

CHAPTER TWO

CONSTITUTIONAL RIGHTS AND THE GLOBAL POLITICAL SYSTEM

If the constitutional formula of rights and constituent power, expressed in the revolutions of the eighteenth century, defined the original inclusionary structure for the political systems of national societies, national political systems were ultimately consolidated through a very different constitutional formula, which resulted from a second – equally revolutionary – process of constitutional norm formation.¹ As discussed further, the original formula of national sovereignty and rights eventually proved unable to establish an enduring foundation to support the political systems of complex modern societies. In fact, most societies only began to develop consistently inclusive political systems at a historical juncture in which this initial constitutional formula had, in part, been abandoned. In most societies, it was only in the decades following 1945 that reasonably generalized political structures began to take shape, able to incorporate different social sectors and spheres of exchange, and it was only at this time that national political systems, albeit still incompletely, began to extend their power over all parts of society. In this period, however, the classical constitutional formula lost effect as the basis for societal inclusion. Tentatively at first, this period distilled a new formula of legitimacy for the national political system, and it produced a new inclusionary structure for society as a whole. Eventually, this new formula proved a more sustainable basis for the patterns of legal and political inclusion required by complex, often integrally antagonistic, national societies, and this formula facilitated a

¹ On the revolutionary character of this process see Brunkhorst (2014: 427).

general growth in the stability and societal penetration of national political systems.

Central to the consolidation of national structures of political inclusion after 1945 was a transformation in the role of international law. The post-1945 period saw an exponential rise in the force of international law, and most especially of that branch of international law focused on promoting human rights norms.² The growing authority of international law, and most notably human rights law, was clearly visible in general international law – for example, in laws created by the United Nations (UN). But it was also visible in regional regimes of international law, such as the European Convention on Human Rights (ECHR).³ In particular, this period slowly saw a growing acceptance of the principle that international law, especially international human rights law, could in some circumstances assume primacy over domestic law. This had a profound impact on the classical norms of constitutional legitimacy, and it deeply altered the standing of *national sovereignty* as a norm of constitutional practice. On one level, the rise of international human rights law reduced the significance of national sovereignty as an *external* attribute of states: progressively, international law imposed certain restrictions on the autonomy of national states in their interactions with other states.⁴ On a different level, the rise of international human rights law changed the extent to which states were *internally* legitimated by national sovereignty: it implied that certain primary norms, derived from external sources, could have higher legitimating force than sovereign powers exercised by a national people, and that legislation could not be authorized exclusively by domestic acts of popular will formation. In both respects, the rise of international law after 1945 meant that the political systems of national societies began to extract some of their authority from relatively formal, abstracted foundations, and the role of popular volition as a source of norm construction was relativized.

² One commentator (Simpson 2001: 333) observes that, up to 1939: ‘There was no general international law of human rights’. After 1945, however, this gradually became a core branch of international law.

³ Throughout, I define the ECHR and other regional instruments as international law. Although the judicial bodies applying such instruments form regionally focused regimes, their jurisprudence is close to general international law, and it actively shapes the wider formation of an international legal system (see Forowicz 2010: 23, 48).

⁴ For standard accounts of this transformation of sovereignty in inter-state relations at different points since 1945, see Jessup (1946: 914), Falk (1970: 13), Delbrück (1982: 572), Henkin (1995: 38), Franck (1995: 3), Koh (1998), Jackson (2008: 22), Bryde (2005: 109), Nollkaemper (2010: 66) and Kahn (2000: 11).

As discussed in [Chapter 4](#), after 1918, a model of constitutional law had become widespread, in which states explained their legitimacy through their *closeness* to the constituent power of their national populations. After 1945, however, human rights laws, often of international provenance, slowly began to displace national or popular sovereignty as the leading justification for the legal and political systems of national societies. In this process, notably, internationally constructed rights were usually defined as rights held individually, by *singular persons*. To be sure, early human rights documents were never solely focused on a liberal, singular construction of rights, and they made clear provisions for social rights. For example, the Universal Declaration of Human Rights (UDHR, 1948) established some advanced social rights, including the right to work and the right to a decent standard of living. International instruments then placed greater emphasis on social rights from 1960s onwards. This began with the approval of the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966). As discussed further, human rights instruments in Latin America and Africa ultimately gave very extensive recognition to social rights. Generally, however, the international human rights instruments devised after 1945 placed primary emphasis on individual rights; social rights were originally only weakly enforceable, and of questionable legal status (see Vierdag 1978: 105). Even in international courts giving high salience to social rights, some such rights have not easily proved justiciable.⁵ At different points in the post-war political system, therefore, neither national sovereignty, nor constituent power, nor collective interests, but single international human rights began to form the basic constitutional mainstay for acts of legal/political inclusion. In different contexts, singular rights slowly became the primary normative premise for the legitimacy of legal and political functions.

This chapter examines this progressive shift from national sovereignty to international human rights in the constitutional fabric of the emerging global society, or the emerging *global political system*, after 1945, and it outlines the main changes in global normative order at this time. [Chapter 3](#) then attempts to elucidate the material forces that propelled the growing importance of international human rights in the wake of World War II, and it examines ways in which the

⁵ For example, the first case in which a failure to meet social rights obligations has been found justiciable in the Inter-American System has just passed through the Inter-American Court of Human Rights (IACtHR). The case in question is *González Lluy (TGGL) y familia v Ecuador* (2015).

rise of rights produced a new inclusionary structure for modern society, more finely proportioned to the legislative demands which society encountered. In this respect, although mainly concerned with the constitutional standing of international human rights, these chapters also seek to contribute to the general development of a sociology of international law, and to explain international law as part of the constitutional fabric of society as a whole.

THE TRANSFORMATION OF INTERNATIONAL LAW

After 1945, the growth of international law, and especially international human rights law, was stimulated in particular by the rise of powerful international organizations. Most notably, the founding of the UN in 1945 as a multi-laterally constructed legal and political entity, with relatively independent law-making and treaty-making functions, greatly increased the authority of international law, and the UN soon began to consolidate a diction of human rights law across international society. To be sure, the promotion of human rights was initially only a secondary function of the UN; the UN was mainly conceived as an organization to help prevent renewed international warfare. However, the UN was also designed as an organization to promote the enforcement of international law and human rights norms. In fact, the high standing of human rights in the post-1945 international order had been anticipated in the Atlantic Charter (1941), which had cleared the ground for the founding of the UN. In Arts 1(3) and 55(c), the UN Charter itself gave unprecedented salience to human rights norms as concepts of positive law; it proposed a set of basic principles for international society, in which the consolidation of human rights had an important place, and which, as stated in Art 103, had primacy over all other international agreements. The importance of international human rights law was then reinforced in the early policies of the UN – first, in the establishment of the Human Rights Commission (1946), and, second, in the promulgation of the UDHR. Moreover, a number of UN bodies were soon established, which possessed supranational authority to legislate over matters relating to human rights. These included the UN General Assembly itself, the Economic and Social Council (ECOSOC), and UNESCO. In addition, the core human rights provisions of the UN acquired objective positive form through the jurisprudence of international courts. This was reflected in

part in the jurisprudence of the International Court of Justice (ICJ). Rights norms did not immediately assume prominence in ICJ rulings; only much later did it openly engage in active promotion of human rights.⁶ Progressively, however, in addition to ruling on particular questions of international law, the ICJ consciously promoted a general observance of human rights norms, which permeated both international law and national law more widely (Kamminga 2009: 21–2). Today, leading tribunals, both national and supranational, commonly acknowledge that other laws must usually be interpreted in conformity with the UN Charter, according UN law and UN human rights provisions, in principle, a basic constitutional authority across global society.⁷ Soon after their creation, in fact, the UN and its judicial organs assumed positions of norm-giving power traditionally reserved for states, and they began to apply international laws, partly anchored in rights, to impose normative limits on the acts of national polities (see Wouters and De Man 2011: 192, 212).

