The Ratification of the Treaty of Münster (1648), oil on copper, by Gerard ter Borch. The Peace of Westphalia was the result of two different treaties signed in 1648—one in Osnabrück and one in Münster—ending the Thirty Years' War and the Eighty Years' War. (Image courtesy of Wikimedia Commons)

Whose Rights Are They, Anyway?

Courtney F. Chenette, Esq.
Edward A. Lynch, PhD

Modern international law came into existence at the end of the Thirty Years' War in Europe.[1] Horrified by the unprecedented destruction of a series of wars over religion, European negotiators at Westphalia coined the phrase "cuius regio, eius religio."[2] Literally translated, it means "whose

(Sources: Various German atlases and G. Duby, Grand Atlas historique, Paris, Larousse, 1997. © Fondation Nationale des Sciences Politiques [FNSP], or National Foundation of Political Sciences/Sciences Po, Cartography workshop, 2018. Map courtesy of Espace mondial, l'Atlas)

Europe after the Westphalia Treaties, 1648

Signed in 1648 by nearly all the European powers with the exception of England and Russia, the Westphalia treaties put an end to the Thirty Years' War between Protestants and Catholics. In addition to reshaping the territory of Europe, they laid the groundwork for the international system organized on the basis of sovereignty by virtue of which each political entity is recognized as being sovereign within its borders. This political model gave rise to the concept of the modern state, which holds the monopoly of legitimate violence over its territory and relies on a national army to ensure its border security.

realm, his religion." It could be loosely translated to mean, "No more interference in the internal affairs of other nations. We leave them alone and they leave us alone." The legal term for this principle is sovereignty, or the legal supremacy of a government over its actions and policies within its territory. As a practical matter, it meant that seventeenth-century governments in Europe were legally free to persecute their citizens for their religion without concern for international repercussions. The goal of the Westphalia negotiators was to ensure that there would be no repeat of the Thirty Years' War or any similar struggle.

The principle of sovereignty would go completely unchallenged for over 250 years, until the end of the First World War. Before attending the peace conference at Versailles in 1919, U.S. President Woodrow Wilson delivered his "Fourteen Points" speech and revealed that the American negotiating position would

include demands that nation-states respect human rights and not use sovereignty as a shield for protecting their actions from scrutiny, criticism, or international action. Points ten to thirteen made Wilson's rejection of sovereignty plain:

> X. The *peoples* of Austria-Hungary, whose place among the nations we wish to see safeguarded and assured, should be accorded the *freest opportunity to autonomous development*.
> XI. Rumania [*sic*], Serbia, and Montenegro should be evacuated; occupied territories restored; Serbia accorded free and secure access to the sea; and the relations of the several Balkan states to one another determined by friendly counsel along historically established lines of allegiance and nationality; and *international guarantees* of the political and economic independence and territorial integrity of the several Balkan states should be entered into.
> XII. The Turkish portion of the present Ottoman Empire should be assured a secure sovereignty, but the *other nationalities which are now under Turkish rule should be assured an undoubted security of life and an absolutely unmolested opportunity of autonomous development*, and the Dardanelles should be permanently opened as a free passage to the ships and commerce of all nations under international guarantees.
> XIII. An independent Polish state should be erected which should include the territories *inhabited by indisputably Polish populations*, which should be assured a free and secure access to the sea, and whose political and economic independence and territorial integrity *should be guaranteed by international covenant*.[3] (italics added)

Wilson was asserting the right of the international community to oversee the protection of the named ethnic groups from abuses, even from, or especially from, their own governments. While attractive as a principle, Wilson's concept of human rights possessed by groups set off a cycle of forced migrations, ethnic cleansing, and persecution that resulted in almost as many deaths in the two years after World War I as had occurred during the war's last two years.[4] In a sense, the damage Wilson wrought did not end there but simply went into abeyance to reemerge in the savage wars that followed the breakup of Yugoslavia. With all of the bloodletting in the immediate aftermath of Wilson's innovative international law proposal, it is not surprising that Europe soon insisted on a return of sovereign rights and the principle of noninterference in the internal affairs of other nations.

