Separating Powers: International Law Before National Courts

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Preface

As any good constitutional lawyer will know, and be more than happy to expound on at length, the interaction between international law and national law is complex and difficult. It is easy enough at an academic level, or before the courts, to invoke international norms in national, domestic legal matters with little more than a general or passing regard for their constitutional status. The focus falls naturally upon their content, adding weight and advantage to press home a desired legal result, and upon the impression of global, trans-jurisdictional comity on at least that legal rule. But status and legal stature prove a somewhat more pressing immediate issue when the time comes actually and concretely to apply them. Countering the pressures of an internationalised world are the equal pressures of maintaining domestic legitimacy and constitutional loyalty. Although the event horizon for the courts may stretch to international distances, the practicable and effective scope of sight would seem to remain limited to national boundaries, if only because the courts are products of and representatives of such a national-oriented constitutional footing.

That constitutional tension serves as the impetus for this book. The central question is to what extent judges respect and enforce the national doctrine of the separation of powers in recognising and enforcing norms of international law. In a more compact form perhaps, the issue is what limits the separation of powers sets on the possibilities of national courts in various countries to interpret and apply norms of public international law. This is framed against the background of the "globalisation" of law. The question is thus to be read within a broader perspective of whether the state should be viewed as a solid, closed entity, or whether globalisation breaks through the boundaries set by the separation of powers with the result of a broader scope of powers for national courts in the field of the interpretation of international norms.

The Hague Institute for the Internationalisation of Law (HiiL, www.hill.org) resolved to find a place for this topic in its research programme, and ultimately it funded a research project through the University of Utrecht, of which this book is the result. Consonant with the HiiL's global, cross-jurisdictional perspective and outreach, the intention from the start was to pursue these issues in a comparative

law context. In the result, four jurisdictions were selected, and so the study in this book reviews the practices of the US, French, UK, and Netherlands courts in matters of treaties and customary international law. This, I readily admit, constituted a very demanding research mandate and it required making certain concessions. Chief among these is leaving out specific and detailed consideration of the role of the EU as a source of "international law", and the interaction of the EU, as a political and legal institution, with international law and institutions. Also, it leaves untapped the practices in Asian, African, and South American countries. Insights and contributions from these perspectives will have to wait for later works.

Analysing the application of international law in national legal systems through the optic of the separation of powers has not been pursued in other more general studies on the effects of international law in national systems. In that respect too, this book approaches the topic from a state-oriented, constitutionalist angle. In my view, this route allows for a more analytic and critical approach, focusing on the presumptions on the nature, and distribution of state power. It would put into relief the modern concept of the state and its structural balance of powers. The trias politica is as much a way of representing a constitutional (political) equilibrium as it is a means of articulating a certain conception of legitimacy, both of political and legal orders. To the extent that this reveals an ideological investment, it is certainly not that international law deserves or ought to have a place in national legal orders. Rather than prescinding from some ontology of international law, I prefer instead assuming the starting point to be the validity and legitimacy of national constitutional orders. Or to be glib, I prefer Schmitt over Kelsen.

Perhaps then it will come as no great surprise that in reality, constitutionalism and a constitutional perspective would be seen to generate an inevitable dualism between international law and national law, one which cannot necessarily be overcome by express constitutional provisions accommodating international law. What the book intends to do on a theoretical level is to draw attention to—and open discussion on—the real issues for integrating international law and municipal law. These issues are the modern conceptions of constitution, constitutionalism, and national and international law-making. This means more than redesigning institutions. One route is to change the way we think about constitutions and constitutionalism. We have to dislodge constitutions from the Romantic ideal of geographically generated cultures, and redefine legal systems without national anchors. Another way would be to reconsider the general relevance and power of international law. The more international law, taken as a global answer to global problems, intrudes into domestic legal systems, the more it takes on the role and function of domestic law. In a globalised world, what do we really and truly want the "new international law" to do, and what can it actually accomplish?

