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Supremacy Lost: International Law Meets Domestic Constitutional Law

INTRODUCTION

This article analyses how domestic constitutional law in many countries responds to the increasing intrusiveness and regulatory claims of international law, notably by refusing to accept an unconditional supremacy of international law above domestic constitutional principles. The method is empirical without claiming to offer a systematic account of all 192 or so constitutions of the world. Moreover, the special problem of constitutional adaptation of EU member states to EU law is left aside.¹ The article does not bother with the specific domestic techniques of incorporating of international law into domestic legal orders, be they called adoption or transformation. While the paper avoids labels such as monism and dualism and seeks to overcome them, it can hardly be denied that the concept of pluralism diagnosed and appraised in the conclusions is 'dualist' to the extent that it presupposes the existence of multiple legal orders.

The paper is structured as follows: Part A shows that state constitutions increasingly refer to international law and offers some explanations for this trend. Part B demonstrates how international and domestic constitutional law are more and more converging, which also implies that the diverse state constitutions share more and more commonalities. Part C deals with the spreading practice of constitutional interpretation in conformity with international law. Part D argues that in some constitutional orders, international human rights norms assume a para-constitutional function by serving as a standard for judicial review even where constitutional review is not allowed. Part E analyses the supremacy of international law. While the international courts and tribunals claim supremacy over all domestic law, including *constitutional* law, this claim is rejected by more and more domestic actors. At the same time, more and more domestic courts claim the competence to scrutinize whether international rules and court decisions are in conformity with the domestic constitution.

The survey of constitutional provisions and case law reveals that although domestic constitutions have, especially in the recent decades, been intensely

1 See on the recent constitutional amendments and constitutional case law of EU member states Julio Baquero Cruz, 'The Legacy of the Maastricht Judgment and the Pluralist Movement' (2008) 14 *European Law Journal* 389-422, for the older case law Anne Peters, *Elemente einer Theorie der Verfassung Europas* (Duncker & Humblot Berlin 2001) 310-324. To the extent that national courts' rulings on the relationship of a state constitution to EU law include general statements on the relation between international law (in general) and the domestic constitution, these decisions will be also mentioned here.

shaped by international law, many constitutional actors, especially constitutional courts, are rejecting international law's claim to supremacy over domestic constitutional law.² Overall, the attitude of domestic constitutional actors towards international law is ambivalent and frequently inconsistent. On the one hand, a 'vertical' and 'horizontal' convergence of fundamental (and in that sense constitutional) norms relating to human rights, the rule of law, and democracy is visible. On the other hand, a simple hierarchy between international law and national constitutional law, visualised as a pyramid of norms with international law at its apex, is not generally accepted by all players.

This twofold descriptive finding supports the normative suggestion, formulated in Part F, to give up the model of a hierarchical relationship between international law and domestic constitutional law, because this model is on the one hand too far away from the legal practice of the relevant actors and in that sense utopian, and on the other hand not (or no longer) necessary to secure fundamental global values.

A. INCREASED REFERENCE TO INTERNATIONAL LAW IN STATE CONSTITUTIONS

State constitutions have traditionally included references to foreign affairs and to international law. Classic examples are constitutional clauses on the powers of state organs in foreign affairs, especially with regard to the conclusion of international treaties.³ However, in recent decades, domestic constitutional provisions relating to international law and international institutions have been significantly refined.⁴ State constitutions nowadays provide for the binding force of international law within the domestic sphere and sometimes explicitly and sweepingly recognize the primacy of international law over domestic law⁵ –

2 The data and examples given in this paper draw on updated material from Anne Peters, 'The Globalization of State Constitutions' Chapter 10 in Janne Nijman and André Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (OUP Oxford 2007) 251-308.

3 Eg Art. 2 §2 US Constitution of 17 September 1787; Art. 59 German Basic Law of 23 May 1949.

4 See in scholarship Alberto Cassese, 'Modern Constitutions and International Law' (1985-II) 192 RdC 331-475; Sadok Belaid, 'Droit international et droit constitutionnel: Les développements récents' in Rfaa Ben Achour and Slim Laghmani (eds), *Droit international et droits internes: Développements récents* (Editions A. Pedone, Paris 1998) 47-79; Thomas M Franck and Arun K Thiruvengadam, 'International Law and Constitution-Making' (2003) 2 Chinese Journal of International Law 467-518; with a view to post-communist Eastern European constitutions, Vladlen S Vereshtin 'New Constitutions and the Old Problem of the Relationship Between International Law and National Law' (1996) 7 EJIL 29-41.

5 Art. 15(4) of the Russian Constitution of 12 December 1993: 'The commonly recognized principles and norms of the international law and the international treaties of the Russian Federation are a component part of its legal system. If an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty apply.' For similar supremacy clauses in other new constitutions of the East (eg in Estonia, Armenia, Kazakhstan, Tadjikistan, Turkmenistan, Belarus) Vereshtin, above n 4, at 34.

although primacy over the domestic *constitution* is frequently not accepted, as will be shown below (section E).

Reference is made in many state constitutions to international organizations, especially to the United Nations.⁶ State constitutions also contain clauses on the state's accession to international organizations.⁷ In the constitutions of EU member states, provision is made for the transfer of sovereign powers to the EU or the pooling of sovereignty within the EU.⁸ Most recently, clauses regarding the International Criminal Court (ICC), concerning its jurisdiction or surrender of persons to the Court have been introduced.⁹

Frequently, special constitutional clauses enshrine international human rights,¹⁰ give them priority over domestic law¹¹ or guarantee access to international control mechanisms.¹² These constitutional provisions have not instantaneously led to a satisfactory human rights record in many countries. However, good law which corresponds to international standards is a minimum condition for improvements.

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- 6 Art. 28 of the Algerian Constitution of 19 November 1976, as amended on 28 November 1996: 'Algeria works for the reinforcement of international cooperation and to the development of friendly relations among states, on equal basis, mutual interest and non interference in the internal affairs. It endorses the principles and objectives of the United Nations Charter.'
- 7 Random examples: Section 20 of the Danish Constitution of 5 June 1953 on the delegation of powers: '(1) Powers vested in the authorities of the Realm under this Constitution Act may, to such extent as shall be provided by Statute, be delegated to international authorities set up by mutual agreement with other states for the promotion of international rules of law and co-operation. ...' (See for an important Danish Supreme Court judgment interpreting Section 20 with a view to the Treaty of Maastricht below n 126). Art. 24 of the German Basic Law: [International organizations]: '(1) The Federation may by a law transfer sovereign powers to international organizations. (1a) Insofar as the Länder are competent to exercise state powers and to perform state functions, they may, with the consent of the Federal Government, transfer sovereign powers to transfrontier institutions in neighboring regions. (2) With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world. (3) For the settlement of disputes between states, the Federation shall accede to agreements providing for general, comprehensive, and compulsory international arbitration.' (accessible via http://www.bundestag.de/htdocs_e/parliament/function/legal/, last accessed 7 May 2009). Art. 136 of the Constitution of Lithuania of 25 October 1992 runs: 'The Republic of Lithuania shall participate in international organizations provided that they do not contradict the interests and independence of the state.'
- 8 See references below in text accompanying n 31 and n 32.
- 9 Art. 53-2 French Constitution (constitutional revision of 8 July 1999); Art. 16 (2), second sentence, German Basic Law (constitutional revision of 29 November 2000).
- 10 Art. 17 (1) of the Russian Constitution of 12 December 1993 holds: 'The basic rights and liberties in conformity with the commonly recognized principles and norms of the international law are recognized and guaranteed in the Russian Federation and under this Constitution.'
- 11 Art. 20 of the Constitution of Romania of 8 December 1991; Art. 11 of the Slovak Constitution of 1 September 1992; Art. 10 of the Constitution of the Czech Republic of 16 December 1992. See below notes 79-81 for the text of those provisions.
- 12 Art. 46 of the Russian Constitution of 12 December 1993 holds: '(3) In conformity with the international treaties of the Russian Federation, everyone has the right to turn to interstate organs concerned with the protection of human rights and liberties when all the means of legal protection available within the state have been exhausted.'

Four factors account for the proliferation of constitutional references to international law. First, the collapse of the socialist bloc a decade ago necessitated the elaboration of entirely new constitutions for former communist countries turning to a liberal rule of law and market economy. In a way that is typical of polities with a totalitarian past the transformed states have been ready (or were urged) to pledge fidelity to international law.¹³ Second, the integration of states within the EU and within other international organizations has progressed. This process requires the member states to amend their domestic constitutions (see in more detail below section B.). Third, new international institutions with far-reaching powers, such as the ICC, have been created. Finally, the international community, or at least its most powerful members, have been supervising regime changes and have induced, accompanied, steered, or even installed new state constitutions, such as the Constitutions of Cambodia (1993), Bosnia and Herzegovina (1995),¹⁴ South Africa (1996), East Timor (2002), Afghanistan (2004), Iraq (interim Constitution of 2004), or Kosovo (2008). Daniel Thürer has described these processes, intensely conditioned, steered and modelled by international law, as 'cosmopolitan constitutional development'.¹⁵

B. HORIZONTAL AND VERTICAL CONSTITUTIONAL CONVERGENCE

International law and domestic constitutional law are converging, and thereby also the state constitutions *inter se*. Traditionally, national constitutional principles have been exported to the international level. For example, the national principle of democracy was transferred to the international level where it was transformed and developed further into an international law principle of self-determination.¹⁶ Nowadays, international standards relating to human rights protection, good governance, or even democracy, are frequently incorporated into national constitutions. This has aptly been called an '*intrusion massive des normes et standards externes dans les droits publics internes*'.¹⁷

Because the origins of those standards frequently lie in domestic constitutional law, the integration of international standards into domestic constitutional law is

13 Vereshtin, above n 4, at 30 with references to Art. 28 of the Greek Constitution (1975); Art. 8 of the Portuguese Constitution (1976); Art. 96 of the Spanish Constitution (1978), all of them marking the new beginning after the defeat of dictatorship.

14 Edin Sarcevic, 'Der völkerrechtliche Vertrag als "Gestaltungsinstrument" der Verfassungsgebung: Das Daytoner Verfassungsexperiment mit Präcedenzwirkung?' (2001) 39 *Archiv des Völkerrechts* 297-339.

15 Daniel Thürer, 'Kosmopolitische Verfassungsentwicklungen' in Daniel Thürer, *Kosmopolitisches Staatsrecht* (Schulthess Zurich 2005) vol 1, 3-39.

16 The link between democracy and the self-determination of a people is manifest eg in the Resolution of the UN-General Assembly on the 2005 World Summit Outcome, UN-Doc A/RES/60/1 of 24 October 2005, para. 135: 'We reaffirm that democracy is a universal value based on the freely expressed will of the people to determine their own political, economic, social and cultural systems ...'

17 Jean-Bernard Auby, 'Globalisation et droit public' (2002) 14 *European Review of Public Law* 1219-1247, 1232.

to some extent the 're-import' of a product which has been modified (sometimes diluted) and which has become more or less universalized in a global discourse. For example, human rights were conceived as legal entitlements 200 years ago on the national level. That conception was transferred to the international level after the Second World War.¹⁸ Today, the idea of legal protection of human rights flows back into the constitutional orders of those states which have otherwise not satisfied human rights standards.