The concept of state sovereignty, at least as established at Westphalia, had a short second career, however. The revelation of the Holocaust caused not only horror among Europeans at the end of the Second World War but also deep and abiding guilt. Rumors of death camps had emanated from Nazi-occupied Europe long before the end of the war. Irrefutable evidence of severe human rights abuses under the Nazis, the Italian fascists, and the Soviet communists, including other instances of mass murder, had appeared as early as the mid-1930s and had been almost completely ignored by Western leaders who used sovereignty as their excuse for inaction.[5] A new dawn for human rights protection in international law appeared.

Human Rights Treaties

Among the first actions by diplomats in the aftermath of World War II were efforts to update and strengthen the Geneva Conventions, the first of which originally came into force in 1864.[6] This first effort had asserted the rights of wounded soldiers. A subsequent convention, signed in 1929, had listed protections that had to be provided to prisoners of war.[7] Both of these had been rudimentary attempts to use international law to protect human rights, and they were possible only because of their specificity.

Courtney F. Chenette, Esq., is an assistant professor of political science at Hollins University and an attorney. Her teaching, research, and practice focus on novel questions of rights and constitutional law.

Edward A. Lynch, PhD, is an expert on international law and international relations. He was formerly employed by the chair of the U.S. Senate Subcommittee on Terrorism and by the White House Office of Public Liaison. He is the author of five books and numerous articles. His latest book, *The United States and the Arab Spring: The Failure of the Obama Doctrine*, has just been released from Praeger.

They protected individuals as part of narrowly defined groups under narrowly defined circumstances. Moreover, they were perceived as an elaboration of international law as it pertained to limits on warfare, which Europeans had accepted centuries before. Even this acceptance was based more on self-interest and the fear of retaliation for the mistreatment of wounded soldiers and/or prisoners of war than on a commitment to human rights per se.

Still, the Geneva Conventions established two radically new concepts for the international legal community. First, they were based on the principle that sovereign states were in fact answerable to the international community for actions taken against individuals. Up until that time, the only individual human beings protected by international law were diplomats and heads of state. Second, the concept of human rights was extended from the group rights asserted by Wilson at Versailles to the far more comprehensive concept of human rights for individual persons.

The Geneva Conventions were updated and strengthened after World War II, and two more conventions were added. A provision of the 1907 Hague Convention, guaranteeing protection for wounded sailors, was extended to all armed forces personnel on the seas. A vague mention of the rights of civilians in the Hague Convention became the Fourth Geneva Convention, "relative to the protection of civilian persons in time of war."[8] Illustrative of the hesitation negotiators showed in embracing the concept of human rights, the Geneva protections still applied only to defined groups in defined circumstances.

The next major step toward an international human rights regime was the Universal Declaration of Human Rights of 1948.[9] The preamble called "recognition of the inherent dignity" a "foundation of freedom, justice and peace in the world."[10] It noted that "contempt for human rights [has] resulted in barbarous acts which have outraged the conscience of mankind" and later averred that human rights protection under the law "is essential to promote the development of friendly relations between nations."[11] This last assertion significantly eroded the idea of sovereignty by linking human rights protection with peace, a belated admission that effective opposition to massive human rights abuses in Nazi Germany might have prevented World War II.

The Universal Declaration presented a long list of specific human rights, from freedom of speech to parental rights over their children's education. However, it was a statement of principles passed by the United Nations General Assembly. As such, it was not legally binding on the signatories. Violators could be accused of hypocrisy but not of illegality. Even given the solely aspirational nature of the declaration, the prerogative of states to limit rights was also included. Article 29 notes, "Everyone has duties to the community," and adds, "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations *as are determined by law* solely for the purpose of … meeting the just requirements of morality, public order and the general welfare in a democratic society" (italics added).[12]

A government's right to suspend rights was made much more explicit in the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.[13] Article 15, section 1, reads: "In 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."[14] The only rights that cannot be derogated are the rights to freedom from torture and slavery.

This section goes far toward negating the remainder of the treaty, and it certainly could not have given much comfort to enthusiasts for human rights at the time that it was signed. First, the treaty contains no definition of such key terms as "public emergency," "threatening the life," "exigencies," or "strictly required." A high contracting party is perfectly free to define such circumstances as broadly and as self-servingly as it wishes, subject only to the obligation that it "keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor."[15] For that matter, even "war" is left undefined.

