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## Court Cooperation, Executive Accountability and Global Governance

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## **Abstract**

It is widely acknowledged that the regulatory power that globalization has transferred to international organizations has largely been vested in the executive branches of a few powerful states that were the system's principal architects. The combination of such overly concentrated executive power and the international system's relative lack of structural checks and balances that safeguard democratic deliberation and human rights in domestic settings should be an important source of concern for those worried about democratic deficit at the global level.

Of particular concern is the fact that judicial oversight, the principal structural check on executive power at the international level, remains very limited. Even those international tribunals with relatively broad mandates, like the International Court of Justice, possess far less independence than their domestic counterparts and the international judicial system is more fragmented and less hierarchical than that in most democracies. In this essay we argue that progress in containing executive power via judicial review is still possible, but that it is likely to be driven primarily from below by national court-led process of inter-judicial coordination that could eventually involve both national courts and international tribunals.

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## Abstract

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## I. Introduction: Courts, Fragmentation, and Executive Branch Accountability

The globalization-driven transfer of regulatory authority from the domestic to the international level has frequently raised the concern that it could lead to the emergence of an EU-like democratic deficit connected with the inability of affected populations to express their preferences electorally. Considerably less attention has been paid to the dangers posed by the fact that the international system continues to lack the sorts of structural checks and balances, such as the separation of powers, court independence, and limited government, that have played an important role in safeguarding democratic deliberation and human rights in the domestic setting.<sup>1</sup>

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<sup>1</sup> As James Madison argued in *The Federalist* No. 51, in order to ensure that the several branches of government "keep[] each other in their proper places" the fundamental component of constitutional design

Yet it is widely acknowledged that the regulatory power that globalization has transferred to international organizations (IOs) operating at the international level has been vested in the executive branches of a few powerful states that were the system's principal architects.<sup>2</sup> From a democratic standpoint, such unchecked and overly concentrated executive power is worrisome independent of whether or not it is representative. With legislative oversight even of the indirect sort represented by the UN General Assembly no longer regarded as a realistic possibility, this small group of actors effectively possesses both legislative power and executive power—a situation in which Montesquieu feared there would be “no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.”<sup>3</sup>

Historically, judicial oversight of IO policy on the part of the ICJ and other international tribunals (ITs)—of the sort that is comparable with that provided by national courts at the domestic level in democratic states or in the EU by the ECJ—has offered a possible partial solution to this problem. However, IT review of IO policy remains very limited. Even those ITs with relatively broad mandates, like the ICJ, possess far less independence than their domestic counterparts in most democracies, are closely monitored by the powerful states, and are constantly worried about competition with other ITs.

We argue below that there is still reason to believe that progress in containing executive power via judicial oversight is possible, but that it is likely to be driven from below and led by national courts (NCs) through a cooperative process involving both the NCs themselves and the ITs. NCs, especially those of the powerful democratic states, are best positioned to do this both because they possess far more structural independence than do ITs and because it is they who stand to lose the most from the continued transfer of regulatory authority to the international level.

The concentration of power at the global level has potentially serious consequences for NCs because it enables the executive branches to insulate their policies

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must ensure that “the members of each department should be as little dependent as possible on those of the others.”

<sup>2</sup> For an analysis of the consequences of the fragmentation of international law see Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007).

<sup>3</sup> See MONTESQUIEU, *THE SPIRIT OF THE LAWS*, 157, bk 11, ch 6 (Anne M. Cohler, Basia C. Miller, and Harold S. Stone eds., 2008).

from NC review by placing an increasing range of activities under IO supervision where they have traditionally been shielded from domestic oversight. The difficulties facing NCs have been exacerbated by the proliferation of ITs, which have emerged as competitors for judicial authority. The decisions of NCs are increasingly being scrutinized by ITs in a process that often amounts to an informal equivalent of judicial review or even an appeal to a higher instance. In addition to the possibility of being corrected or criticized, NCs face potential encroachment on issues traditionally within their jurisdiction. The judgments of ITs, whether in interstate disputes or not, shape the evolution of international law and thereby affect domestic law. While most of these tribunals adjudicate disputes between state parties, some of them permit suits to be brought by individuals. This has reduced the ability of governments to control the nature of the cases that can come before ITs. Consequently, some of the ITs' judgments have either dealt with issues that traditionally have been matters of domestic jurisdiction by constitutional courts, such as civil liberties, due process, and criminal responsibility, or have disregarded those considerations. Thus, the decisions of ITs have a significant impact on the laws NCs are traditionally called upon to interpret and enforce.

These developments have almost certainly combined to reduce both NC effectiveness as a check on executive power at the domestic level and the overall quality of domestic deliberation. This might not have led to the expansion of executive authority had the diminished role of the domestic judiciary been offset by a commensurate expansion of IT review authority at the international level, but there is little evidence that this has been the case. Part of the problem has been that while IOs and ITs may be willing to review decisions of domestic decision makers, they are less eager to review decisions of other IOs and ITs.<sup>4</sup> This phenomenon can be traced to the fragmented nature of the international regulatory system, whose design was overseen by the executive branches of the major powers.<sup>5</sup> ITs must constantly cope with the administrative difficulties posed by a legal space composed of multiple and overlapping issue-specific treaties. With the exception of the ICJ and the ECJ, the ITs narrow mandate provides them with little

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<sup>4</sup> See Eyal Benvenisti and George W. Downs, *Toward Global Checks and Balances 20 CONSTITUTIONAL POLITICAL ECONOMY (forthcoming 2009)*

<sup>5</sup> On the impact of fragmentation on the ability of ITs to effectively constrain the executives of strong powers see Benvenisti & Downs, *The Empire's New Clothes*, *supra* note 2.

opportunity to influence broad policy and or to coordinate with each other. The fact that these tribunals are so numerous and specialized reduces their prestige and tends to make them timid and subject to circumvention. A fragmented global regulatory system also provides powerful states with the ability to shift from one regulatory venue to another at relatively low political cost—an option that they can threaten to use in order to extract concessions from IOs.

Together these factors have combined to create a “judicial deficit.” The proliferation of ITs and IOs have diminished the capacity of NCs, while the narrow mandates and timidity of ITs and IOs have limited their ability to fill the resulting judicial void. As a result, there is a general reluctance to review government policy at the international level. This judicial deficit is as potentially as problematic for global governance as the democratic deficit.

