As said before, my search is limited by three factors: the existence of digitalized judicial records; the access to digital judicial repositories; and the resolutions' language (I can analyze resolutions in English, Spanish, French and German).

Section also zooms into the case that has been most frequently single out as responsible for the reforms concerning the UN listing process: the *Kadi I 2008 case*. This Chapter posits that, contrary to the common doctrinal belief, the ECJ's position regarding targeted sanctions in this case cannot be detached from the evolution of the judicial trend concerning counterterrorism policies in general. Hence, the *Kadi I 2008 case* is the result of the inter-judicial coordination in which the ECJ inserted itself. In this sense, while this work defends that the ECJ cannot be credited for single-handedly forcing the reform of UN listing procedures, the current Section proves that the ECJ joined a pre-existing inter-judicial coordination and acted as a norm-enabler in the creation of the judicial trend. Finally, this Section also addresses the role of international courts like the ECtHR as norm-disablers within the inter-judicial coordination concerning post-9/11 counterterrorism policies.

4.1.1. Evolution of the national and international legal framework concerning the international "war against terror" and its challenges.

As said before, the 9/11 terrorist attacks were the ignition point of the global fight against terrorism and a wave of new counterterrorism policies flooded most of the countries. For the most part, these policies were backed by new counterterrorism regulations inspired by UNSC Resolution 1373. Resolution 1373 is an unprecedented form of global legislation[9], with binding effects, that impose general and permanent obligations upon the 193 member states of the UN in relation to the prevention of terrorism: the obligation to "[f]reeze without delay funds and other financial assets or economic resources" of people and organizations involved in terrorist acts and the obligation to prevent their nationals and other people within their territory from funding terrorist activities and organizations in any possible way.

Hence, a multiplicity of legal reforms branched out from these obligations, starting with the adoption of wide definitions of terrorism (Fry, 2009)[10], very often inspired by the

[9] For a detailed analysis of Resolution 1373 as an innovative form of global legislation see: (Szasz, 2002; Rosand, 2004; Koskenniemi M., 2005).
[10] See also the United Nation Office of Drugs and Crime Terrorist Legislation Database available at: https://sherloc.unodc.org/cld/v3/sherloc/legdb/index.html?lng=en [last accessed on 12/02/23].

British Terrorism Act, 2000[11] (Roach, 2006). National governments combined the new conception of terrorism with equally broad means to prevent it. Democratic countries developed schemes of administrative indeterminate detentions and empowered their secret services to detain and question subjects deemed to hold information relevant to the fight against terrorism based on secret evidence and without judicial supervision.

These policies were often inserted into immigration law due to Resolution 1373's emphasis on "effective borders controls" as the necessary means to "prevent the movement of terrorist or terrorist groups"[12], although the terrorists responsible for the 9/11 attacks hold legitimate visas to enter the United States[13]. Paragraphs 3(f) and 3(g) of Resolution 1373 call states to ensure "that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts" and "that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts". As a result, migrants and asylum-seekers were frequently targeted by the preventive indeterminate detentions and interrogations and the likelihood of deportation despite the risk of undergoing torture increased (Roach, 2011, ps. 39-42).

Hence, this catalogue of preventive policies and measures to fight terrorism affected and fused immigration, criminal and administrative law (Cole & Lobel, 2007; Donohue, 2008; Walker C., 2009), which are law genres with different standards of liability, burdens of proof and investigative tempos. The mixed nature of this antiterrorist regulation, together with the transnational character of the phenomenon, creates a multiplicity of legal conundrums that burdens states: whether states are allowed to base their counterterrorism measures on information obtained through torture in foreign states, whether states can render suspects of terrorism to other states outside the formal venues for extradition, whether states have an obligation to provide diplomatic assistance to protect their nationals' fundamental rights, whether diplomatic assurances are valid guarantees to ensure the state's compliance with the non-refoulment principle, or the legal status and rights of the so-called unlawful enemy combatants, for instance.

[11] Terrorism Act, 2000.
[12] Paragraph 2(g) of S/RES/1373 (2001).
[13] *National Commission on Terrorist Attacks upon the United States, 9/11 Report*, Chapter 7.

These dilemmas pose a quintessential conflict between the needs of security and foreign affairs understood as prevalent values within political and legal systems, and other sets of legal values such as human and fundamental rights. The aforementioned policies and measures often collide with one or more of the rights to life, freedom, freedom of movement, property and, especially, the right to a fair trial and due process because of the opacity surrounding antiterrorism measures and policies. This opacity hinders the courts' jurisdiction to review such policies, the quality and transparency of the evidence used in the sanctioning process and the extent to which such evidence must be rendered to sanctioned subjects or the court.

Since these questions underpin the judicial review of antiterrorism measures in relation to any human and/or fundamental right and, at the same time, are connected to the requirements of due process, the right to a fair trial is always directly or indirectly interpellated by this breed of counterterrorism policies. The unchecked restriction of these fundamental rights challenges the rule of law if not properly justified (Wagstaff, 2014, ps. 114-146; Hofnung & Weinshall-Margel, 2010, p. 153), like in the case of the general and vague appeals to national security risks and foreign affairs needs frequently put forward by national governments after the 9/11 attacks (Benvenisti & Downs, 2017; Roach, 2011).

These Gordian knots proved especially difficult to solve when the policies at stake are not backed up by proper legislative authorization, like United States' first batch of antiterrorist measures in the aftermath of the 9/11 attacks. American policies range from indeterminate detentions in foreign enclaves like Guantanamo Bay and dubious interrogation tactics to the involvement of the Central Intelligence Agency (hereinafter, "CIA") in unregulated renditions of suspects and other irregular antiterrorism activities in collusion with other states (Roach, 2011, p. 174)[14]. These policies relied on executive warlike powers and were thus sheltered from both public opinion and judicial review by the uttermost opacity.

[14] See also Marty, D. *Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states. Report of the Parliamentary Assembly of the Council of Europe* (Committee on Legal Affairs and Human Rights), 12 June 2006.

Far from harnessing executive discretion and human rights' abuse, the UNSC contributed to a situation in which domestic human rights' violations took place in the name of UNSC mandates (Forcese, 2006). In fact, the CTC and the Financial Action Task Force (hereinafter "FATF") periodically enquire member states about their progress in developing domestic regulation to implement Resolution 1373[15]. This is part of the strategy devised by the Counter-Terrorism Implementation Task Force (henceforth "CTITF")[16] in order to ensure compliance with Resolution 1373 above any other national or international obligation. The CTITF also channels its surveillance functions through the 1267 Taliban and al Qaeda Sanctions Committee (hereinafter, the "1267 Committee"), since UNSC Resolution 1267 (1999) (hereinafter, "Resolution 1267")[17] was the first UNSC's attempt to counter international jihadist terrorism[18].

Resolution 1267 was issued as a response to the 1998 bombings of American embassies in Kenya and Tanzania by Osama bin Laden and his Taliban associates. Although Resolution 1267 initially imposed arms embargoes, travel bans and the freezing of funds of Osama bin Laden and Taliban individuals, these targeted sanctions were extended to anyone related to Osama bin Laden and Al-Qaeda in UNSC Resolution 1333 (2000)[19], and several subsequent resolutions amended the list of targeted individuals and established listing and de-listing proceedings. Hence, Resolution 1267 and its amendments[20] are the seed of UN-imposed targeted sanctions as a counterterrorism

[15] Although the CTC decided not to release the subsequent reports on the domestic implementation and development of Resolution 1373, the reports dated from 2001 through 2006 can be found in: https://www.un.org/securitycouncil/ctc/content/member-states-national-reports [last visited on 15/03/23].

[16] The CTITF was created in 2005 to avoid coordination problems among the different institutions and actors connected to the development and management of international counter-terrorist measures. Hence, the CTITF encompasses different UNSC committees such as the CTC; other international organizations like the World Bank; several specialized agencies; and UN bodies devoted to human rights' protection. See: *UN Global Counter-Terrorism Strategy: Activities of the UN System in Implementing the Strategy*, A/62/898, July 7, 2008.

[17] S/RES/1267 (1999).

[18] S/RES/ 1363 (2001) creates the Monitoring Group for the domestic implementation of Resolutions 1267 and 1333 that will report to the 1267 Committee. S/RES/1455 (2003) extends the surveillance of the Monitoring Group and the 1267 Committee to the implementation of Resolution 1373.

[19] S/RES/1333 (2000).

[20] S/RES/1333 (2000); S/RES/1388 (2002); S/RES/1390 (2002); S/RES/1452 (2002); S/RES/1455 (2003); S/RES/1456 (2003); S/RES/1526 (2004); S/RES/1617 (2005) and S/RES/1699 (2006). Subsequent resolutions S/RES/1988 (2011) and S/RES/1989 (2011) split the regime into one branch concerning the Taliban and another branch concerning al-Qaida.

measure, while domestic targeted sanctions, as well as other general domestic policies to prevent and suppress terrorism, are usually presented as implementations of Resolution 1373.

Consequently, anti-terrorism domestic policies are a mix of preventive and punitive regimes fusing immigration, administrative and criminal laws; legal and non-regulated policies; and targeted and general measures that are partially or fully rooted in UNSC resolutions[21]. In addition to these interconnected international and national regimes, at the EU level, regional regulation implementing UN-imposed sanctions also coexists with autonomous EU-managed or EU-imposed sanctions. Common Position 2001/930 on combating terrorism[22] and Common Position 2001/931 on the application of specific measures to combat terrorism[23] are the two first pieces of the autonomous EU sanctions regime developed in response to Resolution 1373[24]. The EU can directly impose sanctions on persons and entities integrating, associated to or supporting international terrorism from September 2016 on. Until then, only EU countries could single out the recipients of the sanctions, although the targeted subjects were included within an EU list that was autonomous since it did not depend on UN-listing[25]. The current EU legal framework for EU-listings is laid down in Council decision (CFSP) 2016/1693 and Council regulation (EU) 2016/1686, which allows the EU to apply sanctions autonomously to ISIL/Da'esh and Al-Qaida and related individuals and entities.

[21] Some countries like the UK had imposed autonomous targeted sanctions prior to Resolution 1373, so these early domestic listings were rather inspired by Resolution 1267, although they were not a strict implementation of UN-imposed sanctions.
[22] Council Common Position 2001/930/CFSP, of 27 Dec. 2001, on combating terrorism, OJ [2001] L 344/90.
[23] Council Common Position 2001/931/CFSP, of 27 Dec. 2001, on the application of specific measures to combat terrorism, OJ [2001] L 344/93.
[24] The latest update of the listing is provided by Council Implementing Regulation (EU) 2022/147 of 3 February 2022 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, and repealing Implementing Regulation (EU) 2021/1188. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.025.01.0001.01.ENG&toc=OJ%3AL%3A2022%3A025%3ATOC [last accessed on 12/02/23].
[25] Hence, up until September 2016 individuals were targeted at the national or UN level and included into an EU list drawn up by the Council under the Second and Third Pillars before adopting a general EC regulation.

The domestic, regional and UN regimes defy human and fundamental rights in very similar ways, and they are especially challenging for the right to a fair trial due to the lack of transparency and accessibility of the listing and de-listing procedures. Hence, the overlap of domestic, regional and UN targeted sanctions interacts with other counterterrorism policies and creates a global net of regulations stemming from autonomous regimes, regimes linked to Resolution 1267 and regimes linked to Resolution 1373. Targeted sanctions are one instrument amidst the amalgam of domestic, regional, and international tools in the global fight against terrorism and they are also justified under the same arguments concerning national security and global affairs. However, in the case of targeted sanctions, their clear connection to UNSC resolutions provides an additional argument in favor of executive measures restricting human and fundamental rights: the combined reading of Articles 25 and 103 of the UN Charter provide the binding effects and primacy of UNSC resolutions.

The alleged superiority of UNSC resolutions adds a new layer to the judicial immunity provided by the executive powers on security policymaking and foreign affairs. It is no surprise that, in the 9/11 attacks aftermath, this combination drove courts to validate restrictive counterterrorism policies under vague and abstract executive appeals to the prevalence of national security, the non-justiciability of foreign affairs and the superiority of UNSC international obligations. It is however more puzzling the ECJ's decision in the *Kadi I 2008 case*, in which the ECJ upheld the respect for European fundamental rights as a condition for the lawfulness of Community acts implementing UNSC resolutions concerning the fight against international terrorism.

This ECJ decision is interesting because the European regulation at issue is backed up by the 1267 UN regime, which allegedly requires implementation ad verbatim, so the arguments in favor of the prevalence of national security, the non-justiciability of foreign affairs and the superiority of UNSC resolutions appear in their strongest form. Hence, this 2008 ECJ decision seems to go against the traditional judicial approach to these fields. Secondly, it is also interesting because the European Court of First Instance (henceforth, "CFI") reviewed the same case 3 years earlier and rendered a radically opposite decision adhering to the traditional approach.

This thesis posits that the *Kadi I 2008 case* is fruit of inter-judicial coordination. In this resolution, the human rights-based approach to the lawfulness of counterterrorism policies reaches its prime and it is taken to its last consequences. Thus, this resolution is the culminating point within the progressive development of the judicial trend to assess counterterrorism measures under human and fundamental rights' centrality. This trend goes beyond the 1267 targeted sanctions regime, and it broadly affected the judicial review of counterterrorism measures in general. In this sense, the *Kadi I 2008 case* solidifies and extends a pre-existing trend among national courts. In fact, the CFI resolution in the *Kadi I 2005 case* concerning the same set of targeted sanctions also mimicked the pre-existing judicial trend to adhere to the traditional approach. Hence, the 180º spin from the 2005 CFI decision to the 2008 ECJ decision in Kadi is due to the emergence of the inter-judicial trend that modifies the norm underlying the judicial review of counterterrorism measures.

4.1.2. Catalogue of available judicial reactions.

In my Conceptual Chapter, I define inter-judicial coordination as the formal dialogue among non-related courts that apply a common approach to common rules, which results in the judicial trend that issues a new-born IR norm and de-fragments the global legal order. According to this definition, inter-judicial coordination takes place when different courts that are not hierarchically bound tackle the same kind of issue with the same kind of legal approach to achieve the same goal.

For instance, in the case of the inter-judicial coordination concerning environmental protection among the courts of developing states (see the Conceptual Chapter), courts' common approach was to insert the right to a clean environment within the domestic fundamental right to life in order to establish their governments' obligation to protect the environment despite the lack of domestic regulation and the weakness of the international regulation in the field. The lack of a clear binding obligation to protect the environment was the common issue faced by all the courts involved in the coordination, despite the difference in the policies under review and the specific judicial remedies provided in each case.

In the current case of counterterrorism measures, the post-9/11 scenario was characterized by a global wave of domestic regulations calling "for special executive powers to combat terrorism and, in doing so, [changing] the balance of powers between branches of government by granting the executive branch special emergency powers of legislation and judicial authorizations" (Hofnung & Weinshall-Margel, 2010, p. 153). Courts reacted in different ways to this common situation, but this thesis posits that some of them adopted a common approach that coordinated their response to this global issue: courts anchored their strategic reasoning in the centrality of fundamental rights and/or international human rights within their legal systems in order to set limits to executive discretion and uphold the rule of law. National courts slowly moved from validating vague appeals to national security risks, foreign affairs' non-justiciability and UNSC resolutions' superiority as a justification for the over-expansion of executive discretion, to assess the limits of counterterrorism measures under the light of human and fundamental rights' centrality within the legal system.

Hence, while the initial trend among national courts was to extend their traditional leniency to executive claims of immunity in the concerned fields, the trend shifted to the collective rejection of the unchecked executive restrictions of human and fundamental rights. As illustrated later in this Chapter, the judicial trend based on the review of counterterrorism policies in light of human rights and fundamental rights' centrality eventually caught up with the UNSC policymaking and the threat to render the targeted sanctions regime ineffective forced them to observe the judicial requirements.

Consequently, the progressive development of this new judicial trend implies the emergence of a new norm that constrains IPAs: counterterrorist policymaking is conditional to the respect of the core minimum content of human fundamental rights. The development of the judicial trend implies not only the progressive adherence of more courts to the new norm, but also the progressive deepening of the new norm. In this sense the culminating point of this emergence process is the *Kadi I 2008 cas*e, which represents the most solidified version of the trend and serves as a sample for other courts to reproduce[26]. Hence, the ECJ was the most important of the norm-enablers involved in the

[26] Although this salient case was followed by two more sequels (the *Kadi II 2010 case* and the *Kadi II 2013 case*), I posit that the version of the norm defended by them was not fully embraced by a critical mass of national courts, as explained in Section 4.2.

emergence of the norm. Despite this, the effects of inter-judicial coordination dissolved when the critical mass of courts upholding the coordination was eroded, as explained later in this Chapter.

As shown by the following jurisprudential analysis, courts always have more than one available approach to tackle the assessment of the exceptional powers vested upon the executive branch of the government by the antiterrorism legislation. However, the range of the options available to courts is partially limited by the legal framing put forward by the parties to the judicial process, as illustrated by the *Palestinian Society case* of 2006[27], for instance. In this case, the petitioners challenged the legality of Israel's targeted killings as preventive counterterrorism policies in the Gaza strip and the West Bank. The court rejected the argument that preventive strikes are generally banned by customary international law on armed conflicts since no prohibition or habilitation could be identified. Consequently, the legality of each individual targeted killing had to be determined in relation to its circumstances[28]. However, the court did provide the guidelines to perform such legal assessment and virtually constricted the legality of future targeted killings[29]. In this case, the parties did not portray the case as a conflict of law, but as a hermeneutical doubt to be solved. Hence, the reasoning of the Israelian Supreme Court focused on elucidating the meaning and extension of customary international law because this was the legal framework presented by both parties.

However, this thesis is ultimately concerned with resolutions that bring face to face executive claims concerning national security's prevalence, UNSC resolutions' superiority and/or foreign affairs' non-justiciability on one side, and human and fundamental rights' centrality on the other, since these are the two trends connected to the turf battle between the executive branch and the judiciary concerning the intra-state balance of power described above. Consequently, my selection of resolutions is limited to the existence of this clash of values, although there are many judicial resolutions

[27] Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and ors, Original Petition to the High Court of Justice, HCJ 769/02; 13th December 2006.
[28] Ibid., para. 60.
[29] Ibid., paras. 29 to 40. However, the court acknowledged a necessary margin of executive discretion and only subjected the preventive strikes to *ex post facto* judicial review (paragraph 59).

dealing with a multiplicity of topics connected to the post-9/11 regulative reforms due to their all-embracing character.

Therefore, the case selection excludes resolutions on criminal or civil charges for terrorism-related actions[30] and the re-assessment of the domestic definition of terrorism[31] (unless the case amounts to a review of the underlining counterterrorism policies). I have also excluded those resolutions concerned with the states' liability for acts of terrorism[32], since this empirical study is only concerned with the liability of states for breaches of human and fundamental rights in relation to counterterrorism policies.

[30] See, for instance, Kiobel and ors v Royal Dutch Petroleum Company and ors, Supreme Court judgement, Docket No 10-1491, 133 S Ct 1659 (2013), 185 Led/d 671, 81 USCW 4241, 17th April 2013, United States, Supreme Court. The case settled a foreign corporation's responsibility for the breach of human rights under terrorism-related regulation. In the *General Amnesty Act* case (Cuellar Martínez and ors v Legislative Assembly of El Salvador and Martínez González, Attorney General of El Salvador (intervening), Unconstitutionality judgement, 44-2013/145-2013, 13th July 2016), the Constitutional Court of El Salvador reviewed the grounds to award a general amnesty in relation to the terrorist acts committed during the 1980-1992 Salvadorian civil war. The court did weigh the relevance of international human rights in the case at stake (more specifically, the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and the Additional Protocols to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts). However, the case did not amount to a review of the counterterrorism measures, but to the executive prerogative to pardon and the gravity of the crimes. See, also the *Montecristo case* (AAM and ors, Final Appeal Judgement, No 26825/2013, ILDC 2240 (IT 2013), 20th June 2013, Italy, Supreme Court of Cassation, 2nd Criminal Section).

[31] See, for instance, Public Prosecutor at the Tribunal of Brescia v Elvis and el Mahdi, Appeal decision, No 40699, 9th October 2015. In this case, the court had to decide whether the Convention on the Prevention of Terrorism was relevant to outline the concept of terrorism considering that Italy had signed but not ratified such convention.

[32] This excludes cases connected to the immunity of states for terrorism acts (Flatow and ors v Iran and Iranian Ministry of Information and Security and Ministry of Foreign Affairs of Italy (intervening), Final Appeal judgement (enforcement of foreign ruling in Italy), No 21946, 28th October 2015, Italy, Supreme Court of Cassation; and Ministry of Defense and Support for the Armed Force of the Islamic Republic of Iran v Cubic Defense Systems, Incorporated, Rubin (joining) and ors (joining), Trial court judgement, 2013 US Deck LEXIS 171268 (SD Cal 2013) 27th November 2013, United States, California, District Court for the Southern District of California [SD Cal]), to the immunity of states and their agents for terrorism acts (Rosenberg and ors v Lashkar-e-Taliba and ors, Trial Judgement, 980 FSupp 2d 336 (ECNY 2013), 30th September 2013), and to the immunity of states for acts of terrorism committed in connection with a private company (see Doe and ors v Drummond Company Incorporated and ors, Appeal judgement, No 13-15503, 782 F 3d 576 (11th Cir 2015) 25th March 2015, United States, Court of Appeals (11th Circuit) [11th Cir]). It also excludes cases about the civil responsibility of states for acts of terrorism (see Jones v United Kingdom, Merits and just satisfaction, Nos 34356/06 and 40528/06, ECtHR 2014, 14 January 2014.; and Estate of the late Zahara (Ziba) Kazemi and Hashemi, Canadian Lawyers for International Human Rights (intervening) and ors v Iran and ors, Final Appeal, case 35034/2014 DCC 62, [2014] 3SCR 176, 10th October 2014, Canada, Supreme Court [SCC]).

The temporal horizon for my case selection is not determined by the commission of the terrorist act, but by whether it is assessed under the legal framework established following the 9/11 attacks and the so-called global war against international terrorism. In this sense, the relevant counterterrorism regulation must be policies connected to the 1267 or 1373 regimes or autonomous regimes linked to the post-9/11 scenario by the executive, legislative or judicial powers. As for the territorial criteria, the case selection extends to all national courts included in the available databases and I have made sure that there are representatives from all continents and both the civil and common law traditions[33].

4.1.2.1. Lenient judicial approaches: the prevalence of security, the supremacy and literality of UNSC resolutions and the non-justiciability of foreign affairs.

As mentioned before, the traditional approach to the judicial review of counterterrorism measures is based on the prevalence of national security as a value within the legal system, the superiority of UNSC resolutions in relation to any other legal rule within the system or/and the non-justiciability of foreign affairs, since this policy-field is seen as external to the legal system. These arguments are deployed, separately or combined, as explained in this Subsection.

The first obvious possibility available to courts is to accept the governmental arguments about the absolute prevalence of national security over any other legal value within the system. Anchored in this premise, courts' alleged lack of legitimacy and expertise in the field will prevent them from meddling into the executive's exclusive competence on national security. This starting point will lead courts to either deflect the review, extend their deference to the governments' explanations, or a combination of the two. As a result, the aforementioned special executive powers will be validated on the grounds of national security's prevalent position within the legal system, as stated by the government.

[33] In this sense, the only country that has been excluded is Israel, since its permanent state of emergency has a direct impact on the separation of powers of the state and its fundamental rights. The cases reviewed by the Israelian Supreme Court are set aside by the war-like environment in which the facts take place. Hence, although Israel's Supreme Court meets the conditions for inter-judicial coordination and, in general, transjudicial communications, the terrorism-related cases reviewed by this court cannot be equated with those concerning other courts.

The Italian Constitutional Court adopted this approach in the *Abu Omar case*[34]. This Egyptian citizen was abducted from the streets of Milan, where he was a resident, and transported to Egypt to be detained on suspicion of support for a terrorist group. During Milan's Public Prosecutor's investigation on his disappearance, it was revealed that both the CIA and the Italian Military Information and Intelligence Service ("SISMi" for short) had participated in what seemed to be the kidnapping, illegal deportation, and indefinite detention of an Italian citizen without judicial or parliamentary authorization. Although the Public Prosecutor was initially able to seize SISMi's unredacted documents concerning the case, a much more censored version of the documents was submitted by the SISMi as the only evidence to be used in the criminal proceedings against twenty-six Americans and nine Italians allegedly involved in the abduction. The question of whether such documents were classified as official secrets roamed through different jurisdictional instances that tried to elucidate whether the thick veil of national security could hide the evidence or, on the contrary, the facts constituted a subversion of the constitutional order that justified the removal of such opaque veil.

As stated by the Italian Constitutional Court, "the core issue […] consists in the need to establish […] the respective extent of the constitutional powers which may lawfully be exercised […] by the President of the Council of Ministers and […] the various judicial authorities […] in relation to official secrets"[35]. According to the court, the starting point of this assessment must be the "supreme interest of the security of the state as an international actor [that] predominates over every other interest within all state organizations, regardless of the political regime"[36]. Although the Italian Constitutional Court portrays the country as a "democratic republic"[37] and recognized that "a problem necessarily arises of the interaction or interference [of national security] with other constitutional principles [such as those] which underpin the judiciary", this clash of constitutional values must be settled in favor of national security's prevalence because "the security of the state constitutes the essential, irrepressible interest of the collectivity, which clearly enjoys absolute predominance over any other interest since it impinges

[34] Judgment No. 106 of 2009; Constitutional Court of Italy; March 11, 2009.
[35] Ibid., para. 3.
[36] Idem.
[37] Idem.

upon, as stated above, the very existence of the state, one aspect of which is the judiciary"[38].

It follows from this that "the assessment regarding the measure appropriate and necessary in order to guarantee the security of the state is of a purely political nature, […] and is certainly not pertinent to the activities of the courts, [since] the President of the Council of Ministers is vested with broad powers over such matters"[39]. Consequently, the Italian Constitutional Court upheld the Government's decision to classify the SISMi's documents as state secrets (which prevents the Public Prosecutor from obtaining and courts from considering such documents), dismissed any considerations concerning the fundamental right to due process and quickly brushed aside the disruption of the constitutional order by stating that "one single criminal offence, no matter how serious it may be, is not in itself capable of qualifying as an act which subverts the constitutional order unless it is capable of undermining and disrupting the overall structure of democratic institutions"[40].

Although the court presents this reasoning as its only possible course of action, the pretended neutrality of its chain of arguments is compromised by its very starting point: the prevalent position of national security over any other constitutional value is not a legal mandate, but rather the court's interpretation of choice. Despite the court's reliance on a systemic interpretation of Article 52 of the Italian Constitution[41] in order to brace national security's prevalence, neither Article 52 nor any other constitutional provisions specifically support this idea. The lenience of the Italian Constitutional Court in this case is especially poignant since the court's decision concerning the legal framing of an accessory question (the nature of SISMi's documents) indirectly precluded the judicial

[38] Idem.
[39] Idem.
[40] Ibid., para. 8.3.
[41] Article 52 of the Italian Constitution (1947) states that "The defence of the Fatherland is a sacred duty for every citizen. Military service is obligatory within the limits and in the manner set by law. Fulfilment thereof shall not prejudice a citizen's employment, nor the exercise of political rights. The organisation of the armed forces shall be based on the democratic spirit of the Republic". Hence, no mention of any hierarchical relationship between national security and other constitutional values is made. The official English translation of Article 52 of the Italian Constitution is available at: http://www.prefettura.it/FILES/AllegatiPag/1187/Costituzione_ENG.pdf [last accessed in 12/02/23].

review of the main events under criminal investigation and, more importantly, of the general legal framework around the Italian Government's counterterrorism measures.

Together with this avoidance strategy rooted in the prevalence of national security over other values within the legal system, counterterrorism domestic measures linked to the international legal framework created by UNSC resolutions provide courts with yet another strategy to avoid the review of the policies. The anchoring of this strategy (that can be combined with the previous one) is the unavoidable supremacy of the international legal rules and obligations sanctioned by the UNSC over any other international or domestic regulations. This argument is especially easy to use in the case of the 1267 regime, in which the targeting of the suspected individuals is directly performed by the CTC, so the domestic measures to implement the targeted sanctions can be read as a literal reproduction of a UNSC resolution. In this strategy, the adducing of Articles 25 and 49 of the UN Charter[42] generally results in either the denial of the court's competence to assess the case or the admission that the executive implementation of the sanction without judicial supervision is the only possible option.

Take as an example the outcome of Mr. Kadi's judicial endeavors in Turkey. Yassin Abdullah Kadi (or Al-Qadi) was a Saudi Arabian businessman whose assets in different countries were frozen after the CTC included him in UNSC Resolutions 1267(1999) and 1333(2000) as a suspected collaborator of the al-Qaeda network[43]. As a result of his inclusion in the CTC Consolidated List, he was also placed in the US Office of Foreign Asset Control (OFAC) list, the EU financial sanctions list created under Regulations Nos 467/2001, 2062/2001 and 881/2002, as well as in different domestic blacklists created in

[42]As previously stated in the Introduction of this thesis, according to Article 25 of the UN Charter "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter", while Article 49 of the UN Charter establishes that "[t]he Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council".

[43] At the time the Turkish Council of State issued its decision, the sanctioning regime set by UNSC Resolutions 1267(1999) and 1333(2000) had been developed by the following subsequent UNSC Resolutions: Resolution 1269, UN Doc S/RES/1269, UN Security Council, 19 October 1999, Resolution 1333, UN Doc S/RES/1333, UN Security Council, 19 December 2000, Resolution 1368, UN Doc S/RES/1368, UN Security Council, 12 September 2001, Resolution 1373, UN Doc/S/RES/1373, UN Security Council, 28 September 2001, Resolution 1390, UN Doc S/RES/1390, UN Security Council, 28 January 2002, Resolution 1455, UN Doc S/RES/1455, UN Security Council, 17 January 2003, Resolution 1526, UN Doc S/RES/1526, UN Security Council, 30 January 2004, Resolution 1617, UN Doc S/RES/1617, UN Security Council, 29 July 2005).

implementation of the UN regime. The obliquity of the sanctions imposed on Mr. Kadi was met with legal actions pursuing his de-listing in all relevant jurisdictions: in Turkey, Mr. Kadi challenged the constitutionality of Decree No 2001/3483[44] (enacted to give effect to UNSC Resolutions 1333 and 1373) and the Council of State's 10th Division granted the annulment on the basis that funds and assets could only be frozen by court decision, since Article 13 of the Turkish Constitution (1982)[45] did not allow the state to restrict human rights through administrative decrees[46].

However, the Administrative Appeals Board of the Turkish Council of State revoked this decision on 22 February 2007[47]. The court emphasized that, according to Articles 25 and 48 of the UN Charter[48], the state had the unavoidable international obligation to give effect to the UNSC resolution and hence carry out the freezing of assets upon the individuals included in the CTC Consolidated List[49]. However, to the extent that the concerned UNSC resolutions did not include any procedural requirements, the government could use any means necessary for their implementation, including an administrative decree[50]. This reasoning relies on the idea that the transposition of international rules falls within the scope of internationals relations, hence bringing forward the non-justiciability of this field under the pretext that it is the exclusive province of the government.

[44] Decree No 2001/3483 (Turkey [tr]).
[45] According to Article 13 of the Turkish Constitution: "Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality". Available at: https://global.tbmm.gov.tr/docs/constitution_en.pdf [last accessed on 12/02/23].
[46] The Turkish Council of State is defined in Article 155 of the Turkish Constitution (1982) as a supreme court in charge of the administrative matters that are not specifically allocated to any other administrative court.
[47] Decision n. 115/2007 App No 2824/2006 (22 February 2007) ILDC 311 (TK 2007).
[48] Article 48 of the UN Charter establishes that "[t]he action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine" in paragraph 1, and adds that "[s]uch decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members" in paragraph 2.
[49] Decision n. 115/2007 App No 2824/2006 (22 February 2007) ILDC 311 (TK 2007), para 37 and 38.
[50] Ibid., paras. 38 and 39.

Similar claims about the inexorableness of UNSC resolutions have been made in relation to regimes that admittedly provide more room for domestic interpretation than the 1267 regime. This is the case, for instance, of the Irish High Court in relation to UNSC Resolution 1368 (2001)[51]. In 2001, the Irish government allowed the United States military and civilian aircrafts *en route* to the Afghanistan's conflict to over-fly and land to refuel in Irish territory. Mr. Dubsky, an Irish citizen, argued that domestic regulations allowing US aircrafts to over-fly and land in Irish territory in their way to the Afghan conflict, were unconstitutional as Ireland's participation in the Afghan war had not been authorized by the Irish Parliament (as requested by Article 28(3)(1) of the Irish Constitution[52]) and such authorization could not, in fact, be given because it would breach Ireland's neutral position under the 1907 Hague Convention (which had to be respected as a recognized principle of international law, in accordance to Article 29(3) of the Irish Constitution[53], although Ireland is not one of its signatories).

The Irish government argued that, by virtue of Articles 25 and 49 of the UN Charter, the country was bound to provide assistance to US international fight against terrorism, in accordance with UNSC Resolution 1368 and that, moreover, no constitutional impediment existed since the Afghan conflict was not a war[54]. The Irish High Court sided with the Irish government's arguments in both points. Justice Macken fully absorbed the governments allegations about the unavoidable and unquestionable superiority of UNSC resolutions by stating that "it is neither permissible nor appropriate for this court to seek to interpret a resolution of the Security Council of the United Nations. This court, in my view, has no competence so to do, and I make no comment on the argument of one or other party on the true meaning of the resolution".[55]

Hence, despite admitting "the argument of the applicant that if a Security Council resolution directed or implied that the State was obliged to embark on a program which

[51] Dubsky v Government of Ireland and ors, Judicial review, 2002 NO 571 JR, [2005] IEHC 442, ILDC 485 (IE 2005), 13th December 2005, Ireland; High Court, para. 91.
[52] Article 28(3)(1) of the Constitution of Ireland (1937) states that "[w]ar shall not be declared and the State shall not participate in any war save with the assent of Dáil Éireann". Available at: https://www.irishstatutebook.ie/eli/cons/en/html#part5 [last accessed on 12/02/23].
[53] Article 29(3) of the Constitution of Ireland (1937) states that "Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States". Available at: https://www.irishstatutebook.ie/eli/cons/en/html#part5 [last accessed on 12/02/23].
[54] Ibid., para. 7.4.
[55] Ibid., para. 91.

was obviously unconstitutional, the existence of that resolution could not render the programme constitutional"[56], the court refused to consider the content of the UNSC Resolution 1368 in any way. This prevented the court from measuring the margin of interpretation that the resolution allowed for in its domestic implementation, which is what Mr Dubsky's legal complaint truly demanded, since he challenged the constitutionality of the domestic implementation of UNSC Resolution 1368, and not the resolution itself. Had the court addressed this issue, it would have noticed that UNSC Resolution 1368 simply called "on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks"[57] and "to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions, in particular resolution 1269 (1999) of 19 October 1999[58]".

Consequently, the court upheld the idea that Ireland's obligation to support US aircraft operations was inescapable by direct mandate of UNSC Resolution 1368, although it did not contain such specific obligation and its wording allowed for different domestic implementations. As for the definition of war, the court also agreed with the government on "the fact that the courts are not the realm in which decisions as to participation or otherwise in a war should be considered", because of "the strictly circumspect role which the Courts adopt when called upon to exercise jurisdiction in relation to the executive's

[56] Idem.

[57] See S/RES/1368 (2001), available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement [last accessed on 12/02/23].

[58] For its part, UNSC Resolution 1269 (1999) does not enclose specific measures either, but rather the general call upon all states to "cooperate with each other, particularly through bilateral and multilateral agreements and arrangements, to prevent and suppress terrorist acts, protect their nationals and other persons against terrorist attacks and bring to justice the perpetrators of such acts; prevent and suppress in their territories through all lawful means the preparation and financing of any acts of terrorism; deny those who plan, finance or commit terrorist acts safe havens by ensuring their apprehension and prosecution or extradition; take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not participated in terrorist acts; [and] exchange information in accordance with international and domestic law, and cooperate on administrative and judicial matters in order to prevent the commission of terrorist acts." See S/RES/1269 (1999), available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/303/92/PDF/N9930392.pdf?OpenElement [last accessed on 12/02/23].

conduct of international relations generally"[59] (as stated in the consolidated jurisprudence[60]) and thus accepted the claim that the Afghanistan conflict was not a war solely based on the government's opinion.

Therefore, in the court's reasoning, the systemic superiority of UNSC resolutions leads the court to stress the government's exclusive province in the field of international affairs and to defer to its judgement in the matter at stake, hence chaining two lenient approaches: the superiority of UNSC resolutions and the non-justiciability of foreign affairs. The transference of this approach from UNSC resolutions establishing more specific obligations to other regimes that, albeit similar, do provide a wider margin of interpretation signals that courts' decision to apply one or another approach is not a mere consequence stemming from the features of the case. Courts' reasoning ultimately depends on the approach they chose to apply to their analysis, and such decision might be influenced by what courts perceive as the normal standard in their legal community: the prevailing norm.

Take as an example the *W.H.A. case*[61]. The World Help Association ("Association Secours Mondial de France") was listed on 19 October 2002 as being financially linked to a terrorist organization (the list was established by a national Decree on 25 September 2001). As a result, the World Help Association of France (hereinafter WHAF) needed the governmental authorization in order to transfer funds to a foreign country. After the Prime Minister's denial to remove them from the list in 2002, the WHAF sought the judicial review of the listing and asked the Council of State for a nullification of the Decree of 19 October. The French government denied the court's jurisdiction based on the alleged non-justiciability of the French government's decision as an act of state: according to the government, the listing had been taken in application of Resolution 1390[62], which mandated the asset-freezing of Al Qaeda members and associated organizations.

[59] *Dubsky case*, paras. 92, 93.
[60] The court specifically relies on Horgan v An Taoiseach and ors, Application for declaratory relief, No 3739P, [2003] IEHC 64, [2003] 2 IR 468, (2003) 2 ILRM 357, ILDC 486 (IE 2003), 28th April 2003, Ireland; High Court.
[61] World Help Association of France v France, Judicial review, CE No 262626, 3rd November 2004, France; Council of State.
[62] UN Doc S/RES/1390 (2002).

However, the Decree of 19 October was issued prior to Resolution 1390, so the court denied the non-justiciability of the act and affirmed its own jurisdiction[63]. Although the Council of State stroke down the government's main argument preventing the judicial review, the court validated the governmental claim concerning the existence of a national security threat based on WHAF's eventual listing under Resolution 1390[64]. Hence, despite dodging the strong grip of UNSC resolutions' superiority, the court still accepted the UNSC's undisputable authority to confirm the executive assessment of a national security threat. This court confirmed the prevalence of this value within the legal system which, in the absence of the UNSC resolution's hierarchical support, can only be attributed to the traditional leniency of courts in this field.

However, these approaches leading to judicial leniency were progressively replaced by approaches leading to the constraint of executive discretion. The calls for unchecked and unrestricted executive powers were met with increasingly strict judicial demands concerning human and fundamental rights. The ECJ 2008 resolution in the Kadi saga is the paradigmatical example of this emergent trend.

4.1.2.2. The common approach to constrain the executive discretion concerning counterterrorism measures: human fundamental rights' centrality.

As previously explained, inter-judicial coordination can be conceptualized as a type of formal judicial dialogue in which non-related courts adopt the same strategic approach to common rules in order to uphold the same stance concerning the same type of policy.

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[63] *W.H.A. case*, para. 14.

[64] Ibid., para. 20: "Considérant qu'eu égard aux renseignements dont disposaient les autorités françaises, corroborés par les circonstances que le 22 octobre 2002, soit quelques jours après la parution au Journal officiel de la République française du décret attaqué, l'association requérante a été inscrite sur la liste élaborée et mise à jour périodiquement par le comité du Conseil de sécurité créé par la résolution 1267 du Conseil de sécurité des Nations-Unies et que par le règlement CE n° 1893/2002 du 23 octobre 2002, la Commission des Communautés européennes a également inscrit l'ASSOCIATION SECOURS MONDIAL DE FRANCE sur la liste des personnes et entités pour lesquelles le Conseil de l'Union européenne a institué des mesures financières restrictives, il ne ressort pas des pièces du dossier que le ministre de l'économie, des finances et de l'industrie a, dans ces circonstances, commis une erreur d'appréciation en estimant qu'en application de l'article L. 151-2 du code monétaire et financier, la défense des intérêts nationaux justifiait que les opérations de change, les mouvements de capitaux et les règlements financiers de toute nature avec l'étranger de l'ASSOCIATION SECOURS MONDIAL DE FRANCE devaient être soumises à autorisation préalable".

According to my theory, inter-judicial coordination implies the creation of a judicial trend that will constrain international political actors and de-fragment the global legal system, provided a critical mass of courts joins the inter-judicial coordination by embracing the common approach to common rules. In this sense, the creation of a trend by inter-judicial coordination can be analyzed as a norm-emergence process in which the non-related courts progressively build and join the emergent norm.

For instance, in the case of the inter-judicial coordination concerning environmental protection among the national courts of developing states, the emergent norm was states' fundamental obligation to procure a clean and healthy environment, and this norm was coined despite the non-binding character of international rules and the lack of domestic regulation in the field. In the present case concerning counterterrorism measures, inter-judicial coordination has coined the norm that counterterrorism policies are conditional to the respect of the minimum core content of human and fundamental rights. This norm stems from the idea that human and fundamental rights are central to the legal system of reference: they are its cornerstone. Hence, the strategical approach shared by all the courts involved in this inter-judicial coordination is based on human and fundamental rights' centrality. The *Kadi I 2008 case* is the best and highest exponent of this strategic approach.

This strategic approach creates a two-teared reasoning. In the first step, courts find a way to establish their legitimacy to review cases involving national and international security (which tends to be regarded as the exclusive realm of the executive branch of the government) by emphasizing the policies' connection to those legal values in which courts are undeniable experts: human and fundamental rights. In the second step, the strategic reasoning relies on those fundamental/human rights to assess the legality of the policies under review. Hence, while the first step of the strategic reasoning is devoted to introducing human/fundamental rights in the discussion in order to assert the court's legitimacy, in the second step courts yield the power acquired as a result.

Not surprisingly, each of these steps mirror the two instances at which courts could extend their leniency to executive policies if they wanted to: courts' avoidance techniques consist in either denying their own capacity to review policies that fall within the government's

exclusive domain or seconding such policies based on the primacy of the legal value protected by them (national and international security). Thus, courts' alleged inappropriateness to weight national and international security concerns and the lack of more preeminent legal values to be protected within the legal system are seen as the two main obstacles for the judicial review of counterterrorism policies. Fundamental and human rights provide courts with the perfect tool to remove both obstacles: if portrayed as relevant legal values they would uphold courts' legitimacy to weigh in, and their portrayal as central values would grant fundamental and human rights the legal preeminence to become a limit to counterterrorism policies[65].

Following Mr. Kadi's listing on 17 October 2001 by the Sanctions Committee, his name was included in Annex I to Regulation No 467/2001 (by Commission Regulation (EC) No 2062/2001) in order to implement the 1267 sanctions regime at the European level[66]. In this context, in 2001 Mr. Kadi brought proceedings before the CFI seeking the annulment of Regulation No 467/2001 and Regulation No 2062/2001 (and, subsequently, Council Regulation (EC) No 881/2002)[67] insofar as those regulations concerned him. From a substantial point of view, Mr. Kadi based his request on three grounds: the alleged breach of his right to a fair hearing, a breach of his right to property and a breach of his right to effective judicial review.

On 21 September 2005, the CFI dismissed Kadi's action[68]. The court asserted that the actions fell within the scope of its jurisdiction due to the impact of the regulations under

[65] The relevance and centrality of a value is automatically granted when established as constitutional to the system. Although courts can portray human fundamental rights as central to the concerned system without declaring their constitutional character, such constitutional portrayal is the easiest and most endurable strategy to avoid the executive challenge of fundamental human rights' centrality.

[66] The original CTC Consolidated List of entities and persons sanctioned with the freezing of funds pursuant to UNSC Resolutions 1267 (1999) and 1333 (2000) was published by the Sanctions Committee on 8 March 2001 (see the Committee's press release AFG/131 SC/7028 of 8 March 2001). This list has been amended several times and the Commission has also amended Annex I of Regulation 467/2001 (as established in Article 10 of the same regulation) accordingly. In the current case, the relevant UNSC resolution is Resolution 1390 (2002).

