

2006

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Recommended Citation

Yuval Shany, *How Supreme is the Supreme Law of the Land? Comparative Analysis of the influence of International Human Rights Treaties Upon the Interpretation of Constitutional Texts by Domestic Courts*, 31 *Brook. J. Int'l L.* (2006).
Available at: <https://brooklynworks.brooklaw.edu/bjil/vol31/iss2/1>

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**HOW SUPREME IS
THE SUPREME LAW OF THE LAND?
COMPARATIVE ANALYSIS OF THE
INFLUENCE OF INTERNATIONAL HUMAN
RIGHTS TREATIES UPON THE
INTERPRETATION OF CONSTITUTIONAL
TEXTS BY DOMESTIC COURTS**

*Yuval Shany**

We emphasize that it is American standards of decency that are dispositive While “the practices of other nations, particularly other democracies, can be relevant . . .” they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.¹

The [Australian] Constitution is our fundamental law, not a collection of principles amounting to the rights of man, to be read and approved by people and institutions elsewhere. The approbation of nations does not give our Constitution any force, nor does its absence deny it effect. Such a consideration should, therefore, have no part to play in interpreting our basic law.²

The provisions of the Charter, though drawing on a political and social philosophy shared with other democratic societies, are uniquely Canadian. As a result, considerations may point, as they do in this case, to a conclusion regarding a rights violation which is not necessarily in accord with those international covenants.³

International human rights (IHR) law and constitutional law (CL) share similar social functions and goals. Still, courts in a number of influential legal systems, most notably in the United States, have long resisted attempts to construe their constitutional texts in light of binding IHR instruments. The Article explores the largely inadequate degree of incorporation of IHR treaty norms in the CL of six common law countries (the United States, Canada, Australia, Israel, the United Kingdom,

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1. *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (citations omitted).

2. *Western Australia v. Ward* (2002) 213 C.L.R. 1, 391 (Austl.) (Callinan, J., dissenting).

3. *R. v. Keegstra*, [1990] 3 S.C.R. 697, 702 (Can.) (McLachlin, J., dissenting).

and South Africa) and identifies the causes for judicial reluctance to incorporation. The Article then challenges the view that incorporation could violate constitutional principles, introduce legal disharmony, and raise cultural and political objections. It posits that numerous legal policy considerations support incorporation at the constitutional level. Most importantly, it asserts that IHR law requires such incorporation.

I. INTRODUCTION

IHR norms bear great resemblance to many constitutional norms found in the domestic constitutions of many nations. Both bodies of norms define and delimit the relations between the government and the governed, protect comparable social and moral values of fundamental importance, and transcend day-to-day legal and political processes (e.g., they are endowed with norm-entrenching features).⁴ In fact, the language of IHR law often mirrors that of constitutional norms.⁵ Given their similar purpose, substance, and form, it is only natural to expect that the two bodies of law will cross-fertilize each other, i.e., that international instruments would be utilized to inform the interpretation and application of constitutional instruments⁶ and vice versa. International law may in fact compel

4. Cf. Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1866–72 (2003) (identifying consent, suprapositivism and institutional aspects as three common features of constitutional and international human rights norms).

5. See Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 415 (1979) (“[M]ost of the Universal Declaration of Human Rights, and later the International Covenant on Civil and Political Rights, are in their essence American constitutional rights projected around the world.”); Louis Henkin, *Constitutionalism and Human Rights*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 383, 388 (Louis Henkin & Albert J. Rosenthal eds., 1990); Thomas Buergenthal, *Self-Executing and Non-Self-Executing Treaties in National and International Law*, in 235 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 303, 392 (1992). See generally Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537 (1988).

6. See, e.g., Louis Henkin, *International Human Rights Standards in National Law: The Jurisprudence of the United States*, in ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS 189, 198 (Benedetto Conforti & Francesco Francioni eds., 1997); Gerald N. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 84 (2004); Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 807 (1990). The following passage by the High Court of South Africa illustrates this point:

International law is particularly helpful in interpreting the Bill of Rights where the Constitution uses language which is similar to that which has been used in international instruments. The jurisprudence of the International Covenant on

such interaction in order to guarantee effective implementation of IHR norms.⁷

Alas, despite these hospitable background conditions, the actual relations between IHR and domestic CL⁸ have often been tenuous or non-existent.⁹ In a number of influential legal systems, most notably that of the United States, there exists deeply imbedded resistance to the idea that texts of a super-legislative nature, such as the Constitution, ought to be construed in light of international law in general, and IHR law in particular¹⁰ (notwithstanding the reference in the U.S. Constitution to international treaties as “the supreme law of land”).¹¹ Other jurisdictions have tended to ignore the issue altogether, opting *de facto* for a non-incorporative regime.¹²

The Article discusses the judicial reluctance to incorporate IHR treaties into CL and criticizes the principal objections to incorporation raised by courts and academics. Furthermore, it presents a host of arguments in favor of applying IHR law as an influential interpretive tool, which should inform the contents of domestic CL. In particular, it argues first that IHR treaties require states to integrate IHR law into all facets of do-

Economic, Social and Cultural Rights, which is plainly the model for parts of our Bill of Rights, is an example of this. It assists in understanding the nature of the duties placed on the State (including the Council) by section 7 of the Constitution.

Residents of Bon Vista Mansions v S. Metro. Local Council 2002 (6) BCLR 625 (W) para. 15.

7. This idea is encapsulated by the *pacta sunt servanda* principle enshrined in customary international law and in the Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) [hereinafter VCLT].

8. In the United States, CL has sometimes been defined as: “1. The body of law deriving from the U.S. Constitution and dealing primarily with governmental powers, civil rights, and civil liberties. 2. The body of legal rules that determine the constitution of a state with an [sic] flexible constitution.” BLACK’S LAW DICTIONARY 307 (7th ed. 1999). In this article, CL comprises the body of law governing the application and interpretation of supra-legislative instruments, such as constitutions, basic law, and other instruments allowing national courts to review the validity of primary legislative instruments. Other legal functions of CL (such as the interpretation of secondary legislation, regulation of the method of operation of government institutions, etc.) will be excluded from the purview of discussion.

9. See Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT’L L. 675, 774 (2003) (“[T]he experiment of judicial internalization of international ideals through constitutional interpretation has failed.”).

10. See *infra* Part IV.C.1.

11. U.S. CONST. art. III, § 2.

12. See discussion below on the legal situation in Israel and, to a lesser degree, on the situation in the United Kingdom.

mestic law. A state's failure to integrate IHR law into CL might thus lead to a breach of its international obligations. Second, a host of substantive moral, social, and legal policy considerations support, even from a domestic law perspective, the need to increase the influence of constitutional-like IHR norms upon CL.¹³

Consequently, the Article posits that binding IHR treaties should always be considered by courts in CL cases and that CL ought to be construed, if possible, as consistent with such treaty norms (although lack of ability to harmonize might result in international liability). This approach promotes the incorporation of IHR into domestic CL while preserving a healthy degree of judicial discretion as to the scope and pace of integration. It therefore facilitates the adaptation of international norms to the particularities of domestic legal systems and strikes a balance between competing legal and policy considerations. By contrast, the failure to apply IHR law at the constitutional level has severe adverse implications. Rejection of IHR law's relevance to the CL discourse results in the exclusion of IHR from crucial legal debates pertaining to the judicial review of legislation, the structuring of social institutions, and the definition and realization of fundamental social tenets, values, and interests. This renders IHR law powerless to challenge deeply imbedded objections to the values it purports to defend.

Hopefully, the work presented here will contribute to a better understanding of the international obligation to incorporate IHR into CL and the various challenges and jurisprudential problems associated with such incorporation. Recognition of the similar nature of the objections raised in different jurisdictions could also advance a comparative analysis of the contested issues and stimulate cross-fertilization across national borders. Although there is a considerable body of literature focusing upon the role of international law within national law and upon constitutional methods of interpretation in specific jurisdictions,¹⁴ little has been written on the topic from a de-localized or international perspective. The present Article aims to fill this void.

Part II of the Article discusses the question of incorporation from an international law perspective and analyzes the relevant incorporation ob-

13. Neuman, *supra* note 6, at 85 ("The prominence of this suprapositive aspect distinguishes human rights law from many other fields of positive law.").

14. See, e.g., INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS (Thomas M. Franck & Gregory H. Fox eds., 1996); ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS, *supra* note 6; WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION (3d ed. 2003); CRAIG R. DUCAT, CONSTITUTIONAL INTERPRETATION (7th ed. 2000); CONTEMPORARY PERSPECTIVES ON CONSTITUTIONAL INTERPRETATION (Susan J. Brisson & Walter Sinnott-Armstrong eds., 1993).

ligations introduced by the main IHR treaties. Part III undertakes a short discussion of various techniques for incorporating IHR law into CL and argues that a number of common law countries fail to meet the required international standard of incorporation. Part IV identifies the main objections raised, explicitly and implicitly, by domestic judges and academics against enhancing the role of IHR treaties within the CL discourse. These objections are critically examined and counter-arguments are presented. The final segment of the Article concludes that interpreting constitutional texts in light of IHR treaties is, generally speaking, good law and good policy.

Before embarking on a substantive review of relevant law and policy, two methodological comments should be made. First, the focus below is on one category of positive IHR law—validly ratified IHR treaties. The more complicated issue of the domestic effect of customary IHR law is dealt with only incidentally.¹⁵ The treaties' precise language, the extensive practice of international bodies in construing them, and the manifest consent to their binding effect on the part of ratifying states, facilitate incorporation and remove objections which could be directed against customary law—primarily, normative ambiguity and questionable legitimacy.¹⁶ Of course, doctrinal assertions developed with respect to the domestic status of IHR treaties would also have implications for the status of customary law.

Second, the Article focuses primarily upon the law and practice of a limited number of common law countries. Not only are legal materials from the selected countries more accessible to the present writer, but there is also considerable evidence that the problems identified in this Article are more acute in common law than in civil law jurisdictions.¹⁷ This can be attributed, *inter alia*, to the dualist traditions of many common law countries¹⁸ and, at least in some cases, to the limited historical

15. For a discussion on the interpretive role of international customary law, see Tamela R. Hughlett, Comment, *International Law: The Use of International Law as a Guide to Interpretation of the United States Constitution*, 45 OKLA. L. REV. 169, 183–84 (1992).

16. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 858–59 (1997); Hughlett, *supra* note 15, at 184 (“The more specific the international norm, the more useful it becomes as a guide for constitutional interpretation.”).

17. See, e.g., Jörg Polakiewicz & Valérie Jacob-Foltzer, *The European Human Rights Convention in Domestic Law: The Impact of Strasbourg Case-Law in States Where Direct Effect is Given to the Convention*, 12 HUM. RTS. L.J. 125 (1991) (conducting a comprehensive survey of the incorporation of the European Human Rights Convention in the internal law of numerous civil law countries).

18. Although it is sometimes believed that civil law countries tend to be monists, while common law countries lean towards dualism, in reality many legal systems have

influence of IHR standards on the creation of their constitutional instruments.¹⁹ It is in encouraging debate in these common law legal systems that the Article can hope to be most useful.²⁰

opted for a mixed regime containing monist and dualist elements. For example, in England and in other countries sharing its legal tradition, such as Canada and Israel, customary international law is automatically part of the law of the land. *See, e.g.*, *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529 (U.K.); *CrimA 474/54 Shtampfer v. Attorney-General*, [1956] IsrSC 10 5 (Isr.). However, treaties do not have any formal legal status until incorporated. In contrast, the U.S. Constitution regards international treaties as the “supreme Law of the Land,” U.S. CONST. art. VI, cl. 2, and U.S. courts have held customary international law to be part of the law of the land. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 1 reporters’ note 5 (1987) (“The courts have held that other international agreements and federal determinations and interpretations of customary international law are also supreme over State law.”). Nevertheless, this monist veneer is misleading, as judge-made distinctions between self-executing and non-self-executing treaties have diminished the monist disposition of U.S. law and have led courts to treat many treaties—especially IHR treaties—under a *de facto* dualistic paradigm. *See Foster v. Nielson*, 27 U.S. 253, 314 (1829); Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695 (1995); Richard B. Lillich, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. J. 53, 62–69 (1990); Buergenthal, *supra* note 5, at 368–82; John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1969–73 (1999). Reluctance to apply customary law by U.S. courts and theoretical challenges to its applicability at the federal level have brought about a similar outcome with regard to customary norms. *See Fernandez-Roque v. Smith*, 622 F. Supp. 887, 903 (N.D. Ga. 1985) (“[T]he President has the authority to ignore our country’s obligations arising under customary international law . . .”). *See also* Henkin, *supra* note 6, at 192; Gordon A. Christenson, *Problems of Proving International Human Rights Law in the U.S. Courts: Customary International Human Rights Law in Domestic Court Decisions*, 25 GA. J. INT’L & COMP. L. 225, 232–41 (1996); Bradley & Goldsmith, *supra* note 16, at 852–53 (observing that 19th century judicial precedents declaring customary international law to be part of the federal common law have been rendered obsolete by the famous Supreme Court decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), which ruled out the existence of a federal common law). *But see* Lillich, *supra*, at 69–71.

19. Both the U.S. and the Australian Constitutions predate the creation of the IHR movement. At the same time, the United Kingdom and Israel have no comprehensive constitutions and the limited scope of their constitutional texts left little room for interaction with IHR norms.

20. Similarities in legal thinking and conceptualization, combined with cultural and political affinities, make the mutual experience of common law countries perhaps more relevant and persuasive to one another. *See, e.g.*, *Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting) (“[T]he Court has found particularly instructive opinions of former Commonwealth nations insofar as those opinions reflect a legal tradition that also underlies our own Eighth Amendment.”).

II. THE OBLIGATION TO INCORPORATE HUMAN RIGHTS TREATIES INTO DOMESTIC LAW: DOES IT APPLY TO CONSTITUTIONAL LAW?

The nature of the duty to incorporate international norms into domestic law that arises from IHR treaties, such as the International Covenant on Civil and Political Rights (ICCPR)²¹ or the European Convention on Human Rights (European HR Convention),²² has been the subject of extensive consideration. The conservative view adopted by influential scholars²³ and human rights bodies²⁴ is that the treaties do not introduce a duty to incorporate human rights by way of specific legislation, and that states have a wide margin of discretion in determining how to give effect to their treaty obligations in this area.²⁵ This approach, which mirrors the

21. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

22. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European HR Convention].

23. See MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 53–54 (1993); Oscar Schachter, *The Obligation to Implement the Covenant in Domestic Law*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 311, 313–14 (Louis Henkin ed., 1981); Henkin, *Constitutionalism*, *supra* note 5, at 395; MATHEW C. R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 125 (1995); Rebecca J. Cook, *State Responsibility for Violations of Women's Human Rights*, 7 HARV. HUM. RTS. J. 125, 161 (1994); Neuman, *supra* note 6, at 84.

24. See, e.g., General Comment 3: Article 2: Implementation at the National Level, para. 1, U.N. Hum. Rts. Comm., 13th Sess., in COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES, U.N. Doc. HRI/GEN/1/Rev.1, at 4 (1994) [hereinafter HRC General Comment 3] (“The Committee notes that article 2 of the Covenant generally leaves it to the States parties concerned to choose their method of implementation in their territories within the framework set out in that article.”); General Comment 3: The Nature of States Parties Obligations (art. 2, para. 1 of the Covenant), para. 4, U.N. Comm. on Econ., Soc. & Cultural Rts., 5th Sess., in COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES, *supra*, at 45 [hereinafter CESCR General Comment 3] (“[E]ach State party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights”); General Comment 9: The Domestic Application of the Covenant, para. 5, U.N. Comm. on Econ., Soc. & Cultural Rts., 19th Sess., 51st mtg., U.N. Doc. E/C.12/1998/24 (1998) [hereinafter CESCR General Comment 9] (“[T]he precise method by which Covenant rights are given effect in national law is a matter for each State party to decide”); *Lithgow v. United Kingdom*, 8 Eur. H.R. Rep. 328, 397 (1986) (“[T]here is thus no obligation to incorporate the Convention into domestic law, by virtue of Article 1 of the Convention”).

25. However, this margin of discretion is reviewable by international monitoring bodies. See CESCR General Comment 3, *supra* note 24, para. 4 (“[T]he ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make.”); CRAVEN, *supra* note 23, at 125.

general attitude towards international obligations of result,²⁶ is supported by a number of policy considerations. Flexibility in incorporation strategies defers to the states' superior ability to determine how best to implement treaty obligations within the framework of domestic law-making procedures and constitutional constraints. It also marks respect for the sovereignty of the state over the law applicable in its territory and deference to diversity in domestic legal arrangements employed by states participating in IHR treaties. The language of article 2(2) of the ICCPR supports this flexible position:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.²⁷

Similar discretionary language can be identified in the other global IHR treaties²⁸ and the European HR Convention.²⁹ However, as the fol-

26. See International Law Commission, Commentaries to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, art. 12, U.N. Doc. A/56/10 (Nov. 2001); Henkin, *supra* note 6, at 189–90.

27. ICCPR, *supra* note 21, art. 2(2) (emphasis added).

28. See International Covenant on Economic, Social and Cultural Rights art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (“Each State Party to the present Covenant undertakes to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant *by all appropriate means, including particularly the adoption of legislative measures.*”) (emphasis added); International Convention on the Elimination of All Forms of Racial Discrimination art. 2(1)(d), *opened for signature* Mar. 7, 1966, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 212 [hereinafter CERD] (“Each State Party shall prohibit and bring to an end, by all appropriate means, *including* legislation as required by circumstances, racial discrimination by any persons, group or organization . . .”) (emphasis added); Convention on the Elimination of All Forms of Discrimination Against Women art. 24, Dec. 18, 1979, 1249 U.N.T.S. 14 [hereinafter CEDAW] (“States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.”); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2(1), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter CAT] (“Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”); Convention on the Rights of the Child art. 4, *adopted* Nov. 20, 1989, 144 U.N.T.S. 123 [hereinafter CRC] (“States Parties shall undertake all appropriate *legislative, administrative, and other* measures for the implementation of the rights recognized in the present Convention.”) (emphasis added).

29. European HR Convention, *supra* note 22, art. 1 (“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Sec-

lowing paragraphs indicate, a closer look at the language of IHR treaties in light of their context, object, and purpose, challenges the accuracy of the conservative approach towards incorporation.

Any discussion on the nature of the incorporation obligations introduced by IHR treaties should first acknowledge the principles that treaty obligations must be performed in good faith³⁰ and that states are unable to rely upon domestic law to justify failures to fulfill their international obligations.³¹ These principles support the proposition that failure to incorporate IHR treaties into domestic law, including CL, could, in theory, be viewed as a violation of international law if a good faith reading of the treaties so requires.

Another relevant principle is that of effective interpretation (“*effet utile*”), which supports reading international treaties in a manner designed to give effect to their provisions.³² In the context of IHR treaties, there can be little doubt that enforcement of IHR norms through domestic courts could be far more effective than methods of enforcement available at the international level (e.g., through treaty bodies such as United Nations (UN) Committees, or inter-state communications), which are less accessible to individual victims and less likely to generate compliance by the state in question (note that the decisions of UN treaty bodies

tion I of this Convention.”). *See also* Organization of American States, American Convention on Human Rights art. 2, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter *I/A CHR*] (“Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.”); Organization of African Unity, Banjul Charter on Human and Peoples’ Rights art. 1, June 27, 1981, 21 I.L.M. 58 (1982) (“The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.”).

30. VCLT, *supra* note 7, art. 26. The customary status of most of the provisions of the VCLT is widely acknowledged. *See, e.g.*, *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000) (“According to a widespread legal conviction of the international community, the Vienna Convention is largely a restatement of customary rules . . .”).

