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I. Introduction

There is a tension inherent to the idea of constitutional self-government, as it is understood by many constitutional lawyers, and the claims to authority made by international law.[2] That tension has long been covered up by the fact that international law covered merely a relatively narrowly circumscribed domain of foreign affairs, was solidly grounded in state consent and generally left questions of interpretation and enforcement to states. Much of contemporary international law no longer fits that description. International law has expanded its scope, loosened its link to state consent and strengthened compulsory adjudication and enforcement mechanisms.[3] Not surprisingly one of the most pressing questions of contemporary constitutional law is how to think about the relationship between the national constitution and international law.[4]

In the first decades of the 20th century jurisprudential debates among international lawyers thinking about the relationship between national and international law focused on whether the legal world exhibits a monist or a dualist structure.[5] Under a monist conception of the legal world international and national law constitute one vertically integrated legal order in which International Law is supreme. Dualists insist on the conceptual possibility, historical reality and normative desirability of a non-monist

conception of the legal world. Under a dualist (or pluralist) conception of the legal world different legal systems on the national and international levels interact with one another on the basis of standards internal to each legal system.

The debates between Monists and Dualists have generally subsided. As is often the case with academic debates, the debate did not end with the victory for one side by way of a generally recognized knock down argument. The debate just withered away, as doubts arose about the fruitfulness of the question. After WWII a more pragmatic, doctrinally focused approach gained ground. Most post WWII international law textbooks spend a couple of pages providing a historic overview of debates concerning Monism and Dualism, point out that practice is pragmatic and not adequately described by a radical version of either and then move on to engage with specific aspects of domestic practice.[6]

This post WWII pragmatic style of thinking about the relationship between national and international law is mostly focused on an analysis of constitutional doctrine as it has emerged as a matter of domestic legal practice. But the emphasis on doctrine and practice as opposed to jurisprudential theory should not obfuscate the fact that the approach taken is in an important sense dualist. The relationship between national and international law is generally taught and written about as the *foreign relations law of the state*, as it has been set out *in the constitution* and reflected in constitutional practice. The very idea that that the national constitution is decisive for generating the doctrines that structure the relationship between national and international law is dualist. This is true, even where the constitution determines that international law is part of the law of the land.[7]

How the constitution manages the interface between national and international law varies across constitutional jurisdictions. But notwithstanding significant variance across constitutional democracies, the basic structure of post WWII constitutional doctrines tends to be similar.[8] National constitutions typically assign a status to international law within the domestic hierarchy of norms giving rise to specific *conflict rules*. Typically international law is assigned a lower status than the constitution but is at least on par with ordinary statutes. This means that a statute enacted prior to the entry into force of a duly ratified Treaty, for example, is trumped by the Treaty, but the Treaty in turn is trumped by a provision of constitutional law. Furthermore these doctrines tend to assign a status to international law that depends on its *source*. Treaties are assigned one rule, customary international law is assigned another.[9] Furthermore there are typically judicially developed rules determining whether a Treaty is self-executing or directly effective and can thus be judicially enforced without further implementing legislation. There are also rules of construction typically requiring domestic statutes to be interpreted so as to avoid a conflict with international law if possible.

This way of thinking about managing the relationship between national and international law is still relevant to contemporary scholarship and practice. Yet much innovative contemporary writing on the relationship between national and international law no longer focuses on these doctrines. With the spread of liberal constitutional democracy after the end of the Cold War and with the spread of constitutional courts and international courts and tribunals[10] national courts have widely begun to engage international law in new ways. An important line of contemporary scholarship[11] is finely attuned to this practice, in which national courts engage international courts and tribunals

in ways that are not captured by traditional doctrinal frameworks. Just as the debates between dualists and monists at some point became unreal in a world where courts were in fact crafting doctrines grounded in national constitutional law to engage international law, today the practice of many national courts seems to have made the doctrines and categories of the post WWII constitutional doctrinalists seem unreal. And just as the doctrinalists after WWII emphasized the normative virtues of pragmatism and realism the contemporary scholars emphasize their keen focus on what is actually going on and embrace the discursive and deliberative nature of the practice they are describing.

What has been missing in these debates, however, is a well developed normative framework for thinking about the relationship between national and international law. Even though there are good reasons to have left behind the fruitless debates between Monists and Dualists, there are high costs associated with an anti-theoretical stance. Those who adopt an anti-theoretical attitude are prone to make one of three mistakes. The first is to get lost in the historical intricacies of a particular political tradition of separation of powers in foreign affairs and emphasize a certain statesmanlike pragmatism that is most likely guided by the unstated presuppositions of such a tradition. Context matters, but it will remain unclear what matters and why without an adequate normative framework to guide engagement with it. The second is to get carried away by a cosmopolitan enthusiasm for international law that is perhaps the *déformation professionelle* of the international lawyer. The third is unqualified enthusiasm for non-hierarchical deliberative networks whose activities transgress traditional doctrinal categories, perhaps the prejudice of choice for scholars attuned to postmodern sensibilities. What is generally missing is the reflection on *the commitments of principle*

that underlie the tradition of democratic constitutionalism and connecting these to the constitutional doctrines that define the terms of engagement between national and international law. Only after clarifying the relevant normative concerns is it possible to provide an assessment of these practices with a view to guiding their further development. [12]

The purpose of the following part of this article is to get a better understanding of the relevant normative concerns that any set of doctrines that manage the interface between national and international law needs to reflect to be normatively convincing (II). The purpose of the third part is to provide some examples that illustrate how a better understanding of these concerns can help explain, assess and guide the practice of national courts in concrete contexts (III). Here the article will focus on cases addressing the relevance of human rights Treaties to domestic rights litigation on the one hand and the enforcement of Security Council decisions in the domestic context on the other. Whereas the first example illustrates the mechanism by which migration of constitutional ideas occurs from the international to the national level, the second example illustrates how appropriate doctrines can help prevent the migration of unconstitutional ideas from the international to the national level, while securing engagement with international law. The concluding part briefly describes some structural features that any set of doctrines managing the interface between national and international law that is attuned to the normative concerns developed here are likely to exhibit (IV).

II. A Constitutionalist Model: Four Principles of Engagement

How then should citizens in liberal constitutional democracies engage international law? What are the relevant normative concerns? The following presents a framework for thinking about the moral concerns that any set of doctrines governing the interface between national and international law ought to take into account and reflect.

At the heart of the model are four distinct moral concerns, each captured by a distinct principle.[13] These principles are the *formal principle of international legality, the jurisdictional principles of subsidiarity, the procedural principle of adequate participation and accountability, as well as the substantive principle of achieving outcomes that are not violative of fundamental rights and reasonable.*

The principle of international legality establishes a presumption in favour of the authority of international law. The fact that there is a rule of international law governing a specific matter means that citizens have a reason of some weight to do as that rule prescribes. But this presumption is rebutted with regard to norms of international law that violate to a sufficient extent countervailing normative principles relating to jurisdiction, procedure or outcomes. To put it another way: *Citizens should regard themselves as constrained by international law and set up domestic political and legal institutions so as to ensure compliance with international law, to the extent that international law does not violate jurisdictional, procedural and outcome related principles to such an extent, that the presumption in favour of international law's authority is rebutted.* When assessing concerns relating to jurisdiction, procedure and outcome each of the relevant principles can either support or undermine the moral force of international law in a particular context.

When citizens in constitutional democracies accept the constraints imposed by an international law that is legitimate as assessed under this approach, they are not compromising national constitutional commitments. Instead, such a respect for international law gives expression to and furthers the values that underlie the commitments to liberal constitutional democracy, properly understood.

Given their pivotal role, the content of these principles deserves some further clarification. Such clarification would ideally occur both in the form of a rich set of examples that illustrate the practical usefulness of the framework in concrete contexts and a more fully developed theoretical account of each of these principles. But here a brief further description of each of these principles will have to suffice.

1. Formal Legitimacy: The Principle of International Legality

The first principle is formal and establishes a *prima facie* case for the duty to obey international law. The principle of international legality generally requires that addressees of international law should obey it.[14] International law establishes a prima facie duty to obey it and deserves the respect of citizens in liberal constitutional democracies simply by virtue of it being the law of the international community. International law serves to establish a fair framework of cooperation between actors of international law[15] in an environment where there is deep disagreement about how this should best be achieved. In order for international law to achieve its purpose, those who are addressed by its norms are morally required to generally comply, even when they disagree with the content of a specific rule of international law.[16] There is *a prima facie duty of civility* to comply with

even those norms of international law that the majority of national citizens believe to be deficient.[17] Otherwise international law has no chance of achieving its purpose.

A commitment to the principle of international legality says nothing about the proper scope of international law. It certainly provides no grounds for some international lawyer's enthusiasm for expanding the reach of international law to as many domains as possible. Nor does it make a fetish of legality by suggesting that legal forms of dispute resolution are superior to other forms. But it does suggest that once a norm of international law has come into existence, its very existence provides a reason to comply with it. In this sense it establishes a presumption in favour of compliance with international law.

