The Legitimacy of International Law: A Constitutionalist Framework of Analysis

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Abstract

Does international law suffer from a legitimacy crisis? International law today is no longer adequately described or assessed as the law of a narrowly circumscribed domain of foreign affairs. Its obligations are no longer firmly grounded in the specific consent of states and its interpretation and enforcement is no longer primarily left to states. Contemporary international law has expanded its scope, loosened its link to state consent and strengthened compulsory adjudication and enforcement mechanisms. This partial emancipation from state control means that domestic accountability mechanisms are becoming ineffective as a means to legitimate international law. Correspondingly, the legitimacy of international law is increasingly challenged in domestic settings in the name of democracy and constitutional self-government. This article addresses this challenge. It develops a constitutionalist model for assessing the legitimacy of international law that takes seriously the commitments underlying constitutional democracy. At the heart of this model are four distinct concerns, each captured by a distinct principle. These principles are the formal principle of international legality, the jurisdictional principle of subsidiarity, the procedural principle of adequate participation and accountability *as well as the* substantive principle of achieving outcomes that are not violative of fundamental rights and are reasonable. *Such a framework provides a middle ground between national and international constitutionalists. Whereas the former sometimes suggest that any law not sufficiently connected to domestic legal actors is suspect legitimacy-wise, the latter tend to underplay what is lost democracy-wise as decision-making is ratcheted up from the national to the international level.*

Some 18 years ago, before the fall of the Berlin wall and the end of the Cold War, Tom Franck observed that no one seemed to be asking fundamental questions about the legitimacy of international law.[1] This observation no longer holds true today. International law's legitimacy has become a central concern. Contemporary

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1 Franck, 'Why a Quest for Legitimacy?', 21 *UC Davis L Rev* (1987) 535.

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critiques of international law take many forms.[2] Particularly influential in recent years are critiques made in the name of commitments of constitutional self-government and democracy. Armin von Bogdandy's contribution to this symposium provides an illuminating overview of an array of conceptions of democracy and their implications for the normative assessment of international law, many of them critical of the current state of international law.[3] Furthermore, claims connected to democracy and constitutional self-government have recently been made by national courts and constitutional scholars to challenge certain aspects of contemporary international legal practice.[4] Leading international law scholars are beginning to suggest that international law is suffering from a legitimacy crisis.[5]

Questions concerning the legitimacy of international law are not just relevant for deciding what the future of international law should be.[6] They can be reframed as questions about the moral force of international law or, to use more traditional jurisprudential vocabulary, the *duty to obey international law*. The very idea of legitimacy develops clearer contours when connected to questions of obedience. Only if and to the extent that international law is legitimate is there a moral duty to obey international law.[7] Such a duty, to the extent it exists, is of central concern for citizens governing themselves through the framework of a national constitution. International law may generally be addressed to the states, but in constitutional democracies the state is merely the institutional framework through which citizens govern themselves.

This makes it possible to refocus the discussion of the legitimacy of international law by asking the following questions: *To what extent should citizens regard themselves as morally constrained by international law in the collective exercise of constitutional*

[2] These critiques range from critiques of the structure of legal discourse, e.g.. M. Koskiennemi, *From Apology to Utopia* (1989) to feminist critiques of international law, e.g. H. Charlesworth, C. Chinkin and S. Wright, *Feminist Approaches to International Law*, available at 85 *AJIL* 613 (1991) to post-colonial critiques, e.g. T. Mahmud, *Postcolonial Imaginaries: Alternative Development or Alternatives to Development*, available at 9 *Transnat'l L. & Contemp. Probs.* 25 (1999).

[3] See Bogdandy, 'Globalization and Europe: How to Square Democracy, Globalization, and International Law', *EJIL* (in this volume).

[4] In the constitutional context, arguments from democracy tend to serve one of three purposes. They serve to justify claims that a rule of international law does not pre-empt the application of a conflicting norm of domestic law in specific contexts. They are used to justify the claim that little or no weight should be given to international law as persuasive authority when interpreting national constitutions. And they can serve as an argument to limit the scope of the Treaty-making power and the participation in certain kind of international institutions. The infamous *Maastricht* decision by the German Constitutional Court is perhaps the best known judicial exemplification of this trend: see *BVerfG* (1993) 89, 155. In the US so-called 'revisionist' scholars, John Yoo, Jack Goldsmith and Curtis Bradley among them, have articulated arguments of this sort. For an overview of US constitutional concerns with international law see Young, 'The Trouble with Global Constitutionalism', 38 *Tex Int'l L J* (2003) 527. See also Rubenfeld, 'The Two World Orders', *Wilson Quarterly* (Autumn 2003).

[5] Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy', [2004] *ZaöRV* 64.

[6] In fact it may make more sense to frame discussion on what international law *ought to become* in terms of an ideal of international justice, rather than legitimacy.

[7] See J. Raz, *The Authority of Law* (1979) (linking the duty to obey the law to the law actually having the legitimate authority it claims to have).

government? Are they morally obligated to always comply with international law? Should they design domestic institutions with a view to ensuring that international law is enforced, even when domestic majorities disagree with the policies it implements? Or are citizens morally free to democratically reject and disobey international law as a legitimate exercise of constitutional self-government, if they are strong enough and willing to 'face the music' internationally? Should the way citizens structure domestic institutions be guided by a strong idea of constitutional self-government and democracy, suggesting that domestically accountable institutions need to independently assess and democratically endorse the policies embodied in rules of international law, before international law can be enforced domestically? What is the appropriate framework for thinking about these questions? What are the relevant normative concerns?

The purpose of this article is to present an analytical framework for thinking about these questions. It hopes to clarify the range and nature of the normative concerns that any discussion of the legitimacy of international law needs to incorporate to be plausible. The article consists of three parts. The first provides a historical context and explains why legitimacy challenges occur now and why they take the form that they do (Section 1). The second part suggests that the idea of democracy is unlikely to adequately capture the core range of relevant legitimacy concerns. Instead the legitimacy of international law ought to be assessed using a richer *constitutionalist* framework (Section 2). The constitutionalist framework proposed consists of four principles. These principles address *formal* concerns relating to the idea of international legality, *jurisdictional* concerns relating to subsidiarity, *procedural* concerns relating to participation and accountability, and *substantive* concerns relating to individual rights and outcomes. The legitimacy of specific norms of international law can only be assessed on the basis of an overall judgment that takes into account the whole range of these concerns. The third part describes implications of adopting a constitutionalist model for assessing the legitimacy of international law and describes how it is related to other frameworks of analysis (Section 3).

1 The Legitimacy Challenge to International Law in Context

After World War II the positivist stranglehold on legal and political thought gradually loosened. The Nuremburg and Tokyo Trials and the Universal Declaration of Human Rights adopted by the General Assembly in December 1948[8] signalled a return to a more normatively focused jurisprudence in the service of anti-Nazism.[9] New constitutions in Western Europe typically contained judicially enforceable constitutional rights. With the maturation of national courts' rights jurisprudence in many jurisdictions, jurisprudential theories became more strongly engaged with issues of principle, justice and legitimacy. Furthermore, rights-based political morality was a *liberal* political

[8] For an insightful account of the drafting of the Declaration and its political context see M.A. Glendon, *A World Made New* (2001).

