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The Interfaces between the National and International Rule of Law: A Framework Paper

Machiko Kanetake*

I Introduction

The interfaces between national and international law create opportunities for mutual self-reflection. The interfaces are the points where the actors, norms and procedures belonging to respective legal orders connect and interact with one another. The possibilities for interactions and mutual self-reflection have been expanded by the subject-matter\(^1\) overlap between national and international law. International law prescribes standards concerning, for instance, human rights, crimes, trade, investment, public health, and environmental conservation, which are equally governed by national

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\(^1\) In this chapter, a ‘subject-matter’ is not the same as the ‘substance’ of law. The subject-matter denotes factual or legal scenarios which sustain the need for legal regulation, and with respect to which law extends its regulatory reach. For instance, environmental degradation or the need for environmental conservation is a broad subject-matter of environmental law. The subject-matter of the ‘rule of law’ is the exercise of authority by institutions in a society.
International law also enforces those standards through adjudicative venues such as human rights courts, criminal courts and tribunals, and investment arbitration tribunals.

National and international law regulating the exercise of authority are no exception to this subject-matter overlap. Such an area of law generally represents the idea of the ‘rule of law’ which, in this chapter, is defined as the regulation of the exercise of authority. Both national public law and international human rights law regulate how the government ought to exercise its authority against individuals and entities within its jurisdiction. While the national and ‘international’ rule of law are both indispensable components of global governance, the overlap has given rise to greater chances of conflict between the two branches of the rule of law. For instance, the rights of detained foreign nationals are regulated by domestic public law (constitutional, administrative, and criminal law), and international human rights treaties and the Vienna Convention on Consular Relations. The parallel regulation created the series of avoidances and conflicts; the US courts interpreted relevant domestic laws and the Vienna Convention (e.g., *Breard* (1998)). The interpretation was contested by the International Court of Justice (ICJ) in *LaGrand* (2001) and *Avena* (2004) and by the Inter-American Court of Human Rights (IACtHR), which further invited domestic

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3 For the definition of the rule of law in this chapter, see Section II below. This chapter employs the rule of law as an umbrella notion, which is open to the inclusion of both formal and substantive requirements. Which elements would fall under the umbrella of the rule of law varies depending on a legal order. For the overview of formal and substantive requirements, see Section II-B in this chapter.

4 This chapter’s approach is inductive: namely, to induce the meaning of the rule of law through legal practices. Nevertheless, at an analytical level, my chapter presupposes possible formal and substantive elements of the rule of law developed at the domestic level. By relying on the list of possible rule of law elements as an analytical tool, my chapter attempts to identify and understand the rule of law materialised in the actual legal practices.

5 In this chapter, the ‘international’ rule of law concerns *international law* regulating the exercise of authority by states, international organisations and other subjects of international law. It does not matter which *relations* the rule of law purports to regulate. Namely, the ‘international’ rule of law may purport to regulate not only state-to-state relations, but also government-individual relations, or the relations between international organisations and individuals.

6 As Schill critically argues, national and international law should not be captured only a from confrontational angle; they often serve to achieve common goods: see ch 17 (Stephan Schill) of this volume.


avoidance in Medellin (2008).  

Broadly, the interfaces between the national and international rule of law can be analysed from three different angles: (i) how the national rule of law understands, accepts and resists the international rule of law; (ii) how the international rule of law understands, accepts, and resists the national rule of law; and (iii) how the interactions can be understood and evaluated from external (outside) angles. International scholarship has produced extensive studies on the national reception of international law, including the international rule of law. Much less recognised is the international reception; namely, how the international rule of law understands, accepts, or resists the national rule of law.  

Now that UN General Assembly resolutions have given recognition to the rule of law at both the national and international levels, it is worth examining the question of how the international rule of law finds connection with domestic rule of law practices.

This chapter aims to capture the interfaces from the international perspective. It considers how the national rule of law has any feedback effect on the international rule of law. This chapter’s angle is a response to the critical need for situating the national legal order, not merely as the venue for implementation, but as the agent for the critical revision of the international rule of law and of the universality of policies.

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11 Among the limited existing studies is Shany’s work on the jurisdictional relations between national and international courts. Shany demonstrates that both international and domestic courts avoid or resolve jurisdictional conflicts by stressing the foundational dualism between international and national judicial decisions, resorting to the jurisdictional hierarchy, or by the application of ‘comity’ which represents the integrative, pragmatic and flexible approach to the jurisdictional competition: see Yuval Shany, Regulating Jurisdictional Relations Between National and International Courts (Oxford University Press, 2007).


13 For the purpose of this chapter, the UN Secretary-General’s report regards national implementation and compliance with international law as the components of strengthening the international rule of law: see Report of the Secretary-General, ‘Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels’, UN Doc. A/66/749 (16 March 2012).

14 Benvenisti and Downs argue that national courts’ active application of international law has also signalled to international courts that the national courts are no longer passive recipients of the decisions of the international tribunals but rather equal partners: Eyal Benvenisti and George W Downs, ‘National Courts, Domestic Democracy, and the Evolution of International Law’ (2009) 20 European Journal of International Law 59, 68.
behind it. Study of the feedback of national legal practices on the critical revision of the international rule of law should highlight how international law and institutions pay deference to political legitimacy attached to the national rule of law.

The chapter begins with an overview of the concept of the international rule of law, by classifying the relations regulated by it, as well as the established elements of the international rule of law (Section II below). The subject-matter overlap between the national and international law concerning the regulation of the exercise of authority has invited confrontational and avoidant practices on the part of domestic courts (Section III). The confrontational national reception, however, provides normative, conceptual, and political feedback on the international legal order (Section IV). The international rule of law has then been re-establishing its interfaces with the national rule of law, by preserving national competences, and, at the same time, making the elements of the international rule of law less formalistic (Section V). Despite the national and international claim of hierarchy, the actual manner in which the international rule of law interacts with national law is much more nuanced and heterarchical. The heterarchical interactions have the benefit of preserving the flexibility and national diversity; at the same time, they give rise to questions about the certainty, and whether international law could provide the credible regulatory framework for the international reception of the national rule of law (Conclusion).

15 See Mattias Kumm, ‘International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model’ (2003) 44 Virginia Journal of International Law 19 (suggesting that to situate domestic courts simply as enforcement forums for the international rule of law may be problematic, as it tends to leave the politics behind the international rule of law unchecked); Jean D’Aspremont, ‘The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order’ in OK Fauchald and A Nollkaemper (eds), The Practice of International and National Courts and the (De-)Fragmentation of International Law (Oxford, Hart Publishing, 2012) 141 (noting that, while the systemic integration of international law in theory places domestic courts in a position to integrate international law, such a one-sided constitutionalist view may not be appropriate). In a similar vein, see Armin von Bogdandy and Ingo Venzke, ‘In Whose Name? An Investigation of International Courts’ Public Authority and Its Democratic Justification’ (2012) 23 European Journal of International Law 7 (suggesting that domestic constitutional organs will retain a critical role in relieving the legitimacy questions leveled against international courts’ authority).

16 This chapter focuses on the interactions between the national and international legal orders. These two legal orders by no means exhaust multiple normative layers in international society. To study multiple layers of transnational norms, notably done by the NYU-based ‘global administrative law’ initiative, has the benefit of identifying normative phenomena which could not be captured by the traditional legal lens. At the same time, to capture multiple normative layers as one set of study injects the greater plurality into the concept of law, unless one uses a more loose term of ‘norms’. Kingsbury puts forward an extended positivist concept of law, which is empirically identified by social facts, and normatively screened by the publicness requirements: see Benedict Kingsbury, ‘The Concept of “Law” in Global Administrative Law’ (2009) 20 European Journal of International Law 23. At the moment, global administrative ‘law’ is not (yet) standing on the established rule of recognition (about law), in the same way as ‘international law’: see ibid 29–30. Somek’s critical comments towards Kingsbury’s approach are directed at the incompatibility between the stated ‘positivist’ and inductive approach to the identification of law, and the natural law approach manifested by the ‘publicness’ requirements: see Alexander Somek, ‘The Concept of “Law” in Global Administrative Law: A Reply to Benedict Kingsbury’ (2009) 20 European Journal of International Law 985.
II The International Rule of Law?

