When *Solange I* Met *Neubauer*: National Court Protecting Global Interests When Reviewing Decisions of International Organisations

Eyal Benvenisti*
Lauterpacht Centre for International Law, University of Cambridge, Cambridge, United Kingdom
eb653@cam.ac.uk

Abstract 627
Keywords 628
I. Introduction 628
II. Why Subject International Organisations to Judicial Review by National Courts? 631
1. The Inherent Failings of the International Law on International Organisations 632
2. National Courts Rising up to Challenge the International Legal Void 634
III. The Proper Limits of Indirect Judicial Review by National Constitutional Courts 638
1. Does Judicial Review of International Organisations Undermine Their Functionality? 639
2. Can National Courts' Indirect Review Undermine the Independence and Impartiality of International Organisations? 642
3. Normative Constraints on Indirect Review – Exploring '*Other-Regardingness*' 643
IV. Conclusion 647

Abstract

What is the significance of the *Solange I* judgment for situations when national constitutional courts (NCCs) are called upon to implement or resist the implementation of an act of an international organisation (IO)? May, or even should these courts follow the German Federal Constitutional Court (FCC) and indirectly review the compatibility of the measure with the national constitution? What considerations should shape these courts' approach? In responding to this question, this essay inquires about the positive and negative effects of such an exercise of indirect review on IOs beyond the European Union (EU): could such a review undermine the functionality of the IO or its impartiality? I will present an argument in support of the *Solange I* approach and explain how and why indirect review by NCCs is more likely than not to contribute to an improvement in the functionality

* Whewell Professor of International Law *emeritus*, University of Cambridge.

DOI 10.17104/0044-2348-2025-2-627 ZaöRV 85 (2025), 627-648

https://doi.org/10.17104/0044-2348-2025-2-627 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-ZA

and impartiality of IOs. My argument will be partially based on integrating into the *Solange I* framework the FCC's 2021 judgment of *Neubauer*, in which the Court extended the Basic Law's protection also to people living abroad. I contend that such an indirect review by an NCC that pays due regard not only to national interests, but also to the rights of foreigners that may be affected by the NCC's decision to implement or reject the IO measure could improve the functionality of IOs and their adoption of inclusive and accountable outcomes that balance the rights and interests of all affected by the IO.

Keywords

Domestic judicial review – acts of international organisations – German Federal Constitutional Court – *Neubauer* case – constitutional protection of people living abroad

I. Introduction

What is the significance of the *Solange I* judgment[1] for situations when national constitutional or supreme courts (NCCs) are called upon to implement, or resist the implementation of an act of an international organisation (IO)? May, or even should these courts follow the German Federal Constitutional Court (FCC) and indirectly review the compatibility of the measure with the national constitution? What considerations should shape its approach? When the *Solange I* judgment was rendered, it was generally assumed that the debate – whether or not the external norm (the relevant European Community [EC] law) was compatible with the national constitution – was an internal matter that the court would resolve from the domestic vantage point, namely by weighing the effects of the IO decision on its citizens. Fifty years later, the constitutional landscape has been transformed, together with the perception about the scope of *jurisdiction* in the context of international human rights law. With global events such as the COVID pandemic and climate change spreading across continents, the scope of state obligations under constitutional and human rights law has significantly expanded. So much so that in 2020[2] and

1 FCC, order of 29 May 1974, 2 BvL 52/71, BVerfGE 37, 271 (*Solange I*).

2 FCC, judgment of 19 May 2020, 1 BvR 2835/17, BVerfGE 154, 152 (*Federal Intelligence Service Case*) (paras 87-110).

 DOI 10.17104/0044-2348-2025-2-627

https://doi.org/10.17104/0044-2348-2025-2-627 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-ZA

2021[3] the same court articulated an all-encompassing vision of the remit of human rights protection under the German Basic Law,[4] one that requires the German branches of government – and the Court itself included, particularly in its *Neubauer* judgment – to respect, if not positively protect, certain rights of '*people living abroad*'.[5] Indeed, the very term – '*people living abroad*' – signals that nobody around the world is a '*stranger to the constitution*',[6] absolutely not an '*alien*'[7] to it. In *Neubauer*, individuals living in Bangladesh and Nepal were among those who filed constitutional complaints alleging that Germany's climate action measures were insufficient to protect their fundamental human rights.[8] The FCC accepted the standing of these complainants and held that the rights in the constitution were not limited to German territory.[9] Although the FCC qualified its ruling by suggesting that the level of protection to be afforded to people living abroad might be less than that required for people living in Germany,[10] the implication is clear: the FCC must weigh the effects of its decisions on the constitutional rights of people living abroad. How, then, should the *Solange I* doctrine integrate this outward-looking scrutiny when indirectly reviewing the national implementation of IO measures? Arguably, even if states must as a matter of their international obligation implement IO measures without exercising independent discretion, their doing so will be subject to constitutional limitations that – as *Neubauer* suggests – protect foreigners as well.[11]

3 FCC, order of 24 March 2021, 1 BvR 2656/18 and others, BVerfGE 157, 30 (*Neubauer*).

4 Art. 1 (3) Basic Law for the Federal Republic of Germany ('The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.').

5 FCC, *Neubauer* (n. 3), para. 175.

6 See Gerald L. Neuman, *Strangers to the Constitution* (Princeton University Press 1996).

7 See Alec Walen, 'Constitutional Rights for Nonresident Aliens: A Doctrinal and Normative Argument', Drexel Law Review 8 (2015), 53-112.

8 FCC, *Neubauer* (n. 3), para. 78.

9 FCC, *Neubauer* (n. 3), paras 90, 173-175. Ultimately the Court found no violation of duties of protection *vis-à-vis* the complainants living in Bangladesh and Nepal.