[9] The impact on rights culture in the US is illuminatingly described by R. Primus, *The American Language of Rights* (1999).

morality. It morally distinguished the West from Communism and provided normative significance to the Cold War that went beyond the idea of a competitive struggle for military, technological and economic superiority. By the 1980s the focus of normative theorizing had expanded from jurisprudential accounts of rights and questions of legal reasoning to constitutional theory more generally. Not only were legal rights embedded in a rights-based conception of liberal justice, but the national constitution, as a whole, was reconceived as embodying a commitment to a coherent ideal of constitutional justice, the specifics of which remain very much in dispute. But there is a consensus today that legitimacy of domestic law is predicated on it being justifiable in terms of a commitment to liberal constitutional democracy, properly understood.

Liberal democratic constitutionalism, and the rich set of theories that have been developed since World War II to legitimate it,[10] coexisted with international law during the Cold War, but did not engage it. As Tom Franck observed in 1987, 'philosophy of international normativity . . . [tended] . . . to appear, at most, as the scraggly tail on elegant, fully developed theories intended to explain national legal phenomena'.[11] Such a lack of interest is puzzling. It cannot be explained by either the fact that international law generally addresses states rather than individuals or that international law leaves it to states to determine how domestically international law should be implemented (1). What then accounted for this lack of interest (2)? And why is the legitimacy of international law emerging as a question of central concern today (3)?

1. From the perspective of citizens in liberal constitutional democracies trying to assess what makes political and legal institutions that affect them legitimate, the lack of interest in international law is more puzzling than it may appear at first. The answer to the puzzle is certainly not that international law is and, to a significant extent, continues to be mostly *addressed to states* rather than individuals. The state, from the perspective of citizens in a constitutional democracy, is just the institutional framework within which citizens govern themselves. Anything that imposes constraints on states also imposes constraints on citizens and how they govern themselves. Furthermore, the reasons do not lie in the soft nature of the demands that international law makes on states. International law does not consist of a set of suggestions that states are encouraged to take to heart, depending on domestic political and legal constellations. Instead, *international law makes a claim to authority*. It is a trite proposition of international law that domestic law, even domestic constitutional law, does not serve as a justification for non-compliance with international legal obligations.[12] States do enjoy considerable discretion to determine *how* to internally organize their institutions so as *to ensure compliance*. International law does not generally

[10] Perhaps the most influential of such accounts is J. Rawls, *A Theory of Justice* (1971). In Europe the writings of Habermas have similar influence, see in particular J. Habermas, *Between Facts and Norms* (German 1992, English 1996).

[11] Franck, *supra* note 1, at 537.

[12] See Art. 27 of the Vienna Convention of the Law of Treaties. For earlier jurisprudence with regard to international law more generally see also Polish Nationals in Danzig (1931), PCIJ Ser. A/B, no.44, at 24: 'It should . . . be observed that . . . a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law . . . '.

require, for example, that domestic courts must have jurisdiction to enforce international law. But if a provision of international law prescribes a certain behaviour, no feature of the domestic legal system can be invoked as a justification for non-compliance. Democratic discontent with specific rules of international law or more pressing domestic priorities are not valid justifications for non-compliance under international law.

2. The reasons for the lack of interest in international law's legitimacy during the Cold War lie elsewhere. Simplifying somewhat, international law in the period between World War II and the end of the Cold War appeared to citizens of Western constitutional democracies and domestic lawyers in one of three guises: it was ineffective and unreliable, addressed to other people, or occupied a highly specialized and narrow field that raised few legitimacy concerns.

First, international law was widely believed to be *ineffective and unreliable* as a guarantor of international peace and security. Before the backdrop of the Cold War and the nuclear arms race, it is plausible for many non-professional international lawyers to have had sympathy with 'realist' assessments of 'high politics' in international affairs. It may not implausibly have seemed as if those well versed in the study of Thucydides, Machiavelli and Metternich or the lay mathematicians with a knack for multi-level iterated prisoner's dilemmata were more likely to have a firm handle on the major problems of the world than 'peace through law' enthusiasts. Legal institutions, procedures and rules may have had a role to play during the Cold War. But there is something deeply misleading in describing the Cold War order as an order established by international law.

Second, there were areas of international law and practice that flourished during the Cold War and had a significant impact on people's lives. But to the extent that international law was perceived as a social force, it was a social force affecting the lives of *other people*. There could be little doubt that, for better or for worse, the International Monetary Fund (IMF) and the World Bank were central actors in developing countries and that the United Nations played an important role in the process of decolonization. But from the perspective of citizens in comparatively rich Western democracies, international law had serious effects primarily for *other people*. From the perspective of the Western democracies that had triumphed in or had learnt their lessons from World War II, other people were the ones in need of decolonization and development and needed to be taught how to respect human rights by international law. Citizens in Western democracies, on the other hand, could rely and did rely on the resources of domestic legal systems. Compare the legal value of the non-binding Declaration of Human Rights with the embodiment of human rights in national constitutions as the supreme law of the land. Compare the thick practice of constitutional rights adjudication in many jurisdictions by the early 1970s with the comparatively modest impact of the International Covenant on Civil and Political Rights.[13] Compare the political struggles, legislative activities and constitutional debates relating to the

[13] In part the significance of the ICCPR was that it served as a model for a national constitutional bill of rights: see *International Law and Constitution-Making*, available at, 2 *Chinese J. Int'l L.* (2003) 467.

establishment of a welfare state to the discussions of the New Economic Order. International law had few contributions to make to the great domestic post-WWII struggles in liberal constitutional democracies.

Third, to the extent that international law was effective and established meaningful obligations on Western constitutional democracies, they were largely the kind of *narrow and specific Treaty-based obligations* characteristic of the classical conception of international law. Diplomatic and consular relations, international mail delivery, aviation etc. are the subject of innumerable generally effective bilateral and multilateral treaties. But these kinds of treaties do not raise serious legitimacy questions from the perspective of citizens governing themselves within a liberal democratic constitutional framework. For the most part, these treaties pertain to the field of foreign affairs narrowly conceived, often involving technical issues of low political salience. Here international law addresses questions for which the national legal process is unlikely to have produced independent and potentially conflicting results. Furthermore, these treaties impose relatively specific obligations on states. Given the consent requirement, all that is necessary to ensure constitutional legitimacy is to establish a constitutional framework that ensures that whoever is authorized constitutionally to give that consent is subjected to adequate democratic controls domestically. And even if some treaties were more ambitious, the flexibility ensured by the general absence of compulsory dispute resolution and the possibility of states to interpret international law for themselves provided further guarantees that ultimately international law would not impede constitutional self-government.

2. In the 15 years following the end of the Cold War, developments in international law have brought serious legitimacy issues to the fore. The moment of triumph for the post-World War II model of liberal constitutional democracy at the end of the Cold War[14] is increasingly feared to have been the prelude to its decline. This decline is linked to the emergence of an international legal order that increasingly serves – if not as an iron cage – certainly as a firmly structured normative web that makes an increasingly plausible claim to authority. It tends to exert influence on national political and legal processes and often exerts pressure on nations not in compliance with its norms. Actors in constitutional democracies are increasingly engaging seriously with international law's claim to authority.[15] What they find once they seriously engage international law gives rise to concern. Citizens find themselves in a *double bind*: the meaning of participation in the democratic process on the domestic level is undermined as international law increasingly limits the realm in which national self-government can take

[14] See F. Fukuyama, *The End of History and the Last Man* (1991).

[15] The debates about international law's legitimacy in constitutional democracies arises from the assumption that *international law's claim to authority* raises legitimacy problems. Once that claim is not taken seriously and engaged, there are no reasons to engage in a legitimacy debate. Without international law's claim to authority in the background, international law discourse is just one more tool that in some very limited domestic contexts advocates for certain policy outcomes latch onto. For the claim that international law provides merely a new language to engage in policy advocacy, see Tushnet, 'Transnational/Domestic Constitutional Law', 37 *Loyola of Los Angeles L R* (2003) 239. This article takes the perspective of citizens that engage international law's *claim to authority* seriously.

place. At the same time, there are no comparable democratic institutions and practices established on the international level. What has happened?