A Relations Regulated by the International Rule of Law

As ‘a principle of governance’\(^{17}\) nurtured historically in the domestic legal order,\(^{18}\) the rule of law primarily regulates the relations between the national government and individuals under its jurisdiction. While the scope of the governmental entities and the applicability of the rule of law to private entities which exercise de facto governmental authority may still be disputed, a historically embedded general idea is that the core addressee of the rule of law is the national government.

With respect to the ‘international’ rule of law, however, it is by no means clear whose relations it purports to regulate in the first place. This elementary ambiguity stems from the absence of centralised governmental authority in international society, which has traditionally made the rule of law a less pressing issue therein. This no longer holds true; the growth and reinvigoration of international organisations and international courts (‘international institutions’\(^{19}\)) have brought the rule of law into the familiar language at the international level.\(^{20}\)


\(^{18}\) The modern elements of the rule of law were first formulated by A. V. Dicey. Three meanings of the rule of law developed by Dicey are: (i) the rule by regular law, and not by arbitrary power; (ii) equality before the law; and (iii) the protection of individual rights by judicial decisions: Albert Venn Dicey, Introduction to the Study of the Law of the Constitution (Indianapolis, Liberty Fund, 1982) 110–22. For the earlier roots of the rule of law, see Brian Z Tamanaha, On the Rule of Law: History, Politics, Theory (Cambridge University Press, 2004) 7–31 (chs 1–2) (Greek, Roman and Medieval roots); Simon Chesterman, ‘An International Rule of Law?’ (2008) 56 American Journal of Comparative Law 331, 334–36 (referring to Sir Edward Coke, Samuel Rutherford, and Thomas Hobbes).

\(^{19}\) In this chapter, ‘international institutions’ include international organisations (including their political and judicial organs) and international courts established by treaties (such as the ECHR). Apparently, there are a number of differences among these ‘international institutions’. (i) For instance, international organisations possess international personality, while international courts generally do not. (ii) Also, there are political institutions (political organs of international organisations, such as the UN Security Council), and judicial institutions (judicial organs of international organisations, such as the ICJ, and other international courts). While these differences must be taken into account for the analysis of the interfaces, the focus of this chapter is to provide the framework, on the basis of which I further pursue individual analyses.

\(^{20}\) This has produced studies such as the NYU-based ‘global administrative law’ initiative, and the Max Planck Institute’s studies on ‘international public authority’, which aim at establishing the rule of law and accountability for the exercise of authority by international institutions. See Benedict Kingsbury, Nico Krisch and Richard B Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 Law and Contemporary Problems 15; Armin von Bogdandy and others (eds), The Exercise of Public Authority by International Institutions: Advancing International Institutional Law (Springer, 2009); Armin von Bogdandy and Ingo Venzke (eds), International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance (Berlin; New York, Springer, 2012).
Broadly, the international rule of law concerns three levels of relations: [A] horizontal state-to-state relations, [B] authority exercised by the government against individuals and non-state entities, and [C] authority exercised by international institutions, which [C1] review or [C2] effectively replace governmental decisions against individuals and non-state entities. By reviewing and effectively replacing the governmental authority, international institutions exercise their authority indirectly (in the case of [C1]) and directly ([C2]) against individuals. (See the diagram regarding the three levels of the international rule of law.)

This chapter primarily focuses on the third level (indicated as [C] in the above diagram): namely, the international regulation of authority exercised by international institutions. Nevertheless, it would be necessarily intertwined with the second level (indicated as [B] in the above diagram), because international institutions review the government’s exercise of authority based upon the standards of review which may differ from those accepted under domestic law. The distinction between three different levels of the international rule of law bears significance when one considers the interfaces between the national and international rule of law. It is important because the degree of subject-matter connection between the national and international rule of law varies depending on the level of the international rule of law to which one refers.

The international rule of law is most commonly understood as the regulation of horizontal relations between states (i.e., the relations indicated as [A] in the above diagram). At this level, the subject-matter connection between the national and international rule of law would be the least extensive among the three. The rule of law developed in order to constrain governments and protect individuals within a national legal system is different from the regulation of state-to-state relations. While both regulate the exercise of authority by governments, they differ in terms of subjects against which authority is exercised, the substance of decisions governed by the rule of law as well as their wider legal and political contexts. The subject-matter disconnection renders Jeremy Waldron’s observation particularly pertinent here. In this first scenario, the rule of law at the international level ought not to be constructed as protecting sovereign states and their freedom in the same manner as does the domestic

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21 In a formal sense, international institutions cannot ‘replace’ governmental decisions; international decisions are rendered under international law, while domestic decisions are made under domestic law. Yet international institutions effectively replace governmental decisions when the institutions make decisions against individuals, and such decisions are internationally binding on member states which have authority over those subjects.
rule of law for individuals and their autonomy. The two branches of the rule of law address very different regulatory relations.

By contrast, the subject-matter overlap between the national and international rule of law would be extensive if the latter is used for the regulation of governmental authority exercised against individuals and non-state entities (i.e., the relations indicated as [B] in the above diagram). International human rights law is a prominent example. An extensive body of treaties and customary international law purport to regulate how the government ensures the protection of rights of individuals. Another example, albeit concerning corporations, may be international investment law, in that it regulates host states’ authority exercised against foreign investors. The key principles of international investment law find parallel presence in domestic public law (administrative and constitutional law), which enables both theoretical comparison and practical conversion between the two areas of law.

The regulation of the exercise of international authority (i.e., the relations indicated as [C] in the above diagram) can be situated in the middle of these two scenarios. Human rights courts, such as the European Court of Human Rights (EChT) and the IACtHR, review the human rights compatibility of governmental decisions vis-à-vis individuals. In restricted cases, international criminal courts and tribunals, including the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR), effectively replace governmental decisions by rendering orders against the accused.

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22 Jeremy Waldron, ‘Are Sovereigns Entitled to the Benefit of the International Rule of Law?’ (2011) 22 European Journal of International Law 315. See also Janne E Nijman, ‘Non-State Actors and the International Rule of Law: Revisiting the “Realist Theory” of International Legal Personality’ in M Noortmann and C Ryngaert (eds), Non-State Actor Dynamics in International Law from Law-Takers to Law-Makers (Ashgate, 2010) 91, 97–100 (observing that the beneficiaries of the rule of law are human individuals, and that such rule of law (perhaps inherently) has a substantive element of justice).

23 International investment law has a unique interplay between international and national law, however, in that investor-state arbitration tribunals can formally apply national law as procedural and/or substantive law. ‘Territorialized tribunals’ apply national procedural law and national and international substantive law. ‘Internationalized tribunals’ (such as ICSID tribunals and Iran-United States Claims Tribunals) apply international procedural law and national and international substantive law. Also, even when international law is primarily applied, national law is treated more than mere facts. See Hege Elisabeth Kjos, Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law (Oxford University Press, 2013).

24 The effective replacement takes place only in extraordinary circumstances, in the sense that; jurisdiction of the ICC is complementary to national criminal jurisdictions and conditioned on the unwillingness or inability of member states; and that the establishment of the ICTY and ICTR was possible as the UN Security Council determined the existence of a ‘threat to the peace’ under Chapter VII of the UN Charter.