This book could not have come to life without the support and patience of many colleagues, friends, and family. Of course, the usual caveats apply and any errors, infelicities, or misunderstandings must remain my responsibility. I am grateful for the financial and other support of the HiiL in allowing me the opportunity to undertake research on this point. David Raic and Kataryna Katarzyna there kept a

steady but gentle hand on the tiller of administration. Many thanks and much gratitude is due to the Constitutional Law Group of the University of Utrecht, and my colleagues and friends there, for providing a welcoming and enlightening base of operations. In particular, I had the great benefit of Leonard Besselink's wise advice and comments as this work proceeded. Both the HiiL and Prof. Besselink demonstrated immense patience and understanding when progress on writing this book was significantly delayed by two personal tragedies, one more grave, painful, and lasting than the other. Marjolijn Bastiaans and TMC Asser Press exercised the necessary patience and professionalism to see the manuscript through to publication. Lastly, there is no easy, family-friendly way to write a book. And it is to my family that I owe my greatest debt, and offer my greatest thanks.

Given the ever-changing landscape of this area of law and academic commentary, it should be noted that the principal research for the book considers the law up to the beginning of 2011.

Contents

Abbreviations

AB	Administratiefrechtelijke Beslissingen
AC	Appeal Cases (Law Reports series HL, PC, SC)
AG	Attorney General
All ER	All England Law Reports
ATS	Alien Tort Statute (US)
CA	court of appeal
CC	Conseil Constitutionnel
CdE	Conseil d'Etat
Ch	Chancery Division/Chancery Division Law Reports series
CLC	Commercial Law Cases
CMLR	Common Market Law Reports
Co. Rep.	Coke's Reports
Dist Ct	District Court
Div Ct	Divisional Court
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EConvHR	European Convention on Human Rights
ESC	European Social Charter
ER	English Reports
EWCA	England and Wales Court of Appeal judgments (neutral citation, online)
EWHC	England and Wales High Court judgments (neutral citation, online)
EU	European Union (in all its various instantiations)
F	Federal Courts Reports
FSIA	Foreign Sovereign Immunities Act (US)
HCJ	High Court of Justiciary
HR	Hoge Raad
HL	House of Lords
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice

KB	King's Bench / King's Bench Law Reports series
LJN	landelijk jurisprudentie nummer (neutral citation)
LLR	Lloyd's Law Reports
LQR	Law Quarterly Review
NJ	Nederlandse Jurispudentie
QB	Queen's Bench
QBD	Queen's Bench Law Reports series
P	Probate, Divorce & Admiralty Law Reports series
PC	Privy Council
PCIJ	Permanent Court of International Justice
Rb	Trial Court (*rechtbank* NL)
RvS	Raad van State
SC	supreme court
SLT	Scottish Law Times
TVPA	Torture Victims Protection Act
UN	United Nations
UNSC	UN Security Council
UNGA	UN General Assembly
UN GAR	UN General Assembly Resolution
UN Charter	Charter of the United Nations
US	United States Supreme Court Reports
VCCR	Vienna Convention on Consular Relations
VCLT	Vienna Convention on the Law of Treaties
W	Weekblad van het recht
WLR	Weekly Law Reports