31. VCLT, *supra* note 7, art. 27.

32. *See, e.g.*, *Loizidou v. Turkey*, 20 Eur. H.R. Rep. 99, 133 (1995) (Preliminary Objections) (“[T]he object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective.”); *Prosecutor v. Delali*, Case No. IT-96-21-T, Judgment, para. 170 (Nov. 16, 1998) (“The interpretation of the provisions of the Statute and Rules must, therefore, take into consideration the objects of the Statute and the social and political considerations which gave rise to its creation.”).

are not even legally binding).³³ The weakness of the inter-state formal and informal enforcement mechanisms existing under UN treaties highlights the advantages of domestic fora.³⁴ Indeed, domestic courts in democracies committed to the rule of law often function as the most accessible and effective human rights enforcers.³⁵ This is because the familiarity of such courts with local conditions facilitates the issuance of politically acceptable decisions; further, their judgments are routinely enforced by the executive branch, and proceedings before them are widely perceived as legitimate.³⁶

The involvement of domestic courts also has important long-term educational and preventive effects. While the record of many domestic courts in upholding IHR law is far from perfect, even in well-respected democracies, their role as a first instance forum for airing human rights grievances is indispensable. However, domestic procedures could be deemed effective from an IHR law perspective only if individuals are able to invoke before municipal courts legal norms which correspond to their internationally recognized human rights. Hence, incorporation of IHR standards into domestic law (directly or through elaboration of analogous domestic standards) goes a significant way towards ensuring their effectiveness.

The centrality of domestic enforcement of IHR law is underscored by the right to effective remedy enumerated in a number of IHR treaties. For example, article 2(3) of the ICCPR provides:

Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated

33. See, e.g., Optional Protocol to the International Covenant on Civil and Political Rights art. 5(4), Dec. 16, 1966, 999 U.N.T.S. 302, 6 I.L.M. 368 [hereinafter ICCPR OP I]; J. S. Davidson, *Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee*, 2001 N.Z. L. REV. 125, 127–28 (2001).

34. See Rosalyn Higgins, *The Role of Domestic Courts in the Enforcement of International Human Rights: The United Kingdom*, in ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS, *supra* note 6, at 37, 38. Cf. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (“[I]n a convention of this type one cannot speak of individual advantages or disadvantages to States . . .”).

35. Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501, 516 (2000) (“Domestic courts seem the best hope for putting international law into action.”).

36. Cf. Louis Henkin, *Introduction*, in THE INTERNATIONAL BILL OF RIGHTS, *supra* note 23, at 1, 14 (observing that, when national institutions fail to provide human rights, international institutions “can only press the state to do so”); Jack Goldsmith, *Should International Human Rights Law Trump US Domestic Law?*, 1 CHI. J. INT'L L. 327, 334 (2000).

shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.³⁷

Similar effective remedy clauses can be found in the texts of other IHR treaties³⁸ and in other instruments related to the work of international

37. ICCPR, *supra* note 21, art. 2(3) (emphasis added). There is some confusion regarding the necessary sequence of events under article 2(3) of the ICCPR. The earlier case law of the Human Rights Committee (HRC) supported the proposition that the application of the “effective remedy” provision depends upon an initial finding that a violation took place. *See, e.g., Mbenge v. Zaire*, Commc’n No. 16/1977, para. 18, U.N. Hum. Rts. Comm., 18th Sess., U.N. Doc. CCPR/C/18/D/16/1977 (1983). For criticism, see NOWAK, *supra* note 23, at 62. However, more recent case law has adopted a more flexible approach. *See Kazantzis v. Cyprus*, Commc’n No. 972/2001, para. 6.6, U.N. Hum. Rts. Comm., 78th Sess., U.N. Doc. CCPR/C/78/D/972/2001 (2003) (“[A]rticle 2, paragraph 3, provides protection to alleged victims if their claims are sufficiently well-founded to be arguable under the Covenant.”).

38. *See, e.g., European HR Convention*, *supra* note 22, art. 13 (“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority”); CERD, *supra* note 28, art. 6 (“States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention”); CAT, *supra* note 28, art. 2(1) (“Each State Party shall take *effective* legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”) (emphasis added); J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN AND DEGRADING PUNISHMENT* 123 (1988); AHCENE BOULESBAA, *THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT* 58 (1999). *See also* Universal Declaration of Human Rights, G.A. Res. 217A, art. 8, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”). Note that this last affirmation of the right to effective remedy might pertain only to incorporated human rights. The right to effective remedy is also consistent with the obligation to exhaust domestic remedies before resorting to international litigation under IHR compliance mechanisms. *See, e.g., ICCPR OP I*, *supra* note 33, art. 2. Such an obligation (which applies with regard to individual complainants and states exercising diplomatic protection) assumes that the allegedly violating state should attempt to offer adequate solutions to the problem through its domestic legal procedures. *Cf. Anne F. Bayefsky, International Human Rights Law in Canadian Court, in ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS*, *supra* note 6, at 295, 296.

treaty bodies.³⁹ It is difficult to see how these provisions can be met without incorporation into domestic law of the substantive primary rights, underlying the “second order” right to remedy.⁴⁰ In addition, a number of treaty provisions, including article 2(1) of the ICCPR, refer to standards of necessity or propriety to gauge the lawfulness of the incorporation strategy adopted by the state in question.⁴¹ This also supports an effectiveness-enhancing interpretation of the implementation provisions found in IHR treaties.

Finally, key IHR treaties require states to “ensure” or “secure” the rights and freedoms enumerated therein.⁴² This requirement has been construed in the practice of international courts and tribunals and some of the relevant literature as entailing an obligation placed upon states to take positive measures to facilitate implementation of human rights and prevent violations of those human rights by private individuals and other non-state actors.⁴³ An additional measure which might be required in order to “ensure” the implementation of IHR treaties is to notify individuals of the rights accrued to them under the treaties.⁴⁴ This combination of conditions and requirements seriously limits the margin of discre-

39. The ICESCR does not contain an “effective remedy” clause. Still, the CESCR Committee has held that the principle is part of the general corpus of IHR law. CESCR General Comment 9, *supra* note 24, para. 3.

40. For a division between “first order” and “second order” rights, endowed with an individuating operative function, see JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 155 (2d ed. 1980).

41. See ICESCR, *supra* note 28, art. 2(1); CERD, *supra* note 28, art. 2(1)(d); CEDAW, *supra* note 28, art. 24; CRC, *supra* note 28, art. 4; Schachter, *supra* note 23, at 319–20; NOWAK, *supra* note 23, at 37.

42. See, e.g., ICCPR, *supra* note 21, art. 2(1); European HR Convention, *supra* note 22, art. 1; I/A CHR, *supra* note 29, art. 1; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, art. 7, U.N. GAOR, 45th Sess., Supp. No. 49A, U.N. Doc. A/45/49 (1990).

43. HRC General Comment 3, *supra* note 24, para. 1 (“[States’] obligation . . . is not confined to the respect of human rights, but . . . States parties have also undertaken to *ensure* the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights.”) (emphasis added); General Comment No. 28: Equality of Rights Between Men and Women (Article 3), para. 2, U.N. Hum. Rts. Comm., 68th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) (providing that states shall undertake steps to remove “obstacles to the equal enjoyment” of rights); Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in *THE INTERNATIONAL BILL OF HUMAN RIGHTS*, *supra* note 23, at 72, 77.

44. HRC General Comment 3, *supra* note 24, para. 2 (“[I]t is very important that individuals should know what their rights under the Covenant (and the Optional Protocol, as the case may be) are and also that all administrative and judicial authorities should be aware of the obligations which the State party has assumed under the Covenant.”).

tion granted to states in deciding how to incorporate IHR into their domestic system. Incorporation must be appropriate and effective. Hence, it must enable individuals to approach domestic courts in the event of a breach of IHR treaty norms, a process that must lead to an enforceable remedy.

These general policy considerations apply with special force to some specific norms and principles of IHR law that have been identified by the treaties themselves, the treaty bodies, and scholars as necessitating explicit incorporation. Consider, for example, article 20 of the ICCPR, which requires specific legislation prohibiting incitement to racism, and article 4 of the CAT, which requires a specific criminal prohibition against torture.⁴⁵ In the same vein, the UN Committee on Economic, Social and Cultural Rights opined that anti-discriminatory policies as well as policies in the field of health and education should be backed up by proper legislation.⁴⁶ More generally, it has been argued that legislation is indispensable in order to apply IHR norms to relations between private individuals (e.g., in the area of labor relations), to override inconsistent legislation, or to remedy situations where non-legislative measures have been proven ineffective.⁴⁷ Hence, while states have some discretion as to the method and perhaps also the pace of legislative reform (e.g., whether to rely upon existing law and buttress it with an interpretive presumption or to enact new statutory instruments),⁴⁸ they are obliged to ultimately

45. ICCPR, *supra* note 21, art. 2; CAT, *supra* note 28, art. 4. Other treaty clauses that incorporate an explicit or implicit obligation to legislate are ICCPR, *supra* note 21, arts. 6, 17, 26; ICESCR, *supra* note 28, art. 10(3); CERD, *supra* note 28, art. 4; CEDAW, *supra* note 28, art. 2; CAT, *supra*, art. 14(1); CRC, *supra* note 28, arts. 16(2), 32; European HR Convention, *supra* note 22, art. 2; Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 22, 1984, E.T.S. 117.

46. In relevant part, the Committee's comment reads:

The Committee recognizes that in many instances legislation is highly desirable and in some cases may even be indispensable. For example, it may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures. In fields such as health, the protection of children and mothers, and education, as well as in respect of the matters dealt with in articles 6 to 9, legislation may also be an indispensable element for many purposes.

CESCR General Comment 3, *supra* note 24, para. 3. *See also* CESCR General Comment 9, *supra* note 24, para. 9; General Comment No. 5: Persons with Disabilities, para.16, U.N. Comm. on Econ., Soc. & Cultural Rts., 11th Sess., U.N. Doc. E/C.12/1994/13 (1994).

47. CRAVEN, *supra* note 23, at 126.

48. *See* discussion in Schachter, *supra* note 23, at 320.

bring their domestic laws into full compliance with the IHR treaties to which they are a party.

The need to incorporate IHR law into domestic legislation through one or another means finds support in the case law and periodic reports of the UN treaty bodies⁴⁹ and the European Court of Human Rights (ECtHR). In *Lithgow*, the ECtHR held:

Although there is thus no obligation to incorporate the Convention into domestic law, by virtue of Article 1 of the Convention the substance of the rights and freedoms set forth must be secured under the domestic legal order, in some form or another, to everyone within the jurisdiction of the Contracting States⁵⁰

The argument regarding the need for incorporation applies with extra force at the CL level. As human rights violations are often the product of domestic legislation,⁵¹ an incorporation strategy which fails to offer adequate constitutional remedies might be viewed as inappropriate and ineffective. Further, the obligation to ensure compliance with human rights standards or to secure their realization also applies with respect to constitutional norms because these norms might themselves be amenable to an interpretation that is incompatible with IHR law.⁵² If courts are unable or unwilling to rectify this impediment through interpretative means, they might perpetuate their state's failure to comply with its international obligations. Finally, it is questionable whether CL that fails to incorporate IHR in a meaningful manner can "ensure" future implementation, i.e., provide human rights the necessary degree of security and protection

49. CESCR General Comment 9, *supra* note 24, para. 8 ("[T]he Committee strongly encourages formal adoption or incorporation of the Covenant in national law."); Concluding Observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland, United Kingdom of Great Britain and Northern Ireland—Dependent Territories, para. 11, Comm. on Econ., Soc. & Cultural Rts., 28th Sess., U.N. Doc. E/C.12/1/Add.79 (2002).

50. *Lithgow v. United Kingdom*, 8 Eur. H.R. Rep. 328, 397 (1986). For a discussion of the duty to incorporate the European HR Convention, see ANDREW Z. DRZEMCZEWSKI, EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW: A COMPARATIVE STUDY 40–53 (1983).

51. For example, see *Toonen v. Australia*, Comm'n 488/1992, U.N. Hum. Rts. Comm., 50th Sess., U.N. Doc. CCPR/C/50/D/488/1992 (1994), in which Tasmania's Criminal Code was challenged as violative of the ICCPR because it criminalized various forms of sexual contact between men, including all forms of sexual contact between consenting adult homosexual men in private. Indeed, a number of IHR treaties require states to repeal legislation inconsistent with their provisions. See, e.g., CERD, *supra* note 28, art. 2(1)(c).

52. See Neuman, *supra* note 6, at 85.

from future legislative encroachment.⁵³ Consequently, an incorporation strategy that stops at the CL level cannot be deemed fully effective⁵⁴ and might even be considered an independent violation of the IHR obligations of the relevant state.⁵⁵ Of course, states have considerable discretion in deciding how to incorporate IHR treaties at this level. They may resort to direct incorporation, interpretation strategies, or any other method of indirect incorporation. However, in my view, this margin of discretion does not include the right to ignore the application of IHR treaties when construing CL.⁵⁶

53. See DRZEMCZEWSKI, *supra* note 50, at 4; Schachter, *supra* note 23, at 329–30.

54. For some support, consider the following passage:

The Committee notes with regret that, although some rights provided for in the Covenant are legally protected and promoted through the Basic Laws, municipal laws, and the jurisprudence of the courts, the Covenant has not been incorporated in Israeli law and cannot be directly invoked in the courts. It recommends early action in respect of recent legislative initiatives aimed at enhancing the enjoyment of a number of the rights provided for in the Covenant, including proposals for *new draft Basic Laws* on due process rights and on freedom of expression and association. It also recommends that consideration be given to enacting further laws to give effect to any rights not already covered by Basic Laws.

Concluding Observations of the Human Rights Committee: Israel, para. 9, U.N. Hum. Rts. Comm., 63d Sess., U.N. Doc. CCPR/C/79/Add.93 (Aug. 18, 1998) (emphasis added).

55. See Laura Dalton, Note, *Stanford v. Kentucky and Wilkins v. Missouri: A Violation of an Emerging Rule of Customary International Law*, 32 WM. & MARY L. REV. 161, 204 (1990) (arguing that failure by courts to consider IHR law in analyzing the constitutionality of a measure is in itself a violation of customary international law).

56. A parallel argument has been advanced by the Supreme Court of India:

These international instruments cast an obligation on the Indian State to gender sensitise its laws and the Courts are under an obligation to see that the message of the international instruments is not allowed to be drowned. This Court has in numerous cases emphasized that while discussing constitutional requirements, Court and counsel must never forget the core principle embodied in the international conventions and Instruments and as far as possible give effects to the principles contained in those international instruments. The courts are under an obligation to give due regard to international Conventions and Norms for construing domestic laws more so when there is no inconsistency between them and there is a void in domestic law.

Apparel Export Promotion Council v. Chopra, A.I.R. 1999 S.C. 625, para. 27, available at <http://orissagov.nic.in/wcd/pdf/judgement1.pdf>.

III. THE PRACTICE OF INCORPORATING HUMAN RIGHTS TREATIES INTO DOMESTIC CONSTITUTIONAL LAW

Having established the existence of an international obligation to harmonize IHR treaties and domestic CL, this Part turns to examine, by way of comparative analysis, incorporation strategies adopted by six common law countries: the United States, the United Kingdom, Canada, Australia, South Africa and Israel.⁵⁷ These strategies will be situated on a spectrum of possible incorporation techniques ranging from explicit incorporation, facilitating the constitutional status of IHR treaties, to discretionary reliance on IHR treaties by judges that construe domestic CL. On the basis of this comparative analysis, this Part argues that, with the possible exception of Canada, the incorporation strategies adopted by the surveyed countries fall short of the international standard identified in Part II. Finally, this Part suggests a variety of reasons which underlie states' preferences for different incorporation strategies.

A. Possible Techniques for Incorporating International Law into Constitutional Law

1. Explicit Incorporation

Several legal techniques could endow IHR treaty norms with constitutional status, which entails, at least in some cases, the power to override ordinary legislation. The first and most straightforward method of incorporation is by way of an explicit constitutional provision specifying the constitutional status of international law in general, or IHR treaties in particular. Such specification could entail three alternative CL regimes: a) supra-constitutionalism, whereby international law overrides constitutional instruments;⁵⁸ b) constitutionalization, whereby international law has a status equivalent to the constitution or similarly binding constitu-

57. It should be noted that even countries lacking a constitution, such as the United Kingdom, have legal mechanisms designed to review the lawfulness or propriety of primary legislation. See Human Rights Act, 1998, c. 42, §§ 4, 10; *Ex parte Factortame Ltd.*, [1991] 1 A.C. 603, 659.

58. This is essentially the status of European Community (EC) law—which includes several human rights norms—in most EC countries. See Case 6/64, *Costa v. E.N.E.L.*, 1964 E.C.R. 585; Case 11/70, *Internationale Handelsgesellschaft GmbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125; Case 106/77, *Amministrazione Delle Finanze dello Stato v. Simmenthal SpA*, 1978 E.C.R. 629. To the extent that state constitutions in the United States are subject to federal law, one could also view the status of international treaties in the United States as supra-constitutional.

tional instruments;⁵⁹ or c) quasi-constitutionalization, whereby international law overrides ordinary legislation but is subject to constitutional limits found in the constitution.⁶⁰ When viewed from an IHR perspective, all three methods of direct incorporation are highly desirable as they underline the direct effect and relative supremacy of IHR treaties. Many legal systems around the world, however, including all of the surveyed common law countries,⁶¹ have refrained from incorporating IHR treaties into their constitutional instrument as directly enforceable norms.⁶²

59. See, for example, the status of the European HR Convention in Austria, Bundes-Verfassungsgesetz [B-VG] [Constitution] BGBl I No. 1/1930, as amended by BGBl No. 59/1964 (Austria). See also Holly Jarmul, *The Effect of Decisions of Regional Human Rights Tribunals on National Courts*, 28 N.Y.U. J. INT'L L. & POL. 311, 334 (1996) (discussing the status of the European HR Convention as constitutional law). See also the status of various IHR Treaties under the 1994 amendment to the Argentine Constitution, ARG. CONST. art. 75, cl. 22.

60. See, e.g., Bruno Simma et al., *The Role of German Courts in the Enforcement of International Human Rights*, in ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS, *supra* note 6, at 71, 89–92; Rett R. Ludwikowski, *Supreme Law or Basic Law? The Decline of the Concept of Constitutional Supremacy*, 9 CARDOZO J. INT'L & COMP. L. 253, 283–84 (2001) (discussing the status of international law in France); COSTA RICA CONST. art. 7; INSTRUMENT OF GOVERNMENT, 1974 [Constitution] ch. 2, art. 23 (Swed.) (providing that the European HR Convention may not be contravened by ordinary laws); RUSS. FED'N CONST. art. 15, § 4; CZECH REP. CONST. art. 10; SLOVK. CONST. art. 7, § 4; BULG. CONST. art. 5; Grondwet voor het Koninkrijk der Nederlanden [GW] [Constitution] art. 94 (Neth.) (however, in reality, Dutch courts do not exercise constitutional review over treaties); Buergenthal, *supra* note 5, at 352–53 (discussing the scope of treaty supremacy in the Netherlands); Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531, 541, 547–48 (2002) (discussing new democracies in Eastern Europe and the system of the Nordic countries and the Netherlands). Under German law, only customary law enjoys a super-legislative status. See Grundgesetz für die Bundesrepublik Deutschland (federal constitution) GG art. 25 (providing that general rules of international law take precedence over ordinary legislation). The courts of several other civil law systems have opted for the quasi-constitutionalist model, endowing treaties with super-statutory status, without explicit constitutional authorizations. This is for example the law in France, Belgium and Argentina. Buergenthal, *supra* note 5, at 347–49, 358.

61. Even the UK Human Rights Act, 1998, which could qualify as a quasi-constitutional instrument, does not involve direct incorporation of European HR Convention rights. STEPHEN GROSZ, JACK BEATSON & PETER DUFFY, *HUMAN RIGHTS: THE 1998 ACT AND THE EUROPEAN CONVENTION* 8–9 (2000).