Second, the phrase "its obligations under this Convention" is seemingly innocuous but highly significant. The high contracting parties are legally permitted to enter into the treaty because they are sovereign states. As such, they have agreed to obligate themselves to respect and uphold the various rights listed in the treaty's other articles, unless they invoke Article 15.

After fleeing turbulence in the Ottoman Empire, Armenian and Syrian refugees wait in quarantine between 1917 and 1919 at an American Red Cross camp outside Jerusalem. (Photo courtesy of the Library of Congress)

This language makes it plain that as sovereign states, they are the original and natural "owners" of the rights listed, and these rights are granted to citizens by the sovereign state. Thus, as rights granted by a state, they can be taken back by the state.

This concept of human rights is the opposite of the concept contained in the U.S. Bill of Rights. The first ten amendments to the U.S. Constitution make it plain that the government of the United States is obligated to recognize, respect, and uphold rights such as freedom of speech and religion that the citizens already have and that they had, as human beings, before the Constitution was written or amended. The Declaration of Independence had stated the principle even more clearly, noting that human beings are endowed with rights "by their Creator."[16] One of the central arguments against including the provisions of the Bill of Rights in the original document was the prevailing view among the delegates to the Constitutional Convention that no reasonable person could fear that the American government would ever doubt the inherent nature of the rights listed in the Bill of Rights. Even if some future government did fail to acknowledge them, a second American Revolution would quickly follow.

The great majority of global human rights treaties reverse the Constitution's concept of the origin and "ownership" of human rights. The European Convention, for example, begins with, "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."[17] Article 2 provides that "everyone's right to life shall be protected by law," but it does not comment on the origin of that right, and the phrasing makes it plain that neither the right to life nor any other right can be considered "unalienable."[18] Article 2 also grants exceptions to the right to life for the death penalty, for deaths incurred while making arrests or preventing escapes, or due to "action lawfully taken for the purpose of quelling a riot or insurrection."[19]

The 1954 Convention Relating to the Status of Refugees seemingly protects stateless persons from

discrimination, saying in Article 4 that "[t]he Contracting States shall accord to refugees within their territories treatment at least as favorable as that accorded to their nationals with respect to freedom to practice their religion."[20] But the same document stipulates in Article 9 that

> nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking measures which it considered to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.[21]

Once again, the apparent "rights" of refugees originate with the state and can be discontinued by the state.

The 1965 European Social Charter significantly expands the number of rights granted to citizens, including economic and financial rights as the right to "just conditions of work," the right to vocational guidance, the right to social security, and the right to organize, among others. However, Article 30 repeats almost verbatim the language of the European Convention:

> In time of war or other public emergency threatening the life of the nation any Contracting Party may take measures derogating from its obligations under this Charter 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.[22]

Again, the only accompanying obligation for the contracting parties is to keep the Council of Europe informed.

Other regional human rights treaties are equally vague on the origin of human rights. The 1969 American Convention on Human Rights, also known as the San José Pact, begins by "recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality."[23] This perambulatory clause was included at the insistence of U.S. representatives. But the pact still gives governments wide latitude in deciding when human rights can be "suspended," a provision that reverts ownership of human rights to the nation-state. Article 27 states: "In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."[24]

The following section of Article 27 stipulates that even in times of "public danger or other emergency" the state may not suspend the right to a juridical personality, the right to life, the right to humane treatment, the right to a name, the right to nationality, and the right to participate in government. Under the same article, governments may not suppress freedom from slavery, impose ex post facto laws, or interfere with freedom of conscience and religion.

While this part of the San José Pact seems to protect a number of individual rights, even during a crisis, other documents seriously undermine the reality of that protection. The Charter of the Organization of American States, for example, prohibits nations from taking any action against a state that violates human rights. Article 15 of the charter, for example, contains unusually airtight language: "No State or group of States has the right to intervene, directly or indirectly, *for any reason whatever*, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements" (italics added).[25]

Article 17 is even more comprehensive: "The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, *on any grounds whatever*. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized" (italics added).[26] Given these provisions, which were not superseded by the San José Pact, it is difficult to see what recourse an individual has if his or her rights are violated. The rights of the nation-states to internal sovereignty receive much better legal protection.