Chapter 1
Making Introductions

1.1 Transnational Law and the Courts

1.1.1 The Story So Far…

If we are to follow the thinking of the globalists and internationalists (and considering their evidence of increasing international co-operation and agreements), the problems facing the modern state require solutions based on a transnational, international approach. Economic activity and social forces no longer respect national boundaries (if they ever did, that is) or much less so. The mobility of labour and capital, international investments, multinational business entities, and worldwide supply and product linkages weave together the economic lives and well-being of many states. Problems, constrictions, or constraints in the one will inevitably affect the economies of the others, just as do growth, expansion and wealth generation on the other side of the balance sheet. Modes of easy, quick transport and of communication, such as television and the Internet, have facilitated the rapid exchange of news and ideas among people, near and far. Whether or not the quality and utility of the information recorded matches its volume, whether the availability and ease of travel within a country or far beyond contributes something more profound than just a passing tourist moment, whether or not the forces of popular, mass culture (in language, music, film, food or otherwise) threaten to erase local, regional cultures and differences, all these and like concerns reflect at their core the realities of an interconnection and inter-penetration of societies and social issues across national boundaries. A similar realisation, and comparable forces, contributed in no small measure to the formation of the Council of Europe, and of the European Union (in its predecessors the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community).

The global nature, then, of economies and societies in their "modern" or "post-modern" circumstances (whatever the fashion may be) has generated

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corresponding pressures to manage and regulate those linkages and the problems arising therefrom on a transnational basis. It is not only a question of efficiency and cost-savings which regulatory harmonisation can provide business and finance. It is also a recognition of the likely confluence of different national jurisdictions and legal domains in any serious economic and social problem. Likewise, and on a broader scale, the more nations interact on a worldwide scale, the more likely their disputes and conflicts spread to all those on the international plane. Co-operation among states to avoid and resolve disputes among themselves and their respective nationals require not only a political engagement, but a legal one as well. Transnational relations grow transnational disputes, whose constituent elements, governing law, and potential remedies easily reach over the borders of any one given state. Thus any rules and laws so generated will similarly need to be of an international, transnational in character, so the globalists argue.

Hence this "post-modern" reality of globalism will pull national judges out of their hitherto national-oriented routines. This entails more than just increasingly frequent reference to and application of foreign law. Courts have always applied foreign law when the case before them has required that because of some significant foreign element, involving a foreign party; status, rights or obligations defined by a foreign legal system, a foreign cause of action, or such like. They have done so, moreover, on the basis of instruction or permission of law. The relevance of foreign law, its proof and its normative weight, are all questions defined and delimited by law, and not ones within the unfettered discretion of any given judge. Courts have a somewhat wider discretion concerning opinions of foreign courts, using them to assist articulating rules and decisions in their own domestic cases. These foreign opinions do not represent a source of law, but rather serve as examples and expressions of a particular rule which is grounded in the domestic legal system. This is particularly so in the Commonwealth legal systems which share an active, common legal heritage with the UK.[1]

A sort of glorified comparative law, however, is not what the globalist mindset appears to consider the prospective role of international law in domestic systems. Instead, globalist arguments would announce the emergence of transnational law as a further legal order, one parallel to national and foreign ones, and amalgamating aspects of the national and international. The easy and quick rejoinder is simply that international law already constitutes a third—or even a second of two—legal orders. But this would miss the significance, the paradigm shift if you will, of what the globalists envision. International law is generally taken to mean those rules of law applicable to relations among sovereign states. Private parties, non-sovereign states, in principle have no standing. The international legal order has no legislature, no parliament, no real court system, none of the trappings customarily associated with a developed, sophisticated legal system. The globalist mindset proposes a shift in emphasis and perspective for international law. It would nonetheless retain its

[1] Discounting the former colonial situation, the *Colonial Laws Validity Act* (1865) 28 & 29 Vict. c.63 and appeals to the Privy Council.

international character. But it would also expand its cover to all private parties, in their relations with one another and to public–private relations within and across borders: a transnational character.[2] In a sense, the post-modern legal situation would see the recovery of the older notion of international law as the "law of nations", a sort of common law inherent in any national legal order, apart from differences introduced by virtue of local culture and politics. (Indeed, a stronger version of this globalist idea might revive Kelsen's hypothesis of all national legal orders being subsumed under, and derivative upon, the international, or revive forms of natural law.) The generation of legal rules would not be exclusively an international nor a national act, but combine and connect national legislatures and judiciaries into an active, borderless network of common rule generation.[3]

All this certainly represents an interesting—and challenging—idea. Not the least is the liminal question whether transnational law is a legal order in its own right, or ought to be, and thus distinguishable in substance from national and international legal systems. I assume here without more that "transnational law" and "international law" are the same, and interchangeable. Aside from this and institutional questions, the realignment of international law as something more than just rules for states raises more immediate issues for domestic constitutional law.