Some might argue that this description of the difficulties facing ITs is too pessimistic and that it is only a matter of time before an effective review process will come into being. Only a decade ago, practicing jurists predicted that the structural infirmities due to the proliferation of international tribunals would lead states to engage in “forum shopping” that could ultimately “jeopardize the unity of international law and, as a consequence, its role in inter-State relations.”<sup>6</sup> However, such tensions never became a serious problem because IOs and ITs responded by constructing social networks that facilitated “an increasingly loud inter-judicial dialogue” to that kept the problem from getting out of hand.<sup>7</sup> Isn’t it likely that ITs can employ these networks to fashion a system of judicial review that can function to moderate if not entirely eliminate the expansion of executive discretion?

While this possibility cannot be ruled out, we believe that there are reasons to be skeptical. Relatively little progress has been made in recent years toward the creation of an improved review process despite the widespread acknowledgment that it is badly needed in the light of ever-increasing globalization. Even those ITs with relatively broad mandates continue to have far less independence than many of their domestic

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<sup>6</sup> Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT’L L. 553, 555 (2002) (citing H.E. Judge Gilbert Buillaume, President of the Int’l Court of Justice, Speech to the General Assembly of the United Nations (Oct. 30, 2001)).

<sup>7</sup> William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT’L L. 963, 967 (2004)

counterparts and are closely monitored by the powerful states. As a result, ITs have a tendency to practice a transaction-based jurisprudence that tends to avoid invoking broad principles as much as possible. Finally, while IT social networks have proved capable of resolving jurisdictional disputes and simple coordination problems among a small number of like-minded courts with a strong interest in avoiding conflict and preserving the status quo, they have yet to evidence the capacity to generate the complex connections, hierarchy, and consensus that a truly effective system of judicial review requires.

Given these structural impediments, in what follows we explore the possibility that at least in the near term, progress in addressing the judicial deficit is more likely to be driven by NCs. We argue that not only do NCs enjoy far more independence from their executive branches than do ITs and operate within systems where judicial review is already commonplace, but they are uniquely positioned to turn the fragmented international legal space that is creating coordination problems for ITs to their advantage by extending their review authority to the policies of international organizations.

In fact, this process is already under way. Invoking their constitutional stature as guardians of domestic law and their oversight responsibilities for the processes by which IO decisions and IT rulings become legally binding domestically, NCs are paying increased attention to the creation and development of international regulation. In particular, the question of which of the often conflicting international legal standards can be applied within their jurisdictions. Although their motivation in doing so is to preserve the domestic legal order, NCs have begun to look outwards as well. NCs in like-minded states appear to be increasingly aware that in a globalized legal environment they need to coordinate their efforts—at least informally—in order to strengthen their roles not only domestically but also in the international legal community.

Ultimately, the success of NCs will depend on their ability to cooperate with ITs. While the competition between NCs and ITs makes a certain amount of conflict unavoidable, their mutual dependence and vulnerability can be the basis for collaboration and, eventually, sustained cooperation. This is particularly true when they share an interest in curbing the growth of executive power and discretion in their respective domains.

The essay is divided into four parts. Part II examines how NCs are responding to the growing challenges that the globalization-driven increase in executive power poses to democratic governance. It explains why NCs rather than ITs are playing an increasingly active role in reviewing IO policy when it is the more natural domain of the latter.

Part III analyzes the likely impact of increasingly assertive NCs on ITs and the prospect for NC-IT cooperation. The four case studies presented are suggestive of how this cooperation is emerging and of the different forms that it might take in the future.

Part IV concludes.

## II. The Response of National Courts

NCs justify their newfound assertiveness with respect to foreign affairs and the decisions of international bodies on grounds similar to those they employ in the domestic context (i.e., their role as guardians of the domestic legal system, the rule of law, and the constitution<sup>8</sup>), while emphasizing the legal supremacy of their domestic legal system over international norms. However, the institutional oversight role of NCs over domestic law and the presumption of domestic legal superiority are not new and yet only recently have NCs begun to engage with the international system. Why have they waited until now to act?

One possibility is that NCs failed to recognize the need for oversight at the outset. As

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<sup>8</sup> For such statements see *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). The role of NCs as guardians of the domestic legal system is particularly demonstrated in their review of executive action in light of the domestic constitution. Thus, 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, available at <http://search.japantimes.co.jp/cgi-bin/ea20080503a1.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 prior parliamentary approval (BVerfG, 2 BvE 1/03 decision from May 7, 2008, available at [http://www.bverfg.de/entscheidungen/es20080507\\_2bve000103.html](http://www.bverfg.de/entscheidungen/es20080507_2bve000103.html)).



political actors with relatively introverted and conservative political tendencies, NCs were naturally slow to perceive that an environment in which an ever-increasing proportion of regulatory law is formulated and implemented by their governments through IOs was a serious problem. Only gradually, as globalization accelerated and the volume and ambitiousness of IO policies swelled to unprecedented levels, did a handful of prominent NCs begin to conclude that to avoid impoverishing domestic democratic and judicial processes, they would have to break from their traditional practice of allowing the executive branch unconstrained authority in international affairs.<sup>9</sup> NCs' inclination to review intergovernmental bodies first manifested itself in the context of EU governance.<sup>10</sup> Previously, these courts had restricted the scope of their intervention to rejecting only those policies adopted by their own governments or legislatures. They did not intervene in connection with those of IOs.<sup>11</sup>

Another possible impetus for NC activism was the growth of global counterterrorism efforts from 2000 to 2002 and the increasing number of asylum seekers in destination countries.<sup>12</sup> Because these problems were particularly prominent for a subset of powerful democratic states whose courts enjoyed the most independence, they offered a particularly propitious political opportunity for these courts to coordinate. We will argue below that such coordination will become increasingly necessary in the future if NC

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<sup>9</sup> For an analysis of the changing attitudes of NCs see Eyal Benvenisti *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AJIL 241 (2008). This perception of the NCs may have been reinforced by a growing realization on the part of NCs that their respective legislatures were incapable of obstructing this trend given their institutional limitations and what appears to be their growing deference to executive leadership in the area of foreign policy. See the analysis of the limited role of national legislatures in the EU legislative process: Philip Norton, *National Parliaments and the European Union: Where to From Here?*, in *LAWMAKING IN THE EUROPEAN UNION* (Paul Craig and Carol Harlow Eds., 1998), 209; David Judge, *The Failure of National Parliaments?* 18 WEST EUROPEAN POLITICS 79 (1995).