The 1981 African Charter on Human and Peoples' Rights added a new dimension to the international law of human rights. It expanded the concept of rights to cover not only individual human beings but also groups of human beings.[27] While originally written

to protect the autonomy of ethnic and tribal groups in Africa, the language of the charter provides little comfort to those committed to the idea of inherent and unalienable human rights.

The African Charter contains an initially impressive list of individual human rights, including freedom of movement, the right to an education, the right to "enjoy the best attainable state of physical and mental health," the right to medical attention, and the right to "freely take part, in the cultural life of his community."[28] However, the document is replete with assertions of the rights of states to make laws limiting rights. A guarantee of the right to liberty, for example, makes an exception for "reasons and conditions previously laid down by law."[29] Other articles contain similar language: Article 8, "subject to law and order"; Article 9, "within the law"; Article 10, "provided he abides by the law"; Article 11, "restrictions provided for by law"; and Article 12, "in accordance with the law."[30]

> "Even in times of 'public danger or other emergency' the state may not suspend the right to a juridical personality, the right to life, the right to humane treatment, the right to a name, the right to nationality, and the right to participate in government."

When the charter switches from individual rights to peoples' rights, however, such restricting language disappears. Article 19, for example, states, "Nothing shall justify the domination of a people by another."[31] No provision of law serves as an exception or justification. Article 20 uses words to describe peoples' rights omitted in the articles on individual rights: "All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination."[32]

Individual human rights are also limited by another innovation in the African Charter, a chapter devoted to duties. Article 27 warns that "the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."[33] Article 29 asserts the duty of individuals "to serve [their] national community by placing [their] physical and intellectual abilities at its service," to "preserve and strengthen social and national solidarity," and to "contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity."[34] While the rights of individuals are balanced with purported duties, the rights of peoples are subject to no such restrictions.

Constructing Rights at Home and Abroad

Who then may vindicate the right to existence? In response, who defends the duty of security? As the international treaty context illuminates, how governing authority defines a right—collective or individual—informs the availability of a route and a remedy. In application, each approach poses unique challenges. Group rights may present unstructured overbreadth while simultaneously failing to deliver a concrete means of redress or a practical acknowledgment of sovereignty; individual rights may narrowly circumscribe both rights and sovereignty, generating conflict and strangling both in exceptions and duties. Conscious of these limitations, the international context highlights similarities and distinctions domestically, illuminating unique U.S. challenges to the future of defining the relationship between human rights and national sovereignty.

Constitutional Commitment to Individual Rights

Despite leading with a rhetorical acknowledgment of "We, the People," the U.S. Constitution begins and ends its collective concepts there, with few exceptions. Distinct from the African Charter's articulation of both individual rights and peoples' rights, the closest operative constitutional parallel is the distinction between person and citizen; in either case, a singular

Endorois people celebrate the return to their land 18 May 2011 at Lake Bogoria National Reserve in the Great Rift Valley of Kenya. In the 1970s, hundreds of Endorois families were evicted from their traditional lands to create a wildlife reserve. (Photo by Denis Huot, Hemis via Alamy Stock Photo)

construction. In text and practice, an individual rights approach permeates American legal history. Particularly consistent through Chief Justice John Roberts' era, since 2005, the U.S. Supreme Court's interest in the structural and institutional value of an individual rights paradigm remains at the forefront of its interpretations.