10 FCC, *Neubauer* (n. 3), paras 175-176; FCC, *Federal Intelligence Service Case* (n. 2), para. 104.

11 In FCC, *Neubauer* (n. 3), para. 141 the FCC noted that the Court was not barred from reviewing the Federal Act that implemented EU law because the challenged provisions were not fully determined by EU law. But that restriction of review is probably a result of the *Solange II* judgment (FCC, order of 22 October 1986, 2 BvR 197/83, BVerfGE 73, 339), which relates solely to EU law and its relations to German law. And it has no bearing on the question of indirect review of an IO other than the EU. Thus it seems that para. 141 supports the claim that even if the challenged domestic act implements an IO measure, the FCC will review the effects of that act on the rights of people living outside Germany.

https://doi.org/10.17104/0044-2348-2025-2-627 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-ZA

This is not a question solely for the German Constitutional Court. As much as the *Solange I* doctrine has spread around Europe and beyond,[12] the recognition that constitutional and international human rights obligations extend toward people living abroad have been accepted in other jurisdictions,[13] and it is widely acknowledged that the obligation to protect human rights '*within the jurisdiction*' of a state encompasses acts or decisions that take place within that state's borders, but that affect the rights of people living beyond that state's borders. If NCCs are authorised to indirectly review IO measures against domestic constitutional rights norms, and these norms also protect individuals outside their borders, they therefore have to take into account how the IO measures affect people living abroad. How does this newly assumed global responsibility affect the *Solange I* approach? Does it call for a more deferential attitude toward IO-generated policies? Does it modify NCCs' calculus of rights balancing between the external and the domestic? And who are the relevant people living abroad for the purposes of NCC review of IO measures – only those directly subjected to the IO's authority (i. e. individuals in member states) or also citizens of third parties? Does the *Neubauer* judgment, which recognised the standing of foreigners to demand review of the compliance of German authorities with their constitutional obligations toward those foreigners, imply that the FCC must take account of the effects of EU measures also on people living outside Europe?

In responding to these questions, this essay inquires first about the positive and negative effects of any exercise of indirect review on IOs beyond the EU: could such a review undermine the functionality of the IO? Could it jeopardise the IO's ability to impartially care for the interests of all those subject to its authority? I will present an argument in support of adopting the *Solange I* approach across the board, namely with respect to all IOs whose measures

12 Peter Hilpold, 'Solange I, BverfGE 37, 291, 29 May 1974; Solange II, BverfGE 73, 339, 22 October 1986; Solange III, BverfGE 89, 155, 12 October 1993; and Solange IV, BverfGE 102, 147, 7 June 2000' in: Cedric Ryngaert, Ige F. Dekker, Ramses A. Wessel and Jan Wouters (eds), *Judicial Decisions on the Law of International Organizations* (Oxford University Press 2016), 170-182 (181); August Reinisch, 'Conclusion' in: August Reinisch (ed.), *Challenging Acts of International Organizations Before National Courts* (Oxford University Press 2010), 258-274 (263-265).

13 On '*other-regarding*' constitutions see Eyal Benvenisti and Mila Versteeg, 'The External Dimensions of Constitutions', Va. J. Int'l L. 57 (2018), 515-538. On the expansion of the concept of '*jurisdiction*' in international human rights law see e. g. Inter-American Court of Human Right, Advisory Opinion OC-23/17, 15 November 2017, Advisory Opinion on the Environment and Human Rights, paras 74, 95-103. See also Human Rights Committee, General Comment No. 36 on Article 6: Right to Life, 2019, para. 63; Yuval Shany, 'The Extraterritorial Application of International Human Rights Law', Collected Courses of the Hague Academy of International Law 409 (2020), 9-152 (14); Marko Milanović, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press 2011).

https://doi.org/10.17104/0044-2348-2025-2-627 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-ZA

affect constitutional rights, and explain how and why indirect review by NCCs is more likely than not to contribute to an improvement in the functionality of IOs without necessarily undermining their impartial outputs. I will then offer my support for indirect review that takes a broad, '*other-regarding*' view, namely a view which pays due regard not only to national interests but also to the mission of the IO and to the constitutional and human rights of people living abroad. I will argue that such a broad view could improve the functionality of IOs and their adoption of inclusive and accountable outcomes while allowing proper balancing among the rights and the interests of all affected individuals and communities. I argue that other-regarding NCCs, namely those which accept the extraterritorial applicability of constitutional or human rights obligations and the NCC's responsibility to have regard to those obligations when discharging its judicial function, must not shy away from indirectly reviewing IO policies within the domestic constitutional order. Such a review requires NCCs to consider also the interests of persons living beyond the state's borders and ensure that they are not adversely affected beyond what is necessary and proportionate.

In the following I argue, in Part II, that NCCs' intervention in IO policies is necessary to secure their proper functioning, thereby filling a wide gap in contemporary international law, which by and large relieves IOs from basic rule of law requirements. I present several examples for this proposition, showing how NCC interventions prompted IOs to become more accountable and respectful of individuals subject to their jurisdiction by readjusting their decision-making procedures. In Part III I explore the proper limits of indirect judicial review, while discussing several concerns about NCC intervention. Part IV concludes.

II. Why Subject International Organisations to Judicial Review by National Courts?

A century after the birth of the League of Nations and other IOs set up during the inter-war period, and almost eighty years after the United Nations (UN) was established, it is no longer tenable to propose that IOs contain any inherent qualities that enable them to overcome the impulses of power and passion.[14] Too many examples have shown that IOs are as fallible as any other human endeavour. They, too, embody passion and power – with all the excesses and temptations that these entail – and they often uphold injustice

14 David Kennedy, 'The Move to Institutions', Cardozo L. Rev. 8 (1987), 841-988.

https://doi.org/10.17104/0044-2348-2025-2-627 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-ZA

and exacerbate conflict. International law, however, continues to root for IOs, in line with the initial, idealised vision in which IOs were seen as impeccable, heaven-sent actors that were above legal discipline and scrutiny.

This Part is composed of two sections. The first presents the gist of the international law on IOs highlighting its *light touch* on IOs. The second section offers examples of NCCs that have interfered with IO decisions and thereby indirectly prompted the latter to adopt some rule of law obligations.

1. The Inherent Failings of the International Law on International Organisations

The Permanent Court of International Justice (PCIJ) and particularly its successor, the International Court of Justice (ICJ), developed a law that expanded the competences, capacities, and freedoms of IOs in general and the UN in particular.[15] In a formative series of Advisory Opinions, the ICJ adopted a deferential legal attitude toward IOs, exuding confidence in the impartiality of IOs,[16] premised on an assumption that their subjection to legal discipline and judicial review would be both unnecessary and counter-productive.[17] The ICJ fleshed-out a doctrine that insulated IOs from any external legal discipline or judicial accountability. Such insulation was achieved by the endorsement of six *freedoms* of IOs: (i) IOs have a legal personality that is independent of their member states; (ii) they have authority to expand their mandate to pursue whatever course of action or policy they deem necessary to achieve their respective (broadly defined) aims; (iii) IOs have the freedom to '*look after number one*' and, essentially, ignore the interests of other IOs; (iv) they are not necessarily bound by the norms of customary international law that are applicable to states; (v) they, as well as the private actors with whom they partner, enjoy immunity from domestic court review and are subject only to forms of review to which they (the IOs) have agreed; (vi) finally, it is only in extreme situations that states

15 David Bederman, 'The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel', Va. J. Int'l L. 36 (1996), 275-378 (366-371).