25 The meaning of ‘replacement’, see (n 21).
individuals and witnesses without being intermediated by states. Political organs can also replace governmental authority in limited circumstances. For instance, the UN Security Council’s sanctions committees designate specific individuals as the targets of global asset freeze measures. Although the asset freeze must be implemented by member states, as far as the prescription of individual targets is concerned, the UN Security Council’s sanctions committees prescribe specific individuals and entities as targets of asset freeze. The quantitative and qualitative extension of review and replacement by international institutions is part of the broader political movement initiated by the UN, the World Bank, and other international organisations to promote the rule of law.

At this third level, there is a subject-matter disconnection between the national and international rule of law in terms of the kind of institutions which exercise authority, in that the former regulates the government, and the latter addresses international institutions. Yet the subject-matter disconnection is mitigated, insofar as the exercise of authority by international institutions bears resemblance to the exercise of authority by national government, with respect to subjects against which authority is indirectly and directly exercised (i.e., individuals), and the substance of decisions rendered by the institutions.

B Elements of the International Rule of Law

i Rule of Law Elements

Having overviewed the relations governed by the international rule of law, the next inquiry is its elements. Whether national or international, the rule of law is one of the lexicons about which few raise an objection as a matter of abstract ideal, but on which many disagree on more specific content. While I do not discount the controversy over the definition, this chapter moves its attention to the consideration of more specific elements. In this chapter, the rule of law is employed as an umbrella
notion, which can cover both formal and substantive requirements. \(^{31}\) In identifying those requirements, I analytically rely upon the major rule of law elements adopted at the national level, and see if they can be found in international legal practices. The reliance upon the national rule of law does not mean that the national rule of law is actually transferable to the international level, or that there indeed exists the overarching rule of law for national and international institutions. What the national concept provides is analytical support for ascertaining the development of the international rule of law. A drawback of the broad definition may be to dilute the distinct function of the rule of law \textit{per se}. \(^{32}\) Yet this chapter focuses not on the definition of the term but on the question of how the two spheres of rule of law connect with each other and how such connection develops the rule of law at the international level.

‘Formal’ requirements under the umbrella of the rule of law typically include: law-based decision-making (namely, the ‘rule by law’ requirement), \(^{33}\) the independence of the judiciary, \(^{34}\) and democratic and participatory decision-making, \(^{35}\) as well as certain non-substantive qualities of the law, such as non-retrospectivity, openness, and certainty of law. \(^{36}\) ‘Substantive’ elements, on the other hand, require the content of the law and law-based decisions to conform to justice and the protection of individual rights. \(^{37}\) Each element can of course be defined in a number of different ways. \(^{38}\) One requirement can also be both formal and substantive. Democracy, for

\(^{31}\) The distinction between ‘formal’ and ‘substantive’ requirements was articulated by Paul Craig: Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ (1997) \textit{Public law} 467. The distinction was further progressively graded by Brian Z. Tamanaha, in accordance with the ‘thinner’ and ‘thicker’ axes: Tamanaha, \textit{On the Rule of Law} (n 18) 91, and chs 7–9.


\(^{34}\) See Chesterman, ‘An International Rule of Law?’ (n 18) 342 (the second and third core definition); Raz, ‘The Rule of Law and its Virtue’ (n 32) 200–01 (fourth and seventh principles). In addition to these requirements, one may also add some other formal elements, such as the equality before the law, and the access to courts.


\(^{38}\) For instance, the ‘rule by law’ requirement could be met by every modern state if it only required (whatever) laws to be adopted. See Tamanaha, \textit{On the Rule of Law} (n 18) 92–93; Raz, ‘The Rule of Law and its Virtue’ (n 32) 197. By contrast, if it is contrasted with the rule by ‘arbitrary power’ as Dicey did, it may serve to restrict the use of public powers for private ends. See Dicey, \textit{supra} note 15, pp. 110, 120. See Raz, ‘The Rule of Law and its Virtue’ (n 32) 203.
instance, could be defined procedurally as popular election, or more substantively as the respect for human rights.39

ii The Formalistic and Thin International Rule of Law

The application of these elements to the regulation of international authority (indicated as [C] in the above diagram, Section II-A) exposes the thin character of the international rule of law.

There is already broad recognition that the rule of law applies at the international level,40 and international organisations are not exempt from it. In the ‘Declaration of the High-level Meeting of the General Assembly on the Rule of Law and the National and International Levels’ adopted in September 2012,41 the General Assembly recognised that ‘the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs’.42

Among the rule of law elements listed in Section B-i above, it is well-established that the ‘rule by law’ element applies to international organisations. The decisions of international organisations are governed by a constituent instrument. Even such a highly political organ as the UN Security Council is bound by law,43 as reiterated by the Appeals Chamber of the ICTY in Tadić (1995).44 The same ‘rule by law’ element should also apply to international courts, whose mandates are much more restricted than (the political organs of) international organisations. The independence of the judiciary is implicit in the function of judicial bodies,45 and the independence of judges is often explicitly provided in relevant treaties.

Yet beyond this, it is difficult to identify an established rule of law element. First, this

39 See Brett Bowden and Hilary Charlesworth, ‘Defining Democracy in International Institutions’ in B Bowden, H Charlesworth and JM Farrall (eds), The Role of International Law in Rebuilding Societies After Conflict: Great Expectations (Cambridge; New York, Cambridge University Press, 2009) 90, 90–100 (analysing various international statements regarding the definition of democracy).
42 Ibid para 2 (emphasis added).
43 As the International Court of Justice (ICJ) affirmed this at the outset of the UN, the “political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations of its powers”: Admission of a State to the United Nations (Charter, Art. 4) [1948] ICJ Reports 64 (Advisory Opinion of 28 May 1948).
44 The Tribunal observed ‘neither the text nor the spirit of the Charter conceives of the Security Council as legibus solutus (unbound by law)’: Prosecutor v Duško Tadić, 2 October 1995, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Decision on Jurisdiction, No. IT-94-1-AR72, para 28 (in relation to the Council’s power under Article 39 of the UN Charter).
45 For instance, the UN Security Council, a political organ, cannot review the individual decisions of judicial organs such as the ICTY which was established by the Council itself.
‘rule by law’ requirement itself is understood in a formalistic manner, in that it does not exclude the arbitral exercise of power by political organs.\textsuperscript{46} The selection of judges through international politics can also call into question the qualifications, independence, and impartiality of international judges.\textsuperscript{47}

Second, other major formal and substantive requirements of the rule of law have yet to be established. The decision-making processes of international organisations are certainly not democratic, in the sense that they do not ensure elections and equitable representation.\textsuperscript{48} Also, there remains uncertainty as to whether international organisations are bound by international human rights law. One may observe that the human rights obligation attaches \textit{a priori} to the legal personality of international organisations enjoyed under international law.\textsuperscript{49} However, international personality has, in principle, no predetermined content in international law.\textsuperscript{50} The presumption that international organisations are born with no predestined entitlement and obligations is, of course, increasingly subject to qualification by the development of common rules on international organisations.\textsuperscript{51} Yet the variance among international organisations has so far hampered the development of substantive rules, such as human rights law, into the corps of common institutional rules. Unless the constitutive instruments of international organisations specifically mandate them to ensure respect for international human rights law, it would be difficult to argue, in a general sense, the institutional human rights obligations.

