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NATIONAL COURTS AND INTERPRETATIVE APPROACHES TO INTERNATIONAL LAW: THE CASE AGAINST CONVERGENCE

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Abstract

Should national courts act as agents of the international community and promote a global rule of law based on a hierarchical structure which puts international tribunals – primarily the International Court of Justice – at its apex? For that purpose, must national courts abandon their current practices of divergent methods of interpretation and use the same rules of interpretation of international law that international courts apply? In this chapter we reject this "convergence thesis." Even when taking only global interests into account, we argue that the convergence thesis is neither necessary nor sufficient to promote collective values; in fact it is counterproductive. Instead we outline a middle road for national courts to take: neither a solipsistic outlook that requires national courts to put national interests above all is appropriate, nor a cosmopolitan attitude that regards national courts as mere agents of the international legal system operating within states. Instead, we offer an approach that is informed by the vision of sovereignty as a trusteeship of humanity, which requires national courts to take global interests into account when interpreting international law. This view does not necessarily imply that national courts should reject international rules of interpretation, but it does imply that they should not aspire to mimic international courts.

National Courts and Interpretative Approaches to International Law: The Case against Convergence

Olga Frishman[*] and Eyal Benvenisti [**]

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1. Introduction

The opportunities for national courts to engage in the interpretation and application of international law are increasing in recent years due to, inter alia, the expanding role of international norms in regulating diverse aspects of life and the improved accessibility of decisions of international courts and of other national courts. This influx of global regulations and judgments pose challenges to the authority of national courts but also present opportunities for them. Some of these courts, in some areas of global regulation, can resort to international law as a strategic tool for forging judicial coalitions in response to what they may rightly see as pressures on their respective jurisdiction and independence by international courts, powerful state executives, and multinational corporations.[1] At the same time, and for the same reasons, the evolution of international law is ever more dependent on its interpretation and application by national courts. This is especially the case with respect to the evolution of customary international law which relies on state practice (rather than the practice of international bodies) with particular emphasis on judgments of national courts.[2] National courts are often the key for the successful implementation of policies and standards set by international organizations.

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[1] Eyal Benvenisti, `Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 AJIL 241.
[2] See most recently, ICJ in *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)* (Merits) [2012] ICJ Rep 99, para 55: "In the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign

This complex interdependency between international law and institutions and national courts has for generations captured the imagination of international scholars who urged domestic judges to resist domestic pressures to prefer parochial national interest and instead act as agents of the international community, inter alia by interpreting international law the way international judges would. For example, George Scelle spoke about a parallel role as a domestic and an international agent at the same time[3] and Benedetto Conforti sought to "strengthen the role of national courts in the application of international law … if international law is to have greater efficacy."[4]

The proponents of this "convergence thesis" argue that national courts should act as agents of the international community besides their national role and thereby promote a global rule of law which is based on a hierarchical structure which puts international tribunals – primarily the International Court of Justice (ICJ) at its apex. To promote this constitutional vision, national courts must abandon their current practices of divergent methods of interpretation and use the same method of interpretation of international law that international courts apply. [5] The supporters of this approach seek to ensure a unified and coherent international legal system, and they believe that coherent interpretation of the law by national courts is essential for the unity of a shared system of law. If only national courts would resort to international rules of interpretation, as reflected in Articles 31-33 of the Vienna Convention on the Law of Treaties[6] and further developed by international tribunals, they would contribute to the convergence of international law, whereas a preference for domestic interpretive methods is likely to undermine such unity.

In this Chapter, we first expose, explore, and question the assumptions behind the convergence thesis. We do not believe that the convergence thesis is based on solid grounds and therefore we think it does not provide a robust foundation for sustaining the structure of a system

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courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention."

[3] Georges Scelle, *Précis de droit des gens: Principes et systematique* (1932 -1934) (on dédoublement fonctionelle).

[4] Conforti (Rapporteur), The Activities of National Judges and the International Relations of their State, Final Report', (1993) 65 Ybk Institute Intl L (1993) Part L 42.

[5] For a critical assessment of this thesis see Helmut Philipp Aust, Alejandro Rodiles and Peter Staubach, `Unity or Uniformity? Domestic Courts and Treaty Interpretation' (2014) 27 LJIL 75 (demonstrating the diversity in the interpretative approaches of international law by the Supreme Court of the United States, the Mexican Supreme Court, and the European Court of Justice).

[6] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 arts 31-33.

of international law, constitutional or not, that the convergers seek to establish. We simply do not share the conviction that the convergence thesis is either necessary or sufficient for that purpose, and hence if only national courts converged on the way international tribunals interpreted international law, a global rule of law would have come to life. Next we explain why we think that the convergence thesis is misguided. In our view it does not adequately address the courts' primary duty to safeguard the domestic legal system and give sufficient weight to national interests. But even when taking only global interests into account, we argue that the convergence thesis is neither necessary nor sufficient to promote collective values, and in fact it is counterproductive because of the political backlash expected from national governments once their courts start imitating international tribunals. Those wishing to promote a more coherent system of international law that promotes human values should not aim at convergence.

