OPERATIONALIZING NOLLKAEMPER'S AND PETERS' THEORIES ON INTERNATIONAL WITHIN THE AVOID, ALIGN, CONTEST FRAMEWORK FOR DOMESTIC COURTS

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Abstract
This paper examines how domestic courts interact with international law through the lens of the 'Avoid, Align, Contest' postures framework, applied to two leading theories: Nollkaemper's vision of international law as a rule of law, and Peters' conception of it as a global constitution. The "posture" model originated from empirical observation of many domestic courts, while the two theories differ in philosophies; this paper applies the postures model back to the theoretical level. It shows how theoretical commitments (rule of law vs. global constitution) implicitly prescribe different expectations about judicial postures.
Keywords: *International Law in National Law, Domestic Court.*

MENGOPERASIONALKAN TEORI NOLLKAEMPER DAN PETERS TENTANG HUKUM INTERNASIONAL DALAM KERANGKA MENGHINDARI, MENYELARASKAN, ATAU MENGGUGAT UNTUK PENGADILAN DOMESTIK

Intisari

Makalah ini mengkaji bagaimana pengadilan domestik berinteraksi dengan hukum internasional melalui kerangka 'Menghindar, Menyesuaikan, dan Menggugat' (Avoid, Align, Contest), yang diterapkan pada dua teori utama: pandangan Nollkaemper tentang hukum internasional sebagai suatu tata hukum (rule of law), dan gagasan Peters tentang hukum internasional sebagai konstitusi global. Model "postur" ini berasal dari pengamatan empiris terhadap banyak pengadilan domestik, sementara kedua teori tersebut berbeda secara filosofis; makalah ini menerapkan kembali model postur tersebut pada tingkat teoretis. Makalah ini menunjukkan bahwa komitmen teoretis (tata hukum vs. konstitusi global) secara implisit merumuskan ekspektasi yang berbeda terhadap postur yudisial.

Kata Kunci: *Hukum Internasional dalam Hukum Nasional, Pengadilan Nasional.*

A. Introduction

Much has been said of how international law should be engaged with national law. From the monism/dualism debates (most applicable to treaties),[1] to more nuanced frameworks. Much has also been noted about the legal tools domestic courts have at their disposal to engage with international law. Most recently, through the assessment of domestic court behaviors at the Johannesburg Conference of 2016, we analyzed when and whether domestic courts avoid or blunt the application of international law, or contest or align themselves with it if a court decides to apply it.[2]

This paper seeks to summarize two idealized views of how international law should be applied in national law, emphasizing the role of national courts, specifically Nollkaemper's International law as a 'rule of law';[3] and Peters' International law as a 'global constitution';[4] and apply them to the Avoid, Align, Contest framework for analyzing domestic courts developed at the Johannesburg conference. Within those idealized theories, the Author seek to identify the expected position and roles of national courts in mediating that interaction and the corresponding postures (avoid, align, contest) the courts would need/are likely to adopt, and characteristics required of national courts for their practical application.

The 'posture' model originated from empirical observation (i.e., the ILA Johannesburg study) of many domestic, but this paper applies it back to the theoretical level. It shows how theoretical commitments (rule of law vs. global constitution) implicitly prescribe different expectations about judicial posture. This reverse-mapping enriches posture theory by tying it to jurisprudential assumptions.

While Nollkaemper's theory emphasizes the integration of international law through normative hierarchy and judicial duty, Peters proposes a more pluralist, value-based framework. This paper examines how these visions

1 Madelaine Chiam, "Monism and Dualism in International Law," *Oxford Bibliographies Online Datasets*, June 27, 2018, https://doi.org/10.1093/obo/9780199796953-0168.

2 Antonios Tzanakopoulos, "Final Report: Mapping The Engagement Of Domestic Courts With International Law," in *ILA Johannesburg Conference* (Johannesburg, 2016).

3 Andre Nollkaemper, National Courts and the International Rule of Law (USA: Oxford University Press, 2011).

4 Jan Klabbers, Anne Peters, and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009).

translate into judicial behaviour. By applying the 'Avoid, Align, Contest' model, it brings clarity to otherwise abstract concepts of domestic judicial engagement and fills a methodological gap between theory and case-based analysis. In doing so, it addresses a crucial but under-explored gap in international legal scholarship: the *predicted institutional behaviours* of domestic courts when faced with international legal norms, based on different theories.

By necessity, this paper is a normative re-examination of the core tenets of the two theories, against the avoid, align, and contest framework. Along with the author's *line of argument* is in fact step-by-step explanation what the theories do say, as well as the assumptions and consequences that the theories do not say.

B. National Courts, Theorists, and International Law

What is and should be the relationship between international and national law? These questions accompanied the birth of international law. The bulk of treaty and customary international law only tends to prescribe obligations of states under international law, and its supremacy against national law.[5] International law's general position seems to be that it should prevail or somehow pull national law's standards towards it; domestic law may not always agree. The way in which state legislatures and judiciaries are expected to implement obligations is not always set,[6] even when an action or standard of treatment is called for. Despite the flexibility of a state's integration of international law, such as human rights,[7] inadequate implementation constitutes a violation. Often, the precision of these subsequent necessary steps is left unsaid,[8] as international law focuses on the end result: whether national law is consistent with it. Thus, only when cases are brought to courts (national and

5 "Vienna Convention on the Law of Treaties," 1969.

6 Human Rights Committee, "General Comment 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" (2016); UN Economic and Social Council, "General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)" (1990); United Nations International Human Rights Instruments, "Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty" (2003).

7 Antonio Cassese, *International Law* (USA: Oxford University Press, 2005).

8 Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (New York and Geneva: United Nations, 2003).

international) do these questions materialize into concrete rulings.

The old debates of how judicial decisions result in a monist or dualist position have evolved into a more nuanced scale of incorporation and transformation.[9] Variations of legal techniques that apply, blunt, or moderate the effects of international law, or the court's strategic position against international law, have all been discussed.[10] Courts thus hold a key role in clarifying and shaping the relationship of international law and domestic law. Academic theories on international/national law often focus on what domestic courts should do, but overlook the specific conditions needed for them to do so effectively. This paper addresses that gap by examining two contrasting theories: Nollkaemper's view of international law as a system of binding norms integrated into domestic law, and Peters' vision of international law as a global constitution grounded in shared values and legitimacy rather than mere normative force.

C. Postures: to avoid, align, or contest

Having established the theories to dissect, we now need a framework to judge a court's interaction with international law. The models used here are those of postures. The trifecta of postures refers to the broad strokes in which a domestic court's actions could be seen to engage in international law and refers to the functional outcome. These postures are the categorizations adopted by the Study Group on Principles on the Engagement of Domestic Courts with International Law.[11] The three postures are Avoid, Align, and Contest.

1. Avoidance

Our first posture is usually what the first domestic courts must consider adopting: whether international law is applied in the first place. A posture of avoidance is where domestic courts avoid applying international law in cases

9 Tzanakopoulos, "Final Report: Mapping The Engagement Of Domestic Courts With International Law."

10 European Comission for Democracy through Law (Venice Commission), "Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts" (Rome, 2014).

