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## Legal Cosmopolitanism in International Law

In *A Cosmopolitan Legal Order*<sup>1</sup> Alec Stone Sweet and Clare Ryan define the eponymous object of their study as a multi-level transnational system of rights protection which through judicialization confers on all persons the entitlement to challenge, by virtue of their shared humanity, the decisions of public officials as to their rights.<sup>2</sup> I admire their study and agree with its ably presented Kantian analysis of the European Convention on Human Rights.<sup>3</sup> The present contribution, legal rather than philosophical in its outlook, concerns two aspects of their theory: what Kantian legal cosmopolitanism means for an international court and what it means for the holders of the rights that flow from the cosmopolitan legal order. I deal, first, with the extent to which the European Court of Human Rights (ECHR), as compared with the Court of Justice of the European Union (CJEU), can, in its capacity as an international jurisdiction, be said to deserve the epithet cosmopolitan. Second, I turn to the extent to which, in order to be considered a truly cosmopolitan legal order, the European Convention needs at times not only to make non-citizens free of rights equal to those of citizens, but also to give them stronger rights than those that citizens enjoy.

In a cosmopolitan legal order, every public act must be capable of being judicially reviewed as to its conformity with rights. This is, as Stone Sweet and Ryan explain, required for the system to be considered to be complete.<sup>4</sup> The authors, in turning to the process through which legislative sovereignty is, as they see it,<sup>5</sup> undermined by European law, set out aspects

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<sup>1</sup> A Stone Sweet & C Ryan, *A Cosmopolitan Legal Order: Kant, Constitutional Justice, and the European Convention on Human Rights* (OUP 2018).

<sup>2</sup> See (n 1) 2–3.

<sup>3</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 222.

<sup>4</sup> See (n 1) 85–6.

<sup>5</sup> This is not necessarily the only way of seeing things. In the United Kingdom, for example, legislative sovereignty was upheld in the face of European law through the device that legislative sovereignty was used in order to give EU law sovereignty. Section 2(1) of the 1972 European Communities Act provides that ‘[a]ll such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the

of the law of the European Union. The doctrine of supremacy, which emerged in the case-law of the CJEU in the 1960s and 70s,<sup>6</sup> contributed to the constitutionalization of the regime of EU law.<sup>7</sup> The authors say:

While it may be argued that the supremacy doctrine constituted a sovereignty claim on the part of the CJEU, no national constitutional court has accepted supremacy as the EU court understands it. The CJEU, in effect, holds that all national judges are agents of the EU legal order, not the national order, whenever they act in domains that fall within the scope of EU law. The CJEU further asserts that it alone has the ‘final word’ when it comes to determining the compatibility of EU law – as well as national law that implements EU law – with rights.<sup>8</sup>

The notion that the CJEU has the final word, which as far as it goes in the situation set out above is entirely sensible, has however been taken rather further by the CJEU. The CJEU has done so in the name of the ‘constitutional structure of the EU and the nature of [EU] law’.<sup>9</sup> One example of this is the decision by the CJEU as regards the accession of the EU to the European Convention,<sup>10</sup> a decision which the authors criticize (in diplomatic terms) as being based on concerns on the part of the CJEU for the fate of its own constitutional authority.<sup>11</sup> It was in this constitutional vein that the CJEU held in *Achmea* that the concept of supremacy, broadly conceived, meant that other international tribunals, such as investor–state tribunals

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Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly...’ As Lord Reid said about section 2(1) in *Miller*, in a paragraph with which the whole Supreme Court agreed, ‘[i]t follows from the UK’s dualist approach to international law that the Treaties could only be given effect in our domestic law by means of an Act of Parliament. This was so notwithstanding the doctrine of EU law, established by the European Court of Justice in *Van Gend en Loos* ... This doctrine is incompatible with the dualist approach of the UK constitution, and ultimately with the fundamental principle of Parliamentary sovereignty. ... As will appear, section 2(1) enables EU law to be given direct effect in our domestic law, but within a framework established by Parliament, in which Parliamentary sovereignty remains the fundamental principle.’ *R (Miller and Another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, (2017) 171 ILR 568, 677–8, paras 183–4.