Political choices concerning the desirability of economic globalization and the assessment of new security threats have given shape to a new kind of international law. This international law is, largely, built on institutions, treaties and the substantive international law established after WWII. On the surface, the transformation of international law after World War II, with the establishment of the UN, the IMF, World Bank and the GATT, was significantly more impressive than changes that occurred in the 1990s, notwithstanding major institutional innovations such as the International Criminal Court and the quasi-judicialization of global trade law within the World Trade Organization (WTO). Yet, subtle institutional changes, both formal and informal, have transformed the practice of international law across a wide range of issues.[16] These changes have occurred along three dimensions.

First, the *subject matter* of international law has expanded significantly. Today there is significant overlap between the kind of questions that traditionally have been addressed by liberal democracies as domestic concerns and the kind of questions that international law addresses. Globalization has not led to a world in which borders are irrelevant. But it has led to a world in which decisions on *how* borders are relevant are increasingly made outside of the national democratic process. Who and what can cross a border and under what conditions exactly is increasingly circumscribed by rules of international law. Furthermore, the negotiation of these rules creates pressures to harmonize other regulatory choices. In order to ensure agreement that certain consumer goods can freely cross borders, an agreement on technical specifications concerning adequate consumer protection may be necessary. Freedom of capital movement creates pressures to ensure that states enforce effective money-laundering controls, to prevent it becoming a tool for organized crime, etc. . . . Trade issues addressed in the context of the WTO are no longer conceived as involving exclusively economic questions. There are pressures to link it to environmental concerns and human rights. In the context of Chapter VII of the UN Charter international peace and security encompasses concerns relating to money laundering and national criminal law,[17] as well as violations of human rights. It seems as if the dictum of an eminent authority of European law today applies equally to international law: 'There simply is no nucleus of sovereignty that the . . . States can invoke, as such, against (it).'[18] The idea of 'matters essentially within the domestic jurisdiction of any state'[19] has little practical significance for cabining in the domain of international law. International law, then, has been the handmaiden of denationalization by having generated an increasingly dense set of substantive rules that directly concern questions traditionally decided by national legal processes.

[16] J. Weiler has used the suggestive idea of geological layering to describe international law's complex evolution. In the last decade or so a regulatory governance layer has been added to previously existing layers. See Weiler, *supra* note 5.

[17] UN/SC/Res 1373 (2001) and 1566 (2004).

[18] See Lenaerts as cited in J. Weiler, *A Constitution for Europe* (1999), at 43.

[19] See Art. 2 VII UN Charter.

Second, the *procedure* by which international law is generated increasingly attenuates the link between state consent and the existence of an obligation under international law. Traditionally international legal obligations arose either because of specific treaty obligations assumed by states ratifying the treaty or as a matter of customary international law reflecting longstanding customary practice of states. Treaties today, though still binding only on those who ratify them, increasingly delegate powers to treaty-based bodies with a quasi-legislative or quasi-judicial character. Within their circumscribed subject-matter jurisdiction, these bodies are authorized under the treaty to develop and determine the specific content of the obligations that states are under. This means that, though states have consented to the treaty as a framework for dealing with a specified range of issues, once they have signed on, the specific rights and obligations are determined without their consent by these treaty-based bodies.[20] The link to state consent is further attenuated by the *expansive interpretation* of the jurisdiction of these bodies, perhaps most dramatically exemplified by the quasi-legislative actions undertaken by the Security Council post-September 11.[21] Furthermore, it is doubtful that much legitimating value can be placed on a state's consent to a treaty, when the state is confronted with a take it or leave it option and the costs of not participating are prohibitively high. Finally, the link between a particular legal obligation of a state and its consent has not just been attenuated by the proliferations of regulatory multilateral treaties. Customary international law (CIL), too, is no longer thought to require a long general and consistent state practice followed by states from a sense of legal obligation. Instead, so-called 'modern' CIL significantly discounts the requirement of general and consistent state practice in favour of an approach that focuses primarily on statements. Particularly in the area of human rights, declarations made by representatives of states either in international fora such as the General Assembly or in the context of multilateral treaty-making are central to the inquiry whether a rule of CIL has developed or not.[22] Here too the effect is to further disconnect the creation of an international legal obligation from a state's specific consent.

Third, states have *less flexibility in the interpretation and enforcement of international law*. In part, this is because of *the relative specificity of the obligations* involved. In part it is because of the spread of *compulsory third party dispute resolution*. Both are connected

[20] There are a number of such treaties presently in force, and they cover a vast number of subject areas. The following is a sampling of such treaties: in the realm of environmental law (the Vienna Convention for the Protection of the Ozone layer, the Montreal Protocol on Substances that Deplete the Ozone layer, the United Nations Convention on the Law of the Sea, and the Convention on Biological Diversity); in the realm of commercial law (the World Trade Organization, the North American Free Trade Agreement, and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards); in the realm of chemical weapons control (The Chemical Weapons Convention); in the realm of collective security (The United Nations and The North Atlantic Treaty); and in the realm of international criminal courts (the creation of *ad hoc* tribunals for the Former Yugoslavia and Rwanda as well as the International Criminal Court). See generally, T.M. Franck (ed.), *Delegating State Powers: The Effect of Treaty Regimes on Democracy and Sovereignty* (2000).

[21] See Szasz, 'The Security Council Starts Legislating', 96 *AJIL* (2002) 901.

[22] For a description and evaluation of that transformation see A. E. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 95 *AJIL* (2002) 757–791.

to the proliferation of international courts and tribunals. General principles of international law or abstract norms of CIL do not in themselves provide the kind of guidance that courts tend to insist on or national politicians are likely to respect when they are asked to assess whether a domestic law is compatible with international law. Besides the steady codification of customary international law generally throughout the past century, the panoply of courts and tribunals that have been established on the international level in the last decade[23] have played a central role in specifying the obligations that states are under in the context of various treaty regimes. Because of the greater specificity of international legal obligations, discrepancies between international law and domestic law tend to become increasingly visible and more difficult to gloss over. In conjunction with more effective monitoring and higher reputational and other costs to non-compliance, international law has in many areas and in many jurisdictions developed into a serious constraint on national political and legal processes.

International law that shares these three features will be referred to as *international law as governance*. International law as governance blurs the distinction between national and international law. Both with regard to the scope of its subject matter and the processes used to generate, interpret and apply it, it is no longer apparent what structurally distinguishes international law from national law, except, of course, for one central point: international law is not generated within the institutional framework of liberal constitutional democracy and does not allow for a central role for electoral supervision. In this sense it lacks democratic pedigree.

Of course representatives of states, authorized by national constitutions are still the major actors on the international level, even though non-state actors such as international courts and tribunals, transnational bureaucracies, NGOs, MNCs and even individuals have emerged as significant participants in the international legal process. Networks of national governments, national administrators and national courts remain at the very heart of global governance.[24] As Anne Marie Slaughter aptly puts it: the state has not disappeared, it has become disaggregated.[25]

But that does little to provide the governance process with democratic legitimacy. State actors as an integral part of a global network, interacting with transnational bureaucracies and interest groups, cannot meaningfully be connected to an ideal of national self-government, either with regard to procedures followed or outcomes generated. Furthermore, state actors that are deeply embedded in transnational networks are notoriously difficult to hold democratically accountable on a national level. The great institutional loser in the shift from classical international law to international

[23] See Boon, 'Instances of Criminal Courts', in T. M. Franck (ed.), *Delegating State Powers: The Effect of Treaty Regimes on Democracy and Sovereignty* (2000), 171–208 (describing the emergence of the *ad hoc* tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) and the International Criminal Court, and analysing the constitutional questions involved). For an excellent resource for information on these and other international courts and tribunals, see the website of the Project of International Courts and Tribunals (PICT), available at http://www.pict-pcti.org/ (visited on 28 April 2003).