<sup>10</sup> On the tense relations between the European Court of Justice and some European NCs, in particular the German and the Italian ones see 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); 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). In its review of the constitutionality of the German ratification of the EU treaties, the German Constitutional Court demanded that the German legislature retains “functions and powers of substantial importance” and that the EU provides for free deliberation between opposing social forces (Brunner v. The European Union Treaty, German Federal Constitutional Court Judgment of October 12, 1993 (trans. in [1994] Common Market Law Reports 57).

<sup>11</sup> Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Norms: An Analysis of Attitudes of National Courts*, 4 Eur. J. Int'l L. 159 (1993).

<sup>12</sup> Benvenisti, *Reclaiming Democracy*, *supra* note 9.

assertiveness is to continue to evolve. There is some evidence to suggest that similar processes, albeit with respect to other issues, such as in the areas of socio-economic rights and the environment, may now be operating in developing countries as NCs struggle to cope with sometimes conflicting IO-based standards that affect them all.<sup>13</sup>

As a result, instead of increased IT review of IO policy “compensating” for NC review as the locus of policymaking shifted to the global stage, the opposite appears to be occurring. NCs are offsetting the lack of IT review within areas of law that were thought to be the natural domain of ITs. Part of the reason is that unlike IOs, which have limited incentives to review each other because of fragmentation, NCs not only possess the power to review IO decisions but they also have a clear interest in doing so whenever such decisions directly or indirectly affect their domestic legal systems.

NCs also enjoy a number of advantages that ITs do not. They have an independent source of authority—their domestic constitutions—which they regard as the basis of an autonomous legal system, and unlike ITs they have no vested interest in maintaining the fragmented equilibrium that characterizes the international legal system. National courts that review policies adopted collectively by their governments increase the domestic accountability of their executive branches while enhancing their own authority to interpret and apply both national law and the law of those IOs in which their states are members.

Particularly interesting is the fact that a subset of major NCs appear to have discovered that in contrast to their legislative branches and to IOs, they are almost as well positioned as their executive branches to exploit the overlapping responsibilities and jurisdictional ambiguities in the international regulatory system that fragmentation has produced. Their main tools in this context are their exclusive control of the interpretation

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<sup>13</sup> On developing countries’ NC cooperation in the sphere of the environment see Benvenisti *Reclaiming Democracy*, *supra* note 9. Courts in India, Pakistan and Bangladesh have invoked the right to life protected by their respective constitutions and mentioned international documents such as the World Health Organization’s resolutions as the basis for restricting the importation of contaminated food, (see *Dr Mohiuddin Farooque v. Bangladesh*, 48 DLR (1996) 438 (Supreme Court of Bangladesh), *Vincent v. Union of India* AIR 1987, 990 (Supreme Court of India)) and reading into the domestic law an obligation on their respective governments to ban advertisement of cigarettes and to prohibit smoking in public spaces (see *Prof Nurul Islam v. Bangladesh*, 52 DLR (2000) 413, ILDC 477 (BD 2000) (Supreme Court of Bangladesh), referring to the similar decisions of the Indian court in *Bamakrishna v State of Kerala and ors*, 1992 (2) KLT 725 (Kerala High Court) and Pakistan *Pakistan Chest Foundation and ors v Pakistan and ors*, 1997 CLC 1379)).

of their respective national constitutions and their ability to control the channels through which international law, including IO decisions, are legally binding domestically. These afford NCs the ability, similar to that of the powerful states, to selectively pick and choose which of the various conflicting international legal standards will be applied within their domestic jurisdictions.

Judges can exercise this discretion over international legal standards in a number of ways: by interpreting treaties, by ordering treaty obligations hierarchically, by “finding” customary international law, by determining which of these norms is directly applicable within the domestic legal system, and by dictating how they interact with domestic norms. Thus, a national court might choose to link human rights obligations to the legal regime of refugees, suspected terrorists, or trade law obligations and thereby add layers of protection not provided by the immediately relevant treaty regime. Alternatively, it might privilege *jus cogens* norms over foreign officials’ claims for traditional immunities from prosecution in cases involving war crimes, or it might apply domestic principles of administrative accountability to IOs. The net results are likely to be substantial changes in international legal regimes that were unanticipated and sometimes unwanted by the executive branches of either the states or the IOs.<sup>14</sup>

Although structural fragmentation in the existing international legal order provides individual NCs with considerable influence by way of interpretation, collective action will be necessary if NCs are to “defragment” the international regulatory system in the sense of creating a more hierarchical, coherent, and egalitarian legal environment. If a given court acts alone and makes a series of rulings that pose a direct challenge to a major international agreement or tribunal, it faces the danger of being discounted as an outlier whose jurisprudence does not reflect general state practice. Should this tendency persist, the country’s reputation as a responsible partner in the globalization process is likely to suffer. At the extreme, foreign decision makers, including powerful foreign governments, IOs, and even private companies, will become more reluctant to deal with it, and the NC could suffer both a loss of prestige and a divestment of foreign capital.

The possibility of backlash is greatly diminished if a significant number of NCs were to act collectively. While powerful states and IOs can effectively isolate a single activist

<sup>14</sup> For some examples see *infra* text to notes 37-53.

jurisdiction, the cost of collective punishment on multiple NCs is likely to be too high to be practical. Similarly, with respect to meaningfully shaping the evolution of customary law through NC judgments, while a national court acting alone can accomplish relatively little, the combined judgments of several NCs will be difficult for ITs to ignore, especially since the tribunals are well aware that the same NCs will have to play a central role in implementing the ITs' judgments.<sup>15</sup>

In a somewhat different vein, cooperation among NCs can also play a critical role in allowing them to escape the negative domestic consequences that might stem from taking unilateral action. For example, a given NC may be reluctant to rule unilaterally that a given agreement required it to adopt a more expansive policy with respect to providing sanctuary for refugees because it feared that doing so might result in its state becoming a magnet for more refugees than it could economically and socially accommodate. If, however, a substantial number of NCs were to make a similar ruling simultaneously to ensure that the refugee burden were shared, this problem could potentially be minimized or avoided.<sup>16</sup>

Cooperation also advances the courts' fundamental interest in avoiding conflict with other courts, for the sake of both credibility and compliance. As Jenny Martinez has observed, courts are aware that "[o]ver time, the habit of obedience to judicial decisions becomes ingrained, allowing them to issue decisions that are more controversial and still achieve a comparable level of compliance. This also explains why courts might have a natural self-interest in cooperating with each other, even when cooperation might, in a particular case, mean yielding jurisdiction to another court. In the long run, [such] reciprocal cooperation between two formally unrelated courts can increase the power of both."<sup>17</sup>

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<sup>15</sup> 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.