More important than the UN and the ICJ in the reinforcement of international law in the decades after 1945, however, was the fact that a number of regional conventions for safeguarding human rights were established, which also eventually obtained judicial bodies. Following the end of World War II, a series of core multi-lateral instruments were drafted which gave supra-constitutional status to human rights in international society, and under which international courts and commissions were established to oversee the cross-national protection of human rights. The year 1948 saw the formation of the Organization of American States, whose Charter contained several provisions concerning human rights. The American Declaration of the Rights and Duties of Man was then adopted in 1948, and the Inter-American Commission on Human Rights was established as a separate body in 1959. In 1953, the ECHR entered into force, and the European Court of Human Rights (ECtHR) was established in 1959. Each of these systems envisaged an international order of rights, possessing some obligatory autonomy in relation to the national states that ratified them. Increasingly, moreover, the judicial interpretation of these legal frameworks was shaped by principles of general international law, and

⁶ See, for example, ICJ Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004).

⁷ Case T-315/01, *Kadi v. Council and Commission* [2005] ECR II-3649

they were slowly elaborated as part of a broad, partly cohesive, system of international law, giving central position to human rights.⁸

After 1945, in sum, a legal/political order began to emerge outside national societies that incorporated a number of powerful international organizations and institutions, which, in different spheres, assumed authority to promulgate and enforce powerful primary norms. In this legal order, notably, international judicial bodies acquired competences for resolving disputes between, and then reviewing the actions of, constituent national states, and for promoting legal norms, typically based in human rights, as overarching guidelines for inter-state activity. To this degree, the norms underpinning this legal order began gradually to assume constitutional force for international society, standing notionally above national states. Of course, international judicial institutions predated 1945; the Permanent Court of International Justice (PCIJ) was already established as an influential judicial actor in the interwar era. However, the distinctive constitutional significance of the post-1945 legal order resulted from the fact that the fabric of international law was transformed, some of its core principles were intensified and international organizations were constitutionally endowed with growing authority to interpret and to apply it. In consequence of these changes, international law assumed greatly heightened autonomy in relation to national states.

Most obviously, for example, after 1945 international law was, to some degree at least, directed away from classical positivist principles of state voluntarism: that is, international law progressively lost its foundation in the presumption that international norms were merely agreements between sovereign states, and they were constrained by state consent and bilateral treaty obligations (Partlett 2011: 7). Positivist constructions of international law had been widespread in inter-war legal thought and practice.⁹ To be sure, positivist ideas did not have

⁸ Notably, Art 31(3)(c) of the Vienna Convention on the Law of Treaties eventually implied that the ECHR had to be interpreted as part of international law. Consideration and use of general international law in the ECtHR were evident in *Chahal v. UK* (1996); *Kurt v. Turkey* (1998); *Bankovic and Others v. Belgium* (2001).

⁹ My definition of positivism is relatively common, but it is neatly condensed in Simma and Paulus (1999: 304), who see positivism as a legal stance in which: 'Law is regarded as a unified system of rules that . . . emanate from state will'. Similar to this is Schmitt's earlier (1940 [1939]: 264) account of positivism as reflecting a 'completely statist-decisionistic' account of legal authority. Tellingly, Schmitt saw positivism as implying that 'the state alone is a subject of inter-state law' and that 'the private individual is naturally excluded from the realm of international law' (1940 [1939]: 262).

unchallenged status between 1918 and 1945, and they were always countervailed by presumptions in favour of customary international law as an enforceable system of norms. Most obviously, Art 38(3) of the statute of the PCIJ bound the court to apply general principles of the laws of civilized nations. Moreover, powerful challenges to positivist ideas were expressed by some of the most influential interwar theorists, notably Hersch Lauterpacht and Alfred Verdross. Tellingly, at this time, Verdross (1937: 574) developed a notion of *jus cogens*, based in the general duty of states to protect certain fundamental rights of their citizens. Indeed, Verdross (1926) developed the most systematic precursor of contemporary accounts of global constitutionalism. Jean d'Aspremont (2016) has clearly argued that constructions of international law as a distinct legal system were quite advanced before 1945, and indeed that 'systemic thinking permeated almost all traditions' of international law. Nonetheless, positivist principles still ran deep through much interwar legal thinking and case law. For example, a positivist position was adopted in the famous *Lotus* decision (1927) of the PCIJ, which ruled: 'International Law governs relations between independent states. The rules of law binding upon States therefore emanate from their own free will'.¹⁰ Similar principles were also enunciated by the PCIJ in *Chorzów Factory* (1928).

After 1945, however, the growth of international organizations meant that international law began to be defined as a universal and increasingly autonomous field of law, or even as a separate legal system, with formal constitutional authority. In its first conception, to be sure, the role of the UN was partly defined in accordance with core positivist ideals, and its judicial functions were focused on resolving inter-state disputes between its constituent members. In fact, in Art 2.1 of the Charter, the UN initially acknowledged single sovereign states as the most essential units of international society, and it recognized inter-state treaties as the primary elements of the new legal order. To this degree, after 1945, international law still echoed the positivist principle that it was based in the consent of sovereign states, and it could be abrogated by these states, largely at will. In Art 38(1)(a), the ICJ statute, reflecting its origins in the statute of the PCIJ, provided that rules applied by the court were only binding if 'expressly recognized' by consenting states, and in its early opinions the ICJ

¹⁰ S.S. "Lotus" (*France v Turkey*) [1927] PCIJ Series Rep A No 10.

insisted on state consent as the basis for all international law.¹¹ Even the most fervent advocates of a unified system of international law denied that UN laws had a mandatory quality (Kelsen 1950: 29–30). Despite much protest and intermittent retrenchment by different parties, nonetheless, the assumption progressively gained ground in international legal thinking after 1945 that, in the UN, there existed a *constituted community* of states, possessing some legal independence from the consensual will of its constituent members, and that some conventions and norms contained unqualified obligations for all states (see Fitzmaurice 1953: 15). The UN Charter itself, for all its selective focus on state sovereignty, emphasized the principle that international law contained certain non-derogable norms, to which municipal legislation was invariably subordinate; this was especially the case in Art 103, and in Art 55, which implied human rights obligations for member states. This principle was then implicitly accentuated in the UDHR, and it was clearly established in the Genocide Convention (1948), which indicated that certain norms had non-derogable status for all societies (Byers 1997: 212). As a result, the conviction became pervasive after 1945 that certain principles of international law, primarily distilled in human rights instruments, could lay claim to supra-positive status, implying *erga omnes* obligations for all states. Moreover, in 1950, the ICJ began to define individual persons as having rights under an international legal system, existing in relative independence of the national states in which they were located; ultimately, this became an important principle in ICJ jurisprudence (see Peters 2014: 341).¹² This principle was more boldly declared in more specific regional human rights instruments, which, as binding conventions, were quite sharply distinguished from treaties in the classical sense of inter-state accords. The concept of immutable personal rights then ultimately assumed pronounced expression in the human rights covenants of 1966, most notably in the International Covenant on Civil and Political Rights (ICCPR).

Incrementally, therefore, the presumptions underlying the international conventions established after 1945 were slowly interpreted to consolidate a doctrine of international *jus cogens*, in which certain directives of international law, either directly or obliquely related to

¹¹ Note the observation in the ICJ's opinion *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*: 'It is well established that in its treaty relations a State cannot be bound without its consent': [1951] ICJ Reports 21.

¹² This was finally illustrated in the ICJ case *LaGrand (Germany) v United States of America* (2001).

human rights, acquired peremptory standing for all exchanges between states in international society. Although it did not conclusively articulate this doctrine until much later,¹³ the ICJ in fact moved towards advocating a concept of *jus cogens* in 1951, even while acknowledging state consent as the basis for treaties.¹⁴ A theory of *jus cogens*, protecting certain select human rights, was also set out in a dissenting opinion, in an otherwise very restrictive judgment, in 1963, in the *South West Africa* case.¹⁵ The concept of *jus cogens* was eventually formalized, most importantly, in 1969 in the Vienna Convention on the Law of Treaties (in force from 1980). In Arts 53 and 64, the Vienna Convention designated certain norms and certain rights as having inviolable status for global society (that is, as existing in a normative sphere independent of the single interests or mutual obligations of particular states),¹⁶ and it implied that states have a duty not to recognize sovereign acts of other states if these were in breach of peremptory norms, especially regarding human rights.¹⁷ In Art 27, it stated that domestic law cannot justify derogation from a treaty. In these respects, international human rights norms were progressively elevated above other treaties and declared binding for all inter-state acts. To be sure, the status of the *jus cogens* principle in these instruments was not categorically clarified, and it long remained a matter of dispute. For instance, after the approval of the Vienna Convention, the ICJ first refused to pronounce on the question of norms possessing *jus cogens* standing. However, in its advisory opinion in *Namibia* (1971), regarding South Africa's imposition of apartheid in Namibia, the ICJ re-emphasized the status of certain fundamental human rights norms as core elements of international law, and it declared that the UN Charter imposed obligations concerning human rights on members of the UN. At this point, the ICJ stated that all UN members were legally bound by the aims of the UN Charter, including the preservation and promotion of human rights.¹⁸ Above all, through reference to the idea of certain human rights norms as parts of an international *jus cogens*, the ICJ was

¹³ In *Democratic Republic of the Congo v Rwanda* (2006), the ICJ claimed jurisdiction 'to settle disputes arising from the violation of peremptory norms (*jus cogens*) in the area of human rights, as those norms were reflected in a number of international instruments': [2006] ICJ Reports 10.

