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.

1.2.3 Exclusion of European Legal Framework

In order to keep an already expansive research undertaking within some semblance of manageability, I have intentionally excluded the European Union and EU law from this study. Although itself a product of complex and far-reaching treaty arrangements, they had the specific objectives of achieving internal changes to sovereign powers to create a transnational institution. That same intention and objective cannot be said to exist generally or specifically with treaties and customary international law at the usual level of ordinary international law. The multi-state array of the EU goes far beyond anything contemplated at the simple international level. This includes the United Nations. Indeed, the EU deserves separate attention on the issues considered here. In the result, I have not considered the impact and nature of the EU treaties as part of, or as a special class of international law with domestic effect.

1.2.4 … And the Story to Come

What remains then is quite simply to begin the examination of the separation of powers problems and issues raised by giving international law domestic legal effect.

Chapter 2 will flesh out in greater detail the confluence of international law and national law in a domestic legal system through the channel of the separation of powers. The chapter begins with a brief review of how the conception of international law has changed its orientation following the Second World War. Rather than limiting itself to an external view of national sovereignty, it has sought a greater effectiveness by pursuing a more internal view. Whereas the more traditional approach of international law was the regulation of affairs among states as sovereign entities, the modern approach would pursue that task of regulation through the mechanisms and institutions internal to the state itself. It would open up the constituency of international law making to non-sovereign bodies, and extend the cover of international law to them as well. The second part of the chapter introduces the separation of powers doctrine and its irrevocable, necessary connection to a particular constitutional settlement. This sets the stage for a general description of the doctrine's status and application in each of the four comparator states, with an emphasis on a judicial vantage point. The third part of the chapter details the problem of drawing international law into a constitutional framework which allocates law-making power differently and elsewhere than in the international legal order. Three options for bridging this disjunction exist. The first is the institutional, giving a domestic law-making organ a formal or substantial say in incorporating international law rules. The second is the presumptive, arguing for the unity and coherence of all law across systemic borders and constitutional impediments. The third is the reflexive, where international law does not immediately represent (domestically) enforceable legal rules, but rather

constitutes more a "morality of aspiration". The next two chapters consider whether and how these strategies appear in the judicial treatment of treaties and customary international law in the four comparator states.

Chapter 3 addresses treaties and like international agreements whose provisions create or convey legal rights and obligations in a domestic legal system. After a brief overview of the general international rules concerning treaties, I proceed to an examination how treaties are handled in the courts of the US, the UK, France and the Netherlands. All four systems rely in different measures on some form of parliamentary approval as the primary rule of recognition for the courts. This institutional strategy seems to correspond with the classic precepts of the separation of powers allocating the final (if not exclusive) say in law-making to a responsible and representative legislative branch. But it is clear from the examples of legislative participation in the various states that the primary tension in the separation of powers obtains between the legislature and the executive, specifically the powers of the executive to make and import rules. The greater parliamentary input in the US and the UK entails a surer footing for the institutional strategy and the separation of powers. While lesser parliamentary input in the Netherlands by contrast suggests the underlay of a presumptive strategy, a similar situation in France is less clear. It seems to reflect continuing institutional concerns, rather than any overriding presumptions concerning law. In sum, while the implementation of international law though treaty provisions offers the courts an easy solution to separation of powers concerns by virtue of the institutional strategy, the imbalance it brings to the classic equilibrium between legislature and executive ultimately plays itself out in the courts as a choice between the reflexive and presumptive strategies.

Chapter 4 considers whether, when and how courts recognise customary international law as domestically applicable law. A brief sketch of the elements of customary international law highlights some principal differences from treaty law. Not having the means to address explicitly private law issues as with treaties entails that customary international law transposed into domestic legal orders has a discernible constitutional flavour. It reflects and prescribes the institutional limits of legislative and executive power. Moreover, unless customary international law is somehow expressly incorporated by statute, there is no legislative cue for the court to recognise. Hence, customary international law is more problematic from the separation of powers perspective. Unsurprisingly, little "pure" customary international law factors into modern domestic court judgements. When it does, it serves primarily as an interpretative aid helping delimit domestic rights and obligations. It is rarely a determinative factor, and if anything, serves mostly as an additional, non-binding, obiter reason. Rather than being taken as a weakness or as a fault in the domestic legal appreciation of customary international law, to be corrected by the presumptive orientation, this characteristic of the reflexive strategy should be understood as a the strong point of international law. Serving as a discussion point, as a "morality of aspiration", it can achieve more lasting institutional and constitutional effect.