\textsuperscript{46}See Chesterman, ‘An International Rule of Law?’ (n 18) 351.
\textsuperscript{47}See von Bogdandy and Venzke, ‘In Whose Name?’ (n 15) 32–36.
\textsuperscript{50}Schermers and Blokker, International Institutional Law Unity Within Diversity (n 49) 990, 992–993; White, The Law of International Organisations (n 49) 40–41.
\textsuperscript{51}Some examples include an \textit{ultra vires} doctrine, the legal personality of international organisations, an implied power doctrine, interpretation of constituent instruments, and a series of rules on immunities and privileges: see Dapo Akande, ‘International Organizations’ in MD Evans (ed), International Law (3rd edn, Oxford, Oxford University Press, 2010) 252, 255–76.
III National Reception of the International Rule of Law

A The Gap and Asymmetry in the Rule of Law

The formalistic and thin international rule of law governing the authority of international institutions has created a gap between the more substantive and thicker national rule of law. The gap between two branches of the rule of law has then solicited confrontational and avoidant national responses to the decisions of international institutions. The gap is problematic especially for domestic courts, which are circumscribed both by the national rule of law and international obligations owed by their states.52

Despite this gap, international institutions review and replace governmental authority based upon the more substantive and thicker element of the rule of law. The widely-cited definition of the rule of law given by the UN Secretary General in 2004 in part illustrates the asymmetry in the international rule of law for the regulation of governmental authority on the one hand (indicated as [B] in the diagram, Section II-A above), and that of international authority on the other (shown as [C] in the diagram). The UN definition encompasses such elements as accountability to laws, independent adjudication, consistency with human rights standards, fairness, the separation of powers, participation, legal certainty, and legal transparency.53 This expansive list is described as ‘almost certainly go[ing] beyond what states would actually implement’.54

B The Claim of Ultimate Authority

While it is true that national courts demonstrate their amenability to international law and proactively invoke international law as leverage to challenge governmental decisions,55 the amenability of domestic courts has thus been compensated by a

55 See Eyal Benvenisti, ‘Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts’ (2008) 102 *American Journal of International Law* 241. Domestic courts employ international law as an interpretive aid, even if they are not obligated to do so to: see Robert Howse and Ruti Teitel, ‘Beyond Compliance: Rethinking Why International Law Really Matters’ (2010) 1 *Global Policy* 127, 132 (observing that the influence of international law in domestic law (and before domestic courts) cannot be reduced to the ‘compliance’ of international law). The interpretive rules commonly employed by domestic courts, such as consistent interpretation, and systemic integration, facilitate the presence of international law before national courts: see further Nollkaemper, *National Courts and the International Rule of Law* (n 52) ch 7 (Consistent Interpretation); D’Aspremont, ‘The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order’ (n 15).
growing number of confrontational and avoidant practices.56

Domestic courts normally claim their ultimate authority to determine the relationships with international law at the domestic level based on the authorizing rule of domestic law.57 The Görgülü case (2004)58 before the German Constitutional Court is an illustrative example; the Court affirmed that it had the ultimate authority to determine the compatibility of the judgments of the ECtHR with its constitutional provisions. In the UK, the Supreme Court in Horncastle (2009) also observed that ‘it is open to [the] court to decline to follow the Strasbourg decision’ when a decision of the Strasbourg Court fails to sufficiently accommodate particular aspects of the UK’s domestic process,59 adding further to the international feedback of such national resistance as being a ‘valuable dialogue’ between the UK Court and the Strasbourg Court. In Spain and France, judges likewise secure their interpretive discretion to determine whether and how ECtHR judgments have effect in the domestic settings.60

C Techniques and Bases for National Avoidance and Contestations

Specific techniques and grounds under which domestic courts avoid and contest the decisions of international institutions vary depending on whether those decisions are rendered by political or judicial institutions, whether states have monist or dualist traditions,61 the kind of treaties involved,62 and the wider political and judicial


57 Domestic lawyers often employ the vertical narratives, regarding national constitutions as the ultimate source of authority of law, and expecting domestic courts to reject international decisions that are inconsistent with fundamental domestic principles: see Shany, Regulating Jurisdictional Relations Between National and International Courts (n 11) 6.


61 States with dualist traditions include: Australia, Canada, Ireland, India, Italy, Israel, Sweden, and the UK. On the other hand, states which have monist traditions include: Germany, Japan, the Netherlands, France, Poland, Russia, South Africa, and the US.

62 With respect to a specific treaty, member states have been incrementally formulating the methods of
climate surrounding the judges. While the grounds cannot be exhaustively elaborated upon, here I refer to four legal techniques and grounds on the basis of which courts limit the domestic effect of the decisions of international organisations and courts.

First, domestic courts may deny the *domestic applicability* of particular decisions in the first place. In a ‘monist’ state, in which international agreements automatically acquire domestic validity, domestic courts encounter the question of whether or not particular international treaties are directly applicable (or so-called self-executing-treaties).63 A well-known case in this regard is *Medellin* (2008), in which the US Supreme Court observed that ICJ decisions were not automatically enforceable as domestic law.64 In monist states, domestic courts are generally endowed with the power to tentatively block the application of particular treaties in the domestic settings, while, in dualist states, such power is, in principle, entrusted to the hands of legislative and executive bodies.

Second, judges can also *interpret* international law as more favourable to domestic law and political interests. This was illustrated, for instance, by the US Supreme Court in *Sanchez-Llamas* (2006).65 In this case, the US Supreme Court interpreted Article 36(2) of the Vienna Convention on Consular Relations as requiring the conformity of the *treaty provision* with domestic laws and regulations.66 This interpretation is

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63 The conditions under which international treaties have direct applicability vary according to states and their domestic courts. It is nevertheless possible to derive some common conditions for direct effect: the *subjective* element that parties have not excluded the direct applicability of the treaty as a whole, and the *objective* elements that treaty provisions are precise and complete enough to be applied by domestic courts. See Nollkaemper, *National Courts and the International Rule of Law* (n 52) 134–38; Yūji Iwasawa, *International Law, Human Rights, and Japanese Law: The Impact of International Law on Japanese Law* (Oxford, Clarendon Press, 1998) 44–49. See also *A and B v Government of the Canton of Zurich, Appeal Judgement, Case No 2P273/1999 ILDC 350 (CH 2000)* (Switzerland, Federal Supreme Court, 22 September 2000) (denying the direct applicability of ICESCR provisions).


65 *Sanchez-Llamas v Oregon* (n 9).

66 See ibid 347–48. Article 36(2) of the Vienna Convention on Consular Relations reads in full: The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended”: Vienna Convention on Consular Relations, 24 April 1963, 596 UNTS 261 (entered into force
contrasted with the ICJ’s reading of the same article in LaGrand, in which the ICJ regarded the provision as requiring the conformity of national law with the treaty.\(^{67}\) The ICJ emphasised giving ‘full effect’ to the conventional rights, while the US court stressed the condition ‘in accordance with the laws and regulations of the receiving State’. Both arguments may be defended by reference to the terms of Article 36(2) of the Vienna Convention.

The third is the principle of separation of power at the domestic level. Domestic courts may avoid or contest the specific decisions of international institutions by leaving the political branches to decide whether or how the rules can be given effect to in the domestic legal order.\(^{68}\) In Ahmed (2010),\(^{69}\) the UK Supreme Court found that the executive orders (the Terrorism Order and the Al-Qaida and Taliban Order), which implemented the UN Security Council’s sanctions regimes on terrorist financing, were ultra vires and unlawful. The Court so decided on the ground that the Parliament did not empower the executive to override fundamental rights.\(^{70}\) In this case, the Court therefore upheld the Parliamentary supremacy, as Lord Phillips observed, in determining whether and how international measures should be imposed at the domestic level when fundamental rights were affected.\(^{71}\)

Finally, the protection of fundamental rights has been an important legal basis of contestations. Courts often invoke the safeguarding of human rights as a basis for which they directly or indirectly review the decisions of international organisations. The aforementioned Ahmed (2010) case before the UK Supreme Court is one example. The Court upheld fundamental rights as well as Parliamentary supremacy, and, by so doing, effectively reviewed the human rights compatibility of the listing decisions of the UN Security Council’s targeted sanctions regimes. Human rights used as the standards of (indirect) review by domestic courts are often no longer parochial national conceptions, but often substantively formulated by international human rights law regulating governmental authority.\(^{72}\)

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19 March 1967), Art 36(2).