¹⁴ [1951] ICJ Reports 23. See Fitzmaurice (1957: 291).

¹⁵ In his opinion, Judge Tanaka argued that the 'protection of human rights may be considered to belong to the *jus cogens*': [1966] ICJ Reports 298.

¹⁶ For this definition of *jus cogens*, see Verdross (1966: 249), Meron (1986: 249).

¹⁷ For a very optimistic view of this see Orakhelashvili (2006: 375).

¹⁸ [1971] ICJ Reports 57.

ultimately able to differentiate between voluntary treaties between one state and another state and binding obligations of states *vis-à-vis* the international community as a whole (MacDonald 1987: 128; Bassiouni 1996: 72). This approach was made clear, after the Vienna Convention, in *Barcelona Traction* (1970), in which it was argued that there are certain norms in which all states, simply as part of the community of states, have an interest in preserving, and which bind states, not as actual parties to treaties, but simply *qua* states (Thirlway 2013: 148). These obligations, it was declared, constitute obligations 'towards the international community as a whole', and have *erga omnes* force.¹⁹

This growing conception of international law as an independently binding legal system moved closer to reality in the course of the 1970s. The persistent rights abuses in South Africa under apartheid and rising political repression in post-1973 Chile and other states in Latin America meant that, by the mid-1970s, the UN had increasingly claimed the power to respond to reports of violations of human rights, even in political crises which contained no specific international dimension or dispute.²⁰ In fact, as early as 1946, the UN had approved inquiries into political conditions in Spain under Franco. This approach consolidated international law as a system of norms standing above states, in which multiple actors, including both single persons and NGOs, could seek remedies and submit complaints (see Tardu 1980: 568; Kamminga 2009: 6). After the 1970s, the distinct systemic quality of international law was progressively reinforced, and its autonomy in relation to treaty law was more frequently expressed. For example, the International Law Commission (ILC) declared in 1985 that inter-state norms relating to human rights could not be deemed attributable to singular states, but belonged to the entire international community.²¹ By 1989, the Institute of International Law felt able to a Resolution stating that 'obligations in the sphere of human rights law' can never be seen as exclusive elements of domestic jurisdiction, and that national actions with relevance for human rights are always immediately subject to international law.²² After the Vienna Convention, moreover, the presumption in favour of basic human rights as non-derogable principles of international law, with obligatory standing for national states,

¹⁹ [1970] ICJ Reports 32.

²⁰ The basis for this was expressed in ECOSOC resolutions 1235 of 1967 and 1503 of 1970, which allowed the UN to investigate complaints about gross violations of human rights.

²¹ ILC Yearbook (1985) DOCUMENT A/CN.4/389, p. 8.

²² Institute of International Law 'The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States'.

was solidified through other, more free-standing, developments in international human rights law. This was expressed most notably through the Helsinki Accords of 1975, the establishment of the Inter-American Court of Human Rights (IACtHR) (1978–79), and the entry into force of the African Charter on Human and Peoples' Rights in 1986. The binding force of international human rights instruments was then greatly reinforced by the Vienna Declaration and Programme of Action (1993), after which the supranational force of human rights conventions was widened and elevated. After 1989, in fact, the force of international human rights law was intensified throughout Europe. This was particularly the case because, after the collapse of the Soviet Union and the processes of systemic redirection in former Soviet-controlled states, observance of international human rights norms became a core precondition for full recognition of new independent states. Clearly, many post-authoritarian states in Eastern Europe in the 1990s saw accession to the Council of Europe as a secure pathway to full political recognition, independence and stability, and they were keen to comply with the ECHR for that reason.

On these separate grounds, international law was slowly consolidated, after 1945, as a distinct, relatively free-standing, legal order, providing the formal substructure for a growing global political system.²³ Classical international law had been primarily based in the principle of inter-state consent as the dominant principle of legal recognition. This principle had been widely questioned in the interwar era, but it had not been supplanted. Accordingly, classical international law had lacked an inner foundation for any universal hierarchy of norms, and it was mainly deducible from the interests and commitments of single states. After 1945, however, the elevation of certain human rights to principles with *erga omnes* quality transformed international law, or at least that part of international law with relevance for rights, from an aggregate of agreements founded in treaty law and resultant state liability into a formal system of (at least partly) autonomous legal norms. As a result, international treaties increasingly implied that all members of the international community had certain general obligations under rights norms, which, at least in principle, were higher than duties towards single states (Amerasinghe 1990: 81).

²³ This characteristic had been imputed to the UN by Kelsen (1950: 706) shortly after the World War II. But it probably only became a real feature of the UN in the 1970s.

To be absolutely clear, it is not suggested here that a comprehensive and effective system of international law was instituted in the wake of 1945. It barely requires emphasis that, even in its core objectives, such as minority protection and prevention of aggressive war, the UN and other international organizations only had limited effect on global politics. The UN Charter, still today, has not developed fully as a constitutional document for global society, and other instruments have not acquired more than declaratory standing.²⁴ Much of this is due to the fact that, after its founding, the UN quickly became caught in the geopolitical realities of the Cold War, which prevented the formation of a neutral system of international rules. Many observers have argued that international rights norms were initially little more than chimera, and they only became politically relevant in the 1970s, or even the 1990s, largely due to changing constellations of international power politics (Hoffmann 2011: 2; Moyn 2012: 3). There are good reasons to support this view, albeit in qualified fashion. It is quite clear, first, that the enforcement mechanisms of the international community originally possessed only variable intensity (see Petersmann 2002: 625). In areas with less entrenched regional human rights instruments, the ability of international law to penetrate national political systems remained weak throughout the entire second half of the twentieth century. Further, the international apparatus for monitoring rights abuse was, initially, not strong; the UN's Human Rights Commission did not acquire powers exceeding an admonitory role, and, 1947, it was formally acknowledged that it could not take prohibitive action against states violating human rights (Tardu 1980: 560). Later reinforcements of the UN's monitoring functions did not create a legal system able to issue bindingly enforceable directives, and states could easily close their jurisdictional borders to the effect of international law. Furthermore, although regional human instruments provided for a judicial order to oversee compliance, neither the UN Charter, nor the UDHR, nor the ICCPR was protected and enforced by a court with specialized powers of review, and the distinction between these covenants and other interstate acts and treaties could easily be disputed (Aust 2000: 410; Conforti 2005: 10, 14): a hierarchical distinction between simple treaties and obligatory *jus cogens* was not always legally self-evident. It was only in the late 1990s, with the negotiation of The Rome Statute

²⁴ Some commentators claim the contrary, emphatically so in some cases (see Fassbender 1998), with certain qualifications in others (see De Wet 2000: 192–4).

and the foundation of the International Criminal Court (ICC), that international courts began to obtain more mandatory authority. Of course, tellingly, the ICC was not created as part of the UN. Equally, second, primary texts of international law reflected a distinct uncertainty about their standing with regard to national states. As mentioned, Art 38 of the Statute of the ICJ specifically upheld positivist ideals, declaring that states were only bound by international laws to which they had given express consent. In fact, early human rights instruments often contained the ambiguity, even where they stipulated supra-positive norms, that they also recognized positivist constructions of state sovereignty, and they defined states as primary sovereign actors in international society. As late as 1970, the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States* emphasized that 'the territorial integrity or political unity of sovereign and independent States' and the 'sovereign equality of states' were, normally, inviolable constructions of international law.