<sup>16</sup> See Benvenisti *Reclaiming Democracy*, *supra* note 9 (analysing inter-judicial cooperation in the area of refugee status determination).

<sup>17</sup> Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. LAW REV. 429, 444-448 (2003) (emphasizing the "system-protective judicial process" that is "inherent in functional judicial systems")

For all these reasons interjudicial cooperation has become an increasingly popular strategy for NCs determined to protect their own authority, sustain domestic democratic processes, or rein in executive overreach. The many procedural, institutional, and normative similarities that characterize their judicial practices enable these courts to forge common grounds beneficial to all of them.

The importance and possibility of judicial cooperation is not limited to the NCs alone. By collectively engaging in a serious application of international law, NCs send a strong signal to ITs that they regard themselves as equal partners in the transnational law-making process, that they will not passively accept their decisions, and that they need to be engaged as equals in shaping international law. This is likely to limit the autonomy of ITs somewhat, but if it provokes the two sets of courts to initiate an informal process of coordination in which they are relatively equal partners, both will be beneficiaries.

Inevitably, not all courts will place the same priority on curtailing executive authority or insulating the domestic political process from outside pressures created by the policies of international organizations. The judiciaries of autocratic states and emerging democracies frequently lack the necessary independence and prestige to do either. Although courts in developed democracies usually enjoy the necessary structural independence, there has historically been enormous variation among states with respect to the relative strength of their executive and legislative branches. And while most courts are committed to preventing any erosion of the boundaries of their review authority, the scope of judicial power differs state to state.

Similarly, not all states experience international regulation with the same force. The extent to which states are likely to be affected by IO policies depends on the size and the nature of their economies, as well as on the role of their own executive branches in designing the international regulatory process. For example, courts of weaker states are likely to be more motivated to try to insulate their governments from the effect of an IO policy because it reflects the interests of powerful states more than those of their own; however, like their executive branches, the courts of weaker states often lack the power to effectively intercede.

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because “such rules are necessary to make systems work.” See also T. Alexander Aleinikoff & Robert M. Cover, *Federalism Dialectical Federalism: Habeas Corpus and The Court*, 86 YALE L.J. 1035 (1977) on federal/state courts tensions and cooperation.

Fortunately, successful intervention by NCs in the global sphere is not necessarily dependent on the action of all or even most courts. A relatively small subset of states can often be enough, especially if these courts represent powerful states. In the EU context, for example, it was the activism of the German court that initiated the protection of domestic democratic processes in other EU countries.<sup>18</sup> Among courts in the developing world, the Indian Supreme Court imposed environmental standards on the domestic governments that were later followed by other courts in the region.<sup>19</sup>

Of course, the potential effectiveness of a small group of courts also raises the specter that the activist courts will be limited to those in the most powerful developed states raising a host of familiar normative issues regarding representativeness and legitimacy. come to the fore. While these issues remain a serious concern, the fact that the courts of the larger developing countries such as India and South Africa appear to be demonstrating a wariness about the costs of global regulations<sup>20</sup> that is similar to that being reflected in the courts of most developed states suggests that at least some key constituencies in the developing world will be taken more into account, perhaps through a global inter-NC dialogue.

Finally, there is the danger that an increased willingness on the part of NCs to review the policies of IOs and the decisions of ITs is that it could ultimately lead to more rather than less fragmentation. Instead of acting together, courts might divide themselves into rival blocs whose competition will lead to sudden reversals in regulatory policies that, in turn, will generate even greater instability and incoherence. This fear should be taken seriously. In the past decade the schism between the North and South has shown no signs of being resolved. Differences in the legal traditions of democratic and nondemocratic states, especially with respect to the independence of courts, continue to be substantial. Much of the democratic momentum in the wake of end of the Cold War has clearly

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<sup>18</sup> See, e.g., Kokkot, *supra* note 10.

<sup>19</sup> Reclaiming Democracy, *supra* note 9; a similar lesson can be learned from a different context. The evolution of the doctrines that enabled courts to found their authority to adjudicate suits against foreign officials for crimes against humanity on the principle of universal jurisdiction (the cases of Eichmann (Attorney General of Israel v. Eichmann, (1962) 36 I.L.R. 277), and Pinochet (R. v. Bow St. Metro. Stipendiary Magistrate & Others, ex parte Pinochet Ugarte (No. 3), [2000] 1 A.C. 147 (H.L.)) was shaped by national courts that at certain junctures in their history felt it was moral necessity and political expedient to do so. By doing so they unilaterally provided a collective good.

<sup>20</sup> *Supra* note 13 and *infra* note 21.

waned. The two states that until recently had made the most recent economic progress, Russia and China, are unlikely to become traditional democracies any time soon. And as the current economic crisis continues to grind on, the world increasingly faces the prospect of growing nationalism and protectionism. These and a host of similar problems could easily lead the international legal system to fracture even further.

The NCs of the powerful northern democratic states should be able to preempt the potential formation of rival coalitions to some degree in they expand their informal coordination with their southern counterparts, such as the Indian and the South African courts. Fortunately, even if initial attempts at cooperation fail to succeed, the formation of rival coalitions is far from certain. For example, The BRICs<sup>21</sup> are only slowly beginning to cooperate and their ability to do so is likely to be constrained by the fact that they possess very different legal traditions and court systems. Neither Russia nor China seems interested in becoming a leader of the developing world, and cooperation between the two of them appears intermittent and limited. Brazil, India, and South Africa have the capacity to play a leadership role, but because their legal and political systems are similar to those of the developed democracies, their courts have little incentive to pursue a markedly different course, at least at this time.

This is not to suggest that even under the most favorable circumstances all NCs will conform to the same substantive policies. In fact, it is quite likely that in some discrete areas, North/South tensions may be reflected in the jurisprudence of their respective NCs. There are, for example, growing signs of cooperation among Southern courts to resist economic pressures by Northern pharmaceutical corporations to enforce trade norms or intellectual property rights that threaten domestic health or environmental policies.<sup>22</sup>

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<sup>21</sup> An acronym referring to Brazil, Russia, India, and China, developed to refer to these countries' fast-growing economies.