16 That confidence is reflected also in the UN Secretary General's response to the Soviet leader's critique of the UN: Dag Hammarskjöld, 'The International Civil Servant in Law and in Fact (Lecture delivered to Congregation at Oxford University, 30 May 1961)' reprinted in: Wilder Foote (ed.), *Servant of Peace: A Selection of the Speeches and Statements of Dag Hammarskjöld, Secretary-General of the United Nations, 1953-1961* (Bodley Head 1962), 328.

17 See, e. g., Nigel D. White, *The Law of International Organizations* (2nd edn, Manchester University Press 2005), 4-5; Jan Klabbers, *An Introduction to International Institutional Law* (2nd edn, Cambridge University Press, 2012), 287-291.

 DOI 10.17104/0044-2348-2025-2-627

https://doi.org/10.17104/0044-2348-2025-2-627 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-ZA

parties operating through IOs will bear responsibility for the acts or omissions of the latter.[18]

Through all these years there was one conspicuous counter-example: the European Union. Beginning as the European Coal and Steel Community (ECSC) in 1951, this IO had an internal judicial review function. The Court of Justice had the authority to review the decisions of other bodies within the ECSC for compliance with their mandate and to annul decisions that were *ultra vires* or constituted a *détournement de pouvoir*.[19] As Maurice Lagrange, the Advocate General of that court explained, the ECSC was a unique *public* body, distinguishable from other IOs because of its legislative powers which directly affected private law within the member states.[20] But that distinction between direct and indirect effects of an IO's decisions does not make much sense if states are bound to implement IO measures in their legal systems. IOs practically determine people's levels of health and safety, influence their political freedoms, delineate their privacy, and in general shape their life opportunities.[21] And indeed, the distinction did not convince Professor James Fawcett, who had been clearly inspired by Lagrange's opinion and the ECSC treaty, when he proposed that agencies of IOs belonging to the UN family could invoke the same doctrine of a *détournement de pouvoir* as a general principle of law seeking an advisory opinion of the ICJ '*upon the validity of a decision by its executive board*'.[22] But Fawcett

18 See Eyal Benvenisti, 'How the Power of the Idea Disempowered the Law: Understanding the Resilience of the Law of International Organisations' (University of Cambridge Faculty of Law Research Paper No. 29/2023).

19 Art. 33 Treaty Establishing the European Coal and Steel Community.

20 Opinion of Mr Advocate General Lagrange delivered on 10 November 1954 in *French Republic v. High Authority of the European Coal and Steel Community*, Case 1-54, ECLI:EU:C:1954:4, 30: '*the Treaty […] makes institutions responsible for seeing that those rules are complied with. […] Quite clearly all of that body of legislation is by its nature public law legislation*').

21 Joseph H. H. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy', HJIL 64 (2004), 547-562 (549 f.) (describing the emergence of the latest *'layer'* of international lawmaking – the regulatory layer); Benedict Kingsbury, Nico Krisch and Richard B. Stewart, 'The Emergence of Global Administrative Law', Law & Contemp. Probs. 68 (2005), 15-62 (elaborating on the different modalities of global regulation and the challenges they present). On the public authority of IOs see further Armin von Bogdandy, Matthias Goldmann and Ingo Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority', EJIL 28 (2018), 115-145 (116 f.); Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann and Matthias Goldmann (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010), 99-268; Michael Zürn, *A Theory of Global Governance: Authority, Legitimacy, and Contestation* (Oxford University Press 2018), 195-216.

22 James E. S. Fawcett, 'Détournement de Pouvoir by International Organizations', BYIL 33 (1957), 311-316 (311).

https://doi.org/10.17104/0044-2348-2025-2-627 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-ZA

would soon rescind his proposal, opting instead for inter-state negotiation as the modality for the resolution of inter-state disputes regarding IO performance.[23] The optimistic belief that member states would be able to resolve conflicts within IOs through negotiations without the need to recourse to judicial review, coupled with the hesitation of NCCs to intervene in matters of international law, ensured that either direct review (by the ECSC) or indirect review (*Solange I*) remained confined to the EU context.

2. National Courts Rising up to Challenge the International Legal Void

Unfortunately, the formative era for the international law on IOs coincided with a period during which national courts by and large refrained from intervening in their governments' handling of international affairs.[24] In line with their '*misgivings regarding the application of international law*'[25] and their general reluctance to engage with international law, NCCs have shied away from developing domestic restraints on IOs or from questioning the law that the ICJ has prescribed for IOs. National courts endorsed the wide immunities of IOs.[26] Recognising IOs' independent legal personality allowed NCCs to exempt state parties from legal liability for IO failures.[27]

But in the post-Cold War era, the threat to domestic democratic and legal processes from intervening IOs and particularly the Security Council has become palpable. This became an issue in the 1990s when an active Security Council issued resolutions affecting individual rights such as in the context of the international criminal tribunals for the former Yugoslavia and for Rwanda and in the counter-terrorism context. With respect to the first, NCCs were quite hesitant to uphold challenges to the authority of the Security Council

23 James E. S. Fawcett, 'The Place of Law in an International Organization', BYIL 36 (1960), 321-343 (328).

24 Eyal Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts', EJIL 4 (1993), 159-183 (173-175). See also August Reinisch, *International Organizations Before National Courts* (Cambridge University Press 2000), 35-168.

25 Benvenisti, ' Judicial Misgivings Regarding the Application of International Law' (n. 24).

26 Reinisch, *International Organizations Before National Courts* (n. 24), 127-168; Michael Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns', Va. J. Int'l L. 36 (1996), 53-166; Peter H. F. Bekker, *The Legal Position of Intergovernmental Organizations* (Nijhoff 1994), 54-61.

27 *J. H. Rayner Ltd v. Department of Trade and Industry* [1990] 2 A. C. 418 (HL), [1990] 81 ILR 670. See also *International Ass'n of Machinists v. OPEC* 649 F.2d 1354 (9th Cir 1981) (dismissing a suit by a US labour union against OPEC and the individual member States of OPEC under the Sherman Act on procedural grounds).

https://doi.org/10.17104/0044-2348-2025-2-627 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-ZA

to set up international criminal tribunals.[28] However, the Security Council resolutions related to counterterrorism faced considerable resistance by NCCs, apparently because these measures overlooked the fundamentals of constitutionally protected individual rights.[29] This IO activism spelled a potential challenge to the very authority of the NCC as the guardian of the domestic legal order and to democracy. Reliance on the executive branch protection through representing the nation's interests within IO decision-making processes was insufficient. Moreover, and perhaps counter-intuitively at first, NCC review through the *Solange I* doctrine would bolster the same executive when representing the national position at the IO: if our concerns are not met, our court will not implement the decision![30] As a result, in what Doreen Lustig and Joseph Weiler termed '*the Third Wave*' of constitutionalism since 1970,[31] several NCCs have asserted their authority to interpret Security Council Resolutions narrowly, in line with the principles of their national constitutions, upholding indirect challenges to the '*targeted sanctions*' regime.[32] In retrospect, those judgments seem to have persuaded the Grand Chamber of the Court of Justice of the European Union (CJEU) to author its own version of indirect review with *Kadi*.[33] The *Kadi* judgment has proven to be, as Devika Hovell noted, a '*game changer*'[34] because it, in

28 On the challenges in NCCs to the authority of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda see Jean d'Aspremont and Catherine Brölmann, 'Challenging International Criminal Tribunals Before Domestic Courts' in: August Reinisch (ed.), *Challenging Acts of International Organizations Before National Courts* (Oxford University Press 2010), 111-136; Erika de Wet and André Nollkaemper, 'Review of Security Council Decisions by National Courts', GYIL 45 (2002), 166-202.