62. For example, in the United States, treaties enjoy a status similar to federal legislation, and in the event of conflict between treaties and the Constitution, the latter prevails. *De Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); *Reid v. Covert*, 354 U.S. 1, 16–17 (1957). See also Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999, 2004 (2003); Buergenthal, *supra* note 5, at 344; Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1562–63 (1984). However, IHR treaties have been viewed by U.S. courts as non-self-executing, thereby

Two caveats to the last observation could be noted. First, some of the surveyed countries include CL norms whose contents mirror IHR treaty norms. Thus, some of the older CL norms, like the U.S. Constitution, have influenced the contents of IHR treaties,⁶³ while modern CL norms have been inspired by IHR law.⁶⁴ Obviously, similarity in the language of CL instruments and IHR treaties reduces the need for explicit incorpo-

barring direct reliance upon their provisions in domestic proceedings. Buergethal, *supra* note 5, at 370–82. Another factor mitigating the relevance of IHR treaties to U.S. CL is the reluctance of the United States to ratify human rights treaties and its practice of introducing generous reservations into the treaties it has ratified. *See, e.g.,* Declarations and Reservations of the United States upon Ratification of the International Covenant on Civil and Political Rights, June 8, 1992, 1992 U.N.T.S. 543, *reprinted in United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights*, 31 I.L.M. 645 (1992), *available at* http://untreaty.un.org/humanrightsconvs/chapt_IV_4/reservations/USA.pdf. Still, there is room to argue that IHR treaties might have relevance for American CL as some norms are not covered by treaty reservations, some non-ratified treaties arguably reflect customary international law (and should therefore apply regardless of the reservations entered by the United States), and the validity of some of the reservations introduced is questionable. *See, e.g.,* General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, para. 19, U.N. Hum. Rts. Comm., 52nd Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994); Elena A. Baylis, *General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties*, 17 BERKELEY J. INT'L L. 277 (1999); Henkin, *supra* note 6, at 196–97. Furthermore, some of the reservations introduced by the United States are of a circular nature: they refer to the U.S. Constitution for delineation of the scope of the international obligation assumed by the U.S. and yet do not bar the U.S. judiciary from relying upon the treaty texts when construing these same constitutional standards. *See* Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986). *See also* Henkin, *supra* note 6, at 194–200; Natasha Fain, *Human Rights Within the United States: The Erosion of Confidence*, 21 BERKELEY J. INT'L L. 607 (2003).

63. *See generally* Henkin, *Rights: American and Human*, *supra* note 5; Henkin, *Constitutionalism*, *supra* note 5.

64. *See, for example,* S. AFR. CONST. 1996 secs. 13, 15, modeled, respectively, after ICCPR, *supra* note 21, arts. 8, 18. *See also* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.); *In Re Pub. Serv. Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, 348 (Can.) (Dickson, C.J., dissenting) (“The Charter conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights.”). To a lesser extent, this is true of the 1992 Israeli Basic Laws. *See* Basic Law: Freedom of Occupation, 1992, S.H. 1387, 114, *available at* http://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1992/3/Basic%20Law-%20Freedom%20of%20Occupation- (last visited Jan. 27, 2006); Basic Law: Human Dignity and Liberty, 1992, S.H. 1391, 150, *reprinted in* European Commission for Democracy Through Law, *Basic Laws on Human Dignity and Liberty and Freedom of Occupation of Israel* (2002), *available at* [http://www.venice.coe.int/docs/2002/CDL\(2002\)129-e.asp](http://www.venice.coe.int/docs/2002/CDL(2002)129-e.asp).

ration, since existing CL may be viewed as an implicit form of incorporation.⁶⁵ Alas, in all surveyed legal systems there are considerable gaps between the scope of coverage of CL and the country's IHR treaty obligations;⁶⁶ therefore, supplementary incorporation strategies are required. Furthermore, similarly worded CL and IHR instruments might be differently construed by the respective domestic and international norm-apppliers.⁶⁷ Hence, the interpretive influence of IHR treaties ought to be examined even with relation to similarly worded CL norms.

Second, the UK Human Rights Act of 1998 may be viewed as a form of direct incorporation of an IHR treaty into domestic CL.⁶⁸ The Act consolidates the status of the European HR Convention in UK law and confers a quasi-constitutional status upon rights recognized in the European HR Convention.⁶⁹ If the courts find primary legislation to be incompatible with a Convention right, they must uphold it, but they may make a "declaration of incompatibility," upon which a relevant government minister or the Queen in Council can rely to introduce amending legislation, by way of order.⁷⁰ Judicial review of existing legislation under European HR Convention standards, as expounded in the jurisprudence of the ECtHR (which UK courts should consider, though not necessarily follow),⁷¹ is thus a viable option under current UK CL. The recent decision of the House of Lords in *A v. Secretary of State* on the unlawfulness of

65. See Gerald Heckman & Lorne Sossin, *How Do Canadian Administrative Law Protections Measure Up to International Human Rights Standards? The Case of Independence*, 50 MCGILL L.J. 193, 201 (2005). The proposition that pre-existing domestic law, including CL, may be viewed as a form of incorporation also indirectly derives from General Comment No. 31 [80]: Nature of the General Legal Obligation Imposed on State Parties to the Covenant, para. 13, U.N. Hum. Rts. Comm., 80th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

66. For example, the ICESCR, which is binding upon the United Kingdom, Canada, Israel and Australia, has not been incorporated into their domestic CL. The specific provisions of CERD had not been incorporated into the U.S. or South African Constitution.

67. See, e.g., David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 42 DEPAUL L. REV. 1183, 1192–93 (1993) (discussing differences between the prohibition of torture in international treaties and the U.S. Constitution); Heckman & Sossin, *supra* note 65 (discussing potential difference in Canada between the constitutional and international standards of quasi-judicial independence).

68. Richard S. Lubliner, Comment, *The Sky is Not Falling: Why the Human Rights Act of 1998 Will Not Radically Affect English Freedom of Expression Law*, 16 EMORY INT'L L. REV. 263, 263 (2002). *But see* GROSZ ET AL., *supra* note 61, at 7–10.

69. Still, some doubt whether this reform signifies a radical departure from the past. *See id.*

70. Human Rights Act, 1998, c. 42, §§ 4, 10.

71. *Id.* § 2(1).

administrative detentions under the post-September 11th anti-terror legislation aptly demonstrates the potential effectiveness of the process.⁷²

Still, it is important to note the limits of this incorporation strategy. The UK Human Rights Act authorizes, but does not require, courts to review the compatibility of domestic legislation with the European HR Convention,⁷³ and it does not authorize courts to invalidate primary legislation. Instead, the question is relegated to the political branches, which may ultimately choose to leave the incompatibility in place. Furthermore, no similar acts of incorporation were undertaken with relation to other IHR treaties to which the United Kingdom is a party (e.g., ICCPR, ICESCR, CERD, CEDAW, CAT and CRC).⁷⁴

2. Incorporation Through Interpretation

A second possible incorporation strategy is indirect incorporation through canons of constitutional interpretation.⁷⁵ Under this legal strategy, national courts may be obliged, or at least encouraged, to construe domestic CL in light of IHR treaties that the state had ratified. Such an indirect form of incorporation could substitute or supplement direct incorporation measures.

The harmonizing effect of incorporation by way of interpretation may depend upon three key factors: the formal source of the interpretive doctrine, the degree of flexibility in its application, and the relationship between an interpretive presumption of conformity—requiring harmonization of IHR treaties and CL—and other CL interpretive presumptions. The following sections address manifestations of the first two factors in the laws of the surveyed states. The third factor has not yet been thor-

72. *A v. Sec'y of State*, [2005] 2 A.C. 68 (proclaiming the incompatibility of UK anti-terrorism law with the European HR Convention).

73. See David Bonner et al., *Judicial Approaches to the Human Rights Act*, 52 INT'L & COMP. L.Q. 549, 561–62 (2003). Bonner notes that there is marked judicial reluctance to utilize the extraordinary quasi-constitution procedure introduced by the act, i.e., declarations of incompatibility. *Id.* at 554.

74. It may also be noted that EC law has been accorded an even stronger constitutional status under UK law by virtue of the European Communities Act, 1972. Hence, UK statutes that are incompatible with EC law and cannot be reconciled with the latter through interpretive means are inapplicable. See, e.g., *Perceval-Price v. Dep't of Econ. Dev.*, [2000] NICA 141 (Civ) (N. Ir.); *Shields v. E. Coomes (Holdings) Ltd.*, [1979] 1 All E.R. 456, 461. To the degree that EC law includes IHR protections, this is another important potential avenue of incorporation of IHR law into the UK constitutional discourse. However, no British court has attempted to date to construe Brussels law according to IHR treaties (other than the European HR Convention).

75. Joan Hartman, *Enforcement of International Human Rights Law in State and Federal Courts*, 7 WHITTIER L. REV. 741, 741 (1985).

oughly discussed in any of the surveyed legal systems. Hence, it suffices, at present, merely to note its potentially disruptive effect, which might hinder the effective incorporation of IHR treaties into CL. The relative nature of an interpretive presumption designed to give effect to IHR treaties enables skeptical judges, apprehensive about the suitability of international law to govern domestic affairs, to prefer recourse to alternative interpretive presumptions.⁷⁶

i) Explicit Constitutional Directive versus Judge-Made Canon of Interpretation

In some legal systems, the constitution explicitly requires domestic courts to use international law in general, and IHR treaties in particular, as an interpretive source when construing CL.⁷⁷ Two of the surveyed common law countries, South Africa and the United Kingdom, have explicit CL provisions to that effect. Section 39(1) of the 1996 South African Constitution requires courts to consider international law when interpreting the Bill of Rights.⁷⁸ Article 3(1) of the UK Human Rights Act

76. See, for example, the presumption that the legislator did not intend to repeal pre-existing legislation. *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976); *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 133 (1974); *Amell v. United States*, 384 U.S. 158, 165–66 (1966); *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963); *United States v. Borden Co.*, 308 U.S. 188, 198–99 (1939). Courts have also relied on the presumption that legislation does not carry extra-jurisdictional effect. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 253 (1991); *United States v. Vasquez-Velasco*, 15 F.3d 833, 839–40 (9th Cir. 1994); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945).

77. For example, article 10(2) of the Spanish constitution provides: “Provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain.” *Constitución Española* art. 10(2) (Spain). See also *CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA OF 1977* art. 9(f) (“[T]he state authority and all its agencies are obliged to direct their policies and programmes towards ensuring . . . that human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights.”). Acting upon this provision, the High Court of Tanzania construed the constitutional right of equal legal protection as encompassing a broad right of access to courts, in accordance with IHR treaties. *Ng’omongo v. Mwangwa*, Civil Case No. 22/1992, unreported (High Ct. of Tanz., Dodoma) (on file with author). The Court of Appeals, the highest court in Tanzania, also accepted the relevance of IHR law for constitutional interpretation purposes in *Pumbun v. Attorney General*, [1993] 2 L.R.C. 317. In another case, the High Court construed the constitutional right to equality as consistent with IHR treaties to which Tanzania is party. *Ephraim v. Pastory*, 87 I.L.R. 106, 110 (1992).

78. Section 39(1) provides: “When interpreting the Bill of Rights, a court, tribunal or forum—(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) *must consider international law*; and (c)

provides: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."⁷⁹ Although, formally speaking, this last presumption of conformity mainly applies to ordinary legislation, the unique structure of the UK legal system would facilitate its application to 'quasi-constitutional' human rights norms protected by statutes and common law principles, including constitutional-like European Union (EU) legislation.⁸⁰

At the same time, one can also identify judge-made canons of constitutional interpretation which refer to IHR treaties without clear constitutional mandate to do so.⁸¹ Among the surveyed countries, such a canon

may consider foreign law." S. AFR. CONST. 1996 s. 39(1) (emphasis added). In practice, IHR treaties and the international jurisprudence relating to their application have been invoked in a number of influential constitutional cases. See *S v Makwanyane* 1995 (6) BCLR 665 (CC) para. 35 (Chaskalson, J.) (stating that international human rights agreements should be considered in interpreting the right to life); *Brink v Kitshoff NO* 1996 (6) BCLR 752 (CC) (construing the right to equality in light of IHR law); *In re: The Sch. Educ. Bill of 1995 (Gauteng)* 1996 (4) BCLR 537 (CC) (construing the right to equality in light of IHR law); *Nat'l Coal. for Gay & Lesbian Equal. v Minister of Justice* 1998 (12) BCLR 1517 (CC) paras. 40–46 (considering developments in IHR law in finding the anti-sodomy laws unconstitutional). It is interesting to note that part of the process of adopting the 1996 Constitution included certification by the Constitutional Court that the Constitution comports with IHR standards. *In re: Certification of the Constitution of the Republic of S. Afr.* 1996 1996 (10) BCLR 1253 (CC). See also Ronald C. Slye, *International Human Rights Law in Practice: International Law, Human Rights Beneficiaries and South Africa: Some Thoughts on the Utility of International Human Rights Law*, 2 CHI. J. INT'L L. 59, 67 (2001).

79. For discussion, see GROSZ ET AL., *supra* note 61, at 28.

80. *Id.* at 43.

81. See Simma et al., *supra* note 60, at 95. A number of civil law countries also habitually use international human rights standards when interpreting their constitutions. See, e.g., Polakiewicz & Jacob-Foltzer, *supra* note 17, at 125, 140 (discussing Liechtenstein and Turkey respectively). In the common law world, it is notable that New Zealand's High Court has been willing to construe the Bill of Rights Act 1990 (which incorporates numerous civil and political rights in New Zealand law and introduces a weak system of quasi-constitutional review) in light of the ICCPR, without explicit authorization. *Ministry of Transp. v. Noort Police* [1992] 3 N.Z.L.R. 260 (C.A.), 1992 NZLR LEXIS 657, at *33. Similarly, the Indian Supreme Court has shown in recent years increasing willingness to construe domestic law, including the Indian Constitution, in light of IHR instruments, although the Constitution gives no clear mandate to do so. Note that article 51 of the Indian Constitution of India instructs the Indian State to "foster respect for international law and treaty obligations in the dealings of organized people with one another." INDIA CONST. art. 51, cl. c. Nevertheless, Indian courts have refrained from construing it as encompassing a duty to incorporate international law into domestic law. See, e.g., *Quamar v. Tsavlis Salvage (Int'l) Ltd.*, (2000) 3 L.R.I. 886, para. 32 (S.C.). For example, in one case the Indian Supreme Court relied on a number of international

has been accepted by the Canadian judiciary. A number of Canadian Supreme Court decisions have consciously used IHR treaties to construe Canada's supreme constitutional instrument, the Charter,⁸² although some academic and judicial criticism of these decisions persists.⁸³

treaties to support the conclusion that IHR law prohibits sexual harassment on the job and to construe the constitutional rights to equality and to liberty accordingly. *Apparel Export Promotion Council v. Chopra*, A.I.R. 1999 S.C. 625, para. 27, available at <http://orissagov.nic.in/wcd/pdf/judgement1.pdf>.

82. For example, the Canadian Supreme Court held in one case that the right to freedom of expression under the Charter should be limited in order to facilitate the right to work, enshrined in the ICESCR to which Canada is party. *Slaight Commc'ns Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 1056–57 (Dickson, C.J.). In another case, it used IHR instruments to support the invalidation of a law reversing the burden of proof in certain drug-related criminal cases. *R. v. Oakes*, [1986] 1 S.C.R. 103, 120–21. In yet another case the Court relied upon the ICCPR and CERD to exclude hate speech from the scope of constitutionally protected freedom of speech. *R. v. Keegstra*, [1990] 3 S.C.R. 697. In another more recent case the Court cited abolitionist trends in international law to support construing the Charter prohibition against cruel and unusual punishment as prohibiting extradition of suspects to death-penalty countries without assurances that the death penalty would not be requested. *United States v. Burns*, [2001] S.C.R. 283, 332–35. See also *In Re Pub. Serv. Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, 358–59 (Dickson, C.J., dissenting) (stating that freedom of association encompasses the right to strike which is protected by the ICESCR and other treaties to which Canada is party); *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, 827–28 (Cory, J., dissenting) (arguing that the constitutional prohibition against cruel and unusual punishment and the scope of protection of the Charter should be construed in light of Canada's international obligations); *B. v. Children's Aid Soc'y of Metro. Toronto*, [1995] 1 S.C.R. 315, para. 38 (Lamer, C.J.) (arguing that article 7 of the Charter should be construed in light of the ICCPR and other international instruments); *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, 232–36 (Bastarache, J., dissenting) (arguing that freedom of association should be construed in light of the ICESCR and other international instruments providing for the right not to join unions). See also Bayefsky, *supra* note 38, at 323–24 (citing governmental officials supportive of this legal development). It is notable that those few occasions in which international law was applied to aid in the interpretation of the Canadian Charter involved IHR treaties. See *id.* at 319 (“Human rights cases in Canadian courts might turn out to be *sui generis*.”). This supports the argument developed below, that special considerations support the incorporation of IHR treaties, and not other international law instruments, into CL.

83. See *In Re Pub. Serv. Employee Relations Act (Alta.)*, 1 S.C.R. at 314–17 (concluding that freedom of association does not include a right to strike notwithstanding the ICESCR); *Prof'l Inst. of the Pub. Serv. of Can. v. Northwest Territories (Comm'r)*, [1990] 2 S.C.R. 367, 404 (holding that freedom of association does not include the right to collective bargaining, which is protected in numerous ILO conventions to which Canada is party); *Keegstra*, 3 S.C.R. at 702 (McLachlin, J., dissenting); *Baker v. Canada*, [1999] 2 S.C.R. 817, 865 (Iacobucci, J., concurring) (opposing the view that the court should look to unimplemented international treaties in statutory interpretation). See also Stéphane Beaulac, *Arretons de dire que les tribunaux au Canada sont lies par le droit international* [Let's Stop Saying that Canadian Tribunals are Bound by International

By contrast, in the other surveyed common law jurisdictions, the United States, Australia and Israel, the permissibility of resort to IHR treaties when construing CL instruments is rather controversial. Although in the 2005 *Roper* case a majority of U.S. Supreme Court justices accepted the relevance of IHR treaties to a dynamic interpretation of the Eighth Amendment,⁸⁴ the resort to international law sources was acerbically criticized by some minority justices.⁸⁵ Since application of IHR treaties by the U.S. Supreme Court in CL cases can be described as sporadic and controversial at best,⁸⁶ the existence of a canon of interpretation incorporating IHR into CL is doubtful. The fact that the U.S. constitutional debate over the status of IHR treaties has largely taken place in footnotes, and not in the body of the opinions, may attest to the marginality of this canon of interpretation in the Supreme Court's CL discourse.⁸⁷

Law], 38 REVUE JURIDIQUE THEMIS [R.J.T.] 359 (2004) (Can.); Bayefsky, *supra* note 38, at 318–19 (discussing discrepancies between Charter interpretations and Canada's international obligations).

84. *Roper v. Simmons*, 125 S. Ct. 1183, 1199–201 (2005). Similar reliance on IHR treaties was advocated by some individual judges on a number of occasions. *See, e.g.*, *Knight v. Florida*, 528 U.S. 990, 996 (1999) (Breyer, J., dissenting) (noting the criticism expressed by the HRC in *Barrett v. Jamaica*, Comm'n No. 271/1988, para. 8(4), U.N. Hum. Rts. Comm., 44th Sess., U.N. Doc. CCPR/C/44/D/271/1988 (1992), on “disturbingly long” delays in execution of convicts).

85. *Roper*, 125 S. Ct. at 1226 (Scalia, J., dissenting) (“[T]he basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.”). *See also* *Thompson v. Oklahoma*, 487 U.S. 815, 869 n.4 (1988) (Scalia, J., dissenting); *Foster v. Florida* 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring); *Atkins v. Virginia*, 536 U.S. 304, 324–25 (2002) (Rehnquist, J., dissenting); *id.* at 347–48 (Scalia, J., dissenting) (“[T]he Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’ must go to its appeal . . . to the views of . . . members of the so-called ‘world community’ . . . I agree with the Chief Justice that [their] views . . . are irrelevant.”) (citations omitted); *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting).

86. For a discussion of the consideration of IHR treaties in some CL cases, see generally Richard J. Wilson, *International Law Issues in Death Penalty Defense*, 31 HOFSTRA L. REV. 1195 (2003); Joan Fitzpatrick, *The Relevance of Customary International Norms to the Death Penalty in the United States*, 25 GA. J. INT'L & COMP. L. 165 (1995–1996); Joan F. Hartman, “Unusual” Punishment: *The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655 (1983); Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3 (1983).