[67] Regulation No 2062/2001 amended Regulation No 467/2001 (for the third time) to include Kadi's name in the list. Regulation 467/2001 was repealed and replaced by Council Regulation (EC) No 881/2002 of 27 May 2002.

[68] See Case T-315/01 Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities [2005] ECR II-3649 (hereinafter, *Kadi I 2005 case*), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62001TJ0315 [last accessed on 12/02/23].

review on the claimant's fundamental rights[69]. However, the court's approach was not based on the centrality of fundamental rights within the European legal system but on the relationship between such system and international law: the CFI grounded its dismissal on international law's principle of primacy and UNSC resolutions' outranking position within the international legal system.

First of all, the CFI brings up Article 307 EC to recall that the "rights and obligations arising from agreements concluded before 1 January 1985 or, for acceding States, before the date of their accession, between one or more member states on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty"[70]. According to this precept, which was "specifically introduced into the Treaty in order to observe the rule of primacy"[71], the member states' obligations under the UN Charter prevail over "any provision of Community law, whether a provision of primary law or a general principle of that law, that raises any impediment to the proper performance of the [member states] obligations under the Charter of the United Nations"[72], which chronologically precedes EU law.

As a result, the inexorability of UNSC resolutions issued under Chapter VII powers is grounded on the combined reading of Articles 25 and 103[73] of the UN Charter[74]: EU member states' obligations under UNSC resolutions are unavoidable without exception and prevail over any other international rule. Hence, the Community might not be directly bound by UNSC resolutions[75] but, insofar as EU member states are inevitably bound by them and EU law cannot contradict their precedent international obligations, UNSC resolutions' supremacy is indirectly extended to the EU legal system, by virtue of the relationship between the EU and the UN legal systems[76].

[69] Ibid., paras. 178 to 180.
[70] Ibid., para. 185.
[71] Ibid., para. 188.
[72] Ibid., para. 190.
[73] According to Art. 103 of the UN Charter, "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."
[74] *Kadi I 2005 case*, paras. 181 to 184.
[75] See *Kadi I 2005 case* at paragraph 192.
[76] *Kadi I 2005 case*, paras. 193 and 203.

UNSC resolutions' supremacy is the cornerstone of the CFI reasoning to both delimit the scope of its review powers and respond to Kadi's claims in the exercise of such review powers. Although the court rejects to decline its jurisdiction (as requested by the European institutions and the United Kingdom[77]), it acknowledges that the limitation of the scope of review "is necessary as a corollary to the principles identified […] in the Court's examination of the relationship between the international legal order under the United Nations and the Community legal order"[78]. Therefore, the court states that any review, beyond ascertaining the Community's adherence to the duly procedural rules and to the content of the UNSC resolution at issue, would intrude on the UNSC exclusive powers to assess international security threats and their proper remedies "and, as such, escapes the jurisdiction of national or Community authorities and courts"[79].

Hence, the court asserts its jurisdiction in this field only to declare its necessary conformity with the measures under review due to the alleged supremacy and unquestioned literalism of UNSC resolutions that amount to the prevalence of security needs above any other legal value. As a result, "the claim that the Court of First Instance has jurisdiction to review indirectly the lawfulness of such a decision according to the standard of protection of fundamental rights as recognized by the Community legal order, cannot be justified either on the basis of international law or on the basis of Community law"[80]. The only exception to this judicial immunity is the instance in which the CFI is required to indirectly check the lawfulness of UNSC resolutions with regard to *ius cogens*[81].

[77] See *Kadi I 2005 case* at paragraph 217: "The institutions and the United Kingdom ask the Court as a matter of principle to decline all jurisdiction to undertake such indirect review of the lawfulness of those resolutions which, as rules of international law binding on the member states of the Community, are mandatory for the Court as they are for all the Community institutions. Those parties are of the view, essentially, that the Court's review ought to be confined, on the one hand, to ascertaining whether the rules on formal and procedural requirements and jurisdiction imposed in this case on the Community institutions were observed and, in the other hand, to ascertaining whether the Community measures at issue were appropriate and proportionate in relation to the resolutions of the Security Council which they put into effect".
[78] *Kadi I 2005 case*, para. 218.
[79] Ibid., para. 219.
[80] Ibid., para. 221.
[81] Ibid., para. 226. The court indeed asserts that "the Charter of the United Nations itself presupposes the existence of mandatory principles of international law, in particular, the protection of the fundamental rights of the human person" (paragraph 228) and that "[t]hose principles are binding on the Members of the United Nations as well as on its bodies" (paragraph 229) since they are "fundamental peremptory provisions of jus cogens" (paragraph 230).

However, far from triggering the court's review, this statement reinforced the preclusion when combined with the presumption that no breach of fundamental rights had occurred because "the express provision [by Resolution 1452 (2002)] of possible exemptions and derogations [to the UNSC sanctions regime] clearly shows that it is neither the purpose nor the effect of that measure to submit those persons to inhuman or degrading treatment"[82]. On this premise, the absolute lack of mechanisms to hear the individual's claims was not a breach of his fundamental right to be heard because "the Community institutions were required to transpose into the Community legal order resolutions of the Security council and decisions of the Sanctions Committee that in no way authorized them […] to provide for any Community mechanism whatsoever for the examination or re-examination of individual situations"[83]. Hence, the UNSC resolution had displaced EU law and no fundamental right was guaranteed in this instance: "[t]he principle of Community law relating to the right to be heard cannot apply in such circumstance, where to hear the person concerned could not in any case lead the institution to review its position"[84].

As for the right to effective judicial review, the court restricts its capacity to the formal review of the "observance by the institutions of the rules of jurisdiction and the rules of external lawfulness and the essential procedural requirements which bind their actions"[85] as well as the observance of "the Security Council's regulation which that act is supposed to put into effect, in particular from the viewpoints of procedural and substantive appropriateness, internal consistency and whether the regulation is proportionate to the resolutions"[86], since "it is not for the Court to review indirectly whether the Security Council's resolutions in question are themselves compatible with fundamental rights as protected by the Community legal order"[87]. Following these criteria, the court also dismisses the breach of Kadi's fundamental right to property because no procedurals rules were ignored by the UNSC or the Community, the European transposition was in line

[82] Ibid., para. 240.
[83] Ibid., para. 258.
[84] Idem.
[85] Ibid., para. 279.
[86] Ibid., para. 280.
[87] Ibid., para. 282.

with the UNSC resolution and the freezing of funds was, hence, a legitimate and proportional measure in relation to the goals pursued by the United Nations[88].

Summing up, the court acknowledges the encroachment of fundamental rights and vests them with judicial immunity due to the supremacy of UNSC resolutions issued under Chapter VII of the UN Charter and national security's prevalence as a value, since "the applicant's interest in having a court hear his case on its merits is not enough to outweigh the essential public interest in the maintenance of international peace and security in the face of a threat clearly identified by the Security Council"[89].

The case reached the ECJ when Kadi sought to set aside the CFI judgement. The ECJ joined this appeal with that of the Al Barakaat International Foundation against the CFI resolution in the *Al Barakaat case*[90], which essentially applied the same approach to assess the same kind of targeted sanctions and reached the same conclusion as in *Kadi I 2005*. In its judgement of 3 September 2008, the ECJ went for the opposite stance to the one delivered by the CFI in *Kadi I 2005* and *Al Barakaat cases*, applying an approach based on the centrality of fundamental rights within the Community's legal system.

Straight out of the gate, the ECJ rejects the perimeter set by the CFI for the review of the regulation at issue, since the first paragraph of the ECJ's findings stresses that "the lawfulness of any legislation adopted by the Community institutions, including an act intended to give effect to a resolution of the Security Council remains subject, by virtue of Community law, to full review by the Court, regardless of its origin"[91]. Hence, the formal primacy of UNSC resolutions cannot constrict the scope of review of the European courts. Interestingly, the ECJ does not challenge the CFI combined reading of Articles 25 and 103 of the UN Charter, the resulting superiority of UNSC resolutions among the rules

[88] Ibid., paras. 243 to 251.
[89] Ibid., para. 289.
[90] Case T-306/01 Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2005] ECR II-3533. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62001TJ0306&qid=1665395291885 [last accessed on 12/02/23].
[91] *Kadi I 2008 case*, para. 278.

of the international legal system[92] or their binding effects for UN members[93]. The ECJ's rejection to provide the regulation at issue with "immunity from jurisdiction"[94] rests, not on the analysis of the formal hierarchical relations between international law and European law, but on the material assessment of fundamental rights as the cornerstone of any political community based on the rule of law[95].

As a result, "obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights"[96]. Therefore, UNSC resolutions issued in exercise of Chapter VII of the UN Charter are vested with "primacy over acts of secondary Community law"[97], but that "primacy at the level of Community law would not, however, extend to primary law, in particular to general principles of which fundamental rights form part"[98].

So, contrary to the conclusion reached by the CFI in 2005, in *Kadi I 2008* the ECJ establishes that no rule of international law can displace European fundamental rights, not even UNSC resolutions. It seems clear that the ECJ does not treat this clash of regulations as a hierarchical conflict of law, but as a constitutional matter in which fundamental rights are the keystone supporting the entire legal system. Hence, the criteria to solve the conflict is not the formal hierarchical relationship between the rules, but their

[92] See *Kadi I 2008 case*, at paragraph 288: "any judgement given by the Community judicature deciding that a Community measure intended to give effect to such resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law". See also paragraph 291 in the same judgement: "the European Community must respect international law in the exercise of its power".
[93] Ibid. at paragraph 294: "it is necessary for the community to attach special importance to the fact that, in accordance with Article 24 of the Charter of the United Nations, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested [which] includes the power to determine what and who poses a threat to international peace and security and to take the measures necessary to maintain or restore them."
[94] Ibid., para. 280.
[95] See *Kadi I 2008 case*, at paragraph 281: "it is to be borne in mind that the Community is based on the rule of law, inasmuch as neither its member states nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions".
[96] Ibid., para. 285.
[97] Ibid., para. 307.
[98] Ibid., para. 308.

material relevance for the legal system, and fundamental rights are a constitutional element of the European legal system based on the rule of law. In other words, fundamental rights are core elements, central to the legal system because their absence would strip the Community from the rule of law.

As a consequence, "respect for human rights is a condition of the lawfulness of Community acts"[99] and "an integral part of the general principles of law whose observance the Court ensure"[100]. The centrality of fundamental rights and the "in principal full review" jurisdictional standard are hence connected by the requirements of rule of law principle: "it is to be borne in mind that the Community is based on the rule of law, inasmuch as neither its member states nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions"[101] and the review of the lawfulness of Community acts in accordance to fundamental rights is "a constitutional guarantee forming part of the very foundations of the Community"[102].

In the absence of a system of judicial protection at the UN level suitable to review the conformity of UNSC resolutions with fundamental human rights[103], "the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested

[99] *Kadi I 2008 case*, para. 284.
[100] Ibid., para. 283. This paragraph is especially interesting because it also attests to the court's attention to national courts' behavior and jurisprudence: "For [the purpose of ensuring fundamental rights], the Court draws inspiration from the constitutional traditions common to the member states and from the guidelines supplied by international instruments for the protection of human rights on which the member states have collaborated or to which they are signatories". The court goes on to reference the especial significance of the ECHR, hence signaling the material connection between domestic, European and international human rights and the fact that, rather than disengaging from international law in general, the court understands human and fundamental rights as the central piece of any domestic, regional or international legal system.
[101] *Kadi I 2008 case*, para. 281.
[102] Ibid., para. 290.
[103] See the ECJ assessment of the re-examination procedure before the Sanctions Committee and its improvements in relation to the requirements to the scheme of judicial protection of fundamental rights laid down by the EC Treaty in paragraphs 321 to 326 of *Kadi I 2008 case*.

regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations"[104]. Therefore, the court refuses to limit its jurisdiction by virtue of the alleged supreme primacy of UNSC resolutions, since the opposite would imply an over-expansion of executive power that would erode the rule of law[105].

The court acknowledges that the "European Community must respect international law in the exercise of its powers"[106] and hence "take due account of the terms and objectives of the resolution concerned and of the relevant obligations under the Charter of the United Nations relating to such implementation"[107]. However, the ECJ adds a nuance that is absent in the *Kadi I 2005 case*: "[i]t must however be noted that the Charter of the United Nations does not impose the choice of a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations"[108].

Therefore, not only did the ECJ establish that no precept of international law could displace European fundamental rights, but it also stated that UNSC resolutions did not require such displacement since they always provide states with a discretionary margin of decision in their implementation. Because the ECJ understood that UNSC resolutions always leave room for implementation according to the domestic system, the judicial review of such implementation neither amounts to the review of the UNSC resolutions nor questions its primacy[109].

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[104] *Kadi I 2008 case*, para. 326.
[105] See, in paragraph 282 of the *Kadi I 2008 case*: "an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it by Article 220 EC, jurisdiction that the Court has, moreover, already held to form part of the very foundations of the Community".
[106] Ibid., para. 291.
[107] Ibid., para. 296.
[108] Ibid., para. 298.
[109] See paragraph 288 of the *Kadi I 2008 case*: "any judgement given by the Community judicature deciding that a Community measure intended to give effect to such resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law".

Bearing this in mind, the ECJ indeed addressed the lawfulness of the regulations at issue in relation to fundamental rights and under the premise of its full capacity to review them (also anchored in the centrality of fundamental rights). The court first tackles the alleged breach of the claimants' rights of the defense, in particular the right to be heard and the right to effective judicial review. The court concludes in this regard that, "in light of the actual circumstances surrounding the inclusion of the appellants' names in the list"[110], these rights "were patently not respected"[111].

In relation to the right to be heard, the court further specifies that, indeed, it seems unreasonable to demand the Community authorities to communicate the grounds for the listing and to hear the targeted individuals or entities before their listing takes place. Nevertheless, the breach stems from the fact that the contested regulation does not provide "a procedure for communicating the evidence justifying the inclusion […] and for hearing those persons, either at the same time as that inclusion or later"[112].

This "failure to inform them of the evidence adduced against them"[113] is on its own enough to strip the claimants of their right to an effective legal remedy as well, due to the symbiotic relationship between these two rights[114], more so when the evidence and charges were not disclosed to the court either[115]. As a result, neither the listed person nor a court could challenge and evaluate the listing on the basis of its factual grounds. Moreover, "the re-examination procedure before the Sanctions Committee, even having regard to the amendments recently made to it […] is still in essence diplomatic and intergovernmental"[116], so it does not satisfy the requirements of the right to effective judicial review[117].

As for the right to respect for property, the court states that, although a European fundamental right, it is not an absolute value, and it admits limitations in relation to the

[110] Ibid., para. 334.
[111] Idem.
[112] Ibid., para. 345.
[113] Ibid., para. 349.
[114] The ECJ explores this relationship in paragraphs 336 and 337 of *Kadi I 2008 case*.
[115] *Kadi I 2008 case*, para. 350.
[116] Ibid., paras. 322 and 323.
[117] See paras. 323 to 325 of *Kadi I 2008 case*.

public interest of the Community[118]. In this sense, these limitations must be justified and proportional to the specific needs born from the Community's public interest[119]. Thus, the right to respect for property is not encroached by the lack of legitimacy of the regulation at issue itself[120], but by the lack of procedural safeguards to oversee the justification and proportionality of the specific measures imposed on the claimants[121].

Summing up, while the counterterrorism measures targeting Mr. Kadi were assessed by the CFI under the premises of UNSC resolutions' absolute primacy, national security's prevalence and the non-justiciability of international organizations' acts as a matter of foreign affairs in 2005, the ECJ's review of the same measures in 2008 was based on fundamental rights' centrality, hence displaying two radically opposed approaches in the short lapse of 3 years. The stark contrast between these approaches cannot be explained by their connection to different bodies of law or jurisprudence, since the CFI and the ECJ work within the same systemic and jurisprudential framework. In fact, the ECJ had hold, in the past, a very similar line of reasoning to that developed in *Kadi I 2005*, like in the *Bosphorus case*, for instance.

In May 1993, the Irish Government seized an aircraft operated by Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi ("Bosphorus Airlines"), a charter company registered in Turkey. The airplane had been leased by the Bosphorus Airlines from the Yugoslav Airlines, landed in Ireland for maintenance and was impounded under EC Council Regulation 990/93 which, in turn, was the implementation of the UN sanctions regime concerning the former Federal Republic of Yugoslavia[122]. The Irish High Court concluded that the Irish Government was not required to impound the airplane after examining the extension of Regulation 990/93 under domestic hermeneutical rules[123]. However, this judgment was appealed before the Irish Supreme Court and the case reached the ECJ in 1995 when such court referred to the ECJ a question on the

[118] *Kadi I 2008 case*, para. 355.
[119] Ibid., para. 357.
[120] In fact, the ECJ establishes that, a priori, the goals pursued by both the UNSC resolution and its European implementation are legitimate. See paragraphs 358 to 366 of *Kadi I 2008 case*.
[121] *Kadi I 2008 case*, para. 369.
[122] Resolutions 713 (1991), 752 (1992), 787 (1992) and 820 (1993).
[123] Bosphorus Hava Yollari Turizm ve Ticaret AS v the Minister for Transport, Energy and Communications, Ireland and the Attorney General (1994).

interpretation of Article 8 of Council Regulation (EEC) No 990/93[124] for a preliminary ruling[125].

In this instance, the ECJ ignored both domestic and European regulation concerning fundamental rights and, instead, relied on the transposed UNSC Resolution as the sole relevant hermeneutical tool to interpret Regulation 990/93[126], hence confirming that the European regulation indeed applied to the aircraft operated by Bosphorus Airways[127]. To the Bosphorus Airways' claim that such interpretation would infringe its fundamental rights to property and freedom to pursue a commercial activity, the court answered that "[i]t is settled case-law that the fundamental rights invoked by Bosphorus Airways are not absolute and their exercise may be subject to restrictions justified by objectives of general interest pursued by the Community"[128] and stated that the goals pursued by both the UNSC resolutions and the Community transposition regulations were legitimate and justified in abstract[129].

Unlike in the *Kadi I 2008 case*, the court did not account for the lack of procedural safeguards in the sanctioning procedure in order to declare a breach of the concerned fundamental rights. In overall, the *Kadi I 2008* reasoning about the limitation of the fundamental right to property is essentially equal to that of *Bosphorus 1996* except for this last consideration. This last reflection is not a trivial matter, but the turning point moving the reasoning of the ECJ from its 1996 approach based on the primacy of UNSC

[124] Regulation No 990/93 concerned trade between the European Economic Community and the former Federal Republic of Yugoslavia. Article 8 provided that "all vessels, freight vehicles, rolling stock and aircraft in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro) shall be impounded by the competent authorities of the Member States".
[125] The specific question posed by the Irish Supreme Court was: "Is Article 8 of Regulation No 990/93/EEC to be construed as applying to an aircraft which is owned by an undertaking the majority or controlling interest in which is held by an undertaking in the Federal Republic of Yugoslavia (Serbia and Montenegro) where such aircraft has been leased by the owner for a term of four years from 22 April 1992 to an undertaking the majority or controlling interest in which is not held by a person or undertaking in or operating from the said Federal Republic of Yugoslavia (Serbia and Montenegro)?". See paragraph 6 of Case C-84/95 Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others. [1996], Judgment of the Court of 30 July 1996 (hereinafter, "*Bosphorus 1996"*).
[126] *Bosphorus 1996*, para. 14.
[127] Ibid., para. 15.
[128] Ibid., para. 21.
[129] Ibid., paras. 24 to 27.

resolutions and international security's prevalence to the approach based on fundamental rights' centrality applied in 2008.

Consequently, the contrasting approaches displayed in *Kadi I 2005* and *Kadi I 2008* are not the result of any internal difference between the CFI and the ECJ, since their jurisprudence seemed to be aligned in the past. I posit that the change of approach between the two first resolutions of the Kadi saga is a reflection of the change in the general judicial trend concerning the review of counterterrorism policies. Both resolutions collected and crystalized the thriving trend among national courts contemporary to them, and such trend slowly moved from one approach to another: the view of human and fundamental rights as a condition of lawfulness for counterterrorism policies had slowly gained traction as opposed to the approach based on the prevalence of security issues, UNSC resolutions' supreme literality and the non-justiciability of foreign affairs issues.

In the Theory Chapter, I specify that inter-judicial coordination is a process of norm emergence in which non-related courts apply the same approach to common rules concerning the same kind of policy. This coordination creates a judicial trend capable of constraining IPAs with the nascent norm and modifying the fabric of the global legal order. Hence, the creation of the norm is a progressive process in which several courts act as norm-entrepreneurs and advocate for an approach different from the traditional one. Therefore, the forging of the new norm ensues from the existence of a critical mass of courts joining the coordination and consolidating the trend, which will trigger the behavioral change in IPAs whose policies are threatened by the emergence of the new norm.

In this process, national courts are the only courts with the capacity to ensemble such critical mass due to the strength of their enforcement powers, and especially influential domestic courts will act as norm-enablers. In norm emergence theory, tipping points are usually conceived as the one event that starts a cascade stage in which the norm is exponentially reproduced by more agents. However, the organic structure of inter-judicial coordination as a process of norm-emergence and norm-contestation implies that several national courts with special international relevance might act as norm-enablers, which will prompt several tipping points followed by partial cascade effects within their area of

influence. In this scenario, there might be several narratives competing to become the prevalent norm, adopted within different groups of national courts under the sponsorship of different norm-enablers.

For their part, international courts are not devoid of relevance in inter-judicial coordination: they serve as norm-disablers in this cumulative process of norm emergence. As opposed to the "positive" effect of norm-enablers when it comes to spreading interpretations, international courts act as norm-disablers that prevent the diffusion of those approaches rejected by them. Hence, international courts' contribution to inter-judicial coordination lies in the refinement of the approach forged by the mass of national courts.

In order to analyze the creation of such critical mass of norm-entrepreneurs and the weaving of the common approach, the next Section starts with the intra-state analysis of the jurisprudential evolution of those states that accumulate the highest number of cases due to their pro-active anti-terrorist fight: United Kingdom, Canada, and United States. The proliferation and similarity of the successive cases reviewed by the judiciaries of these states allows for a comparative chronological analysis of their jurisprudence. In addition to this, the inter-state analysis also examines the interactions of theses national bodies of jurisprudence with other states' judiciaries that might criticize or join the concomitant trend. Finally, the cross-regimes analysis illustrates that the ECJ's decision in the *Kadi I 2008 case* is embedded in the pre-existing trend concerning counterterrorism policies in general.

4.1.3. The emergence and construction of the inter-judicial coordination among national courts.

Witnessing the change of trend among national courts, the ECJ swerved its approach and lead the change, possibly in order to avoid its irrelevance in another Solange-like scenario[130]. In other words, the ECJ coordinated with a previously existing group of

[130] In this regard, it has been long established by legal scholars that "[i]n the aftermath of the Solange saga, the European Court of Justice realized that in order to maintain the freshly-established primacy of European Community (EC) law over the domestic laws of the Member

national courts upholding the centrality of human and fundamental rights in order to constraint the over-expansion of unchecked executive power in relation to counterterrorism policies. This change in the global judicial trend among national courts can be observed in the parallel evolution of the domestic jurisprudence within several states (this is, at an intra-state level), the judicial dialogue across states regarding each kind of counterterrorism measure (this is, at an inter-state level) and the jurisprudential transference of approaches across counterterrorism regimes (this is, in a cross-regimes analysis).

As previously mentioned, counterterrorism policies convey a very diverse array of measures and impact a multiplicity of legal topics, although the controversy they spark is not even across categories or countries. According to my dataset, most of courts' attention has focused on the assessment of preventive detention regimes and the legal requirements of deportations, extraditions and renditions, and most of these resolutions come from the judiciaries of the UK, the US and Canada (see *Maps 1, 2* and *3*). The intra-state analysis of the domestic bodies of jurisprudence of these three countries will allow us to track the change of approach under standardized conditions, since very similar cases were decided by the same court under a completely different approach, and this change can be observed in more than one country within the same span of time.

The intra-state analysis of these three countries advances that, at an inter-state level, jurisprudential transferences among different national courts can be found. Moreover, this phenomenon is not restricted to the judicial interactions of these three countries. On the contrary, it extends to other countries as well. The inter-state analysis will reveal the salience of certain issues, questions and topics within the trend. For instance, the strength of the prohibition of torture (in relation to deportation or the admissibility of evidence) and the secrecy of the decision-making concerning counterterrorism measures (mostly in relation to the availability of the evidence and due process safeguards) have become recurrent issues within the jurisprudence of most countries. Due to the prevalence of these issues, the judicial discussions concerning the content of the right to a fair trial and the concept of proportionality have become the most frequent key questions to elucidate. In

States, it had to ensure that fundamental rights were protected by the EC legal order, failing which disintegration of the autonomous EC legal order may have followed" (Kunoy & Dawes, 2009, p. 73).

turn, these disquisitions led courts to the indirect review of the underlying topics that are common to most counterterrorism policies, such as the extension of national security as a policy-field or the margin of implementation of UNSC resolutions.

In this context, although the *Kadi I 2008 case* is specifically concerned with the review of the targeted sanctions regime, this resolution tackles the same issues and questions posed by other breeds of counterterrorism measures and has inherited the view of its contemporary jurisprudence on the common underlying topics. Although the ECJ has displayed, perhaps, the strongest exponent of the judicial trend to review counterterrorism policies under the idea that fundamental human rights are central to the legal system, the nuts and bolts of the approach displayed in the *Kadi I 2008 case* were developed by the concomitant inter-judicial coordination in the field of counterterrorism measures. For instance, the ECJ decision in *Kadi I 2008* is partially incumbent upon the assumption that the review of the European implementation of a UNSC-established targeted sanctions does not challenge neither the binding character nor the hierarchical primacy of UNSC resolutions. This assumption is cemented on the idea that UNSC resolutions allow the margin of interpretation necessary for a consistent implementation within the domestic legal system. The pre-existing jurisprudence crafted this idea in relation to Resolution 1373 first and then transferred it to Resolution 1267, as shown by the cross-regime analysis performed in this Chapter on the available set of resolutions.

Intra-state, inter-state and cross-regime analysis in the UK, the US and Canada: the inception of the new approach.

The earliest resolution within my set is the *Rehman case*[131]. The approach adopted by the British House of Lords in its 2001 judgement concerning this case falls squarely within the traditional trend. Mr. Rehman, a Pakistani national, was denied indefinite leave to remain in the United Kingdom due to his alleged connections to Markaz Dawa Al Irshad (MDI), an Islamic terrorist organization, and the Secretary of State concluded in its letter of refusal that his deportation was in the interest of national security[132]. However, instead of elaborating on the threat posed to UK's national security, the Secretary of State said in

[131] Home Department v. Rehman, UKHL 47, [2001] 3 W.L.R. 877.
[132] See Secretary of State's quote in Home Department v. Rehman, UKHL 47, [2001] 3 W.L.R. 877, para 1.

his open statement about the refusal that Mr. Rehman's "activities directly support terrorism in the Indian subcontinent and are likely to continue unless he is deported [since his] activities in the United Kingdom are intended to further the cause of a terrorist organization abroad"[133].

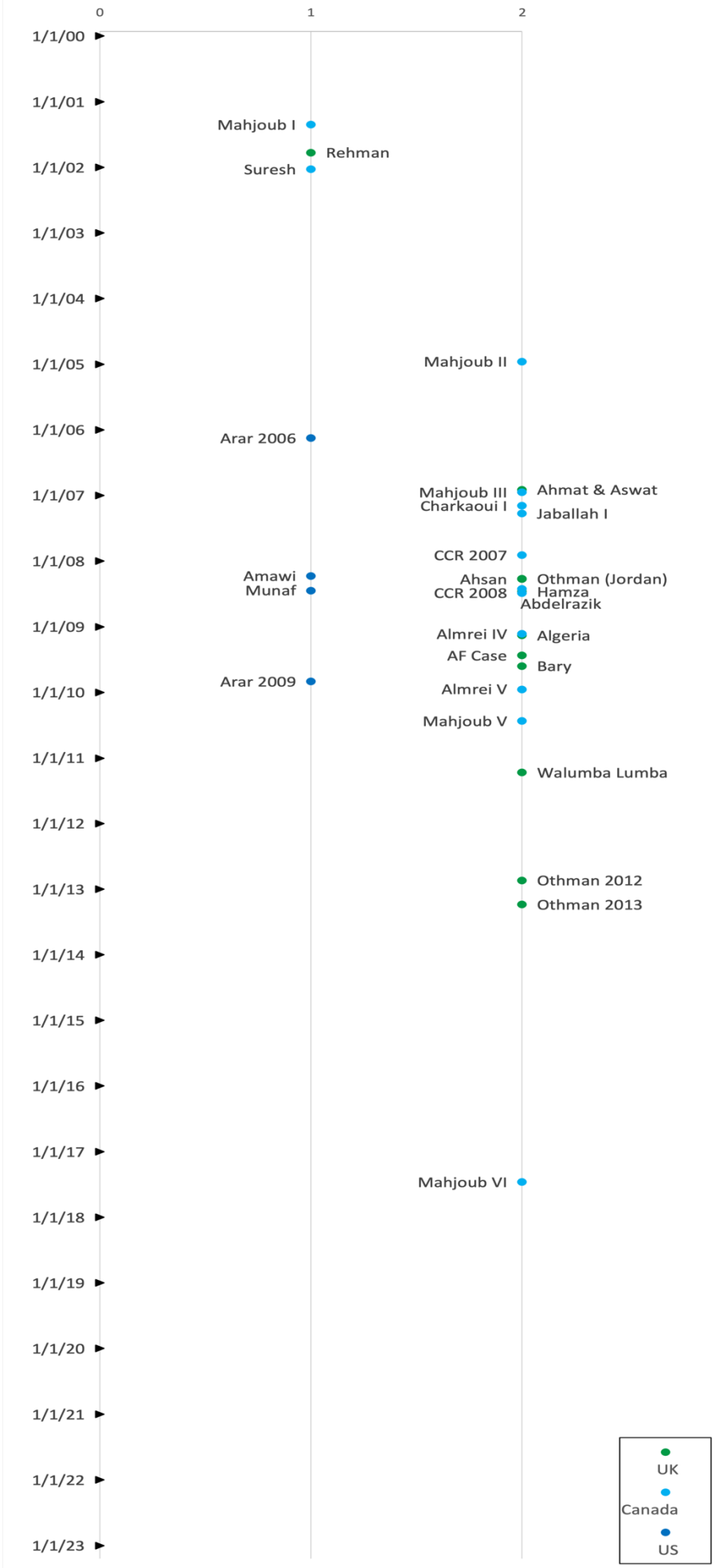
The House of Lords extended its deference to the Secretary of State's decision when reviewing the case on appeal. Lord Hoffmann famously stated that "the question of whether something is 'in the interests' of national security is not a question of law. It is a matter of judgement and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive"[134]. Similarly, Lord Slynn stated that the Secretary of State was "undoubtedly in the best position to judge what national security requires"[135] and Lord Steyn affirmed that the decision to deport Mr. Rehman was irresistibly supported by "[t]he dynamics of the role of the Secretary of State, charged with the power and duty to consider deportation on grounds of national security"[136].

Consequently, the UK House of Lords relied on the executive expertise in national security to validate the executive decision to deport Mr. Rehman, hence ruling out the judicial review of the evidence and confirming that national security was the prevalent value within the domestic system, as defined and stated by the government. This approach spread beyond British borders, as shown by the judgement delivered by the Canadian Supreme Court in the *Suresh case*[137] shortly after (see *Map 2*). The *Suresh case* showcases the early judicial standpoint within the specific body of jurisprudence connected to the extradition of suspects of terrorism despite the risk of torture in the receiving country. Hence, this case illustrates the interplay of counterterrorism policies with *ius cogens* rules (the non-refoulment principle and the prohibition of torture) and, by extension, with human fundamental rights.

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[133] Idem.
[134] *Rehman case*, para. 50.
[135] Ibid., para. 26.
[136] Ibid., para. 29.
[137] Suresh, United Nations High Commissioner for Refugees (intervening) and ors (intervening) v Canada (Minister of Citizenship and Immigration) and Attorney-General of Canada, Decision, Docket No 27790, 2002 SCC 1, [2002] 1 SCR 3, 11th January 2002, Canada; Supreme Court [SCC] (hereinafter, "*Suresh case"*).

Map 2 – Judicial Resolutions related to deportations, extraditions and renditions in the UK, the US and Canada.



Manickavasagam Suresh was facing deportation due to his association to a terrorist organization (Liberation Tigers of Tamil Eelam ('LTTE'))[138] despite his status as a refugee in Canada[139]. As provided by Section 40 of the Canadian Immigration Act[140], the deportation proceeding started with the issuance of a security certificate that was later reviewed and upheld by the Canadian Federal Court on the grounds of the sufficiency of the existing evidence[141]. Although Mr. Suresh submitted evidence of the risk of torture in the event of deportation to the immigration services and such risk was acknowledged as feasible, a report recommending his deportation was issued.

Mr. Suresh appealed this decision, and the case eventually reached the Canadian Supreme Court and challenged the constitutionality of Section 53(1)(b) of the Immigration Act, which permitted the Minister to deport a refugee on security grounds despite the risk of undergoing torture, degrading or physically harming practices upon return. In its decision, the court acknowledges that the prohibition of torture is an ius cogens provision[142] and that, as such, it does not accept derogations[143]. Despite this, the court surprisingly admits one exceptional instance of derogation: the presence of a threat to national security[144].

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[138] Mr. Suresh is a Sri Lankan who was deemed to be a danger to Canada since, according to the Canadian Security Intelligence Service ('CSIS'), he was a fundraiser and member of the Liberation Tigers of Tamil Eelam ('LTTE'), which was classified as a terrorist organization.

[139] Mr. Suresh entered Canada in 1990. He was granted refugee status in 1991 by the Canadian Refugee Division of the Immigration and Refugee Board under the Canadian Immigration Act ((Section 2(1)(a) of the Immigration Act, RSC 1985, c I-2 (Canada)), which essentially replicated the definition of refugee provided by the Refugee Convention (the Convention relating to the Status of Refugees (28 July1951) 189 UNTS 137, entered into force 22 April 1954).

[140] The security certificate is described in Section 40(1) of the Immigration Act and the referral to the Federal Court is in Section 40(1)(4)(d).

[141] After a deportation hearing, an adjudicator of the Immigration and Refugee Board found that, although Mr. Suresh direct engagement in terrorism was not probed, his deportation was justified due to his membership to a terrorist organization as established in Sections 19(1)(f)(iii)(B) and 19(1)(e)(iv)(C) of the Immigration Act.

[142] *Suresh case*, paras. 62 to 64.

[143] Ibid., paragraphs 65 and 76. See, in particular, in paragraph 76: "The Canadian rejection of torture is reflected in the international conventions to which Canada is a party. The Canadian and international perspectives in turn inform our constitutional norms. The rejection of state action leading to torture generally, and deportation to torture specifically, is virtually categoric".

[144] Ibid., paragraphs 58, 77 and 78. See, in particular, in paragraph 78: "We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the Charter or under s. 1. (A violation of s. 7 will be saved by s. 1 'only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like': see Re B.C. Motor Vehicle Act, supra, at p. 518; and New Brunswick (Minister of Health and Community Services) v. G. (J.), 1999 CanLII 653 (S.C.C.), [1999] 3 S.C.R. 46, at para. 99.) Insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because Article 3 of the CAT directly constrains the actions of the Canadian government,

The court openly confirms that this admission is detrimental for the integrity of fundamental rights[145] and, more specifically, for the Canadian fundamental right to life and physical integrity. However, "in these circumstances, s. 53(1)(b) does not violate s. 7 of the Charter"[146], since the exception to the prohibition of torture is deemed constitutionally justified by the prevalence of national security as a value. As a consequence, the court states that "[w]hat is at issue is not the [lawfulness of the] legislation, but the Minister's obligation to exercise the discretion s. 53 confers in a constitutional manner"[147]. In this sense, the court also upholds a wide margin of discretion for the Canadian government to determine which behaviors are constitutive of a terrorist act and whether any activity related to such broad definition of terrorism poses a threat to the national security of Canada, which can also be interpreted within the wide margin of discretion granted to the Canadian government[148].

Hence, the only constraint to the executive decision to deport a suspect of terrorism despite the risk of undergoing torture is the respect to the procedural safeguards derived from the right to be heard. In this regard, the court concluded that Suresh's hearing "did not provide the procedural safeguards required to protect his right not to be expelled to a risk of torture or death. This means that the case must be remanded to the Minister for reconsideration. The immediate result is that Suresh will remain in Canada until his new hearing is complete"[149].

So, in the *Suresh case*, the right to be heard was upheld but the right to life embedded within the prohibition of torture was sacrificed in order to protect national security. This conclusion might be seen as a partial win for the strength of fundamental rights. However,

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but because the fundamental justice balance under s. 7 of the Charter generally precludes deportation to torture when applied on a case-by-case basis. We may predict that it will rarely be struck in favor of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive. The ambit of an exceptional discretion to deport to torture, if any, must await future cases".

[145] See also paragraph 78, mentioned above, of the same resolution.

[146] *Suresh case*, para. 79.

[147] Idem.

[148] In paragraphs 83 to 86 of the *Suresh case*, the Canadian court agrees "with the government […] that the phrase 'danger to the security of Canada' is not unconstitutionally vague", but states "that a fair, large and liberal interpretation in accordance with international norms must be accorded to 'danger to the security of Canada' in deportation legislation", hence confirming the wide margin of secretion granted to the government.

[149] *Suresh case*, para. 6.

the dereliction of the right to life in this context is especially appalling due to the contravention of a well-established ius cogens rule and the lack of a UNSC resolution explicitly backing the executive decision. Hence, the executive discretion rooted in national security prevailed over the fundamental right to life despite the strong arguments supporting the centrality of fundamental rights within both the domestic and international legal systems. In order to support this line of reasoning, the Canadian Supreme Court leaned on the House of Lords praising of national security's prevalence in the aforementioned *Rehman case*, hence proving the transference of approach between these two non-related courts beyond doubt[150].

Initially, lower courts shared this approach[151] but, few years later, the subsequent jurisprudence turned to the opposite approach in relation to virtually identical facts, as shown in *Map 2*, in which resolutions that adopt the traditional approach are categorized with a 1 and resolutions with a fundamental human rights-based approach are identified with a 2. For instance, the *Suresh* reasoning and approach was challenged by the Canadian Supreme Court itself in the *Charkaoui I case*[152]. In this resolution, the court admitted that the regulation under constitutional review allowed for the "deportation to torture" [153].

[150] See, among others, paragraph 33 of the *Suresh case* reproducing paragraph 62 of the *Rehman case*: "The House of Lords has taken the same view in Rehman, supra. Lord Hoffmann, following the events of September 11, 2001, added the following postscript to his speech (at para. 62): 'I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove'. [Emphasis added.]".

[151] See, for instance, the position of the Canadian Federal Court in the *Mahjoub I case* (Canada (Minister of Citizenship and Immigration) et al. v. Mahjoub, (2001) 212 F.T.R. 42 (TD)). In this case, the court accepts that, in cases of terrorism, the evidence against the certified person may "not be disclosed on the grounds that the disclosure would be injurious to national security or to the safety of persons" (see paragraph 13 of the *Mahjoub I case*). This is precisely the reason why the security certificates regime of the time was declared unconstitutional in 2007 (in the *Charkaoui I case*).

[152] Charkaoui v Canada (Citizenship and Immigration), Charkaoui and ors, Attorney General of Ontario (intervening) and ors (intervening) v Minister of Citizenship and Immigration and ors, Appeal judgment, (2007) 1 SCR 350, 2007 SCC 9 (CanLII), 276 DLR (4th) 594, 44 CR (6th) 1, 152 CRR (2d) 17, 54 Admin LR (4th) 1, 23rd February 2007, Canada.

[153] Ibid. at paragraph 7: "The removal order cannot be appealed and may be immediately enforced, thus eliminating the requirement of holding or continuing an examination or an admissibility

Although this particular aspect of the regime was not central to the review, the court signaled that it was relevant to the constitutionality of the regime because it "could cause irreparable harm to the individual, particularly if he or she is eventually deported to his or her home country [and, even more, when] he or she can be deported to torture if the Minister is of the opinion that the person is a danger to the security of Canada"[154].

In the present case, Adil Charkaoui, Hassan Almrei and Mohamet Harkat where arrested and detained, while lawfully living in Canada, pursuant to a certificate of inadmissibility issued by Canada's Solicitor General and the Minister of Citizenship and Immigration under the Immigration and Refugee Protection Act ('IRPA'). As a result, the three individuals filled for the constitutional review of the certificate scheme and the general detention regime of the IRPA, in relation to Sections 1, 7, 9, 10(c), 12, and 15 of the Canadian Charter of Rights and Freedoms[155] ("Canadian Charter") or, what is the same, with regard to the fundamental right to a fair trial[156] and all of the rights connected to due

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hearing: s. 81(b). The detainee, whether a permanent resident or a foreign national, may no longer apply for protection: s. 81(c). Additionally, a refugee or a protected person determined to be inadmissible on any of the grounds for a certificate loses the protection of the principle of non-refoulement under s. 115(1) if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada: s. 115(2). This means that he or she may, at least in theory, be deported to torture".

[154] Ibid., para. 14. Moreover, in paragraph 26 the court quotes the Report of the Events Relating to Maher Arar: Analysis and Recommendations (2006) (at p. 30) to recall the deplorable conditions of Mr. Arar's detention and deportation by the US to Syria, where he was subjected to torture for 11 months. The same paragraph also details that the intelligence supporting the terrorist charges was provided by the Royal Canadian Mounted Police. Following this explanation, paragraph 27 states that, although due process must take into account the needs of national security, security concerns cannot erode the essence of s. 7.:"[t]he principles of fundamental justice cannot be reduced to the point where they cease to provide the protection of due process that lies at the heart of s. 7 of the Charter. The protection may not be as complete as in a case where national security constraints do not operate. But to satisfy s. 7, meaningful and substantial protection there must be".

[155] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, being Schedule B of the Canada Act 1982 (UK), c 11, 1982.

[156] In paragraph 28 of the *Charkaoui I case*, the court highlights the importance of these rights for the overall legal and political system of the country, depicturing them as a traditional feature of the country's identity: "The overarching principle of fundamental justice that applies here is this: before the state can detain people for significant periods of time, it must accord them a fair judicial process: New Brunswick (Minister of Health and Community Services) v. G. (J.), 1999 CanLII 653 (S.C.C.), [1999] 3 S.C.R. 46. 'It is an ancient and venerable principle that no person shall lose his or her liberty without due process according to the law, which must involve a meaningful judicial process': Ferras, at para. 19. This principle emerged in the era of feudal monarchy, in the form of the right to be brought before a judge on a motion of habeas corpus. It remains as fundamental to our modern conception of liberty as it was in the days of King John".

process: the right to a hearing before an independent and impartial magistrate, as well as the right to know the charges and evidence against him or her, and the right to defense[157].