11 Tzanakopoulos, "Final Report: Mapping The Engagement Of Domestic Courts With International Law."

where it could be applicable. Parliament, for example, could also adopt a posture of avoidance by refusing or delaying ratification of treaties or enacting broad reservations when doing so. It does not necessarily mean ignorance or rejection, but could encompass a more nuanced approach. A court could, for example, avoid international law completely by refusing its *procedural* applicability through questions of jurisdiction, or only by refusing to accept certain *substantive* norms or provisions. Even within a posture, various sub-postures exist. In addition to procedural and substantive avoidance, avoidance can be *evasive* or *affirmative*. Evasion occurs in cases where international law is not applied without any argument or discussion by the court, perhaps in cases where international law should clearly apply or is raised by the disputing parties.[12] This could occur when courts are forced into applying relevant domestic law which diverge from international norms. Avoidance could also be affirmative, in the sense that the courts do carefully consider international law but reject it. Deciding that certain treaties as non-self-executing, or the use of legal techniques such as non-justiciability or political questions, would result in an affirmative avoidance. Avoidance could occur when international law itself is invoked (sometimes incorrectly) to argue its own non-application, such as requiring an overly high bar to prove customary international law.[13]

Even in our first posture, an issue can be raised: if a domestic court avoided international law by reference to domestic law, has it not already contested international law? In a theoretical sense, avoiding international law entirely or where it should have been applied is perhaps contestation in the eyes of any moderately monist observer. In this case, it would not necessarily be a case of contestation, as that would require that international law be applied as law in the first place. Thus, a posture of avoidance pre-empts the applicability of international law by the judge, which means they cannot posture to align or contest against it.

2. Alignment

Having gotten past avoidance, our postures now assume international law's interaction by domestic courts. Alignment occurs where an attempt is

12 Machiko Kanetake, "Report on International Human Rights Law," 2015.
13 Hannah Woolaver, "Report on South Africa," 2013.

made to align or harmonize domestic law with international law-irrespective of the constitutional framework. It covers a broad approach. In standard cases with no political problems, such as where international law is already in line with domestic law, or no conflict exists, alignment is not seen by Tzanakapolous to be particularly instructive. So-called *fair-weather* alignment is not instructive unless compared to other postures.[14]

More noteworthy are cases where international law *overrides* domestic law in conflicting cases. The spectrum of what can be considered a conflict of norms is wide, as some conflicts only require modest interpretation to solve, while others may show a fundamental difference. A number of legal techniques may be employed to this end. For example, consistent interpretation occurs where domestic courts interpret (mostly in cases of ambiguous or incomplete) domestic law to align with international law. A more direct example would be the use of international norms, despite the option to reject or blunt its effect, to challenge domestic law. In Belgium, for example, non-self-executing norms were used to seek annulment of domestic acts.[15] A more oblique form of alignment occurs where domestic courts apply domestic law in line with what is required by international law, without reference to international law, known as a *consubstantial* alignment. Sometimes courts may refer to international law merely as a consideration while preferring to apply a consubstantial domestic norm;[16] other times, reference may be completely silent.

Perhaps the most extreme form of alignment, characterized as *hyper-alignment,* may occur where domestic courts go beyond international law and create obligations where none exist. An example here is where Sri Lankan courts relied on the European Convention on Human Rights (not binding to it), or where they raise soft-law environmental principles into binding government obligations and part of their common law.[17]

14 Vaughan Lowe, *International Law* (Oxford: Oxford University Press, 2007); Tzanakopoulos, "Final Report: Mapping The Engagement Of Domestic Courts With International Law."

15 Frederick Dopagne, "Report on Belgium," 2014.

16 Federal Supreme Court Switzerland, Nada (Youssef) v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs, No. 1A 45/2007, BGE 133 II 450, ILDC 461 (CH 2007) (November 2007).

17 Tzanakopoulos, "Final Report: Mapping The Engagement Of Domestic Courts With International Law."

3. Contestation

Finally, contestation is where domestic law is used as a method to contest international law. It comes in a variety of sub-postures and can refer to both the applicability of the law as well as its content. However, it generally assumes some part of international law is applied in the first place. Contestation can be seen as being *local*, where a domestic norm with no corresponding international principle is used to contest, or international-where an international norm is used or present.

Affirmative contestation takes place where domestic courts accept the applicability of international law but assign it a different meaning or substance than what was intended; a sort of reversed consistent interpretation. The most obvious form of contestation is that of a *negatory* manner, where a court rejects outright the validity of an international norm, perhaps due to content, or in cases where legislators choose to 'legislate in breach' of international norms. The usual course of action is by reference to domestic law. Courts could also be seen to adopt this posture when they ignore clearly applicable international norms, going further from mere ignorance in avoidance.

A trickier form to observe is consubstantial contestation, where international law is contested by reference, if indirect, to another rule of international law consubstantial with it or a rule of domestic law. An example being the reliance of courts in *Kadi* and *Ahmed* on fundamental human rights to fair trial and effective remedy, available under domestic and international law, to contest obligations from the Security Council.[18] Another is the Italian Constitutional Court's approach in the case that led to the *Jurisdictional Immunities* ICJ case, which relied on the right to access to a court, which existed both under the Italian Constitution and international law.[19] Here, we see parallels to the way of reasoning in consubstantial alignment

These postures are not mutually exclusive within judgments and work in tandem with the variety of legal techniques available to judges, which could 'blunt the otherwise sharp edge of constitutional requirements to apply

18 Antonios Tzanakopoulos, "Collective Security and Human Rights," in *Hierarchy in International Law: The Place of Human Rights*, ed. Erika de Wet and Jure Vidmar (Oxford: Oxford University Press, 2012).

19 Italian Constitutional Court, Judgment No. 238 of 2014, Constitutional Challenge Referred by the Tribunale Di Firenze Concerning the Jurisdictional Immunity of the Federal Republic of Germany in Civil Damages Claims Related to WWII War Crimes (October 2014).

international legal provisions.'[20] Having described the postures that domestic courts could adopt, we now turn to the substantive discussion: the theories proposed, and the expected role, posture, and characteristics of domestic courts.

D. Nollkaemper: International law as a rule of law

"The quest for the rule of law has set its most ambitious aim yet: the realization of a rule of law beyond the nation-state. The pursuit of an international rule of law is not new. It is the raison d'être of international law to bring power under law"[21]

Nollkaemper's idea of international law as a rule of law assumes the integration of international law as a matter of accepting a norm into the domestic legal system. He sees an integrated rule of law requiring that public powers be conferred and controlled by law,[22] immune to arbitrary changes,[23] respect fundamental human rights protections,[24] and be accountable to the law itself.[25] Accountability in this international rule of law, unlike domestic counterparts, do not and cannot rely too heavily on an independent and authoritative court system-as states retain some degree of sovereignty. Thus, the accountability aspect in international law, which is ubiquitous in the conception of a domestic rule of law, must be provided by diversified means in international law: courts, quasi-judicial and non-judicial compliance mechanisms, politics, and domestic institutions.