Judges have, of course, also been called upon to apply international law, albeit infrequently, rarely. They would generally encounter issues of international law when presented with cases regarding sovereign immunity, treaties (especially in international transport), the territorial limits of state authority, and perhaps even prize cases. Most of these matters have, however, a significant overlay of domestic rules. Yet, certainly as international regulatory and legal co-operation grows to meet business and social realities, so too will the call to apply internationally generated rules. Moreover, in addition to the quantity of international rules and co-operative ventures, the late twentieth century also produced a marked confidence in and reliance on the promise of international law to correct, supplement, and control deficiencies and wilful manipulations in national legal systems, particularly in the domain of human rights and humanitarian assistance. The standards of accountability for persons and officials alike should draw not only upon national law, but on international law too. For the courts, the question quite simple. Is the rule of international law relevant to the case before them as having something authoritative to say, something which the courts must bring into account? Legal authority derives from a constitutional or legal direction instructing courts or permitting them to consider international law. Underlying this is the constitutional allocation of law-making powers: which organ of state is constitutionally recognised to have the power to declare law?

Unless we are willing to ignore the long and often bloody history of constitutionalism, the separation of powers doctrine instructs that the executive branch has no power to legislate; nor do the courts. The conventional model of the

[2] "Transnational law" being coined by Jessup.

[3] See, e.g., Slaughter 2004.

separation of powers (in a simplified structure) assigns to the courts the function of interpreting and applying the law according to the facts of the case before it. The particular task of creating or enacting "law" is assigned to the legislative branch. The implementation and execution of the law, under this simplified classic model, falls to the executive branch. The conventional model assumes that the "law" is principally legislative in origin, whether in the form of primary instruments (Acts, Codes, statutes) or secondary instruments (regulations, decrees, ordinances). Any executive or administrative regulatory act falls conceptually under some preceding legislative delegation of power. The Anglo-American system of common law, of law emanating from judicial decisions, would seek to preserve the model by resort to the fiction of "discovering, not making the law" and by constitutional fiat subject to legislative override. Thus, the executive branch by itself and alone may neither repeal a right granted by law, nor create or confer a right or burden in law, except by and through legislative sanction. That a government and its administrative agencies in daily practice do confer and remove rights simply reflects existing legislative (or even possibly, constitutional) authorisation. That authorisation renders those rules subordinate and secondary to primary legislation. Should the government (taken as the whole administrative leviathan in all its various parts) act without such legislative authorisation, or outside any present conferral of power as may have been given, the government acts *ultra vires* and in breach of the separation of powers. In the ordinary course, those *ultra vires* acts are invalid and of no legal force.

Now, if we consider the conventional conception of international law, its rules are created by agreement among the executive powers of the various states. International law (treaty law and customary international law) is not, by definition, legislative in origin. Rather, it is the product of executive acts in the field of foreign affairs. Foreign affairs are generally and usually a matter of exclusive executive authority and jurisdiction. Thus courts typically characterise the area as non-justiciable for reason of "political questions" or likewise, "the prerogative". While it remains open for legislatures to seek a greater role in guiding, reviewing and approving a government's foray into foreign affairs—and indeed, some legislatures have indeed encroached upon their government's previously untrammelled freedom to act—the core business of the government's foreign relations activities remains as yet untouched by the legislative processes and requirements applicable to statutes. And by the precepts of constitutionalism, it need not be otherwise. As long as these compacts among governments seek effect only outside the domestic legal system, and remain within the constitutionally prescribed domain of executive power (such as policy choices, proposing legislation, and administrative acts and rule-making within the bounds of legal authorisation), the international and the national orders do not conflict. No issue regarding the separation of powers and other constitutional rules arises. But, where the government expressly or impliedly agrees or accepts that certain private or public rights and obligations obtain as a matter of law, then the executive arm of the state begins to trench upon the law-making powers reserved by the separation of powers for the legislative arm. Similarly, where the courts are expected to apply customary international law as national law. When courts are invited to apply international