[24] A.-M. Slaughter, *A New World Order* (2003).

[25] *Ibid.*

law as governance is the national legislature and the national electoral process, the very institutions believed to be at the heart of liberal constitutional democracy.

It seems that the introduction of the argument of democratic legitimacy into the world of constitutional discourse to address just these kinds of concerns occurred as recently as November 1993 when the German Constitutional Court pronounced itself on the constitutionality of the Treaty of Maastricht.[26] The complainant, ironically a former high-ranking official in the European Commission, had invoked a violation of his constitutional *right to vote* on the national level as a cause of action. He claimed that the right to participate in the democratic process on the national level was in substance eroded as further regulatory authority was delegated from the national to the European level by the Treaty of Maastricht. Decisions made under those delegated powers on the level of the European Union take precedence over national law and pre-empt any parliamentary actions to the contrary. The Court, to the surprise of many, held the action to be admissible but then went on to issue the Maastricht Treaty a constitutional bill of health. But as it did so, the Court drew lines in the sand with regard to limits and the direction of future developments of European integration. The Court made its understanding of democracy the central pillar of its argument and a guiding concern for fashioning doctrines relating to the enforcement of supranational law.

It is not surprising that arguments from democracy were first marshalled by the German Constitutional Court adjudicating issues of European integration at the time that it did. On the one hand, European law had long established itself as hard law. As a general matter, litigants in national courts could effectively enforce EC Law, even in the face of conflicting national law.[27] Furthermore, regulatory authority exercised by EU institutions on the European level was not just expansive with regard to its jurisdiction. Since 1987 it had also, to a large extent, become non-consensual. Since the Single European Act, representatives of the most powerful nations in Europe could be outvoted in the European jurisgenerative process. Yet, even though the Treaty of Maastricht had introduced the idea of European citizenship, electoral politics has only an insignificant role to play on the European level (notwithstanding the existence of a European Parliament). There is no government promoting a legislative agenda that can be voted out of office.

Even though there are many features of European integration that suggest that global processes are unlikely to simply replicate European processes with a time lag, there are striking structural similarities between contemporary international law and European law that go right to the legitimacy issue. Both international law and European law are no longer limited jurisdictionally to a relatively clearly circumscribed domain. In both European and international law the link between state consent and the emergence of legal obligations is often attenuated. Certainly, the proliferation of non-consensual international obligations created by diffuse sets of actors has spread significantly. And both in international and European law the cost of non-compliance

[26] *BVerfGE* (1993) 89, 155.

[27] For a general overview of the reception of EU law in the domestic systems of European nations see, generally, A.M. Slaughter, A. Sweet and J. H. H. Weiler, *The European Courts and National Courts* (1998).

for national actors is increasingly high, as monitoring and enforcement mechanisms are strengthened. On the one hand globalization is feared or hoped by many to proceed through the establishment of forms of governance loosely comparable to those established in the European Union.[28] On the other hand, constitutional arguments invoking democracy are beginning to be articulated in Western liberal democracies to challenge the legitimacy of international law, in much the same way as discussion of the democratic deficit has dominated European debates in the last decade.

2 The Constitutionalist Model: A Framework of Four Principles

How then should citizens in liberal constitutional democracies engage international law? To what extent should they see themselves constrained by it and design domestic institutions so that compliance with international law is assured? To what extent should they see themselves free to disregard it and design institutions to ensure the desired flexibility? If a duty to obey international law is a function of its legitimacy, how should the legitimacy of international law be assessed?

In the following I will present a constitutionalist model for thinking about the legitimacy of international law. At the heart of the model are four distinct concerns, each captured by a distinct principle. These principles are the formal principle of international legality, the jurisdictional principles of subsidiarity, the procedural principle of adequate participation and accountability, as well as the substantive principle of achieving outcomes that are not violative of fundamental rights and are reasonable.

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

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

[28] See generally Slaughter, 'The New Real World Order', 76 *Foreign Affairs* (1997) 183.

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

A *Formal Legitimacy: The Principle of International Legality*

The first principle is formal and establishes a *prima facie* case for the legitimacy of international law. The principle of international legality generally requires that addressees of international law should obey it.[29] International law is *prima facie* legitimate and deserves the respect of citizens in liberal constitutional democracies simply by virtue of it being the law of the international community. International law serves to establish a fair framework of cooperation between actors of international law[30] in an environment where there is deep disagreement about how this should best be achieved. In order for international law to achieve its purpose, those who are addressed by its norms are morally required to generally comply, even when they disagree with the content of a specific rule of international law.[31] There is *a prima facie duty of civility* to comply with even those norms of international law that the majority of national citizens believe to be deficient.[32] Otherwise international law has no chance of achieving its purpose.

The benefits of a sufficiently well-established international legal system for the international community are well rehearsed and include the following.[33]

First, an international community that makes do without the resource of a well-developed legal system in which the authority of law is generally recognized is impoverished. An effective international legal system is *an asset to the international community as a whole*. Law is an effective instrument that enables and fosters the establishment of welfare-enhancing cooperative endeavours between various actors. Law can help reduce transaction costs for setting up trans-border cooperative schemes. It is a tool that helps build trust between international actors and thus facilitates engagement in mutually beneficial cooperative endeavours, thereby enhancing global welfare. Law then can be a tool that helps foster the development of transnational communities, internalize externalities, prevent prisoner-dilemma-based misallocation of resources, realize efficiency gains, etc. . . .

[29] For a discussion of the idea of the International Rule of Law as an argument for national courts to enforce international law over national law see Kumm, 'International Law Before National Courts: The International Rule of Law and the Limits of the Internationalist Model', 44 *Virginia Jl of Int'l L* (2003) 19–32.

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

[31] The idea of a duty to support the International Rule of Law is in some sense analogous to what Rawls has called the natural duty to support a just constitution. See J. Rawls, *A Theory of Justice* (1971), at 333–342.

[32] According to Rawls there is a 'natural duty of civility not to invoke the faults of social arrangements as a too ready excuse for not complying with them': Rawls, *supra* note 31, at 355.

[33] The following draws on Kumm, *supra* note 29.

Second, the international rule of law also contributes to the protection of domestic groups within a particular state who are protected by international law. International law *contributes to the checks and balances of a constitutional system*, complementing domestic separation of powers and federalism as another means of achieving this. An effective institutionalization, international legality also has the tendency to limit the options of the executive branch to claim foreign affairs prerogatives and thereby shift power to the executive branch in a way that endangers and potentially destabilizes democracy on the national level. In these ways, the international rule of law has the tendency to *lock in and stabilize liberal constitutional democracy* on the domestic level.