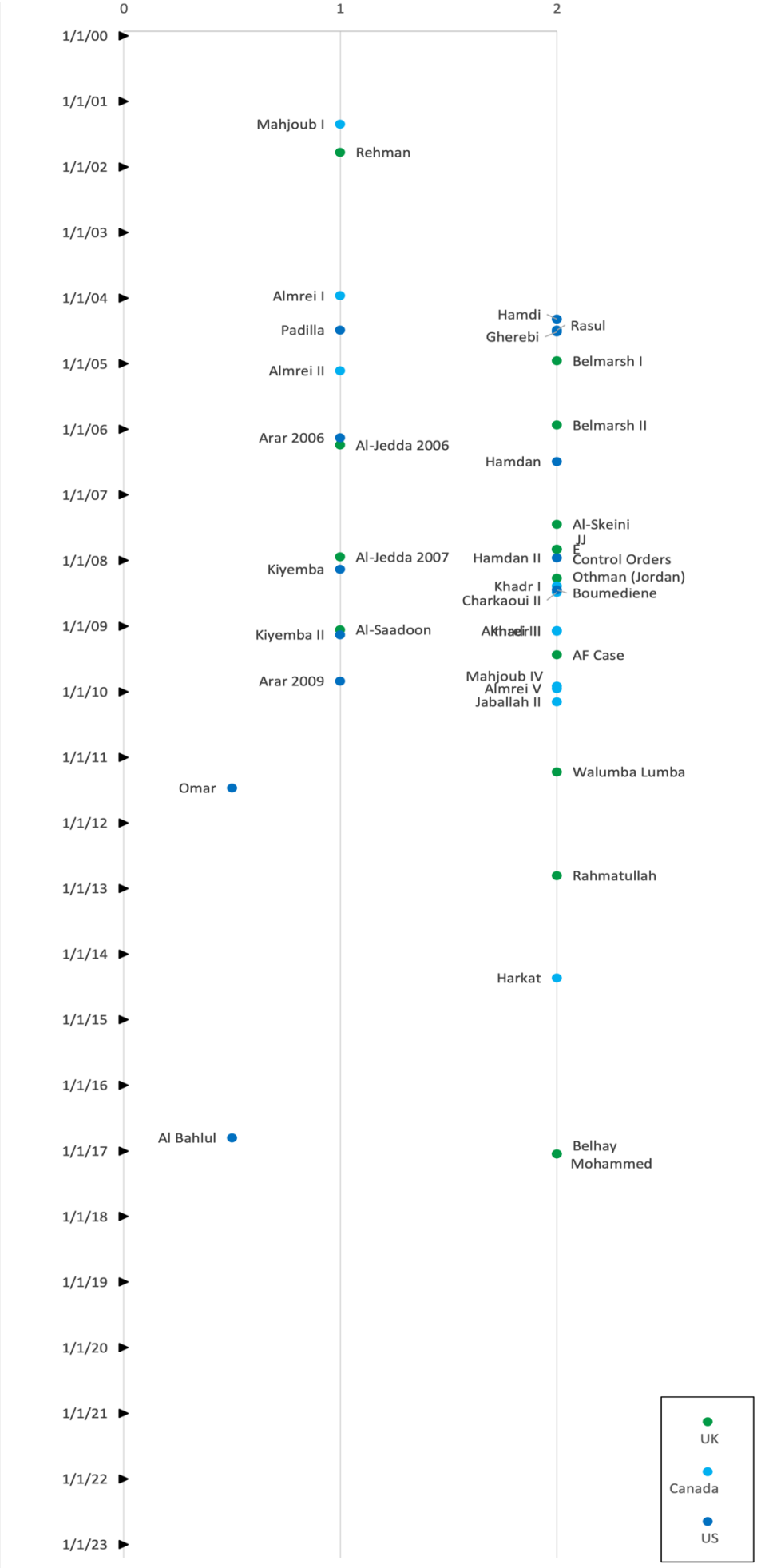
In the *Charkaoui I* decision, the Canadian Supreme Court clearly embraced the centrality of fundamental human rights as the base for its approach to review the constitutionality of the Canadian domestic regime concerning the detention and deportation of suspects of terrorism. This approach is clear in the very first paragraphs of the resolution: "One of the most fundamental responsibilities of a government is to ensure the security of its citizens. […] Yet in a constitutional democracy, governments must act accountably and in conformity with the Constitution and the rights and liberties it guarantees"[158]. Hence, according to the court, "the question is whether the solution that Parliament has enacted conforms to the Constitution, and in particular the guarantees in the Canadian Charter of Rights and Freedoms that protect against unjustifiable intrusions on liberty, equality and the freedom from arbitrary detention and from cruel and unusual treatment"[159].

In particular, the Canadian Supreme Court found that the certificate scheme and the detention procedure did not meet the basic requirements of procedural justice[160], mainly due to the prolonged detention without judicial review provided for non-nationals and the inaccessibility of the evidence against the suspects of terrorism, nationals or not[161]. With regards to the second issue, the court acknowledged that "security concerns may preclude disclosure of the evidence on which the detention is based"[162]. However, this statement cannot translate into the absolute abandonment of the procedural safeguards connected to the fundamental right to a fair trial because, as proclaimed in the opening paragraphs of the resolution, fundamental rights are central to the legal and political system of the country. Hence, the court looks for alternatives and turns its head to the system of special advocates devised in the UK as a solution to preserve the secrecy around security matters without encroaching the integrity of the right to defense[163].

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[157] *Charkaoui I case*, para. 29.
[158] Ibid., para. 1.
[159] Ibid., para. 2.
[160] Ibid., paras. 53 and 63.
[161] Ibid., paras. 65, 87, 139.
[162] Ibid., para. 69.
[163]The court suggests transplanting this system due to the similarities between the administrative bodies that monitor the detention and deportation of suspects of terrorism (the Security Intelligence Review Committee or "SIRC" in Canada and the Special Immigration Appeals Commission or "SIAC" in the UK). See paragraphs 71 to 81 of the *Charkaoui I case.*

Map 3 – Judicial Resolutions related to the national detention regime in the UK, the US and Canada



As for the first issue, the Canadian Supreme Court also embarked in a comparative constitutional analysis of foreign regimes and looked for guidance among the American and British jurisprudence concerning detention regimes (see *Map 3)*. The court relies on the *Rasul case*[164] to prove that the judicial review of preventive detention, even in cases of terrorism, is internationally recognised as part of the fundamental right to a fair trial and due process[165]. For its part, the UKHL provides its Canadian counterpart with great arguments to criticize the indefinite administrative detention of suspects of terrorism[166] in the *Belmarsh I case*[167]. Interestingly enough, the decision of the UKHL in this case is the counterpoint to the position of the same court in the *Rehman case*.

In the *Belmarsh I case* [168], the nine appellants received a certificate under section 21 of Part 4 of the of the Anti-Terrorism, Crime and Security Act 2001[169] and were detained in application of Section 23[170] as suspected international terrorists following what was, essentially, an administrative decision of the Secretary of State for the Home Department without judicial ratification or temporal horizon[171]. Hence, the administrative detention of non-national suspects while waiting for their deportation could be seen as a derogation of domestic and international fundamental rights such as the right to liberty and security, the right to a fair trial and the principle of equality. The UKHL acknowledged that, in order to enact the Terrorist Act in a lawful manner, the UK Government also issued the Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001/3644) ("the

[164] Rasul v Bush, Decision of Supreme Court, 542 US 466, 2004; ILDC 115 (US 2004), 28 June 2004.
[165] See paragraph 90 of the *Charkaoui I case*, also mentioning the US Supreme Court resolution in Zadvydas v Davis, 533 US 678, 2001 (concerning the indefinite detention of immigrants) and case Slivenko v Latvia, No 48321/99, 9 October 2003 of the ECtHR.
[166] *Charkaoui I case*, paragraphs 125 to 127.
[167] A v Secretary of State for the Home Department, (2005) 3 All ER 169; (2004) UKHL 56.
[168] The House of Lords reviews the decision of the Court of Appeal in A, X and Y, and others v Secretary of State for the Home Department [2002] EWCA Civ 1502, Case No: C/2002/1710 of 25th October 2002 which, in turn, reviewed the decision of the Special Immigration Appeals Commission ("SIAC").
[169] According to Section 21 of the Act, "[t]he Secretary of State may issue a certificate under this section in respect of a person if the Secretary of State reasonably- (a) believes that the person's presence in the United Kingdom is a risk to national security, and (b) suspects that the person is a terrorist".
[170] According to Section 23 of the Act, "(1) A suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that his removal or departure from United Kingdom is prevented (whether temporarily or indefinitely)".
[171] See, also, Articles 2.2 and 2.3 of Schedule 3 to the Immigration Act 1971.

Derogation Order")[172] which, in turn, served as basis for the notification required by Article 15 of the ECHR[173] in order to establish a partial derogation of the Convention in times of emergency[174].

Due to the centrality of fundamental human rights, the court emphasizes that such limitation or partial derogation must be duly justified by the government and highlights the court's capacity to review such justification in light of the ECtHR jurisprudence concerning Articles 5 and 15 of the ECHR[175]. Although the political weight of this case is duly acknowledged[176], the court does "not accept the full breadth of the Attorney General's argument on what is generally called the deference owed by the courts to the political authorities"[177], indeed. Far from the indulgence displayed in the *Rehman case*, the UKHL found Section 23 to be "incompatible with Articles 5 and 14 of the European Convention insofar as it is disproportionate and permits detention of suspected international terrorists in a way that discriminates on the ground of nationality or immigration status"[178].

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[172] *Belmarsh I case*, para. 7.

[173] According to Article 15 of the ECHR, "[i]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law".

[174] Indeed, as established in paragraph 11 of the *Belmarsh I case*, "[t]he derogation [order] related to Article 5(1), in reality Article 5(1)(f), of the Convention. The proposed notification by the United Kingdom was set out in a schedule to the Order. The first section of this, entitled 'Public emergency in the United Kingdom', referred to the attacks of 11 September and to United Nations Security Council resolutions recognising those attacks as a threat to international peace and security and requiring all states to take measures to prevent the commission of terrorist attacks, 'including by denying safe haven to those who finance, plan, support or commit terrorist attacks'".

[175] See paragraphs 17 and 18 of the *Belmarsh I case*. However, the court's general embrace of the ECtHR jurisprudence in this matter contrasts with its absolute disregard of Resolution 1271 adopted on 24 January 2002, by the Parliamentary Assembly of the Council of Europe. Paragraph 9 of this resolution established that "[i]n their fight against terrorism, Council of Europe members should not provide for any derogations to the European Convention on Human Rights" and specifically called on its members in paragraph 12 to "refrain from using Article 15 of the European Convention on Human Rights (derogation in time of emergency) to limit the rights and liberties guaranteed under its Article 5 (right to liberty and security)". A mention of the resolution can be found in paragraph 23 of the *Belmarsh I case*, but no further consideration is given to it in the resolution.

[176] See, for instance, paragraph 29 of the *Belmarsh I case*, recalling some of the conclusions of the *Rehman case*.

[177] *Belmarsh I case*, para. 29.

[178] Lord Bingham of Cornhill, at paragraph 73, speaking for the majority in the *Rehman case*.

In other words, the court established that the indefinite administrative detention of non-nationals authorized under Section 23 did not pass the test of "strict necessity" established by the ECHR[179] and, hence, implied an unlawful derogation of the fundamental rights to liberty and security (in connection to the right to due process) and the principle of non-discrimination. The UKHL criticism of indefinite detention can also be found in the *Belmarsh II case*[180], although the core issue of this case is the admissibility of evidence obtained under torture in foreign states as grounds to justify such indefinite detention in cases of terrorism.

This resolution is also embedded with the idea that human fundamental rights (in this case, the prohibition of torture) are central to a democratic system[181]. As a consequence, the majority of the court rejected the admissibility of evidence obtained through torture with or without the involvement of the British government, since the prohibition of torture includes an indirect duty not to encourage torture by tolerating it when performed by other countries[182]. Amidst their disquisitions in relation to the admissibility of evidence tainted by torture[183], many of the Justices pointed out the troublesome nature of the regime of indefinite detention[184], especially due to the lack of judicial safeguards since "no court will readily lend itself to indefinite detention without charge, let alone trial"[185].

The lack of judicial safeguards in relation to special regimes of administrative detention has also been one of the most candent topics for the US Supreme Court. Once more, this

[179] See paragraphs 30 to 44 of the *Belmarsh I case*.
[180] A (FC) and Others (FC)(Appellants) v Secretary of State for the Home Department (Respondent) (2004) A and others (Appellants)(FC) and others v Secretary of State for the Home Department (Respondent) (Conjoined Appeals) [2005] UKHL 71 (No. 2).
[181] See, for instance, the asseverations opening the reasoning of several of the Justices in paragraphs 51, 112, 150, and the reckoning of the ECtHR jurisprudence claiming that the prohibition of torture is a central value of democratic societies in paragraphs 24, 29, 40 and 53 of the *Charkaoui I case*.
[182] Hence, the main source of disagreement was the level of certainty required to refuse the evidence as tainted by torture. While Lords Hope, Rodger, Carswell and Brown established that the refusal was mandatory only if the SIAC concluded that it was obtained by torture but not if it harbored doubts about it (paragraphs 121, 145, 158, 172), Lords Bingham, Nicholls and Hoffmann established that SIAC should only accept the contested evidence if it could dismiss the risk that the evidence had been obtained by torture, which implies its rejection in case of doubt (paragraphs 56, 80, 98).
[183] See, for instance, Lord Nicholls of Birkenhead at paragraph 74.
[184] The regime was amended shortly after the *Belmarsh I case* in order to accommodate the judicial demands.
[185] *Belmarsh II case*, para. 164.

court's jurisprudential evolution in the field (more specifically, in relation to the writ of habeas corpus) shows the transition from the traditional approach displayed in the *Padilla case*[186], for instance, to the approach based on human fundamental rights' centrality. In the *Padilla case*, Jose Padilla was designated as an "enemy combatant" and was detained in military custody[187]. Padilla filed a habeas corpus petition on the grounds that his constitutional rights were encroached by the military detention. Although the District Court originally dismissed his claims in first instance and confirmed the presidential authority to detain non-national enemy combatants, the Court of Appeals for the Second Circuit hold the opposite thesis, granted the writ of habeas corpus and ordered Padilla's release.

The Supreme Court's resolution on this case held a traditional approach and dismissed the courts' jurisdiction over a case involving the review of special presidential powers[188], hence dismissing the writ of habeas corpus[189]. However, Judges Stevens, Souter, Ginsburg, and Breyer strongly dissented, warning that "[a]t stake in this case is nothing less than the essence of a free society"[190], which is connected to "the constraints imposed on the government by the rule of law"[191]. Considering that "[a]ccess to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process"[192], the dissenting Justices affirmed that the usage of indeterminate incommunicado detention as an interrogation technique is contrary to the identity of the

[186] Rumsfeld v Padilla and Newman, as next friend of Padilla, Appeal decision, Docket No 03-1027, 542 US 426 (2004), 124 S.Ct. 2711 (2004), 159 L.Ed.2d 513 (2004), 72 USLW 4584 (2004), ILDC 682 (US 2004).

[187] Such designation and detention were ordered pursuant the powers of the President of the United States as Commander-in-Chief of US armed forces under the Authorization for the Use of Military Force Joint Resolution (Authorization for Use of Military Force (United States [us]) Public Law 107-40, 115 Stat 224).

[188] *Padilla case*, para. 29: "District courts are limited to granting habeas relief "within their respective jurisdictions." 28 U. S. C. §2241(a). We have interpreted this language to require "nothing more than that the court issuing the writ have jurisdiction over the custodian." Braden, 410 U. S., at 495. Thus, jurisdiction over Padilla's habeas petition lies in the Southern District only if it has jurisdiction over Commander Marr. We conclude it does not".

[189] This is, indeed, a traditional approach that is deeply rooted within the history of American jurisprudence. For instance, the Supreme Court was more than willing to extend its deference to special executive powers during World War II and, in Ex p Quirin, 317 US 1; 87 L Ed 3; 63 S Ct 2 (1942), the court validated President Roosevelt's war-time power to appoint a Military Commision to try 'enemy belligerents', acting in accordance with his authority as Commander in Chief.

[190] *Padilla case*, para. 74.

[191] Idem.

[192] Idem.

US as a nation, hence highlighting the centrality of fundamental rights such as due process within the system[193].

The approach suggested by the dissenting Judiciaries in the *Padilla case* was embraced and even extended in the *Rasul case*[194]. The *Rasul case* dealt directly with the issue of habeas corpus extension. Like in the *Padilla case*, the factual background framing the case is the aftermath of the 9/11 terrorist attacks and the special executive powers granted to the President of the United States: Congress conferred upon the President the authority to use all "necessary and appropriate" force in the global war against international terrorism. Among other measures, President Bush ordered the indeterminate detention of individuals suspected of terrorism, cooperation to terrorism or in possession of information related to the 9/11 attacks according to the inquiries and judgement of the executive branch of the government (as explained in the introductory paragraphs of this Chapter).

In the *Rasul case*, the habeas corpus relief was petitioned by two Australian citizens and twelve Kuwaiti citizens whose detention at the Guantanamo Bay facility (since early 2002) was justified on the grounds of such special presidential war-like powers. The petitioners presented claims in relation to both the jurisdiction of American courts in the matter and the bogus character of the charges brought against them by the American government[195]. Although the US Supreme Court did not examine the lawfulness of their detention in relation to the second question, the court did hold US District Courts as competent to review such matters[196].

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[193] Ibid., para. 75.

[194] Rasul v Bush, Decision, Docket No 03-334, 542 US 466 (2004), 124 S.Ct. 2686 (2004), 159 L.Ed.2d 548 (2004), 72 USLW 4596 (2004), ILDC 115 (US 2004), 28th June 2004, United States; Supreme Court [US].

[195] The petitioners alleged, in this regard, that they had neither fought against the US nor were they ever involved in any way in terrorist activities, hence rendering their detention unlawful. Although the court does not engage in the review of the lawfulness of their detention, the petitioners' claims in this regard seemed to be relevant to assess the jurisdiction of American courts, however. See, at paragraph 14 of the *Rasul case*: "Petitioners in these cases differ from the Eisentrager detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control".

[196] *Rasul case*, at paragraph 22: "In the end, the answer to the question presented is clear. Petitioners contend that they are being held in federal custody in violation of the laws of the

At the core of this conclusion is the idea that the reach of the writ of habeas corpus depended, not on "formal notions of territorial sovereignty", but on the "extent and nature of the jurisdiction or dominion"[197]. Insofar as the US was in administrative control of the Guantanamo Bay Base[198], US courts' jurisdiction extended to individuals detained in it (regardless of their nationality)[199] and neither the special nature of the aforementioned presidential powers nor the fact that the Base is outside the territorial borders of the US are taken as obstacles to ensure the fundamental right to habeas corpus[200]. This innovative interpretation of the content of habeas corpus is anchored in the description of such fundamental rights as undoubtedly central to the legal system since "[t]he writ appeared in English law several centuries ago, becom[ing] 'an integral part of our common-law heritage' by the time the Colonies achieved independence" [201].

United States.15 No party questions the District Court's jurisdiction over petitioners' custodians. Cf. Braden, 410 U. S., at 495. Section 2241, by its terms, requires nothing more. We therefore hold that §2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base".

[197] *Rasul case*, para. 21.

[198] As acknowledged in paragraph 3 of the *Rasul case*, "[t]he United States occupies the Base, which comprises 45 square miles of land and water along the southeast coast of Cuba, pursuant to a 1903 Lease Agreement executed with the newly independent Republic of Cuba in the aftermath of the Spanish-American War. Under the Agreement, 'the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas]'", while "the Republic of Cuba consents that during the period of the occupation by the United States … the United States shall exercise complete jurisdiction and control over and within said areas".

[199] See, in *Rasul case*, at paragraph 20: "By the express terms of its agreements with Cuba, the United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses. 1903 Lease Agreement, Art. III; 1934 Treaty, Art. III. Respondents themselves concede that the habeas statute would create federal-court jurisdiction over the claims of an American citizen held at the base. Tr. of Oral Arg. 27. Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship.10 Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority".

[200] This re-definition of the right to habeas corpus as based on the administrative control of the territory allows the court to circumvent previous jurisprudence such as Johnson v Eisentrager, Case No 306, 339 US 763 (1950), 70 S Ct 936 (1950), 94 L Ed 1255 (1950), 5th June 1950, United States; Supreme Court [US], in which the US Supreme Court relied on a territorial-based definition to refuse a writ of habeas corpus. In this sense, see the US Supreme court's historical review of its own jurisprudence to carve out the new definition in paragraphs 18 and 21.

[201] *Rasul case*, para. 3 (quoting Preiser v. Rodriguez, 411 U. S. 475, 485 (1973)). See also the court's references to the "constitutional" and "fundamental" character of habeas corpus in paragraphs 12, 15 and 18 of the resolution, for instance.

Summing up, the intra-state analysis of the jurisprudence of the UK, Canada and United States shows the change of jurisprudential approach to counterterrorism measures connected to the so-called global war on terrorism. While the *Suresh*, *Rehman* and *Padilla cases* embody the most evident expression of the judicial leniency towards the government in the fight against international terrorism, subsequent resolutions like the *Charkaoi I*, *Belmarsh I* and *Rasul cases* showcase the newly acquired will to set boundaries to executive action of the same top-ranked courts in very similar cases that are set apart by, at most, five years. More importantly, this comparison also shows the change of approach that came with the will to constrain the executive policymaking in the field: from traditional approaches based on the prevalence of national security and the non-justiciability of foreign affairs to the approach based on the centrality of domestic and/or international human rights in order to uphold the rule of law.

Intra-state, inter-state, and cross-regime analysis: the diffusion of the approach in the UK, US and Canadian jurisdictions and beyond them.

The new approach springing from *Belmarsh I*, *Charkaoiu I* and *Rasul* took root in the subsequent jurisprudence, infiltrating the lower stratum of national judiciaries and spreading across regimes and countries in which courts looked for inspiration beyond the borders of their territorial jurisdiction. Take as an example the *Jaballah I case*[202], in which the Canadian Federal Court had to deal with the ominous precedent set in the *Suresh case* allowing for exceptions to the non-refoulment principle. Despite the factual similarities between the two cases, the court did not frame this case within the exceptional scenario described in *Suresh* (an unpaired crisis of national and international security). Instead, the court invoked the considerations of the *Charkaoi I* and *Belmarsh I cases* about the centrality of human fundamental rights in order to establish that the deportation of Mr. Jaballah would only be lawful in the absence of risk of torture[203]. In fact, far from of the indulgent approval previously vested on the governmental assessment in *Suresh*, the court indirectly instructed the government on the relevant factors to be considered in order to assess the reasonability of detention under the security certificate regime[204].

[202] Jaballah v. Canada (Minister of Public Safety and Emergency Preparedness), [2007] F.C.J. No. 518.
[203] See, for instance, paragraph 17 of the *Jaballah I case*.
[204] In this regard, the court concluded that Mr. Jaballah should be released on house arrest.

The *Jaballah II case*[205] was concerned with the review of the third ministerial security certificate concerning Mr. Jaballah[206]. The Ministers relied on evidence obtained during the judicial proceedings concerning the previous certificates in order to uphold their case against Mr. Jaballah and he sought to exclude such evidence under Section 24(2) of the Canadian Charter[207], since those proceedings were conducted in breach of the principles of fundamental justice[208] (in accordance with the *Charkaoui I case*'s doctrine[209]). The court ruled in favor of Mr. Jaballah[210] and made some interesting remarks in relation to the content of due process in cases of terrorism, stating that "in security certificate proceedings, the overarching principle of fundamental justice is that persons named in security certificates must be accorded a fair judicial process"[211]. Accordingly, "a person named in a security certificate may in future have to proceed in the absence of full disclosure of the case to be met, so long as a substantial substitute is provided for that missing disclosure (for example, a special advocate)"[212].

In overall, the focus of the *Jaballah II case* is on the importance of evidence-gathering and evidence-disclosure for the fundamental rights to a fair trial and due process and in relation to the limitations of other rights, such as the right to freedom. The portrayal of the rights to due process and a fair trial as the center-peace of the whole system of fundamental rights and, hence, as an unavoidable central piece within the concerned legal

[205] Jaballah, Re, 2010 FC 224; (2010), 363 F.T.R. 160 (FC).
[206] The first one was quashed as unreasonable and, although the second was found to be reasonable by the Canadian judiciary, it was finally struck down for violating Section 7 of the Canadian Charter in accordance with the jurisprudential doctrine set in the *Charkaoui I case*.
[207] According to Section 24(2) of the Canadian Charter of Rights and Freedoms, "[w]here, in proceedings under section (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute".
[208] For a review of such proceedings, se paragraphs 20 to 44 of the *Jaballah II case*.
[209] As to how the *Jaballah II case* relied on the doctrine of *Charkaoui I* and *II*, see paragraphs 13, 16, 17, 23, 31, 32, 33, 41, 48, 49, 55, 69, 70 and 107.
[210] The Canadian Federal Court concluded that the Ministers could not use Jaballah's testimony in the previous security certificate hearings, unless Mr. Jaballah chose to testify in the current proceeding: in this case, the evidence from previous proceeding could be used to cross-examine Mr. Jaballah on that same testimony. However, the Ministers could use the evidence provided by Mr. Jaballah at his Immigration and Refugee Board hearing, both in their case against Mr. Jaballah and for the purpose of cross-examination.
[211] *Jaballah II case*, para. 70 (quoting paragraphs 20, 25 and 28 of the *Charkaoui I case*).
[212] Ibid., para. 41.

system stems from the *Charkaoui I case*[213] and impregnates the subsequent Canadian jurisprudence. For instance, ensuring the safeguards connected to the right to due process within the hearings devoted to review the reasonableness of a ministerial security certificate of detention[214] was the goal of the Canadian Supreme Court in the *Charkaoui*

[213] See *Charkaoui I case*, at paragraph 27: "The procedures required to conform to the principles of fundamental justice must reflect the exigencies of the security context. Yet they cannot be permitted to erode the essence of s. 7. The principles of fundamental justice cannot be reduced to the point where they cease to provide the protection of due process that lies at the heart of s. 7 of the Charter. The protection may not be as complete as in a case where national security constraints do not operate. But to satisfy s. 7, meaningful and substantial protection there must be".

[214] In particular, the court held that the destruction of operational notes by the Canadian Security Intelligence Service was a breach of its duty to retain and disclose relevant evidence. The consequences of such breach were to be determined by the designated judge. In this case, the designated judge postponed the hearing in order to allow Charkaoui to prepare his defense as a remedy for the late disclosure of evidence. The court highlighted, at paragraph 56, that "the issuance of a [security] certificate [under the Immigration and Refugee Protection Act] and the consequences thereof, such as detention, demand great respect for the named person's right to procedural fairness. In this context, procedural fairness includes a procedure for verifying the evidence adduced against him or her. It also includes the disclosure of the evidence to the named person, in a manner and within limits that are consistent with legitimate public safety interests". See also, at paragraph 58: "[i]n the context of information provided by CSIS to the ministers and the designated judge, the factors considered in Suresh confirm the need for an expanded right to procedural fairness, one which requires the disclosure of information, in the procedures relating to the review of the reasonableness of a security certificate and to its implementation. As we mentioned above, these procedures may, by placing the individual in a critically vulnerable position vis-à-vis the state, have severe consequences for him or her". About the connection between the right to freedom (protected under Section 7 of the Canadian Charter) and the right to due process, see paragraph 50 of the same resolution: "the serious consequences of the procedure on the liberty and security of the named person bring interests protected by s. 7 of the Charter into play. A form of disclosure of all the information that goes beyond the mere summaries which are currently provided by the CSIS to the ministers and the designated judge is required to protect the fundamental rights affected by the security certificate procedure".

II case[215] and, in other cases like the *Mahjoub III case*[216] or the *Almerei III case*[217], the Canadian Federal Court did the proper and followed in the Supreme Court's footsteps.

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[215] Charkaoui, Re , [2008] 2 S.C.R. 326; 376 N.R. 154

[216] Mahjoub v. Canada (Minister of Citizenship and Immigration) 2006 FC 1503. Mr. Mahjoub was detained in 2000 following a security certificate (issued by the Minister of Citizenship and Immigration and the Solicitor General of Canada under the IRPA) determining that he was a high-ranking member of an Egyptian Islamic terrorist organization. The security certificate was found to be reasonable and, in 2004, the Canadian Minister of Citizenship and Immigration determined that Mr. Mahjoub was to be deported to Egypt since he was a danger to the security of the country. Initially, his deportation was approved despite the finding that he was at a "substantial risk of [suffering] ill-treatment and human rights abuses" upon his return to Egypt, but the risk of torture was ruled out when Mr. Mahjoub applied for judicial review and the Federal Court mandated the executive to reconsider the available evidence in full in order to balance the need for deportation and the damage inflicted upon Mr. Mahjoub (Mahjoub v. Canada (Minister of Citizenship and Immigration) et al., (2005) 261 F.T.R. 95 (FC), identified within our set of resolutions as the *Mahjoub II case*). In the *Mahjoub III case*, the Canadian Federal Court reprehended the Canadian government again for "selectively rel[ying] on information that went against the bulk of the evidence in concluding there was no institutionalized torture in Egypt [, which] suggests an arbitrary rejection of important, credible evidence on this issue" (see paragraph 68 of the *Mahjoub III case*). In light of this, the Federal Court found the delegate's decision to deport Mr. Mahjoub to Egypt to be patently unreasonable and remitted the matter for redetermination in this point (see, in general, paragraphs 55 to 82 of the *Mahjoub III case*). When the Canadian Federal Court finally found in 2013 that the last certificate issued was reasonable, Mr. Mahjoub appealed against these decisions on the grounds that the proceeding should have stayed in view of their procedural deficiencies. In the *Mahjoub VI case* in 2017 (Mahjoub v. Canada (Citizenship and Immigration), 2017 FCA 157), the Federal Court of Appeals of Canada stated that "The legislative regime concerning security certificates, including the procedures for assessing the reasonableness of a security certificate, is constitutional. It manifests a commitment to fundamental fairness—a commitment worthy of a free and democratic society—to the person named in the certificate, here, Mr. Mahjoub. Viewed alongside other fairness features, such as state-funded counsel for Mr. Mahjoub throughout, these particular security certificate proceedings can only be seen as fundamentally fair in their execution. True, occasionally mistakes and faults happened and often remedies were needed to redress them. But individually or collectively, there is no factual and legal basis upon which the Federal Court could have permanently stayed these proceedings" (paragraph 353).

[217] In 2001, Mr. Almrei was detained pursuant the security certificate issued against him by the Minister of Citizenship and Immigration and the Solicitor General of Canada under the IRPA. Following the constitutional review performed in the *Charkaoui I* case (that also concerned Mr. Almrei's first security certificate) on the certificate process and amendments to the IRPA, a new certificate against Mr. Almrei was issued in 2008. In January 2009, Almrei was released from detention on conditions and when he filed for the review of such the conditions, the special advocates were not allowed into the hearing. In the *Almrei IV case* (Almrei, Re, (2009) 342 F.T.R. 1 (FC)), the Canadian Federal Court found that the special advocates' absence from the hearing was a breach of Mr. Almrei's procedural justice rights, in line with the *Charkoui I case*, since the summary and redacted transcript of the testimony they received instead did not serve as an adequate substitute for the right to "participate in and cross-examine witnesses who testify during any part of the proceeding that is held in the absence of the public" established in s. 85.2(b) of the IRPA. For its part, the *Almrei III case* (Almrei, Re (2009), 342 F.T.R. 27 (FC)) echoed the *Charkaoui II case*'s conclusions on the disclosure of evidence. Finally, when the second security certificate was reviewed as required by s. 77(1) of the IRPA, the certificate was found to be unreasonable and quashed in *Almrei V* (Almrei, Re, 2009 FC 1263;(2009), 355 F.T.R. 222 (FC)); These decisions are diametrically opposed to the pre-Charkaoui I decisions concerning the

Beyond the expected compliance of inferior courts[218], the internal consistency of the top-ranked court's jurisprudence is also relevant for the strengthening of the approach. In the *Harkat case*[219], for instance, the Canadian Supreme Court upheld the legacy of the

detention and deportation of Mr. Almrei: in the *Almrei II case* (Almrei v. Canada (Minister of Citizenship and Immigration), 2005 FCA 54; [2005] 3 F.C.R. 142), the Federal Court of Appeal turned down Mr. Almrei's release on a national security-based approach and, in the *Almrei I case* reviewing the conditions of the detention in connection to a writ of habeas corpus filed by Mr. Almrei (Almrei v. Canada (Attorney General) et al., [2003] O.T.C. 1104 (SC)), the Federal Court refers to the pre-*Rasul* American jurisprudence concerning the reach of habeas corpus in line with the *Padilla case* (see paragraph 42).

[218] However, the lower courts of some countries do not meet this expectation, as proven by the divided follow-up to the doctrine set in the *Rasul case* in the US. On one side, District Court for the District of Columbia granted the government's motion to dismiss the aliens' writs of habeas corpus based on the argument that foreigners lacked any rights to be vindicated through a habeas corpus action (Khalid v Bush, 355 F Supp 2d 311 (DDC 2005) 314). On the other side, the opposite conclusion was reached in Re Guantanamo Detainee Cases, 355 F Supp 2d 443 (DDC 2005) 464, where the idea that detainees hold a constitutional right to due process regardless of their nationality prevailed.

[219] In 2002, a ministerial security certificate issued under the IRPA declared Mr. Harkat inadmissible to Canadian territory on account of being a threat to national security due to its connection to international terrorism. Pursuant this certificate, Mr. Harkat was detained, and numerous certificate-related proceedings ensued. He was released from detention on stringent conditions in 2006, and those were progressively modified in favor of Mr. Harkat (see: Harkat v Canada (Minister of Citizenship and Immigration), 2006 FC 1105; Harkat v Canada (Citizenship and Immigration), 2007 FC 416; Harkat (Re), 2009 FC 241; Harkat (Re), 2009 FC 1008; Harkat v Canada (Citizenship and Immigration), 2013 FC 795; Harkat v Canada (Citizenship and Immigration), 2014 FC 1034; (Harkat (Re), 2018 FC 62; and Harkat (Re), 2020 FC 715). Another security certificate was issued in 2008 under the new security certificate regime implemented pursuant the *Charkaoui I case* and, during the judicial revision of the certificate in 2008, the special advocates appointed to protect Mr. Harkat's interest had access to the additional information disclosed by the CSIS (in accordance with the doctrine of the *Chakaoui II case*). However, the special advocates requested the disclosure of the CSIS's informants concerning Harkat and the possibility of cross-examining them in the closed-door hearings, which raised a number of legal questions and complaints that run through the different instances of the Canadian judicial system to be finally resolved in the *Harkat case* (Harkat, Re (2014), 458 N.R. 67 (SCC)). To begin with, the Supreme Court dismissed Mr. Harkat's appeal against the constitutionality of the IRPA provisions regarding the reasonableness review scheme (Sections 77(2) (concerning the filing of evidence and the elaboration of summaries), 83(1)(c)(d)(e)(h) and (i) (on the protection of information), 85.4(2) and 85.5(b) (regarding the restrictions on communications involving special advocates)), tackled in what is known as the Constitutionality Decision. Harkat claimed that those provisions failed to provide both the court and the named person with the possibility to access the necessary information in order to properly defend themselves from the charges and, in the case of the court, in order to deliver an informed decision. However, the court stood by the conclusions of the *Charkaoui I case* and found that, in general terms, the special advocates' scheme was a suitable compensation for the restrictions imposed by security concerns on the safeguards of due process (which remains as a central piece in the Canadian legal system) and, hence, met the proper fair trial standards conveyed in Section 7 of the Canadian Charter. Notwithstanding this, the court did take into consideration Mr. Harkat's claims in the so-called Privilege Decision, the Abuse of Power Decision and the Reasonableness Decision and added important nuances in order to tune in the regime. In this sense, the court declared that CSIS human

Charkaoui saga, which solidified the idea that executive policymaking in the field of counterterrorism must respect human fundamental rights in general, and the right to a fair trial in specific, as a domestic norm within Canada. Nevertheless, the judicial crystallization of this norm was hampered, in some countries, by the recalcitrance of the government to accept the judicial power attached to it, making it difficult for the judiciary to stand by its chosen approach. This is the case, for instance, of the struggle of US courts in order to ensure the right to habeas corpus, as a procedural aspect of the right to a fair trial, in cases of international terrorism.

The opening round in this intra-state turf battle was settled in the *Hamdi case*[220]. Three days after the 9/11 attacks, the American legislature swiftly enacting the September 11 Authorization for Use of Military Force ("AUMF")[221] to empower the President to use "all necessary and appropriate force" in the country's fight against international terrorism, as explained before. After his apprehension by US forces in Afghanistan, Mr. Hamdi was subjected to indefinite detention as authorized by the AUMF in relation to suspected terrorists (defined as "enemy combatants"). Although this habilitation of executive indefinite detention could have been challenged under the domestic fundamental right to freedom in connection with the right to a fair trial, Mr. Hamdi's father resorted to a writ of habeas corpus in order to allege the encroachment of the Third Geneva Convention[222], instead. The Bush administration responded to these allegations by stating that, since the "war on terror" was not a traditional war, laws of war like the Geneva Conventions were not applicable.

The US Supreme Court delivered a highly controversial interpretation of the Third Geneva Convention[223] but, regarding what concerns us here, the court did embrace the

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sources do not benefit from class privilege, and excluded the confidential summaries made of the destroyed originals as evidence.

[220] Hamdi and Hamdi v Rumsfeld and United States, Appeal judgment, Docket No 03-6696, 542 US 507 (2004), ILDC 116 (US 2004), 124 S Ct 2633 (2004), 159 L Ed 2d 578 (2004), 72 USLW 4607 (2004).

[221] Authorization for Use of Military Force (United States [us]) Public Law 107-40, 115 Stat 224.

[222] Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135.

[223] In paragraph 23 of the *Hamdi case,* the court did confirm that the so-called enemy combatants fall under the umbrella of the Third Geneva Convention but, instead of drawing a limit to these extraordinary executive powers of detention, the court leans on the Convention to validate the lawfulness of indefinite detention since international law's prohibition to extend the detention of prisoners of war beyond the end of the conflict was inversely read as the habilitation to

centrality of the fundamental right to a fair trial when assessing the right to habeas corpus of those enemy combatants that are American citizens. Indeed, such right was constitutionally granted to all citizens and the court stressed that "[a]ny process in which the government's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short"[224] because "the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the government's discretion in the realm of detentions"[225].

Therefore, the right to habeas corpus became the sole constraint to the executive powers granted under the AUMF[226], and the court draws two important conclusions. First, as pressing as security concerns might be, they do not bestow a blank check on the government. Secondly, due process is the indispensable stopcock of executive restrictions on fundamental rights and a core principle of a rule of law-based state, in which the judiciary must wield its power as a constitutional counterweight[227].

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indefinitely sustain the measures in those scenarios in which the conflict is potentially endless, like the global war against terrorism. This interpretation, albeit outlandish, at least confirmed that government could not operate in a legal vacuum, as exceptional as the security concerns might be. However, the *Hamdi case* seems indecisive about the legal frame of reference: while the legality of the AUMF must be assessed under national law according to the Supreme Court (paragraph 15), the court claims to rely on the parameters incrusted in the Third Geneva Convention to assess the legality of the indefinite executive detention (paragraphs 22 and 23) but, in truth, deflects a real international law-based analysis and focuses, instead, on the scope of the domestic authorization granted by the AUMF.

[224] *Hamdi case*, para. 49.

[225] Ibid., para. 48.

[226] Based on this, the court does examine the implications concerning the standard of evidence suitable to the judicial review of counterterrorism policies via habeas corpus. In this regard, the court states that "[a]s the Government itself has recognized, we have utilized the "some evidence" standard in the past as a standard of review, not as a standard of proof. […] This standard therefore is ill suited to the situation in which a habeas petitioner has received no prior proceedings before any tribunal and had no prior opportunity to rebut the government's factual assertions before a neutral decisionmaker" (paragraph 49 of the *Hamdi case*).

[227] See paragraph 48 of the *Hamdi case*: "[…] we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. […] Whatever power the United States Constitution envisions for the government in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake. Mistretta v. United States, 488 U. S. 361,

Having ensured American nationals' right to habeas corpus in the *Hamdi case*, the doubts about foreigners' access to this right within the jurisdiction of American courts were left to be solved in the aforementioned *Rasul case*. Since the *Hamdi case* affixes the centrality of habeas corpus to the domestic constitutional system, in order to extend such right upon non-nationals, the *Rasul case* resorts to a creative construction of the concept of jurisdiction, justified by the centrality of such right, as explained in the previous pages of this Chapter. In an attempt to repress the judicial grip born from this strong stance on habeas corpus, the incumbent administration passed the Presidential Order concerning the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism[228] in order to circumvent courts and channel the review of executive detentions through trials by special military commissions known as Combatant Status Review Tribunal ('CSRT')[229].

However, the Supreme Court had the opportunity to address the lawfulness of the CSRT scheme in the *Hamdan case*[230], in which Common Article 3 of the Geneva Conventions

380 (1989) (it was 'the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty'); Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398, 426 (1934) (The war power `is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties'). Likewise, we have made clear that, unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the government's discretion in the realm of detentions". It is worth noting that, just like in other common law systems like the British one, the judicial power accepts the possible removal of such a key piece within the political and legal system of the state by its legislative branch, although the court does not clarify whether the lack of due process safeguards would transform the model of state in the absence of instances to control the lawfulness of executive discretion, which is one of the corner stones of the principle of separation of powers and a basic tenet of the rule of law.

[228] Presidential Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (United States [us]) 66 Fed Reg 57833.

[229] The DTA provided that "no court, justice, or judge shall have jurisdiction to hear or consider […] an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defence at Guantanamo Bay, Cuba".

[230] Hamdan v Rumsfeld and ors, Appeal judgment, 548 US 557, 126 S Ct 2749, 165 L Ed 2d 723 (2006), ILDC 745 (US 2006). Following the Presidential Order concerning the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Mr. Hamdan (a Yemeni national captured in Afghanistan) was one of the many individuals to be found a suspect of international terrorism, detained, and set for a military trial. Hamdan's petition of habeas corpus was initially addressed by the US District Court for the District of Columbia. According to this Court, since the President "is not a tribunal", his assessment of Hamdan's connection to Al Qaeda cannot amount to determining Hamdan's status as a prisoner of war under the Third

was invoked through a writ of habeas corpus. In this case, the Supreme Court leaned on the law of war to reclaim the judicial safeguards of due process, hence stating that the CSRTs did not meet the procedural requirements of a fair trial[231]. This way, the Supreme Court enlisted the international law of war (qualified as an integral part of the American common law system in the resolution[232]) in order to divert the executive attempt to avoid the review powers of the judiciary. In other words, building on the conclusions of the *Hamdi* and *Rasul cases*, the *Hamdan case* presents the centrality of due process within the domestic legal system as supported by its centrality within the international legal order. In this sense, the *Hamdan case* is a magnifique exponent of the consubstantiality of the inward-looking and the outward-looking versions of fundamental human rights.

The decision in the *Hamdan case* was met with the enactment of the Military Commissions Act of 2006 by the Congress ('MCA')[233] which, in its Section 7(a), intended to strip federal courts of their habeas corpus jurisdiction in relation to detained aliens. This new effort to corner the judicial review of executive detentions of non-national suspects of terrorism into the irrelevance was dismantled when the US Supreme Court finally declared the unconstitutionality of Section 7(a) of the MCA in the *Boumediene case*[234]. In this case, while "the Government's position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay"[235] was not questioned, the Supreme Court emphasized "the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains de facto sovereignty over this territory"[236] which,

Geneva Convention (see Hamdan v Rumsfeld, Lower court decision, ILDC 120 (US 2004), 344 F Supp 2d 152 (DDC 2004), 8th November 2004, United States; District of Columbia; District Court for the District of Columbia). This ruling was reversed by the Court of Appeals for the District of Columbia Circuit on the pretext that the Geneva Conventions were not self-executing and could not apply to the pursuit of Al Qaeda because Common Article 2 of the Geneva Conventions limited their extension "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties" (see Hamdan v Rumsfeld, Appeal judgment, 415 F.3d 33 (D.C. Cir. 2005), (2005) 44 ILM 1276, 15th July 2005, United States; District of Columbia; Court of Appeals [DC App]).

[231] *Hamdan case*, paras. 79, 80, 84, 85, 101 and 111.

[232] Ibid., paras. 77 and 104.

[233] Military Commissions Act of 2006, Pub L No 109-366, 120 Stat 2600, 17 October 2006 (United States).

[234] Boumediene v Bush (President of the United States), Decision, Docket No 06-1195, 553 US 723 (2008), 128 S.Ct. 2229 (2008), ILDC 1039 (US 2008).

[235] *Boumediene case*, para. 50.

[236] Idem. See also the court statement that "[n]o Cuban court has jurisdiction to hear these petitioners' claims, and no law other than the laws of the United States applies at the naval station"

according to the court, extended the constitutional guarantees of habeas corpus to the detainees at Guantanamo. Since the MCA suspended the writ habeas corpus of Guantanamo's detainees without providing them with an adequate substitute, the MCA was declared unconstitutional by the Supreme Court[237].