In the European world at the beginning of the century Max Weber could claim that formal legality could replace charisma or tradition as *the* source of legitimacy.[18] After WWII, such a thin notion of legitimacy has been gradually replaced by the considerably richer idea of constitutional legitimacy. To be fully legitimate more is required of a rule than just its legal pedigree. Formal legality matters, but it is not the only thing that matters. More specifically, there is a range of other concerns that provide countervailing considerations and suggest that under certain circumstances the presumption in favour of the legitimacy if international law can be rebutted. These concerns are related to a more substantive commitment to liberal-democratic governance. Concerns about democratic legitimacy should best be understood as concerns about three analytically distinct features of international law. These concerns are related to jurisdiction, procedure and outcomes respectively. The presumption in favour of compliance with international law can be overridden, by reasons of sufficient weight relating to jurisdiction, procedure or

outcome. Once there are such reasons, citizens in a constitutional democracy ought to think of themselves as free to deviate from the requirements of international law. In these cases, citizens have good reasons to conceive of themselves as free to generate and apply the independent outcomes of the domestic legal and political process.

2. Jurisdictional Legitimacy: The Principle of Subsidiarity

The first of those three concerns is captured by the *principle of jurisdictional legitimacy or subsidiarity.* Subsidiarity is in the process of replacing the unhelpful concept of "sovereignty" as the core idea that serves to demarcate the respective spheres of the national and international.[19] The principle of subsidiarity found its way into contemporary debates through its introduction to European constitutional law in the Treaty of Maastricht. It ought to be conceived as an integral feature of international law as well.

In Europe it was used to guide the *drafting* of the European Constitutional Treaty signed in October 2004. It is a principle that guides the *exercise* of the European Union's power under the Treaty. And it guides the *interpretation* of the European Union's laws. As such, it is a structural principle that applies to all levels of institutional analysis, ranging from the big picture assessment of institutional structure and grant of jurisdiction to the microanalysis of specific decision-making processes and the substance of specific decisions.

At its core the principle of subsidiarity requires any infringements of the autonomy of the local level by means of pre-emptive norms enacted on the higher level to be justified by good reasons.[20] Any norm of international law requires justification of a special kind.

It is not enough for it to be justified on substantive grounds, say, by plausibly claiming that it embodies good policy. Instead the justification has to make clear what exactly would be lost if the assessment of the relevant policy concerns was left to the lower level. With exceptions relating to the protection of minimal standards of human rights, *only reasons connected to collective action problems* - relating to externalities or strategic standard setting giving rise to "race to the bottom" concerns for example - are good reasons to ratchet up the level on which decisions are made. And even when there are such reasons, *they have to be of sufficient weight to override any disadvantages connected to the pre-emption of more decentralized rule-making*. On application subsidiarity analysis thus requires a two step test. First, reasons relating to the existence of a collective action problem have to be identified. Second, the weight of these reasons has to be assessed in light of countervailing concerns relating to state autonomy in the specific circumstances. This requires the applications of a "proportionality test" or "cost benefit analysis" that is focused on the advantages and disadvantages for ratcheting up the level of decision-making. This means that on application this principle, much like the others, requires saturation by arguments that are context sensitive and most likely subject to normative and empirical challenges. Its usefulness does not lie in providing a definitive answer in any specific context. But it structures inquiries in a way that is likely to be sensitive to the relevant empirical and normative concerns.

There are good reasons for the principle of subsidiarity to govern the allocation and exercise of decision making authority wherever there are different levels of public authorities. These reasons are related to sensibility towards locally variant preferences, possibilities for meaningful participation and accountability and the protection and

enhancement of local identities that suggest the principle of subsidiarity ought to be a general principle guiding institutional design in federally structured entities. But the principle has particular weight with regard to the management of the national/international divide. In well-established constitutional democracies instruments for holding accountable national actors are generally highly developed. There is a well-developed public sphere allowing for meaningful collective deliberations, grounded in comparatively strong national identities. All of that is absent on the international level.

The principle of subsidiarity is not a one-way street, however. Subsidiarity related concerns may, in certain contexts, strengthen rather than weaken the comparative legitimacy of international law over national law. If there are good reasons for deciding an issue on the international level, because the concerns addressed are concerns best addressed by a larger community, then the international level enjoys greater jurisdictional legitimacy. The idea of subsidiarity can provide the grounds for strong claims about the *desirability for transnational institutional capacity-building* in order to effectively address collective action problems and secure the provision of global public goods. And even though the principle generally requires contextually rich analysis, there are simple cases. The principle can highlight obvious structural deficiencies of national legislative processes with regard to some areas of regulation.

Imagine that in the year 2010 a UN Security Council Resolution enacted under Chapter VII of the UN Charter imposes ceilings and established targets for the reduction of carbon dioxide emissions aimed at reducing global warming. Assume that the case for the existence of global warming and the link between global warming and carbon dioxide emissions has been conclusively established. Assume further that the necessary qualified

majority in the Security Council was convinced that global warming presented a serious threat to international peace and security and was not appropriately addressed by the outdated Kyoto Protocol or alternative Treaties that were open to signature, without getting the necessary number of ratifications to make them effective. Finally, assume that a robust consensus had developed that Permanent Members of the newly enlarged and more representative UN Security Council[21] were estopped from vetoing a UN Resolution, if four fifths of the Members approved a measure.

Now imagine a powerful constitutional democracy, such as the United States, has domestic legislation in force that does not comply with the standards established by the Resolution. The domestic legislation establishes national emission limits and structures the market for emission trading, but goes about setting far less ambitious targets and allowing for more emissions then the international rules promulgated by the Security Council allow. Domestic political actors invoke justifications linked to life-style issues and business interests.[22] National cost-benefit analysis, they argue, has suggested that beyond the existing limits it is better for the nation to adapt to climate change rather than incurring further costs preventing it. After due deliberations on the national level a close but stable majority decides to disregard the internationally binding Security Council resolutions and invokes the greater legitimacy of the national political process. Yet, assume that the same kind of cost-benefit analysis undertaken on the global scale has yielded a clear preference for aggressively taking measures to slow down and prevent global warming along the lines suggested by the Security Council Resolution.

In such a case, the structural deficit of the national process is obvious. National processes, if well designed, tend to appropriately reflect values and interests of national

constituents. As a general matter, they do not reflect values and interests of outsiders. Since in the case of carbon dioxide emissions there are externalities related to global warming, national legislative processes are hopelessly inadequate to deal with the problem. To illustrate the point: The U.S. produces approximately 25% of the world's carbon dioxide emissions, potentially harmfully affecting the well-being of peoples worldwide. Congress and the EPA currently make decisions with regard to the adequate levels of emissions. Such a process clearly falls short of even basic procedural fairness, given that only a small minority of global stakeholders is adequately represented in such a process.[23] It may well turn out to be the case that cost benefit analysis conducted with the national community as the point of reference suggests that it would be preferable to adapt to the consequences of global warming rather than incurring the costs trying to prevent or reduce it. In other jurisdictions, the analysis could be very different.[24] More importantly, cost benefit analysis conducted with the global community as the point of reference could well yield results that would suggest aggressive reductions as an appropriate political response. The jurisdictional point here is that *the relevant community that serves as the appropriate point of reference for evaluating processes or outcomes is clearly the global community.* When there are externalities of this kind, the legitimacy problem would not lie in the Security Council issuing regulations. Legitimacy concerns in these kinds of cases are more appropriately focused on the absence of effective transnational decision-making procedures and the structurally deficient default alternative of domestic decision-making.

The principle of subsidiarity, then, is Janus faced. It serves not only to protect state autonomy against undue central intervention. It also provides a framework of analysis

that helps to bring into focus the structural underdevelopment of international law and institutions in some policy areas. In these areas arguments from subsidiarity help strengthen the authority of international institutions engaging in aggressive interpretation of existing legal materials to enable the progressive development of international law in the service of international capacity-building.[25]

3. Procedural Legitimacy: The Principle of Adequate Participation and Accountability

One reason why national law is thought to enjoy comparatively greater legitimacy than anything decided on the international level is the idea that the core depositories of legitimacy are electorally accountable institutions. On the national level, legislative bodies constituted by directly elected representatives make core decisions. There are no such institutions on the international level. Customary international law is generated by an ensemble of actors ranging from democratically legitimate and illegitimate governments, unelected officials of international institutions, judges and arbitrators, scholars and NGOs. Treaties, on the other hand, are legitimate to the extent and exactly because they tend to require national legislative endorsement in some form or another. Some claim that problems arise when Treaties create institutions in which unelected officials in conjunction with other actors may create new obligations, which, at the time the Treaty was signed, were impossible to foresee.[26] National law is superior because it tends to be parliamentary law, which is law authorized by a directly representative institution.

Many things would need to be said to address this claim. I will confine myself to two core points.