29 Eyal Benvenisti, 'United We Stand: National Courts Reviewing Counterterrorism Measures' in: Andrea Bianchi and Alexis Keller (eds), *Counterterrorism: Democracy's Challenge* (Hart 2008), 251-276.

30 Juliane Kokott, 'Report on Germany' in: Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds), *The European Court and National Courts – Doctrine and Jurisprudence* (Hart 1998), 77-132; Bruno de Witte, 'Direct Effect, Supremacy, and the Nature of the Legal Order' in: Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 1999), 187-227.

31 Doreen Lustig and Joseph H. H. Weiler, 'Judicial Review in the Contemporary World – Retrospective and Prospective', I.CON 16 (2018), 315-372.

32 For a review of these and other NCC judgments see Antonios Tzanakopoulos, 'Domestic Court Reactions to UN Security Council Sanctions' in: August Reinisch (ed.), *Challenging Acts of International Organizations Before National Courts* (Oxford University Press 2010), 54-76. See also Benvenisti, 'United We Stand' (n. 29), 251.

33 ECJ, *Kadi and Al Barakaat v. Council of the European Union and Commission of the European Communities*, judgment of 3 September 2008, case no. C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461.

34 Devika Hovell, 'Kadi: King-Slayer or King-Maker? The Shifting Allocation of Decision-Making Power Between the UN Security Council and Courts', M. L. R. 79 (2016), 147-166 (148).

https://doi.org/10.17104/0044-2348-2025-2-627 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-ZA

turn, prompted the Security Council to amend its listing and delisting procedures.[35]

Another, less prominent but no less telling example of NCCs successfully reviewing IO decisions and thereby prompting them to improve their decision-making procedures relates to the imposition of labour standards within IOs. Although initially several IOs insulated themselves from any external supervision of their employment conditions, benefitting from the absolute immunity they enjoyed under international law, they eventually had to relent to pressures brought to bear by NCCs. The World Bank established its Administrative Tribunal only after it became clear that the Bank's employment policies could be subjected to challenges in NCCs.[36] In Europe, both NCCs and the European Court of Human Rights (ECtHR) incrementally asserted their authority and their willingness to condition the immunity from suit that the Bank and other IOs had enjoyed (according to the then prevailing norm of international law)[37] on the adoption by the IOs of equivalent protection of labour rights. After initial remarks by the French Court of Cassation in 1995 that raised the concern that such immunity could amount to a denial of justice, a French appellate court in 1997 rejected United Nations Educational, Scientific and Cultural Organization's (UNESCO) plea of immunity by directly invoking the European Convention on Human Rights.[38] In 1999, the ECtHR endorsed this view by suggesting that decisions of domestic courts respecting immunity of international organisations in labour disputes were subject to scrutiny to determine their compliance with European human rights law. According to this court, respect for the immunity of IOs would be conditional on their providing a reasonable alternative means for securing the rights of their employees.[39] In turn, as August Rei-

35 On this see Eyal Benvenisti and George W. Downs, *Between Fragmentation and Democracy* (Cambridge University Press 2017), 157-158. For the impact of *Solange I* on the CJEU's recognition of fundamental rights as part of the general principles of EU law see Nik J. de Boer, *Judging European Democracy* (Thesis, University of Amsterdam 2018), 109-110, 119; Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004), 89.

36 On the events leading up to the establishment of the World Bank Administrative Tribunal see Theodor Meron and Betty Elder, 'The New Administrative Tribunal of the World Bank', N. Y. U. J. Int'l L. & Pol. 14 (1981), 1-28; Chittharanjan Felix Amerasinghe, 'The World Bank Administrative Tribunal', ICLQ 31 (1982), 748-764.

37 On this 'functional immunity' and its rationales see Jan Klabbers, *An Introduction to International Organizations Law* (4th edn, Cambridge University Press 2022), 133-138; Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, Oxford University Press 2015), 570-579.

38 August Reinisch, 'The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals', Chinese Journal of International Law 7 (2008), 285-306 (297).

39 ECtHR (Grand Chamber), *Beer and Regan v. Germany*, judgment of 18 February 1999, no. 28934/95; ECtHR (Grand Chamber), *Waite and Kennedy v. Germany*, judgment of 18 February 1999, no. 26083/94, para. 67.

 DOI 10.17104/0044-2348-2025-2-627

https://doi.org/10.17104/0044-2348-2025-2-627 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-ZA

nisch demonstrates, this attitude adopted by the ECtHR subsequently '*inspired*'[40] various NCCs in Europe to scrutinise the treatment of employees by IOs situated within their own territory.[41] The 2019 judgment of the United States (US) Supreme Court in *Jam v. International Finance Corp*[42] recognising the limited immunity of IOs from national regulation is likely to inspire similar findings by other NCCs.

The third example involves the legal proceedings instituted by international sporting federations such as the World Athletics (formerly known as the International Association of Athletics Federations, the IAAF) or the International Skating Union (ISU) against athletes who, for example, had failed drug tests. According to the private law regime stipulated by the International Olympic Committee (IOC), these proceedings were brought to arbitration under the auspices of the Court of Arbitration for Sports (CAS). The regulations and the arbitral proceedings were subjected to the indirect constitutional scrutiny of national courts,[43] as well as review by the CJEU[44] and the ECtHR.[45] Specifically, several athletes have levelled serious allegations concerning the likelihood that arbitrators who are appointed from a pool determined by the IOC lack impartiality as a result. This has led to reforms in CAS procedures. CAS has issued a statement in which it outlined the reform it introduced in response,[46] although these have been found still wanting in subsequent litigation.