Therefore, the unconstitutionality of the MCA was cemented on both the notion of functional or de facto sovereignty that extended the jurisdiction of US courts (as explained in the *Rasul case*), and the centrality of the writ of habeas corpus within such expanded system, as showcased in the *Hamdi, Rasul* and *Hamdan cases*. In this sense, while the previous resolutions had already relied on constitutional and international legal analyses to uphold the centrality of such right, the *Boumediene case* added a historical and comparative constitutional perspective[238] to sediment the same approach against the executive reluctance by proving the universally accepted centrality of the habeas corpus right even in peculiar scenarios of contested sovereignty.

As a result of the habeas corpus centrality within a legal system designed to protect the rule of law and a constitutional system of checks and balances, the Supreme Court warns the US Government that "[t]he Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution'"[239]. Consequently, the *Boumediene case* strongly disclaims the prevalence

(at paragraph 79) to disprove the government's claim that de jure sovereignty is the cornerstone of habeas corpus jurisdiction. With the same purpose, the Court establishes that "although [the US] recognized, by entering into the 1903 Lease Agreement, that Cuba retained "ultimate sovereignty" over Guantanamo, the United States continued to maintain the same plenary control it had enjoyed since 1898. Yet the US government's view was that the Constitution had no effect there, at least as to non-citizens, because the United States disclaimed sovereignty in the formal sense of the term. The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint" (paragraph 68).

[237] Ibid., para. 123.

[238] At the time of the *Boumediene case*, the constitutionality of suspending the writ of habeas corpus had not been explored by fellow courts of other countries in connection to territories under the effective control of the Government but within the formal sovereignty of another country. Therefore, the US Supreme Court had to resort to historically similar cases like the R., ex parte Sekgome v Earl of Crewe, Judgment, [1910] 2 KB 576, 25th April 1910, United Kingdom; England and Wales; Court of Appeal [EWCA].

[239] At paragraph 69 of the *Boumediene case*, quoting Murphy v. Ramsey, 114 U. S. 15, 44 (1885).

of national security above fundamental rights and contests the non-justiciability of foreign affairs since the US Supreme Court openly declares that the binding effects of the Constitution over executive action extends beyond the territorial borders of the state and even in terrorism-related matters and, with this, the judicial powers of review.

Presence and absence of explicit cross-referencing in the diffusion of the approach: norm-enablers in the judicial trend born from inter-judicial coordination.

Summing up, once the domestic judiciary has produced settled jurisprudence in one specific topic, courts will rely on the pre-existing national resolutions as precedents[240]. However, it is more likely that courts will look for referents beyond the confines of its domestic jurisdiction when trying to get away from the pre-existing approach like in *Charkaoui I case*, when experiencing executive resistance like in the *Boumediene case*, or when tackling an issue for the first time[241] like in the *Mahjoub V case*[242]. In *the Mahjoub V case*[243], the Canadian Federal Court dealt with the admissibility of evidence obtained from torture in cases of global terrorism for the first time and adopted the same

[240] This is the case of *Charkaoi II case*'s reliance on *Jaballah II case* and, of this case's reliance, in turn, on the *Charkaoui I case*, for instance.

[241] Although the examples showcased here are connected to the judicial strand embracing the centrality of human fundamental rights as their approach to assess the lawfulness of counterterrorism measures, the approach stressing the preeminence of national security (or any of the other traditional approaches) also relies in cross-references as a source of legitimacy when tackling new issues.

[242] Mahjoub, Re, (2010) 373 F.T.R. 36 (FC).

[243] The *Mahjoub IV case* (Canada (Minister of Citizenship and Immigration) et al. v. Mahjoub, (2009) 355 F.T.R. 94 (FC)) is concerned with assessing the proportionality of the decision to detain Mr. Mahjoub in 2009, pursuant his certification in 2008 and while waiting for the determination of the security certificate reasonableness and possible deportation. The court mandated is release under specific conditions that were later reviewed in *2011* (Mahjoub, Re, (2011) 389 F.T.R. 47 (FC)), and in 2013 (Mahjoub, Re, (2013) 425 F.T.R. 1 (FC)). His detention pursuant his second certification was also reviewed in 2005 (Canada (Minister of Citizenship and Immigration) et al. v. Mahjoub, 2005 FC 1596) and in 2007 (Mahjoub v. Canada (Minister of Citizenship and Immigration) et al., (2007) 309 F.T.R. 72 (FC)), and while the first time the court dismissed his request to be released, his second action was successful. These resolutions are not included in the set because the revisions performed in them do not amount to a review of the executive criteria since they are not connected to a new certificate.

approach and a similar solution to those devised by the UKHL in the *Belmarsh II case*[244] (which is referenced in the resolution)[245].

Likewise, UK courts displayed a similar behavior and draw inspiration from foreign jurisprudential milestones in the field of counterterrorism measures when facing unsolved issues within their domestic regime connected to the global fight against international terrorism. Embracing the centrality of human fundamental rights declared in the *Belmarsh I & II cases*, the UKHL determined in the *AF case*[246] that Article 6 ECHR required a "core irreducible minimum" of procedural safeguards in order to ensure the fairness of the procedures against suspected terrorists[247]. Consequently, in the imposition of the so-called non-derogating control orders ("control orders") that confined controlees at home for most of the day as a preventive measure against terrorism[248], "the controlled

[244] The Canadian Federal Court agrees with the UKHL on the central importance of the prohibition of torture and that "it is for the named person to raise the issue that information relied upon by the Ministers is obtained as a result of the use of torture". In this sense, "to meet this initial burden, the named person need only show a plausible connection between the use of torture or CIDT and the information proffered by the Ministers". However, "in security certificate proceedings, the Ministers bear the burden of establishing that information they rely upon is reliable and appropriate. They must establish that the information is admissible" (see paragraph 59 of the *Mahjoub IV case*). Hence, although the court does not specify what the appropriate standard would be in case of doubt, it seems like evidence can only be relied upon if it has been satisfied that it was not obtained through torture.

[245] The Canadian court's reference to this case can be found in paragraphs 33 and 34 of the *Mahjoub IV case*. In this passage, the court reflects on the fact that the Canadian government is cropping the doctrine established in the Belmarsh saga and, in the following paragraphs, the court sets the record straight on the real meaning of these resolutions.

[246] Secretary of State for the Home Department (Respondent) v AF (Appellant) (FC) and another (Appellant) and one other action; [2009] UKHL 28.

[247] *AF case*, para 12 and 21.

[248] Paragraphs 2 and 3 of the *AF case* present the non-derogatory and derogatory control orders included in the 2005 Prevention of Terrorism Act (enacted on 11 March 2005) as the governmental replacement for the preventive regime quashed by the *Belmarsh I case.* More specifically, the 2005 Act repealed Part 4 of the 2001 Anti-terrorism, Crime and Security Act, including the aforementioned Section 23, which was deemed incompatible with Articles 5 and 14 of the EHRC. Hence, the UKHL resolution in the *Belmarsh I case* connects the new regime to the post-9/11 legal and political framework. In order to avoid the human rights-related pitfalls that hindered the previous regime, the 2005 Act makes express reference to Article 5 of the ECHR and states its commitment to respect the fundamental right to liberty and security. This declaration of principles at the core of the 2005 counterterrorism policies of the UK is proof of the impact of courts' embracement of fundamental human rights' centrality as an approach. Hence, the UKHL resolutions assessing the appropriate length of the confinements imposed by control orders also embraced such approach. In this sense, see the *JJ case* (Secretary of State for the Home Department (Appellant) v. JJ and others (FC) (Respondents), [2007] UKHL 45) rejecting 18 hours long confinements, and the *E case* (Secretary of State for the Home Department Respondent v. E and another (Appellant), [2007] UKHL 47) and the *Control Orders case* (Secretary of State for the Home Department v. MB (FC) (Appellant), [2007] UKHL 46) declaring that 12 and 14 hours

person must be given sufficient information about the allegations against him to give executive instructions to the Special Advocate"[249]. However, the neatness of this statement in favor of the right to a fair trial as the cornerstone of fundamental rights' centrality became difficult to concretize in relation to the closed materials that the government intended to wrap under national security's secrecy.

Consequently, when tackling this issue in the *Control Orders case*[250], the UKHL looked for guidance among the Canadian and American jurisprudence in order to deliver its opinion on the right of suspected terrorists to access such materials when relevant to their defense. The Court twined the *Charkaoui* and *Hamdi cases* within its reasoning to underpin its own jurisprudence about the centrality of fundamental human rights and, more specifically, the right to a fair trial[251]. From this starting point, the court declares that, according to art. 6 ECHR, "evidence may only be withheld if it is strictly necessary to do so"[252] and, in the case of control orders, the suspect must be accorded a "substantial measure of procedural justice"[253].

Therefore, the key question was whether the non-disclosure of relevant materials is compatible with art. 6 ECHR and, thus, whether the special advocates' regime compensate for all restrictions of the controlee's access to the "material upon which [the Secretary of State] wishes to rely in order to establish her case"[254]. In this regard, the

long confinements were an acceptable limitation of the controlee's fundamental rights (all of these resolutions delivered on the October 31 of 2007).

[249] *AF case*, para. 45.

[250] Secretary of State For the Home Department v MB and Secretary of State for the Home Department v AF [2007] UKHL 46.

[251] See, for instance, paragraphs 30 and 65 of the *Control Orders case*. In paragraph 30, the UKHL highlights the constitutional character vested by the US Supreme Court upon the right to a fair trial.

[252] *Control Orders case*, para. 63.

[253] Ibid., para. 66.

[254] See paragraph 65 of the *Control Orders case*: "[…] it is necessary to go further than that, and ask whether the use of a special advocate can solve the problem where the Secretary of State wishes to withhold from the controlled person material upon which she wishes to rely in order to establish her case. We are all agreed that these are not criminal proceedings for the purpose of Article 6; in ordinary civil proceedings it is appropriate to give weight to the interests of each side; nevertheless, the state is seeking to restrict the ordinary freedom of action which everyone ought to enjoy, in some cases seriously. It seems probable that Strasbourg would apply very similar principles to those applicable in criminal proceedings, but would be more inclined to hold that the measures taken by the judicial authorities had been sufficient to protect the interests of the controlled person. It would all depend upon the nature of the case; what steps had been taken to explain the detail of the allegations to the controlled person so that he could anticipate what the

UKHL established that this question must be answered individually on the bases of each case but, more importantly, that the assessment should be performed by a court, and not by the Secretary of State[255]. So, because of the centrality and importance of the right to a fair trial within the legal system, the ultimate power to decide on the disclosure of restricted materials lies in the hands of the judicial power[256].

References to foreign jurisprudence can be presented as positive examples of the right approach to follow (like the mentions of the *Charkaoui* and *Hamdi cases* in the *Control*

material in support might be; what steps had been taken to summarise the closed material in support without revealing names, dates or places; the nature and content of the material withheld; how effectively the special advocate had been able to challenge it on behalf of the controlled person; and what difference its disclosure might have made. All of these factors would be relevant to whether the controlled person had been 'given a meaningful opportunity to contest the factual basis' for the order: see Hamdi v Rumsfeld 542 US 507 (2004), 509, col 2, O'Connor J".

[255] See paragraph 50 of the *Control Orders case*: "The final question is whether the non-disclosure of the closed material is consistent with the right to a fair trial. On this question, the critical point appears to me to be that material can be withheld only if a judge has decided that disclosure would be contrary to the public interest. It is a judicial decision and not that of the Secretary of State: see paragraph 4(3) of the Schedule to the Prevention of Terrorism Act 2005 and Part 76 of the Civil Procedure Rules. On the other hand, the Secretary of State may make a control order only if he has reasonable grounds for suspecting that the individual concerned is or has been involved in terrorism-related activity and that an order is necessary for 'protecting members of the public from a risk of terrorism'. If, on the evidence put before the judge on review, he considers that the decision of the Secretary of State was flawed, the order cannot stand".

[256] According to paragraphs 35 and 90 of the *Control Orders case*, the court's assessment must identify whether there has been a "significant injustice" in order to declare the unfairness of the trial. In this specific case, the UKHL decided that the controlee's right to a fair trial under Art. 6 ECHR had been infringed since the control order could not be justified on the open material alone and he was not granted any kind of access to the closed materials, which impaired his possibilities to defend himself. As shown in paragraph 41 of the *Control Orders case*, the court's legal analysis took into account the international legal framework connected to the end of reinforcing the centrality and importance of the right to a fair trial: "The Council of Europe Commissioner for Human Rights, in paragraph 21 of his report referred to above (para 16), and the Joint Committee on Human Rights, in paragraph 76 of its report referred to above (para 16), had difficulty in accepting that a hearing could be fair if an adverse decision could be based on material that the controlled person has no effective opportunity to challenge or rebut. This is not a case (like E) in which the order can be justified on the strength of the open material alone. Nor is it a case in which the thrust of the case against the controlled person has been effectively conveyed to him by way of summary, redacted documents or anonymised statements. It is a case in which, on the judge's assessment which the Court of Appeal did not displace, MB was confronted by a bare, unsubstantiated assertion which he could do no more than deny. I have difficulty in accepting that MB has enjoyed a substantial measure of procedural justice, or that the very essence of the right to a fair hearing has not been impaired." However, it must be noted that the standard drawn in this case proved to be difficult to apply in subsequent cases in a consistent manner: see Re Bullivant (AG), [2007] EWHC 2938 (Admin); Secretary of State for the Home Department v AE, [2008] EWHC 132 (Admin); Secretary of State for the Home Department v AN, [2008] EWHC 372; Secretary of State for the Home Department v AF, [2008] EWHC 453; Secretary of State for the Home Department v MB, [2008] EWHC 453; and Secretary of State for the Home Department v AN, [2008] EWHC 372).

Orders case), or in negative as examples of the approach to reject. For instance, in the *Zaoui case*[257], the Supreme Court of New Zealand made express references to the *Suresh* and *Rehman cases* in order to reject the traditional approach based on the absolute prevalence of national security as a legal value displayed by the early resolutions of the UK and Canadian judiciaries. The *Zaoui case* (from 2005) established that, although the faculties of New Zealand's Inspector-General to assess the need to deport a refugee posing a threat to national security are not limited by human right's considerations[258], such deportation cannot take place against the international principle of non-refoulment[259], portraying the prohibition to deport despite the risk of torture as absolute[260].

Unlike the *Suresh case*, this resolution unties the executive assessment of national security's needs from the decision to deport which must be, indeed, consistent with international and national human fundamental rights. Therefore, the *Zaoui case* openly rejects the balancing exercise of the House of Lords between national security and human rights in the *Rehman case*[261], as well as the proportionality judgement or "sliding scale of seriousness of the risk to national security, depending on the possible consequences for a particular refugee of refoulement"[262] devised in the *Suresh case*.

Hence, at the very least, references to foreign jurisprudence are intended to support the court's choice of approach in controversial or groundbreaking cases. However, the inter-state transference of jurisprudential content can go beyond the courts' approach to,

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[257] Attorney-General v Zaoui and Inspector-General of Intelligence and Security and Human Rights Commission (intervening), Appeal to Supreme Court, [2005] NZSC 38, (2006) 1 NZLR 289, (2005) 7 HRNZ 860.
[258] *Zaoui case*, paras. 53 to 73 and 91.
[259] Ibid., paras. 79 and 90.
[260]This portrayal requires the Supreme Court of New Zealand to look for a way to circumvent Article 33 (2) of the Refugee Convention (Convention relating to the Status of Refugees (United Nations [UN]) 189 UNTS 137, UNTS Reg No I-2545, [1954] ATS 5, Cmnd 9171, Ch.V Administrative Measures). According to this article, "[t]he benefit of the [non-refoulment principle (established in Article 33(1)] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country". Interestingly enough, paragraph 42 of the *Zaoui case* portrays this article as the clause limiting the power of the Inspector-General in the matter and relies on this idea to claim that such power is, in no manner, discretionary.
[261] Ibid., para. 39.
[262] See the quote of the *Suresh case* in paragraph 23 of the *Zaoui case.*

occasionally, copy specific measures. For instance, in the *People's Union case*[263], the Indian Supreme Court based its constitutional assessment of Section 30 of the 2002 Indian Prevention of Terrorism Act[264] on its comparative analysis of the jurisprudence and resulting domestic regimes in the US, Canada, New Zealand, Australia and the UK[265]. The Indian Supreme Court relied on its comparative analysis of constitutional and international law and jurisprudence in order to read procedural safeguards into the wording of the statutory precept concerning the protection of witnesses' identity in relation to the suspected terrorists' right to access evidence of charge[266]. Therefore, the court attempted to reshape the Indian regulation in this matter in the image and likeness of the analyzed foreign and international regimes.

Express cross-referencing to foreign jurisprudence, whether in positive or in negative, to the approach or to the solutions implemented by the courts, will ease the identification of a trend among courts. Nevertheless, some courts take part in inter-judicial coordination without participating in explicit cross-referencing. This is the case, for instance, of German courts. Unlike the change of mindset experienced by the UK, US and Canadian judiciaries, German courts have shown an unwavering commitment to the centrality of

[263] People's Union for Civil Liberties & Anr. vs. Union of India; Writ Petition (civil) 389 of 2002, 16/12/2003. People's Union for Civil Liberties v. Union of India [2004] 1 LRI 1.

[264] More specifically, the challenged provisions were Sections 4, 6, 7, 8, 10, 14, 15, 16, 17, 18, 19, 20, 21, 22, 27, 30, 32 and 49. The Prevention of Terrorism Act, 2002 (known as "POTA") replaced the Terrorist and Disruptive Activities (Prevention) Act, 1987 (known as "TADA"). TADA's validity was lapsed in 1995 after receiving harsh condemnation for being frequently utilized against political opponents, human rights advocates, minorities, and excluded groups within Indian society. However, POTA was not enacted until 2002, as a result of the global post-9/11 wave of legislative reforms to fight international terrorism. Thus, POTA (originally enacted through a Presidential decree under the name of Prevention of Terrorism Ordinance in October 2001) is a prime example of domestic transposition of the 1373 Resolution, due to both its preventive and harsh measures and the haste to enact it (Verma, 2003). Hence, POTA's demise ensued after a new wave of popular discontent complained against the questionable political instrumentalization of this counterterrorism regulation missing basic procedural safeguards. The Indian Supreme Court's warnings concerning the shortcomings of POTA were indeed acknowledged in 2005, when this counterterrorism regulation was repealed after the *People's Union case* (Mate & Naseemullah, 2010).

[265] See paragraph 428 of the *People's Union case*. In this paragraph (like in many others), the Indian Supreme Court also brings into its comparative analysis the jurisprudence of the ECtHR.

[266] More specifically, the Indian Supreme Court identified in the aforementioned regimes the existence of an "independent counsel […] appointed for the purpose to act as amicus curie and after going through the deposition evidence assist the court in forming an opinion about the weight of the evidence in a given case or in appropriate cases to be cross-examined on the basis of the questions formulated and given to him by either of the parties" (*People's Union case* at paragraph 428).

fundamental human rights as the proper approach to assess the lawfulness of counterterrorism measures and the limits to executive powers in the name of national security or for the sake of the country's foreign affairs.

For instance, while the early resolutions of lower and higher courts in Canada seemed dubious about the absolute character of the prohibition of torture, this principle connected to the centrality of human fundamental rights is clearly stated by German lower courts even in their early resolutions concerning the admissibility of evidence tainted by torture in deportation procedures[267]. Furthermore, unlike UK courts, the commitment of the German judiciary to the centrality of human fundamental rights did not cave into the pressure of national security claims. The most well-known exponent of this strong position is the *Aviation Security Act case*[268]. In the aftermath of the 9/11 attacks, Germany also succumbed to the global urge to enact far-reaching counterterrorism policies and passed the Aviation Security Act[269] in which Section 14(3) allowed to take down any civil aircraft that was hijacked to the purpose of committing a terrorist act, threatening human lives or undermining national security[270].

[267] See, for instance, the decision of the Düsseldorf Court of Appeal (Oberlandesgericht) of 27 May 2003. In this resolution the court concluded that, despite Turkey's transposition of the UNCAT, there were sufficiently reliable evidential grounds to presume that the evidence presented in order to request the extradition was obtained under torture: both the medical evidence connected to this specific case, as well as the public information reporting the torture methods commonly applied by the Turkish security forces were deemed to be reasonable evidence ("begründete Anhaltspunkte") to make such inferences. Furthermore, the court deemed the human rights reports publicly available to be concrete evidence ("durch konkrete Indizien belegte Gefahr") of the risk that the statements obtained under torture against the requested person might be used in the judicial proceedings against him in Turkey. In addition to this, the reasonableness of this evidence allowed the court to conclude that the requested person was at real risk ("konkrete Gefahr") of undergoing torture if extradited. See also the judgment of 28 August 2003 of the Cologne Administrative Court (Verwaltungsgericht) in a related extradition case, following the criteria set by the Düsseldorf Court of Appeal's judgment. In this case, the Cologne court found that further assurances provided by the Turkish authorities were not reliable since those assurances were too vague and uniquely connected to the Turkish legal framework on torture evidence that had been previously disregarded.

[268] BVerfG, Judgement of the First Senate of 15 February 2006 – 1 BvR 357/05 -.

[269] Aviation Security Act, BGBl I S 78, 11 January 2005 (Germany).

[270] Although the general goal of the Act was the prevention of illegal interference in the civil aviation of the country, Section 14(3) of the Act specifically established that "the direct use of armed force is permissible only where it must be assumed under the circumstances that the aircraft is intended to be used against human lives, and where this is the only means to avert the imminent danger". Therefore, Section 14(3) is a preventive measure included in the Act as a caution in the event of another episode similar to the one that occurred on September 11, 2001.

Shortly after, such provision was constitutionally challenged and the Federal Government stood by its validity arguing that, since the potential loss of human lives during a terrorist attack would be superior to the harm inflicted on those on board of the targeted plane, in overall, Section 14(3) would provide the widest measure of protection to the fundamental right to life in this scenario. However, the Federal Constitutional Court of Germany stated that the quantitative assessment of the fundamental right to life is barred by its connection to the principle of human dignity: the inherent dignity of human beings makes it impossible to authorize the killing of innocent individuals on the grounds of saving much more people since their lives are equally valuable regardless of the number of survivors. Consequently, the Federal Constitutional Court declared the provision void on the grounds that this legal habilitation to sacrifice the life of innocent civilians for the sake of national security was a breach of the human fundamental right to life in connection with the foundational principle of human dignity[271].

Therefore, the Court portrays the fundamental right to life not only as central within the constitutional legal system, but also as an absolute legal value due to its inherent connection with human dignity. While the Federal Constitutional Court relied solely on German constitutional law to reject the utilitarist considerations of the Federal Government[272], other courts like the Polish Constitutional Court resorted to a combination of the domestic and international versions of the same human rights to reach the same conclusion in the remarkably similar *Aviation Law case*[273]. The most remarkable feature of the reasoning of the Polish Constitutional Court in this case is not the evident assimilation of the approach and solution provided by its German counterpart in the *Aviation Security Act case* but, perhaps, the resulting assumption that the outward-looking version of the right to life is also rooted in the right to human dignity within the international legal system, although human dignity is not recognized as an autonomous right with binding effects in the international human rights' treaties mentioned in the resolution[274].

[271] These rights are enclosed in Articles 1(1), 2(2) and 19(2) of the Basic Law, 23 May 1949 (Germany).
[272]The right to human dignity as a foundational principle purports that the individual value of human life is self-determined and absolute, so it cannot be quantified. In this sense, see paragraphs 119 to 122 and 133 to 135 of the *Aviation Security Act case.*
[273] Aviation Law Case, Constitutional review, Case No K44/07, 30th September 2008.
[274] The *Aviation Law case* relies on Article 6(1) of the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, entered into force 23 March 1976

Hence, these two resolutions are another paradigmatic example of how the consubstantial nature of common rules allow courts not only to coordinate their decisions with those of their foreign peers, but also to transfer content and features from one legal system to another, regardless of whether the transference occurs between domestic systems or across the domestic and international level as well. Indeed, the Polish Constitutional Court references to the German jurisprudence were aimed at supporting its combined exercise of comparative constitutional law and creative interpretation of international law in order to implement an innovative approach to an issue that had never been tackled before.

The lawfulness of the authorization to take down civil aircrafts in the event of a terrorist attack was also unchartered territory for the Federal Constitutional Court of Germany but, perhaps due to the lack of similar precedents or because of the strength and legitimacy of its constitutional jurisprudence, the Court asserts the centrality (and absolute character) of the fundamental right to life in connection to the right to human dignity without cross-referencing foreign jurisprudence.

Based on this analysis, the judiciaries of the UK, the US, Canada and Germany can be identified as norm-enablers within the described inter-judicial coordination around the centrality of human fundamental rights. As norm-enablers, these courts have led the establishment and strengthening of the common approach due to their innovative and ground-breaking interpretations. Consequently, partial cascade effects within their area of influence have followed their resolutions. Hence, their jurisprudence is frequently referenced by other domestic and international courts regardless of whether they engage back in the cross-referencing or not.

('ICCPR')—and Article 2 of the ECHR. While the ECHR only mentions the value of human dignity as a principle in the introduction of its Protocol 13, the ICCPR mentions it as a foundational principle in its Preamble as well and as a standard against inhuman mistreatment in Article 10 connected to the right to freedom.

Application of the common approach in relation to UNSC resolutions.

As said before, German courts have shown one of the most solid commitments to the centrality of human fundamental rights in relation to counterterrorism policies. In fact, the strong embrace of the German Constitutional Court of this approach was not shaken in front of UNSC resolutions either. Although this Court has portrayed UNSC Resolutions 1267 and 1373 as compulsory mandates to states to fulfill their international obligations concerning the global fight against international terrorism, the court has also stated that the compliance with such UNSC Resolutions must be compatible with the German constitutional fundamental rights (more specifically, with the right to a fair trial) since there is nothing in the wording of such resolutions requiring states to disregard the essential features of the domestic legal system in order to comply. At the core of this conclusion is the assumption that UNSC resolutions provide a margin for interpretation.

This presumption can be found, for instance, in the decision of the German Federal Constitutional Court in the *Appeal case*[275]. In this case, the court had to examine whether the decision of the Bavarian Administrative Court to reject the application for appeal of an asylum-seeker that had been scheduled for deportation due to his alleged connections to terrorism[276] was constitutionally correct or a violation of the fundamental right to a fair trial and due process (under Article 19 paragraph 4 sentence 1 of the Basic Law). Although the Court acknowledges that the guidelines followed by the Bavarian Administrative Court in order to interpret the domestic regulation connected to the topic were developed in application of UNSC Resolutions 1373 and 1267, the interpretation of the Administrative Court should have also accounted for other guidelines such as the Interpretative Guidelines of the UN Office of the High Commissioner for Refugees (hereinafter "UNHCR")[277] on the exclusion of the right to asylum, which embraces the requirements of due process and the right to judicial review of the executive decision[278].

[275] BVerfG, Beschluss vom 12. März 2008 – 2 BvR 378/05 –, juris.
[276] Bavarian Administrative Court of 26 January 2005 - 21 ZB 05.30001.
[277] UNHCR's Interpretative Guidelines Article 1 F of the Refugee Convention - Guidelines on International Protection: Application of the Exclusion Clauses: Article 1 F of the 1951 Convention relating to the Status of Refugees, September 4, 2003 (HCR/GIP/03/05).
[278] *Appeal case*, para. 38.

This statement conveys two important implications. First, it proves that there is more than one possible interpretation of UNSC resolutions, including Resolution 1267, which had been portrayed by other courts and doctrine as requiring an ad verbum interpretation that would foreclose due process. Second, it is worth noting that, in order to defend this presumption, the Federal Constitutional Court of Germany references the interpretation of an international institution like the UNHCR, thus providing yet another proof of the consubstantial nature of international and domestic human fundamental rights. Consequently, the resolution moves on to annul the decision of the Bavarian Administrative Court for unlawfully denying the claimant's human fundamental right to due process.

This view on the margin of interpretation concerning the implementation of UNSC resolutions is not exclusive to the German judiciary. In the *Sassi case*[279], the French Court of Cassation rejected the executive claim that UNSC resolutions 1368 and 1373 conveyed an inexorable mandate to combat international terrorism that automatically legalized any executive action taken in this context[280]. Moreover, the French Court of Cassation states that, rather than the UNSC resolutions 1368 and 1373, the applicable rules to the present case are those relevant to determine the legality of the appellants' detention by the US Government under the CSRT scheme, which would be the ICCPR and the Third Geneva Convention according to the court[281].

Therefore, this court connects the domestic fundamental right to a fair trial and due process to the outward-looking version of these rights at the international level in order to reclaim the domestic and international relevance of these fundamental human rights in front of the alleged strength of UNSC resolutions. This vindication of the domestic and international centrality of human fundamental rights leads the Court to reject the judicial

[279] Sassi (Nizar) and ors, Cassation Appeal, Pourvoi No 03-84652, Bulletin Criminel 2005 No 1, ILDC 776 (FR 2005).
[280] *Sassi case*, para. 13.
[281] Ibid., para. 14.

immunity of the American government and its agents and officials[282], hence brushing aside all claims connected to the non-justiciability of foreign affairs as well[283].

However, the jurisprudence of other jurisdictions showed a clear transition from the traditional claim that UNSC resolutions are inexorable mandates to ignore human and fundamental rights due to their hierarchical supremacy, to the idea that, albeit legally

[282] Since the domestic regulation on the judicial power to investigate crimes was clear in connection to the centrality of the fundamental right to a fair trial and there were no international rules stripping the French courts of such jurisdictional power, the Court assumed that the case was within its scope of jurisdictions because the two detainees were French nationals. This conclusion implies a severe correction of the decision delivered by the French Court of Appeals that rejected the claimant's application for appeal based on the lack of jurisdiction of French national courts due to the hierarchical superiority of UNSC resolutions.

[283] As previously stated, as soon as a matter fell within the field of foreign affairs, courts struggled to defend the scope of their jurisdiction in front of non-justiciability claims since the judicial intervention is seen as an illegitimate meddling into, not only the international policies of the state, but also into the sovereignty of another country. However, several exceptions have flourished amidst the progressive strengthening of the judicial trend in favor of the centrality of fundamental human rights. For instance, together with the *Sassi case*, another remarkable example of the extraterritorial strength of national courts' jurisdiction is the *Khadr I case* (Khadr v. Canada (Minister of Justice), [2008] 2 S.C.R. 143, 2008 SCC 29). In this case, the Canadian Supreme Court concluded that the Canadian Charter could be applied with extraterritorial effects in order to assess the lawfulness of the Canadian agents' participation in the interrogation of Mr. Khadr in the American facilities at the Guantanamo Bay's military base. The resolution was seen as an indirect review of the practices developed by the American forces during the interrogation because the judicial assessment of the Canadian agents' behavior was indivisible from the actions that they had participated in. The Canadian Supreme Court referenced the *Rasul* and *Hamdan cases* not only because these resolutions' acknowledgement of illegalities in the detention scheme sheltered the *Khadr I case* from the political backlash, but also because the *Hamdan case* resorted to international human rights in its assessment, and this is a key element in the reasoning of the *Khadr I case*. Although according to the domestic principle of comity the laws of a foreign state must be respected when Canadian officials are acting in that state, the principle of comity "ends where clear violations of international law and fundamental human rights begin" (paragraph 18 of the *Khadr I case*). Hence, by framing the encroachments of the right to a fair trial and due process established in the *Rasul* and *Hamdan cases* as violations of the international equivalents of these rights, the Canadian Supreme Court can justify the extraterritorial effects of the Canadian Charter in order to pass judgement on the conduct of the Canadian officials. In overall, in the *Khadr I case*, not only did the Canadian Supreme Court coordinate itself with the approach of the US Supreme Court in the *Rasul* and *Hamdan cases*, but it also coordinated the Canadian and American inward-looking versions of the right to a fair trial and due process between them and with their common outward-looking version of these fundamental human rights. Although the *Khadr II case* (Prime Minister and ors v Khadr (Omar Ahmed), Amnesty International (Canadian Section, English Branch) (intervening) and ors (intervening), Final appeal judgment, 2010 SCC 3) upheld the conclusions reached in the *Khadr I case,* in this second episode of the Khadr saga the Canadian Supreme Court certainly felt the constrictive limits of foreign affairs when it had to concede that no remedy could be provided to the unlawful detention of Mr. Khadr since the court could not do anything beyond ordering the government to ask for Mr. Khadr's repatriation and such requirement was met with the silence of the US authorities. Hence, the *Khadr II case* is the demonstration that the theoretical extraterritorial effect of domestic law is undermined by the territorial limits of national courts' enforcement power, as explained in the Theory Chapter.

binding vessels of international obligations, UNSC resolutions allowed for an implementation compatible with the centrality of fundamental human rights' centrality within the legal system of reference. This is the case, for instance, of the UK judiciary in relation to UNSC resolutions.

The first of these positions is showcased in the *Al-Jedda 2007 case*[284], in which Mr. Al-Jedda claimed to be detained during the joint invasion of Iraq by the UK and the US without charge or trial and in breach of his national and international human right to freedom[285]. The UKHL hold that both Article 5(1) of the ECHR and its equivalent inward-looking fundamental right to liberty established in the 1998 Human Rights Act were pushed aside and superseded by Resolution 1546 as the legal framework of reference for the case by virtue of Articles 25 and 103 of the UN Charter. This led the UKHL to validate the claim of the Secretary of State that UNSC Resolution 1546 imposed on the UK the obligation to detain suspected terrorists for reasons of security.

The UKHL does concede that "as appears from the summaries of UNSCRs 1511 and 1546 given above in paras 12 and 15, the resolutions use the language of authorization, not obligation"[286]. However, the Court quickly dismisses this difference to state that, in matters of security, both concepts can be found to be equivalent "since the UN and the Security Council have no standing forces at their own disposal and have concluded no agreements under Article 43 of the Charter which entitle them to call on member states to provide them"[287] and, thus, "those [states which chose to contribute to the multinational force] (including the UK) became bound by Articles 2 and 25 to carry out the decisions of the Security Council in accordance with the Charter so as to achieve its lawful objectives"[288]. Thus, the UK was "bound to exercise its power of detention where this was necessary for imperative reasons of security"[289]. This resolution is a display of

[284] R (on the application of Al-Jedda) v Secretary of State for Defence, Appeal judgment, (2007) UKHL 58, (2008) 1 AC 332, [2008] 3 All ER 28, [2008] HRLR 13, [2008] UKHRR 244, ILDC 832 (UK 2007).
[285] In order to answer this main question, the UKHL had to clarify first that the responsibility derived from the actions of the UK and US forces was not transferred to the UN by virtue of Resolution 1546, because the UN never assumed the effective control of the military operations. In this sense, see paragraphs 5, 7 and 21 to 25 of the *Al-Jedda 2007 case*.
[286] *Al-Jedda 2007 case*, para. 31.
[287] Ibid., para. 33.
[288] Ibid., para. 34.
[289] Idem.

indulgence towards the government in which the court artfully reads into the wording of an authorization, not only an international obligation to detain, but also the international obligation to establish a detention scheme without regard for due process safeguards.

In contrast with this traditional understanding of the systemic effects of UNSC resolutions that denies all possible interpretations but the one that corresponds to the implementation of choice of the government, the *Ahmed I case*[290] embraces the opposite approach: based on the assumption that all UNSC resolutions (including Resolution 1267) provide a margin for interpretation, they must be implemented with due respect for fundamental human rights, for they are central pieces within the legal system[291].

Summing up, within a 10-year span, the judicial trend shifted from the traditional approaches upholding the absolute prevalence of national security, the inescapable literality of UNSC resolutions and the non-justiciability of foreign affairs to the approach upholding the centrality of fundamental human rights within the legal system of reference. Under this second approach, national security concerns must be weighed against the requirements of fundamental human rights, UNSC resolutions' mandates cannot simply override fundamental human rights and foreign affairs can no longer remain as an impenetrable space for the judicial defense of human fundamental rights.

The *Kadi I 2008 case*, in which the ECJ compared its role to that of domestic courts in relation to constitutional systems[292], embraced this nascent trend among its national peers hence solidifying the jurisprudential agreement concerning the main points of discussion. As a result, the *Kadi I 2008 case* enshrined the general consensus within the trend to portray the right to fair trial as a cornerstone in the protection of fundamental human rights' centrality, for this right allows the judicial balancing of policy needs and the irreducible core content of fundamental human rights. Moreover, the *Kadi I 2008* case became a partial tipping point within the creation of the trend and subsequent resolutions reproduced this case's emphasis on the quality and the quantity of the evidence provided to the individuals subject to a counterterrorism measure, its strong stance in relation to

[290] Ahmed and ors v Her Majesty's Treasury, Appeal decision, [2010] UKSC 2, [2010] 2 AC 534, [2010] 2 WLR 378, [2010] UKHRR 204, [2010] 4 All ER 745, [2010] Lloyd's Rep FC 217, ILDC 1534 (UK 2010), 27th January 2010, United Kingdom; Supreme Court [UKSC].
[291] See the detailed exam of the *Ahmed case* in the following Sections.
[292] See paragraphs 281, 283 and 335 of the *Kadi I 2008 case.*

the interpretability of UNSC resolutions, and the voidance of the policies under review for disregarding the core content of human fundamental rights.

4.1.4. The position of the Kadi saga within the inter-judicial coordination in favor of fundamental human rights' centrality.

As advanced in the previous Subsection, the approach and line of reasoning of *Kadi I 2008 case* was not born in the void. In fact, the *Kadi I 2008 case* stands on the building blocks set by the previous resolutions involved in the inter-judicial coordination upholding the centrality of fundamental human rights in relation to counterterrorism policies.

To begin with, The ECJ's defense of the concerned rights as constitutional due to their connection to the identity of the European Union[293] is remarkably similar to the stance of the German Federal Constitutional Court in the *Arrest Warrant case*[294]. In this case, the German Federal Constitutional Court examined the constitutional fitting of the European Arrest Warrant Act enacted in application of the Framework Decision on the European Arrest Warrant[295] (which, in turn, was presented as an implementation of UNSC Resolution 1373) within the German constitutional legal system. This case was triggered when Spain requested the extradition of Mamoun Darkazanli (with dual citizenship in Germany and Syria) through the 'European Arrest Warrant' mechanism under criminal charges of terrorism.

The German Federal Constitutional Court declared the Act void because it encroached the constitutional right to a fair trial. To begin with, the Act did not provide recourse to a judicial instance in order to appeal the decision to extradite, hence disregarding the requirement of Article 19(4) of the Basic Law. The BVerfG highlighted that, contrary to the government's claims, the decision to extradite could not be reached solely under the lens of foreign affairs: to the extent that the fundamental right to liberty could be restricted

[293] See paragraphs 281 to 285, 290, 316 and 335 of the *Kadi I 2008 case*.
[294] BVerfG, Order of the Second Senate of 18 July 2005 - 2 BvR 2236/04 – juris.
[295] (Council of the European Union) 2002/475/JHA, [2002] OJ L164/3.

as a result of the criminal procedure taking place within the requesting jurisdiction, it was of the utmost importance to ensure the right of judicial appeal against the extradition[296].

Secondly, the extradition regime implemented by the Act also violated the constitutional right to a fair trial because it broke the German citizens' connection to the national judicial system[297]. Moreover, the court emphasizes that, since this is a key feature within a democratic system and, as a consequence, constitutional to the identity of the country, such encroachment of the constitutional right to a fair trial could not be validated by the court[298]. This connection between the constitutional character of fundamental rights and the identity of Germany as a democratic state was also highlighted in the outline published by the court in preparation for the hearing. Such outline advanced the court's unwillingness to validate policies that erode the countries' fundamental rights because it would be tantamount to "losing the core elements of statehood" (Entstaatlichung), and this is an uncrossable line even for those policies rooted in the European legal order. Hence, European challenges to German fundamental rights and the "identity of the German constitutional State" (Identität des deutschen Verfassungsstaates) immediately become the "limits to the European integration" (Integrationsgrenzen) in the view of the court[299].

[296] *Arrest Warrant case*, paras. 111-116.

[297] Hence, the resolutions also relied on Articles 16(2) of the German Basic Law. The idea behind this provision is that the citizens' trust in their national legal system belongs to the democratic environment upheld by constitutional fundamental rights and, in order to protect it, such connection can only be cut through the principle of the domestic connecting factor. According to this principle, for a citizen to be extracted from his or her national legal system in order to be judged in a foreign jurisdiction either the citizen or their acts must be connected to such foreign system. However, the regime established in the European Arrest Warrant Act did not meet this standard, for a citizen could be extradited between signatory countries without such connection. Accordingly, the German legislature's implementation of the Framework Decision was not up to the domestic protection offered to German citizens within the German constitutional order, and the alleged need for a literal implementation was rejected. In this regard, the court established that, to the extent that the Framework Decisions need to be implemented, the government always has the opportunity to comply with the binding goals of such supranational regulation without disregarding the domestic fundamental rights. See paragraphs 85 to 89 in the *Arrest Warrant case*.

[298] *Arrest Warrant case*, para. 67.

[299] Although the resolution in the *Arrest Warrant case* mainly focused on the centrality of fundamental rights (and especially the right to a fair trial) and the corresponding duty of the Federal Parliament (Deutscher Bundestag) to protect them, these remarks can be found, in similar terms, in paragraph 75 of the resolution.

These remarks clearly embrace the spirit of the Solange saga to remind the German government of the perils of lowering the constitutional protection of fundamental rights under the pretext of complying with the supranational legal framework. Despite the threat to, not only nullify such unconstitutional policies, but also paralyze or even disengage from the process of European integration, the court makes the pedagogic choice to provide a teleological reading of the European legal framework to prove that there is room for a domestic implementation respectful with the German constitutional rights.

In this sense, the court states that the Framework Decision is the product of the cooperation in the EU's Third Pillar (devoted to police and judicial cooperation), which is based on a principle of mutual recognition among sovereign states and, hence, designed to respect the value of national identity and preserve the unscathed statehood of the countries engaged in the cooperation. Consequently, a respectful implementation concerning domestic constitutional rights is not only possible but the logical option due to the centrality of fundamental rights within the constitutional legal system and their constitutive relevance to the identity of the state[300].

These considerations were displayed by other courts from other EU member states when assessing the constitutional fit of the European Arrest Warrant scheme as well. See, for instance, the remarkably similar reasoning of the Polish Constitutional Court to reject the surrendering of a Polish citizen to the German jurisdiction[301] and the Supreme Court of Cyprus following suit with its rejection to the extradition of a Cypriot to the UK[302]. While these courts declared the domestic provisions implementing the European Arrest Warrant scheme as unconstitutional for contravening the national fundamental rights of the domestic legal system, the Belgian Cour d'Arbitrage went one step further and, in its request for an ECJ preliminary ruling on the matter[303], questioned the validity of the Framework Decision in relation to the European fundamental rights[304].

[300] *Arrest Warrant case*, paras. 77 and 84.
[301] OTK ZU (Jurisdiction of the Constitutional Tribunal. Official Collection) No 4/A/2005, item 42. The Judgement was published in Journal of Laws – Dz.U. No 77, item 680, dated 4 May, 2005.
[302] Supreme Court Resolution on Αρ. 294/2005, of 7 November 2005.
[303] Arbitragehof (Belgium), decision of 13 July 2005, received at the ECJ on 29 July 2005.
[304] More specifically, the Belgian Cour d'Arbitrage asked the ECJ about the validity of Article 2(2) of the Framework Decision in relation to Article 6(2) of the Treaty of the European Union, which enshrines the EU bond to the European Convention for the Protection of Human Rights.

In its answer[305], the ECJ acknowledged, not only that the concerned European fundamental rights had a constitutional character, but also that such constitutional character had been inherited from "the constitutional traditions common to the member states"[306]. Consequently, the ECJ acknowledged the consubstantiality between national and European fundamental rights and the transference of constitutional character between these common rules. Moreover, it is such constitutional value that leads the ECJ to join the aforementioned constitutional courts in their approach to counterterrorism regimes that disregard fundamental human rights, including those regimes that are ultimately rooted in a UNSC resolution.

Hence, by the time the *Kadi I 2008 case* reached the ECJ, the court had already signaled its willingness to mimic the domestic treatment of such counterterrorism regimes and, as shown in this Chapter, the judicial domestic trend had already shifted towards the approach upholding the centrality of human fundamental rights. In fact, both the ECJ and the CFI were perfectly aware of such trend and, in the *OMPI I case*[307], the CFI finally caught up with it and proved its commitment to reproduce its domestic peers' decision to stick to such approach even in front of UNSC Resolution 1373.