87. For example, in *Thompson* both the majority and the dissent addressed the relevance of foreign and international sources in footnotes. *See Thompson*, 487 U.S. at 831 n.31, 869 n.4. *See also Foster*, 537 U.S. at 990 n.*. However, lower federal courts and state courts might prove more hospitable fora. *See, e.g.*, *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981); *Lipscomb v. Simmons*, 884 F.2d 1242, 1244 n.1 (9th Cir. 1989); *Lareau v. Manson*, 507 F. Supp. 1177, 1187–88 n.9 (D. Conn. 1980);

In Australia too, the permissibility of relying upon IHR treaties when construing the Constitution remains controversial. While one High Court judge, Michael Kirby, has forcefully argued in favor of a presumption of conformity encouraging interpretation of the Constitution in light of IHR law,⁸⁸ no other High Court judge has yet voiced explicit support of the theory⁸⁹ (although several judges have made occasional references to IHR standards in their CL decisions, without expounding a coherent interpretive theory).⁹⁰ On the contrary, some High Court judges have explicitly rejected the applicability of the presumption of conformity to the Constitution.⁹¹ It is thus fair to conclude that the constitutional status of IHR treaties in Australia is still very much unsettled.

The constitutional status of IHR treaties in Israel is also uncertain. Although Israel's Supreme Court has used IHR treaties to inform its interpretation of constitutional rights in several recent cases,⁹² there has yet to

Sterling v. Cupp, 625 P.2d 123, 131–32 (Or. 1981); *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 411 (Mo. 2003). See also Martha F. Davis, *International Human Rights and United States Law: Predictions of a Courtwatcher*, 64 ALB. L. REV. 417, 428–29 (2000); *Using Human Rights*, *supra* note 86, at 14–17. But see *McKenzie v. Day*, 57 F.3d 1461, 1466 (9th Cir. 1995) (“With all due respect to our colleagues abroad, we do not believe [their] view will prevail in the United States.”).

88. *Austin v. Australia* (2003) 215 C.L.R. 185, 291–93 (Kirby, J., partly concurring) (construing the Constitution in a way which conforms with the right to independent judiciary); *Kartinyeri v. Commonwealth* (1998) 195 C.L.R. 337, 400 (Kirby, J., dissenting) (arguing that the constitutional power to regulate race issues must be exercised in light of the international prohibition against discrimination).

89. See Michael Kirby, Hon. J. of the High Ct. of Austl., *The Road from Bangalore: The First Ten Years of the Bangalore Principles on the Domestic Application of International Human Rights Norms*, at 13, http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_bang11.htm (last visited Jan. 17, 2005). See also Kristen Walker, *International Law as a Tool of Constitutional Interpretation*, 28 MONASH U. L. REV. 85, 86 (2002).

90. See, e.g., *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 C.L.R. 273, 304–05 (Gaudron, J.). However, it should be noted that in most cases recourse was made to non-binding treaties and jurisprudence, confirming the dominance of the comparative law paradigm for using international law. See, e.g., *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 611–12; *Nationwide News Pty. Ltd. v. Wills* (1992) 177 C.L.R. 1, 47 n.53 (referring to a decision by the ECtHR regarding the freedom of expression under the European HR Convention).

91. *Western Australia v. Ward* (2002) 213 C.L.R. 1, 390 (Callinan, J., dissenting); *Kartinyeri*, 195 C.L.R. at 384 (Gummow & Hayne, JJ.) (arguing that courts should interpret statutes in conformity with international law as far as their language permits, but otherwise “the provisions of such a law must be applied and enforced even if they be in contravention of accepted principles of international law”); *AMS v. AIF* (1999) 199 C.L.R. 160, 180 (Gleeson, C.J., McHugh & Gummow, JJ.); *Al-Kateb v. Godwin* (2004) 208 A.L.R. 124, paras. 62–73 (Gleeson, C.J.).

92. See, e.g., HCJ 5100/94 Public Comm. Against Torture in Isr. v. Gov’t of Israel, [1999] IsrSC 53(4) 817, translated in HCJ 5100/94 Isr. L. Rep. 1; CrimA. 7048/97

be a decision delineating a coherent theory of incorporation by way of interpretation of the Basic Laws.

ii) Presumption of Conformity Versus Discretionary Weighing

A second factor for assessing the ability of interpretative canons to harmonize CL and IHR treaties is the existence of judicial discretion, i.e., whether courts may or should harmonize CL and IHR treaties. One common model for incorporating international law in domestic law is the “presumption of conformity” doctrine.⁹³ Many domestic legal systems

Anonymous v. Minister of Def., [2000] IsrSC 54(1) 721; HCJ 2599/00 YATED—Non-Profit Org. for Parents of Children with Down Syndrome v. Minister of Educ., [2002] IsrSC 56(5) 843, *translated in* [2002–2003] IsrLR 57. An analogous trend can be identified in cases involving the situation in the Occupied Territories. *See* HCJ 7015/02 Ajuri v. IDF Commander in West Bank, [2002] IsrSC 56(6) 352, *translated in* [2002] IsrLR 1; HCJ 3278/02 Ctr. for the Def. of the Individual v. Commander of the IDF Forces in the West Bank, [2002] IsrSC 57(1) 385; HCJ 5591/02 Yassin v. Ben David—Commander of the Kziot Military Camp—Kziot Detention Facility, [2002] IsrSC 57(1) 403; HCJ 3239/02 Marab v. IDF Commander in the West Bank, [2003] IsrSC 57(2) 349. However, reference to international law in these cases should be evaluated against the backdrop of legal doubts pertaining to the applicability of Israeli CL in the Territories. *See, e.g., Marab*, [2003] IsrSC 57(2) 349, para. 12. Hence, the value of these cases in providing guidance on the interaction between Israeli CL and IHR treaties is limited.

93. The doctrine has also been referred to as the “presumption of compatibility,” “presumption of compliance,” or, in the United States, as the *Charming Betsy* canon of interpretation. *See* Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804) (“[A]n act of [C]ongress ought never to be construed to violate the law of nations if any other possible construction remains . . .”). The doctrine has been viewed as indicative of respect for other nations. *Ma v. Reno*, 208 F.3d 815, 830 (9th Cir. 2000); *United States v. Thomas*, 893 F.2d 1066, 1069 (9th Cir. 1990); *Hong Kong & Shanghai Banking Corp. v. Simon*, 153 F.3d 991, 998 (9th Cir. 1998). The same rule has since been adopted in numerous other decisions. *See, e.g., Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953); *Cook v. United States*, 288 U.S. 102, 120 (1933); *Heong v. United States*, 112 U.S. 536, 540 (1884); *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1465 (S.D.N.Y. 1988). *See also* Henkin, *supra* note 6, at 192; William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 604 (1992). At the same time, courts also sometimes attempt to construe treaties in light of statutory law, in order to avoid the repeal of earlier statutes. *See, e.g., Johnson v. Browne*, 205 U.S. 309, 321 (1907); *United States v. Lee Yen Tai*, 185 U.S. 213, 222–23 (1902); *Blanco v. United States*, 775 F.2d 53, 61 (2d Cir. 1985).

The *Charming Betsy* canon has also been codified in the *Third Restatement of Foreign Relations Law*: “Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987). Note, however, that the Restatement introduces an element of rea-

(including all of the surveyed common law legal systems) apply a rule of interpretation prescribing that ordinary legislation be construed, as far as possible, in harmony with the international obligations of the state.⁹⁴ This presumption is often presented as reflective of a hypothetical parliamentary intent—that, barring contrary evidence, judges must assume that legislators had not intended to compromise their state’s international obligations via legislation.⁹⁵

However, courts in most of the surveyed legal systems do not apply this canon of interpretation to their CL, even when they are prepared to seek guidance from international law sources. Instead, references to IHR treaties often seem to be based on a weaker, comparative law framework of analysis, based upon the inherent persuasiveness of IHR law (whether binding or not upon the relevant jurisdiction), and not on a recognized duty to incorporate it into CL.⁹⁶ Under this interpretive model, courts retain considerable discretion on whether or not to harmonize CL and IHR treaties. For example, in the rare cases where IHR instruments and their treaty bodies’ case law were invoked by U.S. Supreme Court justices, they were addressed within a weak interpretive framework alluding to the informative value of comparative law or non-binding international

sonableness in the application of the doctrine, which the original canon lacked. It is also questionable whether the doctrine applies at the non-federal level, i.e., in state courts. Bradley & Goldsmith, *supra* note 16, at 827–32. It may be noted that Bradley and Goldsmith even question the applicability of the presumption of compliance at the federal level. *Id.* at 871–72.

94. See, e.g., Higgins, *supra* note 34, at 47; *Mabo v. Queensland* (1992) 175 C.L.R. 1, 42 (Austl.); *Daniels v. White*, [1968] S.C.R. 517, 541 (Pigeon, J., concurring) (Can.); S. AFR. CONST. 1996 s. 233 (“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”). While the present article focuses on common law systems, the presumption of conformity is also well known in civil law countries. See, e.g., Simma et al., *supra* note 60, at 94; Buergenthal, *supra* note 5, at 366.

95. See, e.g., Henkin, *supra* note 6, at 192; Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 495–98 (1998). However, a distinction can be made between two possible standards of conformity with international law: normative construction that corresponds to the norms of international law, or normative construction that merely refrains from violating international law. See *id.* at 500–02. Bradley argues that, in the field of constitutional interpretation, adoption of the more restrictive approach will minimize any impact of international law upon the Constitution, as the latter almost never requires (as opposed to facilitates) the violation of international law. *Id.* at 503–04.

96. See, e.g., Knop, *supra* note 35, at 520 (“Because . . . relevance is not based on bindingness, the status of international and foreign law becomes similar . . .”).

law,⁹⁷ and not within the stronger *Charming Betsy* canon.⁹⁸ Indeed, references to IHR law usually fail to distinguish between norms binding upon the United States and other sources, such as ECHR standards and jurisprudence, which are clearly non-binding.⁹⁹

97. See *Roper v. Simmons*, 125 S. Ct. 1183, 1200 (2005) (“The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”); *Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting) (“[T]his Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances.”); *Foster v. Florida*, 537 U.S. 990, 993 (2002) (“Just as ‘attention to the judgment of other nations’ can help Congress determine ‘the justice and propriety of [America’s] measures,’ so it can help guide this Court when it decides whether a particular punishment violates the Eighth Amendment.”) (alteration in original) (quoting *The Federalist* No. 63 (James Madison)); *Thompson v. Oklahoma*, 487 U.S. 815, 831 n.31 (1988); *Harmelin v. Michigan*, 501 U.S. 957, 1019 (1991) (White, J., dissenting); *Oyama v. California*, 332 U.S. 633, 649–50 (1948) (Black, J., concurring); *id.* at 670 (Murphy, J., concurring). There have been many other cases in which the practice of foreign nations was cited in approval in order to support a particular interpretation of the Constitution. See, e.g., *Trop v. Dulles*, 356 U.S. 86, 102–03 (1958); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982); *Boos v. Barry*, 485 U.S. 312, 324 (1988); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (discussing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (Ser. A) (1981) and citing with approval three other ECtHR cases). See also Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 46 (2004); Neuman, *supra* note 6, at 89–90; Alford, *supra* note 9, at 775–80 (noting that while the U.S. Supreme Court has considered practices of foreign nations, it has done so only to bolster an existing national consensus).

98. See Koh, *supra* note 97, at 53 (noting that Justices of the transnationalist persuasion do not “distinguish sharply between the relevance of foreign and international law”). Another approach to the use of international law is to utilize it as a negative test, i.e., in order to refute claims that U.S. standards are unworkable or inherently incompatible with fundamental human rights notions. Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT’L L. 69, 75–76 (2004).

99. For example, in *Lackey v. Texas*, 514 U.S. 1045 (1995), in a memorandum respecting the denial of certiorari, Justice Stevens relied on the House of Lords decision in *Pratt v. Jamaica*, [1994] 2 A.C. 1, 4 All E.R. 769, but not on interpretations of the ICCPR suggesting that unreasonable delays in carrying out death sentences could be viewed under some circumstances as inconsistent with the prohibition against torture and other cruel, inhuman or degrading punishment in article 7 of the Covenant. See, e.g., *Kindler v. Canada*, Commc’n No. 470/1991, paras. 15(2)–(3), U.N. Hum. Rts. Comm., 48th Sess., U.N. Doc. CCPR/C/48/D/470/1991 (1993); *Cox v. Canada*, Commc’n No. 539/1993, para. 17(2), U.N. Hum. Rts. Comm., 52d Sess., U.N. Doc. CCPR/C/52/D/539/1993 (1994). See also *Elledge v. Florida*, 525 U.S. 944, 944 (1998) (Breyer, J., dissenting) (relying on *Pratt*, 2 A.C. at 17, and the ECtHR decision in *Soering v. United Kingdom*, 11 Eur. H.R. Rep. 439 (1989), but not on interpretations of the ICCPR); *Foster*, 537 U.S. at 992–93 (Breyer, J., dissenting) (citing *Pratt*, *Soering*, and the Canadian Supreme Court judgment in *United States v. Burns*, [2001] 1 S.C.R. 283,

Similarly, in Israel, the Supreme Court has tended to use international law only to confirm conclusions which the Court independently deduced from Israeli CL. To date, there has been no conscious attempt to construe the latter in conformity with IHR treaties.¹⁰⁰ The only exception is the *YATED* case that involved judge-made CL, which has limited constitutional status under Israel's legal system.¹⁰¹ Furthermore, the Court's relevant jurisprudence did not clearly distinguish between binding and non-binding international treaty law.¹⁰²

Even in South Africa, whose Constitution requires the judiciary to consider IHR law, no presumption of conformity exists with relation to interpretations of the Constitution. In the words of South Africa's Constitutional Court: "We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it."¹⁰³ Still, in

but not interpretations of the ICCPR); *Thompson*, 487 U.S. at 830–31 (reviewing the growing objection to the death penalty, in general, and to putting minors to death, in particular, in numerous foreign countries, and noting that two international treaties to which the United States was not party at the time, the ICCPR and the I/A CHR prohibit sentencing juveniles to death, but not discussing their potential customary law status); *Lawrence*, 539 U.S. at 576 (discussing ECtHR cases on anti-sodomy laws but failing to mention the parallel jurisprudence of the HRC on the incompatibility of such laws with the ICCPR). An exception can be found in *Knight*, 528 U.S. at 996 (Breyer, J., dissenting) (noting the criticism expressed by the HRC on "disturbingly long" delays in execution of convicts).

100. In fact, the Supreme Court seemed to implicitly reject, in a recent case, the relevance of IHR treaties to interpretation of the Basic Laws. HCJ 4128/02 Adam, Teva Va-Din (Isr. Union for Env'tl. Def.) v. Prime Minister of Isr., [2004] IsrSC 58(3) 503.

101. HCJ 2599/00 YATED—Non-Profit Org. for Parents of Children with Down Syndrome v. Minister of Educ., [2002] IsrSC 56(5) 843, *translated in* [2002–2003] IsrLR 57. Most importantly, judge-made CL cannot invalidate incompatible legislation.

102. For example, in *Public Committee Against Torture* the Supreme Court relied, inter alia, upon a judgment of ECtHR, by which Israel is not bound. HCJ 5100/94 Public Comm. Against Torture in Isr. v. Gov't of Israel [1999] IsrSC 53(4) 817, *translated in* HCJ 5100/94 Isr. L. Rep. 1, 28. In *Anonymous*, the Court equally cited ratified and non-ratified IHR treaties. CrimA. 7048/97 Anonymous v. Minister of Def., [2000] IsrSC 54(1) 721. In another recent case, involving the delineation of a constitutional right to a satisfactory environment, the Supreme Court seems to have accorded IHR treaties the same status it accorded comparative constitutional law. HCJ 4128/02 Adam, Teva Va-Din (Isr. Union for Env'tl. Def.) v. Prime Minister of Isr., [2004] IsrSC 58(3) 503.

103. *S v Makwanyane* 1995 (6) BCLR 665 (CC) para. 39 (Chaskalson, J.). Indeed, in that case, the Constitutional Court indiscriminately cited a variety of IHR sources—binding and not binding upon South Africa—in support of its decision that the right to life protected by the interim 1993 Constitution does not allow capital punishment:

In the context of section 35(1) [now 39(1)], public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary inter-

subsequent cases, the Constitutional Court seems to have edged towards a rebuttable presumption of conformity.¹⁰⁴

Unlike the South African Constitution, the UK Human Rights Act introduced an unmistakable duty to harmonize domestic law and the European HR Convention.¹⁰⁵ It remains unclear, however, how the residual judge-made presumption of conformity will apply to other IHR treaties to which the United Kingdom is a party¹⁰⁶ (e.g., whether it introduces discretionary or obligatory standards).¹⁰⁷

national law accordingly provide a framework within which Chapter 3 [the Bill of Rights] can be evaluated and understood

Id. para. 35. For a discussion of the case, see Ann-Marie Slaughter, *A Typology of Transjudicial Communication*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS, *supra* note 14, at 37, 67–69. This stance can be contrasted to the more robust function of international law under the general presumption of conformity which applies to ordinary legislation, according to section 233 of the Constitution, which prescribes courts to always strive to construe ordinary legislation in accordance with international law. S. AFR. CONST. 1996 s. 233.

104. The following passage illustrates the Court's leaning towards the presumption:

International law and the contents of international treaties to which South Africa might or might not be a party at any particular time are, in my view, relevant only in the interpretation of the Constitution itself, on the grounds that the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the State in terms of international law.

Azanian Peoples Org. (AZAPO) v President of the Republic of S. Afr. 1996 (8) BCLR 1015 (CC) para. 26 (Mahomed, J.). However, at another part of the same decision, the Court opined that it should only "have regard" to international law when construing the Constitution. *Id.* para. 27. For other decisions influenced by IHR treaties, see *Christian Educ. S. Afr. v Minister of Educ.* 2000 (10) BCLR 1051 (CC) para. 39 (holding that prohibition against corporal punishment is consistent with the provisions of the Constitution); *NUMSA v Bader Bop (Pty) Ltd.* 2003 (2) BCLR 182 (CC) para. 26 (finding that right to strike should be construed in accordance with ILO). For similar interpretative strategies in the decisions of lower South African courts, see, for example, *Prince v President of the Law Society, Cape of Good Hope* 1998 (8) BCLR 976 (C) (holding that ban on ritual use of marijuana is not unconstitutional); *Residents of Bon Vista Mansions v S. Metro. Local Council* 2002 (6) BCLR 625 (W) (holding that disconnecting of water supply is unconstitutional); *S v K* 1997 (9) BCLR 1283 (C) (finding anti-sodomy law unconstitutional); *Nyamakazi v President of Bophuthatswana* (1994) (1) BCLR 92 (B) (restrictions upon freedom of association of aliens held unconstitutional).

105. Human Rights Act, 1998, c. 42, § 3(1).

106. Uncertainties relating to the application of the general presumption of conformity include:

a) Doubts whether the presumption applies to all legal interpretation projects, including common law doctrines, to statutes only, or solely to the interpretation of stat-

utes which explicitly or implicitly refer to international standards. The following passages illustrate these doubts:

I readily accept that if the question before me were one of construing a statute enacted with the purpose of giving effect to obligations imposed by the Convention, the court would readily seek to construe the legislation in a way that would effectuate the Convention rather than frustrate it. However, no relevant legislation of that sort is in existence. It seems to me that where Parliament has abstained from legislating on a point that is plainly suitable for legislation, it is indeed difficult for the court to lay down new rules of common law or equity that will carry out the Crown's treaty obligations, or to discover for the first time that such rules have always existed.

Malone v. Metro. Police Comm'r, [1979] 2 W.L.R. 700, 731–32 (Ch.).

Further cases in which the court may not only be empowered but required to adjudicate upon the meaning or scope of the terms of an international treaty arise where domestic legislation, although not incorporating the treaty, nevertheless requires, either expressly or by necessary implication, resort to be had to its terms for the purpose of construing the legislation.