The court's historic interpretation of constitutional rights and remedies begins from a practical and procedural support of individual rights. Article III of the Constitution establishes the judicial branch, limiting the Supreme Court's authority to preside over "cases" and "controversies." This core of the American adversarial process requires an aggrieved party to assert an individualized injury to sustain a reviewable case. In *Marbury v. Madison*, the Supreme Court first articulated the role of judicial review in relation to a private, individual right of action.[35] There, the court also carved out an exception for political issues that the judiciary lacks authority to interpret, excluding the political functions of other branches from judicial review. Further defining this principle, Supreme Court cases limit the ability to claim a right and pursue an action, absent a "concrete and particularized" injury that is "actual or imminent, not conjectural or hypothetical" for which a judicial remedy is possible.[36] These individualized elements form the threshold doctrine of standing. Absent these elements, the American legal system is not empowered to consider violations of substantive rights in any form. Standing criteria are inherently individual and cannot be easily satisfied by collective generalizations. As such, the American judicial system's adjudication of all rights constitutionally begins from an individual paradigm.

Illustrating the specificity required by this individual rights approach, domestic courts routinely reject cases absent an actualized, articulated injury that produces standing. In *Clapper v. Amnesty International USA*, the Supreme Court rejected a form of collective rights strategy from a coalition of petitioners challenging the Foreign Intelligence Surveillance Act Amendments Act of 2008 to the Foreign Sovereign Immunities Act.[37]

There, legal challengers were "attorneys and human rights, labor, legal, and media organizations whose work allegedly require[d] them to engage in sensitive and sometimes privileged telephone and e-mail communications with colleagues, clients, sources, and other individuals" under threat of government surveillance.[38] The court's majority rejected its alleged injury of suspected surveillance and costs to avoid it as insufficient, nonspecific, and ineffective to confer individualized standing on the group. The rejection reversed a 2011 court of appeals decision in 2013. Consistent with an individual rights framework, the court requires specific allegations of a concrete injury; cumulative concern or speculation will not suffice. Significantly, the majority, including Roberts, asserts that this structural demand is fundamental to American government.[39]

By comparison, the African Charter contemplates a broad range of possible petitioners and relationships to the ultimate remedy. From individuals and nations to nongovernmental organizations asserting rights on behalf of people or groups, this range of potential parties sharply contrasts the strict individual rights paradigm memorialized in U.S. standing limits. In *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, the African Commission on Human and Peoples' Rights applied the African Charter's group provisions to define rights and remedies due the Endorois people, the vehicle for those claims was a case initiated by a nongovernmental organization on behalf of an unrelated group of persons.[40] Therein, the commission acknowledged the "debate" engendered by attempts to define peoples and indigenous populations, ultimately finding in favor of the nongovernmental organization, and by extension the land rights of the Endorois community. This expansive, unmanageable breadth of rights, through a collective approach, is not without consequence. While ultimately finding that Kenya violated provisions of the African Charter with respect to the indigenous group, the 2003 complaint was not adjudicated until the commission's 2010 order. The attenuation between these dates for a single adjudication is not surprising; in a collective rights context, concrete specificity and practicality are necessary trades for this breadth.

Beyond the procedural threshold of standing and who can assert a claim, the Roberts Court has overwhelmingly approached substantive constitutional interpretation from an individual rights perspective.[41] In rejecting a collective rights approach to the Second Amendment, the Supreme Court reiterated its commitment to an individual rights framework in *District of Columbia v. Heller*, reasoning,

> Three provisions of the Constitution refer to "the people" in a context other than "rights"—the famous preamble ("We the people"), § 2 of Article I (providing that "the people" will choose members of the House), and the Tenth Amendment (providing that those powers not given the Federal Government remain with "the States" or "the people"). Those provisions arguably refer to "the people" acting collectively-but they deal with the exercise or reservation of powers, not rights. Nowhere else in the Constitution does a "right" attributed to "the people" refer to anything other than an individual right.[42]

Rejecting Washington, D.C., handgun legislation as unconstitutional, the majority reasoned that the Second Amendment "unambiguously" protects "individual rights," not "collective rights," in the same way individual rights and remedies are secured by the First, Fourth, and Ninth Amendments.[43] Dismissing the appearance of *people* and *militia* in the text of the Second Amendment, the court's majority steadfastly and unsurprisingly maintained that this language can only create an individual right in practice. The court holds that the alternative, in a system designed for individual rights claims, would be no right at all.

As to both the procedure and substance of domestic legal interpretation, the Roberts Court remains consistently committed to a specific, individual rights framework of constitutional interpretation.