Indeed, after several resolutions embracing the traditional approach to dismiss any challenge against the European targeted sanctions from both the CFI and ECJ [308], in the *OMPI I case* the CFI annulled, for the first time, a European targeted sanction (asset-

[305] Judgment of the Court (Grand Chamber), of 3 May 2007, case C-303/05 ("*C-303/05 Case*").
[306] See paragraph 49 of the ECJ Preliminary ruling, stating that treaty like the ECHR enshrine such common constitutional tradition.
[307] Case T-228/02, Organisation des Modjahedines du peuple d'Iran v Council and UK [2006] ECR II-4665.
[308] See, for instance, from the CFI: Joined cases T-110/03, T-150/03 and T-405/03, Jose Maria Sison v Council of the European Union [2005] ECR II-01429 ("*Sison I 2005 case*"); Case T-338/02, Segi and Others v Council of the European Union ECR [2004] II-01647 ("*Segi 2004 case*"); Case T-333/02, Gestoras Pro-Amnistía and Others v Council of the European Union (not published in the ECR)("*Gestoras pro-Amnistía 2004 case*"); the *Al Barakaat case;* the *Kadi I 2005 case;* and Case T-253/02 Ayadi v Council [2006] ECR II-2139 ("*Ayadi 2006*"). And from the ECJ, see: C-355/04 P, Segi and ors v Council of the European Union, Spain (intervening) and United Kingdom (intervening) [2007] ECR I-1657 ("*Segi 2007 case*", confirming the ruling of the CFI in the *Segi 2004 case*); Case C-354/04 P, Gestoras Pro Amnistía and others v. Council [2007] ECR I-1579 ("*Gestoras pro-Amnistía 2007 case*" confirming the resolution of the CFI in the *Gestoras pro-Amnistía 2004 case);* and Case C-266/05 P, Jose Maria Sison v Council of the European Union [2007] ECR I-01233 ("*Sison I 2007*", confirming the ruling of the CFI in the *Sison I 2005 case*).

freezing[309]) connected to Resolution 1373 because the applicant's procedural rights had been violated[310] due to the opacity of the sanctioning process and the lack of appeal against the sanction[311]. In this instance, the court pointed out that to the extent that Resolution 1373 required of domestic implementation, such resolution provided a margin for interpretation and, hence, neither the primacy of international law nor the binding effects of UNSC resolutions prevented the enactment of domestic implementations respectful with the central elements of the legal system that are constitutive to the identity of the EU: the European fundamental rights that are described as constitutional[312].

Nevertheless, the measures under review in the *Kadi I 2008 case* were not connected to Resolution 1373, but to Resolution 1267. According to interpretations like the one displayed in the *Kadi I 2005 case*, Resolution 1267 required to be implemented ad verbum since the listing took place under the almighty wing of the UNSC and governments claimed to be inexorably bound to apply those sanctions by virtue of art. 25 and 103 of the UN Charter. However, the ECJ rejects this assumption and states that Resolution 1267 also provides an interpretative margin for it requires domestic implementation. In this regard, the ECJ states in the *Kadi I 2008 case* that "the Community, when giving effect to a resolution of the Security Council, was bound to ensure, as a condition of the lawfulness of the legislation it intended thus to introduce, that that legislation should observe the minimum criteria in the field of human rights"[313].

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[309] The Organisation des Modjahedines du peuple d'Iran ("OMPI") was listed in 2001 through the domestic listing mechanisms established in the UK. In addition to this, the OMPI was also included within the autonomous European list on 2 May 2002 in response to the calling of Resolution 1373 to fight against global terrorism. Such list was annexed to Common Position 2002/340/CFSP (OJ 2002, L 116/75) and the OMPI was included in every other updated list that was created following this first one. At the time of the proceedings concerning the OMPI case, the OMPI was listed in the annex of Common Position 2005/936/CFSP of the Council of 21 December 2005 (O.J. 2005, L 340/80).

[310] The resolution states, in this sense, that the lack of a "statement of reasons" justifying the listing not only prevented the applicant from properly defending itself, but also impeded the judicial review of such decision (*OMPI I case*, paras. 173 and 174). The resolution argues that the requirement of such "personalized statement of reasons" is a consequence of the constitutional right to due process connected to the right to a fair trial and effective judicial protection (*OMPI I case*, paras. 89 to 174).

[311] The CFI reproduced this position in subsequent resolutions like, for instance, the *Sison II 2007 case* (Case T-47/03, Jose Maria Sison v. Council [2007] ECR II-2047).

[312] In addition to this, the resolution also discards the idea that constitutional fundamental rights (more specifically the right to a fair hearing, the right to receive a statement of reasons and the right to effective judicial review) could be brushed aside due to national security concerns (*OMPI I case*, paras. 127, 147 and 156).

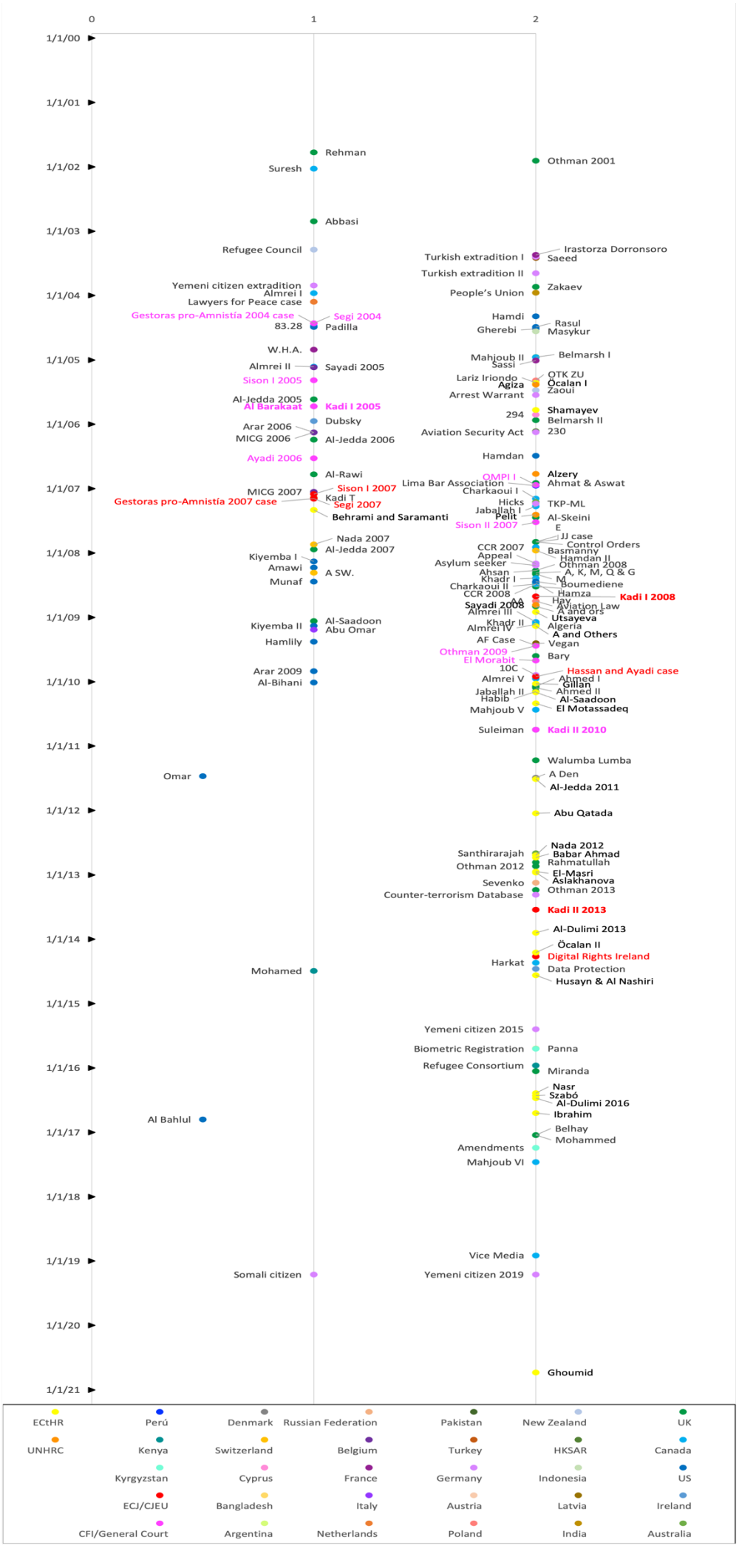
[313] *Kadi 2008 case*, para. 279.

Summing up, the ECJ decided to transfer the CFI assessment of Resolution 1373 to Resolution 1267 in the *Kadi I 2008 case* and, hence, the court rejected the idea that Resolution 1267 does not provide a margin for interpretation. In fact, in the *Kadi II 2010 case*[314], the CFI openly acknowledges such transference when it states that "in particular, paragraphs 336, 340, 342, 343, 344, 345, 346, 348, 349, 351 and 352 of the judgment of the Court of Justice in Kadi [I 2008] at the very least reproduce the substance of the corresponding paragraphs 129, 128, 133, 156, 158, 160, 161, 162, 165, 166 and 173 of the OMPI"[315]. Therefore, in the *Kadi I 2008 case,* the ECJ clarifies that it cannot be assumed from neither the binding character of UNSC resolutions, nor the principle of primacy of international law and the supremacy of UNSC resolutions within the international legal order that any UNSC resolution (including Resolution 1267) requires an ad verbum transposition that excludes fundamental human rights.

The ECJ was, hence, the first court to carry out such transference within the European legal order, taking the judicial trend created around the centrality of human fundamental rights to its ultimate consequences in relation to UNSC resolutions. Nevertheless, the ECJ's decision to equate the judicial treatment of UNSC resolutions underpinning autonomous domestic listings (like Resolution 1373) and UNSC resolutions framing the UNSC listing process (like Resolution 1267, Resolution 1333 or Resolution 1526) was also borrowed from its domestic peers. Indeed, this transference can already be found among the jurisprudence of some national courts, like in the aforementioned *Appeal case* in front of the German Federal Constitutional Court, or the *A, K, M, Q & G case*[316](see *Map 4*).

[314] Case T-85/09 Yassin Abdullah Kadi v European Commission [2010] ECHR II-0000.
[315] *Kadi II 2010 case*, para. 138.
[316] A, K, M, Q & G v HM Treasury [2008] EWHC 869 (Admin).

Map 4 – CFI and ECJ cases within the set of Judicial Resolutions concerning post-9/11



In this case, the Court of Appeal of England and Wales ("EWHC") stated that the individuals and entities sanctioned under the domestic regime designed to implement Resolution 1267 and follow-up resolutions ("AQO")[317] were entitled to the same level of judicial protection as those listed within the autonomous domestic list created in application of Resolution 1373 ("TO")[318]. As a result of this position (confirmed by the Appeals Court[319]), national courts were fully entitled to assess the lawfulness of the concerned domestic measures regardless of the underpinning UNSC resolution. Moreover, given the centrality of fundamental human rights and, in particular, of the right to a fair trial and due process, the recipients of the targeted sanctions were entitled to the necessary disclosure of evidence in order to enable their right to a defense and the judicial review of the merits and grounds of the listing[320].

Thus, Advocate General Maduro's warning to the ECJ that it was "very unlikely that national measures for the implementation of [the 1267 Resolution] would enjoy immunity from [national] judicial review"[321] was very accurate: not only had national courts made their stance in relation to Resolution 1373 clear, but they had also started to transfer it to the regimes created under Resolution 1267 by the time the *Kadi I 2008 case* reached the ECJ. The ECJ took good note of this in the *Kadi I 2008 case*, and the CFI followed suit in the *Kadi II 2010 case* (then re-confirmed again by the CJEU in the *Kadi II 2013 case*)[322]. Moreover, the ECJ persisted in its position in subsequent cases like the *Hassan*

[317] Al-Qaida and Taliban (UN Measures) Order 2006.
[318] Terrorism (UN Measures) Order 2006.
[319] For instance, see the *A and ors case* (A and ors v HM Treasury, Appeal judgment, Case No T1/2008/1080, [2008] EWCA Civ 1187, [2009] 3 WLR 25, [2009] 2 All ER 747, [2009] Lloyd's Rep FC 14, [2009] ACD 16).
[320] In this sense, the court agreed that, in those cases in which the listing relies on closed material, due process would require the appointment of a special advocate in order to compensate such limitation and ensure the fulfilment of the fair trial standards.
[321] Opinion of Mr. Advocate General Poiares Maduro delivered on 16 January 2008 on Joined cases C-402/05 P and C-415/05 P, pg. 12, footnote 34. Available at: https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX:62005CC0402 [last accessed on 25/02/23].
[322] The core idea in the *Kadi I 2008 case* is that the European constitutional fundamental rights cannot be undermined under the pretext of complying with UNSC resolutions, for such fundamental rights are central to the legal system and, hence, constitutive of a political identity based on the rule of law (*Kadi I 2008 case*, para. 288). As a consequence, the ECJ states that, to the extent that the validity of EU policies depends on their conformity with such fundamental rights, the European judiciary has the capacity and duty to perform "in principle the full review" of such acts, including the European implementation of UNSC resolutions (*Kadi I 2008 case*, para. 326). Subsequent resolutions in the *Kadi II 2010 case* (Case t-85/09 Kadi v. Commission [2010] ECHR II-0000) and the *Kadi II 2013 case* (Joined Cases C-584/10 P, C-593/10 P, and C-595/10 P Commission and Council v. Kadi [2013] ECR I-0000) fully embraced this approach

and Ayadi case[323]. Hence, as shown in *Map 4*, the European courts abandoned the traditionally lenient approaches to transition into the approach upholding the centrality of human fundamental rights following the lead of national courts, hence joining their inter-judicial coordination.

Shortly after the *Kadi I 2008 case*, the *Hay case*[324] confirmed the position of the EWHC in the aforementioned *A, K, M, Q & G case* and the *A and ors case.* In the *Hay case*, the EWHC repeated that suspects designated under the AQO in application of Resolution 1267 and UN listings are entitled to the same judicial protection as targeted individuals and entities included in the autonomous domestic list, as established in the *A, K, M, Q & G case*. In this sense, since a merits review was not available in the present case[325], the AQO should be declared void and quashed for it strips suspects of terrorism of their fundamental right to a fair trial[326].

Hence, the EWHC embraced, not only the shared approach within the inter-judicial coordination in which the *Kadi I 2008 case* is framed, but also the standard of review and consequences established in the *Kadi I 2008 case*: both resolutions deem as void the regime connected to Resolution 1267 because the lack of transparency in the listing

based on the centrality of human fundamental rights, although the doctrinal analysis of the different resolutions within the Kadi saga has pointed out that the level of practical engagement in the exercise of that capacity to review in full has been different in the *Kadi I 2008 case*, the *Kadi II 2010 case* and the *Kadi II 2013 case*. In this sense, see (Fontanelli, 2016). The CFI also persisted in this approach in subsequent cases like the *Othman 2009 case* (Omar Mohammed Othman v Council of the European Union and Commission of the European Communities, Case T-318/01, (2009) ECR II-0000).

[323] Joined cases C-399/06 P and C-403/06 P, Faraj Hassan v Council of the European Union and European Commission and Chafiq Ayadi v Council of the European Union, [2009] ECR I-11393.

[324] Hay v HM Treasury, First Instance Judgment, Case No CO/1200/2009, [2009] EWHC 1677 (Admin), [2009] Lloyd's Rep FC 547, ILDC 1367 (UK 2009).

[325] Unlike in the *A, K, M, Q & G case*, the designation leading to the UN listing by the 1267 Committee did not come from the UK, but from another third country in the *Hay case*. Hence, the UK government could not provide a full account of the evidence and charges against Mr. Hay to the High Court (*Hay case*, paras. 30 to 32).

[326] The AQO was promulgated under the umbrella of the UN Act 1946 (enacted to support the institutional and legal relationship between the UK and the UN). To the extent that such Act did not empower the government to remove the right to a fair trial and due process, the AQO was ultra vires and had to be quashed because it implied the de facto removal of such fundamental right as a consequence of the executive implementation of a UN targeted sanction (*Hay case*, paras. 36, 37, 40, 46). However, the reverse interpretation of this prohibition to the government is the court's acceptance that the door to remove the fundamental right to a fair trial is open for the Parliament in the event that an express legislative authorization is passed (*Hay case*, para. 46). This position is also stated in paragraph 61 of the *Ahmed I case*.

procedure amounts to an absolute lack of procedural safeguards that, in turn, also impedes the judicial review a posteriori. The *A, K, M, Q & G case* and the *Hay case* were reviewed by the UK Supreme Court ("UKSC") in a joint appeal (the *Ahmed I case*[327]) in which the court reconfirmed the approach and solution reached by the High Court and partially quashed the AQO[328] while highlighting the centrality of human fundamental rights in relation to states that uphold the rule of law principle[329].

In fact, the UKSC quotes Advocate General Maduro's report[330] in relation to the *Kadi I 2008 case* in order to state that "the right to effective judicial protection holds a prominent place in the firmament of fundamental rights"[331] and it recalls that "[i]n its judgment the ECJ endorsed this approach [for] it said that the Community was based on the rule of law, inasmuch as neither its member states nor its institutions could avoid review of conformity of their acts with the EC treaty, that an international agreement could not affect the autonomy of the Community legal system and that according to settled case law fundamental rights formed an integral part of the general principles of law whose observance the Court ensured"[332]. Hence, the UKSC seems to endorse the ECJ view on the consubstantial character between UK and European fundamental rights: it is this consubstantial nature that allows for the transference of the approach and implies that these rules share the same content and fulfil the same central role within the system.

Moreover, the *Ahmed I case* also points out that "[t]he ECJ is not alone in regarding the way the decisions under the listing system administered by the 1267 Committee are dealt with as incompatible with the fundamental right that there should be an opportunity for a review by an independent tribunal of their lawfulness"[333] and proceeds to quote the

[327] HM Treasury v Mohammed Jabar Ahmed and ors (FC); HM Treasury v Mohammed al-Ghabra (FC); R (on the application of Hani El Sayed Sabaei Youssef) v HM Treasury, Appeal judgment, (2010) UKSC 2.
[328] *Ahmed I case*, para. 77. More specifically, paragraph 84 of the same resolution "suspend[s] the operation of the orders that I would make as regards the AQO for a period of one month from the date of the judgment to give the Treasury time to consider what steps, if any, they should now take".
[329] Ibid., paras. 45 to 47.
[330] For a more detailed analysis of Advocate General Maduro's report, see (de Burca, 2010).
[331] Ibid., para 67.
[332] Ibid., para 68.
[333] Ibid., para 69.

Canadian *Abdelrazik case*[334]: in this case, the court states that "the 1267 Committee regime [entails] a denial of basic legal remedies and [is] untenable under the principles of international human rights. There is nothing in the listing or de-listing procedure that recognizes the principles of natural justice or that provides for basic procedural fairness"[335].

According to this resolution, while Mr. Abdelrazik's right to enter the Canadian territory was granted by the Canadian Charter (as a Canadian citizen)[336], the court relied on international law in order to assert its own power to review the travel ban and Mr. Abdelrasiz's right to due process. Thus, the *Abdelrazik case* is yet another prime example of the linkages created across systems by consubstantiality: the Canadian judiciary's understanding of the content and role of the international right to due process is the same as the interpretation provided by other national courts in relation to the inward-looking domestic version of the same right and, as a result, the international principles of fair justice are portrayed as the cornerstone of the domestic set of human fundamental rights.

In overall, the resolutions mentioned above upheld the centrality of human fundamental rights within the legal system of reference and, more specifically, the right to a fair trial and its derived procedural safeguards as a cornerstone of such set of human fundamental rights. As a result of this, the consubstantial nature of human fundamental rights has led some courts to fuse the domestic and international legal orders (like in the *Abdelrazik*

[334] Abdelrazik v Minister of Foreign Affairs and Attorney General of Canada, First instance judgment, 2009 FC 580, ILDC 1332 (CA 2009). In this case, Mr. Abdelrazik was the object of an asset-freeze and a travel ban as a result of his listing under Resolution 1822 (UN Doc S/RES/1822, UN Security Council, 30 June 2008), which followed Resolution 1267 like many others.

[335] *Abdelrazik case*, para. 51. In the same paragraph, the court states that "[u]nlike the first Canadian security certificate scheme that was rejected by the Supreme Court in Charkaoui v. Canada (Minister of Citizenship and Immigration), 2007 SCC 9; [2007] 1 S.C.R. 350, the 1267 Committee listing and de-listing processes do not even include a limited right to a hearing. It can hardly be said that the 1267 Committee process meets the requirement of independence and impartiality when, as appears may be the case involving Mr. Abdelrazik, the nation requesting the listing is one of the members of the body that decides whether to list or, equally as important, to de-list a person. The accuser is also the judge". Hence, in the view of the Canadian judiciary, the UN listings inflicted a greater damage on the right to due process (to both the national and international versions of the right) than the domestic scheme for listing despite the most recent procedural improvements of the 1267 Committee (*Abdelrazik case*, paras. 52 and 53).

[336] Ibid., para. 69.

case, among others) and has allowed others to import approaches and solutions across jurisdictions (like in the *Ahmed I case*, among others).

Hence, the *Kadi I 2008 case* acted as a positive tipping point within the judicial trend, and the ECJ acted as a norm-enabler within the inter-judicial coordination that forged the norm[337]. This means, on the one hand, that the *Kadi I 2008 case* inherited, solidified and fostered the reproduction of the shared approach and, on the other hand, that this resolution echoes the conclusions of the preexisting coordinated jurisprudence: the equalization of the regimes derived from Resolution 1373 to those connected to Resolution 1267, the subordination of those regimes to human fundamental rights as central pieces of the legal system and key elements of the political system, and the buttressing effect of the right to a fair trial in relation to the judicial protection of such human fundamental rights were not brand-new elements in the trend.

Summing up, the first conclusion of this analysis is that the position of the European judiciary turned 180 degrees around between 2005 and 2008[338] as a consequence of the shift among its domestic peers and the fear to face another Solange-alike scenario[339]. The second conclusion is that the ECJ acted as a norm-enabler that fostered the diffusion of the norm within its area of influence and, more specifically the particular version of the norm endorsed in the *Kadi I 2008 case,* creating a partial cascade effect.

However, considering the European judiciary's ascendency over national courts, the *Kadi I 2005 case* should also have been a positive tipping point binding national courts around

[337] See also, among the resolutions that reproduced the considerations of the *Kadi I 2008 case*, the *Vegan case* ('Vegan' LLC v Parliament of Latvia, Request for constitutional review, Case no 2008-47-01, Latvian Herald, no 85 (4071)), for instance. This resolution confirms the margin of interpretation to implement all UNSC resolutions, reproduce the considerations of the *Kadi I 2008 case* in relation to the principle of proportionality and, performs a comparative constitutional analysis of foreign jurisprudence to prove that the *Kadi I 2008 case* is not an isolated resolution but rather the result of an on-going trend.

[338] From a purely legal perspective, there is still a difference between the *Kadi I 2008 case*, the *Kadi II 2010 case* and the *Kadi II 2013 case* in terms of the extent to which the European courts exercised their self-proclaimed power to a full review of targeted sanctions, including the procedural safeguards offered by the sanctioning procedures within the 1267 Committee: this power is only displayed to its full extent in the *Kadi II 2013 case*. See, for instance, the legal analysis performed in (Fontanelli, 2016) and (Hovell, 2016a).

[339] In fact, some scholars have seen in the Kadi saga the European judiciary's decision to implement a Solange strategy in relation to the UNSC policymaking. In this sense, see (Tzanakopoulos, 2010); (Tzanakopoulos, 2012) and (Tzanakopoulos, 2016).

the approach encapsulated within such resolution. Hence, the fact that the trend among national courts moved away from the approach embraced in the *Kadi I 2005 case* to the approach embraced by the *Kadi I 2008 case* (and reinforced by the *Kadi II 2010* and *2013 II cases*) might seem puzzling. This thesis posits that, although the *Kadi I 2005 case* indeed operated as a positive tipping point, the trend among national courts still shifted as a result of the ECtHR rejection of this approach, hence confirming the role of international courts as norm-disablers in inter-judicial coordination.

4.1.5. International courts as norm-disablers in the creation of the judicial trend.

Just like the *Kadi I 2008 case*, the *Kadi I 2005* also incorporated elements collected from pre-existing national jurisprudence. For instance, the CFI declared in 2005 that the only instance in which courts could review the lawfulness of a UNSC regime is the encroachment of ius cogens. This idea was suggested in the pre-existing national jurisprudence connected to the global fight against terrorism, like in the *Lawyers for Peace case*[340]. On 9 October 2001, the Netherlands declared its support to the US and UK joint attack against the training camps of the Taliban and Al-Qaeda in Afghanistan, understanding that such military actions were in line with the US right to self-defense and UNSC policies. The Association of Lawyers for Peace and four other organizations requested the withdrawal of such declaration and the notification to the US government and its allies, the UNSC, the UNGA, and the UN Secretary-General that those military actions were incompatible with the prohibition of the use of force, with the UN Charter, and with the peremptory principles of customary international law (this is, ius cogens).

In particular, the claimants relied on Article 90 of the Dutch Constitution (which provided that the government shall promote the development of the international legal order), and Articles 2(4), 42 and 51 of the UN Charter in order to describe the functions and scope of power of the UNSC. The court acknowledged that ius cogens precepts are, indeed, a limit to UN powers and any governmental policy connected to it. However, the court quickly declined its own jurisdiction by stating that, first, the claims were based on international

[340] Association of Lawyers for Peace (Vereniging van Juristen voor de Vrede) and ors v Netherlands, Judgment on Appeal in Cassation, C02/217HR, LJN: AN8071, NJ 2004/329, 6th February 2004, Netherlands; Supreme Court [HR].

rules that cannot be invoked by citizens since they do not directly bind them and, second, that foreign affairs and defense issues were non-justiciable[341]. Hence, just like the CFI in the *Kadi I 2005 case*, the court also manufactured and circumvented an ius cogens-based exception to the otherwise ironclad non-justiciability of the UN and executive policies concerning counterterrorism.

In other words, this position favored the supremacy of UNSC resolutions within the international legal order and, in connection to the primacy of international law, above domestic law. Hence, this approach subordinates international and domestic human fundamental rights to international and domestic policies concerning security. The CFI's adoption of this approach created a positive tipping point and other national courts reproduced the reasoning of the *Kadi I 2005 case.* This is the case, for instance, of the Swiss Federal Court's decision in the *Nada 2007 case*[342]. In this decision, the Swiss court found the supremacy of UNSC resolutions and its domestic implementation to be anchored in the overriding effects born from combining Articles 24, 25 and 103 of the UN Charter which, in turn, denied both the state's interpretative capacity to implement Resolution 1267 and national courts' power to review the resolution and its implementation, barring an infringement of ius cogens rules.

The resolution of the Swiss court was challenged in front of the ECtHR in the *Nada 2012 case*[343], and this international court found that the Swiss Government's appeal to the supremacy of UNSC resolutions could not override human fundamental rights like the ones convened under the ECHR. Just like the ECJ, the ECtHR also had to find a way around Article 103 of the UN Charter and, since international courts have no domestic law to fall back on, the idea that UNSC resolutions do come with a margin of

[341] Ibid., para. 3.4.
[342] Youssef Nada v State Secretariat for Economic Affairs and Federal Department of Economic Affairs, Administrative appeal judgment, Case no 1A 45/2007; ILDC 461 (CH 2007). Mr. Nada, an Italian and Egyptian national, was listed in 2001 when he was living in an Italian enclave surrounded by Swiss territory. In implementation of UNSC Resolutions 1390 and 1333, Switzerland froze Mr. Nada's assets and refused to allow him to enter or transit Swiss territory (although the judiciary and the Sanctions Committee could make exceptions for humanitarian reasons). The criminal investigations undertaken in both Switzerland and Italy cleared Mr. Nada of any involvement in international terrorism but, despite this, he remained listed and repeatedly requested his de-listing to both governments. It was his last request to the Swiss Federal Council that finally reached the Swiss Federal Court.
[343] Nada v. Switzerland [GC], App No. 10593/08.

interpretation proved especially useful to the ECtHR in that regard: this international court relied on this idea[344] in other to advocate for a systemic interpretation of UNSC resolutions that would harmonize states' obligations in this field with states' international obligations concerning human rights.

In other words, the ECtHR relied on the strategy devised by national courts, not to disengage from the international legal order, but to reclaim the centrality of international human rights without having to address the thorny question of the vertical hierarchy between international rules concerning security and international rules concerning human rights. In fact, the *Nada 2012 case* is posterior to the *Kadi I 2008 case* and the rest of pre-existing national jurisprudence upholding the interpretability of UNSC resolutions for the sake of fundamental human rights' protection. It is hence safe to say that, rather than leading the change in the judicial trend among national courts, the ECtHR followed such change of mindset and abandoned the clear stance in favor of UNSC resolutions' supreme literality displayed in the *Behrami and Saramanti cases*[345].

However, if not a norm-enabler capable of creating positive tipping points within the trend, the ECtHR can definitely be credited as a norm-disabler that stopped the doctrine of the *Kadi I 2005 case* from spreading: when the ECtHR reviewed and dismissed the reasoning of the Swiss Federal Court in the *Nada 2007 case*, the *Nada 2012 case* amounted to an open reproach to the CFI reasoning in the *Kadi I 2005 case,* for the Swiss Federal Court's decision was its reproduction. Although the *Nada 2012 case* is the first instance in which the ECtHR faces this specific version of the approach sustaining the

[344] In fact, the ECtHR stated that, even if a UNSC resolution impose in "clear and explicit language […] an obligation to take measures capable of breaching human rights", such capacity does not necessarily translate into an unavoidable breach of human fundamental rights since implementation requires interpretation and, with that, comes a margin of discretion to harmonize the different obligations of states (see paragraph 172 of the *Nada 2012 case*). In the present case, the ECtHR takes the inclusion of linguistic modifiers (like the words "necessary" and "appropriate") as proof of the conceptual flexibility of the concerned UNSC resolution and, hence, Switzerland's margin for maneuver in its domestic implementation (see paragraph 177 and 178 of the *Nada 2012 case*).

[345] Behrami and Behrami v. France and Saramati v. France, Germany and Norway (dec.) [GC] App No. 71412/01 and 78166/0. At paragraph 148 it can be read that "the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field".

supremacy of UNSC resolutions devised by the CFI, the ECtHR had already tackled the myth of UNSC resolutions' lack of margin for interpretation in the *Al-Jedda 2011 case*[346].

In the *Al-Jedda 2005 case*[347], the EWHC decided that UNSC resolutions could and did, in fact, override domestic law incorporating treaty-based international human rights obligations into the domestic legal order (more specifically, the Human Rights Act, 1998)[348]. Although the British court acknowledged that Resolution 1546 did not require states to derogate from their previous international obligations[349], the court found no legal basis to demand states' consistent reading of Resolution 1546 with their pre-existing human rights obligations[350] and, by virtue of Articles 25 and 103 of the UN Charter[351], the Court stated that Resolution 1546 overrode Article 5 of the ECHR (in relation to Mr. Al-Jedda's right to the judicial review of his preventive detention). As explained in the previous Subsection of this Chapter, in order to uphold UNSC resolutions' supremacy, the court artificially equated the Resolution's authorization to resort to "internment where this is necessary for imperative reasons of security"[352] to an obligation to detain suspects without the judicial safeguards of due process, as claimed by the British government.

[346] Al-Jedda v United Kingdom, Judgment, joint hearing of Al-Skeini and ors v United Kingdom, App no 55721/07 and Al Jedda v United Kingdom, App no 27021/08; (2011) BHRC 637. Hence, this ECtHR resolution also reviewed and amended the decision of the UKHL in the *Al-Skeini case* (R (Al-Skeini and others) v Secretary of State for Defense (The Redress Trust intervening) [2007] UKHL 26 [2007] 3 WLR 33).
[347] R. (on the application of Al-Jedda) v Secretary of State for Defence, First instance judgment, Case No CO/3673/2005, [2005] EWHC 1809 (Admin), ILDC 202 (UK 2005), [2006] UKHRR 35, [2005] HRLR 39.
[348] In this sense, the EWHC devised a rather confusing reasoning in which, on one hand, the court reduced to irrelevant the connection of the Human Rights Act (HRA) to the ECHR in order to highlight the domestic character of the HRA (*Al-Jedda 2005 case*, paras. 36 and 37) but, on the other, relied on the ECHR as a hermeneutical guide to determine the extension of the rights contained in the HRA (*Al-Jedda 2005 case*, paras. 38 to 43 and 49).
[349] *Al-Jedda 2005 case*, paras. 87 to 93.
[350] Ibid., paras. 105 to 108.
[351] Ibid., paras. 115 to 122.
[352] These words can be found in the letter of then-US Secretary of State Powell annexed to Resolution 1546.

This specific reasoning underpinning the supremacy of UNSC resolutions (confirmed in the *Al-Jedda 2006 case*[353] and the *Al-Jedda 2007 case*[354] by the UKHL, as explained before) was later debunked by the ECtHR in the aforementioned *Al-Jedda 2011 case* and, hence, banished from the catalogue of reasonings available to national courts in order to embrace this approach. To this effect, the ECtHR engineered the already explained presumption that UNSC resolutions do not entail an obligation to breach international human rights in the absence of an express requirement to do so[355]. Hence, the presumption that, in principle, UNSC resolutions can be harmonized with international obligations concerning human rights through a systemic interpretation gave away with the EWHC understanding that UNSC resolutions entail an implicit dismissal of human and fundamental rights that is inevitably imposed on states[356].

Once again, this presumption of harmonization is a very resourceful way of reclaiming the centrality of international human rights within the international legal system without taking a stance on the issue of the hierarchical relation between UNSC resolutions and human rights treaties like the ECHR. However, the *Al-Jedda 2011 case* did not act as a positive tipping point among national courts since domestic judiciaries seemed to show a preference to rely on domestic fundamental rights as a clamp for the over-expansion of executive powers in the field of counterterrorism (with some remarkable exceptions like the Canadian judiciary, for instance). Nevertheless, the ECtHR did act as a norm-disabler that prevented the reasoning of the *Al-Jedda 2005 case* from both settling within the UK

[353] Appeal Judgment; R and JUSTICE (intervening) (on the application of Al-Jedda) v Secretary of State for Defence, [2006] EWCA Civ 327; [2006] 3 WLR 954; [2006] UKHRR 855; [2007] QB 621; [2006] HRLR 27; ILDC 381 (UK 2006).
[354] Appeal judgment; R (on the application of Al-Jedda) v Secretary of State for Defence, (2007) UKHL 58; (2008) 1 AC 332; [2008] 3 All ER 28; [2008] HRLR 13; [2008] UKHRR 244; ILDC 832 (UK 2007).
[355] *Al-Jedda 2011 case*, para. 102. This presumption is constructed upon Art. 24(2) that establishes that the UNSC "shall discharge its duties in accordance with the Purposes and Principles of the United Nations" and the promotion of fundamental human rights can be found among such purposes. Hence, the ECtHR assumption that UNSC resolutions must also respect the European human rights gathered within the ECHR is based on the idea that international human rights and European human rights are consubstantial.
[356] Ibid., paras. 105 to 106.

jurisprudence (hence the shift towards the UKHL position in the aforementioned *Ahmed I case*[357]) and spreading across other domestic jurisdictions[358].

Moreover, the ECtHR presumption of harmonization is in line with national courts' concomitantly nascent view that UNSC resolutions do, in fact, provide a margin for interpretation. It is this presumption of harmonization that the ECtHR also applies to the *Nada 2012 case* in relation to Resolution 1267, thus following national courts' initiative to treat all UNSC resolutions without distinction and to transfer their assessment of Resolution 1373 (and connected resolutions) to Resolution 1267 (and connected resolutions). In fact, it appears that, precisely because the *Nada 2012 case* concerns the 1267 regime, the ECtHR follows the trend among national courts even more closely in this decision than in the *Al-Jedda 2011 case*: instead of focusing on the weight of international human rights within the international legal order, the ECtHR focuses its reasoning in proving the margin of interpretation available to transpose the concerned UNSC resolutions.

Furthermore, once demystified the idea that UNSC resolutions entailed an unavoidable hindrance to comply with international and domestic human rights, the international jurisprudence of the ECtHR seemed to move on to embrace the ECJ's criterion concerning the constitutional value of fundamental rights in the *Kadi I 2008 case* as well. The ECtHR resolution in the *Al-Dulimi 2013 case*[359], for instance, is strongly imbued with the reasoning displayed in the *Kadi I 2008* and *Kadi 2013 II cases*, which are extensively quoted by the court[360]. In this resolution, rather than proving the domestic

[357] In the *Ahmed I case*, the Supreme Court stated that, although the UKHL decision in the *Al-Jedda 2007 case* remained valid law, in light of the latest ECtHR jurisprudence, the court abandoned the premise, by virtue of the supremacy clause in Article 103 of the UN Charter in combination with Article 25 of the UN Charter, that obligations stemming from UNSC resolutions were to supersede all other international obligations including those conveyed in the ECHR.
[358] The UKSC eventually found a way to indirectly circumvent the presumption of harmonization of the *Al-Jedda 2011 case* in order to validate executive powers of detention, but the court could not recover the presumption that an authorization was equivalent to an obligation. In the *Mohammed case* (Mohammed v Ministry of Defence, Appeal judgment, [2017] UKSC 2, [2017] 2 WLR 327, [2017] 3 All ER 215, [2017] HRLR 1, 43 BHCR 137, ILDC 2803 (UK 2017), the court established that the concerned UNSC resolution entailed an authorization (not an obligation) to detain suspects of terrorism when strictly necessary for security reasons and then proceeded to reinterpret the criteria of Article 5 ECHR to define non-arbitrary detentions.
[359] Al-Dulimi & Montana Management Inc. V Switzerland, Judgement, App No. 5809/08; (2013) ECHR 1173.
[360] *Al-Dulimi 2013 case*, paras. 59 to 64.

capacity to harmonize the implementation of UNSC resolutions with international obligations concerning human rights[361], the ECtHR proceeds to perform a test of equivalent protection in relation to the UNSC listing procedure.

The equivalent protection test coined in the *Bosphorus case* works as a gateway to the presumption that "a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organization" [362], provided the implemented international obligation divests domestic authorities of any margin of interpretation[363]. However, this presumption only applies in the event that the decision-making procedure of the concerned international organization provides human fundamental rights with a level of protection equivalent to that required by the ECHR. Otherwise, the ECtHR will proceed as usual with the judicial scrutiny of the alleged violation, as "'[i]n such cases, the interest of international cooperation would be outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights"[364]. Hence the need to test such level of protection by examining the institution's decision-making process.

In the *Al-Dulimi 2013 case*, the ECtHR applied the equivalent protection doctrine on the basis of the constitutional role of the ECHR, and such doctrine led the Court to examine the UNSC listing procedure as did the CJEU in the *Kadi II 2013 case*. In such capacity of review, the ECtHR found that neither the Focal Point for De-listing[365] nor the Ombudsperson[366] afforded targeted individuals the procedural safeguards required under ECHR standards and, as a result, no presumption of equivalent protection could be applied. Consequently, the court ruled on the merits of the case and concluded that "in view of the lack of any alternative, effective, justiciable avenue in domestic law to protect

[361] However, the *Al-Dulimi 2016 case* (Al-Dulimi and Montana Management Inc. v. Switzerland, App No. 5809/08, Appeal) returns to and takes to its last consequences the assumption of harmonization of the *Al-Jedda 2011 case*. In this case, the court states that, unless the UNSC resolution clearly states that fundamental human rights must be waived, states do have the necessary margin of interpretation to implement such resolution without brushing aside human fundamental rights and, hence, its disregard amounts to a breach of the ECHR.
[362] *Bosphorus case*, para. 156.
[363] Ibid., para. 157. See also, for instance: MSS v Belgium and Greece, Judgement, No 30696/09 (ECtHR (GC), 21 January 2011), paras. 338 to 340.
[364] Ibid., para. 156.
[365] *Al-Dulimi 2013 case*., para. 119.
[366] Ibid., para. 120.

the applicants' right to the enjoyment of their property, there has still been a violation of the essence of the applicants' right of access to a court as enshrined in Article 6 (civil limb) of the Convention"[367].

Summing up, the *Al-Dulimi 2013 case* perfectly exemplifies the ECtHR adherence to the inter-judicial coordination among national courts: beyond its references to several domestic resolutions[368], the *Al-Dulimi 2013 case* performs an assessment that mirrors the "in principle full review" presented by the ECJ and buttresses national courts' capacity to perform such review[369]. Far from being an altruist move, the ECtHR's defense of national courts' review powers amounted to a defense of its own capacity, for the court compared the constitutional value of domestic fundamental rights to that of the ECHR within a multilevel global legal order[370], and the ECtHR's role as the gatekeeper of such system to those of national constitutional courts.

Therefore, the ECtHR relied on the consubstantiality of domestic and international rules concerning human fundamental rights in order to absorb the approach put forward by national courts despite the ECtHR lack of domestic fundamental rights to fall back and circumvent UNSC resolutions' supremacy. In other words, it was the consubstantiality among the inward-looking and outward-looking versions of human fundamental rights that allowed for the transference of the approach, and the ECtHR extended its full support to national courts' approach and strategy through such transference.

All of the above confirms that, rather than being norm-enablers, international judicial bodies like the UNHRC [371] or the ECtHR fulfilled a relevant but secondary role of support

[367]Ibid., para. 70.
[368] Beyond the *Kadi I 2008 case* and the *Kadi II 2013 case*, the *Al-Dulimi 2013 case* also references the *Ahmed I case* (paras. 70 to 73) and the *Abdelrazik case* (paras. 74 to 77).
[369]Ibid., paras. 71 to 73 of the Concurring Opinion of Judge Pinto De Albuquerque, joined by Judges Hajiyev, Pejchal and Dedov.
[370] See the *Al-Dulimi 2013 case*, at paragraph 71 of the Concurring Opinion of Judge Pinto De Albuquerque, joined by Judges Hajiyev, Pejchal and Dedov: "Instead of a solipsistic and parochial approach to international law, the Council of Europe prefers a multicentre and cosmopolitan view of international law, which envisages the relationship between international law and Convention law beyond the orthodox, yet outdated, monist/dualist dichotomy. The Convention is both international and constitutional law".
[371] In relation to the participation of the United Nations Human Rights Committee as a norm-disabler within the process of norm emergence in this case, see the explanations provided in the Theory Chapter about the *Sayadi 2008 case*.

as norm-disablers within the formation of the judicial trend among national courts and the resulting norm constraining IPAs. Hence, this Empirical Chapter has explained, so far, the existence of the inter-judicial coordination in the field of counterterrorism measures, the common approach to human rights' centrality as the spine of the coordination built on the consubstantial character of international human rights and domestic fundamental rights, and the different roles of national and international courts in the creation of the critical mass of courts supporting the inter-judicial coordination. The next two Sections are devoted to examining the political and legal effects of such inter-judicial coordination and the norm born from it.

4.2. Political effects of inter-judicial coordination: IPAs' behavioral change and adjustment to the norm connected to the judicial trend.

As explained in the previous Section, the inter-judicial coordination of national courts around the centrality of human fundamental rights, with the support of international courts as norm-disablers, coined a new norm for IPAs: their counterterrorism policies are conditional to their respect for the core minimum content of human fundamental rights. Among human fundamental rights, the right to a fair trial and due process became especially relevant, for this particular right is both the hinge articulating courts' capacity to review executive policies in the secluded field of counterterrorism and the key to limit other human fundamental rights. Therefore, most judicial resolutions on the validity of counterterrorism measures directly or indirectly involve the right to a fair trial presented as the cornerstone of human fundamental rights' protection.

Hence, when it comes to the specific content of the freshly coined norm in relation to these rights, inter-judicial coordination mandated IPAs to observe the procedural requirements of fair trial in relation to the sanctioning procedures. This norm applied to all the policymakers involved in the global fight against international terrorism and to all the regimes entrenched in UNSC resolutions directing such globally coordinated effort. Whereas the abidance of national governments with the mandate of their respective national courts could be attributed to the domestic scheme of checks and balances, the observance of international organizations is more puzzling due their lack of hierarchical subordinance to national and (arguably) international courts.