<sup>6</sup> *Costa*, ECJ 6/64, 1964; and *Simmenthal II*, ECJ 106/77, 1978.

<sup>7</sup> See (n 1) 87.

<sup>8</sup> See (n 1) 89.

<sup>9</sup> *Slovak Republic v Achmea BV* Judgment of the Court, CJEU Case C-284/16, 181 ILR 249, 6 March 2018: 256, para 33.

<sup>10</sup> *Opinion 2/13 pursuant to Article 218(11)* European Union: Court of Justice of the European Union, *TFEU*, ECLI:EU:C:2014:2454, 18 December 2014

<sup>11</sup> See (n 1) 91.

pronouncing themselves on the basis of bilateral investment treaties, will not have jurisdiction to do so in the event that the dispute at issue is an intra-EU one, that is, where the state of the claimant and the respondent state are both EU Member States.<sup>12</sup> The judgment in *Achmea* is of vital importance for the relationship between EU law and international law, and has been welcomed by leading EU law commentators<sup>13</sup> and disapproved by international investment tribunals.<sup>14</sup>

It is interesting to compare the approach of the ECHR to that of the CJEU in this regard. The ECHR, similarly to the CJEU, considers its own treaty instrument, the European Convention, to be of a constitutional nature: ‘a constitutional instrument of European public order’.<sup>15</sup>

On the one hand there is Article 32 and the jurisprudence of the ECHR applying that provision. Article 32 of the European Convention stipulates that the ECHR has jurisdiction over ‘all matters concerning the interpretation and application of the Convention’. The ECHR has held that ‘it alone is competent to decide on its jurisdiction to interpret and apply the Convention and its Protocol (Article 32 of the Convention), in particular with regard to the issue of whether the person in question is an applicant within the meaning of Article 34 of the Convention and whether the applicant fulfils the requirements of that provision’.<sup>16</sup> On the other hand there is Article 55 of the Convention (formerly Article 62), which is in the following terms:

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or

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<sup>12</sup> See (n 9).

<sup>13</sup> See e.g. M Andenas and C Contarese, ‘EU autonomy and investor–state dispute settlement under *inter se* agreements between EU Member States: *Achmea*’ (2019) 56 *Common Market Law Review* 157.

<sup>14</sup> See e.g. *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018.

<sup>15</sup> e.g. *Loizidou v Turkey*, Preliminary Objections, 103 ILR 622, 1995, para 75.

<sup>16</sup> *Shamayev & Others v Georgia & Russia*, ECHR No. 36378/02, 12 April 2005–III, para 293.

application of this Convention to a means of settlement other than those provided for in this Convention.

As it was explained by Sir Samuel Hoare during the drafting of this provision, a consideration that weighed with the drafters was the ‘proliferation of organs with tremendous difficulties for the definition of their respective jurisdiction’.<sup>17</sup> As explained, more recently by William Schabas, however, ‘Article 55 does not entirely exclude the possibility that human rights issues as well as related matters are addressed in other fora’,<sup>18</sup> and the Strasbourg organs, including the ECHR, have, in spite of the broader constitutionalist framework in which it considers itself to be operating, taken a more broad-minded, or in any event less jealous, approach to the question than has the CJEU.

Two examples bear this out. First, regarding the matter of Süd Tirol/Alto Adige, Italy and Austria, having initially submitted an inter-state application to the Commission,<sup>19</sup> reached a subsequent agreement, which contained a compromissary clause in which the parties agreed to submit disputes not to the CJEU but instead to the International Court of Justice. No Strasbourg organ registered any misgivings, then or later.<sup>20</sup>

Secondly, in the dispute between Georgia and Russia relating to South Ossetia and Abkhazia, Georgia relied upon the compromissory clause in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)<sup>21</sup> in order to bring a proceeding before the International Court. That Court granted in 2011 a preliminary objection filed by

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<sup>17</sup> European Court of Human Rights, *Minutes of the afternoon sitting in Travaux préparatoires to the ECHR IV*, 9 June 1950, 124.

<sup>18</sup> W Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2014) 913; E Decaux, ‘Article 62’ in LE Pettit and others (eds), *La Convention Européenne des droits de l’homme* (2nd edn, Economica 1999) 912–13.