In no small measure an unconventional move, I opted to reserve the summary of argument and conclusions for each chapter until the end of this work. These are collected and presented in Chapter 5. My intention is to provide a concentrated and

systematised presentation of the underlying themes and position taken in each of the previous three chapters, and develop on that foundation what I see to be the underlying—constitutional—problems to a seamless integration of national law with international law. In brief, Chapter 5 examines whether transnational law is compatible with the separation of powers. The perspective remains one of a constitutionalist seeking a constitutional account and basis for international law in the domestic legal system. The separation of powers view suggests that there is a disjunction between the two systems. It is a constitutional asymmetry between the international legal order and national legal orders. This produces an inevitable dualism between the two systems. That dualism comprise two dimensions, one pertaining to the institutional structures of political and legal society and the other, to the geographic, cultural motor driving the coalescence of political society in the first place. When we try to integrate international law into a domestic legal system (addressing the first dimension), the doctrine of the separation of powers drives us also to address the second, and logically prior, question of identifying the actual political community underlying and empowering those institutional structures. The separation of powers thus frames the two principal horizons for the possible integration of international law and national law. On the one side, we have to adjust our established concepts of constitutional law and constitutionalism. On the other side and wishing to avoid this, we may have to recalculate what international law should or can do within a municipal legal system.

Note on Usage

In the following work, I confess to having used "EU" to refer to the entire constellation of treaties and treaty-based institutions, without hoping or intending for any learned precision in differentiating the EEC from the EC from the EU, and so forth. In the circumstances of the issues and themes, I did not see it as significant. I also confess to having used "UK" and "Britain" and "England" just as freely, without attention to the underlying constitutional differences between England, Great Britain and the United Kingdom. Again, I would plead general relevance, and would leave the drawing of any signal implications within the issues of this work to others, or to another time.

Chapter 2
International Law and the Separation of Powers

2.1 Constitutionalism and International Law[1]

2.1.1 International Law and the External Perspective

"International law" as a general appellation divides into two branches: private international law and public international law. The former covers the practice and procedure of a national legal system when dealing with foreign litigants, foreign elements to causes of action and foreign laws and legal process. "Foreign" here meaning simply that which originates and belongs to a legal order outside and other than the domestic one. It is thus a body of domestic, nationally developed rules being the particular response of the national legal system to elements outside its accustomed territorial and political jurisdiction. (Its alternate name, "the conflict(s) of law(s)", offers in a nutshell perhaps a quicker sense of its purview.) As such, it is distinguishable in principle from public international law.

That second branch—the predominant focus of our study herein—pertains to the conduct of states together, in their capacity and functions of organised political power. And in what follows, I will follow Bentham[2] and use "international law" and "public international law" as synonyms. Its traditional sphere of operation is principally where the interests of different states abut against one another. Thus it has retailed the generally accepted limits to a state's integral sovereign power among other states, in the boundaries to territory and legal power, the control and use of the high seas, and *terra nullius.* It coordinates the channels of communication and cooperation among states, in the exchange of ambassadors, diplomatic intercourse and sovereign immunity. It has promoted an orderly conduct of wars—

[1] Following generally the line of argument in Koskenniemi 2001, 2005, 2007. The nine symposium essays and response from Koskenniemi provide additional insight into Koskenniemi's position: Symposium 2006a. See also Hoffmann 2009.

[2] Bentham is considered to have coined the term "international law": Bentham 1843.