This reception of international standards leads to a '*vertical*' convergence of constitutional and international law: in other words to a globalization of state constitutions and a constitutionalization of international law.¹⁹ Simultaneously, a '*horizontal*' approximation of state constitutions takes place. Especially new state constitutions designed under international guidance resemble each other strongly. They are 'chipped off the same block', based on the modern canon of fundamental rights, rule of law, democracy, and separation of powers.²⁰ The overall approximation is promoted by constitutional case law: '[t]he last two decades have seen an unprecedented evolution in international and transnational judicial dialogue, especially around human rights issues.'²¹ Quite correctly, scholars have diagnosed a 'heightened convergence in the law in distinct areas, perhaps the most robust being transnational human rights law.'²² In academia, constitutional comparison, a previously remote discipline in which few were interested, has gained popularity. Only under the influence of European integration and globalization has scholarship at large begun to acknowledge its practical usefulness.²³ Increasingly, international (and foreign constitutional) law is becoming an argument in the national constitutional discourse.²⁴ Anne-Marie Slaughter has called this

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- 18 Robert Badinter, 'La mondialisation de la protection juridique des droits fondamentaux' in Rémy Cabrillac, Marie-Anne Frison-Roche and Thierry Revet (eds), *Libertés et droits fondamentaux* (11th edn Dalloz Paris 2005) 119-137.
- 19 Brun-Otto Bryde, 'Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts' (2003) 42 *Der Staat* 61-75.
- 20 Thürer, above n 15, at 25 (translation by the author).
- 21 Cherie Booth and Max du Plessis, 'Home Alone? The US Supreme Court and International and Transnational Judicial Learning' (2005) *European Human Rights Law Review* 127-147, 141.
- 22 Ruti Teitel, 'Comparative Constitutional Law in a Global Age' (2004) 117 *Harvard Law Review* 2570, 2593. On legal harmonization in the field of human rights Laurent Scheeck, 'The Relation between the European Courts and Integration through Human Rights' (2005) 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 837-885; Jörg Paul Müller, 'Koordination des Grundrechtsschutzes in Europa – Einleitungsreferat' (2005) 124 *Zeitschrift für Schweizerisches Recht* 9-30.
- 23 Constance Grewe and Hélène Ruiz Fabri, *Droits constitutionnels européens* (PUF Paris 1995) 22-32; Norman Dorsen, Michel Rosenfeld, Andràs Sajò and Susanne Baer, *Comparative Constitutionalism: Cases and Materials* (American Case Book Series St Paul, Minn. 2003); Guisepppe de Vergottini, *Diritto costituzionale comparato* (6th edn Cedam Padua 2004); Bernd Wieser, *Vergleichendes Verfassungsrecht* (Springer Wien 2005); Armin von Bogdandy, Pedro Cruz Villalón and Peter M Huber (eds), *Handbuch Ius Publicum Europaeum, Band I: Grundlagen und Grundzüge staatlichen Verfassungsrechts* (CF Müller München 2007); Aalt Willem Heringa and Philipp Kiiver, *Constitutions Compared: An Introduction to Comparative Constitutional Law* (intersentia Antwerpen 2007); Elisabeth Zoller, *Introduction to Public Law: A Comparative Study* (Martinus Nijhoff Leiden 2008).
- 24 Vicki C Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement' (2005) 119 *Harvard Law Review* 109-128; Christian Walter, 'Dezentrale Konstitutionalisierung durch nationale und internationale Gerichte: Überlegungen zur Rechtsvergleichung als Methode im

'constitutional cross-fertilization',²⁵ and Sujit Choudhry speaks of a 'migration of constitutional ideas'.²⁶

An example for such migration outside the human rights area is the transnational career of the idea of legitimate expectations, which was imported into French administrative law from German law. An even more prominent case in point is the principle of proportionality. Proportionality had been elucidated as a constitutional principle notably in Germany. The German approach arguably influenced the case law of both the European Court of Justice and the European Court of Human Rights. The rulings of those courts have paved the way for the acceptance of the principle of proportionality in the domestic constitutional order of the United Kingdom. British courts came to accept proportionality as a ground of judicial review which is stricter than the traditional British tests.

As already said, one reason for the convergence is that states have strong political motives to amend and reform their state constitutions in order to become a member of certain international organizations.²⁷ Increasingly, international actors use norms of international law as a point of reference from which to evaluate a national constitution. Pertinent examples are the international prescriptions (hard and soft) on democracy, including free and regular elections. They are used by international institutions, including the United Nations, as guidelines for the reform of state constitutions.²⁸ The most intense and far-reaching pressure or stimulation of domestic constitutional reform has been exercised by the Council of Europe, the EU, and NATO. The states of Eastern and Central Europe had to undertake serious constitutional reforms in order to be admitted as members to the Council of Europe.²⁹ Empirical studies have demonstrated that the 'international socialization' of that region took place due to the EU and NATO accession conditionalities. These conditionalities required states to implement liberal human rights and democracy norms. This in fact formed a necessary condition of

öffentlichen Recht' in Janbernd Oebekke (ed), *Nicht-normative Steuerung in dezentralen Systemen* (Franz Steiner Stuttgart 2005) 205-230.

- 25 Anne Marie Slaughter, 'Judicial Globalization' (2000) 40 *Virginia Journal of International Law* 1103-1119, Part IV (1116-1119); Anne Marie Slaughter *A New World Order* (Princeton UP Princeton 2004). In earlier scholarship Sujit Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74 *Indiana Law Journal* 819-892.
- 26 Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (CUP Cambridge 2006).
- 27 Didier Maus, 'The Influence of Contemporary International Law on the Exercise of Constituent Power' in Antero Jyränki (ed), *National Constitutions in the Era of Integration* (Kluwer The Hague 1999) 50.
- 28 Cf the activities of the UN-Democracy Fund, established on July 4, 2005. <http://www.unfoundation.org>, last accessed on May 7 2009.
- 29 On the increasing demands that the Council of Europe, in particular its Parliamentary Assembly brought to bear on new post-communist constitutions, Heinrich Klebes and Despina Chatzivassiliou, 'Problèmes d'ordre constitutionnel dans le processus d'adhésion d'Etats de l'Europe centrale et orientale au Conseil de l'Europe' (1996) 8 *Revue Universelle des Droits de l'Homme* 269-286; Jean-François Flauss, 'Les conditions d'admission des pays d'Europe centrale et orientale au sein du Conseil de l'Europe' (1994) 5 *EJIL* 401-422, concluding that the function of admission was 'surtout de contribuer à l'extension d'une certaine légitimité constitutionnelle, et même d'un certain modèle constitutionnel.' (at 421). A well-known problem in this context is that the requirements were applied somewhat selectively by the Council of Europe.

sustained compliance with those norms. However, long-term effectiveness has so far only been secured in regimes which were already at least on the path to liberalism before accession (eg in the Czech republic, Estonia, Hungary, Latvia, Lithuania, Poland, and Slovenia), but not in antiliberal regimes (such as Belarus, Ukraine, Serbia, or Russia).³⁰

The Treaty of Maastricht of 1992, which founded the EU and which substantially reformed the European Community, triggered constitutional revisions in most of the then twelve member states, including the powerful members France and Germany. For instance, a new article 23 on the European Union was introduced into the German Basic Law.³¹ The French Constitution was enriched by a new Title XV.³²

Finally, the United Kingdom's current and very important constitutional evolution has to a significant extent, albeit not exclusively, been induced by European integration and global governance.³³ Traditionally, the British constitution was a 'flexible' one which was not codified in one single document and did not enjoy supremacy over other British law. But recent litigation concerning the European Communities Act of 1972 (by which the UK had acceded the EC) led courts to acknowledge a hierarchy of parliamentary acts. Thereby, European integration has contributed to a crucial structural change, namely the establishment of an embryonic constitution enjoying supremacy over ordinary laws.³⁴ Moreover, the establishment of an institutionally independent Supreme Court for the United

30 Frank Schimmelfennig, 'Strategic Calculation and International Socialisation: Membership Initiatives, Party Constellations, and Sustained Compliance in Central and Eastern Europe' (2005) 59 *International Organization* 827-860. See also Anneli Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe* (CUP Cambridge 2005).

31 Art. 23 German Basic Law (constitutional revision of 21 December 1992).

32 Title XV of the French Constitution (constitutional revision of 25 June 1992). This title has been subject to further amendments. For instance, a new Art. 88-2 was inserted to allow for the European Arrest Warrant (loi constitutionnelle no 2003-267 of 25 March 2003).

33 Anthony King names and explains twelve changes of constitutional significance, among them 'Europe' and the Human Rights Act 1998; Anthony King, *Does the United Kingdom still Have a Constitution?* (Sweet & Maxwell London 2001) 53-76: '[T]he truth is that the United Kingdom's constitution changed more between 1970 and 2000, especially between 1997 and 2000, than during any comparable period since the middle of the 18th century.' Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Hart Oxford 2000) 4: 'But many recent developments – including participation in the European project, ... the passage of the Human Rights Act 1998 ... suggest that we are now taking steps to transform our "political constitution" into a constitution which rests on a foundation of law.'

34 House of Lords, *Thoburn v. Sunderland City Council*, [2003] QB 151, 151 at 186-187, paras. 62-64 per Laws LJ: 'We should recognise a hierarchy of Acts of Parliament: as it were "ordinary" statutes and "constitutional" statutes. ... Ordinary statutes may be impliedly repealed. Constitutional statutes may not. ... A constitutional statute can only be repealed, or amended in a way which significantly affects its provisions touching fundamental rights or otherwise the relation between citizens and state, by unambiguous words on the face of the later statute. This development ... gives us most of the benefits of a written constitution, in which fundamental rights are accorded special respect. But it preserves the sovereignty of the legislature and the flexibility of our uncodified constitution.' According to Lord Laws, statutes with such 'constitutional' rank are notably the Magna Charta 1215, the Bill of Rights 1689, the European Communities Act 1972, the Human Rights Act 1998, the Scotland Act 1998 and the Government of Wales Act 1998.

Kingdom, which will take up work in October 2009, appears to have been triggered by concerns about complying with Art. 6 ECHR.³⁵ Finally, the Human Rights Act 1998³⁶ which has incorporated the ECHR into the law of the UK has profoundly changed the state's constitution. English and Scottish justices have described this transformation in strong words. According to Lord Steyn, the Human Rights Act has created a 'new legal landscape' and 'is now part of what is otherwise an unwritten constitution'.³⁷ Lord Slynn of Hadley stressed that the 1998 Act requires 'that long or well entrenched ideas may have to be put aside, sacred calves culled'.³⁸ Lord Reed diagnosed 'a very important shift in thinking about the constitution. It is fundamental to that shift that human rights are no longer dependent solely on conventions, ... the Convention guarantees the protection of rights through legal processes, rather than political processes'.³⁹ This transformation from a political constitution to a law-based constitution has led a commentator to conclude: 'The traditional British constitution ... is dead. *Requiescat in pace*'.⁴⁰

C. CONSISTENT INTERPRETATION

In contemporary state practice, clashes between domestic constitutional law and international law are reduced to a minimum through consistent interpretation of state constitutions. Indeed, the well-established practice of interpreting domestic *statutes*⁴¹ (or European regulations⁴²) in conformity with international law has been extended to the interpretation of domestic *constitutional* law. This

35 Gernot Sydow, 'Der geplante Supreme Court für das Vereinigte Königreich im Spiegel der britischen Verfassungsreform' (2004) 64 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 66-67, 92, with further references.