<sup>19</sup> Council of Europe, *Yearbook of the European Convention on Human Rights, Volume 3* (1960) 168–71.

<sup>20</sup> See A Fenet, ‘La fin du litige italo–autrichien sur le Haut-Adige-Tyrol du Sud’ (1993) 39 *Annuaire français de droit international* 357.

<sup>21</sup> *International Convention on the Elimination of All Forms of Racial Discrimination in Treaty Series* 660 (21 December 1965) 195.

Russia, finding that, under the conditions set out in the compromissary clause in the CERD, Georgia had failed to exhaust the route of negotiation before seising the Court.<sup>22</sup>

During the pendency of the proceeding before the International Court, however, Georgia had in parallel filed a proceeding before the ECHR.<sup>23</sup> The rule against similar proceedings set out in Article 35 of the European Convention does not apply to inter-state proceedings. As the case before the International Court had been rejected, no problem of *lis pendens* arose. But what of Article 55? Whilst the ECHR did not explicitly touch on Article 55,<sup>24</sup> Schabas has wisely observed that:

Georgia may well have breached article 55 of the Convention, although it is hard to see what consequence this could have in judicial proceedings. Jurisdiction before either the International Court of Justice or the ECHR could not be defeated merely because one of the States had failed to respect Article 55 of the Convention.<sup>25</sup>

If one compares the two European Courts as regards the question of how each court, in its husbandry of its self-proclaimed constitutional order, relates to other courts and tribunals, the approach of the ECHR plainly comes across as more Kantian than that of the CJEU. If, as Stone Sweet and Ryan argue, a cosmopolitan legal order is a composite regime in which transnational systems of constitutional justice evolve symbiotically,<sup>26</sup> where at the international level there needs to be a measure of constitutional pluralism between international courts,<sup>27</sup> and where the watchwords are ‘mutual regard’ and ‘respect’ between international courts,<sup>28</sup> then it seems obvious that the ECHR is more Kantian in its outlook than the CJEU.<sup>29</sup> It is, to

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<sup>22</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Preliminary Objections, International Court of Justice, ICJ Rep 2011, 70. For criticism see J Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 669–70.

<sup>23</sup> *Georgia v Russia*, ECHR, no. 38263/08, 13 December 2011.

<sup>24</sup> See (n 23) 79.

<sup>25</sup> See (n 18) 914.

<sup>26</sup> See (n 1) 249.

<sup>27</sup> *Ibid* 256.

<sup>28</sup> *Ibid* 258.

<sup>29</sup> See in this issue the Introduction and the contribution by Corradetti.

appropriate the words of a celebrated internationalist, ‘an open system’,<sup>30</sup> as compared with the closed one of the CJEU.

### *Nationals and strangers*

The elements of a cosmopolitan legal order demand that rights are held by individuals and that, within the domestic legal orders which make up the transnational legal system, all public officials bear the obligation to fulfil the fundamental rights of every person within their jurisdiction, without any discrimination as to nationality or citizenship.<sup>31</sup>

Kant took the view, in *Perpetual Peace*, that hospitality entails that a stranger has, on arrival in another’s country, the right not to be treated in a hostile manner.<sup>32</sup> Sweet Stone and Ryan explain that Kant saw this normative duty as an obligation of all within the state to provide hospitality to strangers.<sup>33</sup> They quote Kant to this effect: ‘Hospitality means the right of a stranger not to be treated as an enemy when he arrives in the land of another.’<sup>34</sup>

There is a long and well-known history in international law of the obligations of general international law, as well as particular international law in the form of treaties, as to the protection of a stranger (or in the terminology of traditional international law: an alien) in a host state. One of the principles underlying these obligations has been the fact that strangers traditionally have lacked the political rights of citizens and would, therefore, be more exposed than citizens to ‘arbitrary actions of the host State and may thus, as a matter of legitimate policy, be granted a wider scope of protection’.<sup>35</sup> The general international law principles just

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<sup>30</sup> J Crawford, *International Law as an Open System* (Cameron May 2002).

<sup>31</sup> See (n 1) 1.

<sup>32</sup> Ibid 15, and I Kant, *Toward Perpetual Peace: A Philosophical Sketch in Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (Yale University Press 2006 [1795]) 358.

<sup>33</sup> See (n 1) 18.

