

**Hauser Globalization Colloquium Fall 2009:
Interdisciplinary Approaches to International Law**

Professor Ryan Goodman
Furman Hall 120
Wednesdays 2:00 pm-3:50 pm
(unless otherwise noted)

Schedule of Sessions (subject to modification)

- September 2** - Professor Andrew Guzman, Boalt Hall, University of Berkeley
(co-author: Prof. Jody Freeman, Harvard Law School)
Topic: "Climate Change and U.S. Interests"
Discussants: Profs. Richard Stewart, NYU, and Ryan Goodman, NYU
- September 16** - Professor Beth Simmons, Harvard University & NYU Straus Institute
(co-author Prof. Allison Danner, Vanderbilt Univ. School of Law)
Topic: "Credible Commitments and the International Criminal Court"
Discussants: Profs. Jose Alvarez, NYU, and Ryan Goodman, NYU
- September 30** - Professor Oona Hathaway, Yale Law School
Topic: "Presidential Power over International Law: Restoring the Balance"
Discussants: Profs. Stephen Holmes, NYU, and Ryan Goodman, NYU
- October 7** - Professors Eyal Benvenisti, Tel Aviv University Faculty of Law; NYU, and
George Downs, NYU
Topic: "Will National Court Cooperation Promote Global Accountability?
The Judicial Review of International Organizations"
Discussants: Profs. Beth Simmons, Harvard Univ. & NYU Straus Institute, and
Ryan Goodman, NYU
- Friday, October 16** - Professor Gary Bass, Princeton University (*FH 120, 2-3:50 PM*)
Topic: "Freedom's Battle: The Origins of Humanitarian Intervention"
Discussants: Profs. David Golove, NYU, and Ryan Goodman, NYU
- October 21** - Professor Kathryn Sikkink, University of Minnesota
(co-author: Hunjoon Kim, Univ. of Minnesota)
Topic: "Explaining the Deterrence Effect of Human Rights Prosecutions"
Discussants: Profs. Philip Alston, NYU, and Ryan Goodman, NYU
- October 28** - Professor Paul Slovic, University of Oregon
Topic: "Can International Law Stop Genocide When Our Moral Intuitions
Fail Us?"
Discussants: Discussants: Dr. Bruce Jones, NYU and Ryan Goodman, NYU
- Friday, November 13** - Professor James Morrow, University of Michigan (*FH 120, 2-3:50 PM*)
Topic: "The Laws of War as an International Institution"
Discussants: Profs. Matthew Evangelista, Cornell Univ., Nina Tannenwald,
Brown Univ., and Ryan Goodman, NYU
- November 18** - Professor Robert Keohane, Princeton University
co-authors: Profs. Allen Buchanan, Duke Univ., and Tony Cole, Univ. of
Warwick
Topic: "Justice in the Diffusion of Innovation."
Discussants: Profs. Robert Howse, NYU, and Ryan Goodman, NYU

**Will National Court Cooperation Promote Global Accountability?
The Judicial Review of International Organizations**

Eyal Benvenisti* and George W. Downs**

Abstract

In an apparent response to the rapidly expanding international regulatory apparatus and growing concerns about excessive executive power, the national courts (NCs) of a number of major democratic states are increasingly abandoning their traditional deference to their executive branches in the field of foreign policy and engaging in the interpretation and application of international law. This paper examines the likely effects of this expanded NC activism on democratic accountability at the international level and argues that relative to current status quo they are likely to be surprisingly positive if in some sense unintended. This assessment is driven by three sets factors: 1) the present moribund state of judicial review in international organizations (IOs) and international tribunals (ITs) that has resulted from their lack of independence from the executive branches of the small group of powerful states that dominate the international regulatory system; 2) the independence of the national courts of these same powerful democratic states from their executive branches and their growing willingness to engage in collective action via a loose form of inter-judicial co-ordination in order to increase their effectiveness and reduce the likelihood of retaliation by domestic or foreign actors; and 3) the character of the deliberation of these NCs that produces information regarding the effects of the policies, and the likelihood that both their respective domestic populations and global constituencies will view this information to be more reliable than that promulgated by their respective executive branches.

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I. Introduction: Inter-governmental Coordination as a Challenge to Domestic Democracy

Few actors have benefitted as much from globalization and the increased international regulatory coordination that it has fostered than the executive branches of powerful states. As the system's principal architects it enabled them to create rules that have institutionalized their preferred policies and helped their states achieve a level of economic performance that benefited both their citizenries and their own incumbencies. Less noticeably but no less importantly, this increased regulatory coordination has also led to a transfer of policy making authority from the domestic to the international sphere that has expanded executive power and eroded traditional constitutional checks and balances and the other oversight and monitoring mechanisms.¹ Increasingly, this process is raising concerns about the deteriorating quality of deliberation and institutional oversight at the domestic level as well as a lack of democratic accountability within inter-governmental institutions (IOs)—the focus of most traditional discussions of the democratic deficit.

The issues of deliberation, oversight, and executive power are inextricably intertwined with globalization. While foreign policy making has long been viewed as the special province of executive branches and their dominance of the area is nothing new, the boundaries of what is considered to be foreign policymaking have been dramatically expanded by the large number of regulatory issues that have recently been relegated to IOs. Domestic policy in hundreds of areas such as the environment, transportation, intellectual property, labor standards, public health, immigration, and communications is increasingly being influenced—and in some areas largely determined—by

¹ Richard B. Stewart *Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance* (2008). On the unrepresented domestic groups and the evolution of international law and institutions see Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 Mich. L. Rev. 167 (1999).

international institutions of various sorts. Because these entities were typically created and continue to be dominated by the executive branches of the member states, particularly a small group of powerful democratic states, the power of executive branch relative to other branches of domestic government has grown disproportionately.

There are good reasons to believe that the oversight capacities of domestic institutions have not kept pace with this expanded role of IOs in policy making and that, consequently, there has been a deterioration in the effectiveness of domestic checks and balances and transparency generally. The opportunities for legislatures to vote on IO policies have become few and far between and often arise only in connection with large appropriation bills. Information regarding IO deliberations is also often very limited. It is difficult for legislators and citizens alike to know what policy options were seriously considered, how they were evaluated, and perhaps most importantly from the standpoint of democratic accountability, what role their respective executive branch's representative played in determining the policy that eventually emerged. National courts (NCs) who have traditionally felt underequipped to oversee executive action beyond national boundaries and/or have deferred to executive in the realm of foreign policy on constitutional grounds have been largely sidelined from the IO policy process entirely.

Domestic stakeholders that are not in a position to directly influence the executive branches of powerful states have sometimes responded to the marginalization of state legislatures and NCs by seeking information and influence outcomes at the IO level. Unfortunately, this strategy has met with only limited success since direct public participation via NGOs or traditional interest groups in intergovernmental regulatory bodies is ²generally modest or absent. This is true even in those cases where IOs are

² This is not to suggest that the move to IOs and ITs has never operated to foster domestic accountability. There have been occasions when IOs and ITs, particularly the latter, have provided an important external check to the domestic institutional failure by offering protection to discreet and insular minorities and other affected domestic groups for whom the domestic political process failed. However, such intervention almost exclusively takes place in weak states rather than strong ones—a fact that reduces their legitimacy in the eyes of developing states.

overseen by oversight and supervisory bodies to ensure their accountability, since such bodies characteristically possess far less independence and narrower mandates than the actors that constitute the system of checks and balances that often exists at the domestic level.³

At this stage of their evolution IOs and ITs are rarely in the position to compensate for the deterioration in the domestic checks and balances or to erode the domination the international regulatory regime by the small handful of powerful states that were the chief architects of the global regulatory system and continue to be its principal overseers and funders. In fact, in terms of their capacity to independently influence outcomes IOs and ITs are arguably even worse off than their domestic counterparts. This is because the environment in which they operate does not exhibit the requisite level of ongoing and uncertain level of political competition that is believed to be a key necessary condition for the evolution and sustainability of any independent review agent.⁴ At the international level the equivalent of what is termed the constitutional legislature long been composed an oligopoly of powerful democratic state executive branches that has been led by the United States. This group of states has generally shared a common perspective on global regulatory issues and, while its effectiveness has sometime varied, it has never been out of power with respect to controlling the international regulatory agenda. In the absence of any serious expectation that they will lose their grip on power in the foreseeable future, they have had no incentive to create an independent judiciary at the international level whose purpose is to preserve a competitive equilibrium.

During the Cold War the US and its major allies tended to be more united on key foreign affairs issues than they were on domestic issues, and the US led coalition was far

³ Some scholars have also suggested that the proliferation of international organizations will foster a healthy competition and “peer review” among them that will result in market driven self-regulation, but as we explain below this seems unlikely to solve the problem.

⁴ See Ramseyer, J. Mark. 1994 The Puzzling (In)dependence of Courts: A Comparative Approach. *Journal of Legal Studies* 23:721-47. Stephenson. Mark. C. 2003. When the Devil Turns...”: The Political Foundations of Independent Judicial Review. *Journal of Legal Studies* 32:59-89.

more influential in shaping international regulatory policy than was the rival Soviet bloc. This state of affairs had a very positive effect on the growth and development of IOs and ITs generally, but it created an environment where these bodies possessed little policy autonomy or strategic leverage. In the post-Cold War period—at least up until the US invasion of Iraq, policy convergence among the major democratic powers and the role of US leadership have been even greater with the result that IOs and ITs could rarely be confident that they would not be reversed or simply ignored if their decisions strayed too far from the consensus position of the de facto ruling coalition of powerful states.⁵

There have, of course, been occasions when IOs and ITs have successfully exploited divisions among powerful states in order to achieve their goals. However, the character and rarity of such occasions that testifies to the strength of the constraints that ITs labor under. ITs like the European Court of Justice and the WTO Appellate Body have exhibited the most independence and have been most effective in situations where they could be relatively certain that the stronger powers were not likely to exit the system, change or ignore their rulings.⁶ The ECJ succeeded in transforming the European Community's legal system due to its ability to capitalize on the confluence of critical circumstances, involving the differences among the original state parties to the EEC (and the requirement of consensus for overcoming ECJ judgments), the unlikelihood of exit, and a steady flow of cases from member-states' national courts.⁷ The WTO Appellate Body could impose obligations on the more powerful state parties due to similar reasons.⁸

Fragmentation, or the proliferation of functionally specialized IOs and ITs, has further dampened policy competition among the states by isolating it within narrow venues. This increases the cost and reduces the likelihood of weaker actors forming cross-issue coalitions through log rolling that might threaten great power dominance. In

⁵ Article by Paul Stephan on hegemony and IL

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⁷ Joseph Weiler, *A Quiet Revolution: The European Court of Justice and its Interlocutors* 26 *Comparative Political Studies* 510, 518 (1994).