For all these restrictions, however, if taken together, the growing body of human rights instruments and conventions instituted in the decades after 1945 contained at least the formal-normative implication that international treaties could produce certain norms for international society with a higher-order, generally obligatory rank, clearly distinct from single inter-state treaties (Jessup 1947b: 388). These instruments contained norms neither distilled from, nor reducible to, particular acts of state consent, and they formed sui-generis declaratory documents (see Schwelb 1967: 957; Klabbers 2002: 82–3). Indeed, in Art 2(6) of the Charter the UN ascribed to itself some implied authority for non-signatory states (Doyle 2012). Moreover, in its advisory opinion in *Reservations to the Convention on Genocide* (1951), the ICJ began to construct some law of the UN as relatively autonomous, containing global obligations. This clearly implied that, in some of their actions, states could be not only normatively but also *constitutionally* bound by an independent system of justiciable norms,²⁵ with force greater than traditional principles of customary international law (Lowe 2007: 59). In principle, at least, certain human rights became a free-standing ground for international condemnation and intervention. Human rights were designated and internationally recognized as prescribing transnational maxims for the conduct of global social life,

²⁵ See Byers (1997), Bryde (2003: 66), De Wet (2006: 64), Kadelbach (2006) and Milewicz (2008: 422, 432).

and international judicial bodies were transformed into primary norm-setting, constitutional agents.

The principle that international law, in some areas, has a normative quality that is independent of the volitional acts of states marked the first important, constitutional change in the international legal order after 1945. This principle began to create a new foundation for political legitimacy, in which the ultimate authority for political institutions and decisions was partly disconnected from the sovereign will of national populations, expressed through states. Alongside this, however, the traditional positivistic fabric of international law was gradually transformed after 1945 by the fact that international organizations began to promote the view that states are not the only entities subject to international law. In classical international law, of course, states were commonly seen as the exclusive subjects of international law. On the conventional positivist account, persons other than states could only claim legal personality and seek remedies under domestic constitutional law, and treaties entered by states applied only to the inter-state domain, without conferring separate rights on persons within state jurisdictions. This view, originating in Austinian positivism, was famously formulated by Lassa Oppenheim,²⁶ and it retained influence through the earlier part of the twentieth century.²⁷ After 1945, however, international law underwent a process of manifest *individualization*: that is, the principle gained recognition that, beside states, multiple agents, including single persons, could be imputed responsibilities under international law, and even, albeit more tentatively, that multiple actors might lay claim to justiciable rights under international law.²⁸ By consequence, this implied that international law could be applied directly to different agents in national societies, and single persons could be addressed by international law in isolation from their domestic legal system; the positivist principle that the obligations prescribed by international law give rise to duties exclusively for states was widely discredited (see Jessup 1947a: 408; Friedmann 1962: 1150). Important early observers even concluded that, after 1945, the ‘individual human being’ had become an ‘effective participant in the world power process’ (McDougal and Bebr 1964: 611).

²⁶ Oppenheim (1905: 18) claimed that ‘states solely and exclusively are subjects of international law’. See also Partlett (2011: 14–15).

²⁷ See, as example, Brown (1924).

²⁸ See the excellent analysis, defining the individual as the ‘primary subject of international law’ in Peters (2014: 173).

These assertions obviously need some qualification. On one hand, the uniqueness of statehood as a source of responsibility in international law had already been extensively disputed before 1945 (Peters 2014: 15). One important commentary (Bederman 1995: 335) notes tellingly that this view was ‘on the wane’ by the interwar era. Influential jurists of the earlier twentieth century had already proposed individual responsibility as a principle of public international law (see Duguit 1921: 560; Politis 1927: 79; Scelle 1932: 42). Such views in fact formed part of a wider growing critique of positivism at this time. Moreover, positivist ideas had already been questioned in international courts and organizations. For example, in 1922, the Upper Silesian Convention of the League of Nations had held that an individual national could bring a case against his or her state. Similarly, an Advisory Opinion of the PCIJ in *Jurisdiction of the Courts of Danzig* (1928) stated that an international agreement could create ‘individual rights and obligations’ which are ‘enforceable by the national courts’.²⁹ Furthermore, on the other hand, after 1945 the standing of the individual as a subject of international law did not even begin to acquire force as a conclusively binding norm. Many leading theorists retained clearly positivist outlooks and even among advocates of individual rights recognition of individuals in international law was often decried as lip-service (St Korowicz 1956: 56). Significantly, express recognition of individuals as subjects of international law was very tentative in the UN Charter.³⁰ Moreover, many international courts did not originally, and some, notably the ICJ, still do not, permit individual persons or organizations to act as parties to a case (see Kelsen 1950: 483; Shelton 2004: 612).³¹ For this reason, international law cannot simply circumvent national states in imputing rights and duties to subjects of law other than states, and the direct effect of international law within national societies is not easily realized. Despite these qualifications, nonetheless, before 1945, international law had not yet been constructed as a categorical legal framework to position other actors alongside sovereign states, and it was only after 1945 that the state was dislodged as the sole holder of rights and duties under international law (see Bederman 1995:

²⁹ *Jurisdiction of the Courts of Danzig*, Advisory Opinion, 1928 P.C.I.J. (ser. B) No. 15 (Mar. 3) 37.

³⁰ This statement is made despite the fact that Lauterpacht (1950: 33) was able to claim: ‘It is in the Charter of the United Nations that the individual human being first appears as entitled to fundamental human rights and freedoms’.

³¹ Also identifying limitations to remedies for private persons under international law, see Galligan and Sandler (2004: 42).

367). Although some of its normative elements were anticipated in pre-1945 legal discourse and practice, the legal order that has developed since 1945 is distinguished by the fact that, in addition to states, other actors can claim legal personality, and other actors, including singular persons, can claim rights under international law, which are derived directly from international instruments.³² As a basic point of principle, the construction of some international norms as having *erga omnes* status necessarily means that rights and duties of individuals are defined and protected under international law (Shelton 1999: 49; Nollkaemper 2003: 632).

This change in the essential emphasis of international law found expression, first, in the principles of criminal law used to prosecute perpetrators of war crimes in the aftermath of World War II. One inevitable result of the war crimes trials in Nuremberg and Tokyo was that the traditional positivistic account of international law as a body of norms generated by states and obligatory only for states was relativized. However cautiously and variably, these trials gave weight to the idea that international law can reach beyond and into state law.³³ They indicated that some international law applies directly to other actors apart from states, such as organizations and individuals, and that, both alongside and within states, a number of very different bodies possess a legal personality, entailing rights against abuse and obligations not to abuse, under international law (Broomhall 2003: 20; Partlett 2011: 274). It was clearly argued in the background to these trials that laws of national states that are repugnant to individual rights do not protect guilty parties from criminal penalty and retribution (Finch 1947: 22; Weil 1963: 805; Peters 2014: 15). In the Charter and judgment of the Nuremberg

³² For classical analysis see the following claim: 'We can safely say that international law applies to states in their relationship with each other. But that response is far from complete. I will say only that international law today applies directly to individuals (for example, in their responsibility for their conduct in war, or in their rights regarding fundamental freedoms); and in some circumstances indirectly (as when they are required, through the intervention of necessary state legislation, to comply with UN trade sanctions against a particular country)' (Higgins 1994: 12–13). For further key discussion, see the following observation: '[O]ne nonstate actor that necessarily participates, directly and indirectly, sometimes formally but mostly informally, singly and with others in numerous ways, and that has rights and duties under international law, is the individual' (Paust 2011: 1001). On the international legal personality of individuals see Cançado Trindade (2011: 17, 110). See also exemplary analysis in Partlett (2011: 278). On the earlier origins of this concept, see Portmann (2010: 126). In support of the claim that private individuals have claim to immediate rights and duties under international law, see also Sieghart (1983: 21), Paust (1992: 51, 62), Buergenthal (1997: 722) and Kälin and Künzli (2009: 15).

³³ This was expressed in Art 6 of the Charter of the Nuremberg Tribunal. For analysis see van Sliedregt (2012: 61).