We end this chapter by outlining a middle road for national courts to take. We argue that neither a solipsistic outlook that requires national courts to put national interests above all is appropriate, nor a cosmopolitan attitude that regards national courts as mere agents of the international legal system operating within states. Instead, we offer an approach that is informed by the vision of sovereignty as a trusteeship of humanity, which requires national courts to take global interests into account when interpreting international law. This view does not necessarily imply that national courts should reject international rules of interpretation, but it does imply that they should not aspire to mimic international courts.

2. The Underlying Assumptions of the Convergence Thesis

Supporters of the convergence thesis believe that if national courts adopt the rules of interpretation used by international courts than the international system will improve and strengthen the global rule of law. This argument is based on a number of underlying assumptions regarding judging and the relationships between the international and the domestic legal systems. This exploration of the underlying assumptions of the “convergence thesis” will also help us, later in the Chapter, to evaluate its normative and practical aspects and also to set the stage for our suggested middle road.

The first underlying assumption that we think characterizes the convergence thesis is that "anything international is wonderful."[7] This belief underlies also other areas of international law (e.g. immunity for international organizations). In this traditional story, national executives are the "bad guys," acting for selfish motives, whereas international bureaucrats and judges are the "good guys" selflessly seeking to promote global welfare. This assumption is actually a box full of additional assumptions about why "anything international is wonderful:" there is the assumption that international actors are impartial and that they are skillfully setting the ideal policy goals for all humanity, or that at least they are more skillful than any other alternative. Proponents of this convergence approach tend also to take the view that the more international regulation the better (i.e., it is better to have increased protection of human rights, more effective resolution of collective action problems in areas such as trade, environment, etc.), or that international law should offer clearer rules and narrower standards,[8] and that the most effective method to advance such goals is through an international legal system that is as coherent, formal, and hierarchical as possible.

The second assumption is that national courts are somehow distinct from national legislatures and executives who are selfish and nationalistic, whereas the judges are miraculously immune to parochial biases or can overcome them by steadfastly clinging to doctrinal purity. Hence the recurring reference to national courts as "domestic" or "municipal" which tends to underplay their potential, if not inherent, partiality. Therefore, the assumption is that national judges view international rules of interpretation as superior to national rules of interpretation, but national legislatures and executives pressure courts to adopt national rules against the courts' better judgment. National judges would have conformed to the international rules of interpretation if only they were able to overcome those domestic pressures.

A third assumption is that national courts can overcome whatever parochial biases they have by interpreting the law like international judges. Using the same interpretive tools is both necessary and sufficient to achieve convergence and thereby ensure the unity of international

[7] Jan Klabbers, 'The Life and Times of the Law of International Organizations' (2001) 70 Nord J Intl L 287, 288. See also Michael Waibel, 'Demystifying the Art of Interpretation' 22 EJIL 571, 573 ("The prevalent view among international lawyers is that international law is a force for good, designed to keep arbitrariness by national governments in check, to moderate power struggles in international affairs, and to provide public goods. In this frame of mind, the more international law, the better").

[8] On the benefits of vaguer standards over clearer rules see Eyal Bevnevnisti, 'Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law' (1996) 90 AJIL 384; Eyal Benvenisti, *Sharing Transboundary Resources: International Law and Optimal Rescource Use* (CUP 2012) ch 8.

law. This assumption obviously, relies on a further, deeper, assumption that rules of interpretation restrict the judge's discretion and hence matter for the outcome.[9]

Fourth, there is the assumption that there is one single method of interpretation that is mandated by international law and is shared by all international courts and tribunals. That despite their proliferation and increasing professionalization, they all subscribe to the same rules of interpretation of treaties and other sources of international law, and that the law is "static, its meaning is perfectly determinate."[10]

The fifth assumption follows closely to suggest that the rules of interpretation in international law are neutral and reflect nothing but pure reason and are endorsed by all. Finding the correct rule in each, according to the assumption, should be a result of pure logic. It is a question of finding how the international rule should be applied and not a question of determining or considering the rule's distributive outcomes.

Finally, supporters of the convergence thesis espouse the belief that once national courts adopt the international rules of interpreting international law the global rule of law will flourish. International law will reign in and domesticate into compliance those selfish state executives who seek to evade the law. This is the happy ending where the international rule of law triumphs.

These assumptions are often not articulated and are rarely discussed critically among international lawyers. If discussed at all, the assumptions that underlie the argument that convergence promotes global values are treated as self-evident truths and hence require no explanation. Thus, for example, the *Institut de droit international*'s 1993 Milan Resolution on "The Activities of National Judges and the International Relations of their State"[11] begins by positing that

> "in order to attain within each State a correct application of international law through its own methods of interpretation within each State, it is appropriate to strengthen the

[9] Aust, Rodiles and Staubach (n 5) 78-79. These authors conclude from their comparative review of the interpretative practice of national courts that Scelle's notion of *dédoublement foncltionnel* is not supported by these courts whose "institutional loyalties appear to be clear" and this should "caution[] against unrealistic assertions of domestic courts as organs of the international community." (at 111)

[10] René Urueña, 'Law-making through comparative international law?' in Rain Liivoja and Jarna Petman (eds) *International Law-making: Essays in Honour of Jan Klabbers* (Routledge 2014) 161 (criticizing this assumption and asserting that "all the talk about the international rule of law obscures the power asymmetries that are built into our current understanding of the relations between domestic and international law." at 164).