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The Netherlands, and the author 2013

if only as a necessary evil—and a reciprocity and equality in a state's treatment of foreign interests. Indeed it has called for states to avoid or indemnify injuries done to foreign persons and their property. Broadly and traditionally considered, international law is that system of rules, rights and obligations said to regulate the interactions of states in times of peace and war. It is thus a body of law governing states, analogous to the body of national law governing individuals. Not necessarily always assuming opposition and antagonism, but also cooperation and mutual aid, international law has operated both at the fringes, the outer limits of a state's sovereignty—and by implication within its very core.

In its traditional, classic, presentation, international law extends the appearance that it relates almost exclusively to matters of the outward manifestations and exercise of sovereignty. Hence, it is "public" law in that it circumscribes the movements and motions of states among and around one another. Private law issues, and those relating to the internal structure and application of state sovereignty, generally fall outside its range of sight.[3] Only insofar as private interests or private law matters, such as damages in tort or contract, expropriation, salvage or prize, and so on, might bear upon or be called to bear a wider public interest, might international law thereby be engaged. Until recently, little or no regard was paid to the internal exercise of sovereignty. It was hardly necessary or relevant, for international law addressed only state actors, the princes and not their subjects, on a completely different plane, and with a (seemingly) completely different set of objectives. And this apparent wilful blindness to obviously differing international arrangements was captured nicely in the presumption of "sovereign equality". Consistent with the mere outward exercise and manifestation of sovereignty, it offered a supposed level start and status to all states in their encounters with one another.

All this goes towards characterising the "external perspective" of international law.[4] It means simply that international law takes an outsider's view of state conduct, accepting and judging it on its face. The machinations and processes by which the state, by whichever representative official, ultimately came to do the acts in question do not factor into, nor weigh upon, any judgment passed by international law.[5] Responsibility for an act attaches to the state irrespective of the official committing it, in the same way an individual is responsible for his acts. States, the principal and primary juridical actors within its sphere of operation, are in effect conceived of as single, unified entities, a Leviathan capable of willing, deciding and acting as a natural person. They were, in a manner of speaking, seen as the personification of the princes who crowned them. Of course, in reality, international law applied to the collection of state officials—heads of state, government

[3] See, e.g., *Polish Nationals in Danzig* PCIJ A/B44 (1932), and *Rights of Minorities in Upper Silesia* PCIJ A15 (1928); also Shaw 2008, pp. 135ff, pp. 257–259.

[4] Trading on Hart 1961. Hoffmann 2005, p. 222 ascribes the distinction "internal/external" sovereignty to Vattel, Wheaton, and thus, the positivistic period in international law.

[5] See, e.g., *Polish Nationals in Danzig* (PCIJ); *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v US) ICJ Reps 1986 p. 14; *Lagrand* (Germany v US) ICJ Reps 2001, p. 466, and *Avena and other Mexican Nationals* (Mexico v US) ICJ Rep. 2004, p. 12.

ministers, diplomats, judges and so on—in the discharge of their various offices, as agents and representatives of and in name of that Leviathan. In that way international law "bound" the state. But the actions or powers of functionaries could not detract from a decided emphasis in international law on the place and interactions of sovereign powers, undifferentiated in their peculiar constitution.

Like any viewing point, the external perspective implies standing and looking at something from some other vantage point. It also implies the existence of a corresponding "internal" perspective. For international law, this vantage point has been the sovereign state. The terms "sovereignty" and "state" obviously carry a sizeable amount of conceptual baggage with a considerable historical pedigree.[6] How we identify sovereignty and a state, the criteria and manifestations, *situs* and powers, all these issues and more have sparked thought, debate, controversy and conflict over the ages. A rich and active intellectual history for political and legal theory, but not really for international law—at least until recently. Indeed, it was only with the draft 1933 Montevideo Convention on the Rights and Duties of States that we have the beginnings of a concerted effort at the international level to come to grips with the primary subjects of international law.[7] Sovereign states have long served as the cornerstone for the international law system, and as the identifying marker for those acts and actors which concern it.[8] At the risk of oversimplifying, a sovereign state an entity who is, and whose acts are, recognised have significance and relevance for the system of international law.[9] In "sovereign state", we have a boundary line, an optic by which to characterise or classify the subjects of international law and their actions. On the one side, there are acts of state which concern international law. These represent the usual, external, manifestations of sovereign state power as against other states, their officials and citizens. The interests of states abut where their respective sovereign powers collide. On the other side, we find the acts of private persons, matters of national law, and more importantly, the national constitutional order. So it follows that an "internal perspective" for international law attends to the constitutional construction and pedigree of a state act, rather than simply accepting it at face value from a recognised source. Here, the quality of the state act, as well as the capacity of the actor, are relevant.