<sup>34</sup> Ibid.

<sup>35</sup> *Joseph Charles Lemire v Ukraine*, Award, ICSID Case No. ARB/06/18, 28 March 2011, para 57.

mentioned were incorporated into the treaty text of Article 1(1) of Protocol I of the European Convention, which stipulates:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

In *James v United Kingdom* and *Lithgow v United Kingdom*, both of which concerned UK nationals,<sup>36</sup> the ECHR observed that ‘the general principles of international law’ to which Article 1 of Protocol 1 makes explicit reference, whilst they could not apply in respect of nationals, ‘are incorporated into that Article ... as regards those acts to which they are normally applicable, that is to say acts of a State in relation to non-nationals’.<sup>37</sup> The fact that these general principles do indeed apply to non-nationals was also emphasized by the Committee of Ministers of the Council of Europe when it opened the Protocol for signature:

*Reconnaissant, en ce qui concerne l'article 1<sup>er</sup> du Protocole, que les principes généraux du droit international, dans leur acceptation actuelle, comprennent l'obligation de verser aux non-nationaux une indemnité en cas d'expropriation.*<sup>38</sup>

For the British applicants in *James v United Kingdom* and *Lithgow v United Kingdom* that meant that they could find no succour in general international law; but the ECHR made it clear that the general principles of international law would apply to acts of a state in relation to non-nationals. There can be no cavil with what the Court concluded in relation to non-nationals: there is no doubt, according to the wording of Article 1, that the article does incorporate general

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<sup>36</sup> In *Lithgow* there was initially one French national among the applicants, Mrs Monique Augustin-Normand; but as she was among those applicants whose complaints were declared inadmissible by the Commission, her complaint was not heard on the merits (*Lithgow & Others v United Kingdom* (1986) 8 EHRR 329, paras 2 and 102).

<sup>37</sup> See (n 36) para. 115; *James v United Kingdom*, ECHR No. 8793/79, 21 February 1986, para 61.

<sup>38</sup> See also Commentary by the Secretariat-General on the Draft Protocol (18 September 1951) Doc DH (57) 10 at 157 (‘the phrase “subject to the conditions provided for ... by the general principles of international law” would guarantee compensation to foreigners, even if it were not paid to nationals’).

international law into its scope and that non-nationals must be able to benefit from that incorporation.

The ECHR explained in some detail why it would be correct as a matter of principle to treat non-nationals and nationals differently in the context of expropriation. The Court determined that Article 14 of the Convention and its prohibition of discrimination did not pose a problem in this connection: ‘the Court has consistently held that differences of treatment do not constitute discrimination if they have an “objective and reasonable justification”’,<sup>39</sup> which the Court held to be the case with difference of treatment in connection with compensation for expropriation. The ECHR went on to say that:

[e]specially as regards a taking of property effected in the context of a social reform, there may well be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned. To begin with, non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election of designation of its authors nor have been consulted on its adoption. Secondly, although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals.<sup>40</sup>

In respect of expropriation of the property of non-nationals, the principles of general international law require *full* compensation, not just the ‘appropriate’ compensation that the ECHR has been content to demand in relation to expropriation of the property of nationals. In *Biloune v Ghana* the Arbitral Tribunal held that: ‘[u]nder the principles of customary international law, a claimant whose property has been expropriated by a foreign state is entitled to full ... compensation’.<sup>41</sup> As one distinguished arbitral tribunal put it, in *Bank for International Settlements*, ‘it is true that the jurisprudence of the European Court has adopted a flexible standard, described as one of “appropriate” compensation for taking by a state of the

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<sup>39</sup> See (n 37) para 63.

<sup>40</sup> Ibid.

<sup>41</sup> *Biloune v Ghana* (1989) 95 *International Law Review* 183, 211.

property of its nationals’; but ‘the general relevance of Human Rights law aside, the mainstream of general international law’, the Tribunal observed, ‘has required full compensation’.<sup>42</sup>

For the reasons given by the ECHR in *James*, the general principles of international law give a higher level of protection to non-nationals than the ECHR gives to nationals. This means that there is no disconnect or conflict between the international jurisprudence demanding full compensation for non-nationals and the Strasbourg jurisprudence that gives less than full compensation for nationals. The two sets of case-law complement each other, as *James* acknowledges, each legal system taking the correct approach within its respective sphere.