[11] Institut de Droit International, 'The Activities of National Judges and the International Relational of their State' (Milan, 7 September 1993) <www.idi-iil.org/idiE/resolutionsE/1993_mil_01_en.PDF> accessed 3 May 2014.

> independence of national courts in relation to the Executive and to promote better knowledge of international law by such courts" and hence "the strengthening of the role of national courts may be facilitated by removing certain limitations on their independence which are sometimes imposed with regard to the application of international law by law and by practice."[12]

While the Resolution acknowledges that the court has to apply international law "through its own methods of interpretation within each State," it urges national courts to "bas[e] themselves on the methods followed by international tribunals"[13] and "mak[e] every effort to interpret it as it would be interpreted by an international tribunal and avoid[] interpretations influenced by national interests."[14]

Below we elaborate on our main difficulties with some of the assumptions. Space limitations prevent us from dealing with them all. So we will either accept for the sake of argument some of the assumptions (i.e., that rules of interpretation matter)[15] or rely on previous findings (i.e., that reject the notion that international institutions are selfless promoters of collective welfare and are independent of domination by powerful state executives).[16]

We do not suggest that the effort to attain convergence is completely misguided. It has many benefits. These benefits prompt national courts to look to other courts (both national and international) when cases that come before national courts raise questions of international law. We think that indeed national courts should look into what other courts are doing. But there is a fundamental difference between paying attention to the jurisprudence developed by international courts and automatically mimicking them. There is a middle ground that national courts – as well as all other national organs – must assume. A coherent system of international law requires that all of the participants work together in harmony. But like musical players in an orchestra, these players must not necessarily play the same tune with the same musical instrument. Insistence on convergence on the same key by the same instrument is more likely to result in conflict, if only because not all actors have the same skills for complying with such instructions, while such requirements are actually unnecessary and insufficient to achieve the goals that the convergers

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[12] Ibid, introductory commentary.
[13] ibid art 1.2.
[14] ibid art 5.3.
[15] Owen M. Fiss, 'Objectivity and Interpretation' (1981-1982) 34 Stan L Rev 739, 744.
[16] Eyal Benvenisti and George W. Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 Stan L Rev 595.

hope to achieve. Therefore, convergence might lead to the opposite result – to a decrease in the international system's ability to operate smoothly and coherently in achieving common goals.

3. The Case against the Convergence Thesis

A. The Normative Concerns

Convergence of interpretation rules appears to be an obvious choice in any legal system.[17] Because interpretation is a necessary element in norm application, it is difficult to imagine how a system of law can function if each actor in the system is able to decide for itself how to interpret the law. Without convergence on the methods of interpretation, and lacking an international court whose decisions are binding and automatically implemented, different tribunals and states will apply the same legal norm differently and with different consequences. This will also lead to indeterminacy as to the proper interpretation of any contentious norm. Convergence of the interpretative approaches can also eliminate forum shopping[18] and enhance the predictability of the law, an important formal demand for a system governed by the rule of law.[19]

But while convergence is necessary in a national legal system, it is quite problematic in the global sphere as it seeks to make a single system out of a multitude of legal systems (which include not only the national legal systems but also the plethora of international regimes) that all seek to preserve their independent authority, with the full legitimacy to do so based on considerations of democratic self-determination (in the case of states) or expertise (in the case of international regimes such as the WTO, ITLOS, etc). The convergence of interpretative approaches transforms the national judicial systems, when dealing with international law, to

[17] For a critique of the view that international and national law form a legal system, see Eyal Benvenisti, 'Comments on the Systemic Vision of National Courts as Part of an International Rule of Law' (2012) 4 Jerusalem Rev Legal Stud 42.

[18] This argument address the undermining of the rule of law, see Andrê Nollkaemper, *National Courts and the International Rule of Law* (OUP 2011) 222.

[19] This approach has similarity to the arguments of the supporters of constitutionalization of international law. According to this approach, the response to the challenges of globalization should be the deepening of the ethical dimension of international law, the expansion and more effective enforcement of international law, and the international law's partial emancipation from the will of the individual state, see Armin von Bogdandy, 'Globalization and Europe: How to Square Democracy, Globalization, and International Law' (2004) 15 EJIL 885, 894-895. See also Armin Von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 47 Harv Intl LJ 223; Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009).

organs of the international system.[20] It assumes that national democracies must be governed by international judges that operate under an authority grounded in international treaties, and eliminates the possibility for these democracies to rely on their own national courts to protect their national interests against the dictates of international bodies that may reflect the interests of other states. In other words, the convergence thesis raises the question how to reconcile it with the basic notion of democracy.