36 1998 ch 42; also in Halsbury's Statutes of England and Wales, 5th edn (2004) vol 7, 674-798; <http://www.opsi.gov.uk/acts/acts1998/ukpga_19980042_en_1> accessed 7 May 2009.

37 Lord Steyn, 'The New Legal Landscape' (2000) 5 European Human Rights Law Review 549-554, 550.

38 House of Lords, *R v. Lambert*, [2001] All ER 577, 581, para. 6.

39 Appeal Court, High Court of Judiciary (Scotland), *Starrs v. Ruxton* (2000 JC 208) (Lord Reed).

40 King, above n 33, at 81.

41 See for the interpretation of US-American statutes the Charming Betsy principle. To avoid violation of international law, statutes must be interpreted in the light of the pre-existing international agreement so as not to conflict with the latter: *Murray v. Schooner Charming Betsy*, 6 US (2 Cranch) 64, 118 (1804). This principle of interpretation derives from the general assumption that Congress does not intend to repudiate an international obligation by nullifying an international agreement as domestic law. See for the principle of construction of United Kingdom statutes in conformity with previously signed treaties *Garland v. British Rail Engineering Ltd* (no 2) [1982] UKHL 2 (22 April 1982) (Lord Diplock). See for the interpretation of domestic law in conformity with EC law the Marleasing principle, case C-106/89, *Marleasing v. La Comercial Internacional de Alimentación*, [1990] ECR I-4135, paras. 8-9. On the principle of consistent interpretation, Gerrit Betlem and André Nollkaemper, 'Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation' (2003) 14 EJIL 569-589.

42 Cases C-420/05P and C-415/05P, *Kadi and Al Barakaat*, judgment of the Court (Grand Chamber) of 3 September 2008, para. 297.

means that national constitutions are more and more often interpreted in the light of international law.

For example, the Portuguese Constitution of 1976,⁴³ the Spanish Constitution of 1978,⁴⁴ the Romanian Constitution of 1991,⁴⁵ and the South African Constitution of 1996⁴⁶ explicitly require that the state constitution must be interpreted in conformity with international human rights law. Notably the South African constitutional court has become famous for its 'universalist interpretation'⁴⁷ of constitutional rights, in a series of judgments relating mostly to criminal processes.

The Supreme Court of Canada also relies quite heavily on constitutional comparison and on international law in constitutional cases.⁴⁸ In a case concerning deportation to a country in which there is the risk of torture, the Court interpreted the Canadian Charter of Rights and Freedoms as follows: '[T]he principles ... of the Charter cannot be considered in isolation from the international norms which they reflect. A complete understanding of the Act and the Charter requires consideration of the international perspective.'⁴⁹ However, the Supreme Court explicitly rejected any binding force of international law over the Canadian Constitution: '[I]n seeking the meaning of the Canadian Constitution, the courts may be informed by international law. Our concern is not with Canada's international obligations qua obligations; rather, our concern is with the principles of fundamental justice. *We look to international law as evidence of these principles and not as controlling itself.*'⁵⁰

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- 43 Art. 16(2) of the Portuguese Constitution of 2 April 1976: 'The provisions of the Constitution and laws relating to fundamental rights are to be read and interpreted in harmony with the Universal Declaration of Human Rights.'
- 44 Art. 10(2) of the Spanish Constitution of 29 December 1978: 'The norms relative to basic rights and liberties which are recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain.'
- 45 Art. 20(1) of the Romanian Constitution of 8 December 1991. See n 79 for the text of that provision.
- 46 Constitution of South Africa of 8 May 1996: Section 233 (Application of international law): 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is *consistent with international law* over any alternative interpretation that is inconsistent with international law.' Section 39 on Interpretation of Bill of Rights: '(1) When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) *must consider international law*; and (c) *may consider foreign law.*' (Emphasis added).
- 47 Choudhry, above n 25, at 841-865, with further references to and analysis of the South-African constitutional case-law.
- 48 Eg Supreme Court of Canada, *Baker v. Canada*, [1999] 2 S.C.R. 817; *USA v. Burns* [2001] 1 S.C.R. 283, paras. 79-92; *R v Hape*, [2007] SCC 26, paras. 55-56. On the Canadian approach in scholarship, Karen Knop, 'Here and There: International Law in Domestic Courts?' (2000) 32 NYU Journal of International Law & Politics 501-535, concluding that 'the caselaw displays only a muddled enthusiasm for international law that has led to confusion and uncertainty about its exact value in Canadian courts', at 515.
- 49 Supreme Court of Canada, *Suresh v. Canada (Minister of Citizenship and Immigration)*, judgement of 11 January 2002, (2002) 41 ILM 945, para. 59.
- 50 *Ibid*, para. 60 (emphasis added). In the end, the Court concluded 'that the better view is that international law rejects deportation to torture, even where national security interests are at stake. This is the norm which best informs the content of the principles of fundamental justice under s. 7 of the Charter.' (para. 75).

German courts have interpreted the Basic Law under due consideration for international law, most often in the light of the ECHR. The German Constitutional Court recently reiterated that '[t]he Convention's text and the case law of the ECHR can, on the level of constitutional law, serve as interpretative guidelines for the determination of the content and scope of fundamental rights and principles of the Basic Law, unless this would lead to a reduction or abasement of the level of protection of fundamental rights under the Basic Law, which would not be desired by the Convention itself (cf Art. 53 ECHR).⁵¹ Other German judgments vaguely suggested the supremacy of international law over the Basic Law.⁵² Inversely, the German Federal Administrative Court has interpreted the Geneva Convention on Refugees only '*within* the framework of the value order of the Basic Law',⁵³ which suggests a primacy of the constitution over the international treaty. The Swiss Federal Tribunal has at least at one occasion interpreted the constitutional rights of prisoners in the light of the ECHR, including ECHR judgments and relevant soft law.⁵⁴

Furthermore, the English Human Rights Act (1998) requires domestic courts to interpret domestic legislation (which includes provisions with constitutional

51 Constitutional Court (Bundesverfassungsgericht/BVerfG), 2nd chamber of the first senate, order of 18 December 2008, 1 BvR 2604/06, publ in *Neue Juristische Wochenschrift* 62 (2009), 1133-1135, para. 24 (translation by the author). See previously on the interpretation of the German Constitution in conformity with the ECHR: BVerfGE 74, 358, 370 (1987); BVerfGE 82, 106, 120 (1990); BVerfGE 111, 307 (2004) – *Görgülü*, para. 32 (english translation available at <<http://www.bverfg.de>>, last accessed May 7 2009).

52 BVerfGE 55, 349, at 368 (1980) – *Rudolf Hess*, stated that in an extreme case, the erroneous interpretation of international law, eg the UN-Charter, by a German authority could violate an individual's constitutional right to be protected from arbitrary state action. In the *Teso*-order, BVerfGE 77, 137, 155 (1987), the German Constitutional Court had to apply the constitutional provisions relating to the German nationality. In this context, it had to pronounce itself on the status of the Federal Republic of Germany as a subject of public international law, also in relation to the then existing Democratic Republic of Germany. The Court here referred to customary international law principles on state identity and state succession. It can be argued that the Constitutional Court interpreted the German Basic Law in the light of customary international law. However, the case was quite specific and does not lend itself to generalization.

53 BVerwGE 49, 44, 47-48 (1975), translation by the author, emphasis added.

54 BGE 102 Ia 279, 284 E. 2(b) and (c) (1976) – *Minelli*: '*Die Haftbedingungen der Gefangenen sind daher in erster Linie an den Grundrechten der Bundesverfassung zu messen. Bei deren Konkretisierung sind jedoch die Garantien der Konvention und die Rechtsprechung der Europäischen Kommission und des Europäischen Gerichtshofes für Menschenrechte zu berücksichtigen. Am 19. Januar 1973 beschloss das Ministerkomitee des Europarates die Resolution (73) 5 betreffend Mindestgrundsätze für die Behandlung der Gefangenen. ... Die Mindestgrundsätze enthalten keine die Mitgliedstaaten des Europarates völkerrechtlich bindende Vorschriften. Ihre Nichtbeachtung kann daher auch nicht mit staatsrechtlicher Beschwerde gerügt werden. Da sie – wie die Europäische Menschenrechtskonvention – ihre Grundlage in der gemeinsamen Rechtsüberzeugung der Mitgliedstaaten des Europarates finden, sind die bei der Konkretisierung der Grundrechtsgewährleistungen der Bundesverfassung gleichwohl zu berücksichtigen. Wo den Mindestgrundsätzen der Charakter eigentlicher Grundrechtsverbürgungen zukommt, wird sich das Bundesgericht zu ihnen nicht leichthin in Gegensatz stellen.*' See in scholarship on interpretation of the Swiss constitution in conformity with international law René Rhinow and Markus Schefer, *Schweizerisches Verfassungsrecht* (2nd edn Helbig & Lichtenhahn Basel 2009) para. 3635; Daniel Thürer, 'Verfassungsrecht und Völkerrecht' in René Rhinow, Jean-François Aubert and Jörg Paul Müller (eds), *Verfassungsrecht der Schweiz* (Schulthess Zürich 2001) 179, 191.

substance) in conformity with the ECHR and to take into account the case-law of the Human Rights Court: 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.' (Human Rights Act, s 3 (1)).⁵⁵ In a landmark decision, the British House of Lords declared illegal the infinite detention of foreigners suspected of terrorism without charge or trial. The Law Lords drew on decisions of the European Court of Human Rights, on the UN Human Rights Covenant, as interpreted by the Committee's General Comments, and on various other international instruments. The judgment also referred to opinions of the Supreme Court of Canada and the United States, and other US courts.⁵⁶ Observers rightly characterized this ruling as 'a strong example of the increasing interdependence of domestic and international law'.⁵⁷

Even the *United States' Supreme Court's* new approach marks a step in the direction of interpreting the US Constitution consistently with international law. While US scholars have long argued that international treaties should be used as guidelines for the interpretation of the US Constitution,⁵⁸ the Supreme Court had been very reluctant to refer to foreign and international sources and case-law. One explanation is the traditional US American concern for the countermajoritarian difficulty of constitutional review. From this perspective, reliance on foreign or international preferences fails to consider the preferences of the American people.⁵⁹ But in 2003, the Court began to cite foreign and international case law and has admitted it to be materially relevant for the Court's majority's analysis.⁶⁰

55 See also s 2 (1): 'A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights'.

56 House of Lords, *Anti-Terrorism Crime and Security Act (2001)*, judgment of 16 December 2004, [2004] UKHL 56, opinion Lord Bingham of Cornhill.