67 LaGrand (Germany v United States) (n 8) 497–98, para 91.


70 See, eg, ibid paras 45, 61 (Lord Hope).

71 Ibid para 157 (Lord Phillips). The aforementioned Medellin (2008) is also combined with the separation of power argument with respect to the effect of the President’s Memorandum on the domestic enforceability of the ICJ judgment. The US Supreme Court held that it is up to the Congress to decide whether a non-self-executing treaty (in this case, the ICJ judgment) could be enforceable at the domestic level: see Medellin v Texas (n 9) 1368.

IV Characterising the Points of Connection between the National and International Rule of Law

A Legal

A brief overview of national avoidance and contestations then brings us to the question as to how domestic legal practices, including confrontational ones, have any feedback effect on the international rule of law.

A classic answer to the question of how national legal practices connect with international law would be that under international law, national rule of law practices are, after all, part of state practices, which contribute to the creation of new customary international law or new treaty interpretations. National legal practices may also form part of the general principles of law. National case-law may also qualify as opinio juris. Before international courts, judicial decisions, possibly including those of national courts, would be invoked as subsidiary means for the determination of rules of international law.

73 See Anthea Roberts, ‘Comparative International Law? The Role of National Courts in Creating and Enforcing International Law’ (2011) 60 International & Comparative Law Quarterly 57, 61–64 (pointing out a dual role of domestic courts to create law as state practice, and to enforce established international law).


75 Treaty interpretation can be developed through subsequent practice which establishes the agreement of the parties regarding its interpretation: Vienna Convention on the Law of Treaties, 23 May 1969 (entered into force 27 January 1980), 1155 UNTS 311, Art 31(3)(b).


77 Hersch Lauterpacht observes that the decisions of municipal courts within a particular state, ‘when endowed with sufficient uniformity and authority, may be regarded as expressing the opinio juris of that State’: Hersch Lauterpacht, The Development of International Law by the International Court (Cambridge University Press, Originally Published in 1958, 1982) 20.

78 See ibid.

79 See ICJ Statute, supra ICJ Statute (n 76) Art 38(1)(d). Regarding the ICJ’s reference to domestic
From these traditional points of view, the practices of national courts against the decisions of international institutions inevitably connect with international law as part of state practice. For instance, the ECtHR makes considerable use of domestic (case-)law in the interpretation and development of the convention. Nevertheless, these classic modes of interaction apply only to a very limited extent with respect to the development of the international rule of law concerning the regulation of international authority; the standards of review applied by domestic courts are often for those applicable to the national government and not to international institutions per se.

B Normative, Conceptual, and Political

Domestic avoidance and contestations may rather contribute to the development of the international rule of law in the normative, conceptual, and political terms. For instance, if domestic courts refer to each other’s decisions, the inter-judicial communication may even create norms which are yet to become part of formal international law but which affect the way international organisations and international judicial institutions render their decisions.

Another possibility is a conceptual connection. National law and the decisions of national courts may be translated into international law by analogy. The analogical reasoning is widely used in judicial practices as well as in the process of treaty-making. Traditionally, the analogical travelling of national law to international law was limited to ‘private law’. Nevertheless, as the exercise of authority by

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81 Judicial dialogue can be broadly defined as the reference in the reasoning of a court to the decisions rendered by other national (or regional or international) courts (‘foreign’ decisions) which the court is not obligated to follow. For transnational judicial dialogue in general and its role in the development of international law, see further, eg, Anne-Marie Slaughter, ‘A Global Community of Courts’ (2003) 44 Harvard International Law Journal 191; Christopher A Whytock, ‘Transnational Judicial Governance’ (2012) 2 St. John’s Journal of International and Comparative Law 55; Benvenisti and Downs, ‘National Courts, Domestic Democracy, and the Evolution of International Law’ (n 14) (observing that the loose form of inter-judicial co-ordination has contributed to the mitigation of fragmentation of norms within the international legal systems). There is however the methodological weakness of the discretionary cross-citation of foreign judgments by domestic courts: see Roberts, ‘Comparative International Law?’ (n 73). See also ch 10 (Shai Dothan) of this volume. Dothan observes that judicial dialogue among states, as well as the emerging consensus doctrine adopted by the ECtHR, are based upon the weak assessment of national practices.

82 For the different types of analogical reasoning, and the practices of international courts, see Robert Kolb, Interprétation et création du droit international: Esquisses d’une herméneutique juridique moderne pour le droit international public (Bruxelles, Bruylant, 2006) 710–56.


international institutions share similarities with that of governmental authority, there is
the growing possibility of applying a ‘public law’ analogy.85

The most likely mode of feedback on the development of the international rule of law
is political. If domestic courts legally prejudice national implementation of
international decisions, their effectiveness would be simply undermined if states
encountered legal impediments to their implementation.86 Yet the political impact that
each national court decision may produce is by no means uniform. It varies, first, by
the geopolitical location in which the courts reside. In addition to the effect of
decisions themselves, judges’ specific reasoning and narratives also determine the
extent to which domestic court decisions foster political momentum and any changes
in judicial interpretation at the international level.

The different modes of connection and feedback involve different actors and their
differing roles. In a classic ‘state practice’ mode of connection, the participants are
limited to those actors whose conduct is attributable to a state. Domestic courts’
decisions are merely part of a collection of the possibly contradictory acts of state. At
the normative point of connection, on the other hand, the role of judicial branches may
carry greater weight than that of non-judicial branches of the government. At the
normative point, non-governmental entities, by contesting international decisions, can
also participate in the development of transnational norms. The theoretical point of
connection generally requires international adjudicative bodies in executing the
theoretical interaction. Finally, at the political point of connection, the international
political significance of national courts varies depending upon their geographical
location. Suppose that the well-known Kadi decisions, which indirectly reviewed the
listing decisions of the UN Security Council’s targeted sanctions, were rendered by a
court of a small state, that the state is not a well-known advocate of the rule of law, and
that the decisions were not readily available in English. In this case, national
(regional87) contestations might have brought far more moderate progress in the
regulation of the UN Security Council’s listing decisions.

85 See Aleksandar Momirov and Andria Naude Fourie, ‘Vertical Comparative Law Methods: Tools for
Conceptualising the International Rule of Law’ (2009) 2 Erasmus Law Review 291. While Momirov and
Fourie do not specifically distinguish between ‘private law analogy’ and ‘public law analogy’, their
‘vertical comparative law methods’ largely concern public law comparison.
86 For instance, Kadi and other national and EU court decisions against the listing decisions of the UN
Security Council’s sanctions committees create legal impediments to the national implementation and
undermine the operational effectiveness of sanctions regimes: see Kanetake, ‘The Interfaces between the
National and International Rule of Law: The Case of UN Targeted Sanctions’ (n 28) Section 3.3.4.
Political interactions also occur between national and international courts; national courts’ support to
particular international judgments contributes to the enhancement of the legitimacy and effectiveness of
international courts in question: see Shai Dothan, ‘How International Courts Enhance Their Legitimacy’
(2013) 14 Theoretical Inquiries in Law 455, Section II.
87 Within the binary national-international classification, this chapter situates the decisions of EU courts
on the ‘national’ side. Apparently, the national-international classification does not sit easily with EU
law which is considered as autonomous and has many distinct characteristics. Yet the purpose of this
chapter is to examine how the rule of law regulating international authority has developed through the
interactions with other legal orders, and, for that purpose, this chapter situates the decisions of the EU
courts on the national side.
V International Reception of the National Rule of Law

A The Distribution of Competences

i Principle of Subsidiarity

National contestations and avoidant practices may have therefore brought incremental changes to the international reception of the national rule of law. The international reception of national law would of course vary depending on cases. Here, I simply refer to two inter-related responses by which international institutions interact with the national rule of law.