<sup>22</sup> A possible harbinger of this trend is the recent decision of the High Court in Madras in the case of *Novartis v. India*, in which the court refused to adjudicate Novartis's claims that the changes to the Indian patent law violated India's obligations under the TRIPS Agreement. The seemingly technical reasoning did hint at the underlying concern, the constitutional right to health (Judgment of August 6, 2007. Available at <http://www.scribd.com/doc/456550/High-Court-order-Novartis-Union-of-India> (last visited February 16, 2009)). "We have borne in mind the object which the Amending Act wanted to achieve namely, [...] to provide easy access to the citizens of this country to life saving drugs and to discharge the [legislature's] Constitutional obligation of providing good health care to its [sic] citizens." (*id.* at para. 19). This decision follows an aborted attempt of international pharmaceutical corporations to sue against a South African legislation that authorized the compulsory licensing of life-saving drugs, claiming that this was a violation of South Africa's TRIPS-based obligations. The case was dropped in 2001 after the court allowed NGOs to

Similarly, NCs of Northern countries may agree on common policies with regard to asylum seekers that differ from those adopted by NCs of developing states. Yet despite these differences, both Northern and Southern courts seem likely to continue to display an increased willingness to curb executive discretion.

### III. Prospects for Cooperation between National and International Courts.

Judicial review of IO policies by NCs is no simple panacea for the accountability problems that the IOs present. As with the implementation of any accountability measure, expanded NC review will provoke reactions on the part of those held accountable and of those whose interests are connected to them. Governments could, for example, conclude treaties which would preempt NC review or limit NC interpretation space. These responses will need to be carefully monitored with the expectation that they will require additional institutional adjustments on the part of NCs. In the absence of such vigilance, judicial activism could easily lead to conflict with IOs and ITs, and some amount of conflict with the executive branches of the powerful states is almost inevitable as they seek to preserve the discretion that they have historically enjoyed.<sup>23</sup>

The greatest immediate risk of the growing willingness of NCs to review the policies of international institutions is the potential for clashes with ITs. Should this occur, it would no doubt weaken both types of courts and lead to even greater executive dominance than currently exists. Yet here too, as with the risk of greater fragmentation discussed in the previous section, there is reason to believe that the worst case scenario can be avoided. While competition between the two sets of actors is inescapable, there

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present affidavits (Case Number 4138/98, High Court of South Africa). On this litigation see David Barnard *In the High Court of South Africa, Case No. 4138/98: The Global Politics of Access to Low-Cost AIDS Drugs in Poor Countries* 12 KENNEDY INSTITUTE OF ETHICS JOURNAL 159 (2002).

<sup>23</sup> Operating through the Counter-Terrorism Committee, under the aegis of Chapter VII of the United Nations Charter, governments limited judicial review by their national courts; In the sphere of migration there is clear evidence of European governments preempting their courts by resorting to the apparatus of the European Union to regulate migration policies (*See Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, 2001 O.J. (L 304) 12); The fragmentation of international law and the move to informal regulatory mechanisms may render the task of inter-judicial coordination more difficult (Benvenisti & Downs, *The Empire's New Clothes*, *supra* note 2).



are stronger reasons for cooperation in the long term. ITs and NCs are increasingly dependent on each other and mutually vulnerable; similarly, their prestige and authority are equally threatened by the expansion of executive branch power in the global sphere.

The likelihood of long-term cooperation remains high despite the fact that conflict is almost guaranteed in the short-term. As a purely doctrinal matter, NCs are directly and indirectly engaged in the evolution of customary international law. The decisions they make based on international law are viewed as reflecting customary international law,<sup>24</sup> and the actions that their governments take in compliance with such decisions constitute state practice coupled with *opinion juris*. Hence, the more the NCs engage in applying international law, the greater their jurisprudence will constrain IT choices when they encounter similar cases in the future, an effect ITs will undoubtedly resist. ITs are also dependent on NCs by virtue to the fact that they rely on NCs to implement their decisions.<sup>25</sup> Finally, a third important potential source of leverage for NCs involves their capacity to redraw the boundaries of IO immunity. NCs have so far participated in creating the doctrine of customary international law that holds that IOs enjoy immunity from domestic adjudication, as if they were foreign sovereigns.<sup>26</sup> Innovation by NCs in this sphere (following the earlier NC-driven partial curtailment of foreign state immunity) could expose IOs to individual suits and thereby increase substantially the operation costs of IOs.<sup>27</sup>

ITs, in turn, possess attributes that give them leverage vis-à-vis NCs and likewise raise the possibility of short-term conflict.. The general jurisdiction of the ICJ along with the narrow scope and technical expertise of ITs generally provides them with a first mover advantage. This enables ITs to shape the interpretation of international law before NCs render their own interpretation, potentially reducing domestic court discretion and limiting what they are able to accomplish through coordination. For example, a ruling by

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<sup>24</sup> 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).

<sup>25</sup> See McNollgast, *supra* note 15.

<sup>26</sup> 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)

<sup>27</sup> See discussion *infra* notes 50-53 and accompanying text.

the ICJ that incumbent state officials enjoy immunity from trial in NCs even in cases involving accusation of torture could preempt NCs from reaching the opposite conclusion, or it could create disunity among NCs on this matter.<sup>28</sup>

Perhaps even more ominously from the perspective of NCs, their traditional role as courts of last resort is increasingly being jeopardized by ITs functioning as what amounts to courts of appeal when governments lose cases involving international laws before other states' national courts.<sup>29</sup> For example, the ICJ has been effectively reviewing the failure of U.S. courts' to follow the Vienna Convention on the rights of foreign nationals charged with crimes to contact the consular officials of their home countries;<sup>30</sup> Congo "appealed" the Belgian court's decision to indict its foreign minister before the ICJ;<sup>31</sup> and Germany is now "appealing" Italian court decisions that have rejected its claims for immunity to suits for damages for World War II crimes.<sup>32</sup>

Still, such short-term conflict will dissipate over time. Doctrinal overlap and structural constraints create a measure of mutual dependence and vulnerability between NCs and ITs that can cause friction, but they can also serve as the basis for productive dialogue and cooperation. This is particularly true when the two share the common interest of curbing the growth of executive power. Defragmentation—if carefully coordinated between NCs and ITs—would benefit them both in this regard.<sup>33</sup> NCs are likely to welcome the efforts of ITs to defragment the international legal system and to broaden their authority if these actions reduce the extent to which executive branches can

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<sup>28</sup> See discussion *infra* notes 28-31 and accompanying text.

<sup>29</sup> Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 NYU LAW REV. 2029 (2004) (describing examples of review of NCs by ITs focusing in particular on NAFTA proceedings under Chapter 11 involving such situations).