First, even on the national level, parliament as the traditional legislative forum has lost significant ground in the 20th century in constitutional democracies. Parliament is no longer considered as the exclusive institutional home of legitimate decision-making on the domestic level. On the one hand, this is linked to the emergence of the *administrative state*. For what generally are believed to be good reasons, the turn to the administrative state in the first half of the 20th century has involved significant delegation of regulatory authority to administrative institutions of various kinds. Whether in the area of monetary policy, anti-trust policy or environmental policy, many of the core decisions are no longer made by parliament. This is generally justified on diverse grounds ranging from the expertise of decision-makers, the greater possibilities of participation for the various stakeholders involved, and the like.[27] The argument that this is of little significance because legislatures retain the possibility to legislate whenever there is the requisite majority to do so is not irrelevant. But as a matter of institutional practice and of political realism, the effective control over administrative decision-making that exists in virtue of such a possibility is modest.[28] On the other hand, liberal constitutional democracies have developed in the second half of the 20th century to include *constitutional courts* with the authority to strike down laws generated by the legislative process on grounds of constitutional principle. And constitutional courts have engaged in such a practice more or less aggressively in many jurisdictions. In many jurisdictions, they enjoy more public support than any other political institution as a result.[29] The reasons generally invoked to justify judicial review of legislative decisions are well rehearsed. They include the

comparative advantage to secure the rights of individuals against inappropriate majoritarian intervention, concerns that are particularly pertinent with regard to groups disadvantaged in the political process as well as other instances in which political failures of various kinds suggest a comparative advantage for judicial review of other actor's decisions. It is important to take note of a bad argument for judicial review. Judicial review is not generally justified because the necessary supermajority for constitutional entrenchment has determined that a specifically circumscribed right ought to be protected. To the extent that this argument casts constitutional courts as the mouthpiece and mechanical instrument of legislative self-restraint as defined by the constitutional legislature, it is misleading at best. In most jurisdictions, a core task of constitutional courts is to interpret highly abstract constitutional clauses invoking equality, liberty, freedom of speech, property or due process. Courts in many jurisdictions engage in elaborate arguments of principle about why this or that policy concern ought to take precedence over competing concerns in a particular context. To that extent constitutional courts can only be understood as political actors in their own right. If it is desirable for there to be such an actor, it can only be because of widely held beliefs about the comparative advantage of the judicial process over the ordinary political process across the domain that falls within the constitutional jurisdiction of the court.[30]

It turns out that any robust version of majoritarian parliamentarianism cannot be understood as the ideal underlying contemporary political practice in liberal constitutional democracies. Instead, there is a predominance of a more pragmatic approach. That approach does take seriously concerns relating to checks and balances, accountability, participation, responsiveness, transparency and so on.[31] But over the

whole spectrum of political decision-making, constitutional democracies allocate decision-making authority to a wider range of decision-makers than a robust parliamentarianism is willing to acknowledge. This draws attention to two points of significance for assessing the comparative legitimacy of international and national law. First much of international law that is in potential conflict with outcomes of the national political process competes with national rules determined either by administrative agencies or constitutional courts, suggesting that the argument from democracy has less bite at least in such cases. And even if International Law does compete with the outcomes of the national parliamentary process, the domestic example suggests that under some circumstances the outcomes of a non-parliamentary procedure may be preferable over the outcome of a parliamentary procedure. Given that the prerequisites for meaningful electorally accountable institutions on the international level are missing, the absence of electorally accountable institutions on the international level is insufficient to ground claims that the international legal process is deficient procedurally.

On the other hand *the absence of directly representative institutions on the transnational level and the difficulty of establishing a meaningful electoral process on the global level*[32] *is one of the reasons why the principle of subsidiarity has greater weight when assessing institutional decision-making beyond the state, than within a national community*. It is not surprising that in well established federal systems concerns about jurisdictional issues are typically less pronounced. A well developed national political process involving strong electorally accountable institutions, a cohesive national identity and a working public sphere on the national level lower the costs of ratcheting up decision-making. In the European Union, on the other hand, European elections don't

mean much as the Commission in conjunction with the Council – consisting of Members of the executive branch of Member State governments – remain largely in control of the legislative agenda. Limiting the scope of what the European Union can do is regarded as a core concern. It ought to be at least as much of a concern when it comes to international law.

But even when international law plausibly meets jurisdictional tests, it could still be challenged in terms of procedural legitimacy. The *principle of procedural legitimacy* focuses on the procedural quality of the jurisgenerative process. Electoral accountability may not be the right test to apply, but that does not mean that there are no standards of procedural adequacy. Instead the relevant question is whether procedures are sufficiently transparent and participatory and whether accountability mechanisms exist to ensure that decision-makers are in fact responsive to constituents concerns. The more of these criteria are met, the higher the degree of procedural legitimacy. In many respects mechanism and ideas derived from domestic administrative law may be helpful to give concrete shape to ideas of due process on the transnational level.[33] Furthermore, principles and mechanisms described by the EU Commission's 2001 White Paper[34] could also provide a useful source for giving substance to the idea of transnational procedural adequacy. Yet it is unlikely that the idea of procedural adequacy as it applies to the various transnational institutional processes will translate into a standard template of rules and procedures comparable to, say, the US Administrative Procedure Act. When it comes to assessing procedures as varied as dispute resolution by the WTO's DSB, UN Security Council decision-making under Chapter VII or prosecutions under the newly

established ICC, a highly contextual analysis that takes seriously the specific function of the various institutions will be necessary.

4. Outcome Legitimacy: Achieving reasonable outcomes

The final concern is related to outcomes. Bad outcomes affect the legitimacy of a decision and tend to undermine the authority of the decision-maker.[35] Yet an outcome related principle has only a very limited role to play for assessing the legitimacy of any law. Principles related to outcomes only play a limited role because disagreements about substantive policy are exactly the kind of thing that legal decision-making is supposed to resolve authoritatively.[36] It is generally not the task of addressees of norms to re-evaluate decisions already established and legally binding on them. This is why the legitimacy of a legal act can never plausibly be the exclusive function of achieving a just result, as assessed by the addressee. Were it otherwise, anarchy would reign. But that does not preclude the possibility of having international rules that cross a high threshold of injustice or costly inefficiency be ignored by a national community on exactly the grounds that they are deeply unjust or extremely costly and inefficient. What needs to be clear, however, is that any *principle of substantive reasonableness* is applied in an appropriately deferential way that takes into account the depth and scope of reasonable disagreement that is likely to exist in the international community. In particular, where jurisdictional legitimacy weighs in favour of international law and international procedures were adequate, there is a strong presumption that a national community's assessment of the substantive outcome is an inappropriate ground for questioning the legitimacy of international law and denying its moral force.

III. The Constitutionalist Framework Applied: Illustrations

What exactly follows for how national courts ought to engage international law? On the one hand, the principle of international legality establishes a presumption in favour of the authority of international law. The fact that there is a rule of international law governing a specific matter means that citizens have a reason to do as the rule prescribes. But this presumption is rebutted with regard to norms of international law that seriously violate countervailing normative principles relating to jurisdiction, procedure or outcomes. To put it another way: *Citizens should regard themselves as constrained by international law and set up domestic political and legal institutions so as to ensure compliance with international law, to the extent that international law does not violate jurisdictional, procedural and outcome related principles to such an extent, that the presumption in favour of international law's authority is rebutted.* When assessing concerns relating to jurisdiction, procedure and outcome, each of the relevant principles can either support or undermine the legitimacy of international law. As the discussion has shown it is not necessarily the case that jurisdictional and procedural concerns will weigh in favour of national decision-making, though often that will be the case. When citizens in a constitutional democracy comply with legitimate international law, citizens aren't compromising constitutional principles. Instead they are complying with the demands of principle that underlie the best interpretation of the liberal constitutional tradition they are part of. [37]

What then are the institutional implications of a constitutional model? How would citizens, committed to a constitutionalist approach, structure their domestic institutions

with regard to international law? What should the terms of engagement between national and international law be?

Here there are no quick and easy answers. In part this is because each jurisdiction has, as its starting point, its own tradition and institutions addressing foreign affairs which would need to be carefully developed within their own constitutional framework. In part it is because a great deal of additional work would need to be done to analyze how these concerns play out in various areas of international law. On application, there is no one size fits all solution.

The following can do little more than provide some illustrations concerning the kind of practices that courts thinking about the enforcement of international law might engage in.

1. The Constitutional Duty to Engage: The Domestic Relevance of International Human Rights Treaties

International Human Rights Instruments are generally Treaties. The International Covenant on Civil and Political Rights, the Inter-American Covenant or the European Convention of Human Rights, to name just some of the most important instruments, were adopted following the same international and domestic legal rules as, for example, Treaties concerning the Diplomatic and Consular Relations of States[38] or the Banning of Land Mines.[39] The status of Treaties in domestic law is conventionally addressed by domestic constitutions and generally recognized doctrines. Though specific constitutional provisions and doctrines relating to the status of Treaties in domestic law vary, in many constitutional jurisdictions Treaties have the same force as domestic statutes.[40] This

means that when there is a conflict between a statute and a Treaty, the provision enacted later in time prevails (the lex posterior or last in time rule). Furthermore there is often a recognized rule of interpretation, according to which national statutes are to be interpreted so as to not conflict with Treaties, if possible.[41] A national constitution, on the other hand, typically is believed to establish the supreme law of the land. The constitutional provisions trump Treaties in case of conflicts. Furthermore rules of constitutional interpretation that require taking into account Treaty law tend to be less universally accepted. A Kelsenian argument relating to the hierarchy of norms frequently finds resonance: Lower ranking law (statutes or Treaties) should not be used to guide the interpretation of higher-ranking law (constitutional law).[42]

Yet this doctrinal framework says next to nothing about the actual relevance of human rights law to domestic legal practice. On the one hand, human rights Treaties are rarely treated like statutes in domestic law, even when they are deemed to be self-executing. On the other hand they have an important role to play in informing national constitutional rights practice in other ways.