Third, an effective international system also provides predictability *and enhances the freedom of individual actors*. The rule of law helps secure fixed points of reference by stabilizing social relationships and providing a degree of predictability for them. In this way the international rule of law protects and enhances the freedom of various actors by creating a predictable environment in which they can make meaningful choices, just as the rule of law does on the national level.[34]

Finally, an effective international legal system has the potential to curtail the illegal abuse of political power. It prevents powerful actors who would otherwise have the capacity to exercise political power to the detriment of those protected by law from doing so. More specifically, there are three kinds of problems that an effective international legal system can help mitigate. The first is related *to asymmetries in power and the potential for political abuse* that such an asymmetry entails. This abuse can take the form of unjustified coercive intervention or other forms of unilateral impositions. Under the principle of international legality, less powerful states tend to be more effectively protected against impositions by powerful states. Just as the rule of law became the battle cry for political reformers in much of Europe in the 18th and early 19th centuries to curb what was experienced as the arbitrary exercise of authority by powerful actors on the domestic level, so the international rule of law has been embraced by many in the 20th century as a means to reign in the arbitrary exercise

[34] This may be of lesser significance for powerful governments, which have the resources and bureaucracies to process information and negotiate commitments concerning the behaviour of other actors in other ways. But non-governmental actors, too, increasingly have a planning horizon expanding beyond their jurisdiction and something real to gain. Their radius of action is not limited to the jurisdiction of the state they live in. That is most obviously true for multinational corporations (MNCs). It is not surprising that MNCs have been among those non-governmental actors pushing the Rule of Law both on the international and on the national level aggressively in the areas that concern the scope of their decision-making. Corporations want to be able to make strategic decisions knowing that market access according to international rules will be guaranteed. They want budgets and projects relating to research and development to be determined knowing that intellectual property will be protected according to international rules. Investors can make informed investment decisions without having to factor in the risks and insurance costs relating to confiscation of property in violation of international standards. But ordinary citizens, too, have something to gain. Citizens have an interest in being able to rely on being treated in accordance with international legal standards when in a foreign country, and in having access to diplomatic and consular personnel, should they require it. Citizens can also make their decisions knowing that they can rely on certain basic guarantees relating to fundamental rights to a greater extent, wherever they are.

of power by militarily and economically powerful actors on the international level. Of course, to some extent any asymmetries of power are likely to be reflected in the rules of the international legal system. But even to the extent that the rules reflect these power asymmetries, the existence of such rules, if obeyed, provide some degree of protection and security for the weak, just as they did on the domestic level. Not only does an effective international legal system instil a habit of obedience, thereby civilizing the exercise of power, the requirement of consistency would also provide greater predictability and would thereby provide a more stable international environment. Furthermore, an environment in which the international rule of law is realized is one that provides a more solid basis for further principled deliberation, with a view to reform and improve on those rules. One dimension of having an effective system of international law, then, is that it furthers *the right of a people to govern itself without inappropriate impositions by other states*.

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

In the European world at the beginning of the century Max Weber could claim that formal legality could replace charisma or tradition as *the* source of legitimacy.[35] After WWII, such a thin notion of legitimacy has been gradually replaced by the considerably richer idea of constitutional legitimacy. To be fully legitimate more is required of a rule than just its legal pedigree. Formal legality matters, but it is not the only thing that matters. More specifically, there is a range of other concerns that provide countervailing considerations and suggest that under certain circumstances the presumption in favour of the legitimacy of international law can be rebutted. These concerns are related to a more substantive commitment to liberal-democratic governance. Concerns about democratic legitimacy should best be understood as concerns about three analytically distinct features of international law. These concerns are related to jurisdiction, procedure and outcomes, respectively. The presumption in favour of compliance with international law can be overridden, by reason of sufficient weight relating to jurisdiction, procedure or outcome. Once there are such reasons, citizens in a constitutional democracy ought to think of themselves as free to deviate from the requirements of international law. In these cases, citizens have good reasons to conceive of themselves as free to generate and apply the independent outcomes of the domestic legal and political process.

B *Jurisdictional Legitimacy: The Principle of Subsidiarity*

The first of those three concerns is captured by the *principle of jurisdictional legitimacy or subsidiarity*. Subsidiarity is in the process of replacing the unhelpful concept of

[35] M. Weber, *Politics as Vocation* (1919).

'sovereignty' as the core idea that serves to demarcate the respective spheres of the national and international.[36] The principle of subsidiarity is a central principle of European constitutionalism. It ought to be an integral feature of international law as well. It was used to guide the *drafting* of the European Constitutional Treaty signed in October 2004. It is a principle that guides the *exercise* of the European Union's power under the Treaty. And it guides the *interpretation* of the European Union's laws. As such, it is a structural principle that applies to all levels of institutional analysis, ranging from the big picture assessment of institutional structure and grant of jurisdiction to the micro-analysis of specific decision-making processes and the substance of specific decisions.

The specific wording of the provisions in the European Community Treaty[37] and the Protocol governing the application of subsidiarity[38] has done little to clarify the exact content of the principle. But independent of its exact formulation, at its core the principle of subsidiarity requires any infringements of the autonomy of the local level by means of pre-emptive norms enacted on the higher level to be justified by good reasons. It follows that any norm of international law requires justification of a special kind. It is not enough for it to be justified on substantive grounds, say, by plausibly claiming that it furthers the general welfare. Instead, the justification has to make clear what exactly would be lost if the assessment of the relevant policy concerns was left to the lower level. With exceptions relating to the protection of minimal standards of human rights, *only reasons connected to collective action problems* – relating to externalities or strategic standard-setting giving rise to 'race to the bottom' concerns, for example – are good reasons to ratchet up the level on which decisions are made. And even when there are such reasons, *they have to be of sufficient weight to override any disadvantages connected to the pre-emption of more decentralized rule-making*. On application subsidiarity analysis thus requires a two-step test. First, reasons relating to the existence of a collective action problem have to be identified. Second, the weight of these reasons has to be assessed in light of countervailing concerns in the specific circumstances. This requires the application of a 'proportionality test' or 'cost-benefit analysis' that is focused on the advantages and disadvantages for ratcheting up the level of decision-making. This means that on application this principle, much like the others, requires saturation by arguments that are context sensitive and most likely subject to normative and empirical challenges. Its usefulness does not lie in providing a definitive answer in any specific context. But it structures inquiries in a way that is likely to be sensitive to the relevant empirical and normative concerns.

There are good reasons for the principle of subsidiarity to govern the allocation and exercise of decision-making authority wherever there are different levels of public authorities. The reasons are related to sensibility towards locally variant preferences,

[36] J. Jackson labelled a similar idea 'sovereignty-modern'. See Jackson, 'Sovereignty-Modern: A New Approach to an Outdated Concept', 97 *Am J Int'l L* (2003) 782.

[37] Art. 5 ECT in so far as it is relevant states: 'In areas which do not fall within its exclusive competence, the Community shall take action in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.'

[38] See ECT Protocol No. 30.

possibilities for meaningful participation and accountability and the protection and enhancement of local identities that suggest that the principle of subsidiarity ought to be a general principle guiding institutional design in federally structured entities. But the principle has particular weight with regard to the management of the national/international divide. In well-established constitutional democracies instruments for holding accountable national actors are generally highly developed. There is a well-developed public sphere allowing for meaningful collective deliberations, grounded in comparatively strong national identities. All of that is absent on the international level. To a significant extent it is also absent on the European level. Not surprisingly, Member States, with the support of the large majority of European citizens, have spent a great deal of effort and resources on drawing jurisdictional boundaries and designing procedures that effectively police them. If international law as governance is no longer grounded in the specific consent of states, jurisdictional concerns addressed by the framework of analysis provided by the principle of subsidiarity have a central role to assess, guide and constrain transnational legal practice.

The principle of subsidiarity is not a one-way street, however. Subsidiarity-related concerns may in certain contexts strengthen rather than weaken the comparative legitimacy of international law over national law. If there are good reasons for deciding an issue on the international level, because the concerns addressed are concerns best addressed by a larger community, then the international level enjoys greater jurisdictional legitimacy. And even though the principle generally requires contextually rich analysis, there are simple cases. The principle can highlight obvious structural deficiencies of national legislative processes with regard to some areas of regulation.