The convergence thesis relegates national courts to a status that is comparable to the status of lower courts in a national system. It ascribes them the role of obedient law appliers, totally submissive to the law as interpreted by international tribunals. They will have to interpret a treaty using "effective interpretation" and expand national obligations under the treaty even when legitimate national interests call for textual interpretation. For example, national courts will have to conform to those methods even if, for instance, the result will be depriving sick patients from access to life-saving drugs as a result of compliance with the way the TRIPS agreement is interpreted by the WTO.[21] This subdued role would deprive national courts from their ability to use interpretative tools to support legitimate domestic concerns about the proper development of international law. Take, for example, the dispute about the proper interpretation of the extraterritorial applicability of the 1966 international human rights covenants.[22] While the ICJ emphasized the teleological aspect which enhances the obligation to protect vulnerable individuals abroad,[23] this interpretation was incompatible with the one supported by the US and the Israeli governments, and the Israeli Supreme Court avoided ruling on this matter.[24] Take, as another example, courts in developing countries whose governments insist on textual interpretation of trade agreements, that are expected to follow what they perceive as an expansive interpretation of those texts by the WTO Appellate Body which limits states' control

[20] The judges will not and cannot create a homogenous group that will make decision together. The paper will touch on the issue in a later stage. For the argument here the important part is that the national judges will be making these decisions.

[21] In the case of Novartis AG v. Union of India & Others (Civil Appeal No. 2728 of 2013, available at http://judis.nic.in/supremecourt/imgs1.aspx?filename=40212) the Indian court interpreted India's trade-related obligations narrowly citing concern for the right to life of poor patients who will not be able to afford the costs of extended patents.

[22] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) and International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

[23] *Legal Consequences of the Construction of a Wall on the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 102-111.

[24] HCJ 7957/04 Mara'abe v The Prime Minister of Israel 2005 PD 60(2) 477, para 27.

over their natural resources.[25] It is one thing to demand national courts to give "full appropriate weight"[26] to a judgment of an international court. It is quite a different thing to expect national courts to curtail their discretion by committing to the methods of interpretation developed by international courts. This demand for faithful submission to the international court abolishes the opportunity for the national courts to participate in the global interpretative process by giving space to national concerns and attitudes about the proper evolution of international law.

It is quite likely that national courts will try to coordinate a shared approach to treaty interpretation in general or to the interpretation of specific treaties. Such a concerted effort is seen, for example, in the context of the interpretation of the 1951 Geneva Convention Relating to the Status of Refugees,[27] There may be strategic reasons behind such a join interpretative effort, such as to form a collective position that precludes forum shopping and external pressures.[28] But this does not mean that the interpretative approach of the national courts should be identical to that of the international courts. In fact, the national courts' ability to withstand the pressure from the international court is key to ensure that the international court heed their concerns and respects them.

Moreover, the rules of interpretation in international law reflect, as all rules of interpretation do, insistent power struggles between drafters and interpreters, and between strong and weak.[29] While drafters seek rules that will give significant weight to the *travaux préparatoires*,[30] and prefer the narrow interpretation of texts that safeguards their freedom, international tribunals have opted for rules of interpretation that expand their authority to develop the law[31] and that enhance the scope of authority and effectiveness of international organizations. In addition, the rules of interpretation eventually determine the distribution of resources between strong and weak countries. For example, textual interpretation tends to emphasize and protect the interests of stronger parties that dominated the drafting procedure.

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[25] WTO, *China: Measures Related to the Exportation of Various Raw Materials – Report of the Appellate Body* (22 February 2012) WT/DS394/AB/R, WT/DS395/AB/R and WT/DS398/AB/R.

[26] See Mara'abe (n 24) para 56: "The ICJ's interpretation of international law should be given its full appropriate weight."

[27] Convention Relating to the Status of Refugees (adopted 28 July 1951, enterted into force 22 April 1954) 189 UNTS 150.

[28] Benvenisti, `Reclaiming Democracy' (n 1).

[29] Cf. Paul Brest, "Interpretation and Interest" (1982) 34 Stan L Rev 765.

[30] Eg., Julian Davis Mortenson, 'The *Travaux* of *Travaux*: Is the Vienna Convention Hostile to Drafting History?' (2013) 107 AJIL 780.

[31] See eg Hersch Lauterpacht, *The Development of International Law by the International Court* (CUP 1958) 267-281 (discussing the "Effectiveness of International Institutions and International Organisations").

This method especially marginalizes the interests of the usually weaker parties that joined a treaty after it was already drafted. Unfortunately, the debate about the proper rules of interpretation rarely addresses these underlying struggles for authority to unaccountably develop international law and the normative ramifications of legislation through interpretation. Therefore, national courts are expected to brush this concern aside and follow the rules of interpretation established by the international courts.