Individual Rights and National Security

In the international context, such as Article 27 of the African Charter, duties curtail and balance individual rights, while collective rights may escape this conflict analysis entirely. If the international context is instructive, the Roberts Court's commitment to defining individual rights domestically can expectedly abut government duties and limitations. Such contexts may require balancing state interests like sovereignty,

or carving more precise duties from the individual rights framework. The uncharted territory of domestic individual rights is at their intersection with government duties and interests. Examples of this intersection in the context of national security and detention are illustrative of this point.

Internationally, government laws and duties necessarily intersect with individual rights frameworks; however, this is not a reason to abandon the individual rights paradigm in favor of a broad group construction. In *Good v. Botswana*, the African Commission applied an individual rights framework to reach a tailored remedy in a fraction of the time the commission required to navigate complex, attenuated collective rights assertions.[44] There, Botswana's President Festus Mogae ordered the deportation of Professor Kenneth Good,

an Australian national who published critical writings on government policy. Botswana's domestic courts promptly dismissed Good's appeal of the unreviewable executive order, resulting in Good's removal on fifty-six hours' notice and prompting his action before the African Commission. Applying Articles 7 and 12(4) of the African Charter, the commission rejected Botswana's assertion that executive action evades all procedural processes under a sweeping national security justification.

> From national security and foreign affairs to migration, government duties in both the domestic and international context pose conflicts and overlap systems of individual rights.

In response, the commission intentionally reinforced the symbiotic relationship between a specific individual right and a robust acknowledgment of local laws and duties.[45] The commission effectively reasons that both are best served by centering adjudication in a specific, predictable system. To achieve this balance, the commission found in Good's favor but only to the extent that deportations must be executed within the specific, predictable, lawful process of the state, which included due process notice and the opportunity to be heard. In this holding, the individual rights system not only coexists with but also significantly reinforces the central importance of domestic law and institutions. Far from abandoning national institutions or denying an interest in national security and sovereignty, only a specific, individual rights paradigm aims to balance these coextensive realities in practice.

Likewise, the Roberts Court's approach to national security, foreign affairs, and detention cases articulates specific, individual rights balanced by government duties with an emphasis on institutional process. Mirroring the African Commission's individual rights reasoning in *Good*, the Supreme Court considers the enduring institutional benefit of a specific individual rights paradigm. For example, in the 2004 and 2008 court decisions of *Hamdi v. Rumsfeld* and *Boumediene v. Bush*, the Supreme Court employed an individual rights approach to find that Guantanamo Bay detainees possess the individual right to habeas corpus.[46] Literally translated, "produce the body," the right and remedy of habeas corpus petitions is limited to appearing before a judicial arbiter and receiving notice of the reason for detention. Much like *Good*, the Supreme Court considers singular habeas corpus challenges within the context of existing domestic law and institutions.

Since *Boumediene*, the Supreme Court has declined to certify many unanswered questions of national security, instead making district courts of appeal the final arbiter in the balance of rights, duties, and American institutional integrity. In applying the Roberts Court's precedent, the U.S. District Court for the District of Columbia employed an individual rights approach in *Al-Aulaqi v. Obama* and found the balance of state sovereignty weighed in favor of American political institutions. There, the district court rejected a petitioner's claims that U.S. officials unlawfully authorized the targeted killing of his son, a dual U.S.-Yemeni citizen in Yemen, who had alleged ties to al-Qaida. In a ruling consistent with the Roberts Court's balance of individual rights, the district court acknowledged both substantive and procedural arguments, declining to reach the merits of the claims, and instead focused on the procedural limits of government duties, relying on both the political question doctrine and standing:

> Whether the alleged "terrorist activities" of an individual so threaten the national

Previous page: A Turkish soldier stands guard 21 September 2014 with several hundred Syrian refugees at a border crossing in Suruc, Turkey. Turkey opened its border to allow in up to sixty thousand people who massed on the Turkey-Syria border, fleeing the Islamic militants' advance on Kobani. (Photo by Burhan Ozbilici, Associated Press)

> security of the United States as to warrant that military action be taken against that individual is a "political judgment[ ] … [which] belong[s] in the domain of political power not subject to judicial intrusion or inquiry." … Because decision-making in the realm of military and foreign affairs is textually committed to the political branches, and because courts are functionally ill equipped to make the types of complex policy judgments that would be required to adjudicate the merits of plaintiff's claims, the Court finds that the political question doctrine bars judicial resolution of this case.[47]

The district court further considers the structural endurance of the American judicial system in declining to extend a limited and disfavored concept of "third party" standing for the parent of an adult child, absent an injury that "affect[s] the plaintiff in a personal and individual way."[48] The dismissal is not a rejection of the individual rights paradigm; it is consistent with a specific exception for government duties.