57 Lizette Alvarez, 'British Court Says Detention Violate Rights' *New York Times* of 17 December 2004, A1. Also Ruth Bader Ginsburg, 'A Decent Respect to the Opinions of Humankind: The Value of a Comparative Perspective in Constitutional Adjudication' (2005) 99 *Proceedings ASIL* 351-359, 355.

58 In particular Jordan Paust pointed out: 'Thus, although a treaty could not prevail in the case of an unavoidable clash with constitutional norms, a treaty can be incorporated indirectly in aid of interpreting constitutional precepts, and, of course, in aid of reinterpreting those precepts. In this sense, the domestic status of a treaty norm can be enhanced by incorporation into the Constitution, however indirectly.' Jordan J Paust, *International Law as Law of the United States* (2nd edn Carolina Academic Press Durham 2003) 134 and 101.

59 *Roper v. Simmons*, US Supreme Court of 1 March 2005, 543 US (2005), J Scalia, dissenting: 'Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage. ... I do not believe that approval by other nations and peoples should buttress our commitment to American principles any more than (what should logically follow) disapproval by 'other nations and peoples' should weaken that commitment.'

60 See already *Atkins v. Virginia*, 536 US 304 (2002) on the death penalty for mentally ill offenders, where the Court cited an *amicus curiae* brief of the EU in a footnote. The breakthrough was *Lawrence v. Texas*, 123 S Ct 2472, 2483 (2003) on homosexual conduct ('sodomy'), citing case-law of the ECHR in order to bolster departure from Supreme Court precedent. Also *Grutter v. Bollinger*, 539 US 309, 342 (2003), concurring opinion Justice Ginsburg, with reference to the international Convention on the Elimination of all Forms of Racism.

In a 2005 five-to-four-decision the Supreme Court departed from precedent and declared the death penalty for juvenile offenders a 'cruel and unusual punishment' in terms of the 8th Amendment to the US Constitution. The Court here referred to the 'opinion of the world community' as supportive, but not decisive in its conclusions.⁶¹ This novel trend ranks among the 'most hotly disputed questions at the United States Supreme Court',⁶² has been sharply criticized by individual justices, and has attracted international attention.⁶³ The fact that the Supreme Court's majority is willing to stir up controversy shows that it now takes international law more seriously than before.

Through the practice of consistent interpretation, international law exercises an indirect effect on national constitutional law. The practice of voluntary acceptance of the guiding authority of international law over constitutional law contributes to constitutional harmonization. This is not an end in itself, but appears useful, not least for adapting old constitutions to contemporary social problems.⁶⁴ Finally, it is worth pointing out that the practice of interpreting state constitutions in conformity with international law is irreconcilable with the idea of the supremacy of constitutional law over international law. In a strictly legal positivist and schematic perspective, a hierarchically inferior norm cannot have an impact on the reading of a 'higher' norm. The courts' insistence on the superiority of their domestic constitutions (see below section E) while simultaneously requiring national bodies to interpret that very constitution in the light of international law reveals a muddled understanding of the 'ranking' of both types of norms. And this is exactly a manifestation of the pluralism described in Part F.

61 *Roper v. Simmons*, US Supreme Court of 1 March 2005, 543 US (2005), opinion of the Court delivered by J Kennedy: 'The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.'

62 Norman Dorsen, 'The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer, Introduction' (2005) 3 *Journal of International Constitutional Law* 519.

63 On this issue in US American scholarship, AJIL Agora, 'The United States Constitution and International Law' (2004) 98 AJIL 42-108 (contributions by Harold Hongju Koh, Roger P Alford, Michael D Ramsey, Gerald L Neumann, T Alexander Aleinikoff); Mark Tushnet, 'Transnational/ Domestic Constitutional Law' (2004) 37 *Loyola of Los Angeles Law Review* 239-269; Ruth Bader Ginsburg, 'A Decent Respect to the Opinions of Humankind: The Value of a Comparative Perspective in Constitutional Adjudication' (2005) 99 *Proceedings ASIL* 351-359. For European views: Andrea Bianchi, 'International Law in US Courts: The Myth of Lohengrin Revisited' (2004) 15 *EJIL* 751-781; Cherie Booth and Max du Plessis, 'Home Alone? The US Supreme Court and International and Transnational Judicial Learning' (2005) *European Human Rights Law Review* 127-147; Helen Keller and Daniela Thurnherr, *Taking International Law Seriously: A European Perspective on the U.S. Attitude Towards International Law* (Staempfli Bern 2005).

64 'It is profoundly necessary in an era of increasing interdependence among nations to rediscover and identify trends in judicial decision-making which serve to limit federal power. Recognition of such trends can help minimize conflicts between U.S. law and international law and thereby facilitate more harmonious international relations.' Paust, above n 58, at 99.

D. FUNCTIONAL RAPPROCHEMENT

International human rights norms are in some states becoming a functional equivalent of domestic constitutional law. By applying international human rights provisions, national courts engage in a new type of *de facto* constitutional review, even in countries which do not otherwise provide for constitutional review. In some states, such as Switzerland, the Netherlands, and France, courts have begun to admit individual complaints which claim that a provision of an international treaty has been violated by the government. These courts have invalidated or discarded national (legislative, executive, judicial) acts due to their incompatibility with international law.

The Swiss federal Constitution explicitly compels the Swiss Federal Tribunal to apply federal statutes, even if a statute turns out to be unconstitutional.⁶⁵ However, in a landmark decision in 1999, the Federal Tribunal held that a federal statute which runs counter to prescriptions of the ECHR must be set aside.⁶⁶ Because the Convention rights are largely identical to the constitutional fundamental rights, the Federal Tribunal in fact set aside a federal law on constitutional grounds without being empowered by the Swiss Constitution to do so. This judicial strategy was criticized in the national discourse on the grounds that it introduced the constitutional review of federal statutes through the backdoor, especially in light of the fact that this had been expressly rejected in the course of a recent constitutional reform of the Swiss judicial system.

In France, the *Conseil Constitutionnel* is not competent to determine whether French laws are compatible with international (or European Community) law. However, the French superior courts have taken over this task and have begun to review whether municipal law is in conformity with international treaties.⁶⁷ The Administrative Court (*Conseil d'Etat*) has realized that review of the conformity of municipal law with international human rights treaties amounts to a *de facto* constitutional control.⁶⁸

In the *Netherlands*, Art. 120 of the Constitution prohibits the courts from considering constitutional challenges to an act of parliament.⁶⁹ However, the

65 Art. 190 Swiss Constitution (*Bundesverfassung*).

66 BGE 125 II 417 (1999) – PKK.

67 Cour de cassation of 23 May 1975, *Administration des douanes v. Société 'Cafés Jacques Vabre'*, (1975) 11 *Revue trimestrielle de droit européen* 336; Conseil d'Etat, judgment of 20 October 1989, no 108243, *Nicolo*, english translation in Andrew Oppenheimer (ed), *The Relationship between European Community Law and National Law, The Cases* (CUP Cambridge 1994) 225; German translation in (1990) 17 *Europäische Grundrechte-Zeitschrift* 99.

68 Opinion of the *commissaire du gouvernement* C. Bergeal of 5 December 1997 before the *Conseil d'Etat* in the case *Mme Lambert*, (1998) *Actualité Juridique – droit administratif* (AJDA), 149, at 152. In this case, the compatibility of a law with Art. 6 ECHR was at issue. The Commissioner of the government stated: '*Nous ne pensons pas, en effet, que les exigences de l'article 6 soient différentes de celles qui résultent déjà du préambule de la Constitution ... Et il nous paraît particulièrement souhaitable, lorsque, comme en l'espèce, la disposition législative litigieuse n'a pas été soumise au contrôle du Conseil constitutionnel ... que vous assuriez par la voie de l'exception de l'inconventionnalité, sur le fondement de l'article 6 § 1, le même contrôle que celui que le Conseil constitutionnel aurait exercé ...*'.

69 Art. 120 Dutch Constitution: '*De rechter treedt niet in de beoordeling van de grondwettig-heid van wetten en verdragen.*' ('The judge does not examine the constitutionality of statutes and [international] treaties').

courts do review acts of parliament against self-executing provisions in international instruments. This has resulted in fundamental rights treaties such as the ECHR taking the stage in Dutch jurisprudence, arguably at the expense of the fundamental rights in the Constitution.⁷⁰

The *Danish* Supreme Court in its *Tvind*-judgment of 1999 exercised constitutional control for the first time and declared a parliamentary statute unconstitutional.⁷¹ Although the Supreme Court did not mention international law, the availing of this power was probably inspired by foreign and international models.⁷²

The consequence of this type of review is that international human rights catalogues take over a constitutional function. In the mentioned states, the application of international human rights law fills a gap with regard to constitutional review. When the domestic courts apply international human rights (instead of the constitutional fundamental rights), the difference lies not in a materially novel standard, but is novel in procedural terms: it amounts to a *de facto* constitutional review.

E. CONTESTED SUPREMACY OF INTERNATIONAL LAW OVER DOMESTIC CONSTITUTIONAL LAW

While the question of hierarchy between international law and domestic law has been extensively debated for more than a hundred years, the specific relationship between international treaties (as the most relevant legal source) and domestic constitutional law has been neglected.⁷³ Because of international law's new intrusiveness and scope, this relationship has become important today.

I. The International Actors' Claim of Supremacy

The position of many international adjudicatory bodies seems to be that international law takes precedence over *all* national law, including state constitutions. This has been stated explicitly only in rulings of international courts and tribunals of the past. In the *Montijo* Award of 1875, the arbitrator stated that 'a treaty is superior to the constitution, which latter must give way. The legislation of the republic must be adapted to the treaty, not the treaty to the

70 Jaap de Visser, 'Constitutional Law: The Netherlands' (2004) 15 *European Review of Public Law* 829-230.

71 Judgment of 19 February 1999, (1999) UfR 481 et seq.; extracts in German translation in (2000) 60 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 884 et seq.

72 The Supreme Court's President Niels Pontoppidan referred to the ECHR and to the ECJ. Fredrik Thoms 'Das *Tvind*-Urteil des dänischen Obersten Gerichtshofs' (2000) 60 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 858, 882.

73 Scholarly contributions under the heading 'international law and constitutional law' mostly deal with questions such as the constitutional provisions on the position of international law in the internal legal order in general, constitutional provisions on treaty-making powers, or constitutional bans on war.

laws.¹⁷⁴ And in 1932, the Permanent Court of International Justice (PCIJ) found that 'a state cannot adduce as against another state its own *Constitution* with a view to evading obligations incumbent upon it under international law or treaties in force.'¹⁷⁵ More recently, but still almost 40 years ago, the ECJ asserted the priority of EC law over the member states' constitutions: '[T]he law, stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, . . . Therefore the validity of a Community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by *the constitution of that state or the principles of a national constitutional structure*.'¹⁷⁶

II. Constitutions Accepting the Supremacy of (Some) International Law over Domestic Constitutional Law

Only very few state constitutions seem to accept that claim to supremacy over domestic constitutional law. Both the Constitution of Belgium (1994)⁷⁷ and the Constitution of the Netherlands (1983)⁷⁸ grant international law precedence over national constitutional law, although in neither case is this entirely clear.