⁸ **footnote re the *Shrimp/Turtle* case here as the exception that proves the rule**

addition, the relative ease with which new IOs and ITs can be created and the resulting fragmentation of the international system has also provided the dominant coalition of powerful states with the ability to threaten to switch or “regime shift” from a problematic venue to one where they would receive more favorable treatment. In the event that no suitable venue existed, the coalition could simply create a new venue to replace the old one as it did in the case of WTO.⁹

The problems associated with fragmentation also serve to highlight the distinction between a system of checks and balances and one of separation of powers. In a system of checks and balances branches of government are authorized to exercise what Manin terms “active influence” on each other in order to counteract an inappropriate use of power or its excessive accumulation. The separation of powers, at least in its original “pure” form, prohibits the active influence of one functionally defined department or branch of government on another as undue interference.¹⁰ By these standards, the fragmented international regulatory system can be viewed as a twentieth century variant of a separation of powers system in which power within each separate, function-specific actor such as an IO or IT is wielded by the same small group of powerful states executive branches. As a result, at the international level independent checks and balances capable of constraining these actors do not exist.

Recently, NCs have been increasingly exploiting their relatively greater independence from executive branches and the discretion that fragmentation has

⁹ Benvenisti & Downs, Stanford LR (2007)

¹⁰ Manin, Bernard. Checks, Balances, and Boundaries in The Invention of the Modern Republic Biancamaria Fontana (ed). 1994 pp27-62. **(page 31)** Interestingly, Manin goes on to describe a prominent account that holds that the Federalists introduced the principle of checks and balances into the constitution because excessive legislative meddling on the part of state legislatures into the business of other branches of government after the revolution of 1776 had convinced them that the separation of powers by itself was ineffective in preserving institutional boundaries. To date history suggests that this is also the case at the international level.

traditionally afforded their executive branches to reassert their own review authority and address the review deficit at the international level by exercising greater discrimination in determining which of the often conflicting international legal standards can be applied within their jurisdictions. Although they are dependent on a flow of suitable cases and face difficulties in obtaining information about policy making at the IO level, recent experience suggests that NCs are increasingly finding ways to overcome such problems just as they have previously at the domestic level.

This trend represents a marked shift in NC behavior. For many years, even those NCs in the most developed and oldest democracies had regularly deferred to their executive branches in the realm of foreign affairs. Ignoring the exhortations of international legal theorists that they expand their mission to include the goal of insuring compliance with international law, they continued to adhere to interpretive norms that allowed their executives enormous latitude such as narrowly interpreting those articles of their national constitutions that recognized the authority of international law domestically. By doing so, they granted their executives absolute discretion whether or not to adhere to the international norms they had created or accepted. The widespread use of so-called “avoidance doctrines” provided the executive with an additional shield against judicial review of administrative action under international law.

Much of this tradition of deference is doubtless attributable to the fact that foreign policy in the major democratic states during much of 20th century was so closely tied to national defense and alliance issues, areas in which executive primacy was long established and in many cases constitutionally enshrined. In addition, defense issues during both wartime and during the Cold War enjoyed wide by-partisan voter support making legislative over-ride of any controversial decision on the part of a NC a real possibility.¹¹ The centrality of defense in foreign affairs eroded somewhat with the

¹¹ Also, NC intervention in connection with international economic matters (for example the non-recognition of foreign expropriations) was also generally avoided for fear that it could carry significant adverse effects on the local economy.

collapse of the Soviet Union, but NCs deference continued to be promoted by the growing array of international agreements with which they were unfamiliar and the prospect intervention on their part could have costly geopolitical implications. Combined with the lack of independence and limited mandates of IOs and ITs, such deference created a protracted judicial review deficit in connection with the domestic accountability problems posed by globalization.

There are a number of possible explanations for the relatively recent change both on the motivational side and on the resource side. With respect to former, NCs may have realized that by limiting their influence on the design and subsequent operation of the rapidly expanding international regulatory apparatus, they ran the risk of seriously shrinking the effective scope of judicial review long into the future. This magnitude of potential shrinkage became particularly apparent in light of the growth of global counterterrorism efforts from 2000 to 2002, which threatened to deprive many NCs of their accustomed role as balancers of the competing claims for liberty, equality, and security. It is also likely that NCs became increasingly aware of the challenges that ITs posed by virtue of their de-facto review power over NC decisions and their preemptory ability to interpret international norms, both of which could give ITs an advantage with respect to establishing legal focal points that could function to narrow the range of options that remain open to national legislatures and courts.

On the resource side, the flow of cases and the lower costs of inter-judicial dialogue enabled NCs to communicate with each other more easily than had in the past and to form common positions that national executives, IOs and ITs would have to take into account. Growing evidence of periodic discontent among domestic populations in both the developed and developing world with regard to the policies and growing role of IOs such as the IMF, World Bank, and WTO may also have emboldened NCs by leading them to conclude that national legislatures would be wary of the political costs of overriding any decision they might make that ruled against an IO policy. Finally, we think it likely that NCs recognized that the fragmented international legal space which created

so many coordination problems for IOs created a growing number of opportunities for themselves to extend their review authority to the IO policies in a wide range of areas without generating system-wide repercussions.

Below we explore the possibility that the developments described above in combination with the advantages that NCs that have traditionally enjoyed over IOs such as greater independence from their executive branches and experience within systems where judicial review is already commonplace will begin to erode excessive executive discretion and improve domestic accountability.

As a prelude to assessing the role of NC review of IOs, Part II describes the modalities for IO review that exist in the global sphere. Part III describes and assesses the potential contributions of NCs to promoting accountability at the IO level; Part IV addresses the challenges to NC review and engages in a normative assessment of the review powers of the various actors; and Part V concludes.

II. IO Review: A Case of Arrested Development

Traditionally, discussions of the democratic deficit in connection with IOs such as the WTO and, at least initially the EU, have generally focused on representativeness, as the extent to which various constituencies were adequately represented by their elected governments the disproportionate influence of large states and the frequent absence of small states in international forums, and the scarcity of access and opportunities for voice on the part of agents of civil society.¹² Attention to such problems has produced some notable progress, particularly with respect to augmenting the traditional pattern of indirect representation through other means. Recently, for example, there have been attempts to create the norm that accessible and open channels of communications between the IOs and the public must exist before an IO can claim to be legitimate from

¹² Nico Krisch, *The Pluralism of Global Administrative Law* 17 EJIL 247, 250 (2006), Stewart, draft (2008).

a democratic perspective.¹³ This was one of the major justifications cited by the German Constitutional Court for its approval of Germany's ratification of the Maastricht Treaty.¹⁴

Far less attention has been devoted to accountability issues, particularly to the democratic costs associated with the absence of an effective system of IO policy review. As a result, progress in creating a system that provides the voters within individual states and NGOs with information about the effects of IO policies that they can then use to judge IO effectiveness and politically employ to improve it has been very slow.

(a) Internal IO Review

In most IOs review procedures are seriously undeveloped.¹⁵ As Jan Klabbers has noted, apart from the EU IOs may have "some rules" relating to the validity of their decisions, such "rules are so broadly circumscribed as to be incapable of any practical application."¹⁶ In those relatively few cases where they are applied they are likely to have been invoked by the agents of the same powerful governments that were responsible for creating the IO's in the first place. More typically, consensus appears to deter review: when an overwhelming majority of the state parties to an IO accept a certain decision of the IO, review of the decision's legal validity is relatively rare.¹⁷

The timidity of IO judges with respect to review is present even at the International Court of Justice, the UN's "principal judicial organ".¹⁸ They, like the judges of other tribunals, are charged to be impartial and independent. Yet possibly because of a vulnerability to political pressures from the P-5 arising from their renewable term of office and the need to stand for reelection they have been extremely reluctant to

¹³ See Jeffrey L. Dunoff, *The Misguided Debate over NGO Participation at the WTO* (1998) J. OF INT'L ECON. LAW 433. For an appraisal of the debate see Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AJIL 489, 504-09 (2001).

¹⁴ *Brunner v. The European Union Treaty*, German Federal Constitutional Court Judgment of October 12, 1993 (trans. in [1994] Common Market Law Reports 57) (The delegation of authority to the European Union is justified under German law only if the German legislature retains "functions and powers of substantial importance" and the EU provides for free deliberation between opposing social forces).

¹⁵ The EU is a notable exception: JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 237 (2002). On EU internal review procedures that create "a democratizing destabilization effect" see J. Cohen and C. Sabel, 'Global Democracy?' (2005) 37(4) *NYU Journal of International Law and Politics* 763, 782-84.

¹⁶ Klabbers, *supra* note 20, at 245.

¹⁷ Klabbers, *supra* note 20, at 237.

¹⁸ Article 92 UN Charter.

engage in review of policies shaped by the P-5.¹⁹ Although the ICJ agreed to review the authority of the General Assembly to set up an internal administrative tribunal for UN employees, finding implicit authority in the UN Charter,²⁰ It subsequently stepped back from providing review to decisions of the Security Council, on the grounds that “Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted.”²¹ “Undoubtedly,” it asserted, “the Court does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned.”²² Despite much scholarly criticism,²³ the ICJ did not accept the invitation to review the legality of the Security Council’s Resolution to impose sanctions on Libya.²⁴ The ICJ did accept the request of the General Assembly to give an advisory opinion on the “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,”²⁵ despite the fact that the Security Council had made an earlier resolution on “the situation in the Middle East, including the Palestinian question,” and had decided to “remain seized of this matter.”²⁶ But it went out of its way to emphasize the

¹⁹ Sands, McWhinney

²⁰ *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (1953-1954)* 1954 I.C.J. Reports 47 (Advisory Opinion of 13 July 1954).

²¹ Certain expenses of the United Nations advisory opinion 1962 at p. 168

²² *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. Reports 16, at para. 89 (Advisory Opinion of 21 June 1970).

²³ A sample of this rich debate includes: Thomas M. Franck, *The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?*, 86 AJIL 519 (1992); W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AJIL 83 (1993); Edward McWhinney, *The International Court as Emerging Constitutional Court and the Co-ordinate UN Institutions (Especially the Security Council): Implications of the Aerial Incident at Lockerbie*, 1992 CAN. Y.B. INT'L L. 261; Geoffrey R. Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 HARV. INT'L L.J. 1 (1993); Vera Gowlland-Debbas, *The Relationship between the International Court of Justice and the Security Council in Light of the Lockerbie Case*, 88 AJIL 643 (1994); José E. Alvarez, *Judging The Security Council* 90 AJIL 1 (1996). See ERIKA DE WET. THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL (2004).

²⁴ *Case Concerning Questions of Interpretation And Application of The 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya V. United States of America)*, Request For The Indication Of Provisional Measures, 14 April 1992.

²⁵ The General Assembly’s Resolution is Resolution ES-10/16 (3 December 2003). For the Advisory Opinion see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, ICJ Reports 2004, 136 (9 July 2004).