Imagine that in the year 2010 a UN Security Council Resolution enacted under Chapter VII of the UN Charter imposes ceilings and established targets for the reduction of carbon dioxide emissions aimed at reducing global warming. Assume that the case for the existence of global warming and the link between global warming and carbon dioxide emissions has been conclusively established. Assume further that the necessary qualified majority in the Security Council was convinced that global warming presented a serious threat to international peace and security and was not appropriately addressed by the outdated Kyoto Protocol or alternative treaties that were open to signature, without getting the necessary number of ratifications to enter into force. Finally, assume that a robust consensus had developed that Permanent Members of the newly enlarged and more representative UN Security Council[39] were estopped from vetoing a UN resolution, if four-fifths of the Members approved a measure.

Now imagine that a powerful constitutional democracy, such as the United States, has domestic legislation in force that does not comply with the standards established by the resolution. The domestic legislation establishes national emission limits and structures the market for emission trading, but goes about setting far less ambitious

[39] Assume that current proposals had become law and that it included as new Permanent Members an African state (Nigeria or South Africa), two additional Asian states (Japan and India or Indonesia), a South American state (Brazil) and an additional European state (Germany), as well as 5 new non-permanent members.

targets and allowing for more emissions than the international rules promulgated by the Security Council allow. Domestic political actors invoke justifications linked to life-style issues and business interests.[40] National cost-benefit analysis, they argue, has suggested that beyond the existing limits it is better for the nation to adapt to climate change rather than incurring further costs preventing it. After due deliberations on the national level, a close but stable majority decides to disregard the internationally binding Security Council resolutions and invokes the greater legitimacy of the national political process. Yet, assume that the same kind of cost-benefit analysis undertaken on the global scale has yielded a clear preference for aggressively taking measures to slow down and prevent global warming along the lines suggested by the Security Council resolution.

In such a case, the structural deficit of the national process is obvious. National processes, if well designed, tend to appropriately reflect values and interests of national constituents. As a general matter, they do not reflect values and interests of outsiders. Since in the case of carbon dioxide emissions there are externalities related to global warming, national legislative processes are hopelessly inadequate to deal with the problem. To illustrate the point: the US produces approximately 25 per cent of the world's carbon dioxide emissions potentially harmfully affecting the well-being of peoples worldwide.[41] Congress and the EPA currently make decisions with regard to the adequate levels of emissions. Such a process clearly falls short of even basic procedural fairness, given that only a small minority of global stakeholders is adequately represented in such a process. It may well turn out to be the case that cost-benefit analysis conducted with the national community as the point of reference suggests that it would be preferable to adapt to the consequences of global warming rather than incurring the costs trying to prevent or reduce it. In other jurisdictions, the analysis could be very different. In Bangladesh, it could be necessary to relocate a significant part of the population if global temperature was to rise as expected without significant cuts in emissions. More importantly, cost-benefit analysis conducted with the global community as the point of reference could well yield results that would suggest aggressive reductions as an appropriate political response. The jurisdictional point here is that *the relevant community that serves as the appropriate point of reference for evaluating processes or outcomes is clearly the global community*.[42] When there are externalities of this kind, the legitimacy problem would not lie in the Security Council issuing regulations. Legitimacy concerns in these kinds of cases are more appropriately focused on the absence of effective

[40] For an argument of this kind in respect of the US position on the Kyoto Protocol, see Yandel and Buck, 'Bootleggers, Baptists and the Global Warming Battle', 26 *Harv Envt'l L Rev* (2002) 177 (contending that 'the Kyoto Protocol would have been a huge drag on the US economy' while producing minimal environmental benefits).

[41] C. Flavin, *Slowing Global Warming: A Worldwide Strategy* (1989), at 8 (citing statistics which show that the US is the largest producer of carbon dioxide in the world).

[42] For an elaborate argument – grounded in both domestic and international environmental law – in support of this reasoning, see Guruswamy, 'Global Warming: Integrating United States and International Law', 32 *Ariz L Rev* (1990) 221.

transnational decision-making procedures and the structurally deficient default alternative of domestic decision-making.[43]

But now imagine the UN Security Council enacting a binding regulation concerning *ambient* standards regarding air pollution. These too are stricter than national standards. This too is a simple case. Since there are no externality problems or, let us assume, other good reasons[44] for such an issue to be addressed beyond the national level, the situation is clearly different. There are no reasons why the national community should not qualify as the relevant community for assessing the legitimacy of procedures. Measures of such a kind enacted transnationally would be incompatible with the principle of subsidiarity and suffer from lack of jurisdictional legitimacy.

C *Procedural Legitimacy: The Principle of Adequate Participation and Accountability*

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

Many things would need to be said to address this claim. I will confine myself to two core points. First, even on the national level, parliament as the traditional legislative forum has lost significant ground in the 20th century in constitutional democracies. Parliament is no longer considered as the exclusive institutional home of legitimate decision-making on the domestic level. On the one hand, this is linked to the emergence of the *administrative state*. For what generally are believed to be good reasons, the turn to the administrative state in the first half of the 20th century has involved significant delegation of regulatory authority to administrative institutions of various kinds. Whether in the area of monetary policy, anti-trust policy or environmental policy, many of the core decisions are no longer made by parliament. This is generally justified on diverse grounds ranging from the expertise of decision-makers, the greater possibilities of participation for the various stakeholders involved, and the like.[44] The

[43] For a general discussion of global climate policy and regulatory approaches to be taken to it see Stewart and Wiener, 'Comprehensive Approach to Global Climate Policy: Issues of Design and Practicality', 9 *Ariz J Int'l & Comp L* (1992), 17.

[44] See, e.g., Stewart, 'The Reformation of American Administrative Law', 88 *Harv L Rev* (1975) 1667 at 1760–1790 (describing how this promotes interest group competition and representation in the administrative process itself).

argument that this is of little significance because legislatures retain the possibility to legislate whenever there is the requisite majority to do so is not irrelevant. But as a matter of institutional practice and of political realism, the effective control over administrative decision-making that exists by virtue of such a possibility is modest.[45] On the other hand, liberal constitutional democracies developed in the second half of the 20th century to include *constitutional courts* with the authority to strike down laws generated by the legislative process on grounds of constitutional principle. And constitutional courts have engaged in such a practice more or less aggressively in many jurisdictions. In many jurisdictions, they enjoy more public support than any other political institution as a result.[46] The reasons generally invoked to justify judicial review of legislative decisions are well rehearsed. They include the comparative advantage to secure the rights of individuals against inappropriate majoritarian intervention, concerns that are particularly pertinent with regard to groups disadvantaged in the political process as well as other instances in which political failures of various kinds suggest a comparative advantage for judicial review of other actor's decisions. It is important to take note of a bad argument for judicial review. Judicial review is not generally justified because the necessary supermajority for constitutional entrenchment has determined that a certain specifically circumscribed right ought to be protected. To the extent that this argument casts constitutional courts as the mouthpiece and mechanical instrument of legislative self-restraint as defined by the constitutional legislature, it is misleading at best. In most jurisdictions, a core task of constitutional courts is to interpret highly abstract constitutional clauses invoking equality, liberty, freedom of speech, property or due process. Courts in many jurisdictions engage in elaborate arguments of principle about why this or that policy concern ought to take precedence over competing concerns in a particular context. To that extent constitutional courts can only be understood as political actors in their own right. If it is desirable for there to be such an actor, it can only be because of widely held beliefs about the comparative advantage of the judicial process over the ordinary political process across the domain that falls within the constitutional jurisdiction of the court.[47]

It turns out that any robust version of majoritarian parliamentarianism cannot be understood as the ideal underlying contemporary political practice in liberal constitutional democracies. Instead, there is a predominance of a more pragmatic approach.