B. The Pragmatic Concerns

In this subsection we engage with what we believe is the "convergers'" goal of using international law to promote human rights and overcome global collective action failures. We argue that convergence is not the way to promote such goals. In fact, the convergence thesis may be counterproductive for this purpose. We suggest that the convergers' assumption that a unified international law would domesticate recalcitrant state executives is counterproductive. Instead we think that the international legal system is and will remain "optimally imperfect" [32] and therefore lawyers' fondness for hierarchy must be tamed to give room for realities of power in the international political arena. Too much convergence or too strong hierarchy will be met with strong resistance by state executives who would explore other, less binding, norms and institutions in an attempt to limit the possibility of convergence of interpretations. Such a turn to informal,[33] even privatized[34] regulation, is already prevalent,[35] and can intensify. As a result, there is a danger that while decreasing one type of fragmentation of international law, the convergence of interpretative approaches will actually stimulate further fragmentation.

Finally, we challenge the assumption about the skillfulness of global regulators and courts. We believe that the convergence approach is counterproductive to achieving the goals of the convergers because it stifles the exploration of alternative regulatory approaches and thus leaves little room for experimentation and contestation that is crucial for identifying efficient and sustainable policies. We contend that even if the global regulators and courts aim to selflessly promote the global good they may miscalculate or rely on insufficient information and adopt

[32] We borrow the term used (for another purpose) by George W. Downs and David M. Rocke, *Optimal Imperfection? Domestic Uncertainty and Institutions in International Relations* (Princeton UP 1997).
[33] Joost Pauwelyn, Ramses A. Wessel and Jan Wouters (eds), *Informal International Lawmaking* (OUP, 2012).
[34] Fabrizio Cafaggi (ed), *Enforcement of Transnational Regulation: Ensuring Compliance in a Global World* (Edward Elgar Publishing 2012).
[35] Colin Scott, Fabrizio Cafaggi and Linda Senden (eds), *The Challenge of Transnational Private Regulation: Conceptual and Constitutional Debates* (Wiley 2011).

counterproductive policies. Convergence that stifles experimentation is likely to fail to achieve optimal solutions that nimbly respond to changing circumstances. Therefore, convergence will decrease the skillfulness of global regulators and courts.

Let us elaborate on these concerns. There are several pragmatic concerns with respect to the convergence thesis, and they all revolve around the counterintuitive argument that the convergence thesis is likely to harm the evolution of international law rather than enhance it. First, national courts have developed over the years an elaborate set of "avoidance doctrines" designed to blunt the application of international law. Non-justiciability, lack of standing, and primacy of domestic law are among the tools that national courts use when they need to justify their divergence from otherwise applicable international norms.[36] When pressed by their domestic constituency to blunt the impact of an international norm or judgment, and if an independent interpretation of the norm is regarded as impermissible, the national court can be expected to resort to one of those doctrines. The result may be counterproductive for the international legal system as national courts construct walls that separate their domestic systems from the international one.[37]

Second, the convergence of interpretive approaches may adversely affect the development of international law. It is unlikely that state executives would sit idle and accept the trimming of their powers by an inter-judicial network of judges. State executives would refuse to surrender the power to interpret their international obligations to an international court. This would lead to two possible reactions. The first reaction would be to undermine the independence of the international courts and ensure that they remain under the national executives' influence.[38] This outcome will solidify the control of powerful states on the interpretation of international law by the international courts. The second reaction would be to increase already existing efforts to

[36] Eyal Benvenisti, 'Judicial Misgivings Regarding the Application of International Norms: An Analysis of Attitudes of National Courts' (1993) 4 EJIL 159.

[37] For example, in the United States there are legislative attempts to limit the use of foreign and international judgments in the Supreme Court's decisions, see eg David T. Hutt and Lisa K. Parshall, 'Divergent Views on the Use of International and Foreign Law: Congress and the Executive Versus the Court' (2007) 33 Ohio Northern U L Rev. 113, 125-31 (describing the legislative attempts to limit the use of foreign law in interpretation of the United States' constitutional law). In the United States' case the legislator and the executive responding to a considerably minor use of foreign law for interpreting national law. They are expected to respond much more severely if the courts accept foreign method of interpretation (and possibly foreign interpretation) as binding.

[38] Eyal Benvenisti and George W. Downs, 'Prospects for the Increased Independence of International Tribunals' in Armin von Bogdandy and Ingo Venzke (eds) *International Judicial Lawmaking* (Springer 2012) and (2011) 7 German LJ 1057.

fragment the law by adopting narrower obligations that will be described in clearer words, and limit the discretion that courts have when interpreting international norms and therefore reduce the space for judicial law-making in the area of international law. States could also opt for soft law and informal alternatives to formal international law and institutions, by which state executives retain their discretion. Such informal norms are likely to be non-justiciable and hence beyond the purview of courts.[39] International law will be further fragmented or be rendered irrelevant for resolving global governance challenges. The challenges to the vision of a global rule of law will intensify, just the opposite of what the convergers hope for.

