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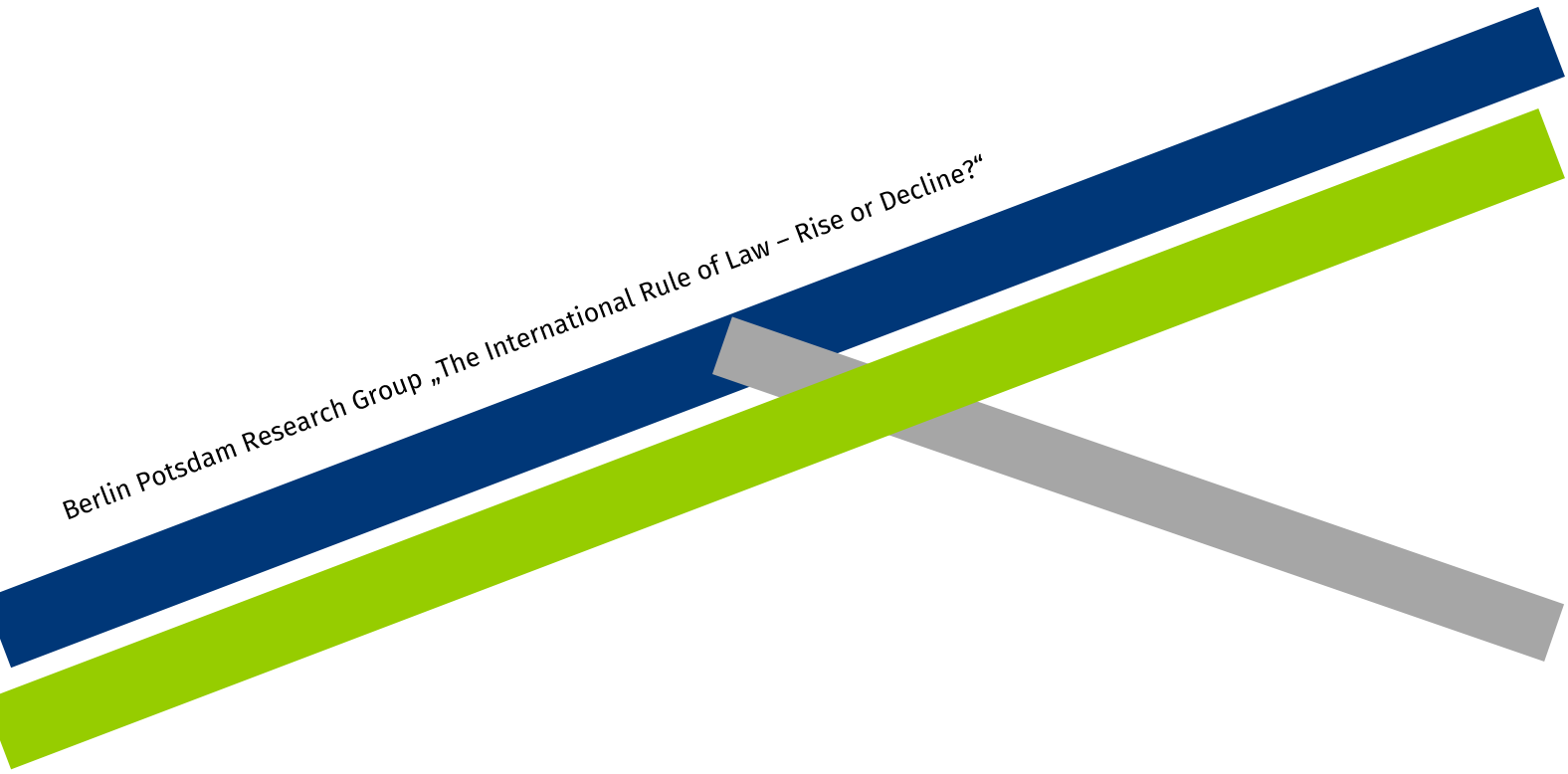