It should not be surprising that human rights Treaties are not treated like ordinary statutes or ordinary Treaties. First, they are atypical as Treaties in a way that weakens the case for their judicial enforcement. The core difference is jurisdictional: Unlike other Treaties, Human Rights Treaties do not function to solve specific collective action problems relating to coordination, externalities, strategic standard setting and the like. They do not have the kind of purpose that Treaties relating to arms control, greenhouse gases, trade or diplomatic relations have. The reasons for entering into a human rights Treaty are of a different sort. First, there are reasons that are linked to *traditional ideas of*

national interest and *quid pro quo* bargaining. States submit to impose on themselves certain obligations because of the benefits they believe to be getting when other states do the same. Such reasons include a) the belief that promoting human rights in other states may help prevent war and further democratic peace b) human rights help support stability and prevent civil war, with such a war in turn producing a flood of immigrants and regional security problems and c) help support prosperity and open markets in other states to the benefit also of domestic corporations and consumers.[43] Second, liberal democratic elites in newly converted democratic countries that have experienced state failures, authoritarianism or totalitarian governments in the 20th century may have an incentive to use international law to *entrench their positions for the purpose of domestic struggles*. Freshly minted democratic elites may fear resurgence of non-democratic forces and use commitments to international law and human rights in particular as a strategy to lock-in the commitment to democratic and human rights friendly institutions and increase the costs for non-democratic forces to exit those arrangements.[44] Third, states could wish to give expression to a national identity, part of which is *the commitment to a global community* structured around universal values, perhaps also to enhance their reputation as a member in good standing of the global community.[45]

When a state violates a specific rule of a human rights Treaty, it is not generally the case that another state's interests are directly affected. Once a state ignores the very idea of limitations on public authority in the name of human rights or manifestly and persistently violates them, there may be a concerns relating to stability, emigration, civil war, etc. But when it comes to fine-tuning the limits and guidance that public authorities receive from the idea of human rights in relation to their citizens, there is no reason to

think that national institutions in a constitutional democracy are unfit to ultimately and authoritatively determine these rules for themselves. All this suggests that there are *jurisdictional* reasons for human rights Treaties not to play much of a domestic role as a quasi-statutory instrument. Because the primary role of international human rights Treaties is not to establish specific coordinates for inter-state relations, their specific enforcement is less of a concern to the realization of an international rule of law.

On the other hand human rights are regarded as the moral foundations on which post WWII legal and political life has been constructed. *Outcome related reasons* suggest that international human rights Treaties should be elevated in a way that, say, Treaties addressing international postal delivery are not. Even if human rights Treaties were treated by national courts as domestic statutes, this would not adequately reflect the expressive and practical function of human rights in domestic constitutional practice. Legislatures could simply enact a new statute later in time. It is widely believed that constitutionally entrenching human rights and empowering a judiciary to strike down a piece of legislation deemed unconstitutional is an important institutional mechanism to ensure their respect.[46] The domestic protection of human rights by a Treaty that is enforced as a statute thus not only provides too much, it also provides too little protection. The typical doctrines applicable to Treaties governing their status in domestic law thus turn out to fit badly.

In practice Human Rights Treaties often provide *both more and less* protection domestically then they would if they were enforced as statutes. They function to *guide and constrain the development of domestic constitutional practice*. Besides having played an important role in the *drafting* of national constitutions in the last decades, human

rights Treaties also play a central role in the context of *interpretation* of national constitutional provisions.[47] They are being referred to as persuasive authority.[48] There is a good reason for this. International human rights Treaties establish a common point of reference negotiated by a large number of states across cultures. Given the plurality of actors involved in such a process, there are epistemic advantages to engaging with international human rights when interpreting national constitutional provisions. Such engagement tends to help improve domestic constitutional practice, by creating awareness for cognitive limitations connected to national parochialism. At the same time such engagement with international human rights law helps to strengthen international human rights culture generally.

Human rights Treaties can be relevant to the domestic interpretation of constitutional rights in a weak and a strong way.

First, international human rights can be relevant in a weak way, by providing a *discretionary point of reference for deliberative engagement*. This is the way that some recent U.S. Supreme Court decisions have referred to international human rights law. In *Roper* v. *Simmons*, Justice Kennedy writing for the Court used a reference - not to specific international human rights instruments,[49] but to an international consensus more generally - as a confirmation for the proposition that the 8th Amendment prohibition of cruel and unusual punishment prohibits the execution of juvenile offenders. And in *Grutter* v. *Bollinger* the Court made reference to a Treaty addressing discrimination issues[50] to provide further support for the claim that the Equal Protection Clause does not preclude certain affirmative action programs. In the U.S., engagement with international human rights, to the extent it takes place at all, is regarded as discretionary. It is

something a federal court facing a constitutional rights question may or may not find helpful under the circumstances.[51] And even when engagement takes place, the existence of international human rights law governing a question does not change the balance of reasons applicable to the correct resolution of the case. Reference to international human rights merely has the purpose to "confirm" a judgment or "make aware" of a possible way of thinking about an issue. In this way the U.S. court and indeed much of the literature does not distinguish between the use of foreign court decisions concerning human rights and references to international human rights law. Both have a modest role to play as discretionary points of reference for the purpose of deliberative engagement.

Second, international human rights law can be relevant to constitutional interpretation in a stronger sense. First, instead of leaving it to the discretion of courts some constitutions *require* engagement with international human rights law. A well known example of a constitution explicitly requiring engagement with international human rights law is the South African constitution. It establishes that the Constitutional Court "shall […] have regard to public international law applicable to the protection of the rights" guaranteed by the South African constitution.[52] Whereas engagement with the practice of other constitutional courts is merely discretionary,[53] engagement with international human rights law is compulsory. Second, a clear international resolution of a human rights issue may be treated not only as a consideration relevant to constitutional interpretation, but as a rebuttable *presumption* that domestic constitutional rights are to be interpreted in a way that does not conflict with international law. The existence of international human rights law on an issue can change the balance of reasons applicable to the right constitutional resolution of a case.

Such an approach has been adopted for example, by the German Constitutional Court. Unlike the South African Constitution, the German Constitution makes no specific reference to international human rights law as a source to guide constitutional interpretation. Under the German constitution Treaty law, once endorsed by the legislature in the context of the ratification process, generally has the status of ordinary statutes. Yet, in a recent decision concerning the constitutional rights of a Turkish father of an "illegitimate" child that had been given up for adoption by the mother, the Constitutional Court developed a doctrinal framework that exemplifies how international human rights can be connected to constitutional interpretation in a strong way.[54] In *Görgülü* a lower court had decided the issue in line with the requirements established by the European Court of Human Rights (hereinafter: ECHR) as interpreter of the European Convention of Human Rights, granting certain visitation rights to the father. The lower Court schematically cited the necessity to enforce international law in the form of the ECHR's jurisprudence and held in favour of the father. On appeal, the higher court dismissed the reliance on the ECHR on the grounds that the ECHR as Treaty law ranking below constitutional law was irrelevant for determining the constitutional rights of citizens. The Constitutional Court held *both* approaches to be flawed. Instead it held that "both the failure to consider a decision of the ECHR and the enforcement of such a decision in a schematic way, in violation of prior ranking [constitutional] law, may violate fundamental rights in conjunction with the principle of the rule of law." Instead the Court postulated a constitutional duty to engage: "the Convention provision as interpreted by the ECHR *must be taken in to account* in making a decision; the court must at least *duly consider* it."[55] The Court even held that there was a cause of action available

in case this duty to engage was violated: "A complainant may challenge the disregard of this duty of consideration as a violation of the fundamental right whose area of protection is affected in conjunction with the principle of the rule of law."[56] Beyond the duty to engage the European Convention when interpreting the Constitution the Court also had something to say about the nature of that engagement: International law and, especially the international human rights law of the European Convention, establishes a *presumption* about what the right interpretation of domestic constitutional law requires. "As long as applicable methodological standards leave scope for interpretation and weighing of interests, German courts *must give precedence* to interpretation in accordance with the Convention."[57] This presumption does not apply in cases where the constitution is plausibly interpreted to establish a higher level of protection than the ECHR. The standards established by the ECHR provide a presumptive floor, but not a presumptive ceiling.

This is not the place to analyze the relative merits of the weak and strong ways of engaging with international human rights law in the context of domestic constitutional interpretation, even though this is where the interesting questions lie. Nor is it the place to analyze the differences in the legal, political and cultural contexts that explain and, to some extent, justify the differences in approach of the U.S. Supreme Court and German Constitutional Court. Here the point was to illustrate how specific features of human rights Treaties give rise to a specific set of characteristic domestic judicial practices that bear only a tenuous connection to the standard doctrinal framework governing the application of Treaties in domestic law. The specific features of these domestic judicial practices are better explained, justified and challenged in terms of jurisdictional,

procedural and outcome-related considerations of the kind that the constitutionalist model focuses on.

2. Precluding the Migration of Unconstitutional Ideas? Constitutional rights and the domestic review of decisions by International Institutions

Is it appropriate for acts by international institutions to be subjected to national constitutional scrutiny? International institutions, from the European Union to the United Nations have an increasingly important role to play in global governance. States have delegated authority to these institutions in order to more effectively address the specific tasks within their jurisdictions.[58] These institutions make decisions that directly effect people's lives. Increasingly this gives rise to situations in which constitutional or human rights of individuals are in play. When these decisions are enforced domestically, should national courts apply to them the same constitutional rights standards they apply to acts by national public authorities?