Third, often "constructive ambiguity" is key to reaching agreement. In some cases, the permissibility of different interpretations is what enables negotiators to smooth gaps and therefore facilitates the adoption of international obligations.[40] This ambiguity will vanish if the convergence thesis is adopted, and lead to fewer agreements that provide venue for further negotiations and an incremental process of coordination.

Fourth, the convergence thesis will undermine the authority of international tribunals. These tribunals are often more dependent on powerful state executives than national courts. The latter provide backing to the former, but this backing is grounded on defiance: it is "the Solange threat"[41] that bolsters the resolve of international actors to withstand pressures of powerful state parties.[42] Submissive national courts are more of a nightmare for international judges rather than a dream.

Fifth, the convergence thesis is likely to limit experimentalism in the development and the application of international law. Drafting any law is a difficult task and it is very hard if not impossible to predict all future situations to which the law will apply. This problem is even more acute in the global setting, which includes a multitude of communities with different

[39] Cf Eyal Benvenisti and George W. Downs, 'The Empire's New Clothes' (n 16).
[40] Nollkaemper (n 18) 223-224.
[41] In a series of judgments, the German Federal Constitutional Court said that it would comply with decisions and judgments of European institutions "as long as" these decisions are compatible with the values of the German Basic Law: Juliane Kokott, 'Report on Germany' in Anne-Marie Slaughter, Alec
Stone Sweet and Joseph H H Weiler *The European Court and National Courts: Doctrine and Jurisprudence* (Hart Publishing 1998). This act was followed by several other courts in the EU. See Wojciech Sadurski, '"Solange, chapter 3": Constitutional Courts in Central Europe—Democracy—European Union' (2008) 14 EJL 1; Bruno de Witte, 'Direct Effect, Supremacy, and the Nature of Legal Order' in Paul Craig and Grainne de Burca (eds) *The Evolution of EU Law* (OUP 1999).
[42] Eyal Benvenisti and George W. Downs, 'Democratizing Courts: How National and International Courts are Promoting Democracy in an Era of Global Governance' NYU J Intl L & Pol (forthcoming).

characteristics and interests.[43] Variations in interpretations, among other things, give room for experimentalism. They open up opportunities for different implementations of the same international norm in different countries without pre-determining the "correct" way of applying that norm. The different experiences provide information to the national court, as well as other national actors, about the most suitable interpretation. The unification of interpretive approaches limits the scope of acceptable interpretations of international norms. It also limits the considerations courts can take into account when interpreting the international norm. For example, it can determine whether courts can take into account the distributive effects of the norm or only the intention of the drafters.

Therefore, unification of rules of interpretation limits the possibility to experiment with different ways to implement the law. Even if courts do not reach the same solutions when interpreting international law their discretion regarding acceptable interpretations becomes narrower. Unification of interpretative approaches limits the variety of legitimate solutions courts can adopt in interpreting international law. Thus, it limits the variety of interpretations courts can adopt and limits experimentalism. Moreover, it is likely that the convergent solution will be sub-optimal. The courts will not be able to take into consideration all of the cultural and legal nuances when adopting an interpretative approach. After an approach is adopted it will be much harder to adapt it so it will take into account all of the relevant concerns and improve the already existing solution. Therefore, a flexible bottom-up model that is based on experimentation will be able to take more nuances and future implications into consideration and reach a better solution.

To conclude this pragmatic critique, while the motivation informing convergence is the promotion of both specific international norms and the international rule of law in general, the method envisioned by the supporters of convergence is likely to lead to the converse outcome – an increased fragmentation and informalization, and a weaker international legal system. Such convergence effort is also likely to ensure powerful states' domination of the interpretation of international law. These potential consequences must be taken into account when discussing the possibility and the desirability of convergence.

4. The Trusteeship Approach as a Middle Ground

[43] Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 Mich J Intl L 999.

As we argued, converging of national courts on interpretative approaches to international law as determined by international tribunals raises concerns both at the normative level and at the pragmatic level. These concerns cast doubt on the desirability of initiatives that force courts of any type to apply uniform interpretative approaches. But while convergence as a tool for promoting collective values is too rigid, the question is whether there are other tools and mechanisms that courts could use to successfully meet the challenges that the convergers are rightly concerned about. Obviously, some type of inter-court cooperation is desirable, and the question is just what type of cooperation would fit the complex global system that we have. In this section we argue that courts should take convergence seriously into account *as a consideration* among other factors when they engage in the interpretation of international texts.

National courts often realize that they need to consider approaches adopted by foreign courts. The adoption of foreign methods of interpretation saves courts time and effort and reduces the concern about forum shopping of litigants. If courts need to act strategically, convergence assists them in coordinating the outcomes also in future cases that can be expected to arise before them.[44] Conforming to an existing approach is likely to enjoy more legitimacy among domestic constituencies. Unless there are significant reasons to deviate from the interpretation of international law by a foreign court, other national courts can therefore be expected to follow it.[45] To a certain extent, weak, voluntary, convergence takes place regardless of a sense of an obligation to do so.