law in domestic cases, to supplement or supplant municipal law and to determine rights and burdens given by domestic law, international law seems to represent legislation by the executive branch precisely outside the limits of the separation of powers.

Presumably, in order to avoid such a naked usurpation of the legislative function, the separation of powers, and constitutionalism more broadly, would push the courts to locate some concrete constitutional (or by extension, legislative) basis which allows them to apply such "executive legislation" *qua* international law domestically, or at least to characterise it as constitutionally recognised and permissible "law". As we shall see below, the constitutional accommodation of treaties and other international agreements addresses directly and clearly the separation of powers issues. Express constitutional provisions concerning the legal effect of treaties and the involvement of the legislative branch, either in approving treaties or incorporating them into domestic statutes, provides the judiciary with the necessary constitutional, separation of powers foundation. Courts can also take their cue from this authorisation to determine when and where to apply international law thus incorporated, and its normative weight (as an ordinary statute or having some degree of paramountcy). The situation for customary international law is the opposite. Its constitutional foundation to be recognised as domestically applicable law is unclear and uncertain. Rarely, if at all does a statute incorporate by general reference "international law", the "law of nations" or "customary international law".[4] Nor is there any certainty on the utility, normative effect, and weight of customary international law in domestic litigation. For example, can *ius cogens* override a statutory provision or invalidate an otherwise *intra vires* administrative act? Surprisingly, unlike questions of judicial power and executive action in domestic cases without foreign elements, little if any regard is generally paid to the separation of powers in the application of customary international law. Some perfunctory and unreflected ruminations on "international law being part of our law" seem to suffice without any further, considered treatment. Not surprisingly however, the courts by consequence tend to treat customary international law in an offhand, non-binding and non-determinative way. Given the portent of the transnational legal order, its potential ramifications for constitutional structure and law, this aspect of international law certainly deserves the same close and considered attention that any proposed addition, amendment, adjustment or abrogation of constitutional tenets would otherwise merit.

1.1.2 The Issues

Nevertheless, the question of analysing the application of international law in national legal systems through the optic of the separation of powers has not really

[4] Among the few, see e.g., the *Alien Tort Claims Act* (28 USC §1350), and the *Uniform Code of Military Justice* (50 USC).

been pursued as a topic in and of itself, nor in other more general studies on the effects of international law in national systems. The question has scholarly significance because, while globalisation and internationalisation are by tradition dependent on states acting coherently, their objective and trend is to create a general permeability in state structure and national sovereignty. Whether a constitutional order can furnish such "openness" to law-making power outside itself remains to be ascertained. So the question pertains to the relation between coherence in the behaviour of states and the openness of the state constitutional structure. Ultimately, it joins a broader debate on how to ensure that the national legal order communicates well with the international environment and at the same time is able to continue to function effectively as a coherent whole.

From such a broad and generous beginning, a number of more specific issues and questions obviously can be teased out. Moreover, it offers a variety of possible angles and perspectives through which to concentrate on the desired issues. As it stands, the within study—remaining a comparative law venture—chooses for a critical approach by focusing on the presumptions on the nature, situs and distribution of state power. In that respect too, it approaches the topic from an original, state-oriented, angle, thereby also putting the presumed legitimacy of international law into question. Thus it would seek to open a way to a coherent critique on the traditional divide between internal and external sovereignty.