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Neither Dr Jekyll, nor Mr Hyde, just a national judge... National courts' strategies of resistance to international law*

Apollin Koagne Zouapet[1]

Abstract:

The development and expansion of international law have also led to greater demands on national courts to interpret and apply international law. However, while this increased demand has confirmed the role of the domestic court as an organ of international law, it has also led to a tension between its tasks as guardian of the rule of law at the domestic level and as guarantor of compliance with the international rule of law. The Kadi case of the European Court of Justice (ECJ), the Solange case of the German Constitutional Court and the Mara'abe case of the Israeli High Court of Justice (HCJ) are some of the symbols of this tension and illustrate the techniques and strategies developed by the domestic courts to apply international law while preserving the domestic legal order. This paper analyses the application of international law by domestic courts and tries to identify the techniques and strategies used by them to oppose, circumvent, undermine or resist international law, sometimes arguing that it is necessary to develop it. In so doing, the paper highlights the difficulties of role splitting (dédoublement fonctionnel) as conceived by Georges Scelle: even in its application of international law, the domestic judge never ceases to be the agent of a domestic legal order whose interests he or she has at heart.

Keywords:

Role splitting, Dualism, National Interest, Foreign Legal Policy, Legitimacy, Fragmentation.

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Contents:

1. Introduction

In a decentralised international society without a judge with compulsory jurisdiction to sanction the violation of law by the main actors, namely the States, the international legal system has always heavily relied on domestic courts as agencies of enforcement of international law. Indeed, lacking a third-party instance or an agreement, the exercise of the power of auto-interpretation of international law by States is often the only one. This means that domestic courts as State organs are the 'natural' and 'immediate' judges of international law, 'the ones who will interpret and apply international law when no centrally instituted judge exists'.[1] National courts may thus compensate for the lack of international courts as a systemic force in the protection of the international rule of law; strengthen the 'structural weaknesses of the international legal system' as a/the key organ 'to perform the international function of upholding rights and duties grounded in international law'.[2]

Consequently, international law, or more exactly international lawyers, place particular expectations on the office of the national judge. In a new contemporary Scellian logic of 'role splitting',[3] the domestic judge is expected to perform his/her functions not only as an organ of the State but also as an 'agent' of international law, 'in a Dr. Jakyll and Mr Hyde manner, exhibiting a split personality'.[4] Domestic courts are thus not just 'impartial enforcers of international law' but also '"gatekeepers", controlling the effects of international law at the domestic level and ready to cushion its impact if deemed necessary'.[5] By establishing them as 'natural judges' of international law, the international legal order expects national courts to play a greater role, compared to the executive and legislative branches, in the implementation and enforcement of international law by States. Indeed, on the international level, the international rule of law is usually described as requiring first and foremost 'compliance with international law'.[6] In that vein, domestic courts are, in the words of Tzanakopoulos, 'at one and the same time the point of first contact and the last time of defense, the last opportunity for the State to comply with its international obligations'.[7] The national judge is expected, in a national context of separation of powers and as guarantor of the rule of law, to 'police the actions of political branches for compliance with the law'.[8]

Domestic courts are thus expected to have a greater allegiance to international law and a greater internationalist spirit than other State powers and institutions. This has resulted in calls for national courts to act as 'guardians' and 'agents of the international rule of law, impartially enforcing international law without regards for national interests'.[9] Some authors pleaded consequently on domestic courts to act as 'guardians of the international legal order', the position of trust imposing

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[1] Antonios Tzanakopoulos, 'Domestic Courts in International Law: the International Judicial Function of National Courts' (2011) 34 Loyola Comparative Law Review 133, 151.

[2] Veronika Fikfak, 'Judicial Strategies and their Impact on the Development of the International Rule of Law' in Machiko Kanetake and André Nollkaemper (eds.), *The Rule of Law at the National and International Levels Contestations and Deference* (Hart Publishing, Oxford and Portland, Oregon, 2016), 50.