Nollkaemper does not simplistically see domestic courts as executors of international law within their states. Instead, they are important agents exerting influence both ways. Courts review their executive and legislative branches against breaches of international law[26] and address threats to the rule

20 Tzanakopoulos, "Final Report: Mapping The Engagement Of Domestic Courts With International Law."

21 Nollkaemper, *National Courts and the International Rule of Law*, 21.

22 Matias Kumm, "International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model," *Va J Int'l L* 44, no. 19 (2003).

23 Gianluigi Palombella and Neil Walker, eds., *Relocating the Rule of Law* (Oxford: Hart Publishing, 2009).

24 Randall Perenboom, "Human Rights and the Rule of Law: What's the Relationship?," *Georgetown Journal of International Law* 36 (2005).

25 Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004).

26 US Secretary fo Defense, Hamdan v. Rumsfeld, 548 US 557, 126 S Ct 2749 (2006); High Court

of law by applying international obligations.[27] Beyond acting merely as facts for international courts, domestic courts have the power to determine legal rights and obligations under international law, "complement[ing] each other in the protection of the rule of law."[28]

Nollkaemper already sees contestation of international law based on domestic law and state politics as rare, particularly when domestic law previously empowered courts to give effect to international law.[29] He also rejects the view that international law and domestic law are separate fields, pointing to the increasing number of states granting full effect to certain aspects of international law,[30] and how international law has conditionally accepted the authority and affects domestic court decisions.[31] Thus, domestic courts play three roles:[32] to decide cases which are wholly or partly based on international law; to review the legality of domestic actions, law, and actors in light of international law; and to interpret, determine, and develop international law.

Domestic courts have already become courts of first instance for many international law disputes, particularly with non-state claimants; exhaustion of local remedies in human rights, and dispute settlement clauses such as in investment treaties also contribute to pushing claims into domestic courts. As many international law rights are conferred directly to private parties (i.e., human rights, humanitarian law, investment protection, etc.), domestic courts increasingly face claims based on international law, particularly those aspects which were previously outside the scope of domestic courts, such as protection in armed conflicts.[33] In this way, domestic courts essentially create decisions

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of Justice, Beit Sourik Village Council v Israel and the Commander of the Israeli Defence Force in the West Bank, HCJ 2056/04, ILDC 16 (IL 2004) (June 2004).

27 United Kingdom Supreme Court, Her Majesty's Treasury v Mohammed Jabar Ahmed and others (FC), UKSC/2009/0016 (January 2010); United Kingdom Supreme Court, Her Majesty's Treasury v Mohammed al-Ghabra (FC), UKSC/2009/0015 (March 2009); United Kingdom Supreme Court, on the application of Hani El Sayed Sabaei Youssef v. er Majesty's Treasury, UKSC/2009/0018 (2009).

28 Nollkaemper, *National Courts and the International Rule of Law*, 13.

29 Nollkaemper, *National Courts and the International Rule of Law*; Hersch Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht*, vol. 2 (Cambridge, 1970).

30 Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht*.

31 Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht*.

32 Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht*.

33 United Kingdom House of Lords, R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent), [2007] UKHL 58 (December).

on international law, becoming a part of state practice themselves, as well as becoming a set of facts or law on which international courts would later have to rule on. In so doing, they are seen to operate within the rule of law in international law, under assumptions that states comply with international obligations, organize their legal order for such effective performance, and cannot plead domestic law to justify breaches.[34] A court that 'gives effect to domestic law and fails to ensure the performance of an international obligation will engage the international responsibility of that state.' [35]

Within this role, Nollkaemper identifies three important caveats:[36] First, not all domestic courts of the world are equally represented or influential. He accepts that many state courts are unwilling, unable or lack the opportunity for much meaningful interaction with international law and therefore are less influential to the development of international law. Second, domestic courts operate in a mixed zone, where international law provides the 'overarching framework', but then are dependent on the specific powers and legal tools available under domestic law. These differences add to the fragmentation of international law as interpretation of laws varies across states and courts,[37] and reflect "an ephemeral reflection of a more fundamental, multi-dimensional fragmentation of global society itself."[38] Finally, these courts' influence is not equal in all aspects of international law. Some aspects are routinely applied and heavily influenced by domestic practice, others less so. Several areas, unlike international criminal law via the International Criminal and ad-hoc tribunals, [39] also suffer from a mechanism by which international law could decide which domestic court decisions it will or will not consider.

In working as an agent within this understanding of the rule of law, domestic courts are challenged as an organ of the "very state whose acts and

34 Nollkaemper, *National Courts and the International Rule of Law*, 12.
35 Nollkaemper, *National Courts and the International Rule of Law*, 12.
36 Nollkaemper, *National Courts and the International Rule of Law*.
37 Ole Kristian Fauchald and André Nollkaemper (Eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Oxford: Hart Publishing, 2012): 352-353.
38 Vicki Jackson, *Constitutional Engagement in a Transnational Era* (Oxford: Oxford University Press, 2010): 50-51.
39 The Rome Statute, signed in Rome on 17 July 1998, entered into force on July 1 2002, 2187 UNTS 90, art 17 (Rome Statute); Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht,* 164.

omissions they are to control";[40] counter to the rule of law's independence and impartiality. He characterizes the struggle domestic courts have in applying international law as a fight to assert power: against international courts, foreign courts, and primarily against the other branches of government.[41] Further, Nollkaemper sees that international law is defective when considering domestic courts from a rule of law perspective. While allowing domestic courts jurisdiction in certain international claims, requiring independence and providing legal standing to injured parties, the principles applicable tend to cover a small part of international law, and primarily that in human rights.[42]

1. Domestic courts in the international rule of law

Nollkaemper's role for domestic courts in international law is wide-ranging but somewhat indirect and weak. International and domestic courts are well differentiated. It is one where roles are distributed and somewhat separate. Domestic courts may apply or draw on a variety of international law rules or be involved in cases that affect international law. They are the first point of contact and perhaps the best-placed institution for a large number of disputes (primarily those between private parties), empowered by the principle of sovereignty. In fact, he advocates that "only in rare circumstances, a domestic court should abdicate jurisdiction in favor of an international court."[43] Several important points can be drawn out.

First, acting as the default entry, the jurisdiction-regulating power of domestic courts is often far weaker. International courts are usually conferred direct and exclusive power through treaties, whereas domestic courts often work within a vaguer framework.[44] The power of domestic courts lies in the default position that unless states otherwise agree, adjudication of international claims relies on the same division of powers applied in a domestic setting. Sovereignty allows states to reserve their courts a role in international adjudication and refuse one where a domestic court has not been used; the principles of exhaustion of local remedies, subsidiarity, and complementarity

40 Nollkaemper, *National Courts and the International Rule of Law,* 299-300.
41 Nollkaemper, *National Courts and the International Rule of Law,* 47-48.
42 Nollkaemper, *National Courts and the International Rule of Law,* 300-301.
43 Nollkaemper, *National Courts and the International Rule of Law,* 22.
44 Nollkaemper, *National Courts and the International Rule of Law,* 23.

all stem from this. This power is not necessarily eroded when international courts are created, i.e., clauses have to be included in contracts and treaties to divert power entirely from domestic courts: exclusive jurisdiction, forum selection, fork in the road, and clauses preventing similar factual and legal issues. Unless specifically excluded, a domestic court's existing jurisdiction is generally not compromised.