In this regard, IOs' behavioral adjustment cannot be explained by the existence of a legal rule directly binding international organizations like the UNSC but, perhaps, by the creation of a judicial norm informing their behavior. In this regard, the most modern IR theory on norm recognition has signaled the creation of the aforementioned norm. For instance, according to Stimmer, an "instance of norm recognition occurred in the dispute between the UNSC and the ECJ" since "[t]he pressure from the ECJ made the UNSC recognize due process rights and create an Ombudsperson mechanism for individual delisting requests" (Stimmer, 2019, p. 1).

Although this thesis fully agrees with this conclusion, it takes issue with the fact that most of the existing literature theorizes the power struggle between the UNSC and the ECJ as a bilateral confrontation (Busco, 2016; Fontanelli, 2016; Hovell, 2016b). This thesis posits that the ECJ came out on top because, rather than standing alone in its defense of human fundamental rights' centrality, this court coordinated its approach to counterterrorism policies with a mass of national and international courts. In fact, as explained in the previous Sections, the ECJ inherited the approach and the different elements of its reasoning from the pre-existing jurisprudence created by its fellow national peers. Hence, the ECJ inserted itself within the pre-existing trend born from the inter-judicial coordination of national courts, and the norm constraining the UNSC's policymaking is the result of a non-tiered process of norm emergence with norm-enablers (influential national courts) and norm-disablers (international courts).

Indeed, the ECJ adherence to such pre-existing coordinated trend is important in more than one sense. To begin with, as explained in the previous Section, it is doubtful that the ECJ would have reached its *Kadi I 2008* position alone. In addition to this, the ECJ participation in the inter-judicial coordination that gave birth to the judicial trend upholding human fundamental rights' centrality is also relevant because the norm constraining the UNSC is born, not from the unilateral pressure of the ECJ, but from the collective threat posed by a critical mass of national courts to the effectiveness of UNSC counterterrorism policies.

The identification of such collective threat as the causal mechanism leading to the behavioral change of IPAs is consistent with the observation that the UNSC had adjusted its policymaking standards to the judicial demands of national courts long before the ECJ joined the inter-judicial coordination. For instance, Resolution 1452 came to embrace the

conclusions of the *Othman 2001 case*[372] and hence created the humanitarian exceptions to the asset-freezing regime for basic expenses that the EWHC had read into Resolution 1333 in the *Othman 2001 case*. This was not the last improvement made to the 1267 regime and its sanctioning procedure with regard to human fundamental rights. More specifically, the legal literature has mentioned the efforts of the UNSC to soothe the judicial concerns about the due process deficits damaging the domestic implementation of the regime (Heupel, 2009; Janik, 2015; Sullivan, 2020; Ginsborg, 2020)[373].

Indeed, while the creation of the Office of the Ombudsperson[374] can be directly connected to the *Kadi I 2008* and *Kadi II 2013 cases*, other pre-2008 reforms concerning due process safeguards such as the provision of a statement of reasons to list suspects[375] and the establishment of the focal point for de-listing[376] cannot be attributed to the pressure of the ECJ but to the preceding jurisprudence[377]. In this sense, for instance, the Chairman of the

[372] The Queen on the Application of Othman v Secretary of State for Work and Pensions; CO/4539/2001; High Court of Justice Queen's Bench Division (The Administrative Court); [2001] EWHC Admin 1022, 2001 WL 1422967.

[373] For instance, after examining the reforms in the listing and de-listing procedures of the UNSC, Heupel states that "[c]onfronted with a growing wave of court proceedings […] the Security Council gradually reformed the listing and delisting procedures of its sanctions regime" (Heupel, 2009, p. 312).

[374] The UN Office of the Ombudsperson was created under Resolution 1904 (S/RES/1904/2009, UN Security Council, 17 December 2009).

[375] The first UNSC resolution establishing that proposing states must submit a statement of case justifying the proposal to list an individual or entity was Resolution 1735 (S/RES/1735/2006, UN Security Council, 22 December 2006). In this regard, Resolution 1822 mandated states to provide "as much relevant information as possible" and Resolution 1617 encouraged states to inform sanctioned individuals and entities of the summary reasons for the listing "to the extent possible". This recommendation to inform the listed individuals and entities of the available statement of reasons became an obligation under Resolution 1822. Finally, Resolution 1735 had also called states to publicly publish the available a summary of statement of reasons for the listings.

[376] The so-called focal point for de-listing was established in Resolution 1730 (S/RES/1730/2006, UN Security Council, 19 December 2006).

[377] According to the statement of the Representative of France in Meeting 5599 (where Resolution 1730 was approved on 19 December 2006), the goal of this reform was to protect the effectiveness of the regime, threatened by its lack of fair trial safeguards: "[m]y country expresses the hope that, by thus facilitating requests for delisting, the new procedure will strengthen the support of States for the sanctions regimes. France is convinced that such support will guarantee the effectiveness of targeted sanctions" (UN Doc. S/PV.5599 (2006), at page 2). For its part, the Greek representative expressed in the same meeting that "Greece co-sponsored the present resolution because we believe that it is a positive first step in addressing concerns regarding the need to establish procedural fairness within the current system of delisting procedures" (UN Doc. S/PV.5599 (2006), at page 3). The representative from Qatar, acting as the President of the UNSC, stated that "[i]nternational, national and regional courts must review Security Council resolutions to ensure that they comply fully with internationally recognized human rights norms and the principles and purposes of the United Nations Charter" (UN Doc. S/PV.5599 (2006), at page 3). This statement is, not only a defense of courts' capacity to (indirectly) review UNSC

UNSC Sanctions Committee acknowledged in a letter addressed to the President of the UNSC that the reforms applied to the sanctioning procedure were meant to forestall the threat posed by the judicial invalidation of the domestic implementations of UNSC resolutions[378].

Since this letter pre-dates the *Kadi I 2008 case*, the Sanctions Committee foresaw the ECJ's position based on the evolution of the judicial trend that precedes such resolution. Indeed, among other activities, the Monitoring Group[379] and the Analytical Support and Sanctions Monitoring Team[380] had been reporting to the UNSC on the judicial proceedings against the 1267 regime and such reports indirectly informed on the evolution of the judicial trend and the mounting number of judicial challenges to the 1267 regime[381].

Moreover, even in the case of the reform that is more directly connected to the Kadi saga (the Office of the Ombudsperson), the pressure to implement such improvement in the procedural safeguards of the UNSC's sanctioning procedures cannot be solely credited to

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policymaking, but also a reminder that courts have already signaled their disapproval of the lack of procedural safeguards and their rejection threatened the effectiveness of the regime. Document available at: https://documents-dds-ny.un.org/doc/UNDOC/PRO/N06/670/95/PDF/N0667095.pdf?OpenElement [last accessed on 19/03/23].

[378] Letter dated 13 May 2008 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the Security Council, UN Doc. S/2008/324 (May 14, 2008), paragraph 40. Available at: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Terrorism%20S%202008%20324.pdf [last accessed on 21/03/23].

[379] According to the intervention of the representative of Chile in the 4798th meeting of the UNSC, the goal of the UNSC with regards to its counterterrorism policymaking is "to establish an ongoing and constructive dialogue between member states and the Committee so that States can believe that the Committee is ready to help them in their work. The Committee itself is assisted in its efforts by the Monitoring Group established in resolution 1363 (2001)". Hence, the Monitoring Group is created in order to gather information about the domestic obstacles to implement the 1267 regime and "to assist States in the preparation of their reports and thereby contribute to the dialogue." (4798th meeting, Tuesday, 29 July 2003, S/PV.4798, page 3). Document available at: https://documents-dds-ny.un.org/doc/UNDOC/PRO/N03/444/42/PDF/N0344442.pdf?OpenElement [last accessed on 19/03/23].

[380] The Analytical Support and Sanctions Monitoring Team was appointed pursuant to UNSC Resolution 1526.

[381] In this regard, see: UN Doc. S/2005/83 (p. 52 to 55); UN Doc. S/2005/572 (p. 48 to 51); UN Doc. S/2006/750 (p. 47 to 50); UN Doc. S/2007/132 (p. 38 to 40); UN Doc. S/2007/677 (p. 40 to 42); UN Doc. S/2008/324 (p. 36 to 37); UN Doc. S/2009/245 (p. 36 to 38); UN Doc. S/2014/770 (p. 24 and 29 to 30); UN Doc. S/2015/441 (p. 24 to 25); UN Doc. S/2016/629 (p. 27 to 28); UN Doc. S/2017/35 (p. 27 to 28); UN Doc. S/2017/573 (p. 24).

the pressure of the ECJ. In this regard, Ambassador Susan Rice, as the US Permanent Representative to the UN, explained the creation of the Ombudsperson as a measure to "address concerns that have been expressed by some European courts"[382], which indicates the UNSC's awareness that the ECJ was not alone in its approach.

In fact, by the time the ECJ was already engaged in the review of the *Kadi I 2005 case*, the Sanctions Committee openly expressed its fear that an ECJ resolution rendering the domestic implementation of the 1267 regime unconstitutional and invalid "would trigger similar challenges that could quickly erode enforcement"[383]. Hence, the UNSC's awareness of the coordinated nature of the mounting judicial resistance against its counterterrorism policymaking went as far as suspecting that, provided the ECJ ever challenged the constitutionality of 1267 regime in line with the coordinated approach, such resolution would act as a positive tipping point within the creation of the judicial trend (as the *Kadi I 2008 case* eventually did).

Summing up, the UNSC progressively increased the procedural safeguards of its sanctioning process as the critical mass of national courts consolidated its requests in relation to the right to a fair trial and due process in the field of counterterrorism. As shown in the previous Section tracing the creation of the inter-judicial trend and the emergence of its resulting norm, the judicial concerns over the access to information and the availability of an instance of appeal were the central pieces of the inter-judicial coordination surrounding the right to a fair trial and due process in relation to targeted sanctions and other counterterrorism measures. Consequently, the three major (consecutive) reforms of the UNSC sanctioning procedure were designed to assuage courts' mistrust and avert the ineffectiveness of the targeted sanctions regime that would come from the collective judicial rejection of its domestic implementations.

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[382] Ambassador Susan E. Rice, US Permanent Representative to the UN, Remarks on UNSC Resolution 1904 (December 17, 2009). Text available at: https://usun.usmission.gov [last accessed on 20/02/23].

[383] Letter dated 13 May 2008 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the Security Council, UN Doc. S/2008/324 (May 14, 2008), paragraph 41. Available at: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Terrorism%20S%202008%20324.pdf [last accessed on 21/03/23].

This is consistent with the idea that, since the process of norm-emergence in inter-judicial coordination is an ongoing and non-stepped process in which the norm will evolve, IPAs will repeatedly re-adjust their behavior according to the concomitant norm until its content is finally fixated. As a consequence, inter-judicial coordination's capacity to constraint IPAs will only go as far as required by the version of the norm that has been consolidated in each moment. In this sense, for instance, Eckes states that "the Council has demonstrated in the OMPI cases that it will defend every inch and attempt to adapt the listing procedure as little as possible to reach the minimum of procedural protection required by the EU courts" (Eckes, 2007, p. 143), and the same can be said about the UNSC and the national governments concerned with the norm establishing that counterterrorism policies are conditional to their respect for the core minimum content of human fundamental rights.

Hence, the creation of the Office of the Ombudsperson was the UNSC last attempt to fulfill the norm born from inter-judicial coordination as expressed in the *Kadi I 2008 case*. However, this improvement in the availability and transparency of the de-listing process at the UN level did not satisfy the standards of due process of the ECJ, which led the court to indirectly demand further reforms that could amount to the creation of an independent and impartial judicial body to review the sanctioning process. Once more, the ECJ was not alone in its opinion and, for instance, Lord Hope had already stated in the *Ahmed I case* that while the improvements provided by the UN Ombudsperson "are to be welcomed, the fact remains that there […] still is not any effective judicial remedy" at UN level for those individuals and entities sanctioned under the 1267 regime[384].

Although further reforms were implemented in the Ombudsperson with the aim of improving its transparency, impartiality and independence[385] since then, the UNSC never

[384] *Ahmed I case*, para 78.

[385] Resolution 2161 (UNSC Resolution 2161 (2014) adopted on 17 June 2014; S/RES/2161(2014)) establishes a deadline for the transmittal of reasons letters to those who are sanctioned (document available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/432/98/PDF/N1443298.pdf?OpenElement [last accessed on 25/03/23]); Resolution 2253 (UNSC Resolution 2253 (2015) adopted 17 December 2015; S/RES/2253(2015)) calls for arrangements in order to ensure the independence and effectiveness of the Office of the Ombudsperson (document available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/437/45/PDF/N1543745.pdf?OpenElement [last accessed on 25/03/23]); Resolution 2368 (UNSC Resolution 2368 (2017) adopted 20 July 2017; S/RES/2368(2017)) standardizes the content of the letters of reasons (document available at:

fully met the due process standards upheld by the ECJ in the *Kadi II 2013 case*. Hence, although "norm recognition has been relatively stable [and] the Ombudsperson mechanism continues to exist", in the *Kadi II 2013 case* "the ECJ signaled that it understands due process rights to [require] an independent court for judicial review of delisting requests" (Stimmer, 2019, p. 1), which is not what the Ombudsperson mechanism can provide. In other words, the version of the norm advocated by the ECJ in the *Kadi II 2013 case* was not recognized by the UNSC, although this IPA did recognize and adjust its behavior to the version of the norm conveyed in the *Kadi I 2008 case*.

Since the individual pressure that the ECJ could exert in 2008 was the same that the CJEU could exert in 2013, I posit that the discrepancies in the recognition of the norm are due to the differences in the collective support to the version of the norm upheld by the *Kadi I 2008 case* and the *Kadi II 2013 case*. Although both cases reflected and crystalized the concomitant judicial trend concerning counterterrorism policies, their impact on the subsequent jurisprudence was different due to the change in the conditions for inter-judicial coordination. While the *Kadi I 2008 case* reinforced the trend as a positive tipping point with a partial cascade effect within the ECJ's area of influence, the *Kadi II 2013 case* was followed by the erosion of the critical mass of coordinated national courts due to the removal of one of the necessary pre-conditions for inter-judicial communication in certain jurisdictions: courts' common rules.

Indeed, some governments amended the right to a fair trial in order to remove its veil of protection in cases of terrorism. This prevented, not only the coordination of their respective national courts in the absence of a common rule to dialogue with their foreign and international peers, but also the loss of such national courts' power to review counterterrorism measures. Take as an example the reform of the domestic right to a fair trial operated in the UK by the Chapter 2 of the Terrorist Asset-Freezing (Temporary Provisions) Act 2010 of 10 February 2010 ('TPA') as a response to the UKSC in the

https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/223/46/PDF/N1722346.pdf?OpenElement [last accessed on 25/03/23]). See also the last Historical Guide of the Ombudsperson Process through Security Council resolutions and Reports of the Office of the Ombudsperson to the Security Council, which details the evolution of the Office of the Ombudsperson since its creation and its achievements in terms of fair trial and due process. Document available at: https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/historical_guide_ombudsperson_process_march_2018.pdf [last accessed on 25/03/23].

aforementioned *Ahmed I case*[386]. The TPA essentially replicated the executive orders regime designed under the wretched TO and shielded it from the constitutional review of the UKSC by vesting the regime with legislative acquiescence[387].

According to the UK constitutional tradition, the repeal of constitutional fundamental rights is possible as long as the Parliament uses clear and unambiguous language to override them[388]. Hence, the Parliament's express validation of the executive orders regime as compatible with Section 1 of the UN Act in the new TPA[389] managed to overcome the constitutional shortcomings of the TO and effectively suspend the fundamental right to a fair trial in cases of counterterrorism connected to the 1267 regime. Summing up, the executive and legislative branches of the government virtually threw the British judiciary out of the inter-judicial coordination in the field of preventive executive detention.

This blockade of inter-judicial coordination in favor of fundamental human rights also took place in other countries and in relation to other counterterrorism policies. In the US, the Supreme Court had to fall back in its efforts to protect the centrality of fundamental rights and could not stand its ground in the field of the habeas corpus protection, as shown

[386] The TPA received the Royal Assent on 10 February 2010 after being fast tracked through the urgent legislative procedure six days after the UKSC delivered its decision in the *Ahmed I case*.
[387] Section 1 of the TPA declared the TO valid according to Section 1 of the UN Act. Section 2 of the TPA established a retroactive provision to ensure the validity of the decisions taken under the TO until the 31st of December of 2010 as well.
[388] This possibility was acknowledged, for instance, by the UKSC in the *Ahmed II case* (Her Majesty's Treasury (Respondent) v Ahmed and ors, [2010] UKSC 5; ILDC 1533 (UK 2010); [2010] 2 AC 534; [2010] WLR 378; [2010] 4 All ER 829) in which the UKSC refused to suspend the effects of the quashing order delivered in the *Ahmed I case*. In this regard, see paragraphs 22 to 24 of the *Ahmed II case*.
[389] The TPA was replaced by the Terrorist Asset-Freezing Etc. Act 2010, of 16 December 2010 (United Kingdom) ('TAFA') in order to mitigate the restriction infringed upon human fundamental rights by the executive orders regime. Among the reforms implemented by the TAFA, for instance, the legal threshold for final designations in executive orders was raised from "reasonable suspicion" to "reasonable belief", whereas the "reasonable suspicion" test was restricted to temporary designations of 30 days. However, both tests of 'reasonable suspicion' and 'belief' provide substantially lower standards of protection than the standard required by Resolution 1373 in order to impute terrorist acts, in fact: Paragraph 1(c) of Resolution 1373 simply required the freezing of funds of those "who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts", without forbidding the effective judicial protection of those sanctioned.

in the *Kiyemba II case*[390] and the *Omar case*[391]. These cases are related, not to the judicial review of the regime of preventive executive detention, but to the judicial review of "transfer-to-torture" claims[392] and it forces the return to the long-standing judicial deference towards the US government in the field of foreign affairs[393].

In the *Omar case*, the court reiterates the jurisprudence established in the *Kiyemba II case* and recognized that Congress had limited the right to judicial review of transfer-to-torture claims as a result of combining the FARR Act[394] (which implemented the Torture Convention and included the 'non-refoulement' prohibition) and the REAL ID Act[395]: the right to judicial review of the conditions of detention in the receiving country was reserved to immigration transferees and denied to the so-called military transferees like Mr. Omar[396]. The court openly states that "[t]he Judiciary is not suited to second-guess [political] determinations" to transfer an individual, even if torture-related claims are presented[397]. This lack of judicial review in the case of military transferees amounts to a

[390] Kiyemba v Obama, Appeal Judgment, 561 F 3d 509 (DC Cir 2009), 7 April 2009. In the *Kiyemba I case* (Kiyemba and ors v Obama and ors, Appeal judgment, 55 F3d 1022 (DC Cir 2009), ILDC 1582 (US 2009)), the court established that the power to determine the admissibility of aliens into the US territory is the exclusive province of the political branches of the government (the legislature and the executive) and the judiciary cannot review such decision as a general rule (paragraphs 9 and 11).
[391] Omar and ors v McHugh and ors, Appeal judgment, No 09-5410, ILDC 1773 (US 2011), 646 F.3d 13 (D.C. Cir. 2011).
[392] For instance, Shawqi Omar (dual citizen of Jordan and the US) was detained by the US military forces in Iraq in 2004 for his alleged collaboration with Al-Qaeda. The US military decided to place Mr. Omar under the custody of the Iraqi government to serve a 15 yearlong pending prison sentence for immigration violations in Iraq. Mr. Omar challenged his transfer on the grounds that he was at risk of being tortured in Iraq and sought a writ of habeas corpus in the US courts. The US executive denied Mr. Omar claims on the risk of torture and appealed to the non-justiciability of foreign affairs.
[393] In fact, whereas the US Supreme Court fought for and succeeded in ensuring the right to habeas corpus in relation to administrative detentions, none of the resolutions related to deportation, transference and extradition of this thesis' dataset embraced the approach upholding human fundamental rights' centrality (see *Map 2* and *Map 3*). However, the *Omar case* is different in that it directly asserts US courts' lack of jurisdiction in the field.
[394] Foreign Affairs Reform and Restructuring Act of 1998, 8 USC (United States), enacted 21 October 1998. However, the valid version at the time of the judicial decision was from 2006. In relation to the *Omar case*, see: Chapter 12 Immigration and Nationality, Subchapter II Immigration, Part IV Inspection, Apprehension, Examination, Exclusion, and Removal, §1231 Detention and removal of aliens ordered removed.
[395] REAL ID Act, 8 (United States), enacted 11 May 2005. However, the valid version at the time of the judicial decision was from 2006. In relation to the *Omar case*, see: Chapter 12 Immigration and Nationality, Subchapter II Immigration, Part V Adjustment and Change of Status, §1252 Judicial review of orders of removal, (a), (4).
[396] *Omar case*, paras. 11, 13, 14 and 16.
[397] Ibid., para. 8.

de facto exception to the general prohibition of refoulment since due process is a constitutive element of the non-refoulment principle, although no formal amendment was made to limit this principle itself.

Another example of the shrinking size of the domestic right to a fair trial of suspects of terrorism in the US can be found in the *Al Bahlul case*[398]. In this case, the court declared that the US Constitution vested the "Congress with ample authority to establish military commissions and make offenses [like conspiracy] triable by military commission"[399], including non-international offences to the law of war[400]. The widening of military commissions' jurisdiction is inversely proportional to the decrease of national courts' jurisdiction. In fact, the dissenting judges in this decision recalled the concerns expressed in the *Hamdan case* about the challenge posed to the separation of powers by military commissions, for they diminish the "role of the Judicial Branch in our tripartite system of government"[401].

Summing up, in the aforementioned cases, the legislative branch of the government managed to constrict the expanse of the right to a fair trial, hence stripping courts of their power to review the policy-fields excluded from the umbrella of due process and, by extension, eliminating their capacity to protect human fundamental rights in relation to counterterrorism policies. To the extent that the rightful limitation of human fundamental rights depends on the fulfilment of due process requirements, the loss of the right to a fair trial and the court's capacity to protect other human fundamental rights amounts to the loss of not one but all available common rules to structure the inter-judicial coordination. Hence, the legislative reform concerning the right to a fair trial and due process prevents, not only the inter-judicial coordination concerning this human fundamental right, but also

[398] Al Bahlul v United States, Appeal judgement, No 11-1324, ILDC 2665 (US 2016), 840 F 3d 757 (DC Cir 2016).
[399] *Al Bahlul case*, para. 13.
[400] Article III of the US Constitution indeed authorizes military commissions to try enemy soldiers for offences against the international 'laws of war'. However, this authorization has traditionally been understood as a narrow exception that only allows the Congress to widen the catalogue of triable offenses before a military commission if such offence constitutes an international law-of-war offence or if the offence had historically been tried by US military commissions. Hence, the declaration conveyed in the *Al Bahlul case* goes against the constitutional tradition of the US in relation to the scope of the jurisdiction of military commissions and the congressional capacity to modify it. However, these concerns are brushed aside in paragraph 53 of the *Al Bahlul case*.
[401] *Al Bahlul case*, paras. 10, 32, 42.

the inter-judicial coordination in relation to any other human fundamental right affected by the counterterrorism policy at issue. Thus, the loss of the human fundamental right to a fair trial and due process as a common rule for inter-judicial coordination will create a domino effect that will sweep the other available common rules away as well.

This setback in the inter-judicial coordination upholding the centrality of human fundamental rights in relation to counterterrorism policies is especially poignant due to the relevance of US and UK courts in the creation of the inter-judicial coordination. First, due to the high volume of cases channeled through these two jurisdictions, any change on the pre-conditions for inter-judicial coordination in them will have a numeric impact on the creation of a critical mass. In addition to this, due to their role as norm-enablers, the resolutions of these two jurisdictions (together with those from the Canadian and European judiciaries) have acted as positive tipping points within the process of norm emergence, based on their influence on the subsequent jurisprudence from other countries (as shown in the Section devoted to tracing the creation of the judicial trend). Thus, their detachment from the inter-judicial coordination arguably had a discouraging effect on the maintenance of the critical mass of national courts.

This backsliding scenario for inter-judicial coordination can also be found in other jurisdictions. For instance, amidst Hong Kong's[402] struggles to keep the "one country, two systems" model (Pei, 2020) and to protect its rule-of-law-based system (Lo, 2020) in front of the mounting interventionism of China (Fong, 2017; Hiroko, 2020), the Hong Kong Special Autonomous Region (hereinafter "HKSAR") judiciary joined the inter-judicial coordination in favor of the centrality of human fundamental rights when China tried to instrumentalize counterterrorism-related UNSC resolutions in order to tighten its grip around the region (Young S., 2009). However, the Chinese mainland eventually managed to inhibit their capacity to engage in inter-judicial coordination through the 2020 legal reform that deprived HKSAR's courts from the necessary common rules to dialogue with their foreign and international peers.

[402] Hong Kong Special Administrative Region (henceforth, "HKSAR").

Take as an example the evolution of the regulative framework concerning covert surveillance from the post-9/11 scenario[403] to the 2020 reform of HKSAR's regulation on national security. In the *230 case*[404], the Hong Kong Court of First Instance reviewed the constitutionality of legislation authorizing secret surveillance (including the interception of private communications without judicial oversight)[405] that was allegedly passed as a response to UNSC's calls to fight against international terrorism[406]. In this case, the court deemed this legislation void due to its unconstitutional encroachment of the domestic fundamental right to privacy enshrined in Hong Kong Basic Law[407] and, in order to do so, the court relied on an extensive comparative constitutional analysis of the legal and jurisprudential framework of other countries in the field of covert surveillance[408].

However, the new P.R.C. Law on the Preservation of National Security in the HKSAR "effectively ended the 'one country, two systems' governance" (Pei, 2020, p. 1) by reforming the HKSAR security law through the mainland legislative process instead of through HKSAR institutions (Pei, 2020). This reform imposed on the HKSAR the system of secret surveillance that the *230 case* had rejected and, in addition to this, barred its judicial review with regard to terrorism-related issues[409]. Hence, this reform amounted

[403] Like many other countries and regions, the HKSAR was provided with new anti-terrorism and national security regulation after the 9/11 attacks. In this regard, Roach stated that without abandoning the "older vision of security based on betrayal of the state", the 2003 National Security Bill also conveyed a new vision "inspired by the United Kingdom's Terrorism Act 2000 and the post-September 11 anti-terrorism laws that have been modeled on that influential law in Canada, Australia, and Hong Kong" (Roach, 2005, p. 120). Hence, HKSAR courts looked for inspiration among the judiciaries of such countries and reproduced their jurisprudence (Young S. N., 2020).

[404] Leung Kwok Hung & Anor v HKSAR - [2006] HKCU 230; HCAL 107/2005.

[405] More specifically, the case reviews the following executive order: the Law Enforcement (Covert Surveillance Procedure) Order published on 5 August 2005. This executive order was passed relying on the regulative powers vested on the Chief Executive by art.48 of the Basic Law. However, as stated in paragraph 17 of the *230 case*, "while [the Executive Order] does not proclaim itself to be a form of legislation, seeks nevertheless to fill a legislative vacuum and thereby take the place of legislation".

[406] *230 case*, para. 89.

[407] Ibid., para. 181.

[408] The court's legal analysis focuses on those countries that also belong to a common law system and, hence, most of the jurisprudential references of the *230 case* belong to courts that are specially relevant and influential within this space. In this regard, see paragraphs 2, 10, 44, 78 to 80, 89, 91, 125, 131, 162, 164, 167 and 172 of the *230 case.*

[409] The new National Security Law "outlines four broad areas of secession, subversion, terrorist activities" (Karmazin, 2023, p. 30) and modifies the regime of HKSAR's fundamental rights in those such areas under the pretext of protecting national security because, as established in Article 6 of the law, "the common responsibility of all the people of China, including the people of Hong Kong, to safeguard the sovereignty, unification and territorial integrity of the People's Republic

not only to the loss of a common rule in order to establish a judicial dialogue, but also the loss of another pre-requisite of all forms of judicial inter-communication, including inter-judicial coordination: arguably, the HKSAR judiciary also lost its identity as courts of a rule-of-law-based system (Young S. N., 2020).

In addition to this, the erosion of the critical mass might also be related to the decrease in the overall number of complaints against counterterrorism policies. IPAs' behavioral adjustment to the subsequent consolidated versions of the norm entails the improvement of citizens protection in relation to counterterrorism measures. Hence, it is reasonable to expect a decrease in the number of complaints and, therefore, in the number of judicial resolutions, as courts' constitutional review cannot be activated *ex officio*. For instance, as noted by the doctrinal analysis of the reforms implemented in the UNSC listing regime, the UN Office of the Ombudsperson has become an effective de-listing mechanism (Lang, 2023), although it has not become the court-based review system envisioned by the *Kadi II 2013 case* (Sullivan & de Goede, 2013; Hovell, 2016a). Hence, the increase in the de-listing requests channeled through the Ombudsperson (Lang, 2023) must be inversely proportional to the decrease of judicial cases concerning UN targeted sanctions.

Summing up, as said before, IPAs will adjust their behavior according to the nascent norm born from inter-judicial coordination, but they will not go beyond the requirements of the standard that has been solidified under the threat posed by a critical mass of courts and their resolutions. This principle applies to the governments directly reviewed by the involved courts, to other IPAs that are indirectly threatened by inter-judicial coordination like the UNSC and even to other IPAs that are simply aware of the judicial trend and adjust their policymaking to the solidified standard as a preventive strategy to avoid the threat posed by inter-judicial coordination. This is the case of domestic governments that adapt their policymaking to the ongoing judicial trend in the belief that their respective

of China". Furthermore, the new National Security Law also creates a special department of justice, under the control of the Chinese central government, to be in charge of the judicial proceedings concerning these areas and "the [newly created Office for Safeguarding National Security of the Central People's Government in the Hong Kong Special Administrative Region] may directly overtake a specific case (upon approval by the Central People's Government). According to this scenario, mainland law may be applied and the mainland's Supreme Court and Procuratorate may select judges and prosecutors" (Karmazin, 2023, p. 31).

national courts would embrace the solidified standard given the opportunity, although such courts have not had the chance to join the inter-judicial coordination yet.

For instance, when New Zealand reformed its domestic regulation on counterterrorism, the new Terrorism Suppression Amendment Act 2007[410] enacted by the Parliament was modeled after the 2005 Report of the Foreign Affairs, Defence and Trade Committee[411]. In order to design its recommendation in relation to the scope of power that should be allocated to courts for the review of targeted sanctions, this report performed a comparative analysis of the constitutional design of such judicial powers of control in other jurisdictions. As a result, the report warns the Parliament that, based on the comparative constitutional analysis of foreign courts' jurisprudence, it is reasonable to expect the New Zealand judiciary to not validate domestic sanctioning procedures devoid of due process safeguards either.

Hence, the conclusion of the report in this matter reflects the solidified standard from 2005 to 2007, according to which the fundamental right to a fair trial demanded national courts to review domestic regimes connected to Resolution 1373 (due to the centrality of fundamental human rights) but not the domestic implementation of the targeted sanctions connected to the 1267 regime[412]. The decision of New Zealand's Parliament to embrace

[410] Terrorism Suppression Amendment Act 2007; Bill No. 105-3. The Bill, its Supplementary Order Papers and the information concerning the process of elaboration of the Bill can be accessed through the official webpage of the New Zealand Parliament: https://bills.parliament.nz/v/6/7572331c-ec69-4379-b680-ec0d9c6ad1df?Tab=history [last accessed on 10/02/23].

[411] Terrorism Suppression Amendment Bill (No 2) (242-1); 20 may. 2005. Report available at: https://selectcommittees.parliament.nz/v/6/e624949f-2802-4c4e-bed1-fa71c2b0196d [last accessed on 10/02/23]. The then Minister of Justice stated that the Bill was drafted following the recommendation of the aforementioned report in its intervention during the parliamentary debate following the second reading of the 2007 Bill: "The bill was introduced to Parliament in March 2007. It followed a review of the Terrorism Suppression Act undertaken by the Foreign Affairs, Defence and Trade Committee in 2005." New Zealand, *Parliamentary Debates*, House of Representatives, 24 October 2007, Volume 643; pg. 12668. The records of this parliamentary debate can be found at: https://drive.google.com/file/d/0B1Iwfzv-Mt3Cckl2elpNRFh1bjQ/view?resourcekey=0-95iIn67__wfQMP61J7IEsQ [last accessed on 10/02/23].

[412] As explained in the previous Sections devoted to tracing the creation of the trend, national courts activism in relation to the 1267 regime started around 2008 and was solidified due to the spreading effects the *Kadi I 2008 case* that acted as a partial positive tipping point in the creation of the trend. In this regard, see the intervention of Hon. Mark Burton (Minister of Justice) in the parliamentary debate on the topic: New Zealand, *Parliamentary Debates*, House of Representatives, 24 October 2007, Volume 643; pg. 12668. The records of this parliamentary debate can be found at: https://drive.google.com/file/d/0B1Iwfzv-

such standard is not connected to the pressure of New Zealand's judiciary (that had not had the opportunity to review any case connected to targeted sanctions[413]), but to the standard born from inter-judicial coordination and the belief that the national courts from New Zealand would eventually be dragged into the self-reinforcing dynamics of the coordination. In other words, as explained in the Theory Chapter, New Zealand's courts could be expected to apply the standard coined by its foreign peers with a common identity and methodology to their common rule.

The analysis of the evolution of national and international policymaking in the field of counterterrorism provides several key observations that confirm the IR theory on inter-judicial coordination presented in this thesis. First, the behavioral changes in IPAs that are not directly bound to the resolutions of the courts involved in the inter-judicial coordination (whether these are IOs or other non-reviewed national governments) prove that the real constraint comes, not from the individual power of courts, but from the norm emerged from inter-judicial coordination. Second, the fact that IPAs repeatedly adjusted their behavior proves that inter-judicial coordination is a non-stepped process of norm emergence: the nascent norm will evolve as a result of courts' interaction and several partial positive tipping points will solidify different versions of the norm at different times, following the lead of norm-enablers.

In both senses, the key element explaining inter-judicial coordination's capacity to constraint IPAs' behavior is the collective threat posed by a mass of national courts upholding the same version of a common approach. As explained in the Theory Chapter, the addition of new courts to the inter-judicial coordination will have an exponential effect because the more norm-entrepreneurs join the coordination, the stronger the norm will become and the more difficult it will be for other courts, governments and IOs to ignore it. Thus, provided the nascent norm has been embraced by a critical mass of courts,

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Mt3Cckl2elpNRFh1bjQ/view?resourcekey=0-95iIn67__wfQMP61J7IEsQ [last accessed on 10/02/23]. See also: House of Representatives Foreign Affairs, Defence and Trade Committee, Parliament of New Zealand, *Statutory Review of the Terrorism Suppression Act 2002 (2005)*, pp. 5-6. Document available at: https://selectcommittees.parliament.nz/v/6/aeb213ff-2219-4e2a-a609-d1d1afd7eb09 [last accessed on 10/02/23].

[413] In those terrorism-related issues in which the New Zealand's judiciary had produce jurisprudence, the executive and the legislative branches of the state followed the policy-guidelines established by the judiciary. In this sense, for instance, see the impact of the *Zaoui case* regarding New Zealand's immigration law: Part 5 of the Immigration Act 2009 has codified the findings of New Zealand's Supreme Court in the *Zaoui case*.

the new standard will spread across states, across national and international jurisdictions and across regimes (deportations, renditions, interrogation techniques, preventive administrative detentions, asset-freezing or any other measures established under Resolutions 1373 or Resolution 1267).

Nevertheless, for the same reasons, the erosion of the critical mass of courts upholding the common approach will paralyze the behavioral change of IPAs, as shown by the previous analysis. Consequently, the reforms in the sanctioning proceedings of the UNSC only went as far as required by the latest solidified version of the norm born from inter-judicial coordination. Indeed, the *Kadi II 2013 case* did establish that such reforms were insufficient to satisfy the due process requirements as understood by the CJEU. However, the potential coalition of national courts that could embrace this conclusion was eroded by the parliamentary limitation of the right to a fair trial in certain domestic jurisdictions and the decrease of constitutional complaints. As a result, the behavioral change of IPAs stagnated beyond the borders of the EU system. All in all, the current analysis confirms that the policymaking adjustments implemented by the different IPAs concerned in the case of counterterrorism policies are due to the collective threat posed by inter-judicial coordination to such policies.

4.3. Legal effects of inter-judicial coordination: global de-fragmentation.

The first Sections of this Empirical Chapter have already showcased that the inter-judicial coordination of national and international courts on counterterrorism policies entailed the transference of a common approach from one jurisdiction to another while relying on the consubstantial nature of their common rules. Considering that the role of consubstantiality as the backbone of inter-judicial coordination (and the exercise of comparative constitutional and international law bearing its weight) has already been proven, the only remaining question from a legal perspective is to assess the impact of such consubstantiality on the fabric of the global legal order which is, a priori, fragmented. This Section will hence analyze the findings of the previous Sections from the perspective of legal theory.

Most of the existing literature has focused on the monadic analysis of the impact of specific resolutions on the strength of international law. Particular attention has been devoted to the ECJ's defense of domestic fundamental rights in the *Kadi I 2008 case* and to other resolutions displaying the same reasoning. Courts' reliance on domestic fundamental rights as a constraint for counterterrorist policies was described by some scholars as a dualist strategy to avoid the grip of Article 103 UN Charter (Cannizzaro, 2009; Tomuschat, 2009; de Burca, 2010; Ferreira-Snyman & Ferreira, 2014). Therefore, this reasoning was interpreted as a denial of the principle of primacy of international law and, thus, as an attack to the validity and enforceability of international law. From this monadic perspective, judicial resolutions like the *Kadi I 2008 case* would further the fragmentation of international law as a system.

However, since the approach of the ECJ in the *Kadi I 2008 case* cannot be explained in isolation, but it is the consequence of inter-judicial coordination (as explained in the previous Sections), a systemic analysis of the rulings that participated in such inter-judicial coordination is more suitable to evaluate the legal transformations produced. The first difference of such systemic perspective is that the analysis considers the collective impact of the critical mass of courts involved in the inter-judicial coordination as described in the preceding paragraphs. Hence, matching the independent variable established in my theory, my analysis must take into account that the same strategic approach is upheld across states, across national and international jurisdictions and across regimes. More importantly, my analysis takes into account that such transference relies on the consubstantial character of the inward-looking and outward-looking versions of the same common rules: domestic law (the inward-looking version of common rules), international law (the outward-looking version of the common rules) or a mix of both.

The second difference in the systemic perspective of the legal analysis performed in this thesis is related to the dependent variable of the legal theory put forward by this work with regard to inter-judicial coordination: international legal de-fragmentation. Although the concept of de-fragmentation has often been defined by the legal scholarship as the standardization of international law's meaning across domestic legal systems, this work highlights the fact that such process of transnational standardizing implies the clarification of the relationship among the different rules of the system as well. Moreover, in an increasingly globalized world in which the domestic and international legal domains

grow intertwined, antinomies arise not only across legal systems, but also across regulative levels.

Consequently, rather than simply exploring the judicial transformations of international law as an isolated legal system, this work focuses on the de-fragmentation of the global legal order: the reduction of the antinomies born not only from the lack of hierarchy and determinacy of international law, but also from the inconsistencies between regulative levels. Therefore, international legal de-fragmentation requires the coordination of the content and order of the international and national legal systems[414]. Summing up, in terms of structural changes, this thesis assesses inter-judicial coordination's capacity to unravel the dysfunctionalities between the different legal systems and regulative levels that form the global legal order as a multilayered system.

In this regard, my theory posits that inter-judicial coordination provides such consistency between legal systems due to the mass of non-related courts upholding a common approach to the content and order of the concerned legal systems. What is more important, this systemic coordination will take place even if the courts involved in the inter-judicial coordination rely on rules belonging to formally independent legal systems because the consubstantial nature of such common rules will allow for the transference of interpretations between legal systems and, hence, coordinate their content and structure. Hence, inter-judicial coordination will necessarily lead to the de-fragmentation of the global order provided a critical mass of courts is involved, and the consubstantiality of the common rules is the causal mechanism explaining such effect.

From a material point of view, there are many combinations of common rules that can sustain the inter-judicial coordination although, as explained in the Theory Chapter, such combinations might come with different structural transformations for the global legal order. In the case under study in this Empirical Chapter, different courts relied on different sets of rules to join the coordination and upheld the same common approach to the lawfulness of the concerned counterterrorist policies: the centrality of human

[414] As said in the Theory Chapter, to the extent that the coordination of two legal systems attempt to affix their structure and content, the coordination of the international and national legal orders will tend to clarify the structure and meaning of international law, rather than driving domestic law into anarchy and indeterminacy.

fundamental rights (which are common rules to them both in their inward- and outward-looking versions) within the legal system of reference. While the *Kadi I 2008 case* and the *Ahmed I case* applied such approach to the domestic fundamental rights within the European or British domestic systems, in other instances like in the *Abdelrazik case* or in the *Hamdan case* the Canadian and US courts equated international human rights to domestic fundamental rights in order to uphold the same approach and, in the case of international courts like the ECtHR, the centrality of human fundamental rights was established in relation to an international convention like the ECHR in the *Al-Jedda 2011 case*, for instance.

This means that, in the aforementioned cases, courts relied on different strategies to uphold the same approach to the lawfulness of counterterrorism measures: human fundamental rights' centrality. In this sense, decisions like the *Kadi I 2008 case* and the *Ahmed I case* contribute to the internationalization of national law to the extent that they uphold the centrality of domestic fundamental rights in opposition to the allegedly unavoidable supremacy of UNSC resolutions, hence increasing the international weight of domestic fundamental rights. Howbeit, in other decisions from the same inter-judicial coordination, like the *Abdelrazik case* or the *Zaoui case,* the strategy to uphold the centrality of human fundamental rights relies in the creation of an analogy between international human rights and national fundamental rights. As a result of this combination of strategies, the overall inter-judicial coordination works as a mixed uploading & downloading mechanism that both internationalizes national law and domesticates international law, reconciling their content and structure.

While the internationalization of domestic fundamental rights is very clear in the *Kadi I 2008 case*, for instance, the domestication of international law can also be noticed in other cases that belong to the same inter-judicial coordination as the *Hamdan case*, in which the US Supreme Court fused international and national law. As previously explained, the attempts of the US government to hamper US courts' jurisdiction in relation to the habeas corpus rights of Guantanamo's detainees pushed the US Supreme Court to enlist the help of international law in order to reinforce the constitutional weight of domestic fundamental rights in the *Hamdan case*. Hence, the US Supreme Court stressed the domestic validity of the international law on war, downloading its content into the

domestic legal system and uploading the enforceability of the domestic rules on due process to the international legal system.

In the *Panna case*[415], the Supreme Court of Bangladesh resorted to the analogical strategy of equating international and national human fundamental rights. In this case, Mr. Panna challenged the constitutionality of the Joint Forces Drive Immunity Act, 2003[416] ("Immunity Act"), which granted immunity to the state's forces for the detention and interrogation of Bangladeshi citizens from 16 October 2002 to 9 January 2003. This set of measures was framed within the so-called 'Operation Clean Heart', as part of Bangladesh's alleged efforts to fight terrorism in the post-9/11 scenario. During the operations conducted in the exercise of the powers vested by the Immunity Act upon the joint forces of the state, the allegations of violations of human rights multiplied.

The court embraced Mr. Panna's claims about the unconstitutionality of the Immunity Act for its contravention of the rule of law principle and human fundamental rights, which are described as central to the legal system of reference in Bangladesh[417]. Moreover, far from choosing between the Bangladeshi domestic legal system and the international legal system as the system of reference, the court relied on both of them in the understanding that they share a common structure in which human fundamental rights are central. Hence, the Bangladeshi Supreme Court displayed a two-fold reasoning based on the consubstantiality of domestic fundamental rights and international human rights.