And as research on questions of (comparative) law, the approach remains invariably reviewing primary sources of law (legislation, instruments, cases) and secondary sources (academic commentary) so as to distil the operative rules and principles, and establish connections among different legal systems. Sociological data, based on interviews, questionnaires, statistical analysis, experimentation and so on, are not deemed pertinent to this type of investigation.

The principle issues treated here can be grouped into four general categories. First, the basic issue remains intact: whether and how national courts address separation of powers concerns when being asked to recognise and apply international law in domestic cases. This requires a survey of relevant court decisions. In addition to that descriptive exercise, the analytic objective is to highlight the fundamental constitutional issues and arguments in favour of a wider and of a narrower reception of international law.

Second, many consider it no longer acceptable to limit the roles for international law, traditionally or customarily stated or assumed. The impact of the internationalised law on the separation of powers implies that the function and purpose of international law seems to have changed significantly. The more international law, taken as a global answer to global problems, intrudes into domestic legal systems, the more it takes on the role and function of domestic law. Examining international law through the optic of the separation of powers joins the debate on the relevance and power of international law in the modern world. This points to a pressing need to articulate and develop the recalibration of international law more clearly and distinctly: in a globalised world, what do we want the "new international law" to do and what can it actually accomplish?

Third, and in same vein, the internationalisation of law also suggests the need to recalibrate our ideas about the constitutional structure of the state and modern constitutionalism. Addressing the interaction of "internal" and "external" sovereignties through a separation of powers optic introduces and lays the groundwork for further consideration. This is not merely retracing work done on questioning in some fashion "Westphalian sovereignty" or announcing the demise of the state. Rather, the question is whether the basic and traditional assumptions of state, legal system and legitimacy continue to be valid and effective. In effect, I would hope to initiate a conversation whether in the "post-modern world" we need to retool and redefine our conception of state and law, and their underlying assumptions about public power.

Fourth, these questions as a whole raise the possibility of a "globalised constitution" or "global constitutionalism". Research in the field has been, up to now, mostly tracing out the possibility and structure of globalised constitutions, and significantly without any detailed attention to the application of constitutional doctrines to them. As its final, collateral, task, my intention is that the study undertaken here would contribute to this field by starting to consider how the political and social values represented by the separation of powers might (or might not) be best integrated into international law.

1.2 Frame of Reference

1.2.1 Judicial Power and Function

The classic presentation of the separation of powers is of a balanced structure among the three leading organs of state power: legislature, executive and judiciary. The balance sought and that in fact achieved depends on a range of historical, institutional, political and social factors, among others. As a triad, there are at least three separate viewpoints, the base or foundation of each being the organ from which the perspective is cast. The common and most popular orientations are from the legislative and the executive positions, as studies in politics and political theory. This is no less true where international law and relations are concerned. The judicial vantage point, on the other hand, is a decided second owing in large measure to the doctrine of the separation of powers itself. That is, the courts take their cue regarding law and legal rules from the legislative branch, and perhaps in strictly delineated circumstances, the executive too. They are generally passive players, the "least dangerous branch".[5] The US, and other states conferring a

[5] See, e.g., Bickel 1986 and Ely 1980 (regarding the US Supreme Court). And by way of contrast, Martin 2003 (speaking to the Canadian context of the Supreme Court of Canada and the Canadian Charter of Rights and Freedoms).

constitutional review jurisdiction on courts, represent considered exceptions to a degree.

But in taking that cue, and in having to decide whether and how to implement a rule of international law, domestic courts are obliged to find practicable solutions. The defining lines of those solutions are traced out by the constitution, the political and legal order. The rule of recognition employed by a court, that is, whether it may recognise a rule of international law as a rule of law enforceable in the domestic legal order, is given by the constitutional allocation of law-making powers. That in turn reflects not only the courts' own position within the constellation of the separation of powers, but also the relative positions of the others, legislature and executive alike. And it opens the question as to what counts, or ought to count, as law.

