

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.

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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 Jurisprudentie
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 (<i>rechtbank</i> 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