<sup>30</sup> On the Breard/LaGrand/Avena cases see Sean D. Murphy, *The United States and the International Court of Justice: Coping with Antinomies* in *The United States and International Courts and Tribunals*, (Cesare Romano, ed., 2008).

<sup>31</sup> Arrest Warrant case, *supra* note 23.

<sup>32</sup> See International Court of Justice, Case concerning Jurisdictional Immunities (Germany v. Italy), Application of the Federal Republic of Germany (23 December 2008) available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=60&case=143&code=gi&p3=0>. The main Italian judgment is *Ferrini v. Germany*, 128 ILR 658 (2004). On this case see Bianchi, *Ferrini v. Federal Republic of Germany. Italian Court of Cassation, March 11, 2004*, 99 AM. J. INT'L L. 242 (2005), Pasquale De Sena & Francesca De Vittor, *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, 16 EUROP. J. INT'L L. 89 (2005).

<sup>33</sup> In saying this we do not mean to suggest that the judges share similar motivations, only that the expansion of the role of judiciary and judicial discretion are phenomena that benefit judges irrespective of the micro-foundations of their individual decisionmaking.

employ IOs to escape domestic accountability and traditional constitutional constraints. Similarly, ITs are likely to tolerate increased domestic court review if it results in slowing or reversing the process of executive-driven fragmentation that they increasingly view as the greatest barrier to increasing their own discretion and reducing the incoherence of international law. As we will see below, there is reason to believe that the effects of regulatory fragmentation on ITs and NCs are quite different, but potentially strategically complementary. Leadership on the part of ITs in the short term is out of the question. The large number, narrow mandates, and close scrutiny on the part of powerful states has made the transaction costs of collective action on the part of both IOs and ITs prohibitively high. Yet this same complexity has expanded the degrees of freedom for NCs in the same way that it has for powerful states giving them a broad array of opportunities in which to selectively intervene to further their goals of redressing the judicial deficit with little prospect of encountering organized opposition. To the extent that they can succeed in accomplishing these ends they will create foster a more judicialized environment that will ultimately work to the benefit of ITs and promote heightened cooperation between them.

To date, international judiciaries have made only modest progress in defragmenting or constitutionalizing the international legal system. What limited success they have had has come from their ability to exploit differences between state parties in connection with treaties in order to prevent states from either (1) modifying the treaty after the tribunal interprets it or (2) exiting the regime entirely if the decision does not suit them.<sup>34</sup> In such circumstances, for example in the context of the WTO, the tribunal can promote policies that diverge from the executive's initial understandings. Unfortunately, more often than not, both conditions are absent and the IT suffers from the additional disadvantage of lacking the necessary independence from the governments that have appointed them. Improved cooperation between international and national courts can potentially help to address both problems.

The relative greater independence and domestic legitimacy of NCs can indirectly and inadvertently contribute to the constitutionalization of the international sphere. The

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<sup>34</sup> Eyal Benvenisti, *The Interplay Between Actors as A Determinant of the Evolution of Administrative Law in International Institutions*, 68 LAW AND CONTEMP. PROBS. 319, 329 (2005).

process by which judges are elected or appointed and their independence once tenured results in NC judges being more insulated from executive influence than judges of ITs who are elected (and re-elected in cases where there are renewable terms) in processes subject to significant governmental influence.<sup>35</sup> NCs in most democracies also enjoy greater domestic legitimacy than do ITs. The basis of their authority – the national constitutions – is usually more immune to inter-governmental collusion. The legal system they control is not one that executive can easily exit from; hence NCs are almost invariably more independent than ITs, whose compositions and budgets are controlled by governments, and who are, at least for stronger power, often expendable.

It is therefore not surprising that in the spheres of both counterterrorism<sup>36</sup> and migration<sup>37</sup> NCs have been more aggressive and more successful in restraining governments, especially the more powerful ones, than ITs have been. The involvement of NCs also limits, if not eliminates entirely, the threat of exit from IOs by states, because such exit in and of itself will not affect the domestic court'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

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<sup>35</sup> This is especially the case with the ICJ where elections are dominated by the P5. See Ruth Mackenzie and Philippe Sands *International Courts and Tribunals and the Independence of the International Judge* 44 HARV. INT'L L.J. 271 (2003), Edward McWhinney, *Law, Politics and "Regionalism" in the Nomination and Election of World Court Judges*, 13 SYRACUSE J. INT'L & COMP. L 1 (1986). But this is also the case with time-limited appointments: The Commission on Democracy through Law of the Council of Europe (the "Venice Commission") has determined that "time-limited appointments as a general rule can be considered a threat to the independence and impartiality of judges." (CDL-AD(2002)012 Opinion on the Draft Revision of the Romanian Constitution, para. 57.)

<sup>36</sup> The European Court of Human Rights has been criticized for its timidity in reviewing governmental policies in situations of national emergencies. See OREN GROSS & FINNUALA NI AOLAIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* 268-89 (2006) ("[S]tates can rest assured, to some degree, that their overall sovereign rights to resort to exceptional measures in times of crisis are not affected, nor will their political reactions and measurements be undercut." *Id.* at 289). The result is an ineffective review mechanism that endows governmental action with legitimacy: Gross & Ni Aolain, *id.* at 324; see also Ralph Wilde, *Legal "Black Hole"?: Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 MICH. J. INT'L L. 739, 783 (2005). Recently, the House of Lords indicated its readiness to review Britain's compliance with its human rights obligations even when it operates under UN Security Council Resolutions: *R. (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)* [2007] UKHL 58 available at <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd071212/jedda-1.htm> (last visited January 10, 2008).

<sup>37</sup> Christian Joppke & Elia Marzal, *Courts, the New Constitutionalism and Immigrant Rights: The Case of the French Conseil Constitutionnel*, 43 EUROP. J. POL. RES. 823, 837 (2004), suggest that national courts, rather than the European Court of Human Rights, were the ones to promote migrant rights.

rule against them, executives may be more inclined to tolerate the ITs ruling.

For their part, ITs also bring resources to the table that can prove to be invaluable to NCs. They can facilitate coordination between NCs by endorsing, or at least by not opposing, their 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 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.

In sum, while serious areas of potential disagreement exist between NCs and ITs and are likely to persist, they will both be better off if they coordinate their actions. Acting independently will only perpetuate judicial marginalization and facilitate the further expansion of executive discretion.