Tribunal (1949: 41), it was expressly stated that crimes against international law are the work, not of 'abstract entities', but of single natural persons. Ultimately, the principles of singular personal responsibility for atrocity underpinning the Nuremberg trials were formalized by the ILC in 1950. Similarly, the Genocide Convention (Art IV) implicitly identified individuals as holders of inalienable actionable rights under international law.

This change of emphasis in international law was reflected, second, in the fact that the main human rights instruments taking effect in the decades after 1945 began to construct individuals as holders of rights in relation to the states to whose jurisdiction they were subject, so that rights could be claimed by individuals against different branches of their own states. As mentioned, the ICJ did not hear complaints from individual persons. However, leading judges in the ILC interpreted Art 56 of the UN Charter as imposing duties on states to recognize and protect the rights of individuals (Lauterpacht 1950: 152–9). The principle of general singular rights holding was then articulated more clearly in later UN documents: notably, in Art 2 of the ICCPR, in Art 5 of the Convention on the Elimination of All Forms of Racial Discrimination (1965) (see Randelzhofer 1999: 23).³⁴ The ICCPR provided for individual petition to the UN Human Rights Committee. Moreover, the 1967 Protocol Relating to the Status of Refugees implied individual rights of protection against enforced refoulement. The principle of individual rights obtained particular emphasis under the ECHR, Art 1 of which allowed individual petition to the European Commission of Human Rights. In *Lawless* (1961), the principle was established that the Commission had standing analogous to that of sovereign states, thus facilitating individual access to the ECtHR (see Gormley 1966: 111). The consolidation of singular rights was then reinforced through a series of important cases heard by the ECtHR in the 1970s.³⁵ Singular rights were also cemented in Art 44 of the ACHR, which allowed any persons, natural or legal, to file complaints and petitions to the Inter-American Commission on Human Rights (Merton 1992: 170–72). In its second advisory opinion (1982), the IACtHR emphatically separated human rights conventions from conventional treaties, stating that, in entering such conventions: 'States can be deemed to

³⁴ Sohn (1982: 11–12) defines four stages in which individual persons acquired rights under international law. On this account, these stages were: (1) the U.N. Charter; (2) the UDHR; (3) the ICCPR; and the ICESCR; subsequent additional conventions.

³⁵ See below p. 410.

submit themselves to a legal order within which they [...] assume various obligations, not in relation to other states, but towards all individuals within their jurisdiction'.³⁶ The IACtHR thus indicated that the ACHR did not belong to the series of 'multilateral treaties of the conventional type', but that its 'object and purpose' was the 'protection of the basic rights of individual human beings [...] both against the State of their nationality and all other contracting states'.³⁷

As implied, this expansion of the concept of legal subjectivity after 1945 was not restricted to single persons. Such widening of international legal subjectivity also became evident in the fact that various international organizations, including the UN itself, could acquire legal personality, and they could act as distinct bearers of legal rights and legal duties under international law (Kelsen 1950: 329). The legal personality of the UN was established in the seminal early opinion of the ICJ, the *Reparation* case (1949), in which the personality and obligations of the UN were deduced, in part, from its functions in maintaining public order and serving the international community (Arsanjani 1981: 134; Shelton 1999: 156; Hernández 2013: 28). This meant that the UN was able to bring claims against state actors in cases in which its representatives had suffered damage, and it could accept liability for wrongful actions by its own agents, for instance peacekeeping forces. To this degree, the UN assumed a personality distinct from the single states that it comprised and from the treaties that gave rise to it, and it acquired partly autonomous status in international law. The implications of this for the inter-state domain were far-reaching.³⁸ Progressively, moreover, other inter-state actors, alongside the UN, were able to claim some (at least derivative) legal personality.³⁹ This obviously included other intergovernmental organizations. For example, in 1980 the WTO was eventually certified as possessing legal personality under the ICJ's interpretation of its agreement with Egypt in 1951.⁴⁰ Yet, to some degree, this also included NGOs. In some cases, NGOs began to

³⁶ IACtHR Advisory Opinion OC-2/82 of 24 September 1982.

³⁷ IACtHR Advisory Opinion OC-2/82 of 24 September 1982.

³⁸ Bederman (1995: 279) sees this case as creating an idea with 'revolutionary' implications for the development of international law.

³⁹ See below pp. 404–7.

⁴⁰ The view expressed is that 'international organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties': [1980] ICJ Rep 89–90.

evolve after 1945 as entities with a certain legal autonomy in relation to their constituents, not fully bound a priori by the dictates of clearly defined political agreements and treaties, and operating in a sphere of international law that was relatively autonomous against single state objectives (White 2005: 55).

On these different counts, the decades after World War II witnessed a deep constitutional revision of the basic normative structure of international society. At the centre of this was a quite intense transformation of international law, and, as a result, a reconfiguration of the character and position of the national constitutional state. Most obviously, the transformation of international law altered the role of national states in the inter-state arena. As stated above, these processes were always rather uncertain, as core texts of international law after 1945 strongly endorsed the sovereignty of states. Nonetheless, growing impact of international human rights laws relativized classical understandings of states as fully sovereign actors, whose engagement with other states, through treaties and bilateral agreements, was freely determined. In addition, the transformation of international law altered the state in its internal constitutional formation, and, in this regard too, it modified constitutional constructions of state sovereignty.

First, the growing power of international law called into question the presumption, expressed in classical constitutional doctrine, that the public legal order of the nation state forms a single normative system, which governs the activities of all bodies and all persons within a given society. Instead of this, international law began to promote the idea of a multi-centric or overlapping constitution, in which the classical hierarchy of national public law could be either challenged or supplemented by norms originating, and enforceable, in the international domain. As a result, the growth of international law rendered fragile the classical constitutional principle that national states define the primary legal obligations for their subjects. Changes in legal doctrine and practice raised the possibility (however tentatively) that individual persons could be constitutional subjects of national and international law at the same time. This implied that rights inhering in international legal norms could prevail over obligations derived from national citizenship, and it meant that persons under law could operate within two legal systems at the same time, such that norms expressed by one system could be appealed through reference to norms expressed in the other system.

Most notably, however, the relativization of national sovereignty in the emergent system of international law began to cast doubt on the basic normative substructure of classical constitutional law. The transformation of international law began to express the cautious presumption that primary acts of national constitution making could only have restricted authority as sources of governmental legitimacy, and that certain norms (especially human rights), articulated at the level of international law, must pre-determine the essential scope and content of constitutional norms in national political systems. In other words, the transformation of international law had the result that national constitutional laws could only be seen as fully valid if they comply with international human rights law. This meant, in essence, that international law placed prior restrictions on the basic classical source of constitutional norm construction: *on national constituent power*. In fact, the transformation of international law had the clear implication that constituent power could not be exercised, even within national territories, in strictly free and spontaneous fashion, and that states could not derive their legitimacy exclusively from free acts of will formation of the sovereign nation. In this last respect, the rise of international law after 1945 suspended the primary and original norm of national democracy, and it meant that national governments were obliged to align their founding laws to pre-defined legal principles, especially principles distilled from human rights instruments. This was clearly visible in early UN practice. The early instruments of the UN expressly promoted the self-determination of national states and their populations as a political ideal. This was formally declared in UN Charter Art 55, although it only acquired real legal meaning in General Assembly resolutions of 1960.⁴¹ However, the UN also placed powerful restrictions on this ideal. This was especially the case in Articles 2(2) and 6 of the Charter. These articles implied that self-determination could only be pursued within certain prior normative constraints, that legitimate polity building presupposed recognition of international norms, and that the unrestricted exercise of national constituent power could not be invoked on its own as a legitimate basis for a polity.

In consequence, the rise of international law after 1945 began to create a legal/political system in which international norms were able, progressively, to penetrate, and *constitutively* to determine the most essential processes of national political foundation. Most particularly,

⁴¹ See p. 121 below.

this meant that national institutions increasingly explained their legitimacy, in part, not as the result of radically founding sovereign acts, but by translating into national laws norms that were already expressed and consolidated in realized legal form, in international law.⁴² Accordingly, vital dimensions of new national constitutions were often designed through the transplanting of norms from international instruments and international case law into domestic constitutional documents. This was especially notable because the increasing intersection between international law and national constitutional law occurred at a time, after 1945, when few national states were reliably formed as such, and the rise of international law coincided with a rapid proliferation of states, caused by conjoined processes of post-authoritarian transition and decolonization. This meant that in many societies international norms became inextricably interwoven with original processes of state formation and polity building: international law often became a basic source of statehood.