Nonetheless, international principles create or extend jurisdiction to domestic courts: specific treaty obligations requiring court enforcement,[45] the principle of effectiveness, and what Nollkaemper sees as the broad maxim of 'ought implies can.'[46] In this sense, his domestic courts primarily adopt a posture of alignment, or contestation (between international rules, higher placed than international norms). Avoidance must be minimized as separating international and domestic law undermines the unity of the rule of law. This is counterbalanced by the idea that "like international courts, national courts can only interpret and enforce international obligations, and make a contribution to the international rule of law, if they have been given the power to do so."[47] In Nollkaemper's view, court posture and their involvement in international law depend upon the rule of law's conferment of jurisdiction to hear international law upon domestic courts. Domestic courts are tied against avoiding international law. Any avoidance should be due to that court being an improper forum, as opposed to international law's material applicability.

Second, while international courts may command domestic authorities, when addressing domestic courts, they rarely dictate specific terms, assign jurisdiction, or change the latter's legal powers and authorities. Domestic courts are not per se subordinate to international courts but facilitate international rulings. The independence of domestic courts is evident not only in judicial practice. Treaties often only require states to empower or work through their courts, without dictating precisely how,[48] conforming to the principle that

45 Paul Mahoney, "Universality versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining Some Recent Judgments," *European Human Rights Law Review* 364 (1997); Paolo G. Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law," *American Journal of International Law* 97, no. 1 (2003): 38.

46 Nollkaemper, *National Courts and the International Rule of Law,* 43-44.

47 Nollkaemper, *National Courts and the International Rule of Law,* 22.; See generally on Chittharanjan F. Amerasinghe, *Jurisdiction of International Tribunals* (The Hague: Kluwer Law International, 2003).

48 Not all treaties work like this: Convention (IV) relative to the Protection of Civilian Persons in

international law does not regulate the internal powers of state organs in the domestic legal organ.[49] Nollkaemper quotes Fitzmaurice:

"It is only by treating the state as one indivisible entity…, that the supremacy of international law can be assured—the atomization of the personality of States is necessarily fatal to this"[50]

When treaties or international court judgments *do* address domestic courts, they refrain from directly altering the power of domestic courts and state that 'international law cannot create a jurisdictional power where national law creates none.'[51] Thus, domestic courts are given broad leeway to interpret how a ruling should be carried out.

However, this suggests Nollkaemper may require a different domestic court's posture against international judgments. Avoidance does not seem an option, not unlike how courts within the same legal system cannot (or should not, in theory) avoid judgments from their colleagues, particularly those hierarchically superior, an appeal or cassation. Contestation and alignment seem to be advocated insofar as domestic law is not used to contest, as the main goal seems to be the empowerment of international law to harmonize domestic law. Thus, consubstantial alignment where domestic law is harmonized with, but without reference to international law, is to be avoided as it robs international law of its rightful position *vis-à-vis* domestic law within a rule of law. Consubstantial contestation, where international law clashes with itself, is less of a structural problem, as it still results in a united rule of law, much as any legal conflict within domestic law can be resolved. On the flip side, affirmative (assigning different meaning) or negatory contestation (rejection) both serve respectively to undermine the consistency of legal rules within the hierarchy of international and domestic law, and to reject that unity altogether.

2. Freedom from internal politics but not international law

Nollkaemper's international rule of law requires that domestic (and

Time of War, signed in Geneva on 12 August 1949, entered into force on October 21 1950, 75 U.N.T.S. 287 (Fourth Geneva Convention) directly addresses courts of occupying states.

49 Internasional Law Comission, Third Report on State Responsibility, UN Doc A/CN.4/246, 114, 5 March–18 May 1971.

50 Gerald Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rule of Law," *Recueil Des Cours* 92 (1958): 88.

51 Nollkaemper, *National Courts and the International Rule of Law,* 25.

international) courts have independence from the political branches, whether states or international organizations. The independence of courts is necessary as 'an essential condition for the effective application of international law.'[52] This independence can be drawn from domestic law or international law, applied proactively, but needs to be tempered by the final efficacy of rendering enforceable decisions.

Four qualifications govern independence of courts: First, states must nonetheless maintain control of the judiciary (crucially in his view) to correct judicial acts contravening international law. Second, requiring domestic courts to use international law to set aside domestic limitations means "replac[ing] dependency on domestic law by dependency on international law."[53] Here, Nollkaemper seeks to rely on international law as leverage for domestic courts against the constraints set upon them by their legal systems: "It is inherent in the very existence of international law and its undisputed claim to supremacy that domestic law has to conform to international law, rather than the other way around."[54] This does not necessarily mean that courts have unlimited power over the executive, preserving forms of dependence that are "a normal and indeed essential feature of a functioning domestic legal system."[55] Third, the existence of necessary interdependence between the judicial and other powers, particularly where over-independence could lead to counter-productive results. Overzealous judicial activism may lead to ineffective decisions. Finally, in cases where international law is still unclear, domestic courts should exercise restraint to avoid the over-judicialization of politics.[56]

In a sense, the freedom that domestic courts gain from the executive and legislative is replaced by the international community's shackles, legislating law through treaty and custom. Variations in the postures of avoidance, alignment, and contestation, which rely on the court's compliance or deference to executive or legislative prerogative is curtailed, depending on

52 Tamanaha, *On the Rule of Law: History, Politics, Theory,* 124.
53 Nollkaemper, *National Courts and the International Rule of Law,* 57.
54 Nollkaemper, *National Courts and the International Rule of Law,* 57.
55 Nollkaemper, *National Courts and the International Rule of Law,* 57.
56 Alec Stone Sweet, "Judicialization and the Construction of Governance," *Comparative Political Studies* 32, no. 2 (1999
): 147, 164.

how independent Nollkaemper needs his courts to be. Many legal techniques and mechanisms, such as non-self-executing treaties or acts of state, may cease to be employed, as the barriers between the domestic and international are blurred. Independence as a domestic agent is gained at the expense of being an international one.

Threats against court independence -in his view- rarely take the form of overt commands by the executive,[57] but are more often found in the political structure and legal practice courts find themselves in. Thus, domestic courts must be constructed with objects and purposes, as well authorities to enact a wide variety of rulings, dictating terms against the executive and judicial branches as needed by international law. As the first stop for many international disputes, domestic courts need to be bestowed with wide jurisdiction on all matters in which international law is potentially raised. The judiciary must retain wide authority for judicial review, perhaps up to and including a review of the constitution (if so, ordered by international courts -certainly a very drastic measure), only to guarantee that the judiciary could ensure the executive and legislative's compliance to such a demand. Still, one wonders what recourse the international rule of law would have if this right were absent, and the executive and legislative (answerable to domestic electorate) refuses compliance. As the one directly vertically integrated organ in the international rule of law, it seems that Nollkaemper's vision relies on domestic courts as its final guardian in the domestic sphere.