[3] See Antonio Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (dédoublement fonctionnel) in International Law' (1990) 1 EJIL 210, 225.

[4] Ibid., 213.

[5] Raffaela Kunz, 'Judging International Judgments Anew? The Human Rights Courts before Domestic Courts' (2019) 30 EJIL 1129, 1131.

[6] Report of the Secretary General, 'Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels' UN Doc. A/66/749, 16 March 2012, paras. 11-13; '2005 World Summit Outcome' UN Doc. A/RES/60/1, 24 October 2005, para. 134.

[7] Tzanakopoulos, 'Domestic Courts in International Law', supra note 1, 152.

[8] Ibid., 141; see also Fikfak, supra note 2, 45-46.

[9] Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 ICLQ 57, 59.

upon domestic courts the 'duty of strict impartiality', or serving 'the cause of world order without regard to national affiliation'.[10] In such a context, any 'deviation' from international law by domestic courts quickly appears to be a more serious and dangerous attack on the international legal order. This may explain the extensive literature on each of the decisions discussed below.[11] While the *Kadi* and *Ferrini* cases have attracted attention on the problem of judicially challenging international law in the domestic order, there are in fact many more situations where acts of international organisations, decisions of international courts or rules of customary international law are questioned and challenged before and in national courts. The main objective of this paper is to capture some patterns of this trend of domestic courts resistances to international law in a systematic way.

This research will be conducted primarily in the context of, and in reaction to, the discourse of international lawyers on international law and on what the role of national courts should be. Indeed, the discourse on international law, as presented above, sometimes loses sight of the specific nature of domestic courts, which makes the Scellian approach difficult to achieve in practice. As studies have shown, national judges see themselves first and foremost as national agents. Whatever their sympathy for international law and the consolidation of a possible international rule of law, national judges have to take into account national interests and the competitive space in which their State operates.[12] In rendering their decisions, domestic courts are then aware that they participate in the development of relevant State practice for the determination of customary law on the one hand, and on the other hand that they are an auxiliary means of determining the rules of law following Article 38 (1) (d) of the Statute of the International Court of Justice (ICJ).[13] National courts thus face what has been presented as a 'dilemma'.[14] On the one hand, the call to ensure compliance with the international rule of law, and on the other hand the call to ensure their constitutional duty to promote and ensure compliance with the rule of law as understood and defined domestically. The two requirements may be contradictory and ask for a difficult choice on the part of the judge, the reliance on foreign and international law being perceived in some cases as into tension with the value of national sovereignty. Domestic courts are, therefore, turned between the 'service' of international law within the domestic realm and the 'dictate' of applicable domestic law.

By analysing strategies and techniques for the application of international law, mainly 'deviant', this paper allows understanding how judges resolve this dilemma and subsequently invites a reconceptualisation of the role of the national judge in the application and development of international law. It argues that resistance to what is seen as a mainstream approach to international law does not necessarily amount to 'undermining' international law, but can be a contribution to the development of international law. Indeed, not all "resistance" or what is perceived as such necessarily leads to a challenge to international law itself. 'Resistance' or what is sometimes wrongly characterised as 'deviation' is part of the necessary space for dialogue that must exist between national bodies and international institutions to develop international law. While there are undoubtedly "contestations", or in some cases "disregard" of international law which result in undermining international law and calling into question the rule of law in the international legal order, it is important to be able to distinguish these from "oppositions" which are less problematic

[10] See Hersch Lauterpacht, 'Decisions of Municipal Courts as a Source of International Law' (1929) 10 BYBIL 65, 93; Richard Falk, *The role of Domestic Courts in the International Legal Order* (Syracuse University Press, New York, 1964), 4.

[11] See notes 22 and 23 below with accompanied text.

[12] See Eyal Benvenisti, 'Reclaiming Democracy: the Strategic Uses of Foreign and International Law by National Courts' (2008) 102 AJIL 241.

[13] On this 'Janus-faced nature' of domestic court decisions, Roberts, supra note 9, 61-64.