²⁶ Security Council Resolution 1515 (19 November 2003).

extraordinary circumstances of the singular situation, so that it would not be viewed as a challenge to the Security Council's authority and set a precedent for future intervention.²⁷

The ICJ has long demonstrated a strong presumption in favor of the legality of acts of other UN Organs as well as of other IOs: "as long as an act of an organization²⁸ can somehow be fitted into the scheme of that organization's purposes, there is at least a presumption that the organization was entitled to undertake that activity."²⁹ In addition, the ICJ adopted a permissive attitude toward the accretion of powers by other organs of the UN. It found implicit authority in the UN Charter for the General Assembly's establishment of the UN Administrative Tribunal,³⁰ thereby providing strong backing to the evolution of the general doctrine of "implied powers" according to which IOs have powers beyond those enumerated in the original treaty provided they can be linked to the purposes of the IO.³¹

Given this history, it is difficult to escape the conclusion that the evolution of review possibilities within other IOs will be shaped by the voting rules within each of the institutions and the degree of consensus that exists among them on a given issue.³² To the extent that a given coalition of states is dominant or there is broad consensus among states, the potential for the emergence of robust review possibilities is not very significant just as it tends to be modest at the domestic level when there is a strong

²⁷ *Legal Consequences, supra* note 26, at paras. 49-50 ("The responsibility of the United Nations in this matter also has its origin in the Mandate and the Partition Resolution concerning Palestine (...). This responsibility has been described by the General Assembly as 'a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy' [...] The object of the request before the Court is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The opinion is requested on a question which is of particularly acute concern to the United Nations.").

²⁸ Klabbers refers not only to the UN as an IO, but to any IO: Klabbers, *supra* note 23.

²⁹ Klabbers, *supra* note 20, at 237.

³⁰ *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (1953-1954)* 1954 I.C.J. Reports 47 (Advisory Opinion of 13 July 1954).

³¹ JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 92-95 (2005); Klabbers, *supra* note 20, at 70-71.

³² Eyal Benvenisti, *Factors Shaping the Evolution of Administrative Law in International Institutions*, 68 *LAW & CONTEMP. PROBS.* 319 (2005).

political consensus among rival branches of government and voters. The continuing opaqueness of decision-making processes within the WTO Ministerial Conferences and the administrative bodies provides a particularly good example of this tendency.³³

The fact that these conditions have generally been present has meant that internal review at the IO level usually been limited to the special situations where the stronger parties within an IO are concerned about the degree of independence being exhibited by its bureaucrats and want to limit slack. The same logic has guided the creation of IO bodies devoted to review. For example, the World Bank Inspection Panel that was established in part to improve the compliance of World Bank staff with internal directives.³⁴

(b) Inter-IO or Peer Review

There are, in fact, a number of international bureaucratic or judicial bodies that have ample opportunities to monitor and even pass indirect judgment over decisions of other institutions.³⁵ The list includes the European Court of Justice, the European Court on Human Rights, the International Court of Justice, the Appellate Body of the WTO are some of the key candidates for exercising indirect judicial review of each other. Such indirect review could at least in theory include a review of the compatibility of the IO's act with its constituting treaty, an examination of the legality of the act under governing norms of international law, or the conformity of that act with the legal system of the reviewing IO.

³³ Richard B. Stewart and Michelle Ratton-Sanchez *THE WORLD TRADE ORGANIZATION AND GLOBAL ADMINISTRATIVE LAW* 3-9 (DRAFT, 2009)

³⁴ Kingsbury, Krisch and Stewart (2005). Another example is the UN Administrative Tribunal *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (1953-1954)* 1954 I.C.J. Reports 47 (Advisory Opinion of 13 July 1954), see Benvenuti, *id.*

³⁵ See Ruth W. Grant and Robert O. Keohane *Accountability and Abuses of Power in World Politics* 99 *American Political Science Review* 1, 9 (2005) ("*Peer accountability* arises as the result of mutual evaluation of organizations by their counterparts."); Joshua Cohen and Charles F. Sabel, *Global Democracy?* (2005) 37(4) *NYU Journal of International Law and Politics* 763, 790-94.

To date, however, the potential for formal peer review among IOs remains largely unrealized.³⁶ The general tendency of bureaucrats and judges in IOs is to tacitly coordinate with their colleagues in other IOs without threatening “unfriendly” action such as indirect review.³⁷ They coordinate by recognizing each others’ precedents and by adopting each other’s legal doctrines. Inter-IO coordination tends to minimize potential inter-IO conflicts.

There are several reasons for this type of coordination. Many of these IOs are composed of a large number of state parties, significant part of whom overlap in the different IOs. The bureaucrats and even judges in several of the IOs are often responsive to the governments that elected them³⁸ and they may even perceive their role as representing their governments’ interests rather than adopting a more cosmopolitan perspective and independently pursuing the mandate of the IO. Moreover, most of the judges in the ITs that could potentially review their peers share the underlying interest of maintaining the perception that they weave together a coherent and common legal system. This view that the various IOs are operating within one hierarchical legal system with the International Court of Justice – the oldest judicial body with the most general authority – at its apex of its legal institutions tends to be shared as well as promoted by many international lawyers.³⁹ Deviation from ICJ’s doctrines is rare, and the consequences of such⁴⁰ can be damaging for the reputation of the deviating tribunal, as well as for the authority of the ICJ. The goal of the judges of the ITs is to create as consistent a body of international legal jurisprudence as possible, because the more consistent the law is, the more authority it generates. This inter-tribunal coordination enhances the role of all the tribunals since the united position they adopt signals a

³⁶ On the reluctance of the WTO Appellate Body to review other IOs see Richard B. Stewart and Michelle Ratton-Sanchez *The World Trade Organization and Global Administrative Law* 18-24 (draft, 2009)

³⁷ Benvenisti & Downs, *supra* note 2, at 623-624. Eran Shamir-Borer’s paper on ISO responding to pressure from WTO, and his ref to tension between ISO and ILO.

³⁸ Bureaucrats and judges in IOs are elected in processes that ensure the strong influence of the nominating states, if not exclusive control. Selection of judges to the ICJ is effectively controlled by the P5. None of the judges are appointed for life, and their retirement benefits do not always exist.

³⁹ Simma EJIL 2009

⁴⁰ (witness the departure of the Criminal Tribunal for Yugoslavia from the ICJ’s jurisprudence which the ICJ later rejected)Nicaragua-Tadic-Genocide trio of cases. The ICJ has therefore had the first mover advantage for decades, and it is now worried of losing it.

convergence on undisputed principles. International tribunals show deference to each other, and strive to conform to previous rulings of their peers.

This coordination strengthens the coherence and consistency of legal argument across institutions which, in turn, reduces the transaction costs of the tribunals and increases the perceived legitimacy of their decisions. To the extent this trend succeeds in reducing the variance in how a given legal claim will be viewed by different institutions it should also gradually reduce the benefit that powerful states obtain by shifting between existing venues or seeking to manipulate the composition of the decisionmakers. To a certain extent, therefore, we can view these coordination efforts as significant if modest and tentative first steps efforts to de-fragment the various strands of international law.

The tools that international bureaucracies and judiciaries employ that strengthen coherence and consistency across institutions include the expansive interpretation of treaties,⁴¹ the doctrine of implied powers of IOs,⁴² and the doctrine on customary international law (CIL).⁴³ The effectiveness of these tools depends on a collaborative and

⁴¹ The main tool for expanding IO authority is the law on treaty interpretation as prescribed in the Vienna Convention on the Law of Treaties (1969). These provisions can be read as privileging the historical intention of the negotiators, or subsequent governmental practice, thereby maximizing governments' influence on the outcomes of the interpretation process, and giving substantial deference to the terms as they were understood by the respective domestic institutions who ratified the treaties. However, international tribunals have developed alternative interpretative approaches to ensure that the treaty effectively achieves its goals, reading into it additional obligations if necessary. In addition, international tribunals depart from the historical bargain by adapting it, through the techniques of "evolutionary" or "systemic" interpretation that adapt the treaty provisions to contemporary standards.

⁴² International tribunals have frequently interpreted the treaties establishing IOs in ways that have enhanced both the IO's powers and thereby also their own powers as decisionmakers. Internally, international courts tended to strengthen the institution's authority and impact vis-à-vis state parties beyond what the negotiators have intended. The doctrine of "implied powers" indicates that IOs must be deemed to have sufficient powers – even if not enumerated in the founding text – to accomplish their mandate. The same concern has led the same courts to recognize IOs as possessing the same status as "subjects" of international law as corporations possess in domestic law, IOs have a distinct legal personality. Therefore they can conclude treaties with third parties and are not affected by obligations incurred by the member states. Klabbers suggests (Klabbers, *supra* note 20, 78-80) that the expansive "implied powers" doctrine has come "under fire" in the 1990s (at least with respect to the EC). In other words, the member states have started to reclaim control over accretion of authority.

⁴³ The third doctrine that has enabled international decision-makers to increase their discretion and hence their authority is the doctrine of CIL. International tribunals exercise considerable discretion in both "finding" state practice and in determining whether such practice betrays states' acknowledgement of its binding quality, which would then constitute CIL norm. Courts rarely engage in systematic review of state

well-coordinated process and therefore for many participants in this process, coordination among IOs is regarded as self-evident, and requires no justification.⁴⁴ Such tools enhance the ability of IOs to depart from the original meaning of the treaty text that was ratified domestically and adapt to the changing preferences of the powerful state principals. Such flexibility requires that national governments tolerate a certain amount of independence of bureaucrats and judges, but to the extent that their decisions continue to be actively monitored by the powerful states there is no reason to presume that this expansion will significantly improve accountability and benefit weaker parties or disregarded populations. Since these attributes collectively benefit all tribunals and the departure from the norms that underlie the system would likely lead to the offending institution being punished by its peers or a destructive cycle of mutual retaliation, tribunals rarely challenge each other's interpretation of the same legal text or criticize the use of these three above mentioned approaches.

Given this context, inter-IO review presents not only risks to the self-interest of the individual IO, but it also arguably threatens the evolution of a stable and effective global legal order of which the different IOs form parts. In contrast, internal review processes within states are sustainable because the domestic legal system is based on a formal hierarchy of norms and institutions that possesses the constitutional authority to resolve disputes between domestic institutions. No comparable formal hierarchy yet

practice and instead use proxies such as adopted treaties or decisions of other international institutions as reflecting state practice. As Theodor Meron observed recently, "[n]otably absent from many of these cases [in which international tribunals invoked CIL] is a detailed discussion of the evidence that has traditionally supported the establishment of the relevant rules as law." Theodor Meron, *Revival of Customary Humanitarian Law* 99 AJIL 817, 819 (2005).

⁴⁴ Witness the recent ICSID arbitration award in [the case of Saipem v. Bangladesh \(2009\)](#) at para. 90: "The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty [sic] of the rule of law."

exists among the fragmented institutions at the international level and the question how one might be established is hotly debated.

While mutual regard among IOs is the rule, there are occasional exceptions in cases where an IO has reason to believe that it is independent of the general system of international law and relatively immune to retaliation by other IOs. The recent litigation in the European Court of Justice concerning the “targeted sanctions” regime imposed by the UN Security Council demonstrates the profound difference between peer review between IOs based on international law, and a review exercised from *outside* the international legal system. The ECJ was faced with petitions against the EU’s compliance with the sanctions imposed by the Security Council. The ECJ’s Court of First Instance (CFI), regarded the European legal order as based on an international treaty and as such embedded in the hierarchical order of international law that recognizes the supremacy of certain Security Council Resolutions. It therefore offered a rather limited basis for review of the sanctions, invoking only the elusive concept of *jus cogens*.⁴⁵ But *Jus cogens* norms refer to abhorrent practices such as slavery and torture, practices that cannot be contracted out by states, whereas due process, or good governance norms hardly amount to such gross violations of basic principles. The limited scope of review offered by the CFI resulted from the self-perception of the CFI as belonging to the same legal order to which the UN belonged.