In this narrow construction, the district court in *Al-Aulaqi* reaches the opposite decision of *Good* for the same reasons. In *Good*, the injury of deportation existed within national borders, subject to domestic laws and institutional process, while in *Al-Aulaqi*, the injury existed extraterritorially. Whereas a group rights approach overlooks the nuances of place, state sovereignty, domestic law, and institutional limitations, an individual rights paradigm in both cases allows for these considerations. Both cases balance individual rights in this way, preserving the centrality of domestic institutions at home and abroad.

The Domestic Future of Rights

With the addition of three justices under the Trump administration, a newly constructed Roberts Court has a host of challenges on the horizon to its individual rights framework. From national security and foreign affairs to migration, government duties in both the domestic and international context pose conflicts and overlap systems of individual rights. When confronted with such conflicts, one approach may be to loosen the Roberts Court's commitment to individual rights by exploring a collective rights approach. This argument obviates the need to confront these challenges directly, and keeps with the trajectory of international human rights treaties. However, the group rights paradigm runs counter to constitutional principles and presents an unchecked and unmanageable alternative that the Roberts Court has consistently opposed.

This landscape faces the newly constructed Roberts Court. When it does, in a departure from international trends, the court likely will continue to favor the specificity of an individual rights approach and its institutionalist motivations. The Supreme Court's commitment to an individual rights framework will likely be tested in the near future. Three pending cases, in different procedural postures, including recently petitioning the Supreme Court, are presently before the D.C. federal courts; all consider whether individual due process rights inure to Guantanamo Bay detainees.[49] This specific, individual right is not yet defined with respect to government duties through the Supreme Court's habeas corpus rulings. While undecided at present, the Roberts Court's construction of a specific individual rights paradigm, as applied to those national security and detention cases, almost certainly foreshadows a similar outcome. Using the framework discussed herein, if certiorari is granted, the court is likely to approach *Ali v. Trump*, *Al Hela v. Trump*, and *Nasser v. Trump* with the same institutionalist individual rights analysis.[50] Predictably, the court will measure and temper its individual rights grant with the government duties and sovereign interests presented.

Ultimately, the Roberts Court is unlikely to deconstruct its own scaffolding of a specific individual rights system. Instead, the examples discussed in this article prove significant. While individual rights constructions may abut government decision-making, the Supreme Court will nonetheless stay the course and center specificity and process in its balance. Far from eroding respect for law, an individual rights paradigm centers institutional endurance. Informed by this greater context, an institutionalist Supreme Court will continue to advance an individual rights framework as it navigates new factual controversies. The Supreme Court's domestic answer to the question, "Whose rights?" for now sounds like "Maybe yours, maybe mine, but definitely not ours." ■

Notes

1. See, for example, David N. Farnsworth, *International Relations: An Introduction* (Chicago: Nelson-Hall, 1992), 17.

2. Stewart C. Easton, *The Western Heritage: From the Earliest Times to the Present* (New York: Holt, Rinehart, and Winston, 1970), 470.

3. *The War of the Nations: Portfolio of Rotogravure Etchings* (New York: New York Times Company, 1919), 528.

4. Robert Gerwarth, *The Vanquished: Why the First World War Failed to End* (New York: Farrar, Straus, and Giroux, 2016).

5. See, for example, Max Beloff, *The Foreign Policy of Soviet Russia, 1929-1941* (London, 1947), 98; see also Ai Silin and Qu Weiji, "Limitations and Problems of the Western Doctrine," *Marxism and Reality*, no. 3 (2020).