[45] Lowi, 'Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power', 36 *Am U L Rev* (1987) 295 at 321–322 (criticizing broad, unaccountable discretionary power held by modern administrative agencies).

[46] See generally Tate and Vallinder, 'The Global Expansion of Judicial Power: The Judicialization of Politics', in C.N. Tate and T. Vallinder (eds.), *The Global Expansion of Judicial Power* (1995), 1, at 5 (describing the worldwide expansion of judicial power in several jurisdictions and dubbing it 'one of the most significant developments in late twentieth century and early twenty-first century government').

[47] Hirschl, 'Resituating the Judicialization of Politics: *Bush* v. *Gore* as a Global Trend', 25 *Canadian J of L & Juris* (2002) 191 (arguing that the availability of a constitutional framework that encourages deference to the judiciary and the existence of a political environment conducive to judicial empowerment have helped bring about a growing reliance on adjudicative means for articulating, framing, and settling fundamental moral controversies and highly contentious political questions).

That approach does take seriously concerns relating to checks and balances, accountability, participation, responsiveness, transparency, and so on.[48] But over the whole spectrum of political decision-making, constitutional democracies allocate decision-making authority to a wider range of decision-makers than a robust parliamentarianism is willing to acknowledge. This draws attention to two points of significance for assessing the comparative legitimacy of international and national law. First, much of international law that is in potential conflict with outcomes of the national political process competes with national rules determined either by administrative agencies or constitutional courts, suggesting that the argument from democracy has less bite at least in such cases. And even if international law does compete with the outcomes of the national parliamentary process, the domestic example suggests that under some circumstances the outcomes of a non-parliamentary procedure may be preferable over the outcome of a parliamentary procedure. Given that the prerequisites for meaningful electorally accountable institutions on the international level are missing, the absence of electorally accountable institutions on the international level is insufficient to ground claims that the international legal process is deficient procedurally.

On the other hand, the absence of directly representative institutions on the transnational level and the difficulty of establishing a meaningful electoral process on the global level[49] is one of the reasons why the principle of subsidiarity has greater weight when assessing institutional decision-making beyond the state than within a national community. It is not surprising that in well-established federal systems concerns about jurisdictional issues are typically less pronounced. A well developed national political process involving strong electorally accountable institutions, a cohesive national identity and a working public sphere on the national level lower the costs of ratcheting up decision-making. In the European Union, on the other hand, European elections do not mean much as the Commission in conjunction with the Council – consisting of Members of the executive branch of Member State governments – remain largely in control of the legislative agenda. Limiting the scope of what the European Union can do is regarded as a core concern. It ought to be at least as much of a concern when it comes to international law.

But even when international law plausibly meets jurisdictional tests, it could still be challenged in terms of procedural legitimacy. The *principle of procedural legitimacy* focuses on the procedural quality of the jurisgenerative process. Electoral accountability may not be the right test to apply, but that does not mean that there are no standards of procedural adequacy. Instead, the relevant question is whether procedures are sufficiently transparent and participatory and whether accountability mechanisms exist to ensure that decision-makers are in fact responsive to constituents' concerns. The more of these criteria are met, the higher the degree of procedural legitimacy. In

[48] For such claims in the context of the legitimacy of the EU, see Moravscik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union', 40 *JCMS* (2002) 603.

[49] Those arguing for a global democracy include Held, *Democracy and the Global Order* (1995). See also Falk and Strauss, 'On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty', 36 *Stanford J of Int'l L* (2000) 191.

many respects mechanisms and ideas derived from domestic administrative law may be helpful to give concrete shape to ideas of due process on the transnational level.[50] Furthermore, principles and mechanisms described by the EU Commission's 2001 White Paper[51] could also provide a useful source for giving substance to the idea of transnational procedural adequacy. Yet it is unlikely that the idea of procedural adequacy as it applies to the various transnational institutional processes will translate into a standard template of rules and procedures comparable to, say, the US Administrative Procedure Act. When it comes to assessing procedures as varied as dispute resolution by the WTO's DSB, UN Security Council decision-making under Chapter VII or prosecutions under the newly established ICC, a highly contextual analysis that takes seriously the specific function of the various institutions will be necessary.

D *Outcome Legitimacy: Achieving Reasonable Outcomes*

The final concern is related to outcomes. Bad outcomes affect the legitimacy of a decision and tend to undermine the authority of the decision-maker.[52] Yet an outcome-related principle has only a very limited role to play for assessing the legitimacy of any law. Principles related to outcomes only play a limited role because disagreement about substantive policy are exactly the kind of thing that legal decision-making is supposed to resolve authoritatively.[53] It is generally not the task of addressees of norms to re-evaluate decisions already established and legally binding on them. This is why the legitimacy of a legal act can never plausibly be the exclusive function of achieving a just result, as assessed by the addressee. Were it otherwise, anarchy would reign. But that does not preclude the possibility of international rules that cross a high threshold of injustice or bear a costly inefficiency being ignored by a national community on exactly the grounds that they are deeply unjust or extremely costly and inefficient. What needs to be clear, however, is that any *principle of substantive reasonableness* is applied in an appropriately deferential way that takes into account the depth and scope of reasonable disagreement that is likely to exist in the international community. In particular, where jurisdictional legitimacy weighs in favour of international law and international procedures were adequate, there is a strong presumption that a national community's assessment of the substantive outcome is an inappropriate ground for questioning the legitimacy of international law.

[50] See Stewart, *Administrative Law in the Twenty-First Century*, available at 78 *N.Y.U. L. Rev.* (2003) 437.

[51] The European Commission's White Paper on European Governance (2001).

[52] For a sceptical view that considerations of justice should play a core role in assessing the legitimacy of international law see T. Franck, *Legitimacy Among Nations* (1990), at 208.

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

3 The Constitutionalist Model: Implications

To what extent then should citizens regard themselves as constrained by international law in the collective exercise of constitutional government? Are they morally obligated to always comply with international law? Should they design domestic institutions with an exclusive commitment to a principle of international legality? Or are citizens always morally free to democratically reject specific rules of international law as a legitimate exercise of constitutional self-government? Should the way citizens structure domestic institutions be guided by a strong idea of constitutional self-government and democracy, suggesting that domestically accountable institutions need to independently assess and democratically endorse the policies embodied in rules of international law, before international law can be enforced domestically?