On appeal to the Grand Chamber of the ECJ, the court’s Advocate General suggested a radical departure from the vision of a hierarchy within a unitary legal structure. Ultimately accepted by the court,⁴⁶ the opinion depicts the European legal order as distinct from the international one. Both Advocate General Maduro and the Grand Chamber envision the European legal order as essentially a non-international order, one that is not based on a ubiquitous inter-state treaty but rather, as described

⁴⁵ CFI, 21 September 2005, Case T-306, *Yusuf and Al Barakaat*, and Case T-315, *Kadi*, now pending before the Grand Chamber.

⁴⁶ *Kadi*, opinion of 16 January 2008.

by Maduro, on “an agreement between the *peoples* of Europe.”⁴⁷ As a consequence, the international pyramid of norms is turned on its head: it is not the UN Charter which dominates EU law based on the primacy of Article 103 of the UN Charter,⁴⁸ but rather the EU law that enjoys legal supremacy.⁴⁹ The Grand Chamber adopted this view, basing its authority to review the implementation of the Security Council’s Resolutions on “the internal and autonomous legal order of the Community.”⁵⁰ This “legal exit” from the sphere of international law is an exercise in “judicial fragmentation” which runs contrary to the general effort to create coherence and consistency.⁵¹ Having reinvented itself as an NC, the ECJ proceeded to replicate their ability to influence the evolution of international law from the outside.

III. The Potential of NC Review

(a) The Opportunities National Courts have for Controlling Executives Acting Globally

Recently, national courts have departed from their historical tendency to refrain from reviewing their own governments’ dealings with foreign governments and have exhibited a willingness to adopt a more assertive position vis-à-vis their governments. While their rationale for this new tendency toward assertiveness doubtless varies, it seems likely that as acute political actors these courts have come to realize that continuing to allow the executive branch unconstrained authority in international affairs

⁴⁷ *Id.*, para 21, emphasis in original. The Rome Treaty had established a ‘new legal order’, beholden to, but distinct from the existing legal order of public international law. In other words, the Treaty has created a municipal legal order of trans-national dimensions, of which it forms the ‘basic constitutional charter’.”

⁴⁸ Art. 103 states: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”

⁴⁹ “in the final analysis, the Community Courts determine the effect of international obligations within the Community legal order by reference to conditions set by Community law.” *Supra* note 48, at para. 23 Therefore, “The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.” *Id.*, para 24

⁵⁰ Kadi, 2008, para 317.

⁵¹ Obviously, the unique nature of the European legal order safeguards against the application of the same argument by other tribunals.

in an era where an ever-increasing proportion of regulatory policy is made by IOs risks impoverishing the domestic democratic and judicial processes. They also recognize that their respective legislatures are poorly equipped to cope with this trend given the legislatures' institutional limitations and the inherent instability of the political processes,⁵² and they seek to strengthen the legislature's ability to react to executive-driven global regulation.⁵³ Together with other domestic actors the NCs can aggressively restrict their governments and thereby they can re-establish lost accountability to the domestic constituencies and also preserve the expansion of judicial authority that they have managed to achieve in the last two decades.⁵⁴

To succeed in this endeavor national courts face two related challenges. The first stems from the coordinated actions of the executive branches of mainly powerful states who are increasingly employing IOs (like the UN Sanctions Committee) to regulate the international sphere. The second results from the impact of decisions of judicial bodies of IOs, such as the ICJ, the ECJ or the WTO Appellate Body.

In response to these challenges, since 2000 domestic courts have been increasingly aggressive in countering intergovernmental actions that threaten to limit their judicial review powers in two areas: the judicial review of global counterterrorism measures and the determination of status and rights of asylum seekers in destination countries. In addition, courts in developing countries have also presented judicial resistance to conflicting IO- based standards in the areas of socio-economic rights and

⁵² See the analysis of the limited role of national legislatures in the EU legislative process: P. Norton, National Parliaments and the European Union: where to from here, in: Craig/Harlow (eds.), *Lawmaking in the European Union* (1998), 209; D. Judge, "The Failure of National Parliaments?" 18 *West European Politics* (1995), 79.

⁵³ German Constitutional Court on Lisbon Treaty (2009)

⁵⁴ On the expansion of judicial power (and judicial autonomy) in recent years see RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004); Alec Stone Sweet, *The Politics of Constitutional Review in France and Europe*, 5 *INT'L J. CONST. L.* 69, On the expansion of judicial power (and judicial autonomy) in recent years see RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004) (explaining this phenomenon as resulting from elites' attempt to secure their dominant positions against challenges of the majority through the political process); Alec Stone Sweet, *The Politics of Constitutional Review in France and Europe*, 5 *INT'L J. CONST. L.* 69, 80-81 (2007).

environmental standards.⁵⁵ The grounds that NCs cite in defense of this expanded assertiveness in connection with these international bodies is similar to those that they employ in the domestic context; i.e., their own role as guardians of the domestic legal system and keepers of the integrity of the domestic rule of law and the constitution.⁵⁶ These traditional roles are flexible enough to provide NCs with a theoretical legal basis for expanding their authority in the spheres of foreign affairs and national security while evidencing continuity with the past.

Direct opportunities for national courts to reassert domestic authority over executive discretion at the IO level and thereby control IO policies are rarely available. Formal IOs have an independent legal personality under international law, and are therefore in principle immune from domestic adjudication, as if they were foreign sovereigns.⁵⁷ But NCs do have at least the theoretical opportunity to lift this legal veil of immunity, and in fact they have begun to explore this possibility.⁵⁸

Domestic courts have developed a variety of indirect review options and related tactics that they can employ to express their disagreement with IO/IT policies and even delay or sometimes prevent their implementation. Their main asset is their control of the domestic aspects of their executive's action. Their intervention enables additional

⁵⁵ See esp. the Indian and South African decisions re the right to access life-saving drugs

⁵⁶ *A (FC) & Others (FC) v. Sec'y of State*, 2004 U.K.H.L. 56 (2004) (the so-called Belmarsh detainees case) (Lord Bingham, para. 42); in the Queen's Bench decision that forced the continued criminal investigation of possible bribes given to Saudi officials by a British company, investigation that was deemed to seriously harm national security interests, Justice Moses invoked "the need for the courts to safeguard the integrity of the judicial process" and the "responsibility to secure the rule of law." (*The Queen on the Application of Corner House Research and Campaign Against Arms Trade and The Director of the Serious Fraud Office and BAE Systems PLC* [2008] EWHC 714 (Admin) (2008). Paras. 91 and 171 respectively). In April 2008, The Nagoya High Court in Japan declared that the Japanese operations in Iraq were unconstitutional: Craig Martin, Rule of law comes under fire, *The Japan Times* 3 May 2008 (<http://search.japantimes.co.jp/cgi-bin/eo20080503a1.html>). In May 2008 the German Federal Constitutional Law has found the participation of German air force personnel in NATO-led activities to have violated the domestic obligation to seek parliamentary approval (BVerfG, 2 BvE 1/03 vom 7.5.2008, Absatz-Nr. (1 - 92), http://www.bverfg.de/entscheidungen/es20080507_2bve000103.html).

⁵⁷ August Reinisch, *The International Relations of National Courts: A Discourse on International Law Norms on Jurisdictional and Enforcement Immunity*, in *THE LAW OF INTERNATIONAL RELATIONS – LIBER AMICORUM* HANSPETER NEUHOLD 289 (AUGUST REINISCH AND URSULA KRIEBAUM EDS., 2007 (discussing inter-judicial dialogue in the areas of state immunity and the immunities of international organizations)

⁵⁸ [refer to labor law cases of IO employees]

domestic actors, such as the domestic legislature or opposition parties, or the voters who are alerted by the information generated by the court, to weigh in on the matters under review. In other words, the courts' intervention empowers those domestic actors that the executive sought to bypass, and together with them the court can limit the executive's discretion.

NCs can impose constraints on the executive both before and after they commit the country to the IO. Ex ante constraints can be imposed in the bargaining stage, by demanding accountability of the executive to domestic constituencies before committing the country to a globally binding policy. A novel example of this type of constraint has been recently developed by the German Constitutional Court when it demanded that the German representatives to the EU bodies inform the German legislature and seek its ratification before committing Germany to EU policies.⁵⁹ The French Constitutional Council routinely canvasses treaties for their compliance with the French Constitution and instructs the political branches whenever the proposed treaty requires constitutional amendments before it can be ratified by France.

Ex post constraints can be imposed in the stage of the implementation of the IO/IT act in the domestic legal system. NCs have several opportunities to resist the implementation of global acts ex post. NCs can, for example, react by refusing to give effect to an act of the IO, following a finding that the act was outside the scope of authority of the IO (such as the Danish court's assertion in 1998 of its power to question the legality of an EC act),⁶⁰ or incompatible with another set of norms, be it international norms (such as a *jus cogens* norm or a human rights norm⁶¹) or a norm of the domestic legal order (based on either constitutional or administrative law doctrines) that has

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⁶⁰ Carlsen v. Rasmussen, (judgment 6 April 1998), [1999] CMLR 855 170, 174 (The court finds that the Danish courts can declare such acts inapplicable in Denmark).

⁶¹ Swiss Supreme Court in the case of *Nada v. SECO* (decision from November 14, 2007, not yet reported officially, available at http://jcb.blogs.com/jcb_blog/files/tf_youssef_nada.pdf (regarding the UNSC's so-called smart sanctions). The possibility of judicial review by national courts of Security Council Chapter VII Resolutions is discussed in Erika de Wet & André Nollkaemper, *Review of Security Council Decisions by National Courts*, 45 GERMAN YBK. INT'L L. 166 (2002)

precedence over the act of the IO (such as the practice of the German constitutional court in the cases involving judgments of The ECJ⁶² and the EctHR⁶³). A domestic court can also indirectly review IO acts without affecting them, such as in the case of a soldier refusing to participate in an “act of aggression” perpetrated by a Security Council Resolution.⁶⁴ While initially the use of this type of review was “episodic and fragmented,”⁶⁵ it is now increasingly used in a more systematic way.

The German Constitutional Court, perhaps the most assertive of them all, combined the ex-post and the ex ante types of review, by reasoning that the very availability of ex-post review is what enables Germany to commit itself to the Maastricht Treaty, without infringing its democratic nature:

“[I]f European institutions or agencies were to treat or to develop the Union Treaty in a way that was no longer covered by the Treaty in the form that is the basis for the [German parliament’s] Act of Accession, the resultant legislative instruments would not be legally binding within the sphere of German sovereignty. The German state organs would be prevented for constitutional reasons from applying them in Germany. Accordingly the [German] Federal constitutional Court will review legal instruments of European institutions and

⁶² Known as the “*solange*” (“as long as”) line of cases: In a series of judgments, the German Federal Constitutional Court said that it would comply with decisions and judgments of European institutions “as long as” these decisions are compatible with the values of the German Basic Law: Juliane Kokkot, *Report on Germany in THE EUROPEAN COURT AND NATIONAL COURTS – DOCTRINE AND JURISPRUDENCE 77* (ANNE-MARIE SLAUGHTER, ALEC STONE SWEET AND J.H.H. WEILER, Eds., 1998).