[14] Fikfak, supra note 2, 46; Kunz, supra note 5, 1157.

because they contest a specific interpretation or development of the rule of international law and thus constitute more of a counter-proposal than a negation of the rule of law. It is to this nuance in the distinction that the present paper invites, which by highlighting the different techniques and strategies of resistance of national judges to international law shows the constancy and permanence of some of these techniques and strategies in the work of domestic courts applying international law.

There is indeed nothing novel in the practices of States and domestic courts in avoiding and resisting the domestic application of treaties and decisions of international organisations and international courts.[15] What is new, however, is the increasing tendency of national judges to use value arguments, especially from the constitution, to avoid, challenge and reject international law, sometimes against the will of the political bodies that wish to give effect to the international rule domestically. As noted, 'the old questions are not yet settled but seem to return with a vengeance'.[16] Similarly, this chapter will demonstrate that 'resistance' to international law is neither a specificity of non-democratic States nor the prerogative of non-independent national courts. It is a common feature of virtually all domestic courts, which use it to varying degrees depending on the nature of the issues at hand and the socio-political context in which they are seised.

Moreover, thinking about the 'deviations' of national courts from international law implies in a way admitting as a premise the 'convergent thesis'. By referring to the idea of going out of the normal direction, of an abnormal change of position, 'deviation' does not necessarily embody something positive. The premise in the 'convergent thesis' is the existence of a pre-existing, transcendental international law that domestic courts are supposed to seek out and apply. There would be a universal international law already constructed that the domestic court could challenge if it adopted a national approach and did not interpret and apply international law as the international court would have done. 'International law thus looks to the judgments of domestic courts to solidify meaning'.[17] The supporters of that approach seek to ensure a unified and coherent international legal system, and they are convinced that coherent interpretation and application of the law by national courts, in a hierarchical structure that puts international tribunals as its apex, is essential for the unity of a shared system of law.[18] In contrast to this thesis, the author of this paper, without denying the need for universality and unity of international law, remains convinced that these characteristics are constructed rather than given.[19] Universality and unity of international law are an objective, a horizon to which national judges contribute, including through their actions of resistance, or 'deviance' from what may appear to be 'orthodoxy' in international law. 'Deviation', 'contestation' or 'resistance' can be constructive. As pointed, sometimes 'domestic courts challenging international

[15] See the examples underlined in Machiko Kanetake and André Nollkaemper, 'The International Rule of Law in the Cycle of Contestations and Deference' in Kanetake and Nollkaemper (eds.), supra note 2, 447.

[16] Helmut Philipp Aust, Heike Krieger and Felix Lange, 'Introduction: the Domestic and the International Context' in Helmut Philipp Aust, Heike Krieger and Felix Lange (eds.), *Research Handbook on International Law and Domestic Legal Systems* (forthcoming).

[17] Karen Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 N.Y.U. J. Int'L L. & Pol. 501, 517; see for example Cassese asserting that the only conceivable reason that States would 'resist international rules in the name of their sovereign prerogatives [is] in order to pursue their short term national interests'. Antonio Cassese, 'Towards a Moderate Monism: Could International Rules Eventually Acquire the Force to Invalidate Inconsistent National Laws?' in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (OUP, Oxford, 2012), 189.

[18] See for presentation and criticism of the 'convergence thesis', Olga Frishman and Eyal Benvenisti, 'National Courts and Interpretive Approaches to International Law' in Helmut Philipp Aust and Georg Nolte (eds.), *The Interpretation of International Law by Domestic Courts. Uniformity, Diversity, Convergence* (OUP, Oxford, 2016), 317; Knop, supra note 17.