The first manner is to keep a distance from the national rule of law by creating the distribution of competence. More specifically, international institutions have been adopting the idea of ‘subsidiarity’ as a technique or basis to avoid conflicts between national practices and international law, and to preserve the autonomy of member states (and their cultural identity) from international law and the decisions of international institutions.

The idea and language of subsidiarity is relatively unfamiliar to international law, as contrasted with EU law, which formally introduced subsidiarity. This unfamiliarity may be largely because international law developed primarily for the regulation of relations between supposedly symmetrical sovereign states, and without a higher, superior authority. Due to this decentralised structure, there was no strong need for legally restraining and counterbalancing the authority exercised by ‘higher’ governance units. However, the regulatory extension of international law into domestic regulatory agendas has created the asymmetrical interactions for which international law claims its supremacy (as represented by Article 27 of the Vienna Convention on the Law of Treaties). This has increasingly injected the idea of subsidiarity into international law as a potential principle to guide the allocation of competences between national and international institutions.

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88 Here, I prefer to use ‘competence’ rather than ‘jurisdiction’. While these two English terms can be used interchangeably, ‘jurisdiction’ is more often invoked as a matter of general fields, while ‘competence’ is more likely used for particular cases which in principle meet the general jurisdictional requirement: see Gerald Fitzmaurice, ‘The Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction, Competence and Procedure’ (1958) 34 British Year Book of International Law 1, 8–9.

89 On subsidiarity, see further ch 12 of this volume.

Subsidiarity commonly refers to a ‘principle which guides the allocation and exercise of public authority in systems of multi-level governance’. Subsidiarity gives preference to the decision-making at a particular (and usually lower) level of governance. By so doing, the principle of subsidiarity is, in a way, to counterbalance the claim and exercise of superior authority by the higher level of governance units, and protects the autonomy of decision-making at the lower level and its political and cultural identity. It is originated in Catholic thought which upholds the autonomy of lesser communities for human flourishing. The flourishing of persons requires the (subsidiary) space of social and cultural communities, which must be safeguarded against, for instance, political bodies. While the principle of subsidiarity is now applied in different political contexts, it can still be traced back to the Catholic Church’s original notion, in that one of its main values remains to be the preservation of the autonomy of individuals and their communities.

While ‘subsidiarity’ per se is still an unfamiliar term, international law and the practices of international institutions accommodate a number of examples which can be regarded as the realisation of the notion of subsidiarity. For instance, the complementarity principle of the ICC can be seen as a specific application of the subsidiarity principle protecting the autonomy of states, and indirectly, that of individuals. Also, the way the ICTY implemented the ‘Completion Strategy’ seems to have effectively introduced the principle of complementarity (and thus the idea of subsidiarity) in the practice of the ICTY.

ii Margin of Appreciation

The margin of appreciation developed by the ECtHR as a judicial doctrine is one of the manifestations of the idea of subsidiarity. The similar deferential review is also

92 See ibid paras 3, 5.
94 See Feichtner, ‘Subsidiarity’ (n 91) para 28.
96 For the detailed analysis of the margin of appreciation, see ch 11 (Andrew Legg) of this volume.
97 The ECtHR observed that: the Court ‘cannot assume the rôle of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention’: Application nos 1474/62 et al Case ‘relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium’ v Belgium (merits) (1968) Series A No. 6 (ECtHR, Judgment of 23 July 1968), para I.B.10. Referred to in: Handyside v United Kingdom App No 5493/72, (1976) 1 EHRR 737, (1979) 1 EHRR 737 (ECtHR, 7 December 1976), para 48. The Handyside v UK (1976), a seminal case for the margin of appreciation doctrine, already contained the key factors that sustain the judicial invocation of the margin of appreciation: see ibid. See James A Sweeney, ‘Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era’ (2005) 54 International & Comparative Law Quarterly 459, 471–475; Paolo G
seen in the jurisprudence of the IACtHR—albeit not as explicit as the case of the ECtHR. The ECtHR mechanisms premise that there is the institutional division of power between national and international institutions, and that the international mechanisms are subsidiary to the activities of contracting parties themselves.98

The justifications99 for the doctrine are both pragmatic and value oriented. National authorities and courts are, in general, better equipped with collecting and analysing evidence or other data, and this generates the inclination of international courts to support the findings of national authorities.100 Yet the margin of appreciation also signals the judicial institutions’ deference to value-pluralism, cultural diversity, and democratic decision-making.101 In the Handyside case, the ECtHR pointed out that ‘it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals’.102 The absence of uniformity then justifies judicial deference to democratic legitimacy.103 The deference to democratic legitimacy is one way to alleviate the democratic deficit in the operation of international judicial bodies

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98 Sweeney, ‘Margins of Appreciation’ (n 97) 471–75.
99 The justifications are wider than a strictly legal basis, and may belong to the sphere of judicial politics. Based upon an extensive analysis of cases, Legg argues that the margin of appreciation is the judicial practice that pays difference to one or more of ‘second-order’ (external) reasons: democratic legitimacy, the common practice of states, and expertise: Legg, The Margin of Appreciation in International Human Rights Law Deference and Proportionality (n 97) 17, and chs 4–6.
100 See Arai-Takahashi, ‘Disarray in the Process of Harmonisation? – The Analytical Account of the Strasbourg Court’s Variable Geometry of Decision-making Policy Based on the Margin of Appreciation Doctrine’ (n 97) 105, 111–12; Legg, The Margin of Appreciation in International Human Rights Law Deference and Proportionality (n 97) 27–29. In the seminal case of Handyside, the Court observed that ‘[b]y reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion…on the “necessity” of a “restriction” or “penalty”’ under Article 10(2) of the ECHR: Handyside v United Kingdom (n 97) para 48. See Legg, The Margin of Appreciation in International Human Rights Law Deference and Proportionality (n 97) 27–29.
101 Arai-Takahashi, ‘Disarray in the Process of Harmonisation? – The Analytical Account of the Strasbourg Court’s Variable Geometry of Decision-making Policy Based on the Margin of Appreciation Doctrine’ (n 97) 105–06, 111. Democratic legitimacy is used in favour of the national margin of appreciation where the legislative body has decided a balance between two competing private rights, or has stricken the balance between public and private rights: Legg, The Margin of Appreciation in International Human Rights Law Deference and Proportionality (n 97) 83–90.
102 Handyside v United Kingdom (n 97) para 48.
103 This may be already illustrated by the fact that the Court in the Handyside case singled out the legislator among domestic organs to whom the margin is accorded. See ibid; Legg, The Margin of Appreciation in International Human Rights Law Deference and Proportionality (n 97) 75–76. Also, for instance, the Court deferred to the Parliamentary decisions of the UK in Hirst v UK (No.2) (2005): Hirst v United Kingdom (No 2) (2005) App. No. 74025/01, ECHR 2005-IX (ECtHR, Grand Chamber, Judgment of 6 October 2005).
themselves.\textsuperscript{104}

The margin has the effect of preserving diversity among member states, except for the protection of minorities, for which international human rights law rather obligates states to engage in cultural preservation.\textsuperscript{105} The acceptance of the national margin does not, however, signify the total exclusion of the review by international judicial institutions.\textsuperscript{106} The margin could be better understood as achieving the universality of human rights law at an abstract level, while preserving the differences among states at the more concrete level.\textsuperscript{107}

The delicate manner in which international courts keep distance from national law can also be found outside human rights adjudicative venues. In the LaGrand case, the ICJ was, in principle, prepared to say that a domestic law was the cause of the violation of an alleged obligation to provide assurances of non-repetition.\textsuperscript{108} Nevertheless, the ICJ concluded that the violation of Article 36(2) of the Vienna Convention on Consular Relations was ‘caused by the circumstances in which the procedural default rule was applied, and not by the rule as such’,\textsuperscript{109} and thus carefully avoided the general assessment of domestic law. The case of LaGrand\textsuperscript{110} seems to illustrate the Court is well aware that the international court is generally not well positioned to consider the matters of domestic law.\textsuperscript{111}


\textsuperscript{105} See Legg, The Margin of Appreciation in International Human Rights Law Deference and Proportionality (n 97) 93–96; Eyal Benvenisti, ‘Margin of Appreciation, Consensus, and Universal Standards’ (1999) 31 New York University Journal of International Law and Politics 843, 849. See also ch 14 (Yvonne Donders & Vincent Vleugel) of this volume.