Limitations to court independence may also be in the form of general doctrines and principles such non-justiciability, immunities, separation of powers particularly in foreign policy, the need for a unified government voice, political questions doctrine, direct effect doctrine, or leaving treaty interpretation to the executive branch. Legislation and the particulars of each court's powers could also limit their independence to check against domestic organs. Further, Nollkaemper writing with Kanetake, advances the view that when domestic courts contest international law, they may do so for reasons entirely separate reasons from those the executive and legislative,[58] such as

57 Nollkaemper, *National Courts and the International Rule of Law,* 55.

58 See generally Machiko Kanetake and and André Nollkaemper, "The International Rule of Law in the Cycle of Contestations and Deference'," in *The Rule of Law at the National and International Levels: Contestations and Deference*, ed. Machiko Kanetake and Andre Nollkaemper (Oxford:

their social and cultural backgrounds.[59]

Independence, and the use of legal techniques rooted and particular to each court's home systems, are limited thus by compliance with an international rule of law, and by factual or political considerations -not necessarily by domestic law. Nollkaemper's concern is one of practical efficacy, and he seems to be willing to sacrifice picture-perfect alignment postures if it leads to the rule of law failing to be accepted altogether. This does not mean that legal techniques cease to exist altogether, but instead serve as a back-up. Where international law has delegated standards to domestic law, they continue to exist as status quo. In cases where international law is in conflict with itself, or where unadulterated application of international law lead to unenforceable or counter-productive judgments, these techniques could come to the forefront to bend international norms to a domestically acceptable result. Nollkaemper seems happy to exchange domestic politics for international politics as a preferable process for an international rule of law, rather than separate domestic rules of law: where domestic courts must translate world politics into actionable domestic judgments.

E. Peters: International law as a global constitution

"Constitutionalism, as far as we are concerned, signifies not so much a social or political process, but rather an attitude, a frame of mind. Constitutionalism is the philosophy of striving towards some form of political legitimacy, typified by respect for, well, a constitution"[60]

Peters' work, initially developed with Klabbers and Ulfstein, hypothesizes a world where international law is endorsed by the international community as a sort of global constitution, bound by a belief of shared values. International law is applied less as a norm, and more as a binding glue. At the outset, Peters' work runs with a what-if scenario,[61] envisioning a global constitutional order, mapping out what it could look like. Peters notes that traditional federalist or

Hart Publishing, 2016).

59 Referring to Ji Li, "Interactions Between Domestic Social Norms and International Law over Trade Dispute Resolution," in *The Rule of Law at the National and International Levels: Contestations and Deference*, ed. Machiko Kanetake and Andre Nollkaemper (Oxford: Hart Publishing, 2016).

60 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 10-11.

61 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 4-5.

hierarchical structures of constitutional orders found in states are unlikely to happen. The former due to fundamentally different values within the world, and the latter due to the presumption equally sovereign states would never accept a permanently superior other. As such any global constitution must be seen to be legitimate and pluralist in nature. Pluralist in the coexistence of different political beliefs, inclusive of international law's various actors and their internal norms, accepting of a diffuse center of authority.

The idea of a global constitutional order draws heavily from prior knowledge of domestic constitutional orders. Consensus indicates that a constitutional order is a distinct system, that at once empowers and limits political institutions, prescribes processes to follow, and delineates the political community that it comprises of -and of those who are not.[62] A constitutional order typically provides centralization of authority, where 'it is clear who can issue what norms and standards, and what the effects of such standards will be.'[63] Whether this process be guided by a higher value or a more functional notion that focuses on the evolving purpose and functions of governance is flexible.[64]

The background against this constitutional order's development is the perception that international law is becoming more similar but not identical to a traditional domestic legal order. On one hand, 'general international law provides the highways between otherwise isolated villages of international environmental law, international criminal law, international trade law, etc..'[65] On the other hand, authority is dispersed and disputed, both in form (legal and quasi-legal), and among the increasingly influential non-state actors. An order based on states, who traditionally interacted nominally as equals, is seen to give way to a more vertical order of international organizations, states, corporations, NGOs, groups, and individuals,[66] each interacting between and within levels, and may operate with their own 'internal normative legal

62 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 10.; Adam Tomkins, *Public Law* (Oxford ; New York: Oxford University Press, 2003).

63 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 18. See also Gavin W Anderson, *Constitutional Rights after Globalization* (Oxford: Hart Publishing, 2005).

64 Martin Loughlin, "The Functionalist Style in Public Law," *University of Toronto Law Journal* 55, no. 3 (2005): 361–403.

65 Referring to Oscar Schachter, *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff, 1991): 1.

66 See generally, Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law*.

orders.'[67] Constitutionalizing international law could potentially regulate this process: both by settling debates over the relationships and hierarchy of legal orders (e.g.. whether human rights, trade, environmental law should prevail), as well to protect against overt privatization by protecting 'public' institutions (as ideally as *should* happen in a nation-state).

In achieving this order and tailoring to local needs, the global constitution would need to rely on three techniques: subsidiarity, margin of appreciation, and proportionality.

Subsidiarity encourages political decisions to be taken preferably at the optimal (usually lowest) possible level of authority.[68] This assumes that all levels of political authority are in coordination with each other and must be balanced with the efficacy and utility of placing decision-making at a higher or lower level.

Margin of appreciation provides policy space for local authorities, based on the idea that they are better able to judge sentiments and conditions than distant ones, and which could lead to differentiated application of common norms. The two concepts above have been discussed mostly in the context of the EU. Subsidiarity being rooted in the Treaty of Maastricht and applicable to a broader set of law,[69] while the margin of appreciation, growing out of the practice of the ECtHR,[70] has been confined more to human rights.

Proportionality refers to the broad and perhaps universal practice of balancing competing interests, rules and consequences.[71] Unlike subsidiarity or margin of appreciation it is not lopsided so to speak, ultimately favouring one interest over another whenever they are applied. Proportionality aims to prevent this from happening by achieving a balancing of (typically) rights.[72] Broadly speaking, this presents a sort of problem to the global constitution

67 Neil Walker, "Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders," *International Journal of Constitutional Law* 6, no. 3–4 (2008): 373–96.
68 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 32-33.
69 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 33-34.
70 European Court of Human Rights, *Handyside v United Kingdom*, App. No 5493/72, Judgment, 7 December 1976 (Handyside v UK Case).
71 See generally, David M. Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004).
72 For discussion on margin of appreciation as reducing the effect of proportionality see also Julian Rivers, "Proportionality and Discretion in International and European Law," in *Transnational Constitutionalism*, ed. Nicholas Tsagourias (Cambridge: Cambridge University Press, 2007), 107–31.

and legal systems in general. This is because legal rules are:

"Typically, deontic in character: they set standards of behaviour which, quite simply, aspire to be met, and aspire to be met in all circumstances (except when the rule itself specifies otherwise)"[73]

While at the same time, proportionality could perhaps undermine this 'by having recourse to the consequences of action.'[74] Taken together, the principles of subsidiarity, margin of appreciation, and proportionality all provide policy space for the domestic court, even in cases where international law and the global constitution dictate a certain approach.