First, the *Panna case* declares the inviolability and non-derogability of domestic fundamental rights as a result of their central role within the Constitution, which is the supreme rule within the national legal system and the normative scaffolding of the rule of law principle that irradiates the domestic legal order[418]. In addition to this, the *Panna case* recalled the centrality of the international obligations acquired by the states in the field of international human rights. In this regard, the Supreme Court stated that "[i]ndisputably Bangladesh is a signatory to the United Nations Universal Declaration of Human Rights, 1948, International Covenant on Civil and Political Rights, 1976 and

[415] Panna v Bangladesh, Writ Petition, Writ Petition No 7650 of 2012, ILDC 3190 (BD 2015), (2017) 37 BLD (HCD) 271, (2016) 4 CLR (HCD) 265.
[416] Act No. 1 of 2003 (Bangladesh).
[417] *Panna case*, paras. 32, 37 and 43.
[418] Ibid., paras. 20 to 22, 36, 66 and 67.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987"[419] and, as a result, "[a]part from the provisions of our Constitution mentioned hereinbefore […] Bangladesh is committed to translate into reality the provisions of those international instruments"[420].

Bangladesh's commitment to international human rights contributes to the centrality of domestic fundamental rights and amounts to its inalienability[421]: fundamental and human rights (virtually equated in this resolution) cannot be derogated by the legislative, so executive violations cannot be hidden under a parliamentary blanket of immunity[422]. Hence, as an integral and inescapable part of the international legal system, the court assumes that international human rights had been assimilated into the national legal order. Hence, while the court easily explains the supremacy of the Constitution as the ultimate source of legitimacy of the domestic legal system[423], the centrality of fundamental rights within the Constitution (and by extension within the domestic legal system) is their material connection to international human rights, presented as inescapable international obligations that cannot be unilaterally derogated.

Summing up, in the inter-judicial coordination concerning the centrality of human fundamental rights in relation to counterterrorism measures, courts applied the common approach to domestic rules in opposition of international law, resorted to fuse international and national rules and/or rested on the analogical comparison of international and national law to uphold the common strategical approach. Therefore, this inter-judicial coordination worked as mixed uploading & downloading mechanism that transferred content and features between the domestic and international regulative levels. On one hand, international human rights buttressed the centrality of fundamental rights and some of human rights' features and principles (like the ius cogens character of the prohibition of torture) were downloaded into the domestic legal system. On the other hand, the enforceability and some of the content of domestic fundamental rights (like the requirements of due process) were assimilated by international human rights.

[419] Ibid., para. 33.
[420] Idem.
[421] Ibid., paras. 37, 66 and 67.
[422] Ibid., paras. 36, 43, 45 and 47.
[423] Ibid., para. 20.

Indeed, some scholars have noticed that resolutions like the *Kadi I 2008 case* "rejected the notion that different levels of judicial protection and review [depended] on the degree of discretion or autonomy [in the implementation of] Security Council resolutions" (de Wet, 2012, p. 147)[424]. This means that courts managed to export into the international level the domestic form of due process, much to the disbelief of those scholars that had foretold the impossibility to instill such form of due process in relation to counterterrorism policies outside the domestic context due to the international lack of institutional tenets connected to this human fundamental right (like the inexistence of an independent judicial system, for instance) (Scanlon, 2003, p. 116; Petersmann, 2016, ps. 187, 188)[425].

However, this thesis posits that inter-judicial coordination provides the institutional framework required for the blossoming of human fundamental rights beyond the domestic level, within the international legal system and, in overall, in the global legal order. As explained in the Theory Chapter, national courts are the primary enforcers of both national and international law within the domestic sphere and, as such, their interpretative capacity amounts to an important power to shape and coordinate the content of both legal systems within the domestic order. However, courts' individual interpretation of the content and structure of the international legal system within the domestic order will not necessarily amount to a structural change within the global order, whereas their coordinated interpretation will have such effect provided the same approach is embraced by a critical mass of national courts.

This reasoning enshrines two important points in relation to inter-judicial coordination's capacity to create structural changes in the global legal order. First, inter-judicial coordination acts as a global enforcement mechanism to support the binding effects of international law capable of solving the main problem hindering the effectiveness of international law: states' unwillingness to delegate enough power into a supranational

[424] In relation to this, see also the analysis of Kunoy and Dawes (2009) of the consolidated jurisprudence of the ECJ in relation to the European implementation of Resolution 1267 and Resolution 1373.

[425] It has been long acknowledged by legal scholars that "[t]he practical value of this layered international value system is closely related to the question of its enforcement. In particular, the question arises whether the international community possesses structures capable of enforcing such a system and resolving potential normative conflicts between these norms and other international obligations" (de Wet, 2009, p. 296).

judicial institution capable of centralizing the clarification of the content and structure of the international legal system (Kingsbury, 2012). As a global enforcement mechanism, inter-judicial coordination does not require such delegation of power although it manages to coordinate different legal systems and regulative levels, hence answering the doctrinal demands for a "multilevel judicial protection of transnational rule of law" (Petersmann, 2016, p. 191).

In this sense, there is a doctrinal agreement in that "[s]imilar to global economic, environmental, and technological integration, the effectiveness of multilevel political, legal, and judicial governance require connecting local, national, regional, and worldwide legal and judicial institutions so that rule of law systems function in mutually coherent ways as required by the 'consistent interpretation' and 'judicial comity' requirements of national and international legal systems" (Petersmann, 2016, p. 188). However, the existing literature had not produced a comprehensive theory on the dynamics of such judicial connection or coordination and focused on the limited capacities of international courts concerning international de-fragmentation (de Wet, 2009; de Wet, 2012; Kingsbury, 2012; Petersmann, 2016).

The empirical research of this thesis on the creation of judicial trends in the field of counterterrorism policies has proven that, according to the theory presented in previous Chapters, inter-judicial coordination can evolve into a global system of checks and balances capable of buttressing the rule of law from a global perspective, and these are the institutional tenets that are necessary for the international system to mirror the domestic capacity to foster human fundamental rights.

Furthermore, among the catalogue of human fundamental rights, the right to a fair trial and due process will necessarily occupy a preeminent position in inter-judicial coordination, for it is this right that anchors courts' capacity to exercise their power. As proven by the set of resolutions included in this thesis, the international strengthening of human fundamental rights resulting from inter-judicial coordination will be led by the international development of the procedural safeguards and other requirements connected to the human fundamental right to a fair right. This, in turn, reinforces the idea that inter-judicial coordination can organically fulfill the requirements of a global system of checks and balances.

Second, as said before, inter-judicial coordination will necessarily lead, not only to the coordination between the domestic and the international legal systems, but also to a de-fragmented global legal order for such coordination of systems can only amount to the creation of hierarchical relations within and between such systems. Courts' task to clarify the content of law also implies the clarification of the systemic relation between rules, and their inter-judicial coordination takes such clarification of content and structure from the intra-systemic level to the inter-systemic level.

Hence, far from the worst dualist omens augured by some of the earlier literature concerning courts' reaction to the post-9/11 counterterrorism policies, an overall analysis of such resolutions yields very different conclusions about their effects on the strength of international law. The inter-judicial coordination that took place in the post-9/11 era established as a norm for counterterrorist policies the respect for the core minimum content of human fundamental rights by upholding their centrality as a common approach. Thus, from an international perspective, this inter-judicial coordination resulted in the strengthening of international human rights and, from a global perspective, in the reduction of inter-systemic antinomies and the creation of hierarchical relations that amounted to the de-fragmentation of the global order.

In this sense, even those resolutions that took their challenge to the UNSC policymaking the furthest (like the *Kadi II 2013 case*) did not adopt a dualist approach but rather strongly contributed to the de-fragmentation of the global order. A truly dualist approach would have conditioned the effectiveness of the international rule (in this case, a UNSC resolution) to the enactment of a domestic implementation and would have highlighted the domestic discretion with regards to that enactment. Take as an example the *Al-Bihani case*[426], for instance. In this case, the court established that, regardless of US consent to international rules and treaties, the binding effects of international law are always subject to the content and effects of its national implementation.

More specifically, the court developed this reasoning in order to deny "that the war powers granted [to the President to fight against international terrorism] by the

[426] Al-Bihani v Obama, Appeal judgment, No 09-5051, 590 F 3d 866 (DC Cir 2010).

[Authorization for Use of Military Force] and other statutes are limited by the international laws of war"[427]. In fact, this dualist interpretation was designed to neutralize the precedent of the *Hamdi case*, in which the court took the opposite stance and declared that international laws of war indeed constraint the President's war powers under the AUMF[428].

Contrary to this, the indirect review of UNSC policymaking performed in resolutions like the *Kadi I 2008 case* does not entail a dualist understanding of the relationship between the international and the national legal orders. In fact, the *Kadi I 2008 case* emphasizes the ECJ's respect for the primacy of international law[429]. By embracing the centrality of European fundamental rights as constitutional values as opposed to upholding the arguments about the inexorable literality of UNSC resolutions or the prevalence of international security as a value within the system, the *Kadi I 2008 case* (together with the other cases involved in the inter-judicial coordination) instilled a change within the structure of the international legal system and, by extension, in the global order: just like in the domestic setting, the hierarchical order among the rules of the international system is connected to the relevance of the values enshrined in such rules, while any procedural requirements connected to their enactment (like the regulative body of origin) is just a consequence of such value.

Hence, the inter-judicial coordination that took place in the post-9/11 era, in the field of counterterrorism measures, clarified that the structural principle insufflating order into the international legal system is not a vertical hierarchy based on the regulative body enacting the rule, but a material hierarchy based on the centrality of the values embodied by the rules. Due to the consubstantiality of human fundamental rights, upholding the centrality of their inward-looking version will amount to reinforcing the strength of their outward-looking version and vice versa, which is consistent with the idea that hierarchy is defined by the material value of rules instead of by the body enacting them. Thus, the *Kadi I 2008 case* entails a reinforcement of human and fundamental rights' centrality, which does not question the superiority of international law in general, but the UNSC's

[427] *Al-Bihani case*, para. 9.
[428] *Hamdi case*, para. 520. See also the court's reflection on the principles of the international law on war in relation to executive detention.
[429] *Kadi I 2008 case*, paras. 288 and 291.

authority to override such constitutional and central rules in both the domestic and international legal systems.

However, since the ability of inter-judicial coordination to constrain the behavior of IPAs depends on the existence of a critical mass of national courts, the defragmenting capacity of inter-judicial coordination is also subject to the same factual condition. As said in the previous Section, the evolution of the norm coined by inter-judicial coordination in the field of counterterrorism policies froze due the erosion of the critical mass of courts from 2010 on: although the centrality of human fundamental rights was vindicated in overall, the loss of the critical mass of courts eventually paralyzed the transference of content between legal systems and regulative levels that fostered the evolution of the norm. As a result, whereas it is safe to say that the international legal system has reinforced the centrality and content of international human rights in the image and likeliness of domestic fundamental rights within domestic legal systems shaped by the rule of law, it is more doubtful whether the content and position of international human rights has truly matched those of domestic fundamental rights.

This is clearly noticeable, for instance, in the last report of the UN Special Rapporteur on counterterrorism and human rights to the UNGA on the impact of UNSC resolutions on the promotion and protection of human rights[430]. The report states that "[t]he legal regulation of terrorism has posed significant challenges to the global legal order for many decades"[431]. As a consequence, "[s]tates have responded at the domestic, regional and international levels through multiple legal and political avenues"[432], including national

[430] Report on Security Council resolutions concerning terrorism on the promotion and protection of human rights since 9/11 (UN Doc. A/73/361) from 3 September 2018. There have been more reports concerning different aspects of human rights and counterterrorism measures but this is the last one that was directly devoted to the evolution of the post-9/11 legal framework in relation to international human rights in general. The report was submitted to the UNGA in accordance with Assembly Resolution 72/180 and Human Rights Council Resolution 31/3. The report is available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/274/67/PDF/N1827467.pdf?OpenElement [last accessed 21/03/23].

[431] UN Doc. A/73/361, para. 8, pg. 4. In this regard, see the Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, of 21 February 2017 (UN Doc. A/HRC/34/61). The report is available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/039/35/PDF/G1703935.pdf?OpenElement [last accessed on 22/03/23].

[432] Idem.

and international courts as proven by the report's account of the literature following the jurisprudential evolution of the policy field.

In this regard, the report states that "[t]he sanctions regime has been criticized for infringing upon a series of human rights, including the right to due process and effective remedy, its lack of transparency and lack of safeguards against arbitrary application"[433]. The report acknowledges that this collective judicial activism (that this thesis identifies as inter-judicial coordination) has born fruits and "improvements, including the inclusion of humanitarian exemptions, the publication of listing guidelines and narrative summaries of listing rationales, national court reviews, as well as the creation of the Office of the Ombudsperson (as limited to the Da'esh and Al-Qaida list), have mitigated some of these shortcomings"[434].

The report goes on to state that, despite the improvements, such "concerns remain. As my predecessor warned, the process remains 'unnecessarily opaque' and access to information problematic (A/HRC/34/61, paras. 17–20), including for the Ombudsperson"[435]. The UN Special Rapporteur's conclusion confirms the findings of this thesis: although inter-judicial coordination is responsible for the reforms that were implemented on UNSC policymaking in the field of counterterrorism (hence confirming the creation of the norm stating that counterterrorism policies are conditional to the respect of the minimum core content of human fundamental rights), the reforms stopped, and the encroachment of international human rights remained.

The analysis performed in the previous Sections of this Chapter reveal that, despite the fact that some courts (like the CJEU) stood by their demands, the standstill of the reforms is due to the erosion of the critical mass of courts upholding the centrality of human fundamental rights as a common approach and the loss of the threat to the efficacy of counterterrorism policies that disregard human fundamental rights. Accordingly, the assimilation between fundamental rights (belonging to domestic systems shaped by the rule of law) and international human rights, in terms of content and structural positioning, only went as far as the last consolidated version of the norm born from inter-judicial

[433] Ibid., para. 20, pg. 10.
[434] Idem.
[435] Idem.

coordination. Hence, the de-fragmentation of the global order, in terms of the reduction of inter-systemic antinomies and the creation of hierarchical relations across systems and regulative levels, was only partial in the present case.

Everything mentioned above confirms the IR and legal theories presented in this thesis on inter-judicial coordination: inter-judicial coordination will lead to the constraining of IPAs' policymaking and the de-fragmentation of the global order as long as a critical mass of national courts embrace the common approach supporting the judicial trend. However, the erosion of such critical mass will paralyze or even erase the evolution of the emerging norm. Furthermore, the constitutionalizing effects of inter-judicial coordination are subject to the same condition.

-- Chapter V: Normative Chapter --

As explained in the Introduction and in the opening Sections of the Theory Chapter, the governmental instrumentalization of international legal fragmentation has led to the over-expansion of the executive discretion which, in turn, erodes the constitutional features of the domestic rule of law. This scenario is especially damaging to the domestic fundamental rights that lose the domestic institutional structure upholding their constitutional character. This erosion arises from the entrenched relationship between the domestic and international regulative levels and the fact that the weight of international human rights within a fragmented international legal system does not match that of domestic fundamental rights within rule-of-law-based national systems. Using as an example my analysis of the post-9/11 counterterrorism policies, domestic fundamental rights could hardly resist the pressure created by the prevalence of international policies concerning security[1].

Hence, the Introduction of this thesis suggested that vesting international human rights with the constitutional character that domestic fundamental rights enjoy within the national sphere would be an effective strategy to not only advance the international rule of law, but also to protect the domestic rule of law. In this sense, this thesis claims that inter-judicial coordination can advance the constitutionalizing of the global order if underpinned by domestic constitutional rules. I define the constitutionalizing process of the global order not only as the progressive process by which certain international rules acquire a constitutional character (Milewicz, 2020), but also as the progressive process by which those international constitutional rules forge international constitutional norms.

5.1. Inter-judicial coordination as the institutional structure of global constitutionalism.

While the first generation of global constitutionalists focused on identifying the international rules vested with a constitutional character (Verdross, 1966), the

[1] This is a very simplified account of the lenient approaches described in the Empirical Chapter.

contemporary literature has enlarged Global Constitutionalism's ontology in the understanding that "a global constitutional order is one that spells out relationships of authority among political institutions, how those institutions are to be controlled, and the fundamental rights of individuals vis-à-vis those public authorities" (Simmons, 2013, p. 364).

Global Constitutionalism's literature has developed two approaches to the task of identifying international constitutional rules. The first approach focuses on the procedures and process of constitutionalizing itself, trying to figure out the formal requirements of international constitutional rules (Trachtman, 2006; Schwöbel, 2010). The second approach relies on the values embedded in modern constitutionalism democracies in order to identify international constitutional rules (Gardbaum, 2008; Wiener, Lang, Tully, Maduro, & Kumm, 2012; Milewicz, 2020). Although they rely on different criteria, both strands of literature enquire about the nature of international constitutional rules and try to identify the normative structure of global constitutionalism. Hence, modern Global Constitutionalism explores the political consequences (norms) of the alleged existence of constitutional rules and their connection to an institutional structure supporting them.

In this sense, this work explores, not only the substantial structure of global constitutionalism (the constitutional rules and norms of the global order), but also its institutional structure: the institutions that uphold the international constitutional character of certain rules and norms. At the end of the day, institutional structures are paramount in order to establish constitutional rules' material superiority within the system (domestic or international), by ensuring the consistency of the rest of the rules with those that are superior within the system. Judicial review is the institution charged with this task within domestic constitutional orders. Given the synergies identified by Global Constitutionalism's literature between the domestic, regional and international orders (Stone Sweet, 2013) it is only normal that scholars have reached the conclusion that global constitutionalism also relies on "a mode of constitutional review to protect those rights" (Stone Sweet, 2012, p. 816; Stone Sweet & Palmer, 2017, p. 394).

In this regard, international courts and quasi-judicial bodies have been identified as belonging to such institutional structure capable of upholding international constitutional rights through judicial review (de Wet, 2009; Petersmann, 2016; Sandholtz, 2021).

However, as explained before, the capacity of international courts, both as judicial entities and as IPAs, is limited without the collaboration of national courts. My claim, in this regard, is that national courts are an indispensable piece of the institutional structure that can uphold international constitutional rules and inter-judicial coordination is the gear assembly that will provide them with the IPAs' capacity that they need.

Due to the challenges of creating a centralized enforcement mechanism for international constitutional values, scholars have long acknowledged that "[a]t the current stage of development of the international constitutional order, the international value system has to be enforced within a variety of institutional structures, given the absence of a binding, centralised international judiciary" (de Wet, 2009, ps. 296, 297).

I posit that inter-judicial coordination fulfils the ideal of a de-centralized judicial enforcement mechanism that works as the institutional structure upholding, not only the constitutionalizing process of certain values at the international level, but also from a global point of view. Due to the role of consubstantiality as both the supporting element of inter-judicial coordination and the causal mechanism leading to international legal de-fragmentation, the values that are constitutionalized within the international legal system will resemble the content and features of those domestic constitutional values from which they get their constitutional value, which amounts to a global constitutionalizing process from a legal perspective.

Moreover, in this thesis, inter-judicial coordination is conceptualized as a type of formal judicial dialogue and theorized as a process of norm-emergence that relies on the collective embrace of a common approach by a critical mass of norm-entrepreneurs. Hence, the examination of inter-judicial coordination's capacity to constitutionalize the global order requires an inquiry about, not only international rules' acquisition of constitutional character within the international legal system, but also about the creation of constitutional political norms within the global order. This thesis posits that inter-judicial coordination's capacity to forge global norms is directly proportional to its capacity to constitutionalize international legal rules.

All in all, this work contributes to the debate on constitutional pluralism (Walker, 2002; Cohen J. L., 2008; Cohen H., 2012) that views authority as distributed horizontally among

different constitutional actors, moves away from the dominant state-centric account and brings together the legal and IR perspectives of Global Constitutionalism.

5.2. Inter-judicial coordination as a constitutionalizing process for international legal rules.

Constitutional rules are materially superior rules that set the limits of the legality and legitimacy of the legal system: hence, constitutional rules are materially superior to the rest and no precepts contradicting them can belong to the system. In this sense, the fragmentation of the international legal order hampers the constitutionalizing process of the international order since it prevents the existence of a normative hierarchy within the system. Moreover, the fragmentation of the international legal system also has an impact on the material superiority of constitutional rules within domestic systems, due to the linkages between both legal levels.

However, de-fragmenting the international order does not necessarily lead to its constitutionalizing unless some of the norms acquire a constitutional character in the newly established hierarchy within the system. Thus, while the de-fragmentation of the international order does not always unravel a constitutionalizing process, the emergence of constitutional rules in the international system always implies its de-fragmentation. In fact, the constitutionalizing of international rules is the most advanced form of de-fragmentation, since it pushes the establishment of a normative hierarchy to the point of identifying the rules serving as keystones for the legal system. The cross-systemic transference of elements that lies at the heart of the de-fragmentation created by inter-judicial coordination poses the question of whether inter-judicial coordination is capable of constitutionalizing the global order as well.

Since there is not such a thing as a formal global constitution containing the constitutional rules of the global legal order, this thesis aims at moving beyond the traditional understanding of constitutional rule inherited from the domestic constitutional order that roots its hierarchical superiority to the formality of its enactment. Hence, beyond the over-formalistic notion of belonging to a national constitution, the main features of constitutional rules are the following:

- Constitutional rules can be *primary rules* (sanctioning rights and obligations) or *secondary rules of adjudication* or *change* (this is, rules adjudicating powers or establishing the meta-rules to change the system). Hart's *secondary rule of recognition* is excluded because it is not a legal rule but the social criterion to define the legal character of a rule[2] (Hart, 2015).
- Regardless of its taxonomy, a constitutional rule can be described as belonging to what Kelsen would define as the system's *Grundnorm* (Kelsen, 2017): the superior rules governing the whole system. The legitimacy of any other rule within the system depends on its compliance with the Grundnorm and inconsistent rules will be expelled from the system.
- Hence, Kelsen's conception of the legal system is a sort of hierarchical pyramid in which the legitimacy of every single rule cascades from the Grundnorm at the cuspid of the pyramid down to the rest of the system.
- Grundnorm's material superiority to the rest of the rules of the legal system is usually accompanied by some sort of formal superiority in terms of its enactment and special procedures to be modified. However, this formal superiority is not a constituent requirement of the Grundnorm, but rather a consequence of it.
- The main weakness of Kelsen's theory about the Grundnorm is the lack of explanation for the legitimacy of the Grundnorm itself since, according to his own theory, the legitimacy of any rule within the system depends on its consistency with its superior, and there is no superior rule to the Grundnorm. Without challenging Kelsen's structural description of the system, Hart provided an answer to fill this gap: the ultimate source of legitimacy of the legal system, including its Grundnorm, is social acceptance. This is what Hart labels as the rule of recognition, this is the ultimate criterion to distinguish legal rules from non-legal rules and legitimize the legal bound produced by them.

Following this definition, international constitutional rules are those primary and secondary rules of adjudication or change that become materially superior to the rest. Their material superiority turns them into the key to the legality and legitimacy of the

[2] The rule of recognition is Hart's response to Kelsen's fiction concerning the source of legitimacy of the Grundnorm.

other rules within the system. In other words: constitutional rules cannot be contravened by the other rules of the legal system. Both the legitimacy and material superiority of international constitutional rules come from the acceptance of the members of the community. This is to say that the constitutional rules of the legal system must be identified by the rule of recognition of the system, and the rule of recognition of the system entails the community's acceptance of such rules as the vault keystones of the system.

Hence, although the current fragmentation of the legal international order does not provide a clear hierarchy of rules, the lack of formal superiority of such rules does not hinder their constitutional character. As said before, constitutional rules' formal features are not a requirement but rather a consequence of their material superiority within domestic legal systems. Thus, there is no reason to require such formality as a constituent element at the international level either: a rule will be constitutional as long as it is validated as materially superior by the members of the international community, regardless of the lack of formal hierarchy.

In other words, outside the rigid parameters of a well-structured domestic system, the constitutional character of one rule cannot be attributed in a single formal act. Instead, the constitutionalizing process of the international order can be defined as the progressive process by which certain international rules acquire a constitutional character (Milewicz, 2020). Moreover, such constitutionalizing process does not establish a formal hierarchy based on the enactment of the rule as superior, but a material hierarchy based on the superiority of its content.

Consequently, more than the specific form of the rules, what constitutionalize them is the states' practice and behaviour, as the members of the international legal community validating them as the top-ranked rules of the system from a material point of view. Hence, in formal terms, constitutional international rules can adopt a multiplicity of shapes: statutory rules established in treaties, international legal custom, the constitutional character of pre-existing statutory rules can be conferred by international custom, and pre-existing international custom may become constitutional when captured in a treaty, for instance.

All of the above options are suitable vessels for international constitutional rules, since the key factor is not the rules' form but states' validation of the constitutional character. However, precisely because of the importance of states' behaviour in the constitutionalizing of the legal international order, international custom is a remarkable source of international constitutional rules. This is not to say that any international custom qualifies as a constitutional rule, but rather that international custom constitutionalizes rules when the opinio iuris and practice of states validate them as materially superior to the rest.

It could be said that, to the extent that coordinated national and international courts can create international custom, inter-judicial coordination is a suitable venue to constitutionalize the international order. However, taking into account the aforementioned considerations concerning the difficulties to assess the creation of an international legal custom[3], this thesis also examines this question under the lens of IR theory on norm-emergence. In this sense, the standard coined through inter-judicial coordination must reveal the constitutional character of the common rules underpinning it and the threat connected to the lack of compliance must be proportional to such constitutional character: contravening policies must be deemed void. This effect comes from the transference of constitutional character from the inward-looking version of a common rule to its outward-looking version.

My analysis concerning inter-judicial coordination's contribution to the development of environmental regulation can also be illustrative in this regard. It has been already established in the previous Chapters how inter-judicial coordination can lead to the de-fragmentation of the international order: the adoption of a common strategic approach leads courts to harmonize the national and international content and structure of common rules. This harmonization entailed the transference of elements between systems in which courts downloaded principles of international law into the national system and, in exchange, vested their enforcement power upon them. Moreover, there is one more element that was transferred, in this case, from the national level to the international one: the constitutional character of the domestic rules.

[3] See Subsection 3.4.1. of the Theory Chapter for further reflection on this topic.

The right to life is an undeniable constitutional rule within the domestic legal system of most states. To the extent that the right to a clean environment is accepted within the natural content of the right to life, the constitutional character of the latter extends to the former. Hence, it can be understood that this constitutional value was transferred to the international right to a healthy environment: the coordinated courts expressly recognised such character when deemed the 1972 Stockholm Declaration to be the "Magna Carta of our environment". Thus, whereas all kinds of inter-judicial coordination lead to the de-fragmentation of the global order (provided the nascent standard is embraced by a critical mass of courts), its constitutionalizing process requires the coordination to work as an uploading mechanism transferring the constitutional character of the inward-looking version of the common rule to its corresponding outward-looking version.

Therefore, the mechanism leading inter-judicial coordination to the de-fragmentation of the global order and to its constitutionalizing process is the same: the consubstantial nature of common rules that allows for the transference of features across systems and regulative levels. The difference lies in the character of the common rules and, consequently, in the pre-conditions for the inter-judicial coordination (see *Figure 8*).

I posit that inter-judicial coordination must involve common rules with a constitutional character within the domestic order (this is inward-looking common rules) in order to lead to the constitutionalizing of the global order in addition to its de-fragmentation (see *Figure 9*). This is the reason why inter-judicial coordination concerning common rules such as legal hermeneutical criteria (which are consubstantial according to Tzanakopoulos (Tzanakopoulos, 2016)) could lead to the de-fragmentation but not to the constitutionalizing process of the international order, for instance. However, inter-judicial coordination concerning fundamental rights (which are domestic constitutional rules and the inward-looking form of international human rights) will advance the constitutionalizing process of the international order provided a critical mass of courts engages in the coordination and applies the same approach to their constitutional common rules.

Figure 8 – Pre-conditions for the constitutionalizing of the global order through inter-judicial coordination

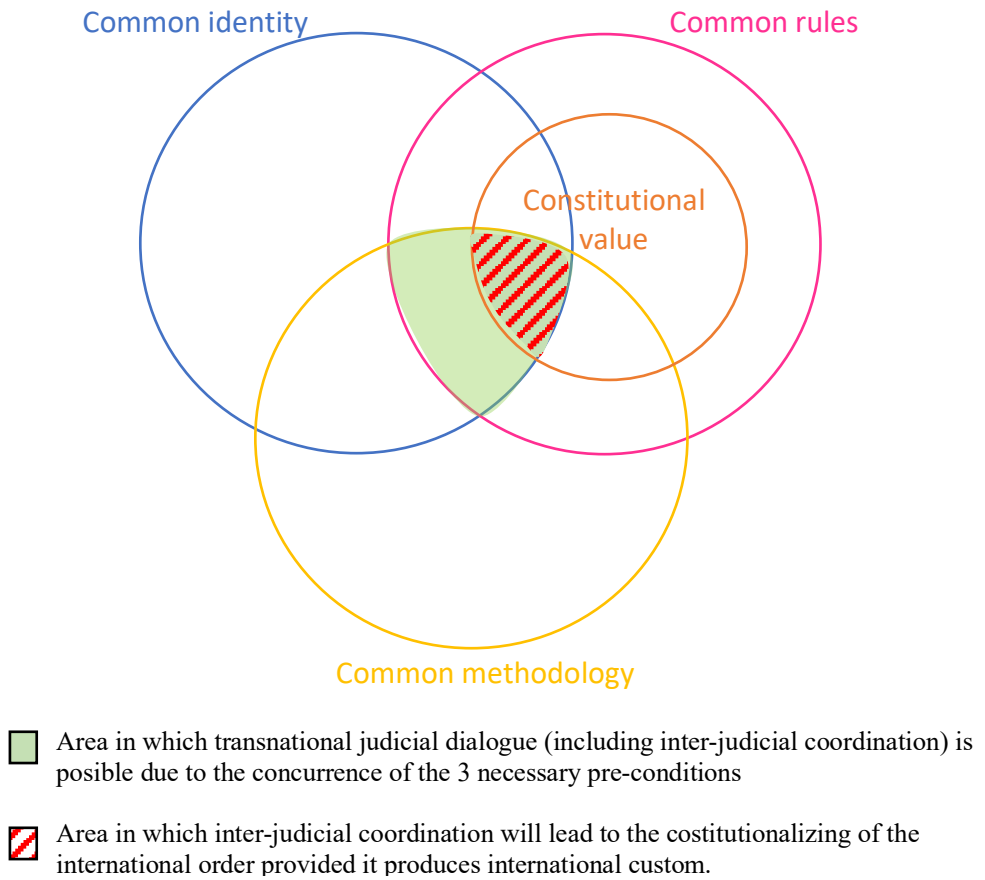
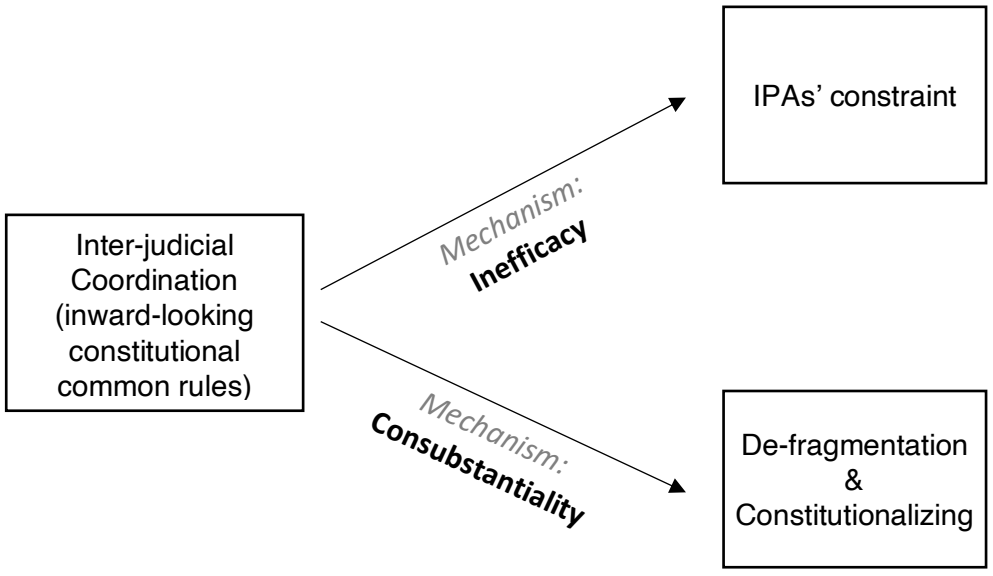


Figure 9 – Hypothesized Double Causal Chain from Inter-judicial Coordination to the Constraint of International Political Actors and the De-fragmentation & Constitutionalizing of the Global Order



All things considered, inter-judicial coordination involving constitutional common rules and working as an uploading mechanism becomes a *constitutional trap* as defined in Mileswicz's work (Milewicz, 2020, p. 182): in this instance, the coordinated courts vest with constitutional value an international provision that states never intended to have enforced upon them. To the extent that the coining of the new standard requires the endorsement of a cumulative mass of courts, the constitutionalizing effects of inter-judicial coordination can also be considered as progressive. Far from taking place overnight, inter-judicial coordination's consequences are slowly forged as the result of a progressive and self-reinforcing process of norm-emergence, de-fragmentation and, if applicable, constitutionalizing.

5.3. Inter-judicial coordination as a constitutionalizing process for emerging political norms.

Since this thesis theorises inter-judicial coordination as a process of norm emergence, its constitutionalizing effects will produce, not only constitutional rules within the international legal system, but also constitutional norms in relation to the global order. In fact, these two effects are interconnected, and it is inter-judicial coordination's capacity to constitutionalize international rules that will also forge global constitutional norms, because the emerging norms from inter-judicial coordination are the result of the prescriptive interpretation provided by courts in relation to legal rules.

Hence, the exploration of inter-judicial coordination's full potential as a constitutionalizing mechanism demands an inquire about, not only the international rules that become constitutional within the international legal system, but also about those norms of political behaviour that become constitutional from a global perspective. Borrowing Reus-Smit's definition of constitutional structures, this work understands constitutional norms as "the metavalues that define units of political authority and the nature of rightful political action" (Reus-Smit, 2017, p. 876). According to Reus-Smit, these metavalues are the deep "structure [of] international societies, and the mechanisms by which these constitute basic institutional practices" (Reus-Smit, 1997, p. 564).

In other words, constitutional norms are those values that define the political power of international actors (like states) based on the appropriate political actions connected to them. Hence, constitutional norms should remain as stable markers of political behaviour beyond cultural differences and historical periods. In this regard, Reus-Smit identifies "three deep constitutive values: a shared belief about the moral purpose of centralized political organization, an organizing principle of sovereignty, and a norm of pure procedural justice" (Reus-Smit, 1997, p. 556). These are the three underlying metavalues of the international society that underpin the global political order and, as such, they are its constitutional norms.

This thesis posits that inter-judicial coordination has the potential to incardinate values like human fundamental rights within the fabric of one of the three constitutional structures identified by Reus-Smit: the norm of pure procedural justice. According to Reus-Smit, "[n]orms of pure procedural justice specify the correct procedures that 'legitimate' or 'good' states employ collectively to formulate basic rules of inter-state conduct. These norms do not prescribe substantive principles of international justice, they simply dictate 'a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, providing the procedure has been properly followed'''(Reus-Smit, 1997, p. 567, quoting Rawls, 1972, p. 86).

Although Reus-Smit warns the reader that norms of pure procedural justice do not naturally include substantive rules like international human rights, in the field of procedural justice the distinction between substantial and procedural rules becomes blurrier than Reus-Smit's taxonomy would admit: procedural safeguards are basic requirements of the overall human fundamental right to a fair justice. Moreover, the rightful limitation of other human fundamental rights relies on the fulfilment of such procedural requirements. Hence, human fundamental rights as a regime require one specific form of procedural justice that is embedded within the right to a fair trial.

Summing up, this thesis agrees with Reus-Smit's conclusion that human fundamental rights do not naturally belong to the constitutional structure of the global order, but this thesis posits that they can be promoted, through inter-judicial coordination as a part of the rightful norm of procedural justice to legitimate IPA's policymaking. In other words, it is possible to live in a global order in which the norm of pure procedural justice remains

oblivious to the procedural requirements of the human fundamental right to fair justice. However, the content of the norm of pure procedural justice can change and inter-judicial coordination could, potentially, shape it in the image and likeliness of the procedural requirements of fair justice and, by extension, the protection of human fundamental rights.

Thus, from the perspective of legal theory, the key question related to global constitutionalism is to identify the rules that become materially superior as to holding the key to the legality and legitimacy of the legal system. Although there may be several ways to identify when inter-judicial coordination has established the material superiority of a rule, I posit that, in inter-judicial coordination, constitutional rules are those identified by courts as the last gatekeepers of the values that shape the identity of the legal system and, as such, the rules capable of nullifying other rules and expelling them from such system. Moreover, I also posit that inter-judicial coordination can accomplish this due to the harmonization and transference of content and features connected to the consubstantial nature of common rules.

However, a constructivist approach to states' international relations will enquire whether the constitutive metavalues that form the constitutional norms of the global order have been altered by inter-judicial coordination. In this sense, I posit that inter-judicial coordination has the capacity to insert consubstantial common rules with domestic constitutional value (like human fundamental rights) within the constitutional structures of the global order because, by forcing IPAs' policymaking to adjust to the content of legal rules that are deemed constitutional within the global legal order, such rules will identify the rightful standard of political behaviour connected to the norm of pure procedural justice.

Nevertheless, as explained and illustrated in the previous Chapters of this thesis, the political and legal effects of inter-judicial coordination are conditional to the existence of a critical mass of norm-entrepreneurs embracing the same common approach to common rules. Hence, the erosion of such critical mass will freeze or even erode the emerging norm, the behavioral change of IPAs will stall, and the de-fragmenting effects will paralyze. The Empirical Chapter of this thesis has exemplified this dynamic in relation to post-9/11 counterterrorism measures. Since the de-fragmentation experienced in the

analyzed field was only partial, it is reasonable to think that the constitutionalizing effects of inter-judicial coordination were also partial, both from the legal perspective concerning the constitutionalizing of international rules (international human rights, in this case) and from the constructivist perspective inquiring about the changes in the constitutional structures (or norms) of the global order.

Indeed, the courts that joined the inter-judicial coordination described in the case of post-9/11 counterterrorism policies and upheld the centrality of human fundamental rights as a common approach did present the legal rules concerning human fundamental rights as the ultimate safeguard of the policies' lawfulness and, hence, as constitutional. As explained before, the key factor to the constitutionalizing process of international rules is not the rules' form but states' validation of the constitutional character and, by expelling those rules and policies that contravened human fundamental rights (whether in their inward-looking domestic version or their outward-looking international version), the courts involved in the inter-judicial coordination stated their constitutional character.

However, the erosion of the critical mass of courts involved in the inter-judicial coordination and the freezing of the resulting norm casts a shadow on the real level of constitutionalizing of the rules enshrining human fundamental rights. The most important stain on the constitutional value of human fundamental rights comes from the domestic realm: the fact that certain governments were capable of reforming their domestic legal system in order to exclude counterterrorism policies from the judicial protection of fundamental rights proves their constitutional weakness. As previously said, constitutional rules are inalienable and hence, non-derogable. Thus, the domestic derogation of fundamental rights within some domestic legal systems hampered the constitutionalizing of international human rights in overall, despite the efforts of the courts that relied on international human rights to portray them as constitutional.

In this sense, the national courts that presented international human rights as domestic constitutional rules did succeed in their endeavor for such national courts are the ultimate enforcers of international rules within the domestic order. However, the domestic constitutionalizing of international human rights does not necessarily amount to their constitutionalizing within the international legal order, and such international constitutionalizing process stumbled upon two interrelated obstacles. First, since the legal

effects of inter-judicial coordination are bound to the consubstantial nature of the concerned common rules and the transference of features between their inward and outward looking versions, it is unlikely that international human rights could acquire the constitutional character of domestic fundamental rights when such character is doubtful in some of the concerned jurisdictions.

Secondly, it is the weakness of domestic constitutional fundamental rights that partially allowed for the erosion of the critical mass of national courts that could have eventually constitutionalized human fundamental rights within the global order. However, as explained before, since the coalition of courts involved in inter-judicial coordination managed to foster the implementation of some reforms in the international and domestic policymaking of IPAs in the field of counterterrorism measures, and such reforms were supported by the centrality of human fundamental rights, inter-judicial coordination was not completely fruitless in terms of the constitutionalizing process of the global order: indeed, human fundamental rights increased their centrality stemming from courts' shift to a material hierarchy as the organizing principle of both the domestic and international systems.

Hence, in the present case, inter-judicial coordination partially de-fragmented the global order and advanced its constitutionalizing process. Accordingly, the norm born from the inter-judicial coordination in this field did not fully become a constitutional structure of the global order. Such norm did prescribe a measure of pure procedural justice that is connected to the respect of human fundamental rights and, in particular, to the human fundamental right to a fair trial and due process. However, the involution of the inter-judicial coordination, and the resulting paralysis of the consolidation and spreading of the norm, hampered its constitutionalizing process as a constitutional structure as well.

Courts' most vehement reasonings in defense of the constitutional nature of human fundamental rights frequently connected such character to the political and legal identity provided by the rule of law. In overall, the judicial upholding of the centrality of human fundamental rights and the corresponding governmental abidance by such standard were presented as the appropriated norm of behavior within a rule of law-based order. Hence, considering that norms of pure procedural justice are one of the three metavalues that define the political authority of IPAs and their appropriated political action, I conclude

that the norm conditioning counterterrorism policies to the respect of human fundamental rights can be seen as a constitutional structure for IPAs whose identity is shaped by the rule of law within the global order, albeit not a constitutional structure for all IPAs and the overall global order at this point. However, all things considered, inter-judicial coordination has indeed proven its potential to advance the constitutionalizing process of the global order, even if the effects were only partial in this case.

-- Conclusion --

The overarching goal of this thesis is to explore the collective power of courts as IPAs in general and, in particular, to chart national courts' potential in this capacity. In this sense, this thesis has focused on courts' capacity to create systemic change and constrain other IPAs through such systemic transformation. Although this thesis has emphasized the often-overlooked role of national courts as IPAs, it has highlighted that the systemic power of both national and international courts is better deployed in a collective manner. More specifically, this thesis has conceptualized and theorized such collective judicial action as inter-judicial coordination.

The object of this thesis springs from the realization that, in the last decades, national and international courts have become an unexpected retaining wall for national governments' international agendas. Moreover, other IPAs that were traditionally resistant to the effects of judicial review seemed to be affected as well. While international courts' potential to be international political actors has been traditionally acknowledged, national courts have shown a newly acquired leverage by collectively contradicting their governments' policies, even in areas traditionally reserved to the executive action and precluded from judicial review (such as international security), and such power can reshape the international order indeed.

In this regard, my thesis proves that courts' increased capacity as international political actors comes from inter-judicial coordination: a phenomenon in which courts from independent jurisdictions uphold a common stance by applying the same strategic approach to common rules. In short, my argument is that, through inter-judicial coordination, national courts become international norm-entrepreneurs that create behavioural change in other international political actors and, eventually, advance the rule of law by de-fragmenting the global legal order and providing a sort of decentralized system of checks and balances.

My work draws from the vague idea of judicial coordination that had been sketched by the pre-existing IR, legal and Global Constitutionalism's literature, as explained throughout this thesis. In this sense, after a thorough examination of such literature, this

thesis has tackled, in the first place, the pending task of conceptualizing the phenomenon within the broad field of judicial dialogue. Hence, this thesis provides the aforementioned strands of literature with a reliable definition to distinguish inter-judicial coordination from neighbouring phenomena connected to judicial dialogue.

In this regard, inter-judicial coordination is defined as a specific kind of formal judicial dialogue (explicit or non-explicit) that can be horizontal, vertical or mixed vertical-horizontal. Inter-judicial coordination shares the same institutional and legal pre-conditions (common identity, common methodology and common rules), actors (non-related courts) and tools (comparative constitutional law and international law) of all types of transjudicial communications. However, inter-judicial coordination is singled out by the jurisprudential convergence that it requires: the application of a common approach to the concerned common rules. According to this thesis, common rules are those legal rules that share a common material content despite formally belonging to different legal systems or even to different regulative levels. Hence, the consubstantiality of common rules allows courts to absorb approaches coined by extraneous courts.

The political and legal effects of collective judicial activism have also been suggested by the pre-existing legal literature in relation to courts' interpretative function. However, the different accounts created around the figure of international customary law have not been able to provide neither an operational description of the creative power of courts nor a comprehensive theory explaining the causal mechanisms behind their political and legal systemic effects. This thesis has filled this doctrinal gap with the two theories presented in relation to inter-judicial coordination's political and legal effects.