\textsuperscript{106} While the domestic margin of appreciation limits the European review and thereby allows the manifold of national practices, the ECtHR signals that it “goes hand in hand with a European supervision”: Handyside v United Kingdom (n 97) para 49. Delmas-Marty observes that the European human rights law manifests both ‘controlled national sovereignty’ (the extension of the ECHR’s regulatory coverage) and the ‘relative European primacy’ (a self-limitation of European supervision): see Mireille Delmas-Marty, Towards a Truly Common Law: Europe As a Laboratory for Legal Pluralism (Cambridge University Press, 2002) 73, 113.

\textsuperscript{107} Legg, The Margin of Appreciation in International Human Rights Law Deference and Proportionality (n 97) 40–50 (drawing on Raz’ conception of ‘thin’ morality).

\textsuperscript{108} LaGrand (Germany v United States) (n 8) para 125 (regarding Germany’s fourth submission to provide assurances).

\textsuperscript{109} Ibid para 125. The Court also made sure to note that the choice of means to allow the review and reconsideration of the conviction and sentence ‘must be left to the United States’ (para 125). It is also noted that the terms of Article 36(2) themselves accommodate the margin which could be used to defend both international and domestic courts. In LaGrand (see para 91), the ICJ regards this provision as requiring the conformity of national law to international standards. The US Supreme Court, on the other hand, for example in Sanchez Llamas (126 S. Ct. 2669), understands Article 36(2) as requiring the conformity of the application of the Convention with domestic law. Both arguments may be defended by reference to Article 36(2).

\textsuperscript{110} LaGrand (Germany v United States) (n 8).

\textsuperscript{111} See Nolkaemper, ‘The Role of Domestic Courts in the Case Law of the International Court of Justice’ (n 79) 318, and fn 94.
In a similar vein, in *Avena* (2004), while the ICJ found the breach by the US of Article 36 of the Vienna Convention, the Court left the US to determine how the state implements the review and reconsideration. An interesting part of this judgment is nevertheless the delicate balancing exercises that the ICJ did at the interface with the domestic criminal law. The Court not only emphasised the need for ‘effective’ review and reconsideration of sentence and conviction, but also effectively denied the use of clemency procedure as an appropriate means of review and reconsideration. The ICJ’s judgment in *Avena* therefore demonstrates how international courts try to keep a delicate balance between mandating and not mandating how domestic procedures ought to be.

The cautious stance of the ICJ in *Avena* is somewhat contrasted with the much more interventionist remedial orders issued by the IACtHR (as a result of its finding of treaty violations). The IACtHR, originally modelled after the ECtHR, has developed remedial practices to order and monitor domestic judicial processes in a way much less deferential to states than those developed under the ECtHR. More specifically, the Inter-American Court has been engaging in a ‘quasi-criminal review’ by ordering, specifying, monitoring, and guiding national criminal prosecutions. In 1996, the Court began to oblige the punishment of those responsible as part of its remedial orders, and, in its subsequent decisions, it further added that the prosecutions must be effective, and specified how the state in question ought to conduct investigation and prosecution. The IACtHR also ordered states to reform their criminal codes and military justice systems.

The differences in the jurisprudential development of two regional human rights courts may in part reflect the maturity of the domestic rule of law reviewed by the international human rights courts. The IACtHR was confronted with mass state-sponsored violations of fundamental rights and the discouraging compliance record, while the ECtHR oversees a group of relatively well-functioning democracies.

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114 In this case, Mexico asked the annulment of the conviction and sentences of Mexican nationals. In rejecting Mexico’s request, the ICJ observed that the relationships between the treaty violations and the domestic convictions/penalties are for the US courts to determine in the process of review and reconsideration: see *Avena* (2004) (n 8) paras 122, 131.
115 Ibid para 143.
117 Ibid.
committed to the rule of law. The systematic human rights violations in the Latin American states encouraged the international human rights court to step in domestic procedures in a much more specific and unconditional way.

B Substantive Accommodation

While the preservation of national competences is one way international courts respond to conflicting national practices, international institutions also engage in **substantive accommodation** by interpreting and developing the international rule of law in line with the national rule of law.

Political institutions have been incrementally developing their own decision-making procedures by adopting the elements of participation and transparency. For instance, the UN Security Council and its sanctions committees, which have invited well-known domestic contestations, have been developing their listing procedures in accordance with the principle of fairness and transparency, and established the petition procedures accessible to the designated individuals and entities. These political changes can be seen as the efforts on the part of international institutions to render the international rule of law for the regulation of international authority less formalistic.

Judicial institutions also make substantive accommodation, by alleviating the gaps between the national rule of law and international standards on the regulation of governmental authority. The margin of appreciation is often combined with the substantive changes in the doctrines and principles of international human rights law. For instance, the ECtHR has been interpreting the ‘legality’ requirement and the associated ‘rule of law’ concept differently to the UK, Germany, France, and other member states. The domestic laws of territorial states and other member states have been invoked for the interpretation of the legality principle and the elements of crimes as interpreted by the ICTY, ICTR, and ICC.

Overall, these examples illustrate the delicate interplay between the national rule of

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121 Huneeus, ‘International Criminal Law by Other Means’ (n 116) 5–6.


law and the decisions of international institutions which review or replace governmental authority. They attempt to preserve the space for national democratic decision-making, while maintaining the universality of international law. International institutions also made some incremental efforts to improve their own decision-making procedures in order to alleviate contestations from the guardians of the national rule of law.

VI Conclusion: Towards Theoretical and Normative Appraisal

It was in 1950 that the International Law Commission (ILC) observed that ‘many of the provisions of international law serve[d] little purpose in national law’. This remark no longer represents the extent to which the subject-matter of international law presently overlaps with the regulatory agendas of domestic law. As noted in Section II of this chapter, international institutions, which are circumscribed only by the formalistic and thin international rule of law, review and replace governmental authority, based upon the assumption that governmental authority would have to be constrained by the thick requirement of the rule of law. The gap between the national and international rule of law, and the asymmetry within the international rule of law, have invited domestic contestations against the decisions of international institutions, as briefly overviewed in Section III of this chapter. Domestic contestations, connected through normative, theoretical, and political points (as analysed in Section IV), have given rise to the opportunity for international law and the international rule of law to revise their relations with the national rule of law (as observed in Section V).

The sketch of the national and international reception finally brings us to the third angle about the interfaces; namely, how can we theoretically understand, and normatively evaluate, the interfaces between the national and international rule of law, from slightly distant standpoints? This is the opportunity to critically recapture the practices, as well as to revise our own perspectives with which to understand and evaluate those practices.