J.H. Rayner (Mincing Lane) Ltd. v. Dep't of Trade & Indus., [1989] 3 W.L.R. 969, 1002 (H.L.). See also AG v. Guardian Newspapers, [1988] 3 W.L.R. 776, 798 (H.L.); Derbyshire CC v. Times Newspapers Ltd., [1992] 3 W.L.R. 28, 44 (C.A.) (both cases apply the presumption of conformity to the common law).

b) Doubts whether the presumption of conformity permits judges to alter the ordinary meaning of statutory instruments, or only applies when the existing legislation is demonstrably open to more than one meaning. Cf. GROSZ ET AL., *supra* note 61, at 34.

c) Conflicting decisions have been rendered on whether the presumption of conformity applies in the field of administrative law so as to govern the acts of public officials. Compare *Ex parte Singh*, [1976] 1 Q.B. 198 (requiring immigration officers to bear in mind the principles of the European HR Convention), *Ex parte Phansopkar*, [1976] 1 Q.B. 606, 626 (Scarman, L.J.) (public authorities should have regard to the European HR Convention), and *Rantzen v. Mirror Group Newspapers*, [1994] Q.B. 670, 691 (“It is also clear that article 10 [of the European HR Convention] may be used when the court is contemplating how a discretion is to be exercised.”), with *Ex parte Bibi*, [1976] W.L.R. 979 (C.A.) (holding that immigration officers are not required to know about the European HR Convention), *Fernandes v. Sec’y of State for the Home Dep’t*, [1981] Imm. A.R. 1 (determining that the Home Secretary is not obligated to consider the European HR Convention), and *Ex parte Brind*, [1991] 1 A.C. 696 (H.L.) (finding no presumption that the executive must exercise its discretion in conformity with the European HR Convention). Cf. *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257, 266 (C.A.) (N.Z.) (noting that respondent’s argument that the Crown is entitled to ignore international conventions is “unattractive” and implies “that New Zealand’s adherence to the international instruments has been at least partly window-dressing”).

107. Compare *Maclaine Watson & Co. v. Dep’t of Trade*, [1988] 3 All E.R. 257, 269, 291 (C.A.) (referring to freedom of courts to invoke international treaties), with *Guardian Newspapers*, 3 W.L.R. at 798, and *Times Newspapers*, 3 W.L.R. at 44–45 (both cases referring to the duty of judges to construe English law in accordance with the Crown’s international obligations).

The only surveyed jurisdiction that applies a general presumption of conformity at the CL level is Canada. In *Slaight Communications*, the majority of Canada's Supreme Court embraced Judge Dickson's opinion that:

[C]anada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the Charter but also the interpretation of what can constitute pressing and substantial s.1 objectives which may justify restrictions upon those rights [T]he fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective.¹⁰⁸

Judge Dickson, the main proponent of incorporating IHR treaties into Canadian CL, did not explicitly link the "general principles of constitutional interpretation [which] require that these international obligations be a relevant and persuasive factor in Charter interpretation"¹⁰⁹ to the presumption of conformity relevant to the construction of ordinary legislation.¹¹⁰ Yet, there can be little doubt that he was of the view that the presumption of conformity has some place within Canadian constitutional discourse. Equating ratification of treaties with social endorsement of the norms expounded in them, which, in turn, supports their importation into the Charter, comes very close to advocating a reading of the Charter that conforms to Canada's international obligations. The difference between the two modes of reasoning—one focusing on embracing values and the other on international legality—could be viewed as rhetorical or tactical.

108. *Slaight Commc'ns Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 1056–57 (Dickson, C.J.). See also *Baker v. Canada*, [1999] 2 S.C.R. 817, 861 (L'Heureux-Dubé, J.) ("[International Human Rights Law] is also a critical influence on the interpretation of the scope of the rights included in the Charter.") (citations omitted); *In Re Pub. Serv. Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, 349 (Dickson, C.J., dissenting) ("The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in Charter interpretation.").

109. *In re Pub. Serv. Employee Relations Act (Alta.)*, 1 S.C.R. at 349. Cf. *Newcrest Mining (WA) Ltd. v. Commonwealth* (1997) 190 C.L.R. 513, 657–58 (Kirby, J., concurring) (noting that while common law and constitutional law "do not necessarily conform with international law," the latter is "a legitimate and important influence" on the development of the former).

110. The presumption of conformity is well-established under Canadian law. See, e.g., *Daniels v. White*, [1968] S.C.R. 517, 541 (Pigeon, J., concurring); Bayefsky, *supra* note 38, at 300–02.

B. Assessment of Compliance of the Surveyed Jurisdictions with the Duty to Incorporate Human Rights Treaties into Constitutional Law

The short study of the law and practice undertaken above suggests that the majority of the surveyed common law systems fail to offer a satisfactory degree of incorporation of IHR treaties into their CL. CL in all six jurisdictions explicitly reflects only some IHR norms. For example, in the United Kingdom, the Human Rights Act only covers IHR norms enshrined in the European HR Convention, but not in other binding IHR instruments.¹¹¹ Additional harmonization measures are therefore necessary. Nevertheless, most countries have failed to establish effective canons of interpretation capable of harmonizing domestic CL and IHR treaty norms. In the United States, resort by the Supreme Court to IHR treaties has been sporadic and conducted within a weak “comparative law” analytical framework, and not within the stronger *Charming Betsy* canon. In Israel and Australia, the applicability of a presumption of conformity to CL remains unsettled. Even in South Africa, whose Constitution mandates consideration of IHR treaties in CL cases, the Constitutional Court is not bound to follow their prescriptions, and may prefer other interpretations of the Bill of Rights. Hence, the study reveals deficiencies in the rules designed to incorporate IHR treaties into CL, which might lead, in turn, to violation of the international duty to harmonize the two bodies of law.

Of the surveyed countries, only Canada offers good prospects of harmonization across-the-board at present, as the Canadian Supreme Court is inclined to construe domestic CL in the light of the various IHR norms binding upon Canada. But even there, judicial resistance to the role of IHR can be identified. Further, some confusion still surrounds the manner of applying the presumption of conformity to CL.¹¹² In particular,

111. It is an open question whether other IHR treaties to which the United Kingdom is party could be utilized in order to influence a UK court’s interpretation of European HR Convention rights enumerated in the 1998 Act. There is yet no definite answer to this question, although preliminary indications do not indicate any tendency to utilize such an elaborate interpretive construction. See Bonner et al., *supra* note 73, at 582 (describing misapplication of the Convention on the Rights of the Child by the English judiciary in the context of a case under the Human Rights Act). *But see* A v. Sec’y of State, [2005] 2 A.C. 68, para. 62 (utilizing non-European HR Convention sources to delineate a right under the convention).

112. First, there remains some controversy as to whether the presumption of conformity applies only with respect to patently ambiguous statutes which necessitate interpretive aids or with regard to all statutes, including clearly worded statutes (which could, however, when compared to international law, be viewed as ambiguous). Compare *Schavernoch v. Foreign Claims Comm’n*, [1982] 1 S.C.R. 1092, 1098, and *Capital Cities Commc’ns Inc. v. Can. Radio-Television Comm’n*, [1978] 2 S.C.R. 141, 173 (in both

there is no clear authority on whether the very resort to the presumption of conformity is mandatory or discretionary.¹¹³

cases, the presumption was held to be applicable only in case of ambiguity), *with Am. Farm Bureau Fed'n v. Can. Import Trib.*, [1990] 2 S.C.R. 1324, 1372 (the presumption is also applicable in cases of 'latent' ambiguity—asserted after examination of international law—and not only in cases of 'patent' ambiguity), and *Milne v. R.*, [1987] 2 S.C.R. 512, 527 (explicit Charter provision bars reference to the ICCPR). See also Bayefsky, *supra* note 38, at 312–18. When applied to the CL context, the degree of textual ambiguity that triggers the introduction of IHR treaties into Charter interpretation processes is also unclear. Cf. GROSZ ET AL., *supra* note 61, at 34–41 (discussing the degree of ambiguity needed to invoke IHR law in the United Kingdom). Second, the majority of Supreme Court judges have applied the presumption of conformity to incorporated and unincorporated international treaties equally. See *Slaight Commc'ns*, 1 S.C.R. at 1056–57 (not distinguishing between incorporated and non-incorporated treaties); *Baker*, 2 S.C.R. at 861 (L'Heureux-Dubé, J.) (non-incorporated treaties may help statutory interpretation and judicial review); *Mercure v. Att'y Gen. for Sask.*, [1988] 1 S.C.R. 234, 268 (supporting interpretation of Canadian legislation through reference to the ICCPR, which was not incorporated in Canada); *Bell Can. v. Quebec*, [1988] 1 S.C.R. 749 (using unincorporated treaties to support argument that federal authority to regulate certain labor standards should encompass right to safe working conditions); Bayefsky, *supra* note 38, at 315–20. Yet, at least one Supreme Court judge has criticized this approach. See *Baker*, 2 S.C.R. at 865–66 (Iacobucci, J., concurring). Bayefsky also notes the Supreme Court's tendency not to distinguish between international treaties to which Canada is party and other international instruments not binding upon it. Bayefsky, *supra* note 38, at 320–23. See also Knop, *supra* note 35, at 513.

113. *Slaight Commc'ns*, 1 S.C.R. at 1056 (“Canada’s international human rights obligations *should* inform . . . the interpretation of the content of the rights guaranteed . . .”) (emphasis added). But see *In Re Pub. Serv. Employee Relations Act (Alta.)*, 1 S.C.R. at 349 (Dickson, C.J., dissenting) (“[T]hough I do not believe the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source for interpretation of the provisions of the Charter . . .”). The relatively modest number of cases in which the presumption was applied in the constitutional context in Canada perhaps suggests that despite occasional suggestions to the contrary, the presumption is not being applied in a systematic manner, and judges do in fact exercise considerable discretion in the matter. Bayefsky, *supra* note 38, at 318; Knop, *supra* note 35, at 512–13. Similar ambiguity can be found in the decisions of Judge Kirby in Australia. See, e.g., *Austin v. Australia* (2003) 215 C.L.R. 185, 291–92 (Kirby, J., partly concurring) (“It is at least as useful in considering questions of basic legal principle concerning the content of Australian law to have regard to this source as it is to examine the non-binding expositions of the law appearing in English cases of centuries ago, often dealing with problems in a context quite different from that of the contemporary world.”). See also *Council of the Shire of Ballina v. Ringland*, 1994 NSW LEXIS 14010, at *82 (C.A.) (N.S.W.) (Kirby, J.) (“If there be any ambiguity or uncertainty about the state of our common law it is, in my opinion, *permissible* for this Court to seek to resolve the ambiguity or uncertainty with the assistance of the applicable international law of human rights.”) (emphasis added). See discussion in Walker, *supra* note 89, at 95.

C. Why Do Different Legal Systems Select Different Incorporation Strategies?

The question of what considerations underlie the choice of an incorporation regime is essentially a political theory topic (e.g., the choice relates to the cosmopolitan or isolationist nature of the relevant society) that exceeds the scope of the present Article. However, a few rudimentary observations may be offered at this stage.

First, the older the constitutional instrument is, the more developed is the idiosyncratic jurisprudence relating to its interpretation. As a result, courts construing such primordial instruments are expected to be less receptive to engaging new interpretive materials derived from IHR law than are courts operating in relatively new constitutional orders, which were often influenced by IHR law during their formation. A second factor is the degree of confidence domestic courts have in their ability to deliver justice. Well-established democracies might view the introduction of additional safeguards to their constitutional order as redundant, while new states and states emerging from non-democratic experiences might feel that such reliance is beneficial and involves a legitimizing effect, which could protect them from future backsliding.¹¹⁴ Third, it appears that domestic courts subject to an international system of review, such as the ECtHR, would be keener to harmonize domestic law, including CL, with IHR law, than would courts of countries not subject to similar oversight.¹¹⁵ The desire to avoid embarrassing adverse findings, as well as the ongoing inter-judicial dialogue between national and international courts and the accelerated transnational legal process that ensues, serve as powerful incentives to pay close attention to IHR requirements.¹¹⁶

Finally, the inclination to resort to IHR law in constitutional interpretation is sometimes judge-dependent. In some common law legal systems, individual judges play a pivotal role in promoting the integration of IHR into the CL discourse. Consequently, a variety of factors relating to the judges' cultural or educational background, idiosyncratic beliefs, values and exposure to the IHR law discourse could also be relevant to the out-

114. Goodman, *supra* note 60, at 541 (national systems with discredited human rights records try to "lock in liberal gains" through accession to international instruments and procedures, with greater perceived legitimacy); Neuman, *supra* note 6, at 85.

115. *Cf.* Neuman, *supra* note 6, at 86.

116. *See* Slaughter, *supra* note 103, at 61–62; Buergenthal, *supra* note 5, at 361, 394 (availability of appeals to international tribunals affects the attitude of courts towards non-incorporated IHR treaties).

come.¹¹⁷ Of course, an explicit constitutional provision mandating courts to consult IHR norms neutralizes many of these subjective elements and sends courts a clear message on the political desirability of invoking IHR law. This is why constitutionally-based canons of interpretation offer better prospects for increasing the influence of IHR treaties on constitutional interpretation than judge-made interpretive doctrines.

IV. IS CONSTITUTIONALIZING HUMAN RIGHTS TREATIES A GOOD IDEA? THE POLICY IMPLICATIONS OF INCORPORATION

The practice of the surveyed common law countries reveals skepticism, reluctance, and sometimes outright hostility on the part of domestic judges to the idea of incorporating IHR treaty standards into the national system of constitutional guarantees. The explicit and implicit resistance to incorporation of IHR norms into constitutional texts cannot be simply dismissed as a manifestation of hostility to internationalism on the part of domestic courts; neither is the issue subsumed in the ordinary monism versus dualism debate. On the contrary, there are discrete arguments, supported by scholarly work, which challenge the applicability of IHR norms to the CL discourse that ought to be confronted. These arguments can be grouped into four categories: a) separation of powers and democratic accountability concerns, b) fears of undermining legal coherence, c) cultural objections, and d) political reluctance to implement IHR law. The following Part discusses these objections and introduces counter-arguments in favor of applying IHR law as an influential interpretative tool that should inform the contents of domestic CL. Hence, policy arguments relating to the welfare of the surveyed domestic legal systems independently support the incorporation of IHR treaties into CL in a way that supplements the international law arguments presented in Part I.

Before delving into the specific arguments and counter-arguments, two premises of the discussion undertaken in this Part ought to be acknowledged. First, the interpretive methodology here recommended accepts the ultimate supremacy of CL in national courts, a concession which leaves in place the conditions for chronic conflicts in outcome between domestic and international judicial fora.¹¹⁸ This approach skirts many of the virtually insoluble theoretical debates over hierarchy of norms (e.g., whether international law is the source of legitimacy of national law or

117. These considerations comport with the transnational legal process literature, which views the projection of ideas and values across national borders through global interaction and discourse as a central factor in ensuring compliance with international law. *See, e.g.*, Koh, *supra* note 97, at 56.

118. Note that under international law, reliance upon domestic law can never justify a violation of international obligations. VCLT, *supra* note 7, art. 27.

vice versa),¹¹⁹ and advocates a role for international law even in conditions of limited applicability. Needless to say, arguments in support of the incorporation of IHR law into CL would apply *a fortiori* under a monistic paradigm, which fully integrates national and international law and accords the latter precedence over the former.

Another premise is the rejection of originalism or interpretivism—i.e., theories which preclude construing CL instruments in light of any post-constitutional legal source, including IHR law¹²⁰—as the sole bases for constitutional interpretation projects.

In the alternative, the following three general propositions are put forward: (1) binding legal sources, which have legal effect within national legal systems, ought to be harmonized with one another through norm interpretation;¹²¹ (2) constitutional interpretation projects should, generally speaking, share similar pro-harmonizing aims;¹²² and (3) interpreta-

119. As is well known, there are two main theories and, consequently, practical approaches to the relations between national and international law. Monism advocates the integration of international and national law, while dualism supports the separate existence of the two legal orders. Ultimately, the two theories differ in identifying the source of legitimacy of law. Traditionally, monism posits that all legal norms derive from a single source—a common *gründnorm*. Indeed, according to Kelsen, national legal systems derive their ultimate legitimacy from the principle of sovereignty, which is a fundamental principle of customary international law. See HANS KELSEN, GENERAL THEORY OF LAW AND STATE 369 (Anders Wedberg trans., 1949); HANS KELSEN, PURE THEORY OF LAW 337–38 (Max Knight trans., 1967); HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 61–62 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., Oxford Univ. Press 1992) (1934). In contrast, dualism views domestic laws and institutions as deriving their authority *exclusively* from a self-contained domestic legal system, corresponding to a sovereign polity, founded upon its own independent *gründnorm*. As a result, domestic courts can apply international law only to the degree it was positively imported into the domestic legal system through domestic rules of incorporation. A third pluralist approach that dismisses any pretensions to identify a common starting point for law and advocates a multi-faceted vision of law, is also available. See, e.g., William Ewald, *Comment on MacCormick*, 82 CORNELL L. REV. 1071, 1078 (1997); Neil MacCormick, *Institutions and Laws Again*, 77 TEX. L. REV. 1429, 1432 (1999).

120. See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST 1 (1980) (“[Interpretivism indicates] that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution.”). But see Hughlett, *supra* note 15, at 181.

121. See, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 116–17 (1977). The proposition that interpretation should strive to harmonize applicable norms might even qualify as a general principle of law given its ubiquitous application. See Statute of the International Court of Justice, June 26, 1945, art. 38(1)(c), 59 Stat. 1031, 1946 U.K.T.S. 67.

122. Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 77 (2002) (“The purposive interpreter does not look for

tion of constitutional texts should take cognizance of changing social values, pursuant to “living constitution” theories accepted in the surveyed jurisdictions.¹²³ These propositions could, in theory, facilitate the consideration of IHR treaties in the course of CL interpretive projects. If IHR treaties form part of domestic law by virtue of a domestic law rule of incorporation, then they may be viewed under propositions (1) and (2) as candidates for harmonization with CL. In the alternative, treaty ratification by democratically elected bodies could be viewed as manifestation of the relevant polity’s social values and deemed relevant for CL interpretation projects under proposition (3).¹²⁴

A. Upsetting the Separation of Powers and Undermining Democratic Accountability

A traditional objection against empowering courts to resort to international treaties when construing constitutional texts is that such authorization might disrupt fundamental constitutional principles.¹²⁵ These include the need to maintain the separation of powers (or the constitutional balance of powers) within the relevant polity¹²⁶ and to resist any democratic accountability-eroding features which appertain to a pro-incorporation rule. The following segment analyzes the distinct claims which comprise this group of anti-incorporation arguments.

1. Fears of Judicial Activism

Two specific separation of powers issues may arise. The ability of courts to step outside of the ‘four corners’ of the text and to fill an existing normative cast with contents derived from international law sources liberates judges from the obligation to abide by the original intent of the norm’s drafters. This necessarily amplifies their law-creating role, which

conflicts; he aims for harmony.”); LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 109 (1991).

123. See, e.g., *Rummel v. Estelle*, 445 U.S. 263, 307 (1980) (Powell, J., dissenting) (“We are construing a living Constitution.”). See also William N. Eskridge, Jr. & John Ferejohn, *Super Statutes*, 50 DUKE L.J. 1215, 1268 (2001); Neuman, *supra* note 4, at 1872.

124. See, e.g., *Baker v. Canada*, [1999] 2 S.C.R. 817, 861 (Can.).

125. See, e.g., Jamil Jaffer, *Congressional Control over Treaty Interpretation*, 70 U. CHI. L. REV. 1093, 1097 (2003); Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT’L L. 57, 57–58 (2004) (“Including a new source fundamentally destabilizes the equilibrium of constitutional decision making.”).

126. See Bradley & Goldsmith, *supra* note 16, at 861.

is inherent in any law-interpretation or law-application project,¹²⁷ and provides rhetorical tools which enable judges to mask their individual preferences with innovative interpretative doctrines.¹²⁸ This criticism is particularly influential at the CL level. If judges are entrusted with the *de facto* authority to reshape the constitution, they might be able to override with greater frequency and intrusiveness democratically elected legislatures and executives. Hence, objections to the use of IHR law for the interpretation of CL are directly linked to fears of judicial activism and theories of constitutional interpretation that seek to curb judicial discretion.¹²⁹

These objections are hardly convincing. First, it is questionable whether empowering judges to apply IHR treaties when construing constitutional texts liberates judges or, rather, constrains them. Most modern theories of constitutional interpretation refer judges to elusive concepts such as “local standards of decency,” “national consensus,” “original intent,” “basic principles of the legal system,” “basic rights” and “justice,”¹³⁰ which leave judges almost unrestricted interpretive discretion.¹³¹ The image of the work of the judiciary as a mechanical law-applying exercise or the automatic identification and implementation of the original drafters’ intent, involving little discretion, is nothing more than a dated myth.¹³² One could, therefore, argue that reference to the more precise legal standards found in IHR instruments and the case law of international monitoring bodies *restricts* the ability of judges to mold consti-

127. See, e.g., Buergethal, *supra* note 5, at 361 (observing that criteria for application of the presumption of compliance “are subjective and easily manipulated, allowing the courts a great deal of latitude to impose their own preferences”).