Overall, after 1945, the rise of international law began to create a legal/political system in which national and international dimensions of law making were closely articulated, and international law shaped national constitutions in a number of ways. After 1945, national political systems were defined, albeit very gradually at first, by the fact that states drew at least part of their inner normative order from a legal domain that was elevated above national jurisdictions, and decision making in national society was guided, in part, by an external normative structure. Of course, needless to say, international law remained formally and doctrinally distinct from domestic law; the case law of national and international courts remained strictly separate, and courts in the national and courts in the international arenas applied very different doctrines. Underlying the political system that emerged after 1945, however, was a shift in the legitimational substance of the national political system. To an increasing extent, the external exercise of national sovereignty of constituent power was displaced as the primary source of constitutional legitimacy. To an increasing extent, already existing norms, instead of norms constructed *ex nihilo*, were defined as the basic constituent source of governmental legitimacy and legal inclusion. The legitimacy of national courts and institutions was, at least partly, constructed through a global constitution.

⁴² See pp. 122–4 below.

COURTS AND THE GLOBAL POLITICAL SYSTEM

In parallel to the rise of international organizations, the emerging legal and political system after 1945 was defined by the fact that, as states extracted some of their legitimacy from compliance with international norms and international judicial rulings, interaction between courts and judiciaries, positioned at different locations in global society, became an increasingly important source of legal norm construction. Indeed, communication between different international courts, between international courts and domestic courts, and between the domestic courts of different states, began to perform vital *ius-generative*, even constitutional, functions. This occurred both in the international domain and in national societies, and norms produced through inter-judicial exchanges were often accorded distinctively high standing. The period after 1945, generally, witnessed a broad transfer of political authority from legislatures to courts, and courts slowly assumed powers in relation to other branches of government, which would have been inconceivable in classical national democracies.⁴³ Quite uniformly, this gave rise to a general *judicialization* of political decision making and legislation, both in the international domain and within national states.⁴⁴ Increasingly, courts became vital sources of legal and structural formation at different points in the global political system, and they began to assume powers to make laws, sometimes with constitutional standing, and to perform general functions of normative inclusion, which had traditionally been reserved for strictly political institutions.

This global rise in judicial authority was most obvious in the growing number of international courts after 1945, which led to an increased judicial promotion of international law, and especially human rights law. Initially, this increase began slowly, and at first international courts had only rather limited reach. Nonetheless, the ICJ was founded in 1946, and the ECtHR was established in 1959, both of which assumed increasing impact on national legislation. The number of international courts was then augmented in the 1970s and 1980s, and

⁴³ Note the use of the term 'judicial review revolution' to describe these changes in the fabric of democratic polities in Renoux (1994: 892). Some political scientists have observed that pure parliamentary sovereignty has 'faded away' across the globe (Ginsburg 2003: 3).

⁴⁴ For selected near-classical literature on the judicialization of politics in recent decades see Tate (1995: 27), Hirschl (2000: 104), Baudenbacher (2003: 397), Wellens (2004: 1180–81), Commaillé and Dumoulin (2009) and Teitel (2011: 216). On the more specifically national dimension of this see Hirschl (2007: 723). More generally see, Hirschl (2004). Additionally, see Ferejohn (2002: 41, 44) and Schneiderman (2008).

it escalated dramatically towards the end of the twentieth century. By the first decade of the twenty-first century, there were no fewer than twenty-five permanent international courts, covering different regions and different areas of law. Naturally, the jurisprudence of such courts was originally circumspect, and the ability of international courts substantially to penetrate national jurisdictions was severely restricted until the 1970s. Self-evidently, as discussed, the domestic reach of international courts still remains subject to clear limits today. However, even where they lacked broad powers of enforcement, international courts typically fostered a presumption in favour of human rights as essential elements of the global grammar of legitimacy, and they slowly spelled out norms that penetrated national legal systems, and cut through the historical boundaries between states. In particular, the fact that some international courts were entrusted with responsibility for interpreting human rights charters, and were in some circumstances able to hear cases referred upwards from national states, meant that these courts gradually produced a body of free-standing jurisprudence, which implied certain constitutional ground-rules for international society as a whole. In recent years, the authority of international courts has increased exponentially, and some courts are now even able to steer policy-making choices in national states.⁴⁵

Of at least equal significance in the global growth of judicial power, however, is the extent to which the rise of international courts strengthened, and in fact often re-defined, the position of superior courts within national societies. The more sharp-eyed observers of the rise of international law after 1945 were aware that the impact of international law was not reserved to the strictly international sphere; they saw that international law began to confer elevated standing on domestic courts, and they quickly identified national courts as key instruments in the domestication, promotion, and even in the formation, of international law.⁴⁶ In particular, the increasing prominence of

⁴⁵ By way of example see the IACtHR ruling against Mexico in *Rosendo Cantú* (2010), which prescribed provision of special care services for female victims of sexual violence.

⁴⁶ In different ways, theorists of international law after 1945 argued that the conjunction between courts began to create a legal/political system situated between the distinctively national and the distinctively international domains, rendering classical positivist accounts of monism or dualism as legal-systemic characteristics rather outmoded. One early commentator (Falk 1964: 444) noted that domestic courts acquired a simultaneously 'national and international character' because of the rising power of international law and he used this to question the strict distinction between international and domestic law (1964: 170). Other key observers noted that, through the function of courts in applying international human rights norms, national courts began to play an active role in developing international law – or, more accurately, *transnational*

international courts placed national courts in a distinctive position in their own societies, and national courts often acted as *legal transformers*. That is to say, in many states, courts assumed increased powers in the reviewing of new legislation, and they were widely required to mediate higher laws from the international arena into authoritative principles to regulate national administrative practices and national constitutional interpretation. Through this process, courts often assumed heightened importance in the production of constitutional laws, assimilating and reconstructing principles of international law as domestically binding norms. This role of national courts was consolidated, most obviously, by the fact that, after 1945, national constitutions increasingly provided for the creation of Constitutional Courts, which were expected either to oversee the compatibility of new laws with domestic human rights provisions (largely based on internationally defined principles), or to ensure conformity between national laws and human rights law, either directly or indirectly based on international norms. international laws. Such formal commitment to the recognition of international law as a basis for national law making was not entirely novel. For instance, the German Constitution of 1919 (Art 4) and the Spanish Constitution of 1931 (Art 7) had both given some recognition to international law. This principle was also implied in the American constitution of 1789. In fact, long before 1945, the earliest experiments in constitutional organization that allowed courts to review legislation had reflected by the presumption that domestic courts should use norms of international law as a basis for authoritative review.⁴⁷ After 1945, moreover, this principle was not cemented overnight; obviously, it took decades until it was broadly established. From 1945 onwards, however, a constitutional model gradually began to become widespread in which international law underpinned key aspects of domestic jurisprudence, and superior national courts, especially Constitutional Courts, were given authority to check outcomes of legislative processes in the national domain, often using international law or principles derived from international law as a normative standard.

law – by virtue of their interaction with international tribunals. See, classically, Jessup (1959: 63). See recently Nollkaemper (2012: 1, 81, 301). Scelle (1932: 56) had already anticipated this phenomenon before 1945.

⁴⁷ For example, after 1918, Kelsen's Austrian constitution of 1920, which provided the basic design for later experiments in judicial constitutionalism, was in part shaped by the idea that one system of norms could pervade society in its entirety, with international law as the highest source of such norms. See the theoretical basis for this in Kelsen (1920: 215).