⁶³ In 2005 The German Federal Constitutional Law asserted that national courts do not have to enforce EctHR decisions without reflection, since they have to implement international law with care. See Dagmar Richter, *Does International Jurisprudence Matter in Germany?* The Federal Constitutional Court’s New Doctrine of “Factual Precedent” 49 *German Yearbook of Int’l L.* 51 (2006).

⁶⁴ See Nikolaus Schultz *Was the War on Iraq Illegal? – The German Federal Administrative Court’s Judgement of 21st June 2005* 7 *German Law Journal* (2006) (available at http://www.germanlawjournal.com/pdf/Vol07No01/PDF_Vol_07_No_1_25-44_Developments_Schultz.pdf).

⁶⁵ Benedict et al at p. 33. See also Dyzenhaus (2005)

agencies to see whether they remain within the limits of the sovereign rights conferred on them or transgress them.”⁶⁶

The ex ante review will in most cases tend to be based on the domestic constitutional order. Their domestic constitutions constitute an independent source of authority which they regard as the basis of an autonomous legal system which they believe that they have the responsibility and sole authority to protect for the benefit of their citizenries. In their ex-post review the NCs might invoke either domestic or international law. The latter basis of review poses more challenges for NCs because while they have the final say in interpreting domestic norms, and the ability of the executive to overcome it is limited, this is not necessarily the case with the interpretation of international norms. First, to be convincing, the interpretation by one NC will have to be endorsed by other courts. Second, executives of like-minded states could elect to amend the IO norms by treaty or operate through other IOs. Embarked on the path of constraining the conduct of public affairs by their executive at the global level, it seems likely that national courts seeking to protect the integrity of their domestic legal system and their own autonomy will increasingly engage themselves in reviewing the actions of IOs and the decisions of ITs. Unlike IOs that possess limited incentives to review each other, domestic courts have a clear interest in reviewing IO and IT decisions of that directly or indirectly affect the domestic legal system. As their traditional deference continues to erode, we expect NCs to have little interest in maintaining the authority of IO's or of international law in general or to display little hesitation in reviewing of IO decisions that seem likely to affect their domestic legal system or limit their own authority as its guardians. The likely result is that, at least in the near term and when they can be confident that they have the support of their peers, domestic courts will be scrutinizing IO's and ITs far more closely than their peer institutions at the international level.

⁶⁶ *Supra* note 12 at page 89 (part C(c)). For similar positions of the Polish and also the Spanish courts see Adam Lazowski, Case Note: Polish Constitutional Tribunal – Conformity of the Accession Treaty with the Polish Constitution, Decision of 11 May 2005 3 *European Constitutional Law Review* 148 (2007).

Recent evidence of this new-found determination of national courts to review IO actions is the House of Lords' judgment in *Jedda v. Secretary of State for Defence* of 12 December 2007.⁶⁷ At issue was a conflict between the UK obligations under the European Convention on Human Rights (ECHR) and a UN Security Council Resolution.⁶⁸ Because it was promulgated under Chapter VII, the Resolution could trump ECHR obligations. The House of Lords interpreted the UNSC Resolution narrowly to find that the UN Resolution only qualified but did not displace the ECHR obligation, and that British forces were still required not to deviate from the ECHR unless such deviation was "necessary for imperative reasons of security."⁶⁹

Such assertiveness, which potentially enables NCs to simultaneously increase the accountability of executives while enhancing their own authority to interpret and apply both national law and the laws of IOs to which their states are parties, is paradoxically facilitated by fragmentation. In contrast to their legislative branches and IO's themselves, NCs are almost as well-positioned as the executive branch to exploit the large number of IOs and their often conflicting standards. Fragmentation provides NCs with a varied menu of policy choices which they can alternatively cite as precedents or strike down as they deem appropriate. This enables them to engage in what effectively amounts to the "defragmentation" of conflicting international legal standards as they will be applied within their domestic jurisdictions. For example, a national court might choose to link human rights obligations to the legal regime of refugees or suspected terrorists, thus managing to add layers of protection not provided by the immediately relevant treaty regime.

⁶⁷ *R. (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)* [2007] UKHL 58).

⁶⁸ The British government's position was that it was operating under the instructions of the UN Security Council and therefore its acts were not imputable to the UK. The court rejected this claim, distinguishing this case from the ECtHR judgment in *Behrami and Behrami v. France and Saramati v France, Germany and Norway* (2007) 45 EHRR SE10 (action under UNSC in Kosovo was attributed to the UN rather than to the participating states).

⁶⁹ *Al-Jedda*, *supra* note 66.

(b) The Benefits of NC Coordination

Collective action among national courts is critical if they to be successful in institutionalizing their review authority at the international level. Any given court knows that if it alone makes series of rulings that are perceived to be direct challenge to a major international agreement or tribunal, it would face the danger of being marginalized as troublemaker, whose jurisprudence does not reflect general state practice. Should this tendency persist the country's reputation as a responsive partner in the globalization process would potentially suffer. At the extreme, foreign decision-makers, including powerful foreign governments, international institutions, and even private companies would become more reluctant to deal with it the future, and it could suffer a divestment of foreign capital as well as a loss of prestige.

If, however, a significant number of state courts were to act collectively, the costs to other states of imposing a collective punishment on all of them would likely be too high to be practical. Similarly, with respect to meaningfully shaping the evolution of customary law, while a national court acting alone can accomplish relatively little, the judgments of several national courts will be difficult for international tribunals to ignore, especially since the tribunals are well aware that national courts will often play a central role in implementing the tribunals' judgments.⁷⁰

In a somewhat different vein, cooperation among courts also helps insulate them from the negative domestic political and social consequences that are often associated with unilateral action. A given state court may be reluctant to unilaterally rule that a given agreement required it to adopt a more expansive policy with respect to providing

⁷⁰ On the interplay between a supreme court (as the principal) and lower courts (as its agents), see McNollgast, *CONDITIONS FOR JUDICIAL INDEPENDENCE* (Research Paper No. 07-43, Apr. 2006), available at <http://ssrn.com/abstract=895723>; McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631 (1995). The dependence of an international tribunal on national courts that are not formally bound by its decisions is even greater. The tense relations that developed between the European Court of Justice and some of the national courts, in particular the German and the Italian courts, confirm this theoretical observation. See Kokkot, *supra* note 63; Bruno de Witte, *Direct Effect, Supremacy, and the Nature of Legal Order*, in *THE EVOLUTION OF EU LAW* 177-213 (PAUL CRAIG & GRAINNE DE BURCA, eds., 1999).

sanctuary for refugees not because it feared that its government would be punished by other governments or by international organizations, but because it feared if its state would become a magnet for more refugees than it possessed the capacity to accommodate. If a substantial number of countries were to make a similar ruling simultaneously so that the refugee burden was shared among them, this problem would be reduced and potentially avoided.⁷¹

To the extent that prominent NCs are capable of acting collectively, this ability (discussed *infra*) holds out the promise of creating the beginnings of a coherent web of linked obligations out of the atomistic cacophony that exists today. Should NCs choose to undertake such a project, it is likely that the next stage in its development will involve their preempting international tribunals and IOs by aggressively participating in the process of lawmaking themselves. As a purely doctrinal matter, national courts are directly and indirectly engaged in the evolution of customary international law: their decisions that are based on international law are viewed as reflecting customary international law,⁷² and their government's acts in compliance with their decisions will constitute state practice coupled with *opinio juris*. As such, international tribunals will have to pay heed to national courts' jurisprudence. It follows that the more the national courts engage in applying international law and the more united they are with respect to the arguments they employ, the more their jurisprudence will constrain the choices available to the international courts when the latter deal with similar issues.

National courts that engage in a serious application of international law – and it is quite likely that they will engage with international law seriously rather than superficially if they want other courts to follow suit – send a strong signal to

⁷¹ See Eyal Benvenisti *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AJIL (forthcoming 2008) (analysing inter-judicial cooperation in the areas of counterterrorism measures, refugee status and environmental protection); Benvenisti, *United We Stand: National Courts Reviewing Counterterrorism Measures*, in Andrea Bianchi and Alexis Keller (Eds.), COUNTERTERRORISM: DEMOCRACY'S CHALLENGE (forthcoming 2008) (discussing inter-judicial cooperation in the area of counterterrorism).

⁷² See, for example, the International Court of Justice judgment in Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14), available at <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm> (last visited Apr. 4, 2007) (examining national courts' jurisprudence to assess the extent to which heads of state enjoy immunity in foreign courts).

international courts that they regard themselves as equal participants in the transnational law-making process and will not passively accept their decisions. Since the effectiveness of international tribunals depends on NC compliance with their decisions, they must anticipate the likely reactions of NCs to their rulings and come to terms with their jurisprudence. In this sense, the more frequently national courts invoke international law the more effectively they can limit the autonomy of the international tribunals, or at least initiate an informal bargaining process in which they are relatively equal partners.

For all these reasons, interjudicial cooperation among national courts promises to become an increasingly attractive strategy for national courts concerned with protecting their own authority and sustaining domestic democratic processes. The many procedural, institutional and normative similarities that characterize their judicial practice and the increasing number of opportunities for NC judges to exchange information via social networks potentially facilitate such cooperation. So too does their reliance on the same or similar legal sources – similar provisions in domestic constitutions or in international treaties such as the Convention against Torture, the 1951 Geneva Convention on the Status of Refugees – which facilitates communication between domestic courts by providing them with a common conceptual vocabulary and, to a considerable extent, signals their commitment for cooperation.⁷³

The realization of this potential to create a common interjudicial stance among national courts will not be easy. There are often marked differences in the positions of the national courts of the largest and most economically developed democracies, and the still greater differences between these courts and those in marginally democratic states or nondemocracies which may often be unbridgeable.⁷⁴ Moreover, courts will

⁷³ Why US courts unique? Because of relative strength, because of traditional deference, but not unique in immigration context.