Here there are two opposing intuitions in play. The first focuses on the nature of the legal authority under which international institutions operate. International institutions are generally based on Treaties concluded between states. These Treaties are accorded a particular status in domestic law. If these Treaties establish institutions that have the jurisdiction to make decisions in a certain area, these decisions derive their authority from the Treaty and should thus have at most the same status as the Treaty as a matter of domestic law. Since in most jurisdictions Treaties have a status below constitutional law, any decisions enforced domestically must thus be subject to constitutional standards.

The opposing intuition is grounded in functional sensibilities. Constitutions function to organize and constrain domestic public authorities. They do not serve to constrain and guide international institutions. Furthermore international institutions typically function to address certain coordination problems that could not be effectively addressed on the domestic level by individual states. Having states subject decisions by international institutions to domestic constitutional standards undermines the effectiveness of international institutions and is incompatible with their function. So both the function of the domestic constitution and the function of international institutions suggest that domestic constitutional rights should not be applied to decisions by international institutions at all.

In its recent *Bosphorus* decision,[59] the European Court of Human Rights had to address just this kind of question, and it did so developing a doctrinal framework that can serve as an example of the application of the framework presented here. To simplify somewhat the applicant, Bosphorus, was an airline charter company incorporated in Turkey, which had leased two 737-300 aircraft from Yugoslav Airlines. One of these Bosphorus operated planes was impounded by the Irish Government while on the ground in Dublin airport. By impounding the aircraft the Irish government implemented EC Regulation 990/93, which in turn implemented UN Security Council Resolution 820 (1993). UN Security Council Resolution 820 was one of several resolutions establishing sanctions against the Federal Republic of Yugoslavia in the early 90s designed to address the armed conflict and human rights violations taking place there. It provided that states should impound, *inter alia*, all aircraft in their territories in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal

Republic of Yugoslavia. As an innocent third party that operated and controlled the aircraft, Bosphorus claimed that its right to peaceful enjoyment of its possessions under Art. 1 of Protocol no. 1 to the Convention had been violated.[60]

The ECHR is, of course, not a domestic constitutional court, but itself a court established by a Treaty under international law. But with regard to the issue it was facing it was similarly situated to domestic constitutional courts. Just as the UN Security Council or the European Union – the two international institutions whose decisions have led to the impounding of the aircraft - are not public authorities directly subject to national constitutional control, they are not directly subject to the jurisdiction of the ECHR either. Just as only national public authorities are generally addressees of domestic constitutions, the ECHR is addressed to public authorities of signatory states.

The Court began by taking a formal approach: At issue were not the acts of the EU or the UN, but the acts of the Irish government impounding the aircraft. These acts unquestionably amounted to an infringement of the applicant's protected interests under the Convention. The question is whether the government's action was justified. Under the applicable limitations clause government's actions were justified if they struck a fair balance between the demands of the general interest in the circumstances and the interests of the company.[61] Government's actions have to fulfill the proportionality requirement. It is at this point that the court addresses the fact that the Irish government was merely complying with its international obligations when it was impounding the aircraft. The Court held that compliance with international law clearly constituted a legitimate interest. The Court recognized "the growing importance of international co-operation and of the consequent need to secure the proper functioning of international

organizations." But that did not automatically mean that a state could rely on international law to completely relieve itself from the human rights obligations it had assumed under the ECHR. Instead the Court "reconciled" the competing principles – ensuring the effectiveness of international institutions and the idea of international legality on the one hand and outcome related concerns (the effective protection of human rights under the ECHR) on the other – by establishing a doctrinal framework that strikes a balance between the competing concerns.

First, the Court held that state action taken in compliance with international legal obligations is generally justified "as long as the relevant organization is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides."[62] If an international institution provides such equivalent protection, this establishes a *general presumption* that a State has not departed from the requirements of the Convention when it merely implements legal obligations arising from membership of such an international institution. If no equivalent human rights protection is provided by that international institution, the ECHR will subject the state action to the same standard as it would if it were acting on its own grounds, rather than just complying with international law. When a general presumption applies, this presumption can be *rebutted* in the circumstances of the particular case, when the protection of Convention rights was *manifestly deficient*.[63]

Under the circumstances the Court first established that the international legal basis on which the Irish government effectively relied was the EC Regulation that implemented the UN Security Council Resolution and *not* the UN Security Council Resolution itself,

which had no independent status as a matter of domestic Irish law. It then engaged in a close analysis of the substantive and procedural arrangements of the European Community as they relate to the protection of human rights. Given in particular the role of the ECJ as the enforcer of last resort of human rights in the European Community the ECHR concluded that the European Community was an international institution to which the presumption applied. Since this presumption had not been rebutted in the present case it held that the Irish government had not violated the Convention by impounding the aircraft.

This approach may be generally satisfactory with regard to legislative measures taken by the European Community and reflects sensibilities towards constitutionalist principles. But in an important sense it dodges the issue. In this case the EC itself had merely mechanically legislated to implement a UN Security Council Resolution. And it is very doubtful that the ECHR would have held that UN Security Council decisions deserve the same kind of presumption of compliance with human rights norms as EC decisions. It is all very well to say that European citizens are adequately protected against acts of the EC generally. But this just raises the issue what adequate protection amounts to, when the substantive decision has been made *not* by EC institutions, but by the UN Security Council. How should the European Court of Justice go about assessing, for example, whether EC Regulation 990/93, which implemented the UN Security Council Resolution, violated the rights of Bosphorus as guaranteed by the European Community? Should the European Court of Justice, examining the EC Regulation under *the EC's* standards of human rights, accord special deference to the Regulation, because it implemented UN Security Council obligations?

There is no need to make an educated guess about what the ECJ would do. The ECJ had already addressed the issue. Bosphorus had already litigated the issue in the Irish Courts before turning to the ECHR. The Irish Supreme Court made a preliminary reference to the European Court of Justice under Art. 234 ECT, to clarify whether or not EC law in fact required the impounding of the aircraft, or whether such an interpretation of the regulation was in violation of the human rights guaranteed by the European legal order. In assessing whether the regulation was sufficiently respectful of Bosphorus' rights to property and its right to freely pursue a commercial activity, the ECJ ultimately applied a proportionality test.[64] The general purposes pursued by the Community must be proportional under the circumstances to the infringements of Bosphorus' interests.

How then is it relevant that the EC Regulation implemented a UN Security Council Resolution? Within the proportionality test the Court emphasized that the EC Regulation contributed to the implementation at the Community level of the UN Security Council sanctions against the Federal Republic of Yugoslavia. But, unlike the ECHR, the ECJ did not go on to develop deference rules establishing presumptions of any kind. Instead the fact that the EU Regulation implemented a Security Council decision was taken as *a factor* that gives further weight to the substantive purposes of the Regulation to be taken into account. The principle of international legality was a factor in the overall equation. The purpose to implement a decision by an international institution added further weight to the substantive purpose pursued by the regulation to persuade the Yugoslav government to change its behaviour and help bring about peace and security in the region. But a generous reading of the decision also suggests that beyond formal and substantive considerations jurisdictional considerations were added to the mix: The Court

emphasized the fact the concerns addressed by the Security Council concerned international peace and security and putting an end to the state of war. The particular concerns addressed by the UN Security Council went right to the heart of war and peace, an issue appropriately committed to the jurisdiction of an international institution such as the UN. Jurisdictional concerns, then, give further weight to the fact that the UN had issued a binding decision on the matter. Under these circumstances the principle of international legality has particular weight. The Court concluded that: "As compared with an objective of general interest so fundamental *for the international community* […] the impounding of the aircraft in question, which is owned by an undertaking based in […] the Federal Republic of Yugoslavia, cannot be regarded as inappropriate or disproportionate."[65]

Within the framework used by the ECJ, both the principle of international legality and jurisdictional considerations were factors that the Court relied on in determining whether, all things considered, the EU measures as applied to Bosphorus in the particular case were proportionate. Outcome related concerns did not disappear from the picture. Indeed within proportionality analysis substantive concerns – striking a reasonable balance between competing concerns – framed the whole inquiry and remained the focal point of the analysis. But what counts as an outcome to be accepted as reasonable from the perspective of a regional institution such as the European Union is rightly influenced to some extent by what the international community, addressing concern of internal peace and security through the United Nations, deems appropriate. Though it may not have made a difference in this particular case, sanctions by the EU enacted under the auspices of the UN Security may be held by the ECJ to be proportionate, even when the same

sanctions imposed by the EU unilaterally may be held to be disproportionate and thus in violation of rights.

The approaches by the ECHR and the ECJ both reflect engagement with the kind of moral concerns highlighted above. The ECHR's more categorical approach is preferable with regard to institutions such as the European Union that have relatively advanced human rights protection mechanisms. With regard to such an institution a presumption of compliance with human rights seems appropriate, preventing unnecessary duplication of functions and inefficiencies. On the other hand even when such a presumption does not apply, there are still concerns relating to the principle of international legality in play. Here the kind of approach taken by the ECJ in Bosphorus seems to be the right one.