128. Bradley, *supra* note 95, at 506 (“Canons may also promote activism, some critics argue, by allowing judges to use ostensibly value-free rules to hide their true policy considerations.”); RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 309 (1996) (observing that canons of construction are “fig leaves covering decisions reached on other grounds”).

129. See, e.g., *Int’l Transport Roth GmbH v. Sec’y of State for Home Dep’t*, [2003] Q.B. 728, 758 (U.K.) (Brown, L.J.) (“[T]he court’s task is to distinguish between legislation and interpretation, and confine itself to the latter. We cannot create a wholly different scheme That must be for Parliament itself.”).

130. See, e.g., 16 AM. JUR. 2D *Constitutional Law* § 67 (1998) (“Whenever language is not explicit, or admits of doubt, it is presumed that it is intended to be in accordance with the acknowledged principles of justice and liberty. . . .”).

131. David M. Beatty, *The Forms and Limits of Constitutional Interpretation*, 49 AM. J. COMP. L. 79, 99 (2001) (“Interpretivism sanctions a process of reasoning which puts each judge at the center of the case and gives them unfettered discretion to chose [sic] which approach to take.”). See also Bradley, *supra* note 95, at 505 (discussing criticisms of the use of canons in statutory interpretation for failing to restrain judicial discretion).

132. See discussion in Bradley, *supra* note 95, at 506; Hughlett, *supra* note 15, at 182.

tutional texts in accordance with their idiosyncratic personal or institutional preferences.¹³³ At the very least, reference to international law helps judges to articulate their preferences in a politically acceptable manner¹³⁴ and provides them with guidance in cases where they do not have strong preferences.¹³⁵

Second, the fact that accession to international treaties is executed through the fiat of other branches of government (the executive, the legislative or both) implies that these branches can influence judicial discretion by way of treaty ratification.¹³⁶ Such influence is augmented by the widely accepted rule that courts should give weight to the way in which the executive branch interprets treaties.¹³⁷ The result is that the presump-

133. *In Re Pub. Serv. Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, 349 (Can.) (Dickson, C.J., dissenting) (“As the Canadian judiciary approaches the often general and open textured language of the Charter, ‘the more detailed textual provisions of the treaties may aid in supplying content to such imprecise concepts as the right to life, freedom of association, and even the right to counsel.’”) (citation omitted). *See also* Hughlett, *supra* note 15, at 180 (“[E]ven reasonable people disagree on how the Supreme Court should interpret the Constitution. Some external interpretive tool is necessary at times to resolve constitutional questions.”); Neuman, *supra* note 6, at 90 (noting that proscribing the use of international law as an interpretive aid would hardly prevent judicial activism); Strossen, *supra* note 6, at 830.

134. *See, e.g.*, *Roper v. Simmons*, 125 S. Ct. 1183, 1200 (2005) (“The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”).

135. *See, e.g.*, *Foster v. Florida*, 537 U.S. 990, 993 (2002) (“Just as ‘attention to the judgment of other nations’ can help Congress determine ‘the justice and propriety of [America’s] measures,’ so it can help guide this Court when it decides whether a particular punishment violates the Eighth Amendment.”) (citation omitted). *Cf.* Bradley, *supra* note 95, at 508 (discussing defenses of canons of interpretation as useful for articulating policy preferences); Neuman, *supra* note 4, at 1896 (“[T]he availability of external precedents offers guidance in interpreting constitutional rights, and may bolster the authority of the reviewing court against other political forces.”).

136. *Cf.* Bradley, *supra* note 95, at 525 (“[The presumption of conformity] is a means by which the courts can seek guidance from the political branches concerning whether and, if so, how they intend to violate the international legal obligations of the United States.”); Kirby, *supra* note 89, at 16.

137. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982) (“Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) (courts ascribe great weight to the meaning given to treaties by departments of government charged with negotiation and enforcement). *See also* Jaffer, *supra* note 125, at 1099–1100; Bradley, *supra* note 95, at 532; Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of the Attitudes of National Courts*, 4 EUR. J. INT’L L. 159, 167–68 (1993); Eskridge & Frickey, *supra* note 93, at 618. There are of course limits to the degree in which the legislature or the executive can restrict judicial discretion regarding the interpretation of trea-

tion of conformity, even when applied at the CL level, *protects* the power of the political branches of government to conduct effective foreign policy by minimizing the number of judicially created conflicts between domestic law and international law. By contrast, courts' application of CL without considering IHR law might result in treaty violations and could complicate international relations. In this respect, incorporation of IHR treaties into CL serves to strengthen rather than undermine the balance of powers between the branches of government.¹³⁸

2. Empowerment of Treaty-Ratifying Agencies

A second separation of powers concern relates to the expected increase in the power of treaty-ratifying agencies. If courts are required to construe the constitution in an international law-friendly manner, the domestic actors directly involved in the creation of the international law binding upon the relevant polity—mainly, by negotiating and acceding to international treaties—become exceptionally empowered. By making new international law, these actors can indirectly affect the meaning of their national constitution and increase their relative power at the expense of the other branches of government.¹³⁹ In other words, recourse to international law under direct or indirect incorporation theories provides a detour to constitutional amendment procedures that enables a small, and perhaps conjectural, political majority in one branch of government to place its stamp upon constitutional instruments, which ought to reflect deeply imbedded social tenets not susceptible to temporal vagrancies.¹⁴⁰ Such a development is also arguably awkward from a theoretical perspective. It enables the same entities whose power is checked by the constitution to tamper with the very means of control, thereby undermining the hierarchical superiority of CL.¹⁴¹

Nonetheless, this argument carries little weight in jurisdictions such as the United States and most civil law legal systems, where virtually all

ties. *Cf.* Jaffer, *supra* note 125, at 1104–10; Buergenthal, *supra* note 5, at 347–48 (the French Conseil d'Etat may interpret treaties independently of the interpretations of the Ministry of Foreign Affairs).

138. *See, e.g.*, Bradley, *supra* note 95, at 525–26 (the presumption of conformity reduces the number of violations which are contrary to the wishes of the political branches); Kirby, *supra* note 89, at 15 (“Far from being a negation of sovereignty, this is an application of it . . .”).

139. Alford, *supra* note 125, at 61.

140. *See, e.g.*, Kirby, *supra* note 89, at 13 (“[Treaties negotiated by the Executive Government] may or may not reflect the will of the people, expressed by their representatives in Parliament . . .”); Walker, *supra* note 89, at 98–99.

141. Alford, *supra* note 125, at 62.

branches of government are involved in the process of treaty ratification and incorporation. The executive negotiates the treaty and submits it for ratification; the legislative branch is free to give or withhold its consent; and the judiciary is invested with the authority to oversee the implementation of international instruments within the domestic legal system.¹⁴² The checks and balances inherent in the process seem to facilitate the maintenance of the pre-existing institutional equilibrium.¹⁴³

Still, one must acknowledge that a more serious separation of powers problem might arise in common law states, such as the United Kingdom, Canada, Australia or Israel, where ratification of international treaties is the prerogative of the executive branch. In such states, incorporating treaties into CL not only sidesteps the normal constitutional amendment process, but it also circumvents the normal legislative process. Through treaty ratification, the executive branch can influence CL and encourage interpretations thereof that override statutory instruments adopted by the legislative branch.¹⁴⁴ In addition, incorporation by interpretation might result in granting international treaties binding effect in the domestic legal system through the backdoor, in contravention of the dominant dualistic paradigm applicable in these countries.¹⁴⁵ Arguably, these develop-

142. For example, judges may determine whether the treaty is self-executing or non-self-executing, what is the precise meaning of the treaty terms, and how to best reconcile treaty norms with the existing constitutional text.

143. One could also argue that, in theory, any interpretation of the constitution influenced by IHR law could be reversed by constitutional amendments introduced by non-judicial branches of government. See T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L L. 91, 95 (2004). However, in reality the process of constitutional amendment might be prohibitively cumbersome.

144. The following passage describes the problem:

[T]he submission by HREOC would undermine the long settled principle that provisions of an *international treaty* do not form part of Australian law unless validly incorporated by statute. It has repeatedly been held that the separation of the legislative and executive arms of government necessitates that *treaties* be implemented domestically under statute. However, HREOC's approach would effectively reverse that principle. By giving priority to the principles assumed by the Executive, by permitting judges to construe legislation in a way that violated the intention of Parliament, it would elevate the Executive to a position that it has never enjoyed under our Constitution. That is another reason for rejecting the submission.

Western Australia v. Ward (2002) 213 C.L.R. 1, 391–92 (Austl.) (Callinan, J., dissenting) (emphasis added).

145. Justice Iacobucci of Canada's Supreme Court encapsulates this argument:

ments might adversely affect the existing system of checks and balances between the different branches of government.¹⁴⁶

It would seem that such countries warrant a nuanced rule of incorporation, which would enable the judiciary to maintain the inter-institutional balance of power. Since the weight attributed to IHR treaties in the course of CL interpretation is always relative, courts should be entitled to consider the compatibility of international standards with their own domestic constitutional concepts and notions of justice. If, on balance, judges believe that incorporation of IHR treaty norms will corrupt or disrupt the constitutional order within the relevant polity, they should be able to reject them (although this might put their country in breach of international law).¹⁴⁷ Courts thus serve as important filtering agencies, supervising the constitutional lawfulness and desirability of giving effect to treaty obligations entered into by the executive.

[The approach advocating a role for unincorporated IHR treaties in construing the Charter] is not in accordance with the Court's jurisprudence concerning the status of international law within the domestic legal system.

In my view, one should proceed with caution in deciding matters of this nature, lest we adversely affect the balance maintained by our Parliamentary tradition, or inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch [T]he result will be that the appellant is able to achieve indirectly what cannot be achieved directly, namely, to give force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament.

Baker v. Canada, [1999] 2 S.C.R. 817, 865–66 (Iacobucci, J., concurring). *See also* Newcrest Mining (WA) Ltd. v. Commonwealth (1997) 190 C.L.R. 513, 657 (Austl.) (Kirby, J., concurring) (“[T]he Court [should not] adopt an interpretive principle as a means of introducing, by the backdoor, provisions of international treaties or other international law concerning fundamental rights not yet incorporated into Australian domestic law.”). One may question, however, the consistency of Kirby’s approach, as in the same case he relied upon the non-incorporated Universal Declaration on Human Rights, notwithstanding that, in Australia, customary law is not part of the law of the land without incorporation. *See* Walker, *supra* note 89, at 87. A comparable argument could be made in the United States in relation to non-self-executing treaties. Their incorporation to CL allegedly bypasses the rule concerning their lack of direct effect.

146. *See, e.g.*, Benvenisti, *supra* note 137, at 174.

147. Compare the German Constitutional Court doctrine that EC law would not be given effect if it is proved that it fails to guarantee an absolute minimum of protection for fundamental rights (“*ausbrechenden Gemeinschaftsakt*”). Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Oct. 11, 1993, 2 BvR 2134/92 & 2159/92, *translated in* [1994] 1 C.M.L.R. 57, 89; Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] June 7, 2000, 2 BvL 1/97, *excerpts translated in* GEORGE A. BERMAN ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW 321 (2d ed. 2002).

Notwithstanding, it should be emphasized that distinct policy considerations—the inherent persuasiveness of IHR treaties, their straightforward adaptability at the CL level and the duty to effectively incorporate them into domestic law—support the incorporation of IHR treaties in all legal systems, even at the price of a minor shift in the inter-branch balance of power. These considerations apply with special force to IHR treaty norms endowed with customary international law status because such norms usually reflect deeply imbedded and widely supported interests and values. The international consensus underlying customary norms is often indicative of their inherent persuasiveness and legitimacy.¹⁴⁸ In addition, the method of creation of customary law is more pluralist from a domestic perspective as it builds upon the practice of *all* branches of government. No single government can create customary law at will and, as a result, purposefully circumvent ordinary constitutional or legislative processes.¹⁴⁹ Hence, erosion of the separation of powers principle as a result of incorporating IHR treaties that also reflect customary standards is minimal.

3. Accountability-Eroding Implications

A pro-incorporation CL interpretive rule empowering non-elected judges and government officials at the expense of parliaments and constitutional assemblies might also be viewed as incompatible with notions of popular sovereignty.¹⁵⁰ Skepticism directed against such accountability-decreasing measures might therefore be justified.¹⁵¹ The democratic defi-

148. Similar arguments could be made in support of attributing increased persuasive weight to widely-ratified IHR treaties. *See, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) (“[T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it”); *Slaight Commc’ns Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 1056–57 (Can.) (“[T]he fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective.”).

149. For discussion, see Walker, *supra* note 89, at 100–01.

150. *Cf.* Aleinikoff, *supra* note 143, at 101 (arguing that customary international law is in tension with popular sovereignty).

151. *Cf.* Alford, *supra* note 9, at 785 (arguing that, in the case of the death penalty, the international majoritarian consensus, which seeks enforcement through the courts, conflicts with the domestic majoritarian consensus of the United States); Alford, *supra* note 125, at 59 (discussing the “international countermajoritarian difficulty”); Goldsmith, *supra* note 36, at 333; Kirby, *supra* note 89, at 15 (“[Judicial creativity] must not undermine the primacy of democratic law-making by the organs of government, directly or indirectly accountable to the people”); Aleinikoff, *supra* note 143, at 93 (discussing

cit associated with a pro-incorporation rule is also reflected in the record of the surveyed states, which often reveals inadequate levels of public debate on the desirability of ratifying IHR treaties in general, and on the implications of such ratification on the CL discourse in particular.¹⁵² This lack of accountability is exacerbated in federal states such as the United States, Canada or Australia,¹⁵³ where expanding the substantive scope of application of the constitution by way of IHR-compatible interpretation might infringe upon the rights and interests of the constitutive federal units.¹⁵⁴ Since the interests of these units might be unrepresented or underrepresented in the treaty ratification process, political pressures against incorporation could escalate.¹⁵⁵

The accountability-eroding argument is also unpersuasive. Once it is established that incorporation of IHR treaties into CL does not result in judicial empowerment (in fact, one could argue that the presumption of

critiques of customary international law as an extraconstitutional norm binding democratic branches of the government).

152. Kirby, *supra* note 89, at 13.

153. Cf. Bradley & Goldsmith, *supra* note 16, at 857–58 (discussing the deficit of state representation when international customary law is applied by courts as federal common law); Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 82–89 (1992); Lea Brilmayer, *Federalism, State Authority and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 307–08, 322–26, 329–332 (1994); Kirby, *supra* note 89, at 14.

154. A classic example demonstrating the potential of international law to manipulate the balance of power between the center and the periphery in a federal state is *Missouri v. Holland*, 252 U.S. 416 (1920). In that case, the U.S. administration bypassed a constitutional ban on the regulation of migratory bird hunting through federal legislation, through the conclusion of an international treaty on the same matter with Great Britain. *Id.* at 432–33. This sort of consideration has led the United States to introduce in the process of ratification of the ICCPR a “federalism understanding,” subjecting the implementation of the Covenant to the distribution of power among the federal and constitutive states. See Brad R. Roth, *Understanding the “Understanding”: Federalism Constraints on Human Rights Implementation*, 47 WAYNE L. REV. 891 (2001).

155. In Canada and Australia, the federal government is authorized to ratify treaties without involvement of the regional units; in the United States, the ratification process normally involves the Senate and the President. Cf. Bradley & Goldsmith, *supra* note 16, at 868 (arguing that state interests are not represented in the application of international customary law by federal judges). Under U.S. constitutional law, the President may also enter independently into “executive agreements.” See LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 215 (2d ed. 1996) (observing that presidential authority to enter into these agreements continues to be debated); Sharon G. Hyman, *Executive Agreements: Beyond Constitutional Limits?*, 11 HOFSTRA L. REV. 805, 822–32 (1983) (discussing the constitutional bases for executive agreements). This, however, bears little relevance to the present topic as human rights treaties have been traditionally subject to the ordinary ratification process.

conformity restricts judicial discretion),¹⁵⁶ the objection, insofar as it relates to judicial non-accountability, fails. In any case, arguments against judicial empowerment run contrary to the notion that, in the area of human rights protection, judges bear a special responsibility for protecting individuals and minorities from the tyranny of the majority.¹⁵⁷ Hence, even if judges were to become empowered by a pro-incorporation legal doctrine which governs IHR treaties, this would not necessarily conflict with democratic principles.¹⁵⁸

Furthermore, the claim that a pro-incorporation interpretive presumption might lead to the circumvention of more popularly representative constitutional amendment procedures is oblivious to the law-creating quality of any interpretive project. Expanding the range of permissible sources for interpretation of CL texts hardly changes the nature of the interpretive process. In other words, CL interpretation necessarily implies a degree of innovation regardless of whether courts resort to IHR treaties or not. Further, one should realize that constitutional instruments which entrench the political choices of past majorities also have inherent democratic deficit problems.¹⁵⁹ Mechanisms which facilitate the periodic updating of constitutional texts in light of contemporary political choices, expressed, *inter alia*, through treaty ratification, could thus have a positive accountability-enhancing effect.

Similar observations would also mitigate the aforementioned concern that incorporation of IHR treaties into CL might disrupt the federal division of powers in some countries.¹⁶⁰ In effect, the federal argument cuts

156. Beatty, *supra* note 131, at 100–01.

157. *Cf.* Ann I. Park, Comment, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195, 1250 (1987) (“[T]he government which is shaped by majoritarian political processes cannot be trusted to safeguard human rights through law.”); *A v. Sec’y of State*, [2005] 2 A.C. 68, para. 42 (U.K.) (“[T]he function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state . . .”).

158. *See, e.g.*, Spiro, *supra* note 62, at 2023; Kirby, *supra* note 89, at 16 (“[I]n so far as courts give effect at least to fundamental rights, they are assisting in the discharge of their governmental functions to advance the complex notion of democracy as it is now understood . . .”).

159. Eskridge & Ferejohn, *supra* note 123, at 1267.

160. In addition, it may be claimed that the influence of federal actors upon the division of powers between the federation and its components through treaty ratification is not radically different from their influence upon these relations through federal legislation (which is also a generally permissible source of input in the CL interpretive process) or executive practices. *Cf.* *Thompson v. Oklahoma*, 487 U.S. 815, 865 (1988) (Scalia, J., dissenting) (referring to the merits of reliance upon legislation when construing CL). In federal countries, such as the United States, where the Senate comprises of delegates

in both ways. The promotion of international law at the CL level will ensure that constitutive federal units would not have the freedom to violate the international obligations of the federation.¹⁶¹ This comports with the organizing principle of most federal states, according to which the central authorities—and not the federal units—are invested with exclusive power to conduct foreign relations on behalf of the federal polity.¹⁶² Interpreting the constitution in accordance with the international obligations of the federation reinforces this principle, whereas failure to consider the same obligations undermines it and complicates the ability of the central government to adequately perform at the international level.¹⁶³

4. Empowering International Adjudicators

A final accountability concern that needs to be addressed involves the impact of the case law of treaty-monitoring bodies under a pro-incorporation rule. According to the Vienna Convention on the Law of Treaties, international treaties ought to be construed, *inter alia*, in light of the practice of the parties thereto.¹⁶⁴ One manifestation of such practice, growing in its importance, is the work of treaty-monitoring bodies such as the ECtHR and the UN Human Rights Committee (HRC). Indeed, when discussing IHR treaties, domestic courts increasingly refer to the jurisprudence of such bodies.¹⁶⁵ Incorporation of IHR treaties into CL would thus, most probably, facilitate the importation of the work of in-

from the States of the Union, these concerns are even less significant, as the interests of the constitutive units may be represented during the treaty ratification process (which is conditioned upon a two-thirds super majority—a requirement which compensates, in part, for the under-representation of some federal units in Senate).

161. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (noting Prof. Philip C. Jessup's caution that "rules of international law should not be left to divergent and perhaps parochial state interpretations").