⁷⁴ It also may turn out that because the courts in non-democratic states are not independent of their respective governments, they will have relatively little influence in any collective consultation process and may even be less likely to participate. If that were the case, the common interjudicial stance emerging from this collectivity of national courts might reflect a stronger emphasis on democratic values than the law produced by governments.

also vary considerably in the extent to which they regard the integrity of their domestic political process to be jeopardized by a given IO or IT policy and in their ability to resist its implementation. Although wide participation of NCs will strengthen their ability to withstand executive-driven backlash, effective review by domestic courts of IO policy, like the formulation of that policy, does not require the active support of all or even most courts; a relatively small subset of those of powerful actors can be enough. The NCs of the U.S. and EU enjoy an unusual degree of prestige and political independence from their respective executive branches relative to those in many developing states. This gives them the potential ability to overturn an IO policy unilaterally or as members of a small coalition that weaker states will rarely possess. As Mancur Olson has famously showed, there are times when power discrepancies among actors promote rather than preempt provision of the public good. The experience with previous NC activism supports this expectation. In the EU context, for example, it was the German court whose signal of vigilance benefited domestic democratic process in other EU countries. Among courts in the developing world, the Indian Supreme Court felt itself powerful enough to venture to impose environmental standards on the domestic governments, later to see other courts in the region follow suit.⁷⁵

IV. The Externalities of NC Coordination

In this Part we assess the character of the political externalities that are likely to arise as a result of the increased NC activism at the international level described in the previous pages. Specifically, we examine the possibility that NC review will contribute to rather than ameliorate global accountability problems by (1) increasing counter-majoritarianism at the domestic level, (2) further decreasing the legitimacy of the international regulatory system by reinforcing the widespread impression that it is dominated by a U.S. led oligopoly of western powers that is fundamentally

⁷⁵ Reclaiming Democracy...; A similar lesson can be learned from a different context. The evolution of the doctrines that enabled courts to adjudicate suits against foreign officials for crimes against humanity was shaped by national courts who at certain junctures in their history felt the moral necessity and political expediency for doing so. By doing so they unilaterally provided a collective good.

nonegalitarian. As Sabino Cassese has noted, in the global context, the countermajoritarian difficulty is exacerbated by the fact that “the ‘migration of power’ towards judges in the global arena is less easily rectified, as to do so requires concerted action by States.”itarian, and 3) undermining the effectiveness of IOs by either creating regulatory gridlock that would be immune to reform or incentivizing the executive branches of major powers to flee to more informal and privatized policy-making venues.

While any of these outcomes is possible and must be guarded against, we argue below that the chance of any of them occurring is relatively remote and that the positive externalities of NC review far outweigh the negative ones. For example, even on those occasions when NCs represent the will of their domestic constituents less well than do their executives, the NC-IO controversy generates useful information for voters and increases the reputation of executives. In other words, ours is the basic constitutional point that court review is necessary in order to keep executives in line with the constitution and to compensate for the fact that citizens are more poorly informed about policymaking by the executive branch and the extent to which their interests are being reliably represented. Greater transparency and deliberation are virtues independent of the representativeness or purity of the motivations of the institutions promoting them.

More broadly, as in the case of the desirability of domestic review of administrative action, we think that the assessment of the virtues of NC activism is situational rather than fundamental.⁷⁶ It must be evaluated in the relatively harsh light of contemporary conditions that include the uncertain and potentially negative consequences of rapid globalization on people’s lives and opportunities, the highly skewed distribution of geopolitical power among states, the current fragmented character of international legal system, and the scarcity of IO review at the international level, all which leads to the increase in executive power and special interests influence

⁷⁶ Mashaw 2009

and the consequent marginalization of both the voice of voters and domestic judicial review.

In such an environment expanded and coordinated NC review of IO policies is likely to produce positive externalities in terms of increasing transparency and deliberation that will increase the quality of both domestic and global public decision making and provide a badly needed check on the growth of executive power. While NC review cannot and should not play the same central role in global government as does domestically, it has an important role to play particularly under current conditions.

(a) NC Coordination and the Facilitation of Democratic Deliberation

In this section we address the global countermajoritarian difficulty. We argue that the presumption that the elected branches reliably represent majority wishes is heavily dependent on a host of assumptions about institutional structure, the nature of voter preferences, voting rules, and so forth. Some of the most critical of these have to do with the availability of information about such things as the nature of the choice set and the distributional implications (in the broadest sense of that term) associated with each alternative. When such information is lacking and particularly when it is possessed by some actors but not others, as is more often the rule than the exception in connection with international regulatory rule making, the reliability of representation is thrown into doubt. By producing information in the course of their proceedings that is widely available to both a wide range of political actors as well as the public, Courts reduce these information problems and promote better accountability and deliberation.

In most discussions of the countermajoritarian difficulty in the domestic sphere both opponents and proponents of judicial review tend to focus on the most salient part of the judicial action, namely the ultimate approval or disapproval of the policy in question, especially on matters like the legality of abortion or same-sex marriage where

the judges cannot claim to have monopoly over the appropriateness of their decision.⁷⁷ As a consequence of the saliency of the “yes or no” moment, observers and analysts often ignore the many significant contributions that courts make to the political system and to public deliberation.

Yet a major part of the court’s contributions to public information consists of its monitoring the state’s system of checks and balances in order to prevent any given branch from overstepping its limits and disturbing the system’s equilibrium. In parliamentary systems courts provide structural rather than substantive support to the opposition vis-a-vis the reigning coalition by requiring that the executive to obtain the approval of parliament to its plans. The political contestation that ensues between the different political factions generates information that civil society or its agents can process. In principle, the more independent are the actors involved in policy making, the more there is contestation among them, and the contestation generates information that the public can assess. By bolstering the independence and stature of opposition parties, experts within the bureaucracy, and local governments (and state authorities in federal systems) vis-à-vis the national executive, courts help insuring that public debate about policies will be adequately informed.

Beyond maintaining checks and balances between and within the political branches, courts have developed principles of administrative law that require officials to ensure transparency of and public participation in executive decision-making processes. In addition, judicially protected constitutional guarantees for political rights, in particular the freedoms of speech, association and information, and the

⁷⁷ Judicial review of IOs by NCs is no simple panacea to the accountability problem that they present. NC review of IOs raises three major concerns. The first is the democratic concern. The fundamental difficulty with the growing prowess of NCs from the perspective of democracy is obviously the traditional concern with the proper balance between the court and the legislature, between law and politics. The general debate concerning the legitimacy of judicial review of political decision-making and the justification of judicial preemption of politics is relevant to this case. Many defenders of the democratic process have pointed out the concern that judicial review tends to preempt politics. Our finding thus far may sound even more alarming to these scholars, because not only judges seek to preempt elected officials; they do so by “colluding” with judges in other countries. Many have used Bickel’s term “the countermajoritarian difficulty”⁷⁷ to characterize this tension between the courts and the political branches.

privileged status of journalists and the media, contribute to the generation of publicly available information

Not only the outcome of the litigation generates information; the litigation itself is information-generating. . The courts themselves become venues for public deliberation where conflicting claims are examined in structured proceedings. In reviewing administrative and legislative acts for compatibility with the constitution (or, where relevant, for compatibility with international law) courts demand from the relevant decisionmakers to publicly assert the reasons for their acts and give opportunities for litigants and amici to contest those reasons. . Moreover, the costs of initiating review of public policies are relatively low: A single individual can take the executive or the legislature to task if he or she has standing to seek judicial review. Briefs by amici shed light on various considerations that are pertinent to the questions at hand. The structured and transparent deliberations in court are closely watched by the public, and the court's own decisions are carefully reasoned and scrutinized.

While judges are not trained to be expert policy makers, they are trained to be expert fact finders. They are masters in employing fact-finding procedures and this expertise also enables them to credibly monitor the decision-making procedures of administrative agencies. Their relative insulation from executive domination and special interests' influence lends credibility to the information they generate directly.

That judicial-generation of information is important, sometimes crucial, is clear from the various occasions where information is all what the court provides. For example, the House of Lords can only declare that the public act is incompatible with the UK Human Rights Act. Besides compensation (that for most governments is in most cases negligible) the main remedy that the European Court on Human Rights offers is a declaration of incompatibility with the European Convention of Human Rights. The only remedy provided by many of the rather effective ITs, like the Human Rights Committee, the World Bank Inspection Panel, the Aarhus Compliance

Commission, or the UNESCO World Heritage Committee, is information on compliance of domestic actors. That information is effective when reputation for compliance is important for the executives because of either internal or external political pressures. One could argue that information as a remedy may be more consequential than invalidation of acts because judges could balk at assuming the responsibility for annulling acts but would be more open to issue seemingly less intrusive remedies.

When courts declare a certain policy as incompatible with a certain norm, they always invite deliberation. Often they leave the ultimate decision in the hands of the political branches that have the discretion to stick to the criticized decision, at the cost of explaining it to an informed public. Courts have developed a sort of ladder of possible responses and they often climb one step at a time in their pressure on the political branches, requiring them to make an informed and publicly accountable decision (either by an administrative act or by a statute). The example of the US Supreme Court's treatment of the petitions of the Guantanamo detainees is a case in point, and there are many other examples from around the world.⁷⁸

When NCs interpret a treaty in a way that is incompatible with the reading of the executives or when they resort to the ultimate weapon of constitutional interpretation, they raise the stakes for the political branches, but in most instances they do not preempt public deliberation. The judicial interpretation of a treaty might prompt the legislature to enact a statute that would render the judicial interpretation inapplicable in domestic law. The public deliberation that would take place is likely to be more informed than the relative opaque process by which treaties are adopted in the first place. The executive could try to negotiate treaty amendments or unilaterally terminate the state's commitment to it, possibilities that would now attract public attention. Constitutional interpretation does not, in most democracies, mean preemption of politics. Unlike in the US, in most other democracies,

⁷⁸ Suresh v Canada, Belmarsh....

constitutional amendments that “correct” judicial interpretations are quite possible, and there are even examples of NCs who were forced, due to constitutional amendments, to “defect” from an agreed inter-judicial interpretation of an international treaty.⁷⁹

But while all this may be true for one NC, one might still worry that NC coordination may pose additional countermajoritarian difficulties. One possible concern focuses on the phenomenon of NC coordination. While the danger of a particular NC engaging in judicial preemption might be relatively small, the dangers associated with a global coalition of NCs are greater because NC coordination would require the coordinated response of executive branches operating in states with quite different systems—a prospectively daunting collective action problem.⁸⁰ We think that the chance of NCs collectively acting to preempt the domestic political process in their states is very remote. While they have increasingly turned their attention to how other courts are dealing with global problems that their states also face, their interests in other courts is more tactical than strategic. Their self-defined mission as guardians of the domestic legal order has remained largely intact. They continue to regard themselves first and foremost as national agents and their chief motivation remains that of protecting the domestic rule of law rather than overseeing the global governance regime or promoting global justice. Moreover, their sensitivity to the national interest continues to reflect itself in any number of traditional and predictable ways such as their continuing refusal to constrain their executives when such constraints might harm their economies, for example by imposing international trade law obligation on their executives,⁸¹ by implementing

⁷⁹ The French and German courts in the context of the meaning of “refugee” under the 1951 Refugee convention (Benvenisti, 2008)

⁸⁰ Sabino Cassese has noted that in connection with ITs the countermajoritarian difficulty is exacerbated by the fact that “the ‘migration of power’ towards judges in the global arena is less easily rectified, as to do so requires concerted action by States.”