But the case of UN Security Council Resolutions may help bring to light a further complication. It is unlikely that UN Security Council Resolutions would be held by the ECHR as deserving a presumption of compatibility. Procedurally UN Security Council decisions involve only representatives of relatively few and, under current rules, relatively arbitrarily[66] selected, states. Their collective decision-making is frequently, to put it euphemistically, less than transparent.

Council resolutions enacted to combat terrorism in recent years in particular illustrate the severity of the problem.[67] These resolutions typically establish the duty of a state to impose severe sanctions on individuals or institutions believed to be associated with terrorism: Assets are frozen and ordinary business transactions made impossible because an individual or an entity appears on a list. The content of the list is determined in closed proceedings by the Sanctions Committee established under the Resolution. Until very recently this internal procedure did not even require a state who wanted an entity or

individual to be on the list to provide reasons.[68] If a state puts forward a name forward to be listed, it would be listed, unless there were specific objections by another state. There is no meaningful participatory process underlying UN Security Council resolutions, and there is no process within the Sanctions Committee that even comes close to providing the kind of administrative and legal procedural safeguards that are rightly insisted upon on the domestic level for taking measures of this kind.

These deficiencies are not remedied by more meaningful assessments during the implementation stage in Europe. The implementation of the Council Resolution by the EC[69] does not involve any procedure or any substantive assessments of whether those listed are listed for a good reason. Implementation is schematic. The fact that a name appears on the list as determined by the UN Security Council is regarded as a sufficient reason to enact and regularly update implementation legislation. As the Sanction Committee of the UN Security Council decides to amend the list of persons to whom the sanction are to apply, the EU amends the implementation Regulation, which is the legal basis for legal enforcement in Member States, accordingly.[70] EU member states have frozen the assets of about 450 people and organizations who feature on this list.

Furthermore there is no administrative type review process and no alternative legal review procedures that provide individuals with minimal, let alone adequate protection against mistakes or abuse by individual states that are represented in the Sanction Committee. The only "remedy" available to individuals and groups who find their assets frozen is to make diplomatic representations to their government that can then make diplomatic representations to the Security Council Sanctions Committee to bring about delisting, if the represented Member States unanimously concur.

Clearly the serious deficiencies that exist on the level of political procedures in this context ought to be incorporated in the ECJ's framework for assessing human rights violations by implementation measures concerning UN Security Council Resolutions of this kind. This, at least, would be required by the principle of procedural adequacy within the constitutionalist model developed here. And it could easily be done. For so long as there are serious procedural inadequacies underlying the international decision-making process, any weight assigned to the principle of legality within proportionality analysis should be regarded as neutralized by countervailing procedural concerns.

When applied to cases that have been percolating through the European Court system in recent years, this would no doubt significantly undermine the enforcement of sanctions as required by the UN Security Council Resolutions. Yet the effect of forceful judicial intervention is likely to be salutary. If the Court were to strike down as incompatible with European human rights the significant infringement of individual interests without adequate procedural guarantees, this creates an incentive for European actors to use their political clout to help significantly improve the procedures used by the Sanction Committee to decide whom to list and when to de-list and strengthens their hand in doing so: If these demands are not met, the sanction regime would simply not be fully implementable on the domestic level. States would have to establish independent review mechanisms that fulfill minimal requirements. In this way European courts enforcing European human rights regimes would help preclude the migration of unconstitutional ideas from the international to the regional and national level while providing political actors with the right incentives to use their influence to improve the procedures of global governance.

Yet the European Court of First Instance in the first[71] of many cases[72] that have been filed to have reached the merits stage[73] has shied away from taking such a step. Instead, unlike either the ECJ or the ECHR, it adopted a straightforward monist approach. It began stating the trite truth that UN Security Council Resolutions were binding under International Law trumping all other international obligations. But it then went on to derive from this starting point that "infringements either of fundamental rights as protected by the Community legal order […] cannot affect the validity of a Security Council measure or its effect in the territory of the Community."[74] The only standards it could hold these decisions to were principles of *jus cogens*, which the court held were not violated in this case.[75] It can be hoped that on appeal to the ECJ and possible further review by the ECHR the constitutionalist sensibilities of these Courts will incline them to strike down the EC implementing legislation as incompatible with European human rights guarantees.[76] Taking international law seriously does not require unqualified deference to a seriously flawed global security regime.[77] On the contrary, the threat of subjecting these decisions to meaningful review could help bring about reforms on the UN level. The very prospect of having the decision reviewed by the ECJ has already helped mobilize the discussion of reform efforts at the UN level. If these efforts bear fruit it can be hoped that the ECJ will have reasons not to insist on meaningful independent rights review of individual cases.

III. Conclusions: The Techniques and Distinctions of Graduated Authority

Constitutionalist principles establish a normative framework for assessing and guiding national courts in their attempt to engage international law in a way that does justice both

to their respective constitutional commitments and the increasing demands of an international legal system. There are three interesting structural features that characterize any set of doctrines that reflect a commitment to the constitutionalist model.

First, such courts take a significantly more *differentiated* approach than traditional conflict rules suggest.[78] Treaties are not treated alike, even if constitutionally entrenched conflict rules suggest they should be. Instead doctrines used are sensitive to the specific subject matter of a Treaty and the jurisdictional considerations that explains its particular function, as the example of human rights Treaties has illustrated. Furthermore the example of the ECHR engagement with international institutions illustrated how outcome related considerations are a relevant factor for assessing the authority of its decisions.

Second, the kind of doctrinal structures that come into view suggests a more *graduated authority* than the traditional idea of constitutionally established conflict rules suggest. The doctrinal structures that were analyzed in the examples illustrated *a shift from rules of conflict to rules of engagement*. These rules of engagement characteristically take the forms of a duty to engage, the duty to take into account as a consideration of some weight, or presumptions of some sort. The old idea of using international law as a "canon of construction" points in the right direction, but does not even begin to capture the richness and subtlety of the doctrinal structures in place. The idea of a "discourse between courts" too is a response to this shift. It captures the reasoned form that engagement with international law frequently takes. But it too falls short conceptually. It is not sufficiently sensitive to the graduated claims of authority that various doctrinal frameworks have built into them. The really interesting questions

concern the structures of graduated authority built into doctrinal frameworks: who needs to look at what and give what kind of consideration to what is being said and done.[79]

Finally the practice is jurisprudentially more complex than traditional models suggest. The traditional idea that the management of the interface between national and international law occurs by way of constitutionally entrenched conflict rules that are focused on the sources of international law is deeply committed to positivist legal thinking. It suggests that the national constitution is the source of the applicable conflict rules. Furthermore these constitutional conflict rules are themselves typically organized around the "sources" of international law: Treaties and customary international law are each assigned a particular status in the domestic legal order. Both ideas are seriously challenged by actual practice that is attuned to constitutionalist thinking. That practice suggests that moral principles relating to international legality, jurisdiction, procedures and outcomes have a much more central role to play in explaining and guiding legal practice. These principles are not alien to liberal constitutional democracy, appropriately conceived. And they are not alien to international law. But their legal force derives not from their canonical statement in a legal document. Their legal force derives from their ability to make sense of legal practice and to develop it further in a way that fulfills its promise of integrity.

[1] I thank the participants of the conference on the "Migration of Constitutional Ideas" at the University of Toronto in Oct. 2004 and in particular Sujit Choudhry and Karen Knop for their helpful feedback. An earlier draft was also presented at a Princeton seminar on "International Human Rights and Democratic Legitimacy" in April 2004 and profited from comments by Chris Eisgruber and Martin Flaherty. Further helpful comments on earlier drafts and presentations were provided in particular by Ronald Dworkin, David Golove, Benedict Kingsbury, Tom Nagel, Rick Pildes, Anne-Marie Slaughter, Joseph Weiler and the participants of NYU's Colloquium on "Globalization and its Discontents" and the participants of NYU's Colloquium on "Legal, Political and Social Philosophy".

[2] For the proposition that law generally makes a claim to authority, see J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979), p. 30. For the claim that this is also true for international law see M. Kumm, The Legitimacy of International Law: A Constitutionalist Framework of Analysis (2004) 15 *European Journal of International Law* 907 .

[3] These kinds of changes are widely described as involving a shift to international law as governance, see J. Weiler, The Geology of International Law – Governance, Democracy and Legitimacy (2004) 64 *ZaöRV* 547. See more generally Kingsbury, Krisch, Stewart and Wiener (eds.), *The Emergence of Global Administrative Law* (2005) 68 *Law & Contemporary Problems* (Symposium Issue) .

[4] See for example Alexander Aleinikoff, Thinking outside the Sovereignty Box: Transnational law and the U.S. Constitution (2004) 82 *Texas Law Review* 1989; Jed

Rubenfeld, Unilateralism and Constitutionalism (2004) 79 *New York University Law Review* 1971 (2004).

[5] The classical literature on the monist side includes the Vienna School with Kelsen, *General Theory of Law and State* (Harvard University Press, Cambridge, 1945), pp. 363-80; Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Vőlkerrechtsverfassung* (Mohr, Tübingen, 1923); H. Lauterpacht, *International law and Human Rights* (Praeger, New York, 1950) and Scelle, *Précis de Droit des Gens: Principes et Systématique*, vol. II (Sirey, Paris, 1934). Leading Dualists include Triepel, *Völkerrecht und Landesrecht* (CL Hirschfeld, Leipzig, 1899) and Oppenheim, *International Law* (Longman, London, 1905).