When national courts consider the possibility of convergence as part of exercising their own discretionary authority to interpret the law, they have three possible avenues to choose from: the particularistic or national avenue, the cosmopolitan (which is reflected in the convergence approach), and a middle ground that envisions their role as providing for the national interest but within a global context; in other words, by taking into account the interests of others. This section argues that the third approach is all things considered the appropriate choice. This approach offers an appropriate way to balance the conflicting concerns while avoiding the risks involved in the more rigid approach offered by the convergence thesis.

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[44] Cf Olga Frishman, 'Transnational Judicial Dialogue as an Organizational Field' (2013) 19 ELJ 739, 754-755.

[45] Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 Intl Comp L Q 57, 83-84.

According to the first, particularistic viewpoint, only national interests matter: the courts should conform to domestic norms of interpretation and take into account only national interests when deciding how to interpret and apply international law. As such, the courts should not take into account how their general interpretative method or the interpretation in a specific case might affect foreign stakeholders and global welfare. Although this approach addresses most of the national concerns and removes risks of adverse national reaction against the court, it also detrimental to achieving inter-court coordination and cooperation that could promote global welfare and equality.[46]

The second approach is cosmopolitan. According to this viewpoint national courts should not assign special importance to national interests when they interpret and apply international law but try to mimic international tribunals. This is the essence of the convergence thesis. According to this approach, courts need to take into consideration only the interests of humanity, thereby promoting a global rule of law that can overcome collective action problems. This approach is prone to all the difficulties discussed above.

There is a third way that to some extent incorporates the advantages of the first two approaches while minimizing their risks. The suggested approach is based on conceptualization of sovereignty also as trusteeship of humanity. To encapsulate, the "trusteeship thesis" argues that states are required to take global interests and the interests of foreigners seriously into account even when making domestic policy choices.[47] The argument rejects the solipsist vision of sovereignty which holds that a sovereign has exclusive law-making authority within its boundaries – as incompatible with the very idea that initially led to the grant of absolute authority to sovereigns. The idea of sovereignty as exclusive authority was congruent with democratic notions as long as there was a perfect or almost perfect fit between the sovereign and the citizens – those affected by the sovereign's policies.[48] Such a vision made eminent sense when sovereigns ruled discrete economies, separated from each other by rivers, deserts and other natural barriers, which made cross-border externalities, such as pollution, a relatively rare event,

[46] If an issue concerns only one state it will usually not be organized under international law because there will not be enough countries interested in creating the international norm.

[47] This section is based on Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 AJIL 295.

[48] For such a functional justification of sovereignty, see Henry Sidgwick, *The Elements of Politics* (4th edn, Macmillan and Co. 1919) 252 ("the main justification for the appropriation of territory to governments is that the prevention of mutual mischief among the human beings using it cannot otherwise be adequately secured").

to be resolved on the inter-sovereign level, negotiated by emissaries, ambassadors, and later within international organizations. The solipsistic vision of sovereignty was enhanced by the notion of national self-determination, which erected barriers to the demands of non-citizens to weigh in on domestic policymaking processes and shielded the domestic body politic from the obligation to internalize the rights and interests of non-citizens in their policymaking. Sovereignty thus becomes an ostensibly neutral format that explained the exclusion of "the other."

Today's reality, however, is significantly different. Sovereigns are hardly the owners of isolated mansions. They are more analogous to owners of small apartments in one densely packed high-rise in which about two hundred families live. In our global condominium, the "technology" of global governance operating through discrete sovereign entities no longer fits. What was previously the solution to global collective action problems has now become part of the problem of global governance. Sovereigns routinely regulate resources that are linked in many ways with resources that belong to others. By their daily decisions on economic development, conservation, or health regulation, some states regularly shape the life opportunities of foreigners in faraway countries who are unable to participate meaningfully in shaping these measures, either directly or by relying on their own governments to effectively protect them. The glaring misfit between the scope of a sovereign's authority and the sphere of the affected stakeholders leads to the imposition of negative externalities on the un- or underrepresented stakeholders as well as the loss of potential positive externalities – namely outcomes that are often inefficient, undemocratic and unjust.

Therefore, "trusteeship thesis" suggests, states must take the interests of others and of humanity at large seriously into account when forming and implementing policies that can affect those foreign interests. In general, the obligation to acknowledge and weigh the interests of foreign stakeholders does not *necessarily* imply an obligation to succumb to those interests, and does not even require full legal responsibility for ultimately preferring domestic interests in balancing the opposing claims. What it does imply as a minimum, however, is that sovereigns must give due respect to foreign stakeholders both procedurally and substantively. This obligation is limited and requires, at the most, to promote the foreign interest if there are no (or, arguably, no *major*) negative implications to national interests (the "restricted Pareto

criterion").[49] Among the considerations that unilateral lawmakers must weigh is the proper deference they should give to collective efforts to achieve comparable goals through collective action.