If the constitutionalist model is correct, both positions are mistaken. Instead, citizens in liberal constitutional democracies would do well to adopt a more complex, intermediate approach. On the one hand, the principle of international legality establishes a presumption in favour of the authority of international law. The fact that there is a rule of international law governing a specific matter means that citizens have a reason to do as the rule prescribes. But this presumption is rebutted with regard to norms of international law that seriously violate countervailing normative principles relating to jurisdiction, procedure or outcomes. To put it another way: citizens should regard themselves as constrained by international law and set up domestic political and legal institutions so as to ensure compliance with international law, to the extent that international law does not violate jurisdictional, procedural and outcome-related principles to such an extent that the presumption in favour of international law's authority is rebutted. When assessing concerns relating to jurisdiction, procedure and outcome each of the relevant principles can either support or undermine the legitimacy of international law. As the discussion has shown it is not necessarily the case that jurisdictional and procedural concerns will weigh in favour of national decision-making, though often that will be the case. When citizens in a constitutional democracy comply with legitimate international law, citizens are not compromising constitutional principles. Instead they are complying with the demands of principle that underlie the best interpretation of the liberal constitutional tradition they are part of.[54]

What then are the institutional implications of a constitutional model? How would citizens committed to a constitutionalist approach structure their domestic institutions with regard to international law? What should the terms of engagement between national and international law be? How should the national constitution manage the interface between national and international law and allocate decision-making authority between institutions? Here there are no quick and easy answers. In part this is because each jurisdiction has, as its starting point, its own tradition and institutions

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

addressing foreign affairs which would need to be carefully developed within their own constitutional framework. On application, there is no 'one size fits all' solution. In part it is because a great deal of additional work would need to be done to subject international human rights law, UN Security Council decision-making, WTO or NAFTA decision-taking to careful scrutiny. The purpose here was merely to introduce a general framework of analysis. Such a framework helps ask the right questions and deal with the right problems. The constitutionalist model provides guidance to questions of institutional design by clarifying what it is that these institutions should aim to achieve: They should be designed to ensure that international law is domestically enforced when it is legitimate. And they should provide constructive avenues for critical engagement, interpretative amelioration and even outright disobedience, to the extent that there are serious legitimacy concerns. On application, constitutionalist analysis involves close and contextual analysis of institutional practices. It does not lend itself to schematic application.

But there are other features of the constitutionalist model that make it attractive as an inclusive general framework. First, it *avoids one-sidedness* by placing on the table the whole menu of central features that determine the legitimacy of international law. This holistic focus –keeping the whole range of factors in view within any given context – is the virtue of a constitutionalist thinking.[55] It avoids two pitfalls.

The first danger is to imagine the legal and political world in strictly dualist terms, suggesting that domestic and international law are radically different and require radically different conceptual tools of analysis. This is the trap that national constitutional lawyers are prone to fall into. All claims suggesting that there is something deeply problematic legitimacy-wise about international law because it lacks certain features that are present on the domestic level – the absence of a *demos* or directly representative institutions – are exaggerated or mistaken. The legitimacy of international law does not depend on whether every state has in fact consented or can reasonably be interpreted to have consented to a specific obligation imposed on it by international law, or that there is a chain of authorization that connects state consent to a specific legal obligation. Nor does international law's legitimacy depend on establishing directly representative institutions on the transnational level. These are all ideas connected to a statist or nationalist conception of democratic constitutionalism. The principles of constitutionalism are not, however, tied to the organizational form of the state, but need to be respected and ought to guide legal and political practice wherever it occurs. National constitutional lawyers are sometimes less open than they ought to be to incorporate jurisdictional concerns and values relating to the idea of international legality into their assessment of international law. With the experience

[55] For a similar defence of constitutionalism as an approach to the assessment and design of national and transnational institutions see Walker, 'Postnational Constitutionalism and the Problem of Translation', in J. Weiler and M. Wind (eds.), *European Constitutionalism Beyond the State* (2003), 27. See also M. Maduro, *From Constitutions to Constitutionalism: A Constitutional Approach for Global Governance* (forthcoming, on file with author). See also C. Joerges, I. Sand and G. Teubner, *Transnational Governance and Constitutionalism* (2004).

of European integration shaping the perspective on transnational legal practices, such an attitude is today less frequently found in Europe than in the US.

On the other hand, there is a growing trend, more pronounced in Europe than in the US,[56] to claim that international law has a constitution. The idea of a constitution is employed in a number of ways. Some suggest that the UN Charter is to be regarded as the world's constitution[57] or that the WTO is the economic constitution of the world[58] or that there is a global unwritten constitution.[59] Once it is clear that a classical model of international law as the consent-based law between states needs to be modified – among other things to take into account the transitions that characterize international law as governance – the idea that, in one way or another, international law has a constitution, seems to be an obvious alternative. There is nothing intrinsically wrong (or new[60]) in using the language of constitutionalism to capture more adequately certain features of international law. But it should be clear what exactly is claimed. The problem is that the language of constitutionalism *suggests* that, through law's formalities, dispersed powers and the judicial protection of rights, international law may be *legitimate* because the *outcome* it generates is likely to be fair and just. Yet as a way to legitimize international law, there is something conspicuously absent in this kind of international constitutional discourse: the idea of self-government and electoral accountability. Yet these ideas are at the very heart of challenges to international law made in the name of national constitutional values. This can make serious engagement between national and international scholars difficult at times.[61] By focusing on the jurisdictional principles of subsidiarity and procedural concerns and providing a framework that allows for the constructive engagement of these concerns, the constitutionalist model developed here not only avoids one-sidedness, but builds a bridge between national and transnational constitutional discourse.

Finally, the constitutionalist approach conceptually reconnects to a tradition of thinking about national and international law in which the legal and political world was not yet deeply divided between national and international law. As Tom Franck puts it:

[56] But see, e.g., the Symposium on 'The Emerging Transnational Constitution', 37 *Loyola of LA L Rev* (2003).

[57] See, e.g., B. Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (1998).

[58] E.g. Petersmann, 'Theories of Justice, Human Rights and the Constitution of International Markets', 37 *Loyola of LA L Rev* (2003) 407.

[59] For an overview of various ways in which the terms 'constitution' and 'constitutionalization' are used see Cass, 'The "Constitutionalization" of International Trade Law: Judicial Norm-generation as the Engine of Constitutional Development in International Trade', 12 *EJIL* (2001) 12.

[60] See, e.g., A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926). For an early discussion of the history the idea of constitutionalism in international law see Opsahl, 'An "International Constitutional Law"?', 10 *ICLQ* (1961) 760.

[61] As a highly respected scholar of US constitutional law put it: 'learning what international lawyers were talking about seemed to me like trying to learn what space aliens were saying. Their concerns appear completely unconnected to the things I worry about as a domestic U.S. constitutionalist, and yet they seemed to think that these concerns mattered a lot for domestic constitutional law': Tushnet, *supra* note 15, 239 at 240.

> When both the national and international systems of dominance, governance or order were based on similar divine or natural-order rationales, . . . questions [of legitimacy] were addressed to both national and international systems, if only because, in the two fields of inquiry, the respective phenomena of social behavior could not be separated neatly. The same 'natural' or divine validation that was believed to authorize national governance also validated the rules of interstate behavior. God's writ, or the natural order of things, was no respecter of the puny lines drawn by men on maps.[62]

From approximately the mid 19th century until very late in the 20th century when Tom Franck was writing about international law's quest for legitimacy, the distinctions between international and national still seemed to be deep. Today citizens in constitutional democracies would do well to assess and engage the world of legal and political practice using a conceptual framework that transcends old dichotomies. The constitutionalist model is committed *not* to an international constitutional law but to constitutionalism beyond the state. It suggests that constitutionalist analysis is usefully undertaken when confronting and assessing legal and political practices that effect citizens. It is increasingly less obvious that it even makes sense to think about something called 'domestic law' and something else called 'international law' relating to one another. The unity of domestic law is disintegrating at the same time as international lawyers worry about fragmentation. Simultaneously, deep linkages between national and international practices in specific areas of regulation are established. It may be more helpful to think of the legal world consisting of a myriad of legal and political practices relating to one another in complicated and highly differentiated ways, ultimately grounded in a commitment to an idea of the human dignity and autonomy and plausibly assessed by constitutionalism as a method of analysis. There is no longer a person (the king) or an institution (the parliament), a text (the constitution) or even a source ('We the People') that can plausibly serve as an ultimate normative point of reference and symbol of the unity and coherence of the legal and political world. In this sense, the world may be moving beyond constitutions. But it may just be discovering constitutionalism beyond the state.

[62] Franck, *supra* note 1, at 535.