After 1945, consequently, the rise of judicial review usually led to a deepening interaction between domestic and international laws. In fact, as provisions for judicial review ordinarily implied that domestic courts could apply or consider international law to scrutinize acts of other branches, judges often saw the reception of international law as a device for increasing their own domestic authority. As a result, courts acquired very strong incentives to intensify the penetration of international law in domestic law, and they often locked domestic laws into the international legal system to maximize their own institutional and constitutional influence. For these reasons, national courts began to participate in shaping a cross-national jurisprudence, increasingly drawing authority from international law to act against other branches of government in their own polities (see Nollkaemper 2009: 75; 2012: 44, 67). Indeed, the prominent reference to human rights within the emergent legal order meant that, in many cases, authority for legislation was partly transferred, via human rights norms, from nationally mandated legislatures, to normatively authorized judicial bodies (Lauterpacht 1958: 156).⁴⁸ Overall, the growing power of international human rights law and the closely linked increase in judicial power meant, indirectly, that international norms and judicial rulings were often present or at least *co-implied* in national constitutional law and in acts of national legislation.

For these reasons, the rising importance of international law after 1945 slowly produced a legal/political system, in which courts became authors of essential constitutional norms in national polities. As discussed more extensively below, the constitutional force of judicial power ultimately became most pronounced in new democratic states, in which the ascription of extensive powers of review to national courts, linked to international courts, was almost invariable. In most recent transitions to democracy or broader processes of systemic transformation, courts often spontaneously invoked international law to alter, or even to initiate legislation, and to elaborate certain basic norms through society.⁴⁹ However, this judicial emphasis also became pronounced in established democracies, including political systems in which presumptions in favour of legislative supremacy had previously been constitutionally immovable. In such polities, notably France, and

⁴⁸ At the inception of the modern international-legal system, it was noted that many legislative functions, especially those regarding extra-national phenomena, could be entrusted to judicial bodies. This point is made in Lauterpacht (1933: 263, 267; 1958: 156).

⁴⁹ See discussion of Hungary, Poland at pp. 216–18 below.

some Scandinavian countries, the principle of legislative supremacy was only very gradually displaced. Yet, even in such cases, powerful courts of review, applying international law, came to sit alongside and limit the authority of parliamentary bodies,⁵⁰ effectively tying these polities into a multi-level legal/political order, in which courts acted as structural hinges between different tiers of an international judicial system.⁵¹ Now, with variations, this transnational judicial emphasis has become almost universal, and it is able even to determine the constitutional shape of polities in which the immediate reception of international law has traditionally been very curtailed. For instance, this judicial emphasis penetrates polities (e.g. China) (Zhu 2010: 109), which have not yet evolved fully enforceable democratic constitutions and which historically rejected international law as Western imperialist artifice; it penetrates polities, for example in Southern Africa, whose basic domestic legal order remains uncertain, pluralistic and often informal (Prempeh 2006: 1241; 2007: 505); to some degree, it even penetrates polities, for instance in North Africa, where historical and cultural preconditions pull against easy acceptance of universal international norms (El-Ghobashy 2008: 613). Even common-law states gradually devised mechanisms for the judicial mediation of international law into domestic law, and, in some cases, they evolved hybrid constitutions, adding some elements of civil-law constitutional models to their basic common-law structure. In Canada, for example, the Supreme Court developed the general doctrine that interpretation of Canadian law should be informed by international instruments, even where these are not incorporated.⁵² In the UK, a polity traditionally closed to absolutely binding higher norms, courts have expanded their capacities for influencing domestic public law and for reviewing administrative acts, and they have proportioned domestic public-legal norms to international human rights norms.⁵³

⁵⁰ For instance, the end of legislative supremacy in France was closely linked to the entrenchment of international human rights norms, following the ratification of the ECHR in 1974. On the powers of review resulting from judicial reforms and human rights law in the UK, see Kavanagh (2009: 275). For penetrating discussion of the 'shift in power from politicians to judges' under the Human Rights Act see Woodhouse (2004: 152–3). On analogous ambiguous 'acceptance of judicial review' in Norway, see Follesdal and Wind (2009: 163). For a more general picture, see Lasser (2009: 24).

⁵¹ See excellent analysis in Bamforth and Leyland (2003: 161).

⁵² See *Baker v Canada (Minister of Citizenship and Immigration)* (1999).

⁵³ See pp. 385–7 below.

Quite generally, therefore, the growing force of international law after 1945 gradually created, at least in broad contours, a semi-autonomous transnational judicial order. Courts began to communicate with each other in partial normative independence of national legislatures and executives, and different national courts now cite international law or rulings of international courts to elevate their own constitutional position within domestic polities, to strike down legislation, to oppose executive acts, or even to promote new constitutional norms (Nollkaemper 2012: 44). After 1945, in short, national democracy was progressively refigured on a model of *transnational judicial democracy*, and this slowly became a common template for democratic political systems.

Owing to these tendencies, different courts, typically acting in conjunction with other courts, have often assumed powers close to those granted to constituent actors in classical constitutions. In this respect, too, constituent power has lost its classical standing as a primary source of national legal norms. In fact, courts applying international law and courts applying domestic law now often act together to dictate and transform the constitutional structure of national societies, and in fact to shape the constitutional structure of global society more widely. It is now quite commonly the case that courts, importing transnational legal principles, define constitutional norms for the polities in which they are located. However, the exercise of constituent power by courts is not one simple phenomenon. In fact, the filtration of norms from international courts into domestic constitutional law has taken place in a number of different ways, and for a number of different reasons.

First, the constituent role of courts developed because, simply, international courts acquired vertical powers to police national states, both through appeal verdicts and through advisory opinions. International courts, following positivist principles of state autonomy, had originally focused primarily on practical processes of dispute settlement and interstate arbitration. After 1945, however, international courts progressively promoted an independent system of jurisprudence, and – in so doing – they established themselves as quasi-constitutional bodies, able, relatively autonomously, to construct and promulgate norms of public order for subordinate actors. This tendency was heightened by the fact that many states after 1945 were new states, and they sought to demonstrate their legitimacy as states through membership of the

UN and through compliance with the directives of the ICJ, usually through assimilation of international norms in national jurisprudence. As a result, international courts increasingly re-defined their functions and typically assumed active responsibility for general standard setting, norm advancement and de facto legislation, giving directions to national states, or to courts inside national states.⁵⁴

In making this claim, caution is required. The ICJ, for example, has no powers of review relating to national laws, and it cannot issue rulings that are binding except on parties to a single case. As discussed, further, Art 38 of the ICJ statute declares that the court can only apply rules recognized by contesting states, thus seemingly restricting the court's remit to adjudicatory functions. However, the same article of the ICJ statute also determines that judicial decisions are sources of international law, which implicitly ascribes law-making authority to the court. As discussed, the ICJ began in early opinions to suggest that its jurisprudence had obligatory force for all states.⁵⁵ Generally, the systemic nature of international law presupposed that courts were able to distinguish international law from the will of single states, and they were required to promote the law of different human rights instruments and conventions as norms that transcended the resolution of simple, single inter-state disputes. Moreover, the rising force of the concept of *jus cogens* of necessity conferred an overarching norm-constitutive role on courts. By the late 1970s, notably, regional international courts openly defined themselves as binding norm providers, often providing directives, not only for national single states but for courts within these states. For example, the ECtHR ruled that its functions extended beyond resolution of singular disputes, and it was obliged to 'elucidate, safeguard and develop the rules instituted by the Convention'.⁵⁶ As such, it assumed a position at the top of a hierarchically ordered cross-national legal system.

Second, the constituent role of courts evolved because the implementation of international instruments presupposed that national courts would play a key role in enforcing international norms, both norms established by the UN for the international community and those established by other international instruments (Amerasinghe 1990: 87–9; McGoldrick 1991: 13). As most human rights instruments attributed rights under international law to single persons, it was

⁵⁴ See on this change in the role of courts Ginsburg (2005: 25), Shany (2009: 81), Teitel and Howse (2009: 960) and Bogdandy and Venzke (2011: 980, 993).