6. Amelioration of the Condition of the Wounded on the Field of Battle (Red Cross Convention), 22 August 1864, 22 Stat. 940, T.S. 377, accessed 14 April 2021, https://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0007.pdf.

7. Amelioration of the Condition of the Wounded on the Field of Battle (Red Cross Convention), 27 July 1929, 47 Stat. 2074, T.S. 847, accessed 14 April 2021, https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0965.pdf.

8. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 8 December 1949, 75 U.N.T.S. 287, accessed 13 April 2021, https://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-973-English.pdf.

9. "Universal Declaration of Human Rights," United Nations, 10 December 1948, accessed 9 April 2021, https://www.un.org/en/about-us/universal-declaration-of-human-rights.

10. Ibid.

11. Ibid.

12. Ibid.

13. European Convention on Human Rights (Strasbourg, France: Council of Europe, 2010), accessed 9 April 2021, https://www.echr.coe.int/documents/convention_eng.pdf.

14. Ibid., art. 15, § 1, at 13.

15. Ibid., art. 15, § 3, at 14.

16. The Declaration of Independence para. 2 (U.S. 1776).

17. European Convention on Human Rights, art. 1.

18. Ibid., art. 2, § 1.

19. Ibid., art. 2, § 2(c).

20. Convention Relating to the Status of Refugees art. 4, 28 July 1951, 189 U.N.T.S. 137, accessed 13 April 2021, https://treaties.un.org/doc/Publication/UNTS/Volume%20189/volume-189-I-2545-English.pdf.

21. Ibid., art. 9.

22. European Social Charter art. 30, 18 October 1961, 529 U.N.T.S. 89, accessed 9 April 2021, https://treaties.un.org/doc/Publication/UNTS/Volume%20529/volume-529-I-7659-English.pdf.

23. Organization of American States, American Convention on Human Rights: "Pact of San Jose, Costa Rica," preamble, 22 November 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, accessed 9 April 2021, https://treaties.un.org/doc/Publication/UNTS/Volume%201144/volume-1144-I-17955-English.pdf.

24. Ibid., art. 27, ¶ 1.

25. Charter of the Organization of the American States art. 15, 30 April 1948, 119 U.N.T.S. 3, accessed 9 April 2021, https://treaties.un.org/doc/Publication/UNTS/Volume%20119/v119.pdf.

26. Ibid., art. 17.

27. African [Banjul] Charter on Human and Peoples' Rights, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, accessed 9 April 2021, http://hrlibrary.umn.edu/instree/z1afchar.htm.

28. Ibid., art. 16–17.

29. Ibid., art. 6.

30. Ibid., art. 8–12.

31. Ibid., art. 19.

32. Ibid., art. 20, ¶ 1.

33. Ibid., art. 27, ¶ 2.

34. Ibid., art. 29.

35. Marbury v. Madison, 5 U.S. 137, 177–78 (1803).

36. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

37. Clapper v. Amnesty International USA, 568 U.S. 398 (2013).

38. Ibid.

39. Ibid.

40. Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, No. 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010, accessed 12 April 2021, https://www.achpr.org/sessions/descions?id=193.

41. See District of Columbia v. Heller, 554 U.S. 570, 579 (2008); Boumediene v. Bush, 553 U.S. 723, 732–33 (2008).

42. *Heller*, 570 U.S. at 579–80.

43. Ibid.

44. Good v. Botswana, No. 313/05, African Commission on Human and Peoples' Rights, 26 May 2010, accessed 12 April 2021, https://www.achpr.org/sessions/descions?id=195.

45. Hamdi v. Rumsfeld, 542 U.S. 507 (2004); *Boumediene*, 553 U.S. at 732–33.

46. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 52 (D.D.C. 2010).

47. Ibid.

48. Ibid.

49. Ali v. Trump, 959 F.3d 64 (D.C. Cir. 2020), *petition for cert. filed* (U.S. 28 December 2020) (No. 20-888); Al Hela v. Trump, 972 F.3d 120 (D.C. Cir. 2020), *petition for reh'g en banc filed* (7 December 2020); Nasser v. Trump, No. 04-cv-01194 (D.D.C. 2020).

50. Ibid.