Four examples are suggestive of the promise of NC-IT coordination and the character that that it might take. The first is drawn from the EU context, where assertive jurisprudence of NCs prompted the international tribunal to enlarge the scope of its authority by (1) linking the reigning treaty with human rights obligations, and (2) later asserting its review powers over IO executives who evaded such obligations. This experience has shown that persistent pressure by NCs on an IT can be used by the IT as a source of self-empowerment. What started out as an interpretation by the ECJ of the relevant EU treaties as requiring the compatibility of EU legislation with minimum criteria in the field of human rights,<sup>38</sup> culminated in 2008 in the Kadi decision,<sup>39</sup> in which the ECJ struck down EU legislation that had incorporated the UN Security Council’s “smart sanctions” in the EU legal system. This bold decision followed signals from some European NCs that unless the ECJ intervened, the NCs would step in and annul national measures that implemented that legislation. In fact, the ECJ’s Advocate General, in his opinion to the court, emphasized these signals by suggesting that it was “very unlikely that national measures for the implementation of Security Council resolutions would

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<sup>38</sup> On this interpretation, influenced by assertive NCs indicating their authority to review European measures for compatibility with their national constitutions, see J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2418-19 (1991).

<sup>39</sup> Grand Chamber decision in *Kadi v. Council of the European Union and Commission of the European Communities* (ECJ, September 3, 2008).

enjoy immunity from [national] judicial review.”<sup>40</sup>

A second example that illustrates the potential challenges as well as the promise of NC- IT coordination involves the litigation concerning immunities granted to foreign heads of states and other foreign state officials in NCs. In recent years, several NCs have grappled with the question whether international law should recognize an exception to this immunity for alleged acts of torture or genocide. The call for recognizing such an exception to immunity was founded on the alleged supremacy of the prohibition on *jus cogens* violations such as torture. In 1996, the British Court of Appeals refused to recognize such an exception in the context of an alleged case of torture by Kuwaiti officials.<sup>41</sup> But in 1999, in the famous Pinochet decision, the House of Lords accepted this claim with respect to former heads of state (while using language and logic that would also support the rejection of such immunity for *incumbent* officials).<sup>42</sup> In 2001, the Belgian courts also rejected such immunity in connection with the incumbent Congolese foreign minister.<sup>43</sup>

Both the 1996 British decision and the 2001 Belgian decision were “appealed” to ITs, the ECtHR (2001) and the ICJ (2002), respectively.<sup>44</sup> Each of the tribunals refused to recognize an exception to incumbent foreign state officials’ immunity. Instead of basing their decisions on a jurisprudential analysis of the hierarchical relationship between the different norms (whether in principle violations of *jus cogens* have doctrinal superiority over rules concerning immunity of foreign officials and therefore create exceptions to those rules) what the courts did was to carefully examine the decisions of the various NCs in cases dealing with immunity. They then concluded that they were “unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity.”<sup>45</sup>

This response is notable in two respects. First, the fact that the two ITs looked to NC opinions for guidance in the shaping of the exception to immunity<sup>46</sup> suggests that they

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<sup>40</sup> Advocate-General Maduro’s Opinion to the ECJ in the Kadi case [Maduro Opinion note 34]

<sup>41</sup> Al-Adsani v Kuwait (1996) 107 ILR 536.

<sup>42</sup> R. v. Bow St. Metro. Stipendiary Magistrate & Others, ex parte Pinochet Ugarte (No. 3), [2000] 1 A.C. 147, 244 (H.L.)

<sup>43</sup> The Belgian courts’ jurisprudence is described in the Arrest Warrant judgment, *supra* note 23.

<sup>44</sup> ECtHR, Al-Adsani v. United Kingdom, [2001] 34 E.H.R.R. 273; ICJ, Arrest Warrant *supra* note 23.

<sup>45</sup> Arrest Warrant (*supra* note 23) para 58.

<sup>46</sup> In Al Adsani (2001), the ECtHR refers to the ILC working group that “itself acknowledged, while

believe that the latter are better positioned to challenge a norm that most executives of powerful states are likely to support. Second, we suspect that the ITs reference to the fact that they were currently unable to deduce a clear pattern with respect to exceptions to immunity indicates a willingness on their part to join with NCs in embracing a common standard if the NCs themselves were able to achieve a common consensus and send them a coherent signal in connection with a series of cases.

Obviously, a risk associated with this strategy of deference to NCs is that the latter may interpret it as indicating dissension on the part of the ITs themselves. If this is the case NCs are likely to conclude that they will not be able to rely on IT support in trying to alter the existing standard. In fact, this appears to be what happened in this example. When the issue of immunity for foreign state officials returned to the British courts in 2006, this time in a case involving claimants who had accused Saudi officials for having tortured them, the House of Lords concluded that the ICJ ruling on this matter was so authoritative that the NCs were “obliged to accept.”<sup>47</sup> Nevertheless, despite such instances of miscommunication, it is difficult not to be impressed with such IT efforts to promote coordination among NCs by signaling their receptivity to such collective action on their part, and it is reasonable assume that the success rate associated with such efforts will increase over time.

A third and more fruitful example of IT-NC cooperation in opposition to the interests of the executive branches of at least some key governments relates to the issue of reparations for individual victims in connection with humanitarian law violations. NCs have been debating the question whether individuals have an international legal cause of action against foreign governments. Some courts, notably in Germany, subscribed to the traditional doctrine according to which only states of the affected citizens could invoke such a right against the violating government, but others have disagreed.<sup>48</sup> In 2004, the

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national courts had in some cases shown some sympathy for the argument that States were not entitled to plead immunity where there had been a violation of human rights norms with the character of *jus cogens*, in most cases ... the plea of sovereign immunity had succeeded” (para 62).

<sup>47</sup> Jones (Respondent) v. Ministry of Interior (Kingdom of Saudi Arabia) (Appellants), 2006 U.K.H.L. 26; also Bouzari [Ontario Court of Appeals 2004]).