If sovereignty is to be regarded as embedded in a more encompassing global order, which is a source not only of powers and rights, and if state authorities must accordingly exercise their authority while taking the interests of all affected individuals into account, the same applies also to national courts.[50] This approach calls upon national courts to uphold national interests and concerns while at the same time taking into account the interests of foreign stakeholders that may be affected by these courts' decisions.[51]

Such an obligation is relevant also in the realm of treaty interpretation. Beyond responding to the immediate concerns of foreigners who are affected by the court's decision, courts could adopt interpretative tools that ensure that the voices of communities and stakeholders who were not present at the drafting of international treaties, or whose countries never took part in forming customary international law, would be heeded. Teleological interpretation is an example of an interpretative tool of this sort, as well as the principle of *contra proferentem* (interpreting the text against the drafting party) that might be used to limit the influence of strong parties that dominated the drafting process.[52] Similarly, courts could demonstrate concern for weaker parties by preferring interpretative rules that enhance the voice of weaker state parties who managed to influence the drafting of the treaty, by insisting on close reading of the text, or by paying attention to the *travaux*, or by rejecting subsequent practice that was dominated by powerful states and in which weaker parties had only a limited role.[53]

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[49] Benvenisti, 'Sovereigns as Trustees of Humanity' (n 47).
[50] Paul Mertenskoetter, 'National Courts As "Trustees of Humanity"?' GlobalTrust Working Paper Series 04/2013, <http://globaltrust.tau.ac.il/national-courts-as-trustees-of-humanity/> accessed 3 May 2014.
[51] In some cases, courts may encounter difficulties when trying to apply the trusteeship approach due to objections from national executives and legislators. Therefore, to a certain extent, courts' ability to apply this approach may depend on their independence from other governmental branches and the level of national public support they enjoy. Nevertheless, due to the characteristics of the trusteeship approach (i.e. its commitment to protect national interests) it is likely that such objections will not be significant.
[52] On the use of this doctrine by national courts to interpret international treaties see J. H. W. Verzijl, *International Law in Historical Perspective*, vol 6 (A. W. Sikthoff International Publishing Company1973) 317.
[53] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion) [1960] ICJ Rep 150, 166 (rejecting an interpretation that denied weaker states their status which emphasized subsequent practice).

To a certain extent, this approach has similar justifications to those of the theory of judicial review developed by Ely.[54] In both approaches, the court's role is to protect a group that was not represented at the decision-making level. While Ely argues that the court should protect discrete and insular minorities whose access to legislation was hindered by the majority, the "trusteeship thesis", when applied to courts, suggests that the court should protect foreign stakeholders that did not have a voice in the national or international political decision-making processes.

The trusteeship thesis is prone to similar difficulties that Ely's theory faces: how can a court identify all the relevant foreign stakeholders who were not adequately represented at the drafting process? Even if courts are able to identify those stakeholders, how can these courts appreciate their interests and concerns? How can national courts genuinely and seriously take foreigners' interests into account?

A preliminary response is that transnational judicial dialogue and comparative observations can enlighten courts about the interests and concerns of foreigners. Courts can also be liberal in allowing foreign actors to take part in judicial proceedings by allowing amicus briefs or liberalizing standing requirements.[55]

The adoption of this third way towards the interpretation of international norms by national courts is supported by normative as well as the pragmatic justifications this chapter has already raised, as it is sensitive to both national and global concerns. This leads to the conclusion that national courts should adopt an attitude that takes seriously the interpretation of the law by international courts, but at the same time maintain their discretion. That discretion may be more or less limited, depending on the nature of the norm and the problem it seeks to resolve, in a similar way to the use by international courts of the doctrine of margin of appreciation or other deferential approaches to national regulation. Indeed, it is possible to refer here to the position of the German Constitutional Court in the *Görgülü* Case[56] which recognized "a duty to take into account" the judgments of the European Court of Human Rights when the latter has acted "within the limits of methodically justifiable interpretation," or to the principle of interpretation that is "international law friendly (völkerrechtsfreundlich)" as recently formulated by the same

[54] John H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard UP 1980).
[55] See Mertenskoetter (n 50).
[56] 2 BvR 1481/04, 14 October 2004.

court,[57] or to the statement of the Israeli Supreme Court that "[t]he ICJ's interpretation of international law should be given its full appropriate weight,"[58] in these cases maintaining the discretion at least of the highest national court to determine what is justifiable or appropriate interpretation of international law.

5. Conclusion

The convergence of interpretative approaches to international law by national courts is far from a simple, technical issue. It raises a number of normative questions as well as several practical concerns that cannot be ignored. While we believe that mandatory convergence is a counterproductive strategy for those who promote it, we also acknowledge that some *voluntary* convergence is unavoidable and also normatively required due to the increasing global inter-dependency and intensifying interactions among national courts. Such voluntary convergence must balance national and international concerns and seek to accommodate them all.

[57] 2 BvR 2365/09, 04. Mai 2011 (openness to international law does not require schematical alignment of the Basic Law with the ECHR but requires that the ECtHR's valuations be taken into account to the extent that this is methodically justifiable and compatible with the Basic Law's standards).
[58] Mara'abe (n 24) para 56.