74 Case of the '*Montijo*': Agreement between the United States and Colombia of August 17, 1874, award of 26 July 1875, in John Bassett Moore, *History and Digest of International Arbitrations to which the United States has been a Party* (Government Printing Office Washington 1898) vol 2, 1421, 1440.

75 PCIJ, *Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory*, Series A/B, no 44 (1932), 24 (emphasis added).

76 ECJ, case 11/70, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide- und Futtermittel*, [1970] ECR 1125, para. 3, emphasis added.

77 There is no explicit constitutional provision to this effect. In a 1971 case, the Belgian Supreme Court held: 'When the conflict is one between a rule of domestic law and a rule of international law having direct effect within the domestic legal order, the rule established by the treaty must prevail; its pre-eminence follows from the very nature of international treaty law.' (Cour de Cassation (1^{ière} chambre), *Etat Belge v. Fromagerie Franco-Suisse Le Ski* ('Le ski'), judgment of 27 May 1971, (1971) 7 *revue trimestrielle de droit européen* 494-501; english translation in (1972) 9 *Common Market Law Review* 229, 230). More recently, the Court confirmed explicitly that the ECHR has priority over the Belgian Constitution (Belgian Cour de cassation, Dutch Section, 2nd Chamber, *Vlaamse Concentratie*, Decision of 9 November 2004, para. 14.1: '*que la Convention de sauvegarde des droits de l'homme et des libertés fondamentales prime la Constitution*'), <www.juridat.be>, last accessed May 7 2009. Annotation by Eva Brems, 'Belgium: The Vlaams Blok Political Party Convicted Indirectly of Racism' (2006) 4 *Journal of International Constitutional Law* 702, 710.

78 The Constitution of the Netherlands of 17 February 1983 prescribes in Art. 91(3) 'Any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the Houses of the states General only if at least two-thirds of the votes cast are in favour.' Although Art. 94 explicitly grants precedence to international treaties only over statutes ('Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.'). Art. 94 should properly be understood in the sense that the Dutch Constitution defers to international treaties. The opinion of Dutch scholars seems to be divided: see Cassese, above n 4, at 409-411, with further references to Dutch literature.

A special case is that of *international human rights treaties*, in particular the ECHR. The Constitutions of several post-transition countries (Romania (1991),⁷⁹ Slovakia (1992),⁸⁰ and the Czech Republic (1992)⁸¹) explicitly grant international treaties on human rights precedence over domestic 'law'. The respective constitutional wording allows for a reading which includes precedence over the domestic constitution. Art. 90(5) of the Turkish Constitution of 7 November 1982 even spells this out clearly: 'International agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.'

A third special case to consider is that of peremptory norms of international law. *Ius cogens* is in some states accepted as superior even to the state constitution.⁸² The Swiss Constitution makes this explicit in its text.⁸³ Although outright clashes between *ius cogens* and domestic constitutional norms are not very likely, divergences as regards the scope of entrenched prohibitions might arise. For instance, the principle of *non refoulement*, which has crystallized and arguably gained the status of a peremptory norm, might be interpreted differently by state authorities and by international institutions. Some states used to limit the application of the principle to those who have already entered state territory, while notably the United Nations High Commissioner for Refugees favours a broader interpretation and applies *non refoulement* to the moment at which asylum seekers present themselves for entry into the state.⁸⁴ In such a case of divergence, it matters whether the international or the domestic 'version' of the *ius cogens* principle applies.

Some state constitutions grant (some) international instruments a status *equal* to the state constitution. This appears to be the case for Austria and Italy. Under Austrian constitutional law until 2008, any international treaty provision

79 Art. 20 of the Constitution of Romania of 8 December 1991: '(1) Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to. (2) Where inconsistencies exist between the covenants and treaties on fundamental human rights Romania is a party to and internal laws, the international regulations shall take precedence.'

80 Art. 11 of the Slovak Constitution of 1 September 1992: 'International treaties on human rights and basic liberties that were ratified by the Slovak Republic and promulgated in a manner determined by law take precedence over its own laws, provided that they secure a greater extent of constitutional rights and liberties.'

81 Art. 10 of the Constitution of the Czech Republic of 16 December 1992: 'Ratified and promulgated international accords on human rights and fundamental freedoms, to which the Czech Republic has committed itself, are immediately binding and are superior to law.'

82 See for the USA cautiously Paust, above n 58, at 115 and 117.

83 Art. 139(2) and 194(2) Swiss Constitution (*Bundesverfassung*).

84 Guy S Goodwin-Gill *The Refugee in International Law* (2nd edn Clarendon Oxford 1998) 121-124 and 168 note 234 with further references.

which might give rise to constitutional problems was declared, either in the act of its publication or otherwise, to effect a revision of the Austrian Constitution. These provisions therefore enjoyed a constitutional status. This practice led to the existence of numerous provisions of a constitutional character in various treaties, but which were not mentioned in the Austrian constitutional document itself.⁸⁵ A constitutional revision of 2008 terminated this state of the law. New treaties can no longer amend or supplement the constitution outside the procedure for constitutional amendment.⁸⁶ This reform manifests a heightened sensibility for the integrity and transparency of Austrian constitutional law and probably also reacts to the growing number of international treaties. While the revision does not divest older international treaties of their constitutional status, it makes it more difficult to conclude new treaties of a 'constitutional' type.

In Italy too, international law may have a constitutional rank, depending on the formal status of the concrete domestic law which has endorsed the international treaty in question (*legge di esecuzione*).⁸⁷ Moreover, the Italian Constitution contains a novel provision on state and regional legislative power, clearly spelling out that European and international law limit governmental powers.⁸⁸ This idea of limitation may imply a constitutional status of international law.

In those constitutional systems where international law and domestic constitutional law have a formally equal rank, the resolution of potential conflicts is entirely left to the constitutional actors. And even in the abovementioned more or less 'globalist' constitutional orders which allow for the supremacy of international law, the question of hierarchy between international law and the state constitution is pervaded by doubts and uncertainties. Moreover, the supremacy of international law is real only if a municipal court can review a domestic act for its compatibility with international law. This hinges in part on the criteria of direct effect. If no judicial review is available, any constitutional clause granting superiority of international law over the national constitution is basically a dead letter.

85 Hanspeter Neuhold, Waldemar Hummer and Christoph Schreuer(eds), *Österreichisches Handbuch des Völkerrechts* (2nd edn Manz Wien 2004) vol 1, para. 589. Former Art. 50(3) of the Austrian *Bundes-Verfassungsgesetz* of 10 November 1920 (7 December 1929), in force until 31 December 2007.

86 Revision of Art. 50 of the Austrian constitution, with a new cl 4, amendment through *Änderungsgesetz Bundes-Verfassungsgesetz* (in force since 1st January 2008), Art. 1, no 13 (Bundesgesetzblatt für die Republik Österreich, Teil I, of 4 January 2008, no 2, at 7; www.ris.bka.gv.at). See the explanatory comment in no 314 der Beilagen XXIII.GP – Regierungsvorlage – Vorblatt und Erläuterungen, on Z 10, Z 11, and Z 13 (Art. 50), para. 4. See in scholarship Walter Berka, *Lehrbuch Verfassungsrecht: Grundzüge des österreichischen Verfassungsrechts für das juristische Studium* (2nd edn Springer Wien 2008), para. 265.

87 The Italian example demonstrates that even a dualistic scheme of incorporating international treaties into the domestic order by means of a transformative domestic act does not compel lawyers to grant an international treaty (in *gestalt* of the domestic act) a sub-constitutional status.

88 See Art. 117 of the Italian Constitution as amended on 18 October 2001: '(1) Legislative power belongs to the state and the regions in accordance with the constitution and *within the limits set by European Union law and international obligations.*' (Emphasis added).

III. Rejection of the Supremacy of International Law over Domestic Constitutional Law

The claim that international law trumps state constitutions has never been fully accepted by all national constitutional actors. This is well known for the domestic (constitutional) courts of some member states in the EU vis-à-vis EC law, but also concerns general international law. Most states do not grant international (or European) law priority over their national constitutions. The states' posture normally becomes visible only in the case-law, because constitutional provisions which clarify the hierarchy between international law and the domestic constitution are quite rare. Not surprisingly, the issue seems to be mentioned mainly in young, mostly post-transition state constitutions, which have been created in an era marked by globalization, and whose authors sought to lock the constitutions in against backsliding into totalitarianism. But even with regard to these modern constitutions Judge Vereshtin has noted 'a clear tendency towards *'de jure* recognition' of the primacy of international law by new constitutions ... but not [a placement of international law] above the constitution itself.'⁸⁹

Examples of state constitutions which explicitly claim the *superiority of state constitutional law over international law* (or parts of it) are the Constitution of Belarus (1994),⁹⁰ the Constitution of Georgia (1995),⁹¹ and the South African Constitution (1996).⁹² Some state constitutions clearly grant international law priority over ordinary statutes, but not over the domestic constitution itself (see eg the Greek Constitution (1975),⁹³ the Constitution of Estonia (1992)⁹⁴ and

89 Vereshtin, above n 4, at 29 and 37.

90 Constitution of Belarus of 1 March 1994, Art. 128(2): 'Other enforceable enactments of state bodies and public associations, international treaty, or other obligations that are deemed by the Constitutional Court to be *contrary to the Constitution*, the laws or instruments of international law ratified by the Republic of Belarus shall be deemed *invalid* as a whole or in a particular part thereof from a time determined by the Constitutional Court.' (Emphasis added).

91 Constitution of Georgia of 24 August 1995, Art. 6(2): 'The legislation of Georgia shall correspond to universally recognised principles and rules of international law. An international treaty or agreement of Georgia *unless it contradicts the Constitution of Georgia, the Constitutional Agreement*, shall take precedence over domestic normative acts.' (Emphasis added). Available in English at <http://www.parliament.ge/files/68_1944_951190_CONSTIT_27_12.06.pdf>, last accessed May 7 2009.

92 Constitution of South Africa of 8 May 1996, Section 232 on customary international law: 'Customary international law is law in the Republic *unless it is inconsistent with the Constitution* or an Act of Parliament.' (Emphasis added).

93 Art. 28 of the Greek Constitution of 11 June 1975: '(1) The generally recognized rules of international law and the international conventions after their ratification by law and their having been put into effect in accordance with their respective terms, shall constitute an integral part of Greek law and *override any law provision to the contrary*. The application of the rules of international law and international conventions in the case of aliens shall always be effected on condition of reciprocity.' (Emphasis added). What is here translated as 'law provisions' includes only secondary laws, not the Greek Constitution.

94 Art. 123 of the Estonian Constitution of 28 June 1992: '(1) The Republic of Estonia shall not conclude foreign treaties which are in conflict with the Constitution. (2) If Estonian laws or other acts are in conflict with foreign treaties ratified by the Parliament, the arts of the foreign treaty shall be applied.'