40 Reinisch, 'Immunity of International Organizations' (n. 38), 295.

41 See Eyal Benvenisti, *The Law of Global Governance* (Brill 2014), 245.

42 US Supreme Court, *Jam v. International Finance Corp*, 139 S. Ct. 759 (2019).

43 Oberlandesgericht München (Munich Higher Regional Court), *Pechstein v. International Skating Union*, 15 January 2015, Az. U 1110/14 Kart (accepting jurisdiction against CAS proceedings), <https://openjur.de/u/756385.html>, (German) last access 24 April 2025, summarised and analysed in English in Thaleia Diathesopoulou, The Aftermath of the Pechstein Ruling: Can the Swiss Federal Tribunal Give the Kiss of Life to CAS Arbitration? (28 May 2015), available at SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2607992>; German Federal Court of Justice, judgment of 7 June 2026, KZR 6/15, BGHZ 210, 292; FCC, order of 3 June 2022, 1 BvR 2103/16, NJW 75 (2022), 2677.

44 In the case of *Meca-Medina and Igor Majcen v. Commission of the European Communities*, the CJEU insisted on the applicability of EU law and particularly standards concerning individual rights to sporting institutions (CJEU, *Meca-Medina and Igor Majcen v. Commission of the European Communities,* judgment of 18 July 2006, case no. C-519/04, ECLI:EU:C:2006:492).

45 ECtHR, *Mutu and Pechstein v. Switzerland*, judgment of 2 October 2018, nos 40575/10 and 67474/10; ECtHR, *Affaire Semanya c. Suisse*, judgment of 11 July 2023, no. 10934/21.

46 Statement of the Court of Arbitration for Sport (CAS) on the Decision made by the Munich Higher Regional Court in the case between Claudia Pechstein and the International Skating Union (ISU), 27 March 2015, <www.tas-cas.org/fileadmin/user_upload/Media_Release_Pechstein_07.06.16_English_.pdf>, last access 24 April 2025.

https://doi.org/10.17104/0044-2348-2025-2-627 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-ZA

The final example of indirectly imposing legal obligations on IOs deviates from the *Solange I* model, because the NCC does not invoke the national constitution, but instead interprets *international law* as holding *its state organs* responsible for the acts or omissions of the IO. This is the approach taken by the Supreme Court of the Netherlands, which has found the Dutch forces operating under the UN flag responsible for their failure to protect the Bosnian Muslims they had given refuge to in Srebrenica.[47] In a revolutionary reversal of the traditional concept that IOs are responsible for member states' action – one that is reflected in the International Law Commission's Draft Articles on the Responsibility of International Organisations[48] – this court interpreted international law on *state* responsibility as recognising the state as having responsibility for IO action when the state is in '*factual control of the specific conduct*'.[49] And if the state is responsible, and hence accountable before the Dutch court for the IO's acts and omissions, presumably the state will insist that the IO refrain from harming individuals subject to its control. And if NCCs follow the *Neubauer* approach, the IO would also have to show that it did not infringe the constitutional provisions protecting those individuals.

III. The Proper Limits of Indirect Judicial Review by National Constitutional Courts

Detractors of the *Solange I* approach raise two types of concerns. First, they denounce the very idea of imposing rule of law obligations on IOs, fearing that this would undermine their functionality, burdening them with unnecessary legal requirements, and hence diminish their appeal for the member states that sacrifice their own resources for the common good. Second, they worry that indirect scrutiny by NCCs will not be aimed at the common good but instead will promote sectarian interests. In this part I first discuss both concerns about indirect review by NCCs (sections 1 and 2) and then outline a course of action for NCCs to limit the risks associated with their review (section 3).

47 Hoge Raad (Supreme Court of the Netherlands), *The Netherlands v. Stichting Mothers of Srebrenica*, 17/04567, 19 July 2019, ECLI:NL:HR:2019:1284, <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:HR:2019:1284>, last access 24 April 2025.

48 Art. 61 Draft Articles on the Responsibility of International Organizations.

49 Hoge Raad, *Stichting Mothers of Srebrenica* (n. 47), para. 3.5.4.

 DOI 10.17104/0044-2348-2025-2-627

https://doi.org/10.17104/0044-2348-2025-2-627 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-ZA

1. Does Judicial Review of International Organisations Undermine Their Functionality?

There are obvious concerns about indirectly imposing legal obligations on IOs, even by an impartial review body. Subjecting IOs to review might be counterproductive because it would create gridlock within IOs and require state parties to IOs and IO secretariats to take defensive, additional steps to insulate their policies from judicial scrutiny. They will be even less agile to adapt to new circumstances than they currently are. Rule of law demands could generate time-consuming legal disputes before tribunals and courts that are not necessarily more qualified to promote the collective interest. Imposing such burdens on IOs could lower their appeal and dissuade state parties from setting up and supporting IOs, diverting them to seek alternatives to formal IOs that might be even more problematic from the rule of law perspective: better an imperfect IO than none.

There are several responses to this concern, and their elaborate analysis requires a separate discussion.[50] Suffice here to say that there is nothing inherently trustworthy about IOs that somehow elevate them from mundane venues where policies are discussed and rules are adopted to govern the lives of people. They, too, often perpetuate injustice and exacerbate conflict or simply become dysfunctional. Many IOs are created and steered by powerful state parties that use them to promote their interests while obfuscating their agency, or are captured by commercial interests that use them to evade national regulation that seeks to promote the common good. In fact, the EU offers a model that dispels all those concerns. In contrast to the many failings of IOs, the EU example shines as a unique model for world-wide emulation, one that owes much of its relative success to the rule of law model that it adopted.[51]

Beyond the straightforward argument that IOs must be bound by the rule of law and be more inclusive and egalitarian, the strongest case for imposing legal discipline on IOs is the old functional argument: IOs *need* legal discipline, often externally enforced, in order to be functional. This is especially the case once power is no longer concentrated in one party or a few like-minded states. In a multipolar space, IOs are likely to falter, absent enforceable norms. Coordination problems will not be resolved or will remain brittle, while cooperation will fail due to endemic mistrust.

50 See Eyal Benvenisti, 'Power and Passion in the Law of International Organizations' (forthcoming).

51 Joseph H. H. Weiler, 'The Transformation of Europe', Yale L. J. 100 (1991), 2403-2483.

https://doi.org/10.17104/0044-2348-2025-2-627 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-ZA

The concern that powerful states would lose interest in IOs they cannot control remains. They can be expected to prefer less formal, less transparent alternatives.[52] However, and where multilateralism is key – such as when global security (the UN Security Council) or health (World Health Organization [WHO]) is concerned – there are not always appealing alternatives to formal IOs. In an increasingly multipolar space that operates like the Rawlsian *veil of ignorance*, perhaps even the relatively powerful would opt for regimes that promise to promote collective interests.