To begin with, my thesis relies on IR theories on norm-emergence and norm-contestation in order to model the construction of the inter-judicial coordination. Since inter-judicial coordination is a qualified type of judicial dialogue that relies on legal rules, such dialogue will lead to the emergence of a socio-political norm if courts coordinate their legal approach to the topic, for legal rules convey the desirable standard of behavior within the social group of reference. Hence, inter-judicial coordination can be described as a non-tiered process of norm-emergence in which a critical mass of courts act as norm-entrepreneurs by embracing a common approach to the common rules they dialogue about.

Courts' rejection of certain policies sends a clear message across the political arena: those policies that do not conform with the social standard conveyed within the legal system as interpreted under their coordinated approach will be ineffective. Hence, other IPAs will adjust their policymaking to the nascent standard in order to avoid such threat. However, as the norm becomes a frequent standard among courts, even those political actors that are not under the direct review of the coordinated courts will fear the diffusion of the standard provided such common approach is embraced by a critical mass of courts.

Therefore, the creation of a plausible threat to the effectiveness of IPAs' policies is the key element to explain IPAs' behavioural change: it is the fear of potentially suffering the consequences of disregarding the emerging standard that will motivate IPAs to change their behaviour as a preventive strategy to protect the effectiveness of their policies. This fear might develop into an intersubjective belief concerning the appropriateness of the standard but, in any case, the threat of inefficacy must be plausible.

Since inter-judicial coordination is a bifurcated process of norm-emergence that requires both courts' adoption of the common approach and IPAs' abidance by the resulting norm, the creation of the threat of inefficacy strongly depends on the enforcement power of national courts in order to solidify the norm. Hence, although international courts can also join the inter-judicial coordination, national courts are the necessary components of the critical mass of norm-entrepreneurs. In fact, the inter-judicial coordination of international courts alone will not result in the emergence of a norm, but national courts' coordination can give birth to a norm without the cooperation of international courts.

This is not to say that international courts are irrelevant to the process of norm-emergence that takes place in inter-judicial coordination. Indeed, international courts can have a strong impact in the forging of the norm: as norm-disablers, their rejection of a competing norm will halt its diffusion and expel the underlying legal interpretation from the catalogue of available approaches available to national courts in the assessment of the policies under review. Hence, international courts have a non-indispensable but relevant role because they can funnel the emergence of the norm if involved in the inter-judicial coordination.

However, international courts will not be as successful in terms of promoting specific versions of the political norm. This is a role reserved to the most influential domestic

courts whose jurisprudential constructions are frequently observed by other domestic courts within their area of influence. Hence, influential domestic courts can be described as norm-enablers that foster the coordination and promote their specific interpretation of the common approach among its followers. The judicial resolutions of norm-enablers are likely to create a tipping point in relation to the evolution of the norm within their area of influence. Hence, the cascade effects unleashed by norm-entrepreneurs are usually partial in relation to the overall inter-judicial coordination, for they only affect their area of influence. This explains the fact that several partial cascades can overlap within this non-tiered process of norm-emergence.

Just like in other processes of norm-emergence, the increase in the rate of adhesion to the new standard creates a self-reenforcing feedback loop that builds an exponential pressure for other courts and IPAs to embrace the nascent norm. In a tiered model of norm-emergence, the tipping point will unchain the reproduction of a consolidated norm throughout the cascade stage. However, since the norm-emergence process of inter-judicial coordination can have several tipping points and overlapping partial cascades of reproduction, different versions of the norm might solidify in different moments in time. While all of the coordinated courts embrace the same strategic approach in essence, different groups of norm-entrepreneurs might advocate for different versions of the same norm based on different nuances connected to the common approach.

Hence, inter-judicial coordination is an open-ended process of norm-emergence in which the increase of coordinated norm-entrepreneurs will strengthen and deepen the norm through successive reviews. However, as explained in the Theory Chapter and illustrated in the Empirical Chapter of this thesis, this evolving dynamic will end if the critical mass of coordinated courts is eroded, which will provide a window of opportunity for the emergence of an alternative norm. Hence, the legal innovations connected to the consolidated version of the norm born from inter-judicial coordination will subsist unless a substitute norm instils their legal reform. As proven in the Empirical Chapter, the behavioural change of the IPAs constricted by the emerging norm will only go as far as necessary to satisfy the consolidated version of the norm.

Thus, the erosion of the critical mass of courts embracing the common approach will, at best, freeze the evolution of the emerging norm and dissolve the social pressure fuelling further behavioural adjustments for IPAs. At worst, the political changes created by inter-

judicial coordination will involute. Consequently, the legal effects of inter-judicial coordination are subject to the same condition: the non-erosion of the critical mass of courts embracing the common approach.

From a legal perspective, this thesis posits that inter-judicial coordination can de-fragment the global legal order, hence changing the structural conditions for the international relations of states. This thesis examines the phenomenon of international legal de-fragmentation from a global perspective as not only the standardization of international law's meaning across countries and the creation of hierarchical relations among the rules of the international system, but also the coordination of the international and domestic legal systems in terms of content and order.

In this sense, while the inefficacy threat is the causal mechanism leading inter-judicial coordination to the constraint of IPAs' policymaking, the mechanism leading to the de-fragmentation of the global legal order is the consubstantial nature of the common rules. As explained before, inter-judicial coordination can provide such consistency since a mass of non-related courts upholds a common approach to the content and order of the legal systems of reference.

In fact, the de-fragmentation takes place even if the courts involved in the coordination rely on rules belonging to formally independent legal systems. The consubstantial nature of such common rules will allow for the transference of interpretations between legal systems and, hence, inter-judicial coordination will coordinate their content and structure. This is due to the fact that the consubstantial nature of common rules allows for the transference of features and content between the inward-looking and outward-looking versions of the same common rule. In other words, inter-judicial coordination as a phenomenon implies, not only the institutional coordination among non-related courts, but also the resulting systemic coordination among legal regimes.

Therefore, as explained in the Theory Chapter and exemplified in my analysis of the inter-judicial coordination concerning post-9/11 counterterrorism measures in the Empirical Chapter, inter-judicial coordination can be based on many combinations of common rules, although the transformations created in the fabric of the global legal order might be different. Depending on whether the common approach is applied to inward-looking common rules, outward-looking common rules, or to a combination of both, the inter-

judicial coordination will work as an uploading mechanism that internationalizes domestic rules, as a downloading mechanism domesticating international rules or as a mixed uploading & downloading mechanism that has both effects.

Thus, given a critical mass of coordinated national courts adopting the same approach to common rules, inter-judicial coordination will de-fragment the global order because it unravels the dysfunctionalities among the legal systems coexisting in the national and international regulative levels. Moreover, this thesis has also reflected on whether such de-fragmentation, as a structural change, can advance the constitutionalizing process of the global order.

This reflection starts with the assessment of the most suitable framework to evaluate the possible constitutionalizing process of the global order. In this regard, this thesis states that the constitutionalizing of international legal rules and the constitutionalizing of international political norms are different but interrelated endeavours. Hence, any enquire about the overall constitutionalizing process of the global order must answer both questions while considering the connections between the realms of legal theory and IR theory in this field.

From a legal theory perspective, the constitutionalizing of the global order implies the positioning of certain rules as the top-ranked legal values that hold the key to the legality and legitimacy of the legal system. Hence, rules colliding with them will be deemed unconstitutional and expelled from such system. I posit that inter-judicial coordination can vest rules with the material superiority that identifies constitutional rules due to the cross-systemic harmonization and transference of content and features that lies at the heart of the phenomenon.

From a legal perspective, the mechanism leading inter-judicial coordination to the de-fragmentation of the global order and to its constitutionalizing process is the same: the consubstantial nature of common rules that allows for the transference of features across systems and regulative levels. Hence, in order to foster the constitutionalizing of the global order, I posit that inter-judicial coordination must involve common rules with a constitutional character within the domestic order, so such constitutional character will be transferred to the corresponding outward-looking version of such common rules.

While the constitutionalizing of legal rules will always entail a process of legal de-fragmentation, de-fragmentation does not always amount to a constitutionalizing process. Hence, the constitutionalizing effects of inter-judicial coordination must be understood an extra-layer of the structural transformations produced by inter-judicial coordination in the legal tissue of the global order. Thus, the factor explaining the additional constitutionalizing effects of inter-judicial coordination is not a change in the causal mechanism but a difference in the pre-conditions for the inter-judicial coordination: the constitutional character of the inward-looking version of the common rules underpinning the inter-judicial coordination.

However, from an IR perspective, the constitutionalizing of the global order implies the emergence of political constitutional structures understood as the deep metavalues that structure international societies by identifying the nature of rightful political actions within them. In other words, constitutional structures or norms identify the confines of the political practices that define international societies. Hence, a constructivist approach to states' international relations will enquire whether the constitutive metavalues that form the constitutional norms of the global order have been altered by inter-judicial coordination.

I posit that inter-judicial coordination has the capacity to insert consubstantial common rules with domestic constitutional value (like human fundamental rights) within the constitutional structures of the global order, more specifically, within the norm of pure procedural justice. As explained before, because inter-judicial coordination can force IPAs' policymaking to observe the content of legal rules that are deemed constitutional within the global legal order, those rules will identify the rightful standard of political behaviour. Inter-judicial coordination could, hence, shape the norm of pure procedural justice as to including the procedural safeguards of due process. Consequently, due process requirements would become part of the constitutional structures defining the rightful political action which, by extension, would increase the protection of human fundamental rights.

Nevertheless, as explained and illustrated in the previous Chapters of this thesis, the political and legal effects of inter-judicial coordination are conditional to the existence of

a critical mass of norm-entrepreneurs embracing the same common approach to common rules.

As exemplified by my analysis of the inter-judicial coordination concerning the post-9/11 counterterrorism measures, the erosion of such critical mass will freeze or even erode the emerging norm, the behavioral change of IPAs will stall, and the de-fragmenting effects will paralyze. My empirical work revealed that, while inter-judicial coordination is responsible for the behavioral change of the concerned IPAs in the field of counterterrorism measures, the de-fragmentation of the global order and the constitutionalizing of human fundamental rights were only partial.

However, this empirical analysis does confirm my theories and the potential of inter-judicial coordination to constrain IPAs and advance the de-fragmentation and constitutionalizing of the global order: inter-judicial coordination works as a process of norm-emergence that relies on the existence of a critical mass of courts acting as norm-entrepreneurs. Summing up, inter-judicial coordination has the potential to increase the ability of national and international courts as IPAs capable of creating systemic change and modifying the structural conditions of states' international relations.

In this regard, this work has contributed to answering the questions identified in the Introduction about courts' political profile in the global order: it has conceptualized judicial collective action as an institutional coordination that creates systemic coordination, it has identified the mechanisms in the creation of such inter-judicial coordination (the self-reinforcing feedback loop connected to the critical mass of courts), and it has identified the mechanisms explaining inter-judicial coordination's legal and political effects in relation to the global order (the threat of ineffectiveness and the consubstantiality of the common rules).

However, there is much more that could be researched in relation to inter-judicial coordination in order to complete the rather exploratory work developed in this thesis. In this regard, I have identified the following open lines of research:

- The Single Case Study developed in this thesis should be developed into a Comparative Cases Study to reinforce the external validity of my theory. Adding another positive case to the analysis would allow me to confirm my results. First,

an additional positive case would allow me to test whether my results can be replicated. In this sense, I believe that the incipient judicial activism concerning states' liability in relation to climate change poses an exceptional opportunity to trace the existence of inter-judicial coordination in a different field: in order to confirm my results concerning the creation of inter-judicial coordination I would have to identify the transference of a shared common approach among the courts reviewing these cases. Secondly, this additional case would allow me to explore alternative explanations behind the Dependent Variable (IPA's behavioral change) that were not present in the case of counterterrorism measures, like the existence of strong civil activism, for instance.

- This thesis has focused on conceptualizing inter-judicial coordination as a phenomenon, exploring the dynamics behind its creation and proving its potential effects. While this thesis has theorized and proved the nature and effects of inter-judicial coordination, it has not explored its causes. Hence, further research is needed in order to better understand courts' will to coordinate. It would be especially important to process-trace (through elite interviews) courts' motivation to coordinate in the inceptive stages of inter-judicial coordination when the nascent norm is at its weakest in order to pressure IPAs and other courts into compliance. However, examining courts' mindset at later stages of the coordination would also provide relevant information concerning the level of internalization of the norm and, hence, the strength of the intersubjective agreement supporting the norm.
- Furthermore, it might be worth exploring the relevance of informal judicial dialogue as an alternative or complementary mechanism of diffusion. In order to answer this question, the first step would be to identify the relevant fora for judicial dialogue in relation to the concerned policy fields.

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ANNEX 1: Tables of cases included in the dataset per countries.

Australia			
Dates	Description	Category	Full citation
18/3/07	Hicks	2	Hicks v Ruddock and ors, Decision on Application for Summary Judgment, Case No NSD2376 of 2006, [2007] FCA 299
25/2/10	Habib	2	Habib v Australia, Decision on Justiciability, [2010] FCAFC 12, [2010] 183 FCR 62, (2010) 265 ALR 50, (2010) 113 ALD 469, ILDC 1518 (AU 2010), 25th February 2010, Australia; Federal Court [FCA]; Full Court [FCAFC]
31/8/12	Santhirarajah	2	Santhirarajah v Attorney-General for the Commonwealth, Judicial review, [2012] FCA 940, ILDC 2141 (AU 2012)
Austria			
Dates	Description	Category	Full citation
30/9/08	AA	2	AA v Austria, Appeal judgment, 1 Ob 225/07f, ILDC 1619 (AT 2008), 30th September 2008, Austria; Supreme Court of Justice [OGH]
Argentina			
Dates	Description	Category	Full citation
10/5/05	Lariz Iriondo	2	Lariz Iriondo, Jesús María s/ solicitud de extradición, Office of the Public Prosecutor and Spain (joining) v Lariz Iriondo (Jesús María), Ordinary Appeal Judgment, L.845.XL, Vol 328
Bangladesh			
Dates	Description	Category	Full citation
13/9/15	Panna	2	Panna v Bangladesh, Writ Petition, Writ Petition No 7650 of 2012, ILDC 3190 (BD 2015), (2017) 37 BLD (HCD) 271, (2016) 4 CLR (HCD) 265
Belgium			

Dates	Description	Category	Full citation
11/2/05	Sayadi 2005	1	Tribunal de Première Instance de Bruxelles (quatrième section), Judgment of 11 February 2005
16/2/06	MICG 2006	1	Moroccan Islamic Combatant Group; Brussels Trib. corr. (54th Chamber bis), 16 February 2006
19/1/07	MICG 2007	1	Moroccan Islamic Combatant Group; Brussels Appeal Court (12th Chamber), 19 January 2007
CANADA			
Dates	Description	Category	Full Citation
8/5/01	Mahjoub I	1	Canada (Minister of Citizenship and Immigration) et al. v. Mahjoub, (2001) 212 F.T.R. 42 (TD)
11/1/02	Suresh	1	Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002 SCC 1
19/12/03	Almrei I	1	Almrei v. Canada (Attorney General) et al., [2003] O.T.C. 1104 (SC)
21/6/04	83.28	1	Application under s. 83.28 of the Criminal Code (Re), [2004] S.C.J. No. 40; Supreme Court of Canada
17/12/04	Mahjoub II	2	Mahjoub v. Canada (Minister of Citizenship and Immigration) et al., (2005) 261 F.T.R. 95 (FC)
8/2/05	Almrei II	1	Almrei v. Canada (Minister of Citizenship and Immigration), 2005 FCA 54; [2005] 3 F.C.R. 142
27/2/07	Charkaoui I	2	Charkaoui v. Canada (Citizenship and Immigration), [2007] 1 S.C.R. 350, 2007 SCC 9
12/4/07	Jaballah I	2	Jaballah v. Canada (Minister of Public Safety and Emergency Preparedness), [2007] F.C.J. No. 518

29/11/07	CCR 2007	2	Canadian Council for Refugees and ors v Canada, Decision on Judicial Review, 2007 CANLII 1262 (FC), ILDC 862 (CA 2007)
23/5/08	Khadr I	2	Khadr v. Canada (Minister of Justice), [2008] 2 S.C.R. 143, 2008 SCC 29
26/6/08	Charkaoui II	2	Charkaoui, Re , [2008] 2 S.C.R. 326; 376 N.R. 154
27/6/08	CCR 2008	2	Canada v. Canadian Council for Refugees and ors, Appeal Judgement, 2008 CANLII 22º (FCA), 74 Admin L R (4th) 79, ILDC 1228 (CA 2008)
26/1/09	Almrei III	2	Almrei, Re (2009), 342 F.T.R. 27 (FC)
29/1/09	Khadr II	2	Prime Minister and ors v Khadr (Omar Ahmed), Amnesty International (Canadian Section, English Branch) (intervening) and ors (intervening), Final appeal judgment, 2010 SCC 3
10/2/09	Almrei IV	2	Almrei, Re, (2009) 342 F.T.R. 1 (FC)
14/12/09	Almrei V	2	Almrei, Re, 2009 FC 1263;(2009), 355 F.T.R. 222 (FC)
26/2/10	Jaballah II	2	Jaballah, Re, 2010 FC 224; (2010), 363 F.T.R. 160 (FC)
9/6/10	Mahjoub V	2	Mahjoub, Re, (2010) 373 F.T.R. 36 (FC)
14/5/14	Harkat	2	Harkat, Re (2014), 458 N.R. 67 (SCC)
19/6/17	Mahjoub VI	2	Mahjoub v. Canada (Citizenship and Immigration), 2017 FCA 157
30/11/18	Vice Media	2	R v. Vice Media Canada, Inc. 2018 SCC53
Cyprus			
Dates	Description	Category	Full citation
7/11/05	294	2	Supreme Court Resolution on Αρ.294/2005, of 7 November 2005
Denmark			
Dates	Description	Category	Full citation
30/6/11	A Den	2	A v Danish Prosecution Service, Appeal judgment, S-3321-10
France			

Dates	Description	Category	Full citation
16/5/03	Irastorza Dorronsoro	2	Irastorza Dorronsoro, case no. 238/2003, 16 May 2003
3/11/04	W.H.A.	1	World Help Association of France v France, Judicial review, CE No 262626
4/1/05	Sassi	2	Sassi (Nizar) and ors, Cassation Appeal, Pourvoi No 03-84652, Bulletin Criminel 2005 No 1, ILDC 776 (FR 2005)
Germany			
Dates	Description	Category	Full citation
27/5/03	Turkish extradition I	2	Düsseldorf Court of Appeal (Oberlandesgericht), Judgement of 27 May 2003
28/8/03	Turkish extradition II	2	Cologne Administrative Court (Verwaltungsgericht), Judgement of 28 August 2003
5/11/03	Yemeni citizen extradition	1	Yemeni citizens extradition case, Anonymous, Individual constitutional complaint, 2 BvR 1506/03, BVerfGE 109, 13, NJW 2004, 141
18/7/05	Arrest Warrant	2	BVerfG, Order of the Second Senate of 18 July 2005 - 2 BvR 2236/04 – juris
15/2/06	Aviation Security Act	2	BVerfG, Judgement of the First Senate of 15 February 2006 – 1 BvR 357/05 -
27/3/07	TKP-ML	2	Higher Administrative Court for the State of North Rhine-Westphalia, Judgment of 27 March 2007 - 8 A 4728/05.A -, juris
1/3/08	Appeal	2	BVerfG, Beschluss vom 12. März 2008 – 2 BvR 378/05 –, juris
12/3/08	Asylum seeker	2	BVerfG, Granting Chamber Decision of 12 March 2008 - 2 BvR 378/05 -, juris
24/11/09	10C	2	BVerwG, judgment of 24 November 2009 - 10 C 24/08 -, BVerwGE 135, 252-272
24/4/13	Counter-terrorism Database	2	BVerfG, Judgment of the First Senate of 24 April 2013 - 1 BvR 1215/07 -

27/5/15	Yemeni citizen 2015	2	Yemini citizen living in Sana'a and ors v Federal Republic of Germany (represented by the Minister of Defence), First instance judgment, 3 K 5625/14, VG Köln, ZVR-Online Dok. Nr 20/2015
19/3/19	Yemeni citizen 2019	2	Prevention of the use of Ramstein Air Base for United States armed drone strikes in Yemen, Yemini citizen living in Sana'a and ors v Germany (represented by the Minister of Defence), Appeal, 4 A 1361/15
19/3/19	Somali citizen	1	Somali citizen living in Shabeellaha Hoose v Germany, Appeal, 4 A 1072/16
HKSAR			
Dates	Description	Category	Full citation
9/2/06	230	2	Leung Kwok Hung & Anor v HKSAR - [2006] HKCU 230; HCAL 107/2005
India			
Dates	Description	Category	Full citation
16/12/03	People's Union	2	People's Union for Civil Liberties & Anr. vs. Union of India; Writ Petition (civil) 389 of 2002, 16/12/2003. People's Union for Civil Liberties v. Union of India [2004] 1 LRI 1
Indonesia			
Dates	Description	Category	Full citation
22/7/04	Masykur	2	Indonesian Constitutional Court Decision No 013/PUU-I/2003
Ireland			
Dates	Description	Category	Full citation
13/12/05	Dubsky	1	Dubsky v Government of Ireland and ors, Judicial review, 2002 NO 571 JR, [2005] IEHC 442
18/6/14	Data Protection	2	Schrems v. Data Protection Commissioner, [2014] IEHC 310, [2014] 2 ILRM 441 (Irish High Court)
Italy			
Dates	Description	Category	Full citation

11/3/09	Abu Omar	1	Judgment No. 106 of 2009; Constitutional Court of Italy; March 11, 2009
Kenya			
Dates	Description	Category	Full citation
30/9/10	Suleiman	2	Suleiman (on behalf of Suleiman) v Commissioner of Police and ors, Decision on application for habeas corpus, Misc App 441 of 2010
30/6/14	Mohamed	1	Mohamed and ors v Cabinet Secretary and ors, Constitutional petition judgment, Petition 206 of 2011, [2014] eKLR
18/12/15	Refugee Consortium	2	Refugee Consortium of Kenya and NT (suing on behalf of DL (Minor) and 47 Others) v Attorney General and ors, Constitutional petition judgment, Petition No 382 of 2014, [2015] eKLR
Kyrgyzstan			
Dates	Description	Category	Full citation
14/9/15	Biometric Registration	2	Constitutional Review of part 1, sub-paragraph 2 of part 2 of Article 2, paragraph 3 of Article 3, parts 1, 2 of Article 4, parts 1, 2 of Article 5, parts 1, 3 of Article 6, Article 7 of the Law of the Kyrgyz Republic 'On Biometric Registration of the Citizens of the Kyrgyz Republic' made at the submission of citizen Toktakunov Nurbek Akbarovich and the Union of Legal Entities 'Association of non-governmental and non-commercial organizations' represented by Umetalieva Toktayym Jumakovna, Toktogunov and ors v Boljurova and ors, Decision, Decision no 11-p
29/3/17	Amendments	2	Constitutional Review of Article 6 of the Law of Kyrgyzstan 'On Amendments to Certain Legislative Acts in the Sphere of Combating Terrorism and Extremism' made at the

			submission of the Ombudsman of the Kyrgyzstan, Aralbaev v Yrysbekov and Turdugulov, Decision, Decision No 5-p
Latvia			
Dates	Description	Category	Full citation
28/5/09	Vegan	2	'Vegan' LLC v Parliament of Latvia, Request for constitutional review, Case no 2008-47-01, Latvian Herald, no 85 (4071)
Netherlands			
Dates	Description	Category	Full citation
6/2/04	Lawyers for Peace case	1	Association of Lawyers for Peace (Vereniging van Juristen voor de Vrede) and ors v Netherlands, Judgment on Appeal in Cassation, C02/217HR, LJN: AN8071, NJ 2004/329, 6th February 2004, Netherlands; Supreme Court [HR]
New Zealand			
Dates	Description	Category	Full citation
16/4/03	Refugee Council	1	Attorney-General v Refugee Council of New Zealand Inc and ors, Appeal judgment, [2003] 2 NZLR 577, (2003) 7 HRNZ 1
21/6/05	Zaoui	2	Attorney-General v Zaoui and Inspector-General of Intelligence and Security and Human Rights Commission (intervening), Appeal to Supreme Court, [2005] NZSC 38, (2006) 1 NZLR 289, (2005) 7 HRNZ 860
Pakistan			
Dates	Description	Category	Full citation
2/6/03	Saeed	2	Hafiz Muhammad Saeed and others v Government of the Punjab, Home Department and others (Writ Petition No 6208 of 2009)
Perú			
Dates	Description	Category	Full citation
15/12/06	Lima Bar Association	2	President of the Lima Bar Association and State Prosecutor General v Ministry of

			Defence, Original petition claiming the unconstitutionality of certain provisions of the Code of Military and Police Justice, Exp No 0012-2006-PI/TC
Poland			
Dates	Description	Category	Full citation
27/4/05	OTK ZU	2	OTK ZU (Jurisdiction of the Constitutional Tribunal. Official Collection) No 4/A/2005, item 42
30/9/08	Aviation Law	2	Aviation Law Case, Constitutional review, Case No K44/07, 30th September 2008
Russian Federation			
Dates	Description	Category	Full citation
14/2/13	Sevenko	2	EV Savenko and Deputies of the State Duma v Russian Federation, Constitutional proceedings, No 4-P, No 8 item 868, ILDC 2056 (RU 2013)
Switzerland			
Dates	Description	Category	Full citation
14/11/07	Nada 2007	1	Youssef Nada v State Secretariat for Economic Affairs and Federal Department of Economic Affairs, Administrative appeal judgment, Case no 1A 45/2007
18/12/07	Basmanny	2	Extradition Basmanny Russia, X v Swiss Department of Justice and Swiss Federal Criminal Court, Final appeal judgment, 1C 205/2007, BGE 134 IV 156
22/4/08	A SW.	1	A v State Secretariat for Economic Affairs and Federal Department of Economic Affairs, Administrative first instance judgment, No 1A48/2007
Turkey			
Dates	Description	Category	Full citation

22/2/07	Kadi T	1	Kadi v Prime Ministry and Ministry of Foreign Affairs of Turkey, Appeal Judgment, E 2006/2824, K 2007/115
UK			
Dates	Description	Category	Full citation
11/10/01	Rehman	1	Secretary of State For The Home Department v. Rehman (AP) [2001] UKHL 47
28/11/01	Othman 2001	2	The Queen on the Application of Othman v Secretary of State for Work and Pensions; CO/4539/2001; High Court of Justice Queen's Bench Division (The Administrative Court); Neutral Citation Number: [2001] EWHC Admin 1022, 2001 WL 1422967
6/11/02	Abbasi	1	R. (on the application of Abbasi (Feroz Ali) and Abbasi) v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department, Original application for judicial review, [2002] EWCA Civ 1598
13/11/03	Zakaev	2	Government of the Russian Federation v Zakaev (Akhmed), First instance, ILDC 259 (UK 2003)
16/12/04	Belmarsh I	2	A (FC) and Others (FC)(Appellants) v Secretary of State for the Home Department (Respondent) [2004] UKHL 56 [2005] 3 All ER 169, [2005] 2 AC 68
12/8/05	Al-Jedda 2005	1	R. (on the application of Al-Jedda) v Secretary of State for Defence, First instance judgment, Case No CO/3673/2005, [2005] EWHC 1809 (Admin), ILDC 202 (UK 2005), [2006] UKHRR 35, [2005] HRLR 39
8/12/05	Belmarsh II	2	A (FC) and Others (FC)(Appellants) v Secretary of State for the Home Department (Respondent) (2004) A and others

			(Appellants)(FC) and others v Secretary of State for the Home Department (Respondent) (Conjoined Appeals) [2005] UKHL 71 (No. 2)
29/3/06	Al-Jedda 2006	1	R and JUSTICE (intervening)(on the application of Hilal Abdul-Razzaq Ali Al-Jedda) v Secretary of State for Defence, Appeal Judgement, [2006] EWCA Civ 327, [2006] 3 WLR 954, [2006] UKHRR 855, [2007] QB 621 [2006] HRLR 27, ILDC 381 (UK 2006)
12/10/06	Al-Rawi	1	R. and Office of the United Nations High Commissioner for Refugees (intervening) (on the application of Al Rawi and ors) v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Home Affairs, Appeal decision, [2006] EWCA Civ 1279, ILDC 729 (UK 2006), [2008] QB 289, [2007] 2 WLR 1219, (2007) 2 LRC 499, [2006] All ER (D) 138 (Oct), [2006] HRLR 42, [2007] UKHRR 58, (2006) 103(41) LSG 33
30/11/06	Ahmat & Aswat	2	Babar Ahmad and Haroon Rashid Aswat (Appellants) v The Government Of The United States Of America (Respondent) [2006] EWHC 2927 (Admin)
13/6/07	Al-Skeini	2	R (Al-Skeini and others) v Secretary of State for Defense (The Redress Trust intervening) [2007] UKHL 26 [2007] 3 WLR 33
31/10/07	Control Orders	2	Secretary of State For the Home Department v MB and Secretary of State for the Home Department v AF [2007] UKHL 46
31/10/07	E	2	Secretary of State for the Home Department Respondent v. E and another (Appellant), [2007] UKHL 47

31/10/07	JJ case	2	Secretary of State for the Home Department (Appellant) v. JJ and others (FC) (Respondents), [2007] UKHL 45
12/12/07	Al-Jedda 2007	1	R (on the application of Al-Jedda) v Secretary of State for Defence, Appeal judgement, (2007) UKHL 58, (2008) 1 AC 332, [2008] 3 All ER 28, [2008] HRLR 13, [2008] UKHRR 244, ILDC 232 (UK 2007)
9/4/08	Othman 2008	2	Othman v Secretary of State for the Home Department [2008] EWCA Civ 290
10/4/08	Ahsan	2	R (Syed Talha Ahsan) and others v Government of the United States of America and Secretary of State for the Home Department [2008] EWHC 666 (Admin) Case No: C0/4771/2007
24/4/08	A, K, M, Q & G	2	A, K, M, Q & G v HM Treasury [2008] EWHC 869 (Admin)
30/4/08	M	2	R (on the application of M) v Her Majesty's Treasury, Decision on request for preliminary reference to the European Court of Justice, (2008) UKHL 26, ILDC 1539 (UK 2008), 30th April 2008, United Kingdom; House of Lords [UKHL]
20/6/08	Hamza	2	R (Abu Hamza) v. the Government of the United States of America and the Secretry of State for Hom Department of EWHC of 20 June 2008
10/7/08	Hay	2	Hay v HM Treasury, First Instance Judgment, Case No CO/1200/2009, [2009] EWHC 1677 (Admin), [2009] Lloyd's Rep FC 547, ILDC 1367 (UK 2009), 10th July 2009, United Kingdom; England and Wales; High Court [EWHC]; Queen's Bench Division [QBD]; Administrative Court
30/10/08	A and ors	2	A and ors v HM Treasury, Appeal judgment, Case No T1/2008/1080, [2008] EWCA Civ

			1187, [2009] 3 WLR 25, [2009] 2 All ER 747, [2009] Lloyd's Rep FC 14, [2009] ACD 16
21/1/09	Al-Saadoon	1	R (Al-Saadoon and Mufdhi) v Secretary of State [2009] EWCA Civ 7, [2008] No. C4/2008/3083
18/2/09	Algeria	2	RB (Algeria) (FC) and anor v Secretary of State for the Home Department, OO (Jordan) v Secretary of State for the Home Department, RB and U v Secretary of State for the Home Department, Appeal judgment, (2009) UKHL 10, ILDC 1250 (UK 2009)
10/6/09	AF Case	2	Secretary of State for the Home Department (Respondent) v AF (Appellant)(FC) and other (Appellant) and one other action [2009] UKHL 28
7/8/09	Bary	2	R (Bary) v Secretary of State for the Home Department [2009] WLR (D) 284 [QBD (Admin.)]
27/1/10	Ahmed I	2	Ahmed and ors v Her Majesty's Treasury, Appeal decision, [2010] UKSC 2, [2010] 2 AC 534, [2010] 2 WLR 378, [2010] UKHRR 204, [2010] 4 All ER 745, [2010] Lloyd's Rep FC 217, ILDC 1534 (UK 2010), 27th January 2010, United Kingdom; Supreme Court [UKSC]
4/2/10	Ahmed II	2	Her Majesty's Treasury (Respondent) v Mohammed Jabar Ahmed and others (FC) (Appellants) Her Majesty's Treasury (Respondent) v Mohammed al-Ghabra (FC) (Appellant) R (on the application of Hani El Sayed Sabaei Youssef) (Respondent) v Her Majesty's Treasury (Appellant) (No 2), HM Treasury v Ahmed and ors, Final judgment, (2010) UKSC 5, (2010) 2 AC 534, (2010) WLR 378, (2010) 4 All ER 829

23/3/11	Walumba Lumba	2	Walumba Lumba (previously referred to as Congo 1 and 2 (Appellant) v Secretary of State for the Home Department (Respondent) and Kadian Mighty (previously referred to as KM)(Jamaica)(Appellant) v Secretary of State for the Home Department (Respondent), on Appeal from 2010 EWCA Civ 111, SC, [2011] UKSC 12, 2011 WL 806813
21/10/12	Rahmatullah	2	Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Defence v Rahmatullah, Final appeal judgment, [2012] UKSC 48, ILDC 1947 (UK 2012), [2012] 3 WLR 1087, 31st October 2012, United Kingdom; Supreme Court [SC]
12/11/12	Othman 2012	2	Mohammed Othman (Abu Qatada) v Secretary of State for the Home Department; Appeal No: SC/15/2005; Special Immigration Appeals Commission; 2012 WL 4888783
27/3/13	Othman 2013	2	Omar Othman Aka Abu Qatada v Secretary of State for the Home Department; Case No: T2/2012/3138; Court of Appeal (Civil Division); [2013] EWCA Civ 277, 2013 WL 617866
19/1/16	Miranda	2	R (Miranda) v. Secretary of State for the Home Department [2016] EWCA Civ 6
17/1/17	Mohammed	2	Mohammed v Ministry of Defence, Appeal judgment, [2017] UKSC 2, [2017] 2 WLR 327, [2017] 3 All ER 215, [2017] HRLR 1, 43 BHCR 137, ILDC 2803 (UK 2017)
17/1/17	Belhay	2	Belhaj and Boudchar v Straw and ors, Appeal judgment, [2017] UKSC 3, [2017] AC 964, [2017] 2 WLR 456, [2017] 3 All ER

			337, [2017] HRLR 4, [2017] 1 WLUK 198, ILDC 2974 (UK 2017), 17th January 2017, United Kingdom; Supreme Court [UKSC]
US			
Dates	Description	Category	Full Citation
28/4/04	Hamdi	2	Hamdi and Hamdi v Rumsfeld and United States, Appeal judgement, Docket No 03-6696, 542 US 507 (2004), ILDC 116 (US 2004), 124 S Ct 2633 (2004), 159 L Ed 2d 578 (2004), 72 USLW 4607 (2004)
28/6/04	Rasul	2	Rasul v Bush, Decision, Docket No 03-334, 542 US 466 (2004), 124 S.Ct.2686 (2004), 159 L.Ed.2d 548 (2004), 72 USLW 4596 (2004), ILDC 115 (US 2004)
28/6/04	Padilla	1	Rumsfeld v Padilla and Newman, as next friend of Padilla, Appeal decision, Docket No 03-1027, 542 US 426 (2004), 124 S.Ct. 2711 (2004), 159 L.Ed.2d 513 (2004), 72 USLW 4584 (2004), ILDC 682 (US 2004)
8/7/04	Gherebi	2	Gherebi v Bush and Rumsfeld, Appeal Judgement, Docket No 03-55785, 374 F 3d 727 (9th Cir. 2004), ILDC 944 (US 2004)
16/2/06	Arar 2006	1	Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006)
29/6/06	Hamdan	2	Hamdan v Rumsfeld and ors, Appeal judgement, 548 US 557, 126 S Ct 2749, 165 L Ed 2d 723 (2006), ILD 745 (US 2006)
17/12/07	Hamdan II	2	United States v Hamdan (Salim Ahmed), Ruling on defence motion for Article 5 status determination, ILDC 747 (US 2007)
18/2/08	Kiyemba I	1	Kiyemba and ors v Obama and ors, Appeal Judgement, 55 F3d 1022 (DC Cir 2009), ILDC 1582 (US 2009)
24/3/08	Amawi	1	United States v Amawi (Mohammed Zaki), Lower Court Decision, Case No 3:06CR719, ILDC 1153 (US 2008)

12/6/08	Munaf	1	Mohammed (on the application of Munaf) v Geren, Secretary of the Army and ors, Judgement, 128 S.Ct.2207 (2008)
12/6/08	Boumediene	2	Boumediene v Bush (President of the United States), Decision, Docket No 06-1195, 553 US 723 (2008), 128 S.Ct. 2229 (2008), ILDC 1039 (US 2008)
18/2/09	Kiyemba II	1	Kiyemba and ors v Obama and ors, Appeal judgment, 55 F3d 1022 (DC Cir 2009), ILDC 1582 (US 2009), 18th February 2009, United States
19/5/09	Hamlily	1	Hamlily and ors v Barack Obama and ors, Decision on motion to dismiss, 616 F Supp 2d 63 (DDC 2009)
2/11/09	Arar 2009	1	Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009)
5/1/10	Al-Bihani	1	Al-Bihani v Obama and ors, Appeal decision, 590 F3d 866, (DDC 2010)
21/6/11	Omar	0,5	Omar and ors v McHugh and ors, Appeal judgement, No 09-5410, ILDC 1773 (US 2011), 646 F.3d 13 (D.C. Cir. 2011)
20/10/16	Al Bahlul	0,5	Al Bahlul v United States, Appeal judgement, No 11-1324, ILDC 2665 (US 2016), 840 F 3d 757 (DC Cir 2016)
CFI/General Court			
Dates	Description	Category	Full citation
7/6/04	Segi 2004	1	Case T-338/02, Segi and Others v Council of the European Union ECR [2004] II-01647
7/6/04	Gestoras pro-Amnistía 2004 case	1	Case T-333/02, Gestoras Pro-Amnistía and Others v Council of the European Union
26/4/05	Sison I 2005	1	Joined cases T-110/03, T-150/03 and T-405/03, Jose Maria Sison v Council of the European Union [2005] ECR II-01429
21/9/05	Al Barakaat	1	Case T-306/01 R, [2002] ECR II-2387

21/9/05	Kadi I 2005	1	Case T-315/01 Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities [2005] ECR II-3649
12/7/06	Ayadi 2006	1	Case T-253/02 Ayadi v Council [2006] ECR II-2139
12/12/06	OMPI I	2	Case T-228/02, Organisation des Modjahedines du peuple d'Iran v Council and UK [2006] ECR II-4665
11/7/07	Sison II 2007	2	Case T-47/03, Jose Maria Sison v Council of the European Union ECR [2007] II-00073
11/6/09	Othman 2009	2	Case T-318/01, Omar Mohammed Othman v Council of the European Union and Commission of the European Communities [2009] ECR II-0000
2/9/09	El Morabit	2	Joined cases T-37/07 and T-323/07, Mohamed El Morabit v Council, 2009/C 256/42
30/9/10	Kadi II 2010	2	Case T-85/09 Yassin Abdullah Kadi v European Commission [2010] ECHR II-0000
ECJ/CJEU			
Dates	Description	Category	Full citation
1/2/07	Sison I 2007	1	Case C-266/05 P, Jose Maria Sison v Council of the European Union [2007] ECR I-01233
27/2/07	Gestoras pro-Amnistía 2007 case	1	Case C-354/04 P, Gestoras Pro Amnistía and others v. Council [2007] ECR I-1579
27/2/07	Segi 2007	1	C-355/04 P, Segi and ors v Council of the European Union, Spain (intervening) and United Kingdom (intervening) [2007] ECR I-1657
3/9/08	Kadi I 2008	2	Joint resolutions C - 402/05 P & C - 415/05 P, Yassin Abdullah Kadi and Barakaat

			International Foundation v. Council and Commission [2008] ECR I-06351
3/12/09	Hassan and Ayadi case	2	Joined cases C-399/06 P and C-403/06 P, Faraj Hassan v Council of the European Union and European Commission and Chafiq Ayadi v Council of the European Union, [2009] ECR I-11393
18/7/13	Kadi II 2013	2	Joined Cases C-584/10 P, C-593/10 P, and C-595/10 P Commission and Council v. Kadi [2013] ECR I-0000
8/4/14	Digital Rights Ireland	2	Joined Cases C-293/12 and C-594/12, Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and others and Kärntner Landesregierung and others
ECtHR			
Dates	Description	Category	Full citation
12/5/05	Öcalan I	2	Case Öcalan v. Turkey, [GC] App No. 46221/99
12/10/05	Shamayev	2	Shamayev and others v. Georgia and Russia, Application App No. 36378/02
2/5/07	Behrami and Saramanti	1	Behrami and Behrami v. France and Saramati v. France, Germany and Norway (dec.) [GC] App No. 71412/01 and 78166/0
1/12/08	Utsayeva	2	Utsayeva and others v. Russia, [Section I] App No. 29133/03
19/2/09	A and Others	2	A and Others v. United Kingdom, [GC] App no. 3455/05
12/1/10	Gillan	2	Gillan and Quinton v. The United Kingdom, [Section IV] App No. 4158/05
2/3/10	Al-Saadoon	2	Case of Al-Saadoon and Mufdhi v. The United Kingdom, [Section IV] App No. 61498/08
4/5/10	El Motassadeq	2	El Motassadeq v. Germany, App No. 28599/07

7/7/11	Al-Jedda 2011	2	Al-Jedda v. United Kingdom, Judgment, joint hearing of Al-Skeini and ors v United Kingdom, App No. 55721/07 and Al Jedda v United Kingdom, App No. 27021/08; (2011) BHRC 637
17/1/12	Abu Qatada	2	Othman (Abu Qatada) v. the United Kingdom, [Section IV] App No 8139/09, [2012] ECHR 56
12/9/12	Nada 2012	2	Nada v. Switzerland, [GC] App No. 10593/08
24/9/12	Babar Ahmad	2	Babar Ahmad and others v. the United Kingdom, App Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09
13/12/12	El-Masri	2	Case of El-Masri v. The Former Yugoslav Republic of Macedonia, App No. 39630/09
18/12/12	Aslakhanova	2	Case of Aslakhanova and Others v. Russia, (Applications Applications nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10), [First Section]
26/11/13	Al-Dulimi 2013	2	Al-Dulimi & Montana Management Inc. v. Switzerland, Judgement, App No. 5809/08; (2013) ECHR 1173
18/3/14	Öcalan II	2	Öcalan v. Turkey (No. 2), European Court of Human Rights (Second Section) Application Nos. 24069/03, 197/04, 6201/06, and 10464/07 (2014)
24/7/14	Husayn & Al Nashiri	2	Husayn (Abu Zubaydah) v. Poland, no. 7511/13, 24 July 2014; Al Nashiri v. Poland, no. 28761/11
23/5/16	Nasr	2	Nasr and Ghali v. Italy, (Section IV) App No. 44883/09
6/6/16	Szabó	2	Szabó and Vissy v. Hungary, [Section IV] App No. 37138/14
21/6/16	Al-Dulimi 2016	2	Al-Dulimi and Montana Managment Inc. v. Switzerland, Appeal, App No. 5809/08

13/9/16	Ibrahim	2	Ibrahim and Others v. The United Kingdom, European Court of Human Rights, [Grand Chamber] App Nos. 50541/08, 50571/08, 50573/08, and 40351/09
25/9/20	Ghoumid	2	Ghoumid and Others v. France, [Section V], App Nos. 52273/16, 52285/16, 52290/16, 52294/16, and 52302/16
UNHRC			
Dates	Description	Category	Full citation
20/5/05	Agiza	2	Agiza v. Sweden, (communication no. 233/2003, decision of 20 May 2005)
10/10/06	Alzery	2	Mohammed Alzery v. Sweden, CCPR/C/88/D/1416/2005
29/5/07	Pelit	2	Pelit v Azerbaijan, (communication no. 281/2005)
22/10/08	Sayadi 2008	2	Sayadi and Vinck v Belgium, Merits, UN Doc CCPR/C/94/D/1472/2006, IHRL 3216 (UNHRC 2008)