<sup>48</sup> The Greek Court of Cassation rendered a default judgment against Germany for war crimes during World War II, awarding damages (Prefecture of Voiotia v. Federal Republic of Germany, Areios Pagos [Supreme Court], Case No. 11/2000, May 4, 2000, reported by Maria Gavouneli & Ilias Bantekas, 95 AM. J. INT’L L. 198 (2001)), but the German Supreme Court refused to recognize the Greek judgment (Bundesgerichtshof

ICJ's Wall opinion was worded in such a way that it appeared to give implicit recognition to individual rights.<sup>49</sup> Subsequent decisions of NCs have explicitly recognized such a right.<sup>50</sup>

The fourth and perhaps most successful example of IT-NC cooperation led to both a crucial limitation of the immunity from suits in domestic courts and the indirect imposition of requirements related to the obligations of IOs as employers. This was a case concerning IO employment practices that seemed to fall short of guaranteeing their employees rights that were comparable to those enjoyed by domestic legal systems (which were also obligatory on states by international law). Both European NCs and the European Court on Human Rights (ECtHR) itself incrementally expressed their authority and their willingness to condition the immunity from suit that the IO had enjoyed according to the then prevailing norm of international law<sup>51</sup> on the adoption by the IOs of equivalent protection of labor rights. After initial remarks by the French Court of Cassation in 1995 that raised the concern that such immunity could amount to a denial of justice, a French appellate court in 1997 rejected UNESCO's plea of immunity by directly invoking the ECtHR.<sup>52</sup> In 1999, the ECtHR endorsed this view by suggesting that domestic courts' decisions respecting IO immunity in labor disputes were subject to scrutiny for their compliance with European human rights law. According to this court, respect for the IO immunity would be conditional on the IO's provision of a reasonable alternative means for securing the rights of those employed by the IO.<sup>53</sup> As August

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[BGH] [Supreme Court], *Distomo Massacre Case*, BGH – III ZR 245/98 (June 26, 2003)). The Italian Court of Cassation reached a conclusion similar to that reached by the Greek court in a suit brought by Greek and Italian citizens against Germany (see supra note 31).

<sup>49</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ICJ Advisory Opinion (2004) para.151 (referring to the possible responsibility for “providing for compensation or other forms of reparation for the Palestinian population”).

<sup>50</sup> The Italian Court of Cassation ( supra note 31); The Israel Supreme Court, *The Public Committee against Torture in Israel v. The Government of Israel (Targeted Killing case)* (2006).

<sup>51</sup> On this “functional immunity” and its rationales see JAN KLABBERS, *AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW* (2002) at 146-155; HAZEL FOX, *THE LAW OF STATE IMMUNITY* (2<sup>nd</sup> Ed, 2008) 724-734.

<sup>52</sup> August Reinisch, *The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals* 7 *CHINESE J INT'L L* 285, 297 (2008).

<sup>53</sup> *Beer and Regan*, Application No. 28934/95, European Court of Human Rights, 18 February 1999, (1999), ECHR 6; *Waite and Kennedy*, Application No. 26083/94, European Court of Human Rights, 18 February 1999, (1999), ECHR 13; 116 ILR 121, The court makes the following general statement (in *Waite*, para. 67): “The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the



Reinisch demonstrates, this attitude adopted by the ECtHR subsequently “inspired”<sup>54</sup> various NCs in Europe to scrutinize the treatment of employees by IOs situated in their territory.

A major source of friction between international and national courts that is not likely to disappear anytime soon is the amount of independence NCs have in implementing the judgments of ITs. Whereas ITs usually expect NCs to comply fully with their decisions, NCs insist on preserving their right to exercise discretion. From their perspective as guardians of the domestic constitutions, NCs believe that renouncing that right would be to further incentivize their executives to short-circuit the domestic democratic process and delegate greater authority to the relatively more compliant IO and IT system.

This NC concern was apparent in the recent decision of the U.S. Supreme Court in the case of *Medellin v. Texas*<sup>55</sup> where the court refused to give effect to the ICJ ruling in domestic U.S. law, despite the U.S. president’s endorsement of that ruling. The court determined that the president did not have the constitutional authority to demand that U.S. courts comply with ICJ judgments. The justices (including those dissenting) shared the concern that the U.S. President, acting alone or with the advice and consent of the Senate, would deprive state and federal courts of the authority to determine the domestic effects of US international obligations.<sup>56</sup>

While this source of friction is likely to persist far into the future, it is hoped that the damage it creates will decline as NCs and ITs acquire more experience in dealing with each other. Interaction may not reliably result in mutual affection, but it should lead to the development of more nuanced “terms of engagements,” greater mutual respect that goes beyond the binary dual/monist formal divide between the national and the international legal systems,<sup>57</sup> fewer jurisdictional confrontations,<sup>58</sup> and perhaps even a

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protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.

<sup>54</sup> Supra note 51, at 295.

<sup>55</sup> *Medellín v. Texas*, No. 06-984 (U.S. Mar. 25, 2008).

<sup>56</sup> At p. 2, see also Stevens (concurring) at 3, Breyer (dissenting) at 19 (“ICJ decisions .. must be domestically legally binding, and enforceable in domestic courts *at least sometimes.*”) (emphasis added) also at 24

<sup>57</sup> In this vein see Matthias Kumm, *Democratic Constitutionalism Encounters International Law. Terms of Engagement*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 256 (Sujit Choudhry, Ed., 2007).

<sup>58</sup> YUVAL SHANY, *REGULATING JURISDICTIONAL RELATIONS BETWEEN NATIONAL AND INTERNATIONAL*

more well-defined division of labor between the two types of courts.

#### IV. Conclusion

The tendency of IOs to facilitate the expansion of executive power at both the state and the international level is widely acknowledged. Designed by the executive branches of powerful states, IOs overwhelmingly remain agents of their creators. As a result, the international system in its current form lacks the checks and balances that have played such an important role in sustaining and safeguarding democratic deliberation and human rights in the domestic setting.

In this essay we argued that there is scattered evidence to suggest that NCs are gradually positioning themselves to check the effects of the IO-driven growth in executive power and to promote the emergence of something reminiscent of a Madisonian constitutional legal order at the global level. To accomplish this, NCs are increasingly interacting with each other and with ITs in unexpected and unprecedented ways.

While such interaction runs the risk of creating conflict that could further fracture an already overly fragmented global legal system, there is a reasonably good chance that such destructive mutual conflict will be avoided because cooperation benefits both parties. Recent events suggest that both NCs and ITs are learning that isolated action on the part of individual courts is far less likely to be effective than action that is informally coordinated through expectations generated by historical experience and a common professional language. Most importantly, NCs and ITs increasingly share a mutual desire to curb executive discretion, a goal that would bolster the judicial independence on which both rely. The process of achieving this goal holds out the potential of beginning to lay the groundwork for a more effective global system of checks and balances that is a necessary institutional component of any constitutionalized system.

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COURTS (2007) (suggesting comity and other doctrines that would diffuse jurisdictional conflicts between NCs and ITs).