But can *judges* be entrusted with IO affairs? The other functionality concern raises doubts about the capacity of judges, and especially judges of constitutional courts, to review the decisions of IOs: judges have little expertise in the running of IOs. They also lack the authority to determine the proper goals that IOs should pursue and how they should pursue them. This is a variation on the well-rehearsed concerns about the non-democratic, countermajoritarian *gouvernement des juges.* But as George Downs and I argued,[53] judicial review should not be taken only for the specific judgment that an NCC renders but rather, and perhaps more importantly, for the direct and indirect ramifications of the judgment. NCC review promotes deliberations within and outside the IOs by providing diffuse stakeholders with information that can benefit them but to which they otherwise would not have had access. The '*countermajoritarian difficulty*'[54] is based on a rather narrow focus: it assumes that there is a zero-sum game between the court and the political branches and that, without the court's interference, the popular vote will have its way. But that is a misleading proposition because it misses the crucial role of courts in generating information. Courts, in the course of their proceedings, generate reliable information – highly crucial in the age of fake news – and make it widely available to a broad range of political actors, as well as to the public, thereby promoting better accountability and more effective deliberation among stakeholders. The courts serve as venues for public deliberation where conflicting claims are examined in structured proceedings. In reviewing administrative and legislative acts for compatibility with the constitution (or, where relevant, for compatibility with international law), courts require that the relevant decision-makers provide public justifi-

52 For such alternatives see, Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012).

53 For more see Benvenisti and Downs, *Fragmentation and Democracy* (n. 35), 168-172.

54 Alexander Bickel, *The Least Dangerous Branch* (Bobbs-Merrill 1962). Karen Alter argues that the countermajoritarian difficulty is less pronounced for international tribunals because they seek to co-opt the support of domestic interlocutors to secure compliance with their judgments: Karen J. Alter, *The New Terrain of International Law* (Princeton University Press 2015), 335-365.

https://doi.org/10.17104/0044-2348-2025-2-627 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-ZA

cations for their acts and afford litigants and *amici* opportunities to contest those reasons. The structured and transparent deliberations in court are closely watched by the public, and for the most part the court's reasoned decisions are carefully scrutinised by legal experts who elaborate on the judgments. In the context of IO review, this function has greater impact than in domestic settings because IOs are controlled by the executive branches of – primarily powerful – state parties, and the involvement of legislatures is rather limited. In the age of global governance, the real countermajoritarian difficulty lies in what are too often impoverished domestic democratic deliberations and the continued domination of most IOs by a handful of powerful state executives. In such circumstances, judicial intervention – particularly when it involves several NCCs acting in unison – has a critical democratic role to play. The result from NCC intervention would rarely end the deliberative process. What is more likely to emerge is an informal process of negotiations that will lead to reform in the law of IOs in general and in practical adjustments in the life of specific IOs.

Can NCCs be such skilful organs that could offer a potentially important institutional counterpoint to IOs? NCCs have at their disposal effective legal tools with which they could restrain power and passion within IOs. My positive response is grounded in administrative and constitutional law doctrines that are common to many if not most democratic countries, doctrines designed to ensure accountability and inclusion in decision-making and compatibility with individual human rights, such as the doctrines of *ultra vires*, abuse of discretion, infringement of the requirements of natural justice, and excessive limitations of individual rights. There is much strength to James Fawcett's insight articulated in 1957, that such doctrines (he specifically referred to the doctrine of *détournement de pouvoir*) are general principles of law.[55] As Lustig and Weiler note, it may be preferable for NCCs to promote international-law-based doctrines, thereby promoting uniformity among member states.[56] But in light of the current lax international law on IOs, it may be easier for NCCs to find firmer grounds in their own constitutions and weave together a web of similar obligations inspired by comparative constitutional law. This way or the other, NCCs adopting the *Solange I* approach could incrementally and collectively develop a rule-of-law-based international law for IOs.

55 Fawcett, 'Détournement de Pouvoir' (n. 22), 311.
56 Fawcett, 'Place of Law' (n. 23), 328.

https://doi.org/10.17104/0044-2348-2025-2-627 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-ZA

2. Can National Courts' Indirect Review Undermine the Independence and Impartiality of International Organisations?

The second concern with the *Solange I* approach focuses on the undue influence that a reviewing national court may have on the independence and impartiality of the IO. As the ECtHR stated, with respect to the immunity of the UN from judicial review, '*[t]he attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments*'.[57] Such influence might even be used to undermine the IO's effectiveness by exempting a state party from its obligation to comply with an IO measure.

The concern about the lack of impartiality makes sense under the assumption that IOs are somehow inherently benign or that they already have effective and independent internal review mechanisms. Under such conditions, indirect review might be superfluous and even counterproductive. But such internal mechanisms are rare, and in fact, the availability of indirect, external review might prompt them or strengthen them.[58] Moreover, it rings hollow to cling to the naïve premise of IO impartiality that NCC review might destabilise once one acknowledges how powerful state parties, or strong commercial lobbies, control IOs and shape their policies, without reliable, independent, internal review mechanisms.[59]

There are two reasons to expect NCCs to be more independent and impartial than internal IO mechanisms in reviewing IO measures and rebuffing pressures from powerful actors. First, judges of NCCs often have guaranteed tenure and therefore may be relatively less dependent on the political branches that appoint, renew terms, and promote IO secretariats or adjudicators. Secondly, NCCs' output – norms, backed by the promise of coherence over time – allows others, including other NCCs, to adjust their expectations accordingly. The precedential value of their decisions holds the key for inter-NCC cooperation, which is crucial for national judges wishing to prevent a backlash by the IO that targets only their jurisdiction. NCCs can form a network of constitutional courts that could collectively withstand IO pressure, and they can also support regional courts such as the CJEU or the ECtHR in their own quest to subject IOs to the rule of law.[60]

57 ECtHR, *Stichting Mothers of Srebrenica v. Netherlands*, judgment of 11 June 2013, no. 65542/12, para. 139.

58 Benvenisti, *Global Governance* (n. 41), 230-237.

59 On IO secretariats and expert bodies that serve the powerful see Eyal Benvenisti, 'Power and Passion in the Law of International Organizations' (forthcoming).