[19] See Apollin Koagne Zouapet, 'Regional Approaches to International Law (RAIL) Rise or Decline of International Law' (2021) 46 KFG Working Paper Series.

judgments do so not only on the basis of a purely national law assessment, but also in such a way as to render their decisions more tolerable from the standpoint of international law itself'.[20]

Due to their special position, national courts are, therefore, not only 'agents' for the application of international law but also actors in its development. These are two inseparable functions that are consubstantial with the functions of any judge in international law, including national judges as 'ordinary' judges of international law.[21] However, the borderline between these two functions is not always clear and it may be difficult to distinguish clearly between violation and development of international law by the domestic judge. Making such a distinction is not only difficult in many cases but is also a highly subjective task. It depends on the observer's view and conception of international law and the role that national courts should play in the international legal order. For example, when the Court of Justice of the European Union (CJEU) paralyses the application of a Security Council resolution on the fight against terrorism because it does not respect fundamental rights which are considered essential in the European legal order, is this a case of 'resistance' to international law as derived from the United Nations Charter,[22] or is it a reinforcement of the rule of law in international society by ensuring the respect of human rights by international institutions? Similarly, when in the *Ferrini*[23] and *Jones*[24] cases, the Italian and British courts diverge sharply on the content of customary international law relating to immunities and their role in its development, which of them should be considered as 'undermining' international law? What may appear as 'resistance' and 'undermining' of international law to some may to others be an effort to adapt and evolve the international rule of law.

Resistance can thus range from a total rejection of international law by ignoring it or dismissing it as inapplicable, to an assertion of allegiance to international law accompanied by a refusal of a certain interpretation considered, rightly or wrongly, as incorrect and/or inappropriate. The International Law Association (ILA) Study Group on the issue speaks of posture or strategy of avoidance (where the question of international law is altogether dodged); posture or strategy of problematic or partial accommodation (rather than full alignment); and the posture or strategy of contestation (where domestic law is ostensibly used as a method to contest existing and acknowledged international law).[25] This paper will present each of these strategies and techniques, addressing, in turn, the undermining of international law by its ignorance by national courts; the rejection of international law by national judges in the name of safeguarding the domestic legal order; and cases of resistance by national courts due to a divergent interpretation and conception of international law and the international legal order. As resistance to international law is increasingly illustrated in the context of a simmering conflict between domestic and international courts, a specific section will be devoted to this, even if conflict often only becomes visible (and thus all the other strategies) if an international court decided differently on the matter. It should be stressed, however, that the strategies and techniques presented are not exclusive to each other, nor are they always identifiable under a single label. For example, a value argument for an interpretation that is presented as evolutionary may also be justified by the desire to support the country's foreign policy. Similarly, the

[20] Fulvio Maria Palombino, 'Compliance with International Judgments: Between Supremacy of International Law and National Fundamental Principles' (2015) 75 ZaöRV 503, 508.

[21] See Tzanakopoulos, 'Domestic Courts in International Law', supra note 1, 136.

[22] European Court of Justice, Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

[23] Court of Cassation (Sezioni Unite) (Italy), *Ferrini v Federal Republic of Germany*, Judgment, n° 5044, 6 November 2003, registered 11 March 2004.

[24] UK House of Lords, *Jones v Saudi Arabia* [2006] UKHL 26.

[25] ILA, 'Preliminary Report Principles on the Engagement of Domestic Courts with International Law', available on https://www.ila-hq.org/index.php/study-groups?study-groupsID=57, last accessed 13 April 2021.

argument of imperfect ratification can also be used to dismiss decisions of an international court as intrusive and excessive.

Three final points should be made at the outset of this study. Firstly, the present study focuses mainly on the strategies and techniques of resistance by national courts to what is presented as the applicable rule of international law. Less than the result obtained, what is at the heart of the study is the process, the reasoning carried out by the national judge to avoid or paralyse the application of a rule of international law, to oppose a specific interpretation of it, or to reject the decision of an international court. It is therefore to this object of study that the proposed taxonomy responds, which is not only limited by the chosen perspective but, above all, is far from being exclusive of another reading grid based, for example, on the motivations or the legal reasonings of the domestic courts.