Constitution of Poland (1997)).⁹⁵ In a landmark decision of 2006, the Lithuanian Constitutional Court ruled that Lithuania's Constitution (which is silent on this question of hierarchy) is superior to international treaties.⁹⁶ Finally, the Russian Constitution of 1993 is important in political terms. Art. 79 holds: 'The Russian Federation may participate in inter-state associations and delegate some of its powers to them in accordance with international agreements *if this does not restrict human or civil rights and liberties or contravene the fundamentals of the constitutional system of the Russian Federation*.'⁹⁷ A 2003 decision of the Russian Supreme Court confirmed that international law has priority over the laws of the Russian Federation, but not over the Russian Constitution, except maybe for the generally recognized principles of international law, 'deviation from which is impermissible'.⁹⁸

In earlier epochs, constitution-makers have seldom reflected on the hierarchical position of the state constitution vis-à-vis international law. The ranking of older state constitutions has mostly been defined in constitutional case law. Under Art. 6 of the *US-American Constitution* in the second clause 'all Treaties made ... under the Authority of the United States, shall be the supreme Law of the Land'.⁹⁹ Treaty provisions operating as law of the US are granted authority equal to that of Acts of Congress, and in the case of conflict, the act most recently

95 Art. 91 of the Polish Constitution of 2 April 1997: '(1) After promulgation thereof in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute. (2) An international agreement ratified upon prior consent granted by statute shall have *precedence over statutes* if such an agreement cannot be reconciled with the provisions of such statutes. (3) If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have *precedence in the event of a conflict of laws*.' (Emphasis added).

96 Constitutional Court of Lithuania, Case no 17/02-24/02-06/03-22/04 on the limitation of the rights of ownership in areas of particular value and in forest land, ruling of 14 March 2006, para. 9.4. '... Thus, the Constitution consolidates not only the principle that in cases when national legal acts establish the legal regulation which competes with that established in an international treaty, then the international treaty is to be applied, but also, in regard of European Union law, establishes *expressis verbis* the collision rule, which consolidates the priority of application of European Union legal acts in the cases where the provisions of the European Union arising from the founding Treaties of the European Union compete with the legal regulation established in Lithuanian national legal acts (regardless of what their legal power is), *save the Constitution itself*.' (Emphasis added). English translation available at <http://www.lrkt.lt/Documents1_e.html>, last accessed May 7 2009.

97 Russian Constitution of 12 December 1993 (emphasis added).

98 Supreme Court of the Russian Federation (plenum), decision no 5 of 10 October 2003 on the application by ordinary courts of the universally recognized principles and norms of international law and the international treaties of the Russian Federation, (2004) 25 HRLJ 108-111, paras. 1 and 8.

99 This formula derives from Blackstone's commentaries on the laws of England, stating that 'the law of nations ... is here adopted in its full extent by the common law, and is held to be a part of the law of the land.' William Blackstone, *Commentaries on the Laws of England* (13th edn Cadell & Davies London 1809) vol 4, 67. No internal executive act is needed to give effect to the international norm within the municipal order. For the reception of international law in the US American domestic order most instructively, Paust, above n 58.

passed prevails.¹⁰⁰ Within this scheme, it is formally consistent that all conventional norms have effects in the national legal order only within constitutional limits.¹⁰¹ The American Supreme Court justifies the supremacy of the constitution over international treaties with the language of the constitution's treaty clause (Art. VI), the history of its adoption, the objections of the framers and the entire constitutional history.¹⁰² The government routinely subjects international treaties to conflicting constitutional provisions.¹⁰³

In *France*, the Constitution grants duly ratified and published treaties priority over statutes under the condition of reciprocity (Art. 55 French Constitution).¹⁰⁴ Interestingly enough, this provision remained a dead letter, with the French courts largely ignoring international law until the 1980s. French courts began to recognize the priority of international treaties over French statutes only after the ratification of the ECHR in 1974 and the acceptance of the individual complaint mechanism in 1981. When the risk became real of the judgment of an international court being issued against France, due to the possibility of an individual filing a

100 *Head Money Cases*, 112 US 580, 599 (1884); *Whitney v. Robertson*, 124 US 190, 194 (1887); *Chae Chan Ping v. U.S.*, 130 US 581, 599 (1889). See also Restatement (Third) of Foreign Relations Law, § 115 (2) (1986). To the extent of conflict, a subsequent self-executing treaty provision prevails over a statute. Vice versa, an Act of Congress can – in the internal order – supersede an earlier provision of an international agreement. See Senator Jesse Helms, US Senate Committee on Foreign Relations, Address before the UN-Security Council, 20 January 2000: 'Under our system, when international treaties are ratified they simply become US law. As such, they carry no greater or lesser weight than any other domestic US law. Treaty obligations can be superseded by a simple act of Congress. ...Thus, when the United States joins a treaty organization, it holds no legal authority over us.' Reprinted in Sean D Murphy, *United States Practice in International Law* (CUP Cambridge 2002) vol 1: 1999-2001. Disregard by US authorities for an earlier international treaty of course does not relieve the US of its international obligation (Restatement (Third) of Foreign Relations Law, § 115 (1) (a) and (b) (1986)).

101 Paust, above n 58, at 99, with numerous references to the Supreme Court practice in n 1, p 123. See also Louis Henkin, *Foreign Affairs and the United States Constitution* (2nd edn Clarendon Oxford 1996) 187: 'Treaties, surely, are also subject to the Bill of Rights.'

102 *Reid v. Covert*, 354 US 1, 16-7 (1957): '... no agreement with a foreign nation can confer power on Congress, or any other branch of Government, which is free from the restraints of the Constitution ... The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or the Executive and the Senate combined.'

103 See the US reservation to the Genocide Convention of 1948 in *Multilateral Treaties as Deposited with the Secretary-General – Status as at 31 December 2002*, vol 1, part I, ch IV, at 124: 'nothing in this Convention requires or authorizes legislation or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.' Objections against this reservation were lodged by Denmark, Estonia, Finland, Norway, Ireland, Mexico, Netherlands and Sweden on the grounds that no state party may invoke the provisions of its internal law as justification for failure to perform a treaty (ibid p 125 et seq.). Such objections led the US to formulate an identical statement in special notes intended to be less visible than a 'reservation'. See also the UN-Convention against Torture of 1984: Communication of the United States of America the Secretary-General requesting that a notification should be made to all ratifying parties, United Nations Treaty Collection, ch IV, Treaty no 9, Note no 12 (as of 7 May 2009).

104 Art. 55 of the French Constitution of 4 October 1958: 'Duly ratified or approved treaties or agreements shall, upon their publication, override laws, subject, for each agreement or treaty, to its application by the other party.'

complaint to the European Court of Human Rights, the French courts started to apply the Convention frequently. The purpose was to avoid negative Strasbourg rulings.¹⁰⁵ The French Constitutional Council (*Conseil Constitutionnel*) is competent to decide whether international treaties are compatible with the French Constitution. Ratification of an international treaty that is in conflict with the constitution can take place only after an eventual constitutional revision (Art. 54 French Constitution).¹⁰⁶

This scheme implies that the French Constitution ranks above treaty law. It is therefore consistent that the Administrative Court (*Conseil d'Etat*) held that '*la suprématie ainsi conférée aux engagements internationaux ne s'applique pas, dans l'ordre interne, aux dispositions de nature constitutionnelle*'.¹⁰⁷ This position was more or less explicitly confirmed by the *Conseil Constitutionnel* in a ruling on the European Constitutional Treaty: '*[L]orsque des engagements souscrits à cette fin contiennent une clause contraire à la Constitution, remettent en cause les droits et libertés constitutionnellement garantis ou portent atteinte aux conditions essentielles d'exercice de la souveraineté nationale, l'autorisation des les ratifier appelle une révision constitutionnelle*'.¹⁰⁸ Consequently, international treaties must be interpreted in conformity with fundamental principles recognized by the French Republic which form part of French constitutional law.¹⁰⁹ In the important recent ruling *Arcelor*, the *Conseil d'Etat* confirmed the supremacy of French constitutional law over international and European law, while emphasizing that the higher authority of the domestic constitution and the control of the constitutionality of European acts by French judges must be reconciled with the French EU membership, as foreseen in Art. 88-1 of the Constitution. By establishing a constitutional obligation for French courts to defer to the ECJ under certain conditions, *Arcelor* has reduced the likelihood of a constitutional conflict between EU law and French constitutional law, but did not eliminate it.¹¹⁰

Along similar lines, the Austrian Constitutional Court refused to re-interpret the Austrian Constitution so as to comply with the broad reading of Art. 6 ECHR

105 Constance Grewe, 'Die Grundrechte und ihre richterliche Kontrolle in Frankreich' (2002) 29 Europäische Grundrechte-Zeitschrift 209, 212.

106 Art. 54 of the French Constitution (introduced in 1992): 'If, upon the demand of the President of the Republic, the Prime Minister or the President of one or other Assembly or sixty deputies or sixty senators, the Constitutional Council has ruled that an international agreement contains a clause contrary to the Constitution, the ratification or approval of this agreement shall not be authorized until the Constitution has been revised.'

107 Judgment of 30 October 1998, *Sarran*, (1998) Revue Française de Droit Administratif 1081-1090; (1999) 126 J.D.I. 745; also in Marceau Long and others *Les grands arrêts de la jurisprudence administrative* (15th edn Dalloz Paris 2005), no 106. See in the same sense the French Superior Court (*Cour de Cassation*), *Pauline Fraisse*, decision no 450 of 2 June 2000.

108 *Conseil constitutionnel*, decision no 505 DC of 19 November 2004, (2004) JORF 19885, para. 7. Also *Conseil Constitutionnel*, no 92-308 DC of 9 April 1992 on the Treaty of Maastricht: An international treaty may not impinge '*aux conditions essentielles d'exercice de la souveraineté nationale*'.

109 French *Conseil d'Etat*, *Moussa Koné*, judgment of 3 July 1996 on the interpretation of a bilateral extradition treaty.

110 *Conseil d'Etat*, *Société Arcelor Atlantique et Lorraine et autres*, decision of 8 February 2007 (no 287110), German translation in (2008) 43 *Europarecht* 57 with annotation by Franz Mayer et al (ibid, p 63 et seq.). See also Baquero Cruz, above n 1, at 401.

by the European Court of Human Rights and explicitly disrespected the Court's case-law on the notion of 'civil rights'.¹¹¹ Finally, the *German* Constitutional Court affirmed in its *Görgülü*-ruling that the Constitution (Basic Law) 'does not waive the sovereignty contained in the last instance in the German constitution.'¹¹²

Not infrequently, reservations to international treaties seek to give effect to the adhering state's national constitution in deviation from the treaty provisions.¹¹³ It can hardly be concluded from this practice *e contrario* that without such reservations, states generally consider international treaties to supersede their national constitution. On the contrary, this practice should be interpreted as making explicit the states' persistent concern for the safeguarding of domestic constitutional precepts.

Due to its paramount importance and substance, the ECHR is itself a kind of 'constitutional instrument'.¹¹⁴ As a consequence, the status of the ECHR as domestic constitutional or even supra-constitutional law has been discussed for some time by European scholars.¹¹⁵ However, the practice of the member states

111 Austrian Constitutional Court (*Verfassungsgerichtshof*), judgment of 14 October 1987, *Miltner*, part 4g, VfSlg. 11500/1987.