Within the global constitution, domestic courts do not necessarily apply international law directly but should behave to show they believe in its legitimacy by aligning themselves to it or the values contained within it, particularly guarantees traditionally connected to a constitution.[75] They may check or assess states and international organization actions seen to run counter to procedure or fundamental protections, much like the *Kadi* case.[76] This constitutional review is particularly important to check international organizations, which, aside from the EU, do not tend to be justiciable, particularly at the domestic level.[77] Private persons and business actors, acting in transnational activities, are also best seen to be regulated by domestic courts.

Another important theme within Peters' work is the importance of accepting or giving effect to soft-law, or the internal legal norms governing relations between parties. Examples being the internal codes of conduct for companies and agreements between relatives, norms established through the practice of government agencies in a welfare state, and regulatory activities between international and domestic civil servants.[78] The end goal being that domestic must also be able to position themselves to adjudge the workings

73 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 36-37.
74 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 36-37.
75 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law*.
76 The European Court of Justice, *Kadi and Al Barakaat v Council and Commission*, Judgment of the Court (Grand Chamber), 3 September 2008, C-402/05 P C-415/05 P (Kadi Case).
77 See generally, Niels Blokker, "Jurisdictional Immunities of International Organisations – Origins, Fundamentals and Challenge," in *The Cambridge Handbook of Immunities and International Law*, ed. Tom Ruys, Nicolas Angelet, and Luca Ferro (Cambridge: Cambridge University Press, 2019).
78 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 83, 84, 96.

of domestic and international actors utilizing norms and values present in a global constitution, or at least be able to position the court's norms and values against that global order -within states, and to the relations between states and international organizations.[79] This seems to be in line with her suggestion that legal disputes be adjudicated-taking account of domestic bias-as close as possible to the party and case, as well as the relevant public debate and legal issue, as international forums are considered subsidiary.[80]

The margin of appreciation also plays a role, relying on a distinction between 'inward-looking' and 'outward-looking' norms.[81] Greater leeway is given to domestic courts are given to the former, and with more traditionally domestic issues like criminal procedure.[82] Contrarily, in 'outward-looking' cases such as use of force or self-defense, domestic courts must give deference to international tribunals. A dialogue of such occurs when the norms have a strong domestic and international character, and while tensions arise, she does not see it as fatal. This integration presupposes the acceptance by domestic courts of decisions and norms created by international courts, particularly those of compulsory character, and "… international functions are largely beyond the control of national organs."[83] The empowerment of international tribunals is thus an aspect of international constitutionalization.

This is not to say that international law or courts must prevail in domestic courts simply because it is of a formally higher hierarchy. Instead, particular attention must be paid so that "substance-oriented perspective suggests that provisions in state constitutions of minor significance would have to give way to important international norms."[84] Constitutional functions and perspective can be applied to existing norms such as *jus cogens* and *erga omnes* obligations,[85]

79 Anne Peters, "Are We Moving Towards Constitutionalization of the World Community?," in *Realizing Utopia: The Future of International Law*, ed. Antonio Cassese (Oxford: Oxford University Press, 2012), 130–31.

80 Peters, "Are We Moving Towards Constitutionalization of the World Community?" 144-145.

81 Yuval Shany, "Toward a General Margin of Appreciation Doctrine in International Law?," *European Journal of International Law* 16, no. 5 (2005): 907–40, 912, 924–25.

82 Peters, "Are We Moving Towards Constitutionalization of the World Community?" 145.

83 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 150.

84 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 349.; For a discussion on constitutional principles and international law see Anne Peters, "The Globalization of State Constitutions," in *New Perspectives on the Divide Between National and International Law*, ed. Janne E. Nijman and Andre Nollkaemper (Oxford: Oxford University Press, 2009), 257–70.

85 Peters, "Are We Moving Towards Constitutionalization of the World Community?"123.

While acknowledging that a truly hierarchical international-domestic court relation might not ever exist, judicial organs should act in a constitutionalized manner: guided or responsive of precedent, and exercise restraint on issues beyond their regimes or those that are handled by other courts.[86] Another important suggestion is the existence of a system of referral to international judicial organs, whether to harmonize domestic courts or other international courts.[87]

1. Domestic courts in a global constitution

The role of domestic courts is not as well developed in Peters' theory when compared to Nollkaemper's. Primary discussions revolve around framing the role of international courts, and here it relies heavily on the established practice and assumptions made about domestic courts in general. In Peters' view, the distinction of roles between international and domestic courts are not necessarily those prescribed by law, as in Nollkaemper, but also that of a value judgment: which court is the appropriate forum for a case. To develop this balancing act, Peters not only points to the use of binding treaty instruments to divide jurisdiction and powers, but also existing principles such as exhaustion of local remedies, subsidiarity or complementarity, as well as alluding to the possibility of a 'code of conduct' respected by all courts.[88]

Another important consideration to the facts is the distinction of the substance of norms discussed: inward or outward looking, depending *inter alia* on the norm's addressees. For inward-looking norms, Peters points to Shany's idea that a greater margin of appreciation could be applied to give more leeway to domestic courts.[89] Alternatively, freedom could be expressly given for domestic court's enforcement in a way they see fit, pointing to the *La Grand* and *Avena* cases which left the choice of means to the US.[90] Peter disagrees with Shany that certain inward-looking norms, such as self-

86 Peters, "Are We Moving Towards Constitutionalization of the World Community?" 123.
87 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 207-208.
88 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 145.
89 Shany, "Toward a General." 914–925.
90 Internasional Court of Jusrice, *La Grand (Germany v United States of America*), Judgement, 27 June 2001, I.C.J. Rep. 466, para. 125 (*La Grand* Case); Internasional Court of Justice, *Avena and Other Mexican Nationals* (Mexico v United States *of America),* Judgement, 31 March 2004, I.C.J. Rep.12, para.141 (*Avena* Case).

defense, should be left to domestic authorities as with the prohibition against torture.[91] It seems that while certain aspects of self-defense and torture are inward looking, they tread upon norms which are part of Peters' fundamental guarantees inherent in a global constitution; importance placed in the norm's value, not jurisdiction or mere categorization.[92] For example, international crimes contained in the ICC Statute are:

"addressed to every human being in the world in his or her private and personal capacity. Not only state officials or agents acting in their official capacity as militaries or politicians, but also private businessmen are under obligation. It is immaterial for the quality as an international obligation whether the international norms are enforced by international criminal courts or merely by municipal courts which apply international law either directly or indirectly"[93]

Even so, a hierarchy between courts in a global constitution still exists. Peters, like Nollkaemper, raises the *Medellin* case,[94] but referred to it as a "disrespect of the ICJ's Avena judgment… contribut[ing] to undermining a relationship based on consistency between the international and domestic judiciary."[95] She ultimately sees the relationship of an international court as a dominant one to a domestic court.[96]

Conversely, when non-compliance stems from a desire to protect human rights to a higher standard than that accepted by international tribunals, this "in itself can be seen as a form of constitutionalization."[97] Peters argues that global constitutional values override the formal divide between international and domestic courts, allowing domestic courts more flexibility than in Nollkaemper's model. Instead of strict subordination, courts may align with, contest, or avoid both international and domestic norms to uphold shared values. This flexibility includes soft responses like declarations of non-compliance and is supported by principles such as subsidiarity, proportionality,

91 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 146.
92 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 349.
93 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 176.
94 United States Supreme Court, *Medellín v Texas*, 552 U.S. 491(2008), at 507 (*Medellín v Texas).*
95 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 146.
96 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 146.
97 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 77-79.; See also *Kadi* Case.

and margin of appreciation. In cases of potential conflict, especially across multiple jurisdictions , Peters endorses avoidance to harmonize legal systems without direct confrontation.