Theoretical Understanding about the Interfaces

The theoretical understanding about the interfaces has developed from the classic monism-dualism debates (Triepel and Kelsen) regarding the abstract relations between two legal orders. As a matter of formal relations domestic and international legal

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126 See, eg, Twining, Globalisation and Legal Theory (n 2); Weiler, ‘The Geology of International Law: Governance, Democracy and Legitimacy’ (n 2) 559–61.
127 The traditional monism-dualism argument was not necessarily about understanding of how two legal orders interact in the actual legal practices, but about advocating political agendas from which to doctrinally or hypothetically organise the inter-order relationships. Kelsen observed that the question of primacy between national and international law is guided by ethical or political preferences: Hans
orders, the proposition of dualism to separate them still has a powerful explanatory force. Even when a treaty specifies how it should be implemented under domestic law, the formal legal effect of international law within the domestic legal order is contingent on an authorizing rule of domestic law (and vice versa). While the formal separation of two legal orders remains a useful starting point, the more substantive interactions between two legal orders have rendered the formal dualistic perspective on national and international legal orders increasingly mismatched with the reality of inter-order interfaces.

The monism-dualism theory has thus been substituted by the more recent debates on constitutionalism and pluralism. While these terms could be defined in multiple ways, one basic dichotomy concerns the question of hierarchy as to which institutions have the final way, and which norms have the superior status.

As I have noted above, domestic courts claim and reserve the ultimate authority to determine the effect of international law in their own legal orders by reference to constitutional principles. International courts likewise reserve their final say about the effect of domestic law in their legal orders. Such determination is ultimately based upon international law, which claims its supremacy over domestic law, as represented

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128 The monism-dualism classification is used in two different contexts: (1) to see the relationships between national and international law from a distance, and provide a general theory about the relationship, and (2) to describe a particular state’s policy with regard to the effect of international law under its domestic law: Sloss, ‘Treaty Enforcement in Domestic Courts: A Comparative Analysis’ (n 10) 6. Here, the term ‘dualism’ is used in the former sense (i.e., general theory, as opposed to particular states’ policy).


131 Pluralism can be used as a matter of multiplicity or as the absence of clear-cut hierarchy. This chapter uses the term in a latter (hierarchical) sense. As Krisch observes, pluralism rejects the practical feasibility and normative desirability of the overarching legal framework, and emphasises the ‘heterarchical interaction of the various layers of law’: Krisch, Beyond Constitutionalism (n 130) 23.
by Article 27 of the Vienna Convention on the Law of Treaties. Also, before international courts, national law is officially regarded as mere ‘facts’ and does not occupy any space in the legal construction. In this respect, there is clearly hierarchy in terms of the ultimate authority to determine the interfaces, and the ultimate legal basis for the determination.

Yet what national and international institutions actually do in order to resolve normative conflicts is much more subtle, and cannot be reduced to the presence of hierarchy. Domestic courts try to avoid conflicts by interpreting international law in such a way that it does not contradict domestic law, and by leaving the issue to the executive’s decisions, based upon the separation of power. The reception of international institutions cannot be reduced to the hierarchy either. They avoid conflicts by preserving national competences, and also by incrementally absorbing some of the rule of law requirements into the regulation of international authority. The picture we can draw with respect to the interfaces thus appears to be much more heterarchical than claimed by national and international institutions.

Normative Appraisal of the Interfaces

The theoretical understanding finally leads us to evaluate interfaces from the broader question of legitimacy. Have the heterarchical interactions rendered the decisions of international institutions and the international rule of law more certain, participatory, and democratic?

On the one hand, the heterarchical interactions have an advantage of preserving flexibility. They also help alleviate the democratic deficit of international law and institutions. Behind national contestations and avoidance always lies the democratic (il)legitimacy of international law and institutions in the eyes of the national guardians of the rule of law. To secure the space for national competences for the matters regulated by international law would be one way to defer to political legitimacy attached to national law.

On the other hand, if the interfaces should be understood as heterarchical, this may also suggest that law, including international law, fails to provide rules as to how international law and institutions respond to conflicting national practices and how conflict between them can be resolved. The margin of appreciation doctrine could


133 German Interests in Polish Upper Silesia (Germ v Pol) (1925) 1926 P.C.I.J. (ser. A) No. 7 (PICJ, 25 May 1925), para 52 (‘municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such’). For the ‘factual’ status of national law, see further Carlo Santulli, Le statut international de l’ordre juridique étatique: étude du traitement du droit interne par le droit international (Paris, Editions A Pedone, 2001) 258–77.

134 See André Nollkaemper, ‘Inside or Out: Two Types of International Legal Pluralism’ in J Klabbers and T Piiparinen (eds), Normative Pluralism and International Law: Exploring Global Governance (Cambridge; New York, Cambridge University Press, 2013) 94, (critically observing that the paradigm of (external) pluralism seems difficult to reconcile with the interests of stability of the international legal
be one illustrative example. The difficulty in predicting when and how precisely the doctrine ought to be applied may support the characterisation of the doctrine as a (judicial) policy standard, rather than a legal rule.\textsuperscript{135} While the heterarchical interactions preserve national diversity and alleviate democratic deficit, there remains the greater uncertainty in the manner in which international institutions and international law interact with potentially contradictory national law.

One possible way to alleviate the uncertainty and reclaim the regulatory role of international law could be to identify the rules, which are akin to ‘conflict-of-laws’, that regulate the international reception of conflicting national legal practices. Traditionally, the law of conflict-of-laws (also referred to as private international law) is applied against ‘horizontal’ state laws and concern transnational ‘private’ legal disputes.\textsuperscript{136} Yet attempts have been made to extend the conflict-of-laws ‘approach’ to the regulation of legal conflicts between ‘non-horizontal’ orders (e.g., between EU law and member states’ national law),\textsuperscript{137} including disputes in ‘public’ law (e.g., human rights). It has been put forward as a perspective to account for the treatment of international law in domestic courts, namely, the national reception of international law,\textsuperscript{138} and, to a limited extent, as a possible approach to the international reception of domestic law.\textsuperscript{139} The conflict-of-laws approach accepts the pluralistic inter-order interactions and yet still aims at ensuring the certainty and justice for affected individuals and entities.\textsuperscript{140} The conflict-of-laws approach, albeit still an issue for future studies, may have the potential of achieving greater consistency in the interactions between multiple layers of law without disturbing the foundational non-hierarchical setting that sustains and enriches the interactions between the national and international rule of law.

Overall, we witnessed the delicate interplay between the actors, norms, and procedures at the interfaces between the national and international rule of law. National avoidance and contestations signal deficiencies in the decisions of international institutions and


\textsuperscript{137} The approach has been put forward to regulate three types of legal conflict: horizontal, vertical, and diagonal. (i) Horizontal conflicts occur between different state laws; (ii) vertical conflicts are those between a state law and EU law; and (iii) diagonal conflicts arise between a state law and EU law, which do not directly conflict one another, but nevertheless make potentially conflicting demands. See Christian Joerges, Poul F Kjaer and Tommi Ralli, ‘A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation’ (2011) 2 Transnational Legal Theory 153, 155; Renate Mayntz, ‘The Architecture of Multi-Level Governance of Economic Sectors’ MPIfG Discussion Paper 13/2007 23–24.


\textsuperscript{139} See Krisch, Beyond Constitutionalism (n 130).

\textsuperscript{140} See Alex Mills, The Confluence of Public and Private International Law (Cambridge University Press, 2009).
the formalistic and thin international rule of law regulating such institutions. The
confrontational national reception, and the international responses to it, further point to
the need for a nuanced understanding about the hierarchical relationships between the
national and international legal orders. As noted at the beginning of this chapter, the
interfaces are the venues for learning and self-reflection. They continue to revise the
way in which national and international institutions exercise authority, develop the
national and international rule of law, and further revise the theoretical and normative
accounts on the interfaces between the national and international rule of law.