112 BVerfGE 111, 307 (2004) – *Görgülü*, para. 35; english translation available at <www.bverfg.de>, last accessed 7 May 2009. For the superiority of the German Fundamental Law over international law in scholarship see Georg Ress, 'Wechselwirkungen zwischen Völkerrecht und Verfassung bei der Auslegung völkerrechtlicher Verträge' (1982) 23 *Berichte der Deutschen Gesellschaft für Völkerrecht* 7, 47: '*Dies kann freilich weder bedeuten, dass die Verfassung hinter den allgemeinen Regeln des Völkerrechts (Art. 25 GG), die nur Übergesetzesrang haben, noch gar hinter völkerrechtlichen Verträgen zurücktreten muß. Ein favor conventionis dieser Art ist mit dem Grundgesetz unvereinbar.*'

113 One example is the numerous reservations to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) of 18 December 1979, UNTS vol 1249, 13. The Maldives declared: 'The Republic of Maldives does not see itself bound by any provisions of the convention which obliges to change its constitution and laws in any manner.' Lesotho, Malaysia und Pakistan subject the entire CEDAW to their constitutions. Turkey, Tunisia, and other states have made reservations to the effect that domestic law prevails in specific instances. See also the Declaration of Tunisia on the Convention of the Rights of the Child: 'The Government of the Republic of Tunisia declares that it shall not, in implementation of this Convention, adopt any legislative or statutory decision that conflicts with the Tunisian Constitution.' See the following Reservations and Declarations on the ICESCR by Pakistan: 'While the Government of Islamic Republic of Pakistan accepts the provisions embodied in the International Covenant on Economic, Social and Cultural Rights, it will implement the said provisions in a progressive manner, in keeping with the existing economic conditions and the development plans of the country. The provisions of the Covenant shall, however, be *subject to the provisions of the constitution* of the Islamic Republic of Pakistan.' (Emphasis added). Bangladesh on Arts. 2 and 3 of the ICESCR: 'The Government of the People's Republic of Bangladesh will implement arts 2 and 3 in so far as they relate to equality between man and woman, *in accordance with the relevant provisions of its Constitution* and in particular, in respect to certain aspects of economic rights viz. law of inheritance.' (Emphasis added). Statement by China made upon ratification of the ICESCR: 'The application of Article 8.1(a) of the Covenant to the People's Republic of China shall be *consistent with the relevant provisions of the Constitution* of the People's Republic of China, Trade Union Law of the People's Republic of China and Labor Law of the People's Republic of China; ... ' (emphasis added). Most of these declarations and reservations have met objections by a number of Western European states.

114 ECHR, *Loizidou v. Turkey* (preliminary objections), Series A 310 (1995), para. 75.

115 See for the German debate Thomas Giegerich, 'Wirkung und Rang der EMRK' in Rainer Grote and Thilo Marauhn (eds), *EKRM/GG: Konkordanzkommentar* (Mohr Tübingen 2006), ch 2.

has not followed scholarly proposals. For instance, in the already mentioned *Görgülü*-decision, the German Constitutional Court repeated that the Convention enjoys only the rank of a federal Act, and can be applied only within the confines of the German Basic Law.¹¹⁶

In most other member states too, the ECHR ranges in the hierarchy of norms below the state constitutions, either between the constitutions and statutes, or on the same footing as a domestic statute.¹¹⁷ In some member states, namely Austria¹¹⁸ and Italy,¹¹⁹ the ECHR is accorded the same domestic status as constitutional law, although this is probably not uncontroversial everywhere. In the Netherlands and in Belgium, the Convention has a supra-constitutional status.¹²⁰

One distinct case is the Constitution of Bosnia and Herzegovina, because that constitution was adopted as part of the international Peace Accord of Dayton of 1995,¹²¹ and because the state is still more or less under international administration. Art. II Section 2 of the Bosnian Constitution provides that '[t]he rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. *These shall have priority over all other law.*'¹²² The prevailing view seems to be that the phrase 'other' law implies that the ECHR does *not* have priority over the Bosnian Constitution itself.

Finally, the EU itself, as a domestic-type political entity vis-à-vis international law, has always insisted on the supremacy of the European Treaties (understood

116 BVerfGE 111, 307 (2004) – *Görgülü*, paras. 30 and 35.

117 See the country reports in Robert Blackburn and Jörg Polakiewicz (eds), *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (OUP Oxford 2001); Helen Keller and Alec Sweet Stone (eds) *The Reception of the ECHR in Europe* (2007 forthcoming).

118 Art. II para. 7 of the *Bundesverfassungsgesetz, mit dem Bestimmungen des Bundes-Verfassungsgesetzes in der Fassung von 1929 über Staatsverträge abgeändert und ergänzt werden*, of 4 March 1964, Austrian BGBl. 59/1964.

119 For the view that the ECHR enjoys a special '*forza di resistenza*' which precludes constitutional review of its provisions, see Giuseppe de Vergottini, *Diritto costituzionale* (4th edn CEDAM Milano 2004) 38-39. On the diverging views in Italian scholarship on the position of the Convention in Italian law see Enzo Meriggiola, 'Italy' in Blackburn and Polakiewicz, above n 117, at 475, 480.

120 For the Netherlands, see Leo F Zwaak, 'The Netherlands' in Blackburn and Polakiewicz (eds), above n 117, at 595, 599. For Belgium, see Belgian Cour de cassation, Dutch Section, 2nd Chamber, *Vlaamse Concentratie*, Decision of 9 November 2004.

121 The constitution is Annex 4 to the General Framework Agreement for Peace in Bosnia and Herzegovina of 14 December 1995, (1996) 35 ILM 75, 118. On the absorption of the international elements into the Constitution of Bosnia and Herzegovina, see the landmark decision of the Constitutional Court of 2000 concerning a law enacted by the High Representative for Bosnia and Herzegovina, Constitutional Court of Bosnia and Herzegovina, case no 9/000, decision of 3 November 2000, para. 9: The High Representative derives his powers from the 1995 Dayton Agreement and its annex. However, the Constitutional Court held that the High Representative was acting as an 'institution of Bosnia and Herzegovina' (rather than as an international official), and that his acts could be reviewed accordingly.

122 Emphasis added.

as the EU's constitution) over international treaties.¹²³ However, the ECJ stressed that this ranking is for internal purposes only, concerns only the 'internal lawfulness', and does not challenge the supremacy of international law 'at the level of international law' and from the perspective of international law itself.¹²⁴

To conclude, numerous important constitutional actors (including the ECJ behaving as a domestic actor) seem to reject the supremacy of international law, even of international human rights law, over the domestic constitution.

IV. National Courts' Control of Infringements of the State Constitution by International Acts

The domestic constitutional actors' assertion of the supremacy of the state constitution as a whole, or of core constitutional principles, over international law is normally accompanied by those domestic actors' procedural claim to have the final word on this question. Put differently, many national (constitutional) courts claim to be the ultimate authority on potential infringements of the state constitution by acts of international (or European) institutions.

Decisions of this statist type have been rendered, for instance, in Spain,¹²⁵ Denmark¹²⁶ and Ireland,¹²⁷ where the national courts rejected the priority of EC law over the state constitution and/or claimed jurisdiction over EC acts. The German Federal Constitutional Court, which, because of the *Maastricht* decision of 1993,¹²⁸ has become notorious for its claim to have the ultimate word in

123 See for a recent restatement ECJ, cases C-420/05P and C-415/05P, *Kadi and Al Barakaat*, judgment of the Court (Grand Chamber) of 3 September 2008, paras. 285 and 306-09. See on previous case-law on the supremacy of the EC/EU treaties over international law Anne Peters, 'The Position of International Law within the European Community Legal Order' (1997) 40 *German Yearbook of International Law* 9-77, 37-40.

124 ECJ, *Kadi*, above n 123, paras. 288, 290, and 300.

125 The Spanish Constitutional Court, in judgment 64/91 of 22 March 1991, *Asepesco*, implies that the national authorities are bound by the Spanish Constitution when implementing EC law. The Constitutional Court claimed jurisdiction: 'Furthermore, it is also evident that where a constitutional complaint action is brought against an act of the public authorities, taken for the implementation of a provision of Community law, alleging the violation of a fundamental right, such an action falls within the jurisdiction of the Constitutional Court' (English translation in Oppenheimer, above n 67, at 705, 706).

126 Danish High Court, *Maastricht Judgment* of 6 April 1998, para. 9.6.: 'Therefore Danish Courts may consider an Act of the Community inapplicable in Denmark, if the extraordinary situation should arise that it could be established with the necessary certainty that an Act by the Community, which has been confirmed by the European Court, builds on an application of the Treaty which lies beyond the transfer of sovereignty effected by the accession treaty' (German translation in (1999) 26 *Europäische Grundrechte-Zeitschrift* 49; English translation by the author). [1998] *Ugeskrift for Retsvaesen (UfR)*, H 800; English annotation by Sten Harck and Henrik Palmer Olsen, 'Decision Concerning the Maastricht Treaty' (1999) 93 *AJIL* 209-214.

127 Irish Supreme Court, judgement of 19 December 1989, *Society for the Protection of Unborn Children Ireland v. Grogan*, [1990] *ILRM* 350, 361 (separate opinion Walsh J): '[I]t cannot be one of the objectives of the European Communities that a member state should be obliged to permit activities which are clearly designed to set at nought the constitutional guarantees for the protection within the State of a fundamental human right.'

128 BVerfGE 89, 155 (1992).

matters of European integration, is probably not the most statist court in Europe. In its so-called *Bananas* order of 2000, the Court clarified that it does not claim jurisdiction in each individual case of an alleged violation of German fundamental rights by EU Acts, but only in the event of a general failure of fundamental rights protection by the ECJ.¹²⁹ Should the exceptional situation arise in which the German Federal Constitutional Court will exercise its jurisdiction, it will not require European institutions to observe the full 'German' fundamental rights standard, but only a minimum standard.

Overall, the message of the national judiciaries is mixed, and national (constitutional) courts sometimes appear somewhat schizophrenic. For instance, the above-mentioned *Görgülü*-order of the German Federal Constitutional Court on the one hand emphasized the sovereignty of the German Constitution, and construed the relationship between international law and domestic law in a strictly dualist fashion.¹³⁰ Most importantly, it downgraded the ECHR, which it did not acknowledge as a strict prescript for the German authorities, but merely as a text to be 'taken into account' within the limits of German constitutional principles.¹³¹ On the other hand, the Court assumed in the *Görgülü*-order the existence of 'a gradually developing international community of democratic states under the rule of law'.¹³² The Court confirmed that the German Basic Law must be interpreted in the light of the Convention and, most importantly, opened the way for constitutional complaints relating to a disregard of judgments of the European Court of Human Rights by German authorities. If a German court does not 'take into account' a Strasbourg ruling (which means either to comply with it or to justify why the national court did not comply), complainants can instigate a constitutional complaint (*Verfassungsbeschwerde*) before the German Federal Constitutional Court. Such complaints must formally rely on the infringement of the principle of the rule of law (Art. 20 clause 3 German Constitution) and of those domestic fundamental rights which correspond to the Convention guarantee at issue.¹³³

Arguably, the posture of national courts as just reported is not entirely unsound. It probably constitutes an 'emergency brake' and thereby one condition for the opening-up of states' constitutions towards the international sphere. On the long run, reasonable resistance by national actors might compel the international law-makers and appliers to engage in democratization and improve human rights protection against international actors themselves. It might thereby promote the progressive evolution of international law in the direction of a system more considerate of human rights and democracy.