⁵⁵ See p. 81 above. ⁵⁶ *Ireland v United Kingdom* – 5310/71 [1978] ECHR 1.

commonly expected that cases with implications for international law would be filed, in the first instance, in domestic courts, and domestic courts would resolve most such cases. This created a situation in which national courts, sometimes even local courts, were required to consider international law and to decide human rights questions, and they were placed in a direct relation to, or even in a constructive dialogue with, international judicial bodies. In most international instruments, notably, it is implied that the universality of a legal norm does not entail universality of application, and domestic courts are expected to interpret and apply international law in distinct, context-sensitive fashion. For example, the ECtHR has repeatedly stressed the need for diversity of protection for human rights.⁵⁷ For the IACtHR, although much more reticent than the ECtHR in acknowledging a margin of appreciation, the Pact of San José gives states some latitude in defining the necessary measures to protect rights and liberties. Overall, moreover, international instruments have tended to promote doctrines of *proportionality* to give effect to international norms (see Legg 2012: 178). These doctrines, while leaving scope for nation-specific practice, have bound national courts into an overarching normative community, yet they have also designated national courts, within national contexts, as vital actors in the construction and enforcement of a system of inter- or *transnational* law. Perhaps unintentionally, this constitutive role of national courts has been widened through the common presumption that local remedies must be exhausted in national courts before remedies can be sought in international courts.

This principle was expressed in ECHR (Art 35) and in ACHR (Art 46).⁵⁸ For the UN, this was spelled out in *Interhandel* (1959), in which the ICJ described the ‘rule that local remedies must be exhausted before international proceedings may be instituted’ as a ‘well-established rule of customary international law’ (see Shany 2007: 27; Thirlway 2013: 611).⁵⁹ ICCPR Art 41(1)(c) also states that local remedies must be exhausted before referral of a case to the Human Rights Committee. Typically, such provisions have required that states offer remedies that reflect international expectations, and, in so doing, they lead to a direct transmission of international norms into domestic practices. Historically, of course, the customary law on exhaustion of local

⁵⁷ See *Sahin v Turkey* – 44774/98 [2005] ECHR 819.

⁵⁸ See also Art 11(3) of International Covenant on the Elimination of All Forms of Racial Discrimination.

⁵⁹ [1959] ICJ Rep 27.

remedies had been designed to preserve formal state sovereignty, and in many cases national states only acceded to human rights conventions if they were allowed to ensure compliance through domestic remedies (Amerasinghe 1990: 425). After 1945, however, the growing power of international courts meant that many states were pressured to adjust their provisions for remedies to extra-national norms, to guarantee heightened protection for singular rights, and so to position national courts in a transnational system of rights.⁶⁰ In some cases, national courts took international principles regarding domestic remedies as a basis for augmenting their independence and influence, using the insistence on national guarantees for remedies consonant with international human rights law to consolidate their own position in their domestic polities (Nollkaemper 2012: 36). In each respect, courts began to act as *structural hinges* between different levels of a transnational legal/political order, serving to translate international directives from the international to the national domain, to enforce compliance with international law within the national institutional order,⁶¹ and, both within and above national jurisdictions, to elaborate a free-standing corpus of jurisprudence, with strong constitutional influence.

The constituent role of courts developed, third, because, across national boundaries, individual judicial bodies and members of different national judiciaries (judges, lawyers, advisors) began to show increasing regard for judicial rulings in other jurisdictions, both national and supranational. This had the result that, informally at least, laws with constitutional effect were transplanted from one jurisdiction to another, comparative law acquired additional weight across jurisdictions and presumptions in favour of certain norms became widespread. Through this process, an increasingly interlinked transnational or *trans-jurisdictional* judicial community evolved, in which judicial transplants impacted broadly on different dimensions of national legal formation – whether on constitution drafting, on legislation, or on results of litigation. Numerous examples of this can of course be found, even in jurisdictions that tend to view judicial borrowing as a dilution of national constitutional principles.⁶² Central to this phenomenon, in general,

⁶⁰ See the classic case: *Velásquez Rodríguez v Honduras*, IACtHR. (Ser. C) No. 4(1988) 64, 66. See for analysis Cançado Trindade (1979: 742; 1983: 55, 127). A further example of this is *Smith and Grady v UK* (1999) 29 EHRR 493. See wider discussion of this process in Latin America on pp. 237–8, 246 below.

⁶¹ For an explanation of this, see Benvenisti and Downs (2009: 60).

⁶² For a thorough, level-headed study of this process in the USA, for example, see Cleveland (2006). See also Jackson (2010: 272).

is the fact that national courts are increasingly expected to consider for the normative directives of international courts, and that human rights norms are more uniformly accepted, at least in principle, as basic premises for legislation and judicial finding.⁶³ Acceptance of these general parameters has meant that extreme divergence between courts is less probable, semi-monistic cross-penetration between courts has been fostered and simplified and historically rigid distinctions between different bodies of national jurisprudence have been eroded. This has also been underpinned by the rapid rise of proportionality as a doctrine to support judicial ruling. Proportionality standards have locked together different national jurisdictions as they provide a generic, although flexible, measure for judicial validity across national differences.⁶⁴ In so doing, moreover, proportionality standards have opened broad channels of communication between different judiciaries, they have created a wide terrain for inter-judicial comparativism and dialogue and so generally intensified judicial authority (Cohen-Eliya and Parat 2013: 134–5; Stone Sweet and Mathews 2008: 161).

The constituent role of courts has been consolidated, fourth, because of the basic open texture of international law, and the importance that this imputes to judicial bodies in the development of the law. International law, clearly, is derived not in the fashion of classical constitutions, from original constitution-making processes, but rather from piecemeal interpretive procedures. As a result of this, courts have of necessity acquired key law-making functions, and, at different points in the global system, the practice of different courts has played a core, semi-constituent role in elaborating the foundations of international law (Strebel 1976: 319). Tellingly, for example, one commentator has observed that the framers of the UN Charter did not remotely envision that it would become the basis for a ‘vast and multifarious corpus juris’ (Schachter 1995: 2). The fact that it did so was the result of an ongoing judicial elaboration of its primary principles, in which many different courts participated. In the first instance, notably, UN law was promoted, not solely through the judgments of the ICJ, but also through its wider interpretive acts. This included the issuing of advisory opinions (Brown 2007: 74–5), which were not required to meet the test of state consent prior to their enunciation (Amerasinghe 2009: 202). However, principles of UN law and international law more generally then filtered into

⁶³ For general accounts of this see McCrudden (2000: 501), Slaughter (2003: 204, 210) and Waters (2007b: 636, 691).

⁶⁴ See pp. 395–403 below.

the jurisprudence of other courts, both international and national. As a result, a variety of judicial institutions have contributed, both formally and informally, to the continuing interpretation and expansion of international law. Indeed, domestic courts have at times constructed new high-ranking norms for their own national polities.⁶⁵

In broad terms, the decades after 1945 saw the construction of a new model of legal order and law production, which substantially transformed the constitutional models that first characterized modern society and its inclusionary structure. The first defining feature of the slowly evolving post-1945 legal order was that much national law, including constitutional law, was in some respects pre-defined by international law. A further defining feature was the cross-national production of laws, often with quasi-constitutional rank, by judicial bodies. Of course, it is self-evident that, in both respects, this was initially a tentative and rather implicit process; still today, the entrenchment of international norms in national societies remains fragile and variable. However, at a formal level, the post-1945 period was marked by a revolutionary shift in the design of the global legal/political system. The normative implications of this shift were repeatedly, and often egregiously, denied, both by states and by theorists of law. But they did not disappear. This normative shift was twofold: it transferred the conceptual basis of legitimacy, in part, from the *constituent power* of national populations to internationally defined *human rights norms*, and it transferred the practice of constitutional legitimation, in part, from legislatures to judiciaries. In both respects, international human rights norms, applied by strong judicial bodies, began to act as principles in a *two-tier constitution*, which integrated national political exchanges into a global political system and enunciated normative principles to regulate both the national and the extra-national dimensions of this system at the same time. This constitution evolved, in an eminent sense, on a *transnational* foundation: it combined elements of national and international law to provide higher-order norms to support acts of legal inclusion, both in national societies and in global society more widely. At the centre of this constitution was a deep revision of the basic inclusionary structure, which had historically underpinned the emergence of society's political system. After 1945, notably, international human rights slowly supplanted national sovereignty as the ultimate reference for defining the validity

⁶⁵ See more extensive discussion and examples of such cases on pp. 282–90 below.

of law and for promoting law's inclusionary force. International human rights norms became primary norms of social inclusion, and international human rights increasingly formed the deepest sources of inclusionary authority, co-implicated across all levels of the global legal/political system, and impacting deeply, through different sources, on national political institutions.