60 Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts', AJIL 102 (2008), 241-274 (272 f.).

https://doi.org/10.17104/0044-2348-2025-2-627 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-ZA

But exercising indirect review also raises complex questions. Obviously, NCCs' indirect review can function as a sword to shape IO policies, and not only as a shield to protect individuals from offensive IO policies.[61] Moreover, such review, typically by those beholden to their executives, might be abused to justify the evasion of the forum state's obligations toward the IO. As we well know from domestic settings, there is, indeed, always the risk that judicial review might be used by those resisting the common interest. Lustig and Weiler acutely point to the dark side of the *Solange I* doctrine, which invites such courts to '*assert one's own values above those of the international community [which] could be seen precisely as the slide from voice to exit*'.[62] These authors note a conspicuous tone that characterises such decisions – an identitarian trope[63] – such as in the Polish judgment of 2010 which celebrated '*the sovereignty of the state and its constitutional identity*',[64] and '*the principle of the Polish Nation's sovereign and democratic determination of the fate of its Homeland*'.[65]

To answer these challenges, I wish to add a normative component that complements the *Solange I* approach. This is the expectation that an indirect NCC review of IOs should be based on a broad view of the NCC's intervention, a view that is '*other-regarding*' in the sense that it requires NCCs to take account of the ramifications of the review on *all* those who are affected by the review, including '*people living abroad*'. I develop this requirement in section 3 below.

3. Normative Constraints on Indirect Review – Exploring '*Other-Regardingness*'

As mentioned above, the FCC has in recent years asserted that the German Basic Law requires the German branches of government to respect certain fundamental constitutional rights of '*people living abroad*'[66] and that these rights '*may be invoked as the basis for establishing duties of protection vis-à-*

61 Reinisch, *International Organizations Before National Courts* (n. 24), 325 (contemplating attempts by Member States, third states or private parties attempting to influence policy decisions of IOs via NCCs).

62 Lustig and Weiler (n. 31), 350.

63 Lustig and Weiler (n. 31), 354 et seq.

64 Constitutional Tribunal of the Republic of Poland, Ref no. K 32/09 (*Constitutionality of the Treaty of Lisbon*), 24 November 2010, <https://trybunal.gov.pl/fileadmin/content/omowienia/K_32_09_EN.pdf>, last access 24 April 2025.

65 Constitutional Tribunal of the Republic of Poland, *Constitutionality of the Treaty of Lisbon* (n. 64).

66 FCC, *Neubauer* (n. 3), para. 175.

https://doi.org/10.17104/0044-2348-2025-2-627 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-ZA

vis people living abroad'.[67] The Court obviously refers to a constitutional duty of German state organs rather than the IO itself. But the constitutional responsibility of a German organ is implicated when it implements the policy adopted by the IO. By extension, the decision of the FCC itself when indirectly reviewing the act of the IO – is subject to the same constitutional obligation toward people living abroad.

Arguably, such an obligation offers the '*antidote*' to the insular approach described in section 2 above as it applies also to the situation in which the court exercises indirect review of IO policies. In other words, the *Neubauer* '*other-regarding*' vision complements the *Solange I* approach by defanging *Solange I*'s main harmful side-effect, namely its apparent invitation to promote national identity and interests over commitment to basic shared values and concerns. The revised – *Solange* cum *Neubauer* doctrine – accepts that NCCs owe, besides their guardianship role toward people living in Germany, also a duty to take account of the impact of the NCC's review on the rights of others, rather than bluntly disregarding them. In other words, NCCs must seek to ensure that the IO policy under scrutiny does not infringe the rights of people living within the jurisdiction, but that in doing so, the rights of those living in other states parties to the IO, as well as the rights of those who live outside the IO member states (to the extent that the latter are affected by the IO measures), are not negatively impacted by the IO measure beyond what is necessary and proportionate. Of course, while the IO is expected to weigh the interests of the constituencies of all member states at par, an NCC is supposed to prioritise the rights of its own citizens, mainly because the constitution would typically be interpreted as protecting them before respecting the rights of others.[68] As a result, the indirect IO review by NCCs would not offer a comprehensive and even-handed remedy to IOs that lack effective direct review mechanisms. The indirect review might enhance the functionality of the IO only as much as the national constitution would permit. But in addition, it could correct severe repercussions visited on people living abroad, such as members of weaker state parties to the IO or citizens of non-member states. Indirectly requiring IOs to consider the effects of their policies on people living within and also beyond the jurisdictions of the IO member states would be a welcome development in the law on IOs.[69]

67 FCC, *Neubauer* (n. 3), para. 175.

68 In *Neubauer* the FCC distinguishes between the level of protection afforded to German citizens and that required for people living abroad, see paras 175-178.

69 On the other-regarding obligations of IOs see Eyal Benvenisti, 'Why International Organizations are Accountable to You' in: Chiara Giorgetti and Natalie Klein (eds), *Resolving Conflicts in the Law: Essays in Honour of Lea Brilmayer* (Brill 2019), 205-221.

https://doi.org/10.17104/0044-2348-2025-2-627 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-ZA

To illustrate the gist of the *Solange* cum *Neubauer* approach, imagine a petition against the relevant German agency brought to the FCC seeking stricter pollution prevention standards for ships entering German ports than the standards adopted by the International Maritime Organisation (IMO) because those standards are deemed too lax and were adopted in an opaque manner, heavily influenced by the shipping industry,[70] thereby infringing on the German citizens' constitutional right to life and physical integrity as well as the right to receive information about decisions affecting them. If the FCC, and NCCs of other member states, were to uphold such a petition, this would likely prompt the IMO to adopt more transparent and inclusive procedures. A consequence of such a change in policy might be an increase in the costs of shipping, affecting the access of foreign, poorer producers to remote markets. The '*other-regarding*' approach will require NCCs to pay attention to such adverse effects and accommodate them, for example by ordering the agency to postpone the imposition of the new standards on products from those remote countries. Conversely, in the (unlikely) case where the IMO standards are higher than the German ones (for example, allowing only double hull tankers as opposed to a single hull German standard), the IO-imposed limitation on the freedom of occupation and property rights of the German tanker owners could be justified by the constitutional obligation to take into account the global effects of oil spills when balancing the competing rights at hand.

Another normative ground for instructing courts to adopt an 'other regarding', rather than an insular outlook is to adhere to standards of review that are shared by the other member states. For example, regional or global standards of human rights protection could serve as the basis of reviewing the functioning of the international organisation. One illustration of this approach is the case of the Second Senate of the FCC in the *European Schools* judgment.[71] In that case, the FCC was invited to review the compatibility of an international organisation ('The European Schools') with the rights of German and other students under the German Basic Law. While accepting

70 Alan Khee-Jin Tan, *Vessel-Source Marine Pollution: The Law and Politics of International Regulation* (Cambridge University Press 2005), 347 f. (explaining how the perceived inefficacy of the IMO can cause states to take unilateral action in reaction to growing concerns for ship safety, environmental protection and maritime security); Harilaos N. Psaraftis and Christos A. Kontovas, 'Influence and Transparency at the IMO: The Name of the Game', Maritime Economics & Logistics 22 (2020), 151-172 (166 f.) (investigating the role played by the shipping industry in the lax standards adopted by the IMO); Md Saiful Karim, *Prevention of Pollution of the Marine Environment from Vessels: The Potential and Limits of the International Maritime Organisation* (Springer 2015), 15-20.