129 BVerfG order of 7 June 2000, *Banana Market*, (2000) 53 Neue Juristische Wochenschrift 3124.

130 BVerfGE 111, 307 (2004) – *Görgülü*, paras. 34-35 (official english translation available at <www.bverfg.de>, last accessed 7 May 2009).

131 Ibid, paras. 47-50.

132 Ibid, para. 36.

133 Ibid, para. 63.

F. CONCLUSION: CONSTITUTIONAL PLURALISM AS PROMISE AND PERIL

The examples of national constitutions and case-law have demonstrated that there is indeed a worldwide constitutional practice highly responsive to international law but jealous of safeguarding at least domestic core constitutional principles against international intrusion. The irreconcilability between the international actors' claim of the supremacy of 'their' law and of their own ultimate authority and states' attitudes to the contrary is not new, but has remained a theoretical issue for a long time. Because international law was, until recently, both more technical and more vague than today, no concrete constitutional conflicts arose. Only in the last decade has the intensification of global governance increased the potential for conflicts between international law and domestic constitutional law, and has therefore provoked the questions of hierarchy and ultimate say, and the search for other modes of conflict solution.

Unsurprisingly, a growing body of international legal scholarship has begun to call into question the unconditional supremacy of international law over domestic constitutional law, notably in the event of a conflict with domestic core values. Thomas Cottier and Daniel Wüger were one of the first to argue that international norms which disregard fundamental rights and suffer from democratic deficiencies should be unenforceable in the domestic legal order. The authors deem such a 'constitutional right to resistance' necessary for the states to be able to accept as a general matter the supremacy and an eventual direct applicability of international law. They suggest that the relationship between international law and domestic law should not be conceived as a hierarchical one, but rather as a 'communicative' relationship.¹³⁴ Armin von Bogdandy has voiced his 'preference ... that, given the state of development of international law, there should be the possibility, at least in liberal democracies, of placing legal limits on the effect of a norm or an act under international law within the domestic legal order if it severely conflicts with constitutional principles.'¹³⁵ Most recently, André Nollkaemper has appraised domestic constitutional, legislative, and judicial challenges to the full application of international law less as nationalistic reflexes that seek to undermine the

134 Thomas Cottier and Daniel Wüger, 'Auswirkungen der Globalisierung auf das Verfassungsrecht: Eine Diskussionsgrundlage' in Beat Sitter-Liver (ed), *Herausgeforderte Verfassung: Die Schweiz im globalen Konzert* (Universitätsverlag Freiburg 1999) 241-281, 263-64. See also Thomas Vesting, 'Die Staatsrechtslehre und die Veränderung ihres Gegenstandes: Konsequenzen von Europäisierung und Internationalisierung' (2004) 63 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 41, 66: '*In der neuen Ordnung des Rechtspluralismus würde es aber keinen pauschalen Anwendungsvorrang der einen Rechtsordnung mehr vor der anderen geben.*' See further Matthias Kumm, 'Democratic Constitutionalism Encounters International Law: Terms of Engagement' in Sujit Choudhry (ed), above n 26, at 256-293. For a non-hierarchical relationship between EU law and domestic law of the EU member states Miguel Poiars Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Neil Walker (ed), *Sovereignty in Transition* (Hart Oxford 2003) 501-537; Christian Joerges, 'Re-Conceptualizing the Supremacy of European Law: A Plea for a Supranational Conflict of Laws' in Beate Kohler-Koch and Bernhard Rittberger (eds), *Debating the Democratic Legitimacy of the European Union* (Roman & Littlefield Lanham MD 2007) 311-327.

135 Armin von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law' (2008) 6 *Journal of International Constitutional Law* 397-413.

international rule of law, but as legitimate responses that are necessary to preserve the rule of law or legitimacy, not only at the domestic but also at the international level, and has diagnosed a 'need to qualify and refine the sacred principle of supremacy of international law.'¹³⁶ Even protagonists of a constitutionalist approach to international law specifically insist on the non-hierarchical relationships between the multiple constitutions on the national and global level.¹³⁷ In parallel, most analysts of global governance agree that the multiplicity of political entities on the globe is not properly described as a hierarchy, and should not be transformed into one. In contrast, the scene is depicted as a polyarchy or heterarchy.¹³⁸

The new label given to these judicial practices and scholarly proposals is the label of pluralism. Pluralism here refers first of all to *perspectives* and denies the existence of an absolute external observation standpoint ('God's eye-view'). The consequence is that there is no absolute vantage point from which to decide where the rule for deciding a conflict sits and what its content is. The plurality of perspectives is accompanied by a plurality of legal orders, a plurality of legal actors claiming ultimate authority, and a plurality of rules of conflict. In this intellectual framework, there is no legal rule to decide which norm should prevail, in other words there is no supremacy. There is also no legal rule to resolve the competing claims to authority raised by the international and the domestic constitutional actors. Different legal actors, for example courts, necessarily belong to one of the various orders, therefore necessarily speak from their own perspective, and can only apply a rule of priority residing in their own legal system. In the absence of an overarching, institutionalized power which could decide a conflict, the different actors' perspectives are – in legal terms – equally valid and consistent. Conflicts can therefore not be decided by legal argument, but must be solved politically.¹³⁹

It is my claim that this type of pluralism poses both chances and risks for the preservation of international law's practical and normative power. On the one

136 André Nollkaemper, 'Rethinking the Supremacy of International Law' in Rüdiger Wolfrum (ed), *Select Proceedings of the European Society of International Law* vol 2 (2008) (Hart Oxford 2009 forthcoming) with further references to recent case-law.

137 Jean Cohen, 'A Global State of Emergency or the Further Constitutionalization of International Law: A Pluralist Approach' (2008) 15 *Constellations* 456-484, 473; Konrad Lachmayer, 'The International Constitutional Approach: An Introduction to a New Perspective on Constitutional Challenges in a Globalising World' (2007) 1 *Vienna Journal on International Constitutional Law* 91-99, 97-98.

138 Even the concept of multilayered governance does not necessarily imply a hierarchy with a normative prevalence of the 'higher' level. See only Sol Picciotto, 'Constitutionalizing Multilevel Governance?' (2008) 6 *Journal of International Constitutional Law* 457-479, 461.

139 In the words of Neil Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders' (2008) 6 *Journal of International Constitutional Law* 373-396, 392: '[W]e must accept that the disorder of orders, considered as an accomplished and ongoing state of affairs, concerns the absence of transunit agreement in the presence of multiple competing candidate metaprinciples about how we should best resolve the relations between the different units of legal, political, and moral ordering in the world.' See on this 'pluralisme cognitif' also Loïc Azoulay, 'La constitution et l'integration: Les deux sources de l'Union Européenne en formation' (2003) 19 *Revue Française de Droit Administratif* 859-875, 866.

hand, pluralism in the sense of *abandoning formal hierarchy* seems theoretically sound, realist, and it has no detrimental consequences. In theoretical terms, the hierarchical conception of law has recently been convincingly criticized and a network model of law has been suggested as an alternative to the legal pyramid.¹⁴⁰ In practical terms, a formal hierarchy between international law and domestic constitutions appears less and less relevant because of the increasing permeability and convergence of state constitutions, i.e. because of vertical and horizontal constitutional harmonization. This is certainly true with regard to human rights. It matters less whether a court applies a 'domestic' fundamental right or an international human rights provision, because both types of norms tend to acquire the same content and scope.

These observations lead to suggesting prescriptively that less attention should be paid to the formal sources of law, and more to the substance of the rules in question. The ranking of the norms at stake should be assessed in a more subtle manner, according to their substantial weight and significance. Such a nonformalist, substance-oriented perspective implies that on the one hand certain less significant provisions in state constitutions would have to give way to important international norms. Inversely, fundamental rights guarantees should prevail over less important norms (independent of their locus and type of codification). This approach is in fact already implicitly present in the emerging national constitutional practice of treating international human rights treaties differently from ordinary international law, either by granting them precedence over state constitutions, or by using them, more than any other category of international law, as guidelines for the interpretation of state constitutions. Admittedly, this new approach does not offer strict guidance, because it is debatable which norms are 'important' in terms of substance, and because it does not resolve clashes between a 'domestic' human right on the one side and an 'international' human right on the other. However, the fundamental idea is that what counts is the substance, not the formal category of conflicting norms. Such a flexible approach appears to correspond better with the current state of global legal integration than does the idea of a strict hierarchy, particularly in human rights matters. From this perspective, international law and state constitutions find themselves in a fluent state of interaction and reciprocal influence, based on discourse and mutual adaptation, but not in a hierarchical relationship.

On the other hand, it would be naïve to expect that identical norms are interpreted and applied identically by all actors. Because norms, especially constitutional norms, are intrinsically open, and because every interpretation is necessarily creative, it matters very much who the interpreter is. Any interpretation of a constitutional norm by a national constitutional court or by an international tribunal is likely to be influenced to some extent by the acting body's institutional bias. Moreover, the practical impact of the meaning given to a norm in a judgment or decision will depend on the institution's legal and political authority.

140 François Ost and Michel van der Kerchove, *De la pyramide au réseau: pour une théorie dialectique du droit* (Facultés universitaires Saint-Louis Bruxelles 2002).

It is therefore misleading to celebrate the openness of the question 'who decides who decides' and the lack of ultimate authority as a constitutional achievement.¹⁴¹ While it is true that such openness in theory constitutes an additional mechanism for limiting power, it seems more likely that legal openness tends to result in the political dominance of the more powerful actors.

The task ahead then is to devise novel procedural mechanisms for the adjustment of competing claims of authority in order to realize what Mireille Delmas-Marty has called a 'pluralisme ordonné'.¹⁴² For instance, it must be acknowledged that national courts are under a *bona fide* obligation to take into account international law, must interpret domestic constitutional law as far as possible consistently with international prescriptions, and must give reasons for non-compliance. Moreover, any refusal to apply international law based on domestic constitutional arguments must be strictly limited to constitutional core values, and may be permissible only 'as long as' the constitutional desiderata have not been even in a rudimentary fashion incorporated into international law itself.¹⁴³ On the other hand, the international bodies should grant a margin of appreciation to national decision-makers with a strong democratic legitimation.¹⁴⁴ Of course these suggestions bear the real risk of reinforcing the perception that international law is only soft law or even no law at all, with little potential to place robust constraints on the exercise of political powers. They may therefore seem minimalist or even subversive for international law and global governance. However, it is my hope that procedural principles for ordered pluralism might work constructively, and provide, together with further democratization of international law, a flexible and sustainable response to counter nationalist tendencies and non-compliance with international law.

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141 As does Póitares Maduro, above n 134, at 522.

142 Mireille Delmas-Marty, *Le pluralisme ordonné* (Seuil Paris 2006).

143 Cf German Constitutional Court, BVerfGE 37, 271 (1974) – *Solange I*.

144 ECHR, *Hatton v. UK*, appl. No 36022/97, judgment of 8 July 2003, para. 97: 'The national authorities have a *direct democratic legitimation* and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions.' (Emphasis added).