For these reasons, the approach to the separation of powers optic preferred here is that through the eyes of the judiciary. They provide a distinctly legal and constitutional view, consistent with the overriding "inside–out" perspective. The internal validity and legitimacy of state powers and law govern the validity and legitimacy of rules external to or generated outside a constitutional order sought to be internalised. Moreover, the judgments of courts are official, public statements on the law for which judges are likewise publicly accountable, whatever their personal politics and private opinions. They are also for the most part easily and publicly accessible.

1.2.2 Comparative Study

This present work is a comparative study of how international law engages the separation of powers from a judicial viewpoint in four legal systems: the United States, the United Kingdom, France and the Netherlands. In part, this was the remit of the research brief under the aegis of the directing foundation, the Hague Institute for the Internationalisation of Law. In part, the subject itself mandated such an approach. Every constitutional settlement differs from every other. It implements the separation of powers in different ways. Political, social and historical forces combine to produce different tolerances in the scope of powers exercised by judicial, executive and legislative organs, and in their mutual equilibrium. Likewise, every constitutional and legal system has its own response and reaction to international law. This too largely depends upon political and historical circumstances in which the state controlled or was controlled by powers and events outside its borders. Hence those states which took a prominent place on the international stage, like the United States or Great Britain, will tend to exhibit greater independence in their appreciation of the collective efforts of international law.

In light of this, extrapolating from one constitutional and legal order to draw general conclusions on the nature of all such systems is an exercise fraught with peril. Equally, unexplored similarities among such systems can also lead to

unreflective, generalised conclusions on the nature of constitutions, constitutionalism and international law, or even the nature of law more broadly. Coincidence may simply be happenstance. On the other side, differences are neither insignificant or easily explained away, nor do they necessarily disprove or discount the existence of wider and deeper interconnections. (Frankly, the weighting given to differences and similarities may reveal more about the unspoken assumptions and predilections of the commentator than about the legal systems themselves.) Hence, a comparative study offers some assurance that the significance of similarities not be overstated, nor the existence of differences misconstrued

In order to keep this study within manageable grasp, the comparators are limited to four states: the United States, the United Kingdom, France and the Netherlands. The chosen quartet presents a fair cross-section of western legal systems engaged with international law. Politically both the US and the UK are and have been prominent individual players on the international stage; France, much less so. While the same might be said for the Netherlands, its international position benefits from the Netherlands profiling itself as co-operative, active member of the international collective of states. Juridically, France and the Netherlands are continental European civilian systems. The UK is a common law system within Europe, and the US is a separate, mixed system, one with a common law heritage but yet heavily reliant on legislation. The US, France and the Netherlands all have written constitutions with express provision for the domestic effect of treaties. The UK famously has no constitution in written form. Where the US and UK exhibit strong dualist tendencies, the Netherlands and France present strong monist ones. The courts of France (excepting the specific jurisdiction of the *Cour Constitutionnel*) and the Netherlands are restricted in principle by their respective separation of powers doctrines from reviewing the constitutional position and powers of the executive and legislative branches. Yet, the treaty provisions in the Netherlands Constitution have produced the result of a type of judicial testing of legislation as against human rights and freedoms stipulated in treaties. The jurisdiction of the UK courts is not so severely limited. And US court jurisdiction is in many ways the paradigm of a review jurisdiction for constitutionality.

It would not be amiss to note that only "Western" legal systems are represented here, and no "Eastern", "African" or "third world" ones. With that remark, it might seem that this study opens itself to Anghie's criticism of a persistent Western bias, blindness in or orientation to international law studies.[6] My reply would be twofold. First, the limits of time, resources and space determine what is and is not practicable. Second, the work herein is meant as the first steps towards a larger, wider consideration of the issues, in which successive undertakings would examine not only significant oriental international players such as China, India, Singapore, and Japan, but also the European Union in its constituent parts and as an international entity itself.

[6] See, e.g., Anghie 2007, also Anghie et al. 2004.