162. See, e.g., Yoo, *supra* note 18, at 1964 ("[T]he Constitution divests the states of any power in the field [of international agreements]."). See also Bradley, *supra* note 95, at 525; Aleinikoff, *supra* note 143, at 94 (discussing the internationalist argument that international law cases constitute one area where federal common law survives the Erie doctrine because "they concern a preeminently federal interest").

163. A parallel argument was raised with regard to the impact of the *Charming Betsy* doctrine upon division of powers between the legislature and the executive. Alford, *supra* note 9, at 733–34.

164. VCLT, *supra* note 7, art. 31(3)(b).

165. See, e.g., *S v Makwanyane* 1995 (6) BCLR 665 (CC) para. 35 (S. Afr.) (Chaskalson, J.) ("[D]ecisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, . . . and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter 3 [of the South African Constitution]."). See discussion in Slaughter, *supra* note 103, at 67–69.

ternational human rights bodies into the constitutional interpretive process. This, in turn, might empower non-popularly elected international bodies at the expense of directly accountable domestic legislators and drafters of the constitution.¹⁶⁶

This argument, couched in somewhat more general terms, has been addressed in a recent article written by Professor Mark Tushnet.¹⁶⁷ Tushnet persuasively argued that treaty language that confers the power to settle disputes to an international tribunal (such as the WTO Appellate Body) presents no constitutional problem under U.S. CL, since the power of the President and Congress to create obligations for the Union also encompasses the power to undertake open-ended and dynamic obligations.¹⁶⁸ Further, the mediating role of domestic judges in interpreting and applying such decisions in domestic legal contexts mitigates any alleged loss of sovereignty.¹⁶⁹

While Tushnet's general argument is valid, delegation of judicial authority is even less of a problem in the IHR sphere, at least with respect to the surveyed countries. This is because most of the relevant IHR monitoring bodies—the HRC, which state parties have normally met with approval, and other UN treaty bodies—do not have the authority to generate binding decisions. Hence, domestic courts may derogate from their views if deemed necessary, although the high quality of the decisions, the fairness of the procedure, the expertise of the Committee members and the acceptance of the decisions by other parties could generate considerable compliance pull.¹⁷⁰ The ECtHR is, of course, a differ-

166. Goldsmith, *supra* note 36, at 333; Barak, *supra* note 122, at 162 (the international judge is less accountable than the domestic judge); Ramsey, *supra* note 98, at 79.

167. Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 LOY. L.A. L. REV. 239 (2003).

168. *Id.* at 253–57.

169. *Id.*

170. As the Federal Court of Australia has stated:

Although the views of the Committee lack precedential authority in an Australian court, it is legitimate to have regard to them as the opinions of an expert body established by the treaty to further its objects by performing functions that include reporting, receiving reports, conciliating and considering claims that a State Party is not fulfilling its obligations. The Committee's functions under the Optional Protocol to the International Covenant on Civil and Political Rights, to which Australia has acceded (effective as of 25 December 1991) are particularly relevant in this respect. They include receiving, considering and expressing a view about claims by individuals that a State Party to the Protocol has violated covenanted rights.

Minister for Immigration and Multicultural and Indigenous Affairs v. Al Masri (2003) 126 F.C.R. 54, 91. *See also* Queen v. Sin Yau-Ming, [1992] 1 H.K.C.L.R. 127, 141

ent matter, as its decisions are legally binding upon parties litigating before it,¹⁷¹ but carry no *stare decisis* effect vis-à-vis third parties. However, the only country surveyed in this article which is subject to its jurisdiction, the United Kingdom, may exercise considerable judicial, executive and legislative discretion in determining the effect of such judgments within its legal system.¹⁷² In short, fears concerning the power of IHR monitoring bodies to dictate the contents of domestic law, much less of CL, seem to be exaggerated.

Finally, it could also be argued that the wide international consensus underlying most IHR norms and the international jurisprudence relating to their application provides some degree of international accountability and legitimacy which supports adherence to these standards.¹⁷³ While this does not entirely alleviate the concerns of those lamenting the erosion of domestic accountability as a result of the internationalization of the CL discourse, it does reduce the risk of arbitrariness introduced by domestic judges during CL interpretation processes.¹⁷⁴

B. Fears of Undermining Legal Coherence

Another concern raised by opponents of incorporation is that the introduction of international law at the CL level might disrupt the existing legal discourse and create disharmonizing tensions.¹⁷⁵ Incorporation would require the importation into the domestic legal system of foreign normative concepts that are not based upon local notions of justice and specific social structures. Differences between national and international

(C.A.) (H.K.). Cf. Alford, *supra* note 9, at 756–59 (noting, however, that deference to the rulings of international tribunals is entirely within the discretion of the domestic court). For a discussion of the link between perceived legitimacy and compliance pull, see THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 48–49 (1990).

171. European HR Convention, *supra* note 22, art. 46.

172. Section 2 of the Human Rights Act instructs British courts to *take into account* the decisions of the Strasbourg institutions, including ECtHR judgments in the process of interpreting Convention rights. Human Rights Act, 1998, c. 42, § 2. This seems to guarantee the status of domestic courts as final arbiters as to the application of ECtHR judgments within domestic law.

173. See, e.g., *Newcrest Mining (WA) Ltd. v. Commonwealth* (1997) 190 C.L.R. 513, 658 (Austl.) (Kirby, J., concurring) (“The reason for this [resort to IHR law] is that the Constitution not only speaks to the people of Australia who made it and accept it for their governance. It also speaks to the international community as the basic law of the Australian nation which is a member of that community.”); Spiro, *supra* note 62, at 2021–22; Hughlett, *supra* note 15, at 181; Aleinikoff, *supra* note 143, at 105 (“[I]t is a state’s compliance with fundamental norms of human rights that establishes its legitimacy at home and abroad.”).

174. See Goodman, *supra* note 60, at 541.

175. Alford, *supra* note 125, at 57–58.

law—from differences in legal drafting techniques to differences in the methods of balancing competing social interests—further complicate integration efforts.¹⁷⁶ For example, IHR law might require a more intrusive standard of governmental involvement in social life (through the introduction of positive human rights obligations) than what is acceptable within a given society.¹⁷⁷ The introduction of such far-reaching reforms through judicial action, without correlative changes in the structure and machinery of government, might be ineffective and disruptive. When linked to the argument addressed below regarding the lack of familiarity of domestic judges with IHR law, the formidability of the task of incorporation becomes apparent. Arguably, a more prudent course of action would be to encourage legislators and other constitutional actors to gradually introduce constitutional amendments necessary to meet the state's international obligations.¹⁷⁸ Such a process would not only meet separation of powers and accountability concerns,¹⁷⁹ but it would also ensure smoother integration of international norms into the domestic legal system.

This group of arguments is also untenable. The opposition's arguments are premised on a dubious image of a uniform and harmonious law-creating mechanism which international law allegedly subverts. In truth, domestic norms are generated over time by different individual law-makers and a variety of social institutions, such as constitutional assemblies, federal legislatures, provincial legislatures, courts, and administrative agencies. In some legal systems, customs, such as *lex mercatoria*, and religious edicts also apply.¹⁸⁰ Consequently, courts are well-accustomed to harmonizing assorted norms derived from diverse sources and coming in different shapes and forms, such as statutes, judicial decisions, administrative orders, etc. It is difficult to see why the introduction of international law, especially of treaty norms which the state has freely chosen to ratify—a fact suggesting a good fit between the treaty norms and domestic notions of justice—should be treated in a radically different manner.

176. See Goldsmith, *supra* note 36, at 332; Hughlett, *supra* note 15, at 180 (“There are differences between the way the courts in the United States have defined rights and the way international agreements define those rights.”); Louis Henkin, *International Human Rights and Rights in the United States*, in 1 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 25, 51–53 (Theodor Meron ed., 1984).

177. Christenson, *supra* note 18, at 242.

178. Eskridge & Ferejohn, *supra* note 123, at 1271–72.

179. Goldsmith, *supra* note 36, at 334.

180. For example, in Israel, religious law governs personal status matters (marriage, divorce and many associated legal issues).

The disharmony argument is particularly weak with regard to norms of international law which have already been incorporated within the domestic legal system as part of the law of the land by virtue of incorporating legislation or a general constitutional rule. In such cases, courts are expected to apply international norms directly and to synchronize their application with other legal norms.¹⁸¹ It would be odd to exclude international law norms endowed with direct effect within the national legal system from the purview of CL interpretation, while, at the same time, factoring in other domestic law sources, such as domestic legislation.¹⁸²

However, even where ratified IHR treaties are not part of the law of the land—either by reason of their non-self-executing character or because of a dualistic constitutional rule of incorporation—important policy considerations related to the promotion of legal coherence support harmonizing CL with such treaties. The first and foremost consideration is that harmonization could avoid some of the political costs incurred by the state on the international plane by reason of inconsistencies between its domestic law and international obligations. These costs might include formal or informal sanctions, reputation costs (e.g., public shaming), and the risk of deteriorating relations with other members of the international community.¹⁸³ As argued in Part I, failure to harmonize IHR treaties into CL might even constitute an independent violation of these treaties. It thus seems sensible to encourage courts to opt for an interpretive methodology that reduces these costs by way of harmonization.

Another consideration is that IHR treaties that have been accepted by democratically elected actors—members of the government or the legis-

181. See Jaffer, *supra* note 125, at 1099.

182. And yet, that is exactly what the following passage espouses:

The most reliable objective signs [for identifying evolving standards of decency in constitutional cases] consist of the legislation that the society has enacted. It will rarely if ever be the case that the Members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives.

Thompson v. Oklahoma, 487 U.S. 815, 865 (1988) (Scalia, J., dissenting). See also Stanford v. Kentucky, 492 U.S. 361, 369–73 (Scalia, J.) (reviewing a variety of State capital punishment law in order to ascertain the evolving standards of decency in an Eighth Amendment case); Alford, *supra* note 125, at 60.

183. See, e.g., LOUIS HENKIN, HOW NATIONS BEHAVE 320–21 (2d ed. 1979); Koh, *supra* note 97, at 56. This might eventually lead to the destabilization of international legal regimes. Cf. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S.D. of Iowa, 482 U.S. 522, 567 (1987) (Blackmun, J., concurring in part) (“The final component of a comity analysis is to consider if there is a course that furthers, rather than impedes, the development of an ordered international system.”).

lature—normally represent socially acceptable values.¹⁸⁴ Unless we embrace a wholly cynical view of international law, the act of ratification must be deemed to signal some degree of agreement with the object, purpose and the contents of the norms enumerated in the ratified instruments.¹⁸⁵ Courts invested, *inter alia*, with the task of constantly updating constitutional texts in order to meet changing realities, new challenges and emerging social perceptions, should take into account the espousal of norms and values by treaty-ratifying agencies as important indicia of contemporary standards of what the law should be.¹⁸⁶ So, the ability of courts to consider norms enshrined in international treaties while interpreting constitutional instruments might help to minimize conflicts between legally binding norms and societal values and may therefore increase legal harmony.

Finally, it should be noted that IHR treaties have the potential to enrich domestic law since they often represent more progressive and enlightened approaches to human rights protection than constitutional instruments, sometimes drafted many decades or even centuries ago.¹⁸⁷ Furthermore, they often provide more specific guidance on human rights protection than comparable CL provisions. Learning from the experience of other legal orders and societies also opens new horizons and introduces new perspectives which could improve the quality of judicial decision making.¹⁸⁸ This potential for improvement of CL through invocation of IHR law should also support a pro-incorporation strategy.¹⁸⁹

184. See *Slaight Commc'ns Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 1056–57 (Can.).

185. Cf. *S v Makwanyane* 1995 (6) BCLR 665 (CC) para. 362 (S. Afr.) (Sachs, J.) (“Reference in the Constitution to the role of public international law (sections 35(1) and 231) underlines our common adherence to internationally accepted principles.”).

186. See Hughlett, *supra* note 15, at 190.

187. See, e.g., Goldsmith, *supra* note 32, at 331 (“[S]ome of [the ICCPR] rights clearly go further than US law.”); Hughlett, *supra* note 15, at 183 (“If the Constitution is not interpreted to guarantee at least those individual freedoms protected by international consensus, the United States will fall far behind the rest of the world in the protection of human rights.”); Neuman, *supra* note 6, at 87 (“In the United States, such reexamination may be especially beneficial where doctrinal structures preserve vestiges of long-vanished historical conditions.”). See also Henkin, *Constitutionalism*, *supra* note 5, at 394 (listing areas in which IHR law could contribute to U.S. CL).

188. *Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting); Stephen Breyer, *Keynote Address*, 97 AM. SOC'Y INT'L L. PROC. 265, 267 (2003); Knop, *supra* note 35, at 532; Neuman, *supra* note 4, at 1898; Koh, *supra* note 97, at 56; Christenson, *supra* note 86, at 11.

189. See Bradley, *supra* note 95, at 507 (noting that proponents of normative canons of interpretation concede that the canons are “not policy neutral”).

C. Cultural Objections to Internationalizing the Constitutional Discourse

Another set of objections derives from cultural and ideological animosity towards IHR standards. This set of objections may be grouped in two categories: objections that IHR are not adaptable to local conditions, and objections that domestic courts may be ill-equipped to apply IHR standards.

1. Suitability to Local Conditions

Cultural objections are sometimes related to parochial “we know best” sentiments, which contest the wisdom of international regulation, especially its adaptability to local conditions.¹⁹⁰ Indeed, domestic law is often

190. Justice Scalia expounded such objection in *Thompson*:

We must never forget that it is a Constitution for the United States of America that we are expounding. The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so ‘implicit in the concept of ordered liberty’ that it occupies a place not merely in our mores but, text permitting, in our Constitution as well. But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution. In the present case, therefore, the fact that a majority of foreign nations would not impose capital punishment upon persons under 16 at the time of the crime is of no more relevance than the fact that a majority of them would not impose capital punishment at all, or have standards of due process quite different from our own.

Thompson v. Oklahoma, 487 U.S. 815, 869 n.4 (1988) (Scalia, J., dissenting) (citation omitted). See also *Roper v. Simmons*, 125 S. Ct. 1183, 1226 (2005) (Scalia, J., dissenting); *Foster v. Florida*, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring) (“While Congress, as a *legislature*, may wish to consider the actions of other nations on any issue it likes, this Court’s Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans.”); *Atkins v. Virginia*, 536 U.S. 304, 325 (2002) (Rehnquist, J., dissenting) (“For if it is evidence of a *national* consensus for which we are looking, then the viewpoints of other countries simply are not relevant.”); *id.* at 347–48 (Scalia, J., dissenting); *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (characterizing court’s discussion of foreign nations’ treatment of sodomy as meaningless and dangerous dicta); *McKenzie*, 57 F.3d at 1466. See also *R. v. Keegstra*, [1990] 3 S.C.R. 697, 702 (Can.) (McLachlin, J., dissenting) (“The provisions of the Charter, though drawing on a political and social philosophy shared with other democratic societies, are uniquely Canadian. As a result, considerations may point, as they do in this case, to a conclusion regarding a rights violation which is not necessarily in accord with those international covenants.”). Similar views have been espoused by an Australian judge:

The provisions of the Constitution are not to be read in conformity with international law. It is an anachronistic error to believe that the Constitution, which was drafted and adopted by the people of the colonies well before international

viewed as offering an apposite level of human rights protection. As a result, recourse to the less-familiar system of international protection might be viewed as a redundant gesture, entailing more potential risks of diluting local standards than potential benefits for normative progress.¹⁹¹

Further, some have challenged the legitimacy of super-imposing IHR law upon national constituencies,¹⁹² regarding such imposition as imperialistic¹⁹³ and offensive to local traditions and moral tenets.¹⁹⁴ The debate about the appropriateness of resorting to international law could indeed be framed in the language of identity politics, as a contest between cosmopolitan and communal visions of social life.¹⁹⁵

Naturally, such cultural objections are harder to address than other more pragmatic and doctrinal objections, as they pertain to deeply entrenched conventions and identities. Admittedly, attempts to reinforce the status of IHR treaties could be contextualized as part of the reemergence of cosmopolitan citizenship as a non-exclusive form of identity.¹⁹⁶ So,

bodies such as the United Nations came into existence, should be regarded as speaking to the international community. The Constitution is *our* fundamental law, not a collection of principles amounting to the rights of man, to be read and approved by people and institutions elsewhere. The approbation of nations does not give our Constitution any force, nor does its absence deny it effect. Such a consideration should, therefore, have no part to play in interpreting our basic law.

Western Australia v. Ward (2002) 213 C.L.R. 1, 390–91 (Callinan, J., dissenting). *See also* R v. Jefferies, [1994] 1 N.Z.L.R. 290, 299–300 (C.A.) (N.Z.) (“[T]here are obvious differences in our legal and social history, differences in societies and cultures . . . Jurisprudence in other jurisdictions provides valuable insights but can never be determinative of New Zealand law.”).

191. *See* Simma et al., *supra* note 60, at 108; Alford, *supra* note 125, at 58 (“[A] robust use of international sources could have the unintended consequence of undermining rather than promoting numerous constitutional guarantees.”).

192. Alford, *supra* note 125, at 59. *See* Henkin, *Constitutionalism*, *supra* note 5, at 392 (discussing “unilateralist” strands in U.S. jurisprudence).

193. *See* BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE 254 (2003).

194. *See* Spiro, *supra* note 62, at 2023.

195. *See, e.g.*, Bradley, *supra* note 95, at 523 (“The approach of the political branches to the human rights treaties is, for better or worse, a rejection of internationalism.”).

196. *Cf.* Treaty on the European Union pmb., Dec. 24, 2002, O.J. (C 325) 9 (“[R]esolved to implement a common foreign and security policy . . . thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world . . .”). This essentially Kantian notion identifies cross-border ties, values and needs which constitute an apolitical community that exists independently of statal structures. Hence, according to writers such as Joseph Weiler, one should speak nowadays of overlapping circles of identities rather than of a single exclusive or even dominant identity. JOSEPH H.H. WEILER, THE CONSTITUTION OF EUROPE 344–

integration of IHR treaties into CL reflects a political choice, since it facilitates the conditions for harmonious co-existence of cosmopolitan and national identities. The political act of treaty ratification, however, signifies the state's residual power to control the pace and scope of the integration and multiple-identity building process.¹⁹⁷ Once a state has ratified an IHR treaty, it has arguably accepted its contents as reflecting both national and international values. In such circumstances, the cultural opposition to incorporation seems theoretically indefensible.

It must be conceded, nonetheless, that a persistent value gap between international standards and domestic constituencies (elites and masses)—notwithstanding the formal act of ratification—could generate political pressures which might undermine the project of incorporating IHR law into CL. One specific risk might be that even if domestic courts acknowledge the relevance of IHR law, they will construe it in an idiosyncratic manner, so as to conform to preexisting constitutional notions and national agendas.¹⁹⁸ This construction, in turn, might lead to multiple interpretations of IHR law and threaten its unity. In the long run, however, incorporation involving the embrace of common norms across national boundaries is likely to narrow cultural and ideological gaps between domestic legal systems and international law. The increasing proc-

47 (1999). See also Michel Rosenfeld, *Modern Constitutionalism as Interplay Between Identity and Diversity*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY: THEORETICAL PERSPECTIVES 3, 6 (Michel Rosenfeld ed., 1994); Paul S. Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 322–23 (2002); Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REFORM 751, 754 (1992). In a similar vein, Anne-Marie Slaughter has described national judges as involved in a common judicial project, across national borders, and as possessing a common judicial identity. Slaughter, *supra* note 103, at 58–59. See also Hon. Gérard V. La Forest, *The Expanding Role of the Supreme Court of Canada in International Law Issues*, 34 CAN. Y.B. INT'L L. 89, 100–01 (1996) (“[I]t is important that, in dealing with interstate issues, national courts fully perceive their role in the international order and national judges adopt an international perspective.”); RICHARD A. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 72 (1964) (noting that “domestic courts must act as agents of the international order”); Bradley, *supra* note 95, at 498–99 (discussing the so-called “internationalist conception” of the *Charming Betsy* canon); Neuman, *supra* note 4, at 1882–83; Koh, *supra* note 97, at 53–54.