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[6] See, e.g., Bartlesen 1995, 2001 (questioning the modern need for and persistence of "state" and "sovereignty"); Poggi 1990; Philpott 2001 (the development of the concept "sovereignty"); O'Connell 1970, vol. I, p. 80ff; Brölmann 2007, p. 84 (deterritorialised actors establishing concurrent normative regimes to entrenched state concept), and Walter 2007, p. 191 (loosening connection of "constitution" from state concept); and Perkins 1997, p. 436ff (survey of "traditional canon").

[7] 165 LNTS 19.

[8] See e.g., Brownlie 2008, pp. 105ff, 289ff; Koskenniemi 2005, Chap. 4. By contrast Shaw 2008, pp. 645ff, 697ff, frames the issues under "jurisdiction" and "immunities from jurisdiction".

[9] Tracking broadly the 1933 Montevideo Convention criteria in its Article 1 (viz. a permanent population, defined territory, effective government and capacity to enter into relations with other states). The further nuance of whether state recognition is constitutive for another sovereign state, or merely confirmatory, is not relevant here.

International law's apparent exclusive regard for the external presentation of sovereign power cannot avoid an implication of at least some minimal concept of internal sovereignty. That is, it cannot logically be said to recognise and coordinate in some orderly way the competing demands of abutting sovereignties without having some idea, however inchoate, of just what sovereignty entails as a whole. This should come as no great revelation or surprise. A goodly portion of international law involves discussions about the criteria for statehood, the recognition of states and their governments. The point here is not the actual conception of sovereignty, of state power. The problem is rather that once the subjects of international law have been established, international law withdraws any attention to the internal mechanisms driving state conduct on the international plane. The external perspective turns its back, so to speak, on the internal, and contents itself with an assumption of a national constitutional order as a monolithic, undivided and undifferentiated, block of political and legal power, irrespective of the particularities of internal constitutional arrangements and constitutionalism more broadly. Fairly seen, it is a rough default position to fill a conceptual vacuum. We can hardly accept this as a developed, analytic and systematic conception, let alone as a constitutionally informed one. A proper conception must entail some basic understanding of the legislative, administrative and juridical structure and function of a state—if not also its political, economic and social aspects too. Or put more simply: state constitutionalism.[10]

But the external perspective is deeply ingrained in international law. International law seemed oblivious to and unengaged by the great constitutional upheavals, discussions, and reconstructions during the eighteenth and nineteenth centuries.[11] As matters relating to the "internal perspective", they largely and justifiably fell outside the scope of its attention. This began to change with increasing rapidity in the last decades of the twentieth century, prompted by the events of that century. Human and environmental catastrophes, economic and social pressures, all invited a reconsideration of the presumptions of "sovereignty" and "statehood", and a calculating how to strengthen transnational mechanisms. International legal personality was conferred on entities and individuals for whom the concepts of sovereignty and statehood are inapplicable. These forces, broadly thus categorised, were seen as moving to disaggregate the state and state sovereignty.[12] Out of that could be constructed transnational or international constitutional systems, with national constitutional orders having a delegated or subordinate status—as opposed to an original one.[13]

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[10] A quick perusal of the earliest treatises on international law—aptly and accurately, the "law of nations"—reveals a goodly portion of their pages devoted to describing the exercises of ostensibly internal sovereignty.