⁸¹ FIAMM v. Council of the EU 9 September 2008, (Cases C-120/06 P and C-121/06 P)

(<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&Submit=Submit&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtf=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&>)

anti-bribery provisions that might cause reactions by foreign governments that would harm their economy,⁸² or by piercing the immunity granted by international law to acting officials of foreign states.⁸³ In the face of constitutional amendments and public pressure, as in the case of immigration laws that ran counter to the Refugee Convention, NCs found ways to wiggle out of the international obligation and “defected” from the shared understanding of the NCs of the treaty.⁸⁴

Experience suggests that the associated concern connected with the consensus requirement for overcoming the courts is also exaggerated. Like-minded executives have been able to overcome their NCs’ resistance by adopting treaty amendments.⁸⁵ IOs like the UN Security Council or the EU that do not require unanimity to impose obligations can facilitate counter-NC decisions. Finally and most importantly, in an overwhelming majority of jurisdictions NCs are required to comply with their constitutions at the expense of international texts or any shared NCs’ position. The status of international law in most states as secondary to the constitution (and even secondary to statutes in some countries) is a major factor in ensuring the viability of domestic politics.

(b) NC Coordination, Global Deliberation and Equality

A second source of worry associated with NC cooperation is that the courts of powerful states will dominate any NC coordination process just as their executive do within IOs. The more aggressive of the NCs, those who are the first movers because the scale of their economy ensures them a steady stream of cases, or those who are

[docinf=docinf&alldocnoref=all&docnoref=docnojd&docnojd=docnojd&docnojd=docnojd&typeord=ALL&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=fiamm&domaine=&mots=&resmax=100\)](#)

⁸² HL 2008

⁸³ Jones (Respondent) v. Ministry of Interior (Kingdom of Saudi Arabia) (Appellants), 2006 U.K.H.L. 26, [2007] 1 All E.R. 113 (H.L.).

⁸⁴ supra

⁸⁵ EU Directive on Migration (2005)

more independent, will shape the outcomes also for courts of weaker countries and their constituencies. Given the fact that the judges care first and foremost for their own domestic constituency, their tendency to generate information that is most relevant to them and remain oblivious to other perspectives and considerations that a more comprehensive account would discover.

Again, as with respect to the “domestic” countermajoritarian difficulty, we begin our response by questioning the implicit assumption that the executive-driven treaty was reflective of diverse national constituencies. The implausibility of this assumption in the global context is even more evident. The less democratic the country is, the less likely its executives will internalize their citizens’ interests when they negotiate treaties. The weaker the country is, the less likely will its executives be able to promote their citizens’ interests in global negotiations. Between the strong executives and the strong courts, we suggest that the latter will promote the interests of the weaker constituencies more than the former. NCs will be more weak-friendly than executives because they have a different mode of operation. While executives resort to fragmentation that enables them to both ensure and conceal their domination, courts operate by weaving webs of coherent obligations of all the executive-made fragments, webs that are exposed, well-reasoned and accessible for all to deliberate on. The information that NC coordination generates has political implications also in this context. NGOs committed to promote the interests of constituencies in weaker states could use the information to raise global consciousness to the effects of IO policies. Such public awareness could prove politically significant in strong democracies whose civil society is also sensitive to such concerns. Beyond the benefits of information, weaker countries can be expected to benefit indirectly from NC coordination due to the likelihood that such coordination will bolster the independence of ITs from strong state domination. In our previous writings we argued that ITs participate in efforts to “de-fragment” international law and thereby reduce the opportunities of a handful of strong states to engage in divide and rule tactics. We noted that “[e]xpanding the role of judges

and of international law in general promises all actors—sovereign states weak and strong—equal formal status as participants in the international lawmaking process, and equal protection via an impartial decision-making process that is based on a coherent and consistent interpretation and application of the law.”⁸⁶ The generalization and rationalization of the international legal landscape “provides weaker states with a stable hierarchy of claims that they can then employ in a variety of venues, and it increases the likelihood that a victory in a particular venue will have wide-ranging limitations.”⁸⁷ The drawback for ITs and weak countries alike is the dependency of important ITs on the strong state executives who designed the ITs in ways that limit their independence, and the constant threat of strong states to retaliate against too independent ITs. Here could be a crucial contribution of the NCs, whose relative greater independence of executive control is likely to give support to ITs. As we argue in another paper (NYUJILP, forthcoming), NC review of IOs, ITs and national executives is more likely to strengthen both NCs and ITs, because each of the two can strengthen its counterpart. Like a couple in the familiar battle of the sexes game, the two understand that both are better off if they coordinate their actions than if they act independently. NC coordination strengthens the national executive’s incentives to abide by their international obligations. The involvement of NCs also limits the threat of exit from IOs by states, a threats that weakens IOs and their ITs, because such exit in and of itself will not affect the NC’s interpretation of either the domestic constitutional obligations or international law. Finally, NCs provide a measure of cover for ITs and increase the chances that ITs will escape retribution if they deviate from the outcome preferred by executives of the powerful states. If NCs are expected to rule against them eventually , executives may be more inclined to tolerate the ITs ruling. For their part, ITs support NC coordination by endorsing, or at least by not opposing, the NCs’ shared interpretation of the law. In addition, their endorsement of NC jurisprudence by, for example, regarding it as reflecting customary law can help pressure recalcitrant courts in others states to

⁸⁶ Benvenisti & Downs, *Fragmentation* (2007).

⁸⁷ *Id.*, at

comply with a given NC ruling. Such endorsement can also operate to preempt the possibility of a government threatening to “appeal” a national court decision before an IT.

(c) NC Coordination and the Functionality of Global Governance Structures

The last concern is functional. There are two main worries. One relates to the functionality of IOs. Unless employed with discretion and balance NC review could easily undermine the effectiveness of these IOs by creating gridlock that would make reform and adaptation to new circumstances more difficult. The other concern is with the possible reactions of executives to NC coordination. The executive branches of powerful states in particular will almost certainly initiate a search for new ways to neutralize and limit their courts’ jurisdiction just as they adjusted to the increased scrutiny of IOs by creating a variety of informal and privatized decision-making venues. This could lead to the further fragmentation of international law and undermine the quest to create a coherent international legal system which has long been the goal of generations of internationally-oriented lawyers and judges.

(i) The Functionality of IOs

As with the rise of judicial review of domestic administrative agencies and administrative tribunals, NC coordinated review of IOs offers mixed results: the reviewers slow the administrative process and encumber it with procedural and substantive requirements, but at the same time their interventions promote better-informed and more equitable policies. The interplay between the pros and cons is well known and there is no way but to be continuously alert not to err on either side of the equation.⁸⁸ Review by internal bodies within the IOs is in general no substitute to NC review, as much as domestic administrative tribunals need to be supplemented

⁸⁸ Mashaw 2009

by regular courts. As we saw above, intra-IO and peer review cannot compare to review by NCs with their commitment to rigorous scrutiny of IOs.

[example – targeted sanctions] NC intervention in IT jurisprudence provides informational benefits that are similar to those provided by NCs that intervene in the domestic administrative review. IOs are no less (if not more) prone to special interest capture than are national executives, and to the extent that IOs are unwilling or unable to restrain the special interests, NCs could prove effective. NC review functions can be effective in developing norms concerning the decision-making processes within IOs – Global Administrative Law – to ensure accountability and attention to all affected stakeholders. This is also why we think that NC activism is more likely to enhance, rather than undermine, the evolution of an egalitarian and coherent international legal system. Indirectly, by collectively exercising their review authority even a relatively small group of NCs, primarily motivated by the common desire to safeguard their domestic democratic processes, can promote what is arguably a global public good; i.e., the increased accountability of international decisionmakers to more diverse groups of stakeholders around the globe.

(ii) Executive Flight from IOs to Informal and Privatized Decision-making Venues

Finally, the worry is that growing NC coordination, and in particular NC/IT coordination, will prompt executives to pursue informal and privatized ways to coordinate below the radar screen of public law that is subject to judicial monitoring. This could lead to the further fragmentation of international law. This phenomenon has already been observed and analyzed, and it is only expected to proliferate. This is but a variation of the ancient struggle between reviewer and reviewed that is well known in the domestic sphere. This has never been a good reason why courts should end their pursuit of executive excesses. Courts have shown abilities to respond to executive reactions by, for example, restricting the delegation of public authority to private actors or by imposing public law obligations on private actors that exercise

public functions. There are all the reasons to expect that NCs will be able to act in a similar way toward similar efforts at the global level.

One should not exaggerate this risk. While informal and privatized venues have a number of virtues such as flexibility and low transaction costs, they also have a host of disadvantages with respect to representativeness, enforceability, and stability that make them second best substitutes for IOs in many situations. This is likely to be especially true for the perspective of powerful states whose dominance of the treaty making system provides them with the ability to lock other states into a regime that benefits them. Just as one is likely to prefer a formal constitution to an unwritten informal one if one is fortunate enough to be one of its designers, so it is with treaties. Had this not been the case, it is unlikely that powerful states would have taken the time and effort to negotiate elaborate formal agreements in the first place.

This potential downside of informal and private institutions is particularly dangerous in today's world in which the relative power of major states appears to be shifting and the US and EU must cope with the prospect that rising powers like China and India may be mounting a challenge to their dominance. At times like these one expects the US and EU to be rushing to lock in the current status quo or an improved one while they still can and using ITs and IL in general as enforcement agents. A related defect of informal venues in contrast to formal treaties is that they make it more difficult for states and executives to obscure their own agency.

Whether this embrace of informal governance structures (what we call here international transnational institutions – ITI's) has been motivated primarily by a sense of urgency in the face of an unresponsive bureaucracy, a desire for greater expertise and flexibility in dealing with a problem that is rapidly changing, or a calculated effort to minimize transparency and reduce oversight is not clear. However, whatever the motivation for such informality in any particular case it is difficult to escape the fact that it has generally operated to further expand the de facto authority of the executive branch in comparison with other branches of

government and reduced the opportunities for accountability and deliberation generally.⁸⁹ The inherent lack of transparency and the ad hoc quality of deliberation make accountability in connection with ITI's difficult. This, in turn, raises the specter of a host of abuses that are connected with the unaccountable centralization of power such as enabling opportunistic government officials to make politically invisible concessions to powerful private actors.