[6] See for example I. Brownlie, *Principles of Public International Law* (5th edn, Oxford University Press, 1998), p. 34: "These and other writers express a preference for practice over theory, and it is to the practice that attention will now be turned." See also Damrosch, Henkin, Pugh, Schachter and Smit, *International Law: Cases and Materials* (4th edn, West, St. Paul, MN, 2001) p.160: "By the late twentieth century the dualist-monist debates had largely subsided, as particular states adopted their own variants of one school or another, and did so not from jurisprudential persuasion but from their own historic, political and constitutional commitments." Rudolf Geiger, *Grundgesetz und Völkerrecht* (3rd edn, Beck, Munich, 2002) declares the theoretical debate irrelevant for the resolution of practical questions and then goes on to discuss the "concrete interdependence" between the different legal orders (at p. 14).

[7] Even if a constitution determines that international law is to be the supreme law of the land, it is still committed to dualism, if the supremacy of international law is determined

by virtue of a national constitutional rule. Only if the national constitutional rule was merely declaratory and not constitutive, would it reflect a monist conception of the world of law. For debates in the Netherlands of this kind see Monica Claes and Bruno de Witte, 'Report on the Netherlands' in Slaughter, Sweet and Weiler (eds.), *The European Court and National Courts: Doctrine and Jurisprudence* (Hart Publishing, Oxford, 1998) p. 171 at p. 173.

[8] For a comparative overview concerning the rules governing Treaties see F. Jacobs and S. Roberts (eds.), *The Effect of Treaties in Domestic Law* (Sweet & Maxwell, London, 1987). For an overview concerning customary international law, see Wildhaber and Breitenmoser, The Relationship between Customary International Law and Municipal Law in Western European Countries (1987) 48 *ZaöRV* 163.

[9] Interestingly there is no agreement on whether customary international law should have a higher or a lower status than Treaties in domestic law. In Germany, for example, customary international law generally trumps statutes, whereas Treaties occupy the same position as statutes (requiring the application of the last in time rule in case of conflict (see Geiger, *Grundgesetz und Völkerrecht*, pp.167, 176). In the U.S., on the other hand Treaties have the same status as Congressional legislation, whereas there is a debate whether customary international trumps state law or not. There is agreement, however, that customary international law enjoys a *lower* status than Congressional legislation (see *Restatement of the Law (Third), The Foreign Relations Law of the United States* (American Law Institute, St. Paul, MN, 1987), paras. 115 and 111(d)). The European Court of Justice accords the same status to both Treaties and Customary International Law, see Case C-162/96, *Racke* v. *Hauptzollamt Mainz* [1998] ECR I-3655 (concerning

the rebus sic stantibus rule as it applies to the unilateral suspension of trade concessions of an EEC/Yugoslavia Cooperation Agreement).

[10] See Roger P. Alford, The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance (2000) 94 *American Society of International Law Proceedings* 160.

[11] See for example Anne-Marie Slaughter, Judicial Globalization (2000) 40 *Virginia Journal of International Law* 1103 and A Typology of Transjudicial Communication (1994) 29 *University of Richmond Law Review* 99; Karen Knop, Here and There: International law in Domestic Courts (2000) 32 *New York University Journal of International Law and Politics* 501; Claire L'Heureux-Dubé, The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court (1998) 34 *Tulsa Law Review* 15; Jenny Martinez, Towards an International Judicial System (2003) 56 *Stanford Law Review* 429.

[12] For some important groundwork concerning the use of comparative arguments see S. Choudhry, Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation (1999) 74 *Indiana Law Journal* 819.

[13] The following discussion draws heavily on M. Kumm, , supra, note 2 918-927

[14] For a more in depth discussion of the idea of the International Rule of Law as an argument for national courts to enforce international law over national law as well as a discussion of countervailing concerns related to reciprocity and flexibility see M. Kumm, International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model (2003) 44 *Virginia Journal of International Law* 19-32.

[15] For an extensive discussion see T. Franck, *Fairness in International law and Institutions* (Oxford University Press, 1995).

[16] The idea of a duty to support the International Rule of Law is in some sense analogue to what Rawls has called the natural duty to support a just constitution. See J. Rawls, *A Theory of Justice* (Harvard University Press, Cambridge, 1971), pp. 333-342.

[17] According to Rawls there is a "natural duty of civility not to invoke the faults of social arrangements as a too ready excuse for not complying with them." *Ibid.*, p. 355.

[18] M. Weber, Wirtschaft und Gesellschaft (Mohr, Tübingen, 1922).

[19] J. Jackson labelled a similar idea "sovereignty-modern". See J. Jackson, Sovereignty-Modern: A New Approach to an Outdated Concept (2003) 97 *American Journal of International Law* 782.

[20] For a discussion of how the principle of subsidiarity operates, see M. Kumm, Constitutionalizing Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union (Forthcoming, 2006) 12 *European Law Journal*.

[21] Assume that current proposals had become law and that it included as new Permanent Members an African state (Nigeria or South Africa), two additional Asian states (Japan and India or Indonesia), a South American State (Brazil) and an additional European state (Germany), as well as five new non permanent members.

[22] For an argument of this kind in respect of the US position on the Kyoto Protocol, *see* Bruce Yandle and Stuart Buck, Bootleggers, Baptists and the Global Warming Battle (2002) 26 *Harvard Environmental Law Revew* 177 (contending at 179 that "the Kyoto Protocol would have been a potentially huge drag on the United States' economy" while producing minimal environmental benefits.)

[23] Procedural requirements to take into account external effects in cost-benefit analysis have in part been established to mitigate these concerns. See for example: Benedict Kingsbury, Nico Krisch, Richard Stewart 'IILJ 2004/1: The Emergence of Global Administrative Law', available at: http://www.iilj.org/papers/2004/2004.1.htm [Last consulted on: 10/1/05] ; Richard B. Stewart, Administrative Law in the Twenty-First Century (2003) 78 *New York University Law Review* 437.

[24] For example the island of Tuvalu, situated in the Pacific Ocean, is in danger of disappearing entirely. On this issue, the Governor General of Tuvalu addressing the UN General assembly September 14th, 2002 stated the following: "*In the event that the situation is not reversed, where does the international community think the Tuvalu people are to hide from the onslaught of sea level rise? Taking us as environmental refugees, is not what Tuvalu is after in the long run. We want the islands of Tuvalu and our nation to remain permanently and not be submerged as a result of greed and uncontrolled consumption of industrialized countries.*" Available online at http://www.un.org/webcast/ga/57/statements/020914tuvaluE.htm.

[25] See for the judicial interpretation of customary law in this respect Eyal Benvenisti, 'Customary International Law as a Judicial Tool for Promoting Efficiency' in Eyal Benvenisti and Moshe Hirsch (eds.), *The Impact of International Law on International Cooperation: Theoretical Perspectives* (Cambridge University Press, 2004), p. 85.

[26] For the argument that in the American constitutional tradition has endorsed a more embracing approach see David M. Golove, The New Confederalism: Treaty Delegations of Legislative, Executive and Judicial Authority (2003) 55 *Stanford Law Review* 1697.

[27] See for example Richard Stewart, The Reformation of American Administrative Law (1975) 88 *Harvard Law Review* 1667 at 1760-90 (describing how this promotes interest group competition and representation in the administrative process itself).

[28] Theodore Lowi, Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power (1987) 36 *American University Law Review* 295 at 321-22 (criticizing broad, unaccountable discretionary power held by modern administrative agencies).

[29] *See generally*, C. Neal Tate and Torbjörn Vallinder, 'The Global Expansion of Judicial Power: The Judicialization of Politics' in C. Neal Tate and Torbjörn Vallinder (eds.), *The Global Expansion of Judicial Power* (New York University Press, 1995), p. 1, at p. 5. (describing the worldwide expansion of judicial power in several jurisdictions and dubbing it "one of the most significant trends in late-twentieth century and early-twenty-first-century government.")

[30] Ran Hirschl, Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend (2002) 22 *Canadian Journal of Law and Jurisprudence* 191 (arguing that the availability of a constitutional framework that encourages deference to the judiciary, and the existence of a political environment conducive to judicial empowerment have helped bring about a growing reliance on adjudicative means for articulating, framing, and settling fundamental moral controversies and highly contentious political questions).

[31] For such claims in the context of the legitimacy of the EU, see Andrew Moravscik, In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union (2002) 40 *Journal of Common Market Studies* 603-24.

[32] Those arguing for a global democracy include Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Polity Press, Cambridge, 1995).

See also R. Falk and A. Strauss, On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty (2000) 36 *Stanford Journal of International Law* 191.

[33] See for example R. Stewart, 'U.S. Administrative Law: Model for Global Administrative Law', New York University, IILJ Working Paper 2005/7, available at: http://www.iilj.org/papers/documents/2005.7Stewart.pdf [Last consulted on: 10/1/05].

[34] The European Commission's White Paper on European Governance (2001), available at: http://europa.eu.int/comm/governance/white_paper/index_en.htm.

[35] For a sceptical view that considerations of justice should play a core role in assessing the legitimacy of international law, see T. Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, 1990), p. 208.