[11] Philpott's "revolutions in sovereignty" which have arguable impacted upon international relations fall in fact into two categories: "Westphalian sovereignty" and the national political realities of the post-war twentieth century: Philpott 2001. See also Olsted 2005, p. 435 (definitions of the nation-state).

[12] As argued by, e.g., Slaughter 2004, pp. 12ff, 131ff.

[13] See e.g., Walter 2007; Paulus 2007; Peeters 2007; and Kumm 2009 (attacking "sceptics" who, by miscontruing constitutionalism, find it inapplicable to international law).

The second observation speaks to the nature of international law as a legal system. Public international law is indeed presented as a system of law in the forensic sense—if not also read to include a social and moral sense as well (or whatever other types may exist). Its normative constructs are principally treaties and customary international law. The former category comprises agreements in writing between one or more states, by their heads of state or governments, to do or refrain from doing certain things otherwise within their respective powers and capacities, for their mutual and reciprocal benefit. Whether treaties are merely contracts, and at most evidence and rely on extant (but unwritten, customary) law, or whether they can stand in as a form of international legislation, remains a topic of debate.[14] The real position is perhaps likely somewhere in the middle, dependent upon the precise terms of the treaty itself. The latter category, customary international law, comprises the collection of customs and practices of nations generally accepted as evidencing law. Article 38(1)(b) of the *Statute of the International Court of Justice*, one modern touchstone for defining customary international law, recognises "international custom as evidence of a general practice accepted as law". This belies an inveterate obscurity. It reflects a conciseness, clarity, and certainty in theory and definition that is inversely proportional to identifying in practice the precise form and scope of what is given as its legal propositions.[15]

This may seem to bear rather uncharitable—if not mildly antagonistic—phrasing. But from its earliest scholarly representations, indeed a significant consequence of that exercise of analysis, international law has been dogged by a perceived absence of two fundamental elements to any legal system. These are briefly (1) settled institutions exercising those powers of lawmaking and enforcing, distributed amongst the former in some fashion, and (2) identifiable, public instruments issuing from those institutions declaring law, which in turn is obeyed and enforced generally over time and place. Naturally obvious and obviously natural, these represent the signal elements of any municipal legal system and form the backdrop to our understanding of what a legal system is. Any discussion of international law will either assume the two elements proven (even if only for the sake of argument) and proceed instead to discuss the desired concrete issues, or will expressly address the elements, demonstrating their presence or the irrelevance of their absence. That is, any presentation of international law must account in some degree for how international law is made, by whom, and how it may be enforced, even before any explication of its substantive content. If these criteria, the instrumental and the institutional, are necessary as well as sufficient constituents for any legal system, then perhaps their absence shows international law to be something other than "law" in a forensic sense. On the other hand, conceding

[14] Aust 2007, pp. 13–14.

[15] Thus the scores of academic works attacking or seeking to establish or buttress customary international law, in addition to the conceptual divide between international relations theory and international law theory, such as Boyle and Chinkin 2007; Byers 1999; Murphy 2010; Lepard 2010; Goldsmith and Posner 2005; Koh 1997; Kelly 2000; Guzman 2005, Trimble 1986 (and works cited therein) and see Perkins 1997, p. 461ff.

the existence of international law as a full legal system may have to accept these two criteria, obviously derived from and crystallised out of national legal systems, as perhaps exclusive to domestic law or, more generally, not necessary facts after all. Hence the perceived absence of these institutional and instrumental ingredients represents a defining framework for international law.

2.1.1.1 Institutional Frailty?

For international law, there exists no comfortable backstop or assumption of a state structure as an incontestable social and political fact, and to supply legislative, executive and judicial organs. There is a lack of a general international forum, and such standardised, common processes and mechanisms so as to generate, and ensure observance of, international norms. This vacuum may have been more palpable prior to WWI, namely before the creation of first the League of Nations and the Permanent International Court of Justice, and later, the UN, the ICJ, the ICC and diverse multilateral tribunals. But the need for some response or doctrinal position has nevertheless become more acute under the twentieth century's predominantly positivistic view of law. Driven in part by democratic constitutionalism, the exercise of all public powers must derive legitimacy from constitutionally validated institutional sources and processes, as in the "principle of legality" of continental legal systems. The test for valid and legitimate law is its institutional provenance rather than its moral weight. Legitimacy and validity are in effect conflated under the heading of "legality". And the ultimate expression of legality originates in legislation, deliberated upon and approved by a democratic parliament. The principle of legality also controls and guides the exercise of executive and judicial power. The demand for a like positivistic legitimation of international law is no less vigorous or pressing than the one called for at a domestic level.