But when, as will almost certainly come to pass, a case comes before the European Court concerning a non-national, or a stranger in the Kantian idiom, what should the Court do in order best to adhere to the exigencies of cosmopolitan legal order? Should the stranger, under Article 1 of Protocol I, receive the full protection that general international law affords strangers in a host state, or would it be wrong in Kantian terms to treat the stranger better than the national?

The award given by the arbitral tribunal in the case of *Joseph Charles Lemire v Ukraine* makes a compelling argument, which, if it is not couched in Kantian terms, cannot be far off the Kantian ethos:

this unequal treatment is not without justification: justice is not to grant everyone the same, but *suum cuique tribuere*. Foreigners, who lack political rights, are more exposed than domestic investors to arbitrary actions of the host State and may thus, as a matter of legitimate policy, be granted a wider scope of protection.<sup>43</sup>

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<sup>42</sup> The United Nations, *Bank for International Settlements – Partial Dispute with former private Shareholders* (2002) 23 *Reports of International Arbitral Awards* 153, 231, para 168.

<sup>43</sup> *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para 57.

The obligation, within a properly Kantian cosmopolitan legal order, to provide such hospitality so that the stranger is not only treated as well as citizens but better than them must be the only Kantian-congruent approach. As a matter of general international law, the right is based simply on state sovereignty, in the sense that, as Vattel put it, '[w]hoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen'.<sup>44</sup> The idea is that if a host state expropriates the property of a non-national without giving him or her full compensation, it is indirectly breaching the rights of his or her state of nationality (whereas no such internationally wrongful act would arise if the host state expropriated, without full compensation, the property of its own nationals).

But, beyond that, is there not something almost instinctively decent about the idea that, at times, the visiting stranger must be treated better than the locals (witness all the societies in the world where pride is taken in letting the guest be served first and have the juiciest bit of the local delicacy). And, as a matter of the exigencies of cosmopolitan legal order, the idea that the non-national needs stronger rights than the national surely goes beyond the protection of property?

The ECHR is indeed a cosmopolitan legal order, and it is in this writer's view the only international legal order ever properly to have attained such characteristics. It is tempting in that regard to conclude with one of the ideas on which the authors end their study: the meaning of the European Convention beyond its European context. In relation to the French Revolution Kant said in *The Contest of Faculties*<sup>45</sup> that, if it was difficult to prove progress in history, the study of history nevertheless allows the observer to discern signs that real progress is possible.<sup>46</sup> The French Revolution was such a sign, in that what eventuated in France in 1789

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<sup>44</sup> E de Vattel, *Le droit des gens, Vol. II* (1758, tr Anon 1797), vi, para. 71.

<sup>45</sup> I Kant, 'The Conflict of Faculties' in *Political Writings* (tr HS Nisbett, Cambridge University Press 1991).

<sup>46</sup> Compare that with the Proustian sally to the effect that someone looks at history as would a newly born chicken at the bits of the eggshell from which it had been hatched! See N Stone, *Turkey: A Short History* (Thames & Hudson 2010) 8.

had until then been entirely unthinkable. More important than the reality of the Revolution, however, was the enthusiasm engendered by the fact that it came into being:

The recent Revolution of a people which is rich in spirit, may well either fail or succeed, accumulate misery and atrocity, it nevertheless arouses in the heart of all spectators (who are not themselves caught up in it) a taking of sides according to desires which borders on enthusiasm and which, since its very expression was not without danger, can only have been caused by a moral disposition within the human race.<sup>47</sup>

This applies to the European Convention on Human Rights, and its Court, in that the European system for the protection of human rights and fundamental freedoms may well either fail or succeed, and in any event might be thought to be imperfect and capable of maturing.<sup>48</sup> But the enthusiasm this ‘single most active and important rights-protecting body in the world’<sup>49</sup> has created in bystanders and the very fact that it came into being combine to prove that real progress is possible. This may well in the long run be its greatest accomplishment.

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<sup>47</sup> See (n 45) 182.

<sup>48</sup> See (n 1) 1.

<sup>49</sup> Ibid 2.