197. See *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 C.L.R. 273, 305 (Austl.) (Gaudron, J.) (“[R]atification would tend to confirm the significance of the right within our society.”). Still, it could be argued that global economic, political and cultural forces impel states to participate in the aforementioned process, and that their ability to control it is limited.

198. Cf. HCJ 785/87 *Affo v. Commander of I.D.F. Forces in the Judea and Samaria Region*, [1988] IsrSC 42(2) 4 (holding that article 49 of the Fourth Geneva Convention does not, despite of its clear language, prohibit individual deportations from an occupied territory).

ess of cross-fertilization between different national systems and between national and international law in particular,¹⁹⁹ would eventually exert harmonizing pressures which tend to minimize culture gaps.

2. Lack of Judicial Familiarity with International Human Rights Law

Another distinctively cultural issue is judges' lack of familiarity with international law, particularly IHR law.²⁰⁰ The long-running marginalization of international law from legal education and judicial training programs, exacerbated no doubt by the growing complexity of both municipal and international law, has resulted in a considerable lack of expertise among many (though certainly not all) members of the judiciary in the substance and methodology of international law.²⁰¹ Under these conditions, the hesitancy of judges to step outside the boundaries of their judicial expertise and introduce IHR norms into CL is understandable and perhaps commendable given the dangers of incorrect application.²⁰²

Nevertheless, one could maintain that this objection amounts to a self-fulfilling prophecy. The more courts refrain from invoking IHR treaties in important cases, including, by necessity, cases raising significant CL issues, the less judges will be motivated to familiarize themselves with these instruments. In other words, the marginalization of IHR has a self-perpetuating quality which reflects upon legal education and legal practice. There are several ways to break this vicious cycle: legislators could explicitly incorporate IHR treaties into CL; judges could lead the way and develop more international law-friendly canons of interpretation; academics could press for reform of legal education, etc. Most probably, a combination of some of these measures, including special measures designed to improve the fluency of judges in IHR law,²⁰³ would be necessary to effect a significant change. In all events, lack of familiarity should encourage improved knowledge and not inertia. Still, it is sensible to require that the introduction of IHR treaties into domestic law in gen-

199. This is sometimes referred to as the "transnational legal process." Koh, *supra* note 97, at 56.

200. Bradley & Goldsmith, *supra* note 16, at 874-75; Henkin, *supra* note 6, at 199; Simma et al., *supra* note 60, at 107.

201. Alford, *supra* note 125, at 64-65 (the U.S. Supreme Court lacks the "institutional capacity" to apply international law systematically).

202. See Stephen J. Toope, *Keynote Address: Canada and International Law, in* CANADIAN COUNCIL ON INTERNATIONAL LAW, *THE IMPACT OF INTERNATIONAL LAW ON THE PRACTICE OF LAW IN CANADA* 33, 36-37 (1999); Bayefsky, *supra* note 38, 316-23.

203. Kirby, *supra* note 89, at 13.

eral, and into the politically sensitive domain of CL in particular, ought to be undertaken with prudence.²⁰⁴

D. Political Reluctance to Empower IHR Law within the National Legal System

Finally, one could identify unique political objections directed against the incorporation of IHR treaty norms into CL. The inherent sensitivity of many human rights issues, the political costs of reforming local arrangements in order to conform to international standards and the embarrassing implications of finding national authorities to be in violation of IHR standards, all produce an inhospitable legal climate for promoting IHR through judicial means. Special problems relate to the introduction of economic, social and cultural human rights, as the implementation of such rights often entails significant economic costs.²⁰⁵

Because IHR law introduces limitations upon the freedom of action of governmental structures and presents courts with an additional yardstick by which to measure the performance of the other branches of government, incorporation of IHR treaties into CL could put courts on a collision course with the executive and legislative branches.²⁰⁶ The fear that judges might adopt interpretations of international law which diverge from those adopted by other branches of government presents yet another complication.²⁰⁷ Courts might therefore be understandably reluctant to alienate the other branches of government and might refrain from invoking IHR standards altogether. This tendency might be encouraged by perceptions of IHR as a highly politicized body of law seeking to impose one set of values and interests (anti-hegemonic, anti-imperialistic, pro-market economy, etc.),²⁰⁸ over competing values or interests which can be viewed as no less legitimate. Domestic courts, whose intuitive loyalty lies with their nation's values and interests, might be loath to join international critics and legitimate such a disapproving discourse.²⁰⁹

204. For a variety of mostly justified methodological concerns, which ought to govern international law analysis by domestic courts, see Ramsey, *supra* note 98.

205. See, e.g., Yoram Rabin & Yuval Shany, *The Israeli Unfinished Constitutional Revolution: Has the Time Come for Protecting Economic and Social Rights?*, 37 *ISR. L. REV.* 299 (2004).

206. Cf. Spiro, *supra* note 62, at 2015–16. See also Neuman, *supra* note 6, at 88–89 (“Entrenching positive human rights standards as constitutional interpretation . . . would deprive the political branches of their authority to choose methods of treaty implementation, and would not be consistent with current constitutional understandings.”).

207. Cf. Jonathan Turley, *Dualistic Values in an Age of International Legislation*, 44 *HASTINGS L.J.* 185, 238 (1993).

208. See RAJAGOPAL, *supra* note 193, at 292.

209. See Christenson, *supra* note 86, at 6; Benvenisti, *supra* note 137, at 173–74.

Once again, these criticisms of incorporation are ultimately unconvincing. First, as treaty ratification is undertaken by the non-judicial branches of government, any criticism directed against the courts for implementing the obligations entered into by the other branches is unjustified. It amounts to an attempt by the ratifying actors to shirk the domestic political costs of their actions on the international plane.²¹⁰ In the same vein, the costs of any embarrassment associated with a finding by domestic courts of failure on the part of the state to respect its international obligations should not be attributed to the courts, but to the legislature or government agency responsible for the incompatible measure. In fact, by enforcing international standards courts actually minimize international criticism against the state.

Second, courts often face the unpopular task of introducing rule-of-law constraints on the operations of the other branches of government.²¹¹ Inevitably, they sometimes need to rule against what some domestic actors perceive to be the community interest.²¹² Still, the unpopularity of such measures or their inherent potential for inter-branch conflict should not deter courts from fulfilling their constitutional role. As a result, the non-judicial branches of government can expect only limited support from the judicial branch in their endeavors to evade the dictates of the rule of international law, by way of rejecting the implementation of the state's international obligations.²¹³

210. *Cf.* Jaffer, *supra* note 125, at 1111 (arguing that Congress and not the courts should pay the political costs for adopting incorporating legislation inconsistent with international treaties); Kirby, *supra* note 89, at 16 ("Giving effect to international law . . . does no more than give substance to the act which the executive government has taken."). *But see* Yoo, *supra* note 18, at 1979 (contending that direct judicial enforcement of international obligations "robs the President and Congress of the flexibility they might need in conducting the nation's foreign affairs").

211. *See* Slaughter, *supra* note 103, at 64 (arguing that separation of powers considerations support putting additional curbs on the path of the executive). Justice Landau, of Israel's High Court of Justice, has remarked:

I regard myself here, as a person who must meet the obligation to rule in accordance with law in any matter properly brought before the court, knowing well in advance that the general public would fail to pay attention to our legal reasoning, but only note the final outcome; this might adversely affect the status of the court as an institution situated above divisive public conflicts. But what can we do? This is our role and obligation as judges.

H CJ 390/79 Dawikat v. Gov't of Israel, [1980] IsrSC 34(1) 1, 4 (Landau, J.) (unofficial translation).

212. *See* Knop, *supra* note 35, at 532.

213. *Cf.* Christenson, *supra* note 18, at 240.

Finally, in many democracies, courts serve as protectors of the constitution and guardians of human rights. Incorporation of IHR treaties into CL, to the degree that they enhance the protection of human rights, promotes this vision of the role of courts in a democracy.²¹⁴ Inevitably, this is a political argument.²¹⁵ This does not, however, necessarily detract from its force since the political system in all of the surveyed countries is a liberal democracy which promotes, or at least tolerates, judicial activism in the area of human rights. Moreover, as indicated above, the accession of states to IHR treaties signifies their political support of these very same normative values.²¹⁶

V. CONCLUSION: A CALL FOR EXPANDING THE PRESUMPTION OF CONFORMITY TO CONSTITUTIONAL TEXTS

This Article has advanced a variety of policy considerations that support the incorporation of IHR law into CL from a domestic law perspective: limitation of unchecked judicial discretion, protection of the power of the executive to conduct foreign policy, necessity of harmonizing domestic law with self-executing international norms, promotion of the desirable social values reflected in IHR norms, confirmation of an emerging cosmopolitan identity, minimization of international criticism, etc. Still, from an international law perspective, the debate on the pros and cons of incorporation is mostly academic. Under most IHR treaties, states *must* incorporate some or all of the norms enumerated thereby into their domestic law, including, as argued in Part I, into their CL. Surely, the fact that international law—a system of law which binds the polity—*requires* a certain outcome, ought to be considered a relevant factor by the courts of the same polity.²¹⁷

214. Strossen, *supra* note 6, at 806. Some writers have criticized the selective utilization of right-enhancing international standards, and have challenged internationalists to accept “the bitter with the sweet.” See, e.g., Alford, *supra* note 125, at 67. However, the nature of IHR law is such that it lays a “floor” for human rights protection, and not a “ceiling.” The often invoked assertion that U.S. Constitutional law adopts higher human rights standards in freedom of speech matters, and that harmonization of the First Amendment with IHR law would, for instance, have a right-diluting effect, Ramsey, *supra* note 98, at 77, is problematic, as it fails to acknowledge the right-enhancing implications of prohibitions on hate speech.

215. DWORKIN, *supra* note 121, at 127.

216. Cf. *In Re Pub. Serv. Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, 349 (Can.) (Dickson, C.J., dissenting) (“The content of Canada’s international human rights obligations is, in my view, an important indicia of the meaning of ‘the full benefit of the Charter’s protection.’”).

217. *Id.* (“The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in Charter interpretation.”).

The survey of the law and practice of six common law countries on the incorporation of IHR treaties into their CL, undertaken in Part II, suggests that most of them fail to meet the required standard of incorporation. In practice, resort to IHR treaties in the course of interpreting CL instruments is discretionary and haphazard. Further, even when mentioned, IHR treaties are usually addressed within a weak “comparative law” framework, and not under a stronger presumption of conformity.

Therefore, a legal reform is needed in order to solidify the influence of IHR treaties upon the CL of the surveyed common law countries. The most natural basis for introducing such a reform is the development of a coherent judicial canon of constitutional interpretation.²¹⁸ This legal tactic does not require constitutional or legislative amendments and can be applied under existing law. It draws its legitimacy from the inherent power of the judiciary to construe constitutional instruments and to resort to all relevant materials that could facilitate this endeavor.²¹⁹

An important methodological question that needs to be explored in this regard is whether it is desirable to link the incorporation of IHR treaties into CL to the long-standing presumption of conformity doctrine. Arguably, such linkage could improve the legitimacy of the discussed interpretive strategy because all of the surveyed legal systems recognize and apply the presumption with regard to primary legislation.²²⁰ It would also offer judges a body of precedents concerning the incorporation of international law into domestic law.

218. Lillich, *supra* note 18, at 78 (“[T]aking advantage of this ‘indirect incorporation’ approach seems to be a sensible strategy for human rights lawyers and a wise policy for United States courts concerned with developing the promising relationship between the United States Constitution and international human rights law.”); Hughlett, *supra* note 15, at 174; Connie de la Vega, *Comments*, 18 INT’L LAW. 69, 69 (1984); Spiro, *supra* note 62, at 2025–26. *See also* Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 45 (1994) (“International law can and should inform the interpretation of various clauses of the Constitution . . .”).

219. *Cf.* Roger A. Silver, *The Inherent Power of the Florida Courts*, 39 U. MIAMI L. REV. 257, 261–62 (1985) (discussing the origins of the courts’ inherent power to interpret the Constitution). Interestingly enough, in both Canada and Australia, judges that resorted to IHR treaties law in order to promote specific constitutional interpretations, did not see a potential constitutional problem in expanding the scope of possible interpretative aids. *See* *Slaight Commc’ns Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 1056–57 (Dickson, C.J.) (Can.); *Kartinyeri v. Commonwealth* (1998) 195 C.L.R. 337 (Austl.). *Cf.* Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J.L. & PUB. POL’Y 807, 818–19 (2000) (discussing the consequences of Justice Breyer’s insertion of comparative constitutional law materials in a judicial opinion).

220. *Cf.* Bradley, *supra* note 95, at 533 (“[T]he long-standing existence of the canon, without a reaction from the political branches, may suggest some sort of acquiescence that further reduces the separation of powers problem.”).

Interestingly, however, those judges who have resorted to IHR treaties as sources of constitutional interpretation have not explicitly created such linkage.²²¹ This can probably be explained by reference to the limits the presumption of conformity imposes upon judicial discretion. According to the presumption, courts *should* construe domestic law in a manner consistent with the state's international obligations. It may be assumed that even pro-incorporation judges felt that in the field of CL, where the constitutional stakes are particularly high, such a rigid formulation might be politically untenable. The question is thus whether the doctrine can accommodate the particular sensitivities of CL and allow for some flexibility in its application, or whether it should be excluded from the purview of CL altogether.

Analysis of the traditional rationales offered for applying the presumption of conformity divulges legal policy choices that might be more complicated than apparent at first glance, a fact that might bear upon the willingness to employ the doctrine in the context of CL. The presumption is normally premised upon a legislative intent theory, according to which it can never be presumed that legislators had intended to place their country in breach of its international obligations. Hence, only explicit legislative language can justify overruling IHR treaty norms. Although the presumption is based upon a legal fiction, as legislators often do not consider the effect of legislative measures upon international law and are arguably less concerned about international obligations than the presumption supposes,²²² the presumption could, over time, create a self-fulfilling prophecy.²²³ The mere knowledge that courts apply such a presumption induces legislators to consider its potential effect upon the interpretation of legislation and to select, where necessary, explicit language overriding the international obligations of the polity. Thus, as the interplay between international and national law becomes more and more visible, the theory of legislative intent becomes less and less fictional.

Nevertheless, this development has little or no bearing on CL instruments. Sometimes, such instruments were concluded before the presumption was even enunciated. In all events, given the uncertainties regarding

221. An exception could be found in the dicta adopted by Judge Mahomed of the South African Constitutional Court. See *Azanian Peoples Org. (AZAPO) v President of the Republic of S. Afr.* 1996 (8) BCLR 1015 (CC) para. 26 (Mahomed, J.) (“[T]he lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the State in terms of international law.”).

222. See Bradley, *supra* note 95, at 522 (noting that as an empirical matter, the claim that the political branches wish to comply with international law may be suspect, especially with respect to new international customary law).

223. *Id.* at 497.

the status of international law on the constitutional sphere, it is more likely than not that the drafters of constitutional instruments were unaware that the presumption might apply vis-à-vis their brainchild.²²⁴ The infrequency of constitutional amendment procedures further reduces the chances of factoring in the effects of international law. In short, the fictitiousness of the presumption is more apparent in relation to constitutional instruments than to ordinary legislation. The problematic legitimacy of relying upon drafter intent theories as part of the CL discourse could justify, from a domestic law perspective, caution in the application of the presumption of conformity to CL instruments.

Another important concern is the relationship between the presumption of conformity and other interpretive presumptions. All systems surveyed in this Article do not apply the presumption to the exclusion of other rules of interpretation. On the contrary, other rules of construction are regularly applied.²²⁵ Hence, even if the presumption is to be applied at the CL level, it may not exclude the application of other canons of interpretation designed to protect fundamental constitutional values (such as federal organizing principles, separation of powers, etc.);²²⁶ nor can it override the clear meaning of the constitutional text.²²⁷ While from an international law perspective this outcome might be unacceptable (as it might result in non-compliance with IHR norms), it would meet the concerns of legal systems which view compliance with international law as merely one among numerous competing systematic values.²²⁸

224. *But see* *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 132–33 (1923) (Sutherland, J., dissenting) (“It does not seem possible to me that Congress, in submitting the Amendment or the several States in adopting it, could have intended to vest in the various seaboard States a power so intimately connected with our foreign relations and whose exercise might result in international confusion and embarrassment.”).

225. See, for example, the presumption that legislation should be construed in a manner which does not raise serious constitutional problems. *INS v. St. Cyr*, 533 U.S. 289, 299–300 (2001); *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *United States v. Del. & Hudson Co.*, 213 U.S. 366, 407 (1909). *See also supra* note 76.

226. *Cf.* Neuman, *supra* note 6, at 88.

227. *See* *Kartinyeri v. Commonwealth* (1998) 195 C.L.R. 337, 418 (Austl.) (Kirby, J., dissenting) (“There is no doubt that, if the constitutional provision is clear and if a law is clearly within power, no rule of international law, and no treaty (including one to which Australia is a party) may override the Constitution or any law validly made under it.”).

228. *See* Hughlett, *supra* note 15, at 188 (“[I]nternational law should be only one interpretive tool used by the courts, and the courts should not apply international law when the application is inconsistent with the result of all other interpretive approaches.”). *Cf.* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401 (1950) (“[T]here are two opposing canons on almost every point.”); Simma et al., *supra* note 60,

Therefore, if the presumption of conformity is to apply to CL, it should be applied with caution and deference to other constitutional doctrines as well as sensitivity to the needs and concerns of domestic legal systems. Nevertheless, a number of reasons justify resort to the presumption in the course of CL interpretation. First, resort to a presumption of conformity underscores the international *obligation* to comply with IHR treaties and has, as a result, important symbolic value. Second, considerations of legitimacy and stability support the incorporation of IHR into CL in the context of the well-accepted presumption of conformity. Courts would therefore be able to build upon existing practice in the field of statutory construction when harmonizing CL and IHR treaties. Finally, the presumption is sufficiently flexible to accommodate the necessary degrees of caution and sensitivity, as well as the protection of other constitutional values.

While my position might also accommodate incorporation into CL of non-IHR international obligations through interpretive means, there are unique policy arguments supporting integration of IHR norms. Most importantly, IHR law has intellectual and historical affinity to CL. Second, IHR instruments impose an explicit or implicit duty to incorporate. Hence, a stronger presumption of conformity is apposite in relation to IHR treaties.

The proposed approach may be summarized as follows. Explicitly or implicitly, IHR treaties require states to bring domestic law into conformity with the human rights norms enunciated by them. This requirement also applies at the CL level. As a number of civil and common law countries have adopted such an approach (e.g., Canada and Germany),²²⁹ it is

at 95 (“[T]he limits of constitutional interpretation . . . still define a borderline beyond which divergent international human rights standards may not be considered.”).

229. It can be noted that several attempts have been made in recent years at the international level to call upon national courts to adopt a more hospitable attitude towards the utilization of IHR treaties when construing national law, including CL. For example, in 1998, a high-level meeting of members of the judiciary from Commonwealth and South Asian countries convened in Bangalore and issued a joint proclamation asserting that:

It is the vital duty of an independent, impartial and well-qualified judiciary, assisted by an independent, well-trained legal profession, to interpret and apply national constitutions and ordinary legislation in harmony with international human rights codes and customary international law, and to develop the common law in the light of the values and principles enshrined in international human rights law.

Concluding Statement Issued by Participants at the Judicial Colloquium on the Domestic Implementation of International Human Rights Norms (Dec. 30, 1998), <http://www.apwld.org/vol122-02.htm>. The joint proclamation issued ten years earlier stated:

hard to contend that this represents an unrealistic threshold of compliance with international standards. In most common law legal systems, this outcome could be largely achieved through the development of canons of CL interpretation by the domestic judiciary *à la* the presumption of conformity applicable to statutory construction. Although these proposals are hardly revolutionary, they could encourage courts to take IHR law more seriously and to improve the level of human rights protection under domestic law.

It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes—whether or not they have been incorporated into domestic law—for the purpose of removing ambiguity or uncertainty from, national constitutions, legislation or common law.

Concluding Statement of the Judicial Colloquium Held in Bangalore, India from 24–26 February 1988, 62 AUST. L.J. 531, para. 7 (1988). While sources such as the Bangalore Statement are clearly aspirational in nature, they do suggest that there is a growing awareness of the importance of incorporating IHR treaties into CL instruments.