The second precision, of a methodological nature, concerns the unavoidable limits of the general conclusions that the paper intends to draw from a few examples that are considered representative. The method applied is based on case-law analysis taking court decisions as a starting point for the legal analysis of how national courts 'resist' international law. However, as has been pointed out by all those who have studied the issue, domestic decisions dealing with international law issues are not necessarily easier to find than other national judgments. A study such as this one, requiring a comparative approach, is inevitably limited by language barriers and the author's knowledge of different legal systems, 'meaning that such references are usually not truly representative of the full range of systems and approaches'.[26] The method is thus empirical without claiming to offer a systematic account of the practice of all the domestic courts and tribunals in the world. Starting from a number of cases that have attracted the attention of and been dealt with by internationalist legal doctrine (*Kadi, Ferrini, Mara'abe, Solange*...), a provisional taxonomy was established. Subsequently, research was carried out to identify other decisions that would invalidate or confirm the initial postulates and thus refine the proposed categories. The approach is thus both empirical-inductive, with the analysis of a number of cases leading to the formulation of categories, and deductive, with the formulation of provisional categories leading to the search for examples and counter-examples. Notwithstanding the above-mentioned reservations about representativeness, great effort has been made to research the decisions of national courts in different regions of the world, taking care to include States that are perceived as democratic or less democratic.

The last clarification relates to the CJEU. Because of the specific nature of the European legal order, it will be considered both as the domestic court of a supranational order and as an international court in its relations with the legal orders of the EU Member States. Indeed on one hand, with the respect to the treatment of international law, excluding EU law itself, scholarship has long treated the CJEU like a domestic court in the sense that it is primarily addressing the same kinds of questions faced by domestic courts.[27] On the other hand, the national courts, and in particular the constitutional courts, have developed strategies of resistance and avoidance of the case law and decisions of the CJEU, indicating that they perceive it as an international court, of a special type, but

[26] Roberts, supra note 9, 88; see also David Sloss, 'Treaty Enforcement in Domestic Courts A Comparative Analysis' in David Ross (ed.), *The Role of Domestic Courts in Treaty Enforcement A Comparative Study* (CUP, Cambridge, 2010), 2.

[27] See for example Armin von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law' (2008) 6 I.CON 397; Mario Mendez, 'The Application of International Law by the Court of Justice of the European Union' in Curtis A. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP, Oxford, 2019), 601.

still outside their legal order. The analysis of these strategies is necessary to have a complete overview of the field that this paper aims to cover.

2. Ignoring and disregarding International Law

As mentioned above, to be effective, international law needs the support of the national judge who, in certain cases and in the absence of an international judge with compulsory jurisdiction, is the only one able to ensure that the State respects the rules of international law. By ignoring it, the national judge contributes directly to its weakening by allowing States to free themselves from their obligations under international law. This ignorance of international law is not always deliberate, however, but could simply be the result of a lack of training or information on the part of local judges who are unaware of the existence of international rules on a specific issue or lack the linguistic or technical capacity to apply international law. In addition to the traditional techniques of deliberate avoidance of international law by national courts, which will be presented in the second paragraph, the first paragraph of this section will briefly discuss the 'unconscious', because unintended, undermining of international law by national courts that 'err' in ignorance.

a) Ignorance Through Lack of Knowledge of International Law

To fulfil its role as guardian of the international rule of law and enforcer of international law, the national judge must not only be equipped with the technical skills and tools to apply international law directly in his/her courtroom but also have access to information and case law on international law. Without adequate training and access to sources, due part to language barriers, the invocation and application of international law may remain a dead letter, despite the goodwill of the courts concerned. In the *Lekaj*[28] and *Scorpions*[29] cases, for example, the highly questionable application of international humanitarian law (IHL) by the Serbian War Crimes Chamber (WCC) is certainly the result of a desire not to offend strong nationalist sentiment on a sensitive issue (see below IV) but also of the very poor expertise of the judges concerned in IHL. Indeed, despite the fact that the factual and legal issues discussed before the WCC were discussed extensively before the International Criminal Tribunal for the former Yugoslavia (ICTY)[30] and then before the ICJ,[31] references to customary international law and international jurisprudence are sorely lacking in these decisions, even though the Serbian Criminal Code prescribes the application of relevant international law. This poor application of international law has been explained by a lack of skills and deference to a legal tradition that often sees international law merely as a required referencing formality. The 'WCC's poor application of international law is thus due to lack of expertise rather than as a result of a negative stance towards international law or the ICTY, on whose experience and evidentiary material the WCC relies heavily'.[32]