The turn to hybrid public/private regulatory bodies or to fully private institutions raise similar concerns. Privatized transnational institutions (PTIs) differ from ITI's – in what pertains to exposure to NC review—by the fact that an ITI policy still needs to be implemented in each jurisdiction by an administrative agency, and hence the NC in that jurisdiction will have an opportunity to review the implementing act, and indirectly also the ITI's decision-making process and its adopted policies. In contrast, the PTIs do not usually depend on implementation by a public act but rather influence directly the relevant market that they regulate, by setting standards for private actors to follow or by monitoring private activity. Theoretically at least, because PTIs do not need to wield public authority and instead can rely on the consent of the relevant stakeholders as the source of their authority, NCs show less sensitivity to standards setting by PTIs who are therefore are more insulated than

⁸⁹ A recent example of this shift relates to the management of shared polar bears populations. In 2000 the US signed a bilateral agreement with Russia on the Conservation and Management of the Alaska-Chukotka Polar Bear Population that envisioned the establish a common legal, scientific and administrative framework and the establishing of a "U.S.-Russia Polar Bear Commission," which would function as the bilateral managing authority to make scientific determinations, establish harvest limits and carry out other responsibilities under the terms of the bilateral agreement (see AJIL 97 (2003), pp. 192-193). In contrast, when in 2008, the US and Canada sought to collectively protect their shared polar bear populations, they chose to do so through their respective administrative agencies. They implemented their joint memorandum of understanding through their respective powers under domestic law. (see Memorandum of Understanding between Environment Canada and the United States Department of the Interior for the Conservation and Management of Shared Polar Bear Populations, May 8, 2008). The MOU states among its aims "to help improve collaboration and the development of partnerships between the Participants and other interested parties" and set up an "ad-hoc Oversight Group" comprising of members of the two agencies and others whom those members would decide to invite (text available at <http://www.asil.org/ilib/2008/05/ilib080516.htm#t1>).

public bodies from NC review, and have lesser opportunity to monitor and rebuke privately generated policies. Since growing assertiveness of on the part of NCs with respect to the review of IO policies is likely to lead state executives to gravitate still further toward ITI's and PTIs, it is important to gauge the extent of the challenge that they pose to the ability of NCs to provide checks on executive discretion. At least to date, relatively little attention has been focused on the accountability problems connected with ITI's and PTIs.⁹⁰ Much of this is probably attributable to their relative newness and lack of political visibility, but there are also those who are skeptical that such problems are really important enough to warrant attention. Some stress that informal coordination among officials has always existed to some extent and that because if it does not constitute a formal delegation of authority it should not raise accountability concerns. National administrative agencies continue to retain formal decisional authority and citizens continue to possess the same tools they have always used to monitor governmental agencies and to participate in their decisionmaking processes. Others observers acknowledge that a change is taking place but argue that the professionalism and impartiality of the non-governmental decisionmakers who are involved in ITI's and PTIs make more formal accountability mechanisms unnecessary.⁹¹

Yet such arguments seem likely to have more merit with respect to informal and private institutions in the domestic sphere than they do at the global level.⁹² In the domestic setting, the traditional tools to ensure accountability and participation can be backed up by recourse to the legislature or to the court to restrain runaway agencies or to publicly regulate private activity. As we have seen in connection with

⁹⁰ But see Kingsbury 2009

⁹¹ See Jody Freeman, *The Private Role in Public Governance* 75 NYU L. Rev. 543 (2000) at 666 ("Public/private arrangements can be more accountable because of the presence of powerful independent professionals within private organizations. The background threat of regulation by an agency can provide the necessary motivation for effective and credible self-regulation. The two principal partners in a regulatory enterprise (the agency and the regulated firm, or the agency and the private contractor) might rely on independent third parties to set standards, monitor compliance, and supplement enforcement."). For criticism see David Kennedy, *Challenging Expert Rule: The Politics of Global Governance* 27 Sydney L. Rev. 5 (2005).

⁹² Those described by Freeman, *supra* note 18.

formal IO's, such recourse is much less frequently available at the global level. It is still less likely to exist in connection with ITI's and PTIs where the motivation of interest groups and executives to escape the scrutiny of civil society is just as great as it is in the case of formal IO's, but where the transparency of the processes involved is reduced still further. In such circumstances of relatively little information, the opportunity of executives and interests groups to elude democratic checks and balances are arguably at their height.

Nevertheless, we too believe that ITI's and PTIs pose less of a danger to the potential efficacy of NC review than they might initially appear. NCs, once aware of the role and impact of ITI's and PTIs, have means at their disposal to respond to the challenge. With respect to ITI's, perhaps their main weakness is their reliance on national implementation of their policies. An ITI's decision will in most cases have to be implemented by the domestic executive, and the NC has therefore the opportunity to indirectly review the compatibility with the domestic law of the ITI's decision-making process or the policy it has adopted. While "episodic and fragmented,"⁹³ until only a few years ago, these types of review are increasingly used, in a systematic and arguably conscious effort. Many of the PTIs will also discover that they depend on NCs in order to have their standards and processes respected and even endorsed by NCs, when stakeholders unhappy with PTI standards and processes seek NC backing for their refusal to comply. NCs have asserted authority to review PTI standard setting and arbitral proceedings in several occasions, such as in the context of domain-name registration,⁹⁴ and sports.⁹⁵ When asked to recognize an arbitral award rendered by a PTI or to defer to proceedings taking place at a PTI, NCs have examined the fairness of the PTI's decision-making process, including the impartiality of the rule-making and rule-applying functions of the PTI.⁹⁶

⁹³ Benedict et al at p. 33. See also Dyzenhaus (2005)

⁹⁴ *Barcelona.com v Excelentísimo Ayuntamiento de Barcelona* (2003) 330 F.3d 617 (4th Cir) (court disregarding arbitral award under ICANN rules).

⁹⁵ *Meca-Medina and Majcen v. Comm'n of European Communities [2006] 5 C.M.L.R. 18 (ECJ 3rd Chamber 2006)*. See *Lorenzo Casini (2009)*

⁹⁶ *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litigation*, 228 F.Supp. 2d 348 (S.D.N.Y. 2002)

PTIs that wish that their standards would have domestic impact would have an interest that NCs would adopt such standards as reflecting reasonable rather than negligent behavior.⁹⁷ PTIs are subject to private law sanctions in tort and contract law, and to the obligations under competition law, corporate law and the law of associations.⁹⁸

To the extent that ITI's and PTIs are entrusted with decision-making powers that can directly impact stakeholders, for example by setting standards for goods or services, labeling or otherwise monitoring for compliance with certain policies, or controlling access to certain commercial activities, NCs can resort to several domestic legal doctrines developed to discipline the abuse of public authority. NCs in most democracies have developed public law doctrines, based on principles of either constitutional law or administrative law. These doctrines have different titles and different scopes of application, but they all share the effort to treat private bodies that exercise public functions as if they were administrative agencies subject to public law constraints and hence to judicial review. In some countries courts have recognized the "horizontal" applicability of constitutional law, either as a doctrine that recognizes the applicability of basic constitutional obligations to private actors (so-called "drittwirkung"⁹⁹), or as applying such obligations to actors who perform traditionally sovereign functions (the US "State Action" doctrine)¹⁰⁰. As the Supreme Court of Canada reasoned "Just as governments are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other "private" arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the

⁹⁷ see Benedict Kingsbury, *Weighing Global Regulatory Rules and Decisions in National Courts* (2009), also citing H Schepel 'Constituting private governance regimes: standards bodies in American law' in C Joerges, I Sand & G Teubner (eds) *Transnational Governance and Constitutionalism* (2004) 161.

⁹⁸ Freeman, *supra*

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¹⁰⁰ Jody Freeman, *The Private Role in Public Governance* 75 NYU L. Rev 543 (2000) (examining the fading distinction between public and private actors that perform public functions, and the need to develop new devices to increase the accountability of private bodies performing public functions). Harold J. Krent *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. Rev. 62 (1990) (noting that Congress has delegated administrative authority also to private individuals and private groups to implement and execute legislative plans.) Cafaggi

implementation of their policies and programs to private entities.”¹⁰¹ Courts in several other countries have applied principles of administrative law on private entities that perform public functions.¹⁰² These are tools developed in the domestic context by many NCs in response to executive attempts to pass, disguised as private actors, below the radar screen of the administrative or the constitutional court. There is no reason to suspect that NCs, increasingly alert to the use of ITI’s and PTIs for similar objectives, would fail to respond the way they did to similar behavior in the domestic context.¹⁰³

The availability of legal doctrines to check ITI’s and PTIs, and their prevalence in different legal systems, suggest that NC review of IOs is in itself not very likely to prompt state executives to prefer informal and private venues to the more formal IOs.

V. Conclusions

NCs have been instrumental, if not pivotal, in building up domestic democratic mechanisms and legal tools that address the inherent challenge of asymmetric

¹⁰¹ *Eldridge v. British Columbia (Attorney General)* [1997] 2 S.C.R. 624, para. 42

¹⁰² In the UK the leading judgment is *R v Panel for Takeovers and Mergers, ex parte Datafin plc* [1987] QB 815 (decisions of a private body -- the City’s self-regulating mechanism for dealing with mergers and acquisitions -- exercising public functions may be amenable to judicial review)

¹⁰³ Although at least in one area, the prevention of gender discrimination in the Olympic games courts in the US and Canada refused to intervene: *Sagen v. Vancouver Organizing Committee for the 2010 Olympics and Paralympic Winter Games 2010* (Supreme Court of British Columbia, July 2009). In *Martin v. International Olympic Committee* 740 F2d 670 (1984) the Ninth Cir. rejected the suit on procedural grounds but added:

“we find persuasive the argument that a court should be wary of applying a state statute to alter the content of the Olympic Games. The Olympic Games are organized and conducted under the terms of an international agreement--the Olympic Charter. We are extremely hesitant to undertake the application of one state’s statute to alter an event that is staged with competitors from the entire world under the terms of that agreement.”

The dissenting judge saw an opportunity missed for the entire world:

“When the Olympics move to other countries, some without America’s commitment to human rights, the opportunity to tip the scales of justice in favor of equality may slip away. Meanwhile, the Olympic flame--which should be a symbol of harmony, equality, and justice--will burn less brightly over the Los Angeles Olympic Games.”

information in democracies. The delegation of authority to IOs threatens the viability and relevancy of those mechanisms. If not by design then by consequence, the delegation of authority to international bodies and arenas facilitates special interest capture because of the policy making process at the global level is considerably more opaque than that at the domestic level at least in most democratic societies. The recent interventionism of NCs has managed, at least to a certain extent, to impede the dilution of the democratic controls of government. In the new globalized environment judicial deference to the government's dominance of the international policy sphere is a potentially risky policy from the perspective of democracy. For most states the new modalities of international or inter-governmental policy-making mean greater dependence on external forces and less opportunity for meaningful domestic democratic deliberations. For NCs to continue to allow the government *carte blanche* to act freely in world politics potentially impoverishes the domestic democratic and judicial processes and reduces the opportunity of most citizens to use these processes to thwart outcomes that are detrimental to many if not most of them.

The traditional maps of checks and balances at the domestic level are continually being redrawn in a never-ending struggle to both govern and to contain government. In an era of global inter-dependency, rapid growth, and increased intergovernmental coordination it has become increasingly apparent that the judicial branches of governments must forge coalitions across national boundaries to remain effective domestically. By seeking to coordinate their stances, the courts are not motivated by utopian globalism, but, like their executive branch counterparts, they are acting in pursuit of their domestic interests and concerns. Such coordinated reviews on the part of national courts is potentially one of the most effective avenues for promoting democratic accountability within inter-governmental institutions and should be welcomed by those concerned about improving the legitimacy of intergovernmental institutions. Paradoxically, in an era increasingly dominated by globalization and international institutions, domestic courts are becoming crucial players whose input

promises to indirectly improve the accountability and democratic legitimacy of intergovernmental action. Whether these goals are ultimately achieved is yet to be determined and depends on a number of factors such as the future trajectory of the relationship between state courts and IOs. This relationship, like the broader ongoing struggle to both govern and to contain government, is a dynamic one. It can be expected that IOs will react to the prospect of review by national courts by acting to preempt or otherwise limit it. This resulting give and take between these actors will shape both their futures as well as the evolution of accountability in global governance.