2. Global, domestic courts

Global constitutionalism begins with the idea that domestic courts possess independence and are subject to due process guarantees, whether as regulated by domestic or international law.[98] A minimum standard of expertise, guarantees of fairness and justice, impartiality, and conformity with human rights is seen as being of a 'constitutional quality' both at the domestic and international level.[99]

Within the domestic sphere, Peters sees domestic courts as holding an indispensable role through judicial review, "to ensure that the executive power implements legislation loyally, and to protect those affected … judicial review of both legislation and executive acts is essential to protect the rights of individuals and minorities at the national level."[100] The separation of powers, whereby a counter-majoritarian court holds the power of the people in check, is crucial in a constitutional system. On the international sphere, Peters elaborates on judicial reviews against international organizations, which are then assumed (or need) to be seamlessly enforceable within the states involved, for it to work. This right to judicial review is wide, as states, individuals, and organizations are entitled to a right of complaint within a global constitution. It should encompass "both law-making and executive acts of international organizations… [while] it is less obvious that judicial review should also encompass non-binding decisions."[101] It should also cover procedural requirements of decision-making, possible ultra vires, and legality against general international law (including jus cogens). The final products of

98 E.g. International Covenant on Civil and Political Rights, signed in New York on 16 December 1966, entered into force on 23 March 1976, 999 U.N.T.S. 171, art. 14 (ICCPR).; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), signed in Rome on 4 November 1950, entered into force on 3 September 1953, 213 U.N.T.S. 221, art. 6 (ECHR).

99 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 129.

100 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 64-65.

101 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 66.; Jan Klabbers, "Straddling Law and Politics: Judicial Review in International Law," in *Towards World Constitutionalism*, ed. Ronald St. John Macdonald (Leiden, The Netherlands: Brill | Nijhoff, 2005), 824.

this judicial review would be invalidity of the act, inapplicability in relation to affected states, or a statement of inconsistency.

In Peters' view, this judicial review could in theory also be performed by domestic courts. Granted, this would only crop up in the most developed constitutionalized organizations, but if created, this may present problems to the previously established hierarchy. Should only member states of that international organization be allowed to domestically review the actions of that organization? International courts may find themselves in a position of having to accept or deny domestic rulings on what is essentially an international body, while they may not even have jurisdiction over the parent state. Other states, including their domestic courts, are thus put in a similar position, and are expected to follow by judicial comity or reciprocity. In essence, then, the position of domestic courts becomes extremely powerful.

Underlying this wide right of judicial review is the broader need to subject all, if not most, acts to a unified constitutional standard, particularly for individual complaint.[102] Peters seems to suggest that, particularly when it comes to individual human rights, domestic courts should be the primary entry point for most legal disputes. In so doing, they must be able to directly affect international law and do so according to international principles.[103] This ties into Peters' preference that all actors at all levels should somehow be able to access and benefit from the shared norms of that constitution.[104]

F. Domestic postures and global values

This expanded role of domestic courts does not necessarily equal the limitations to postures as in Nollkaemper's view. Unlike his unitary rule of law, Peters is more tolerant that international and domestic law have some distinctions and could develop independently while adhering to shared tenets. As such, the variety of postures and legal mechanisms towards international law is not curtailed as much. However, Nollkaemper's international shackles are replaced by a gravity field where international and domestic law orbit global constitutional values.

102 Further proposals to this effect are seen in Peters, "Are We Moving Towards Constitutionalization of the World Community?" 129 – 135.
103 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 166.
104 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 167.

The traditional forms of alignment postures, whether in fair-weather, overriding, or consubstantial forms, are acceptable, so long as they do not undermine global values. For example, a single case of consubstantial alignment of domestic norms (without reference to international law) to a global value would not in itself be problematic, but such a consistent posture by a judiciary serves to undermine the link between a global constitution, international and domestic law. A persistent lack of reference to international law is perhaps as problematic as an incorrect reference, as the former reflects a rejection of the universal applicability and existence of the global constitution itself, while the latter is an erroneous application of acceptance.

Likewise, contestation of international norms is an acceptable and perhaps desirable effect of empowering domestic courts to draw upon a set of values encompassing the international and domestic. A wide right of judicial review and litigation by individuals against international organizations provided by domestic courts would inevitably produce contestation, at the very least of the legal product or action of that organization against its own constitution or rules. It also seems likely that if individuals were to litigate against international actors directly, they would also still be tied to and regulated by domestic rules (at the very least the domestic court's complaint mechanism); local and international-minded contestations will continue to occur in Peters' world.

This expansion of the role of domestic courts is not limited to human rights cases, but also to commercial disputes. Peters notes the deficiencies in the investment arbitration system,[105] where private actors are free to litigate against states, overseen by privately selected arbitrators operating piecemeal. While justiciability by private actors is commended, compared to the state-initiated WTO procedures, her problem lies in the lack of constitutional guarantees: lack of an appellate system to ensure coherence, over-reliance of arbitrators on continued business and appointment, and lack of transparency.[106] In particular, the whole corpus of international businesses' self and co-regulation, *lex mercatoria*, is best seen to be protected through domestic

105 For the public law aspects of ICSID, see Gus van Harten, *Investment Treaty Arbitration and Public Law, Stanford Journal of International Law* (Oxford: Oxford University Press, 2007).
106 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 253-254.

courts "acting upon product liability claims or deceit liability by consumers and competitors, and litigation based on employment contracts."[107] This is an extension to today's arbitral practice of arbitrators ruling on a private contract governed under a particular law, the remedies of which are then executed in the relevant state's courts. In effect, domestic judges will hear what a transnational business-legal regime or an international framework like the WTO is essentially, the remedy, standard setting, and impacts of which will need to be enforceable by all courts, states, and organizations in question.

To apply international law within a global constitutional framework, Peters envisions domestic courts with broad jurisdiction and the capacity to act like international courts, subject to correction by higher tribunals. Unlike Nollkaemper—who avoids overlapping roles—Peters permits domestic courts to engage extensively with international law, drawing on global constitutional values to shape or even override domestic and international norms. These values must be accessible within the constitutional order, either through legislation or judicial initiative. While existing courts need not change their formal jurisdiction, they should be empowered to adjudicate a wide range of disputes in line with these shared values, using tools like proportionality and margin of appreciation. Such courts must be highly independent—possibly more than in Nollkaemper's model—to hold both domestic and international actors accountable. Peters thus imagines domestic courts as globally responsive institutions capable of upholding fundamental rights and constitutional principles across legal orders. Such a proactive domestic judiciary:

"bears the risk of diverging case law, this would ideally have to be accompanied by a system of referral to the international adjudicative organs for preliminary rulings in order to harmonize the interpretation of the respective international organizations' law."[108]

In short, in Peters' global constitution, domestic courts retain more of their independence to posture as compared to Nollkaemper's. They can align, avoid, or contest international law, but are subject to a broad underlying need to shape it and domestic law to conform with a global constitution. In a sense, there is an added dimension of posture, that is towards the shared values, and

107 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 256.
108 Klabbers, Peters, and Ulfstein, *The Constitutionalization of International Law,* 209.

perhaps the only acceptable posture here is of broad alignment to it.