But the international legal system, as presently constituted, has no real organs of positive constitutionalism. There exists no legislature which expressly generates instruments of general law. Of course, it has been argued that the UN Security Council (UNSC), and the General Assembly (UNGA) more broadly, could and potentially do serve just such a purpose.[16] Yet the resolutions of the UNGA are not generally regarded as legislation. At the highest, they may be said to evidence customary international law.[17] UNSC resolutions approximate legislation the most closely, not the least in light of Article 25 of the Charter of the UN conveying some sense of obligation, "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Yet UNSC resolutions obtain in situations of crisis, rather than as ordinances of

[16] As considered by, *inter alia*, Fassbender 1998, and his reconsideration, Fassbender 2009. As an alternate perspective, Doyle 2009, p. 113ff. Paulus 2009 approaches the same idea.

[17] Shaw 2008, p. 114 (and works cited at n. 193); at p. 115 he refers to a suggestion found in *Paramilitary Activities in Nicaragua* ICJ Reps 1986 14. See also Brownlie 2008, p 15.

general application.[18] Moreover, they too are open to interpretation as simply evidence of customary international law. Nor, secondly—as is transparently clear—is there anything remotely resembling an executive branch as such.

Third, there is the absence of a unified judicial branch. This however is less telling and problematic. In the first place, international law has always relied on the courts of national systems as its judicial arm.[19] In the second place, prize courts (of long-standing practice), the ICJ,[20] the ICC, and assorted (multilateral) international tribunals such as the WTO Panels, lend themselves easily to proposals for the recalibration as a world judicial branch. Apart from any considerations arising from the treaties establishing these tribunals and stipulating jurisdiction, the more significant issue pertains to the "secondment" of domestic courts. Such courts are created within a particular constitutional order which prescribes and legitimates a particular distribution of law-making and law-enforcing powers among government organs, the "separation of powers" in other words. International law trades upon the status and powers of the domestic courts for its recognition and articulation, and thus opens itself for examination according to the principles of that constitutional order, including legitimacy and legality. This, of course, assuming that international law has validity and existence as a system of norms outside and independent of the domestic system. Reliance on domestic courts also invites reflection on the status of international law as a free-standing system, and its relation to constitutional order and sovereignty. Specifically, if international law emanates out of domestic courts deciding matters on the nature and limits of a state's constitutional order and sovereignty, then perhaps international law is in fact merely an extension of domestic law. It is not an independent system of law, but merely a constellation of resemblances and points of contiguity among the separate and independent constitutional orders of sovereign states.

To these observations, a patient and perceptive internationalist will no doubt caution with the words (and arguments) of Henkin:

> What matters is not whether the international system has legislative, judicial or executive branches corresponding to those we have become accustomed to seek in a domestic society; what matters is whether international law is reflected in the policies of nations and in the relations between nations…. Most important, the question is not whether law is enforceable or even effectively enforced; rather, whether law is observed, whether it governs or influences behaviour, whether international behaviour reflects stability and order.[21]

And inasmuch as nations do generally tend to observe precepts of international law, even without the existence of an institutional framework, Henkin argues, international law does exist as a forensic fact.[22]

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[18] And Murphy 2010, p. 104ff suggests that they have not been effective.

[19] As a leading proponent, Benvenisti 20081 and Benvenisti and Downs 2009; also Conforti 1993, p. 8 and Kumm 2003.

[20] Notwithstanding Article 59 of the ICJ Statute limiting effect of its judgments to the parties.

[21] Henkin 1979, p. 26.

[22] Henkin 1979, p. 329.