[36] To some extent that is also true about questions of procedure and jurisdiction, that the approach sketched here opens up for evaluation. But there is a difference of degree between them. Questions of procedure or jurisdiction often provide a focal point for consensus even when an agreement on outcomes can't be reached.

[37] With regard to the loss of self-government this entails Neil MacCormick's point on the loss of sovereignty applies: Sovereignty is not "the object of some kind of zero sum game, such that the moment X loses it Y necessarily has it. Let us think of it rather more as of virginity, which can in at least some circumstances be lost to the general satisfaction without anybody else gaining it," N. MacCormick, Beyond the Sovereign State (1993) 56 *Modern Law Review* 1 at 16.

[38] Vienna Convention on Diplomatic Relations, Vienna, 18 April 1961, in force 24 April 1964, 500 UNTS 95 and Vienna Convention on Consular Relations, Vienna, 24 April 1963; in force 19 March 1967, 596 UNTS 261.

[39] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Oslo, 18 September 1997, in force 1 March 1999, 2056 UNTS 577.

[40] See F.G. Jacobs and S. Roberts (eds.), *The Effect of Treaties in Domestic Law* (Sweet & Maxwell, London, 1987), examining the position in Belgium, Denmark, France, Germany, Italy, the Netherlands and the U.K.

[41] *Murray* v. *The Charming Betsy*, 6 US 64 (1804).

[42] See in the U.S. context, for example, R. Alford, Misusing International Sources to Interpret the Constitution (2004) 98 *American Journal of International Law* 57 at 62 (Finding "anomalous" that a Treaty that has the same status as federal statutes under the Supremacy Clause should inform constitutional interpretation, even when it can be overridden by a statute later in time).

[43] David Golove, Human Rights treaties and the U.S. Constitution (2002) 52 *DePaul Law Review* 579 at 605 and 606.

[44] Andrew Moravcsik, The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe (2000) 54 *International Organization* 217 at 228.

[45] Abram Chayes and Antonia Handler Chayes, The New Sovereignty (HUP 1995), pp. 27-28. For a recent overview of literature on why states obey international law, *see*, Oona Hathaway, Do Human Rights Treaties Make a Difference? (2002) 111 *Yale Law Journal* 1935.

[46] Some constitutions, however, also provide for the possibility of a legislative override that falls short of the requirement to amend the constitution. See S. Gardbaum, The New Commonwealth Model of Constitutionalism (2001) 49 *American Journal of Comparative Law* 707.

[47] For a helpful overview see T. Franck and Arun K. Thiruvengadam, International Law and Constitution-Making (2003) 2 *Chinese Journal of International Law* 467.

[48] Persuasive authority as understood here refers to any "material […] regarded as relevant to the decision which has to be made by the judge, but [….] not binding on the judge under the hierarchical rules of the national system determining authoritative sources." See Christopher McCrudden, A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights (2000) 20 *Oxford Journal of Legal Studies* 499 at 502-503.

[49] He could have cited Art. 6(5) of the International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 172 as well as Art. 4(5) of the Convention of the Rights of the Child, New York, 20 November 1989, in force 2 September 1990, 1577 UNTS 3 and Art. 37(a) of the American Convention of Human Rights, San Jose, Costa Rica, 22 November 1969, in force 18 July 1978, 1114 UNTS 123. These obligations were not binding on the U.S. as Treaty obligations, because the U.S. has either not signed on (Rights of the Child Convention), signed but not ratified the Treaty (in case of the American Convention) or signed and ratified the Treaty but with reservations concerning the juvenile death penalty (the case of the ICCPR). Having signed two of these Treaties and failing to meet the "persistent objector"

requirements, the US was, however, under an obligation to comply with this prohibition as a matter of customary international law.

[50] *Grutter* v. *Bollinger*, 539 US 306 (2003) at 345. (O'Connor in a concurring opinion citing the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women); International Convention on the Elimination of All Forms of Racial Discrimination, New York, 21 December 1965, in force 4 January 1969, 660 UNTS 195; Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979, in force 3 September 1981, 1249 UNTS 13.

[51] Even the strongest supporters of transnational deliberative engagement on the court insist on that point, see J. Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (Knopf, New York, 2005), p. 180.

[52] See Art. 35 of the South African Constitution.

[53] The Court "may have regard to comparable foreign case law." *Ibid.*

[54] *Görgülü* v. *Germany* (2004) 2 BvR 1481/04.

[55] *Ibid.*, para. 62 (emphasis added).

[56] See *ibid.*, para. 30.

[57] *Ibid*., para. 62.

[58] Thomas M. Franck (ed.), *Delegating State Powers: The Effect of Treaty Regimes on Democracy and Sovereignty*, (Transnational Publishers, Ardsley, NY, 2000)

[59] Case 45036/98, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi* v. *Ireland* [2005] ECHR 440.

[60] Art. 1 of protocol no. 1 to the Convention reads:

> 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.
>
> The preceding provisions shall not, however, be in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

[61] See *Bosphorus*, para. 149.

[62] *Ibid.*, para. 155. *Bosphorus* further develops the ECHR's case law in this respect, see Case 13258/87, *M. & Co.* v. *Federal Republic of Germany* (1990) 64 DR 138 and Case 21090/92 *Heinz* v. *Contracting States also Parties to the European Patent Convention*, (1994) 76A DR 125.

[63] *Bosphorus*, para. 156.

[64] Case C-84/95, *Hava Yollari Turizm ve Ticaret Anonim Sirketi* v. *Minister for Transport, Energy and Communications and others* [1997] ECR I-2953, paras. 21-26.

[65] *Ibid.*, para. 26 (emphasis added).

[66] The UN Security Council composition, particularly with regard to the permanent members, reflects post WWII standing in the international community. Current reform proposals are focused on creating a more representative body including a stronger South American, Asian and African presence.

[67] See Kim Lane Scheppele, 'The Migration of Anti-Constitutional Ideas: The Post 9/11 Globalization of Public Law and the International State of Emergency' in this volume.

[68] A weak reason giving requirement has been established by UN Security Council Resolution 1617 (2005).

[69] See Commission Regulation (EC) No. 881/2002.

[70] See for example Commission Regulation (EC) No. 1378/2005 of 22 August 2005 amending for the 52nd time the original implementation Regulation (EC) No 881/2002. In order to satisfy the reason giving requirement under art. 253 of the ECT the Commission stated only: "On 17 August 2005, the Sanctions Committee of the United Nations Security Council decided to amend the list of persons, groups and entities to whom the freezing of funds and economic resources should apply. Annex I should therefore be amended accordingly."

[71] Case T-306/01, Yusuf and Al-Barakaat International Foundation v. Council and Commission [2005] ECR ____. See also Case T-315/01.

[72] There are approximately 15 such cases on the Court's docket.

[73] See for example Case T-229/02 and Joined Cases T-110/03, T-150/03 and T-405/03.

[74] Case T-306/01 para. 225.

[75] There are traces of constitutionalist thinking evident in the Court's innovative understanding of *jus cogens*. The Court acknowledged that the right to access to the courts, for example, is protected by *jus cogens*, but that as a rule of *jus cogens* its limits must be understood very broadly. In assessing the limitations the Court essentially applies a highly deferential proportionality test attuned to the principles of the constitutionalist model: Given the nature of the Security Council decision and the legitimate objectives pursued, given further the Security Council's commitments to review its decisions at specified intervals, in the circumstance of the case the applicants'

interest in having a court hear their case on the merits is not enough to outweigh the essential public interest pursued by the Security Council (see paras. 343-345). Even if the approach taken by the Court to jus cogens is promising and defensible, the results it reached are not.

[76] One reason for the reluctance of the ECFI to adopt anything other than a monist position is the introduction of Art. I-3 s(4) of the Constitutional Treaty, which establishes that "the strict observance and the development of international law, including respect for the principles of the United Nations Charter" as an EU objective. The Constitutional Convention that drafted the Constitutional Treaty was deliberating these clauses in the context of what was widely regarded as the blatant disregard of the U.S. for international law and the UN specifically in the context of the Iraq War, which generated mass demonstrations in capitals across Europe, including London, Rome and Madrid. The Constitutional Treaty is unlikely to be ratified in the present form, following its rejection in French and Dutch referenda, but its provisions may still exert a moral pull that informs the interpretation of the current law of the European Union. A commitment to international legality, in particular in the security area, may well have become a central part of a European identity.

[77] See the contribution in this volume by Scheppele, 'The Migration of Anti-Constitutional Ideas'.

[78] See also Michael Riesman, 'The Democratization of Contemporary International Law-Making Processes and the Differentiation of their Application' in R. Wolfrum and V. Röben (eds.), *Developments of International Law in Treaty-Making* (Springer, Berlin, 2005), p. 15.

[79] There are two other ways in which the "discourse between courts" paradigm is not helpful. It downplays the significance of the distinction between international law and foreign law. Outside of the area of human rights the reasons supporting judicial engagement with foreign law are generally considerably weaker than the reasons supporting engagement with international law. Not surprisingly in many jurisdictions these differences are reflected in the different doctrinal structures concerning engagement with international law. Furthermore the idea of "discourse between courts" is too court focused. The spread of constitutional courts and international courts and tribunals clearly is a factor that furthers the tendencies described here. But this shift is not just about courts engaging other courts. It is about courts engaging the various institutions that generate and interpret international law.