G. The theories and the sources of international law

The theories make demand not only of postures, as we can also tease out what demands they make of the treatment of international law sources in domestic courts. In an international rule of law, domestic courts play three roles:[109] to decide cases which are wholly or partly based on international law; to review the legality of domestic actions, law, and actors in light of international law; and to interpret, determine, and develop international law.

In terms of the use of sources, we should also expect to see certain outcomes. For example, within international law there is a hierarchy of clarity (if not also one of often confusing superiority) between written, explicitly consented to legal norms such as agreements, international treaties and statutes establishing international bodies, the by-products of these norms (the regulations, decisions, judgments, commentaries etc.)[110] and the more amorphous realm of custom, general principles, and *jus cogens;* not to mention the large body of academic writing and doctrines on the matter.

On the written sources, we expect to see a degree of discrimination between the sources which are meant to be binding and those which are persuasive, secondary or aim to implement the primary sources.[111] This would show that the court behaves in a way that is aware of international law as a logical and somewhat (not always) hierarchical legal system, which would be shown in its judgment. We should expect a correlation between the use of binding norms and a posture of alignment, as these norms should be the one that domestic courts apply the most 'as is', and that persuasive norms (especially those in line with an avoid or contestation posture) to come into more play when a domestic court attempts to avoid or contest international

109 Nollkaemper, *National Courts and the International Rule of Law,* 9-11.

110 For example, where Bulgaria accepts treaties as part of the domestic legal order but not international court decisions, Supreme Court of Cassation, Prosecutor General v. V.S., Case No. 988/2006, Judgment No. 293 (2006); U.S. Supreme Court, *Moises Sanchez-Llamas v. Oregon*, 548 U.S. 331, 126 S. Ct. 2669 (2006) (Sanchez-Llamas v. Oregon).

111 Such as between treaties ratified with a domestic instrument, and other international agreements which do not require domestic instruments to ratify, pointing the Constitution of the Republic of Poland, signed on 2 April 1997, entered into force on 17 October 1997, art. 87 (Polish Constitution); and, Polish Supreme Court, *Stanisław K v Zakład Techniczno-Budowlany P Spółka zoo*, II PK 100/05 ILDC 388 (PL 2005).

law.

Thus, in Nollkaemper's view, we should expect clear differences both in the likelihood of creating a posture, as well as which postures are taken. Treaties, being a written source and clearly binding, should be expected to produce clear postures and lead to alignment as international law is superior to domestic law. Custom on the other hand, should also lead to alignment and a clear posture, but perhaps less clearly so than treaties. On the other hand, the persuasive sources, written or unwritten, such as those coded under other international documents or foreign legislation and practice, while expected to still more likely to lead to alignment, should do so less clearly than the binding sources.

In contrast, within Peters' global constitution, a strict and narrow understanding of sources of international law, such as that offered by Article 38(1) ICJ Statute, is not workable.[112] Thus, within the global constitutional framework, the distinction between ratified treaties, treaties, and other multilateral documents signifying the intent of states are less distinct than that expected from the ICJ's theory or Nollkaemper's conception.[113] Examples provided are such *moral agreements* such as the 1975 Helsinki Final Act which contains key understandings between the Eastern and Western Blocs during the cold war, but in strict legalistic terms is devoid of legal force;[114] or the UN Global Compact which aimed at providing a voluntary code of conduct which companies could subscribe to relating to human rights, labour standards and environmental protection.

Therefore, a distinction is that an international rule of law divides sources of international law between binding and non-binding ones and expects a consistent treatment (and obedience) by states to binding sources; whereas the global constitutional model sees different sources of international law as different vehicles to contain and transfer universal values to states, and each of them having different degrees of influence and persuasiveness.[115]

112 Klabbers, "Straddling Law and Politics: Judicial Review in International Law." 86-89.
113 Klabbers, "Straddling Law and Politics: Judicial Review in International Law." 89-91.
114 Harold S. Russel, "The Helsinski Declaration: Brobdingnag or Lilliput?," *The American Journal of International Law* 70, no. 2 (1976): 242–72.
115 Jutta Brunnée and Stephen J. Toope, "International Law and Constructivism: Elements of an International Theory of International Law," *Columbia Journal of Transnational Law* 39, no. 3000 (2009): 19–74.

Scholars have also investigated testing whether these expectations hold true, but the body of established research does not go to the same extent of directly testing different sources against postures. Some researchers focus on international law's effect on a domestic system as a whole, such as Lupu's study whether ICCPR ratification (as an independent variable, alongside judicial independence score, regime durability, GDP, states of war etc.) is correlated positively with a country's performance rating for freedom of association, speech and freedom, as well as the CIRI index for personal integrity rights covering killings, torture, imprisonment and disappearances (affirmative for the former, but negative for personal integrity rights).[116] Others test international law acceptance in a domestic legal system through a value system assessing receptiveness to sources such as treaties and custom against domestic restraints, but otherwise shy from full statistical analysis for correlation.[117]

Where descriptive or statistical analysis was carried out, many of the assessments were related to the frequency of sources and their relationship to certain rights as opposed to the postures or effects that they produce. For example, Yánez & Molina's research shows that the Ecuadorian Constitutional Court sees a strong distinction between hard laws (relying on ratified treaties, using them to override domestic legislation) and soft law.[118]

H. Conclusions

Each theory carries implicit assumptions about the capacities of domestic courts must possess. Nollkaemper's model envisions courts as agents of the international rule of law, but their autonomy is constrained by a duty to comply with international norms and defer to international courts, reducing flexibility in using domestic legal techniques. This demands highly independent courts with broad law-finding powers and strong international law expertise. Peters,

116 Yonatan Lupu, "Best Evidence: The Role of Information in Domestic Judicial Enforcement of International Human Rights Agreements," *International Organization* 67, no. 3 (2013): 469–503.

117 Pierre-Hugues Verdier and Mila Versteeg, "International Law in Domestic Legal Systems: An Empirical Perspective," *Proceedings of the Annual Meeting (American Society of International Law)* 108 (2014): 376–82.

118 María Helena Carbonell Yánez and Dunia Martínez Molina, "¿Un Romance Moderno? El Derecho Internacional Público y El Derecho Constitucional En El Trabajo de La Corte Constitucional Ecuatoriana: A Modern Romance? Public International Law and Constitutional Law in the Ecuadorian Constitutional Court," *International Journal of Constitutional Law* 20, no. 4 (2022): 1675–1697.

by contrast, allows greater flexibility: domestic courts can draw from both international and domestic sources to advance shared global values, even contesting international norms when justified. Their postures are more varied, as they operate on a more equal footing with international bodies, so long as they remain aligned with the underlying values of a global constitutional order.

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