71 FCC, order of 24 July, 2018, 2 BvR 1961/09, BVerfGE 149, 346.

https://doi.org/10.17104/0044-2348-2025-2-627 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-ZA

this authority to review, the FCC referred also to the standards of the European Convention on Human Rights, including the case-law of the ECtHR, because, the court stated, these must be taken into account when interpreting the Basic Law.

It should be pointed out that this other-regarding approach is not shared by all. The US historical interpretation of the spatial scope of its constitution is rather confined, '*stop[ping] at the border*',[72] even with respect to the acts of state officials that operate abroad.[73] This basic rule still stands[74] even though the Supreme Court extended some constitutional protection to the unique situation in Guantanamo.[75] Having said that, as I have argued elsewhere,[76] the '*other-regarding*', approach à la *Neubauer*, and arguably even a stricter commitment towards people living abroad can be said to emerge from the basic principles of state sovereignty that regards sovereignty as responsibility towards humanity in trusteeship. Ultimately, NCCs might be the sole venues where foreigners can vindicate their rights. Even foreign NCCs could provide an effective venue for protecting their rights, at least under the German Basic Law, since, as *Neubauer* acknowledged, people living abroad have standing to demand accountability from German authorities for the latter's compliance with the constitution, and hence, indirectly, with their compliance with IO policies.[77]

---

72 Andrew Kent, 'Citizenship and Protection', Fordham L. Rev. 82 (2014), 2115-2136 (2128). See also Sarah H. Cleveland, 'Embedded International Law and the Constitution Abroad', Colum. L. Rev. 110 (2010), 225-287; see generally Kal Raustiala, *Does the Constitution Follow the Flag?* (Oxford University Press 2009); Neuman (n. 6).

73 US Supreme Court, *United States v. Verdugo-Urquidez*, 494 US 259 (1990) (holding that the Fourth Amendment does not protect foreigners from search and seizure abroad). See most recently *Hernandez v. Mesa*, 589 U. S. ___ (2020) (the '*Bivens*' claim for damages grounded in a violation of constitutional rights is not available in the context of a cross-border shooting by a US Border Patrol Agent).

74 Brendan O. Beutell, 'Hard Cases Make Bad Law: Extraterritorial Application of the United States Constitution', W. Va. L. Rev. 122 (2019), 587-630 (604-605); Cleveland (n. 72); Christina Duffy Burnett, 'A Convenient Constitution: Extraterritoriality after *Boumediene*', Colum. L. Rev 109 (2009), 973-1046 (982-983). For a comparative overview see Galia Rivlin, 'Constitutions Beyond Borders: The Overlooked Practical Aspects of the Extraterritorial Question', B. U. Int'l L. J. 30 (2012), 135-228. See also Chimène I. Keitner, 'Rights Beyond Borders', Yale J. Int'l L. 36 (2011), 55-114; Adam Shinar, 'Israel's External Constitution: Friends, Enemies and the Constitutional/Administrative Law Distinction', Va. J. Int'l L. 57 (2018), 735-768.

75 US Supreme Court, *Boumediene v. Bush*, 553 US 723 (2008), 761-762 (determining that non-citizens detained at Guantanamo Bay have the constitutional privilege of *habeas corpus*).

76 Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', AJIL 107 (2013), 295-333 (323-333).

77 FCC, *Neubauer* (n. 3), paras 101, 174-175.

https://doi.org/10.17104/0044-2348-2025-2-627 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-ZA

Of course, this intersection between *Solange*'s and *Neubauer*'s other-regardingness leaves many questions open, among them identification of precisely which are the communities whose rights must be taken into account (the '*all affected*' question),[78] whether other-regardingness as part of *Solange*-type indirect review of IOs is similar or different than other-regardingness in the direct review of national standards (what *Neubauer* was about), how to balance the competing claims and interests of the communities whose rights must be taken into account, and whether to altruistically respect the rights of people living in countries whose NCCs refuse to reciprocate in this collective project of securing the rule of law within IOs. These questions are likely to become ubiquitous as the responsibility of national actors for internal decisions that have external effects becomes increasingly dominant in constitutional and international human rights law.

IV. Conclusion

Lustig and Weiler acutely point to the double-edged sword that is the *Solange I* doctrine: while it can be used by a truly '*other-regarding*' national court that seeks to improve the functioning of an IO, it could at the same time be misappropriated by an NCC relishing the opportunity to '*assert one's own values above those of the international community*'.[79] This essay proposed that the latter concern can and should be met by supplanting *Solange I* with *Neubauer*'s recognition of a constitutional obligation toward people living abroad, be they residents of the member states of the reviewed IO, or people living in other countries.

NCCs have contributed significantly to the development of international law by filling yawning gaps in various fields of international law, ranging from environmental protection[80] and natural resources management[81] to command responsibility in wartime,[82] and immunities of foreign states and state officials.[83] *Solange I* stands out as a model for a unilateral judicial

78 Benvenisti, 'Sovereigns as Trustees' (n. 76), 318.

79 Lustig and Weiler (n. 31), 350.

80 *Trail Smelter Arbitration (United States v. Canada)*, Award, 11 March 1941, UN RIAA Vol. III, 1963-1965 (inspired by US Supreme Court judgments on inter-state disputes).

81 On the contribution of decisions of the US Supreme Court in apportionment disputes between US states to the crystallisation of the law on freshwater see Stephen McCaffrey, *The Law of International Watercourses* (3rd edn, Oxford University Press 2019), 291.

82 US Supreme Court, *In re Yamashita*, 327 US 1 (1946).

83 UK House of Lords, *In Re Pinochet*, judgment of 15 January 1999, UKHL 17. And see further Odile Ammann, *Domestic Courts and the Interpretation of International Law* (Brill Nijhoff 2020), 143-144; and the various contributions to the symposium on 'Domestic Courts as Agents of Development of International Law', LJIL 26 (2013), 531-699.

https://doi.org/10.17104/0044-2348-2025-2-627 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-ZA

intervention that over the years contributed positively to the bolstering of the rule of law in the EU. There is no reason to suspect that NCCs will fail to contribute in a similar way to a robust international law on IOs that enhances the functionality of IOs while securing their inclusivity and accountability.

 DOI 10.17104/0044-2348-2025-2-627

https://doi.org/10.17104/0044-2348-2025-2-627 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-ZA