This insufficient knowledge of international law due to a lack of training also helps to explain, at least in part, the poor application of international law by Chinese judges. Indeed, for a long time and before the adoption of the Judge Law in 1995, there were no mandatory qualifications to be appointed

[28] War Crimes Chamber of the Belgrade District Court, *Anton Lekaj,* case n° K.V. 4/05, 1st Instance Verdict, Judgment, 18 September 2006.

[29] War Crimes Chamber of the Belgrade District Court, *Slobodan Medić* et al. (Scorpions case), case n° K.V. 6/2005, Judgment, 10 April 2007.

[30] See International Criminal Tribunal for the former Yugoslavia (ICTY), Trial Chamber, *Prosecutor v Slobodan Milošević*, ICTY IT-02-54; ICTY, Appeals Chamber, *Prosecutor v Duko Tadić*, ICTY IT-94-1-A.

[31] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro),* Judgment, ICJ Reports 2007, 43.

[32] Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (OUP, Oxford, 2014), 65.

as a judge in China. Many officials, members of the Chinese Communist Party (CCP) or the military were appointed as judges, sometimes without having any degree or qualification in law. It is difficult to imagine that judges with such a profile would be able to know and apply international law. In addition to this lack of technical skills, there is sometimes a language barrier: most Chinese judges do not have the language skills to read and understand the many treaties ratified by China, of which only the English text is authentic, or the decisions of international courts which are rarely translated into Chinese. Therefore, the ability to apply international law depends largely on the legal culture of the judge concerned and his/her openness to the world. It has thus been possible to draw up the geography of the invocation and application of international law in the country: nearly all the application of international law happens in the Eastern part of China, especially in Shanghai, Beijing and Guangdong, and judges in the Western areas, for instance, Xinjiang and Yunan, hardly have the experience of applying international law.[33]

The same is true for Russia, where the fact that most European Court of Human Rights (ECtHR) judgments are in English and French, sometimes with no official translation into Russian, and rendered in cases against States other than Russia made it more difficult for Russian courts to apply the concepts developed by the ECtHR.[34] The same explanation is given for the weak consideration of the ECtHR case law by the Czech courts. Very few judges in the country can read decisions of the Court in French or English. Although a few specialised journals translate into Czech certain decisions of the ECtHR that are considered important with commentaries, this represents only a small part of the Strasbourg Court's case-law to which Czech judges generally do not have access. This is also true for the case-law of the CJEU.[35]

The general state of knowledge of international law is indeed a key factor in the ability of national courts to apply and enforce international law. This capacity depends not only on the knowledge of judges but also on the knowledge of lawyers and other actors in the judicial chain. But as Jan Wouters regretfully noted, the general state of knowledge in many countries is 'often depressingly low and a certain prejudice towards international law seems to prevail. Many practitioners consider it as something completely academic that falls outside their daily bread-winning practice. Lawyers often do not even have the insights or the feeling that certain issues of (…) international law are underlying a case. Even when they do realize there is an issue, they would not really feel confident enough to invoke it before the national court, which to some extent amounts to a mutually reinforcing disregard to (…) international law. Lawyers also sometimes do not dare to invoke it, because they fear the judge will consider it a weak argument and either declare it inadmissible or simply refuse the claim'.[36] This pusillanimity of lawyers and other actors, leading to undermining international law in the domestic

[33] Congyan Cai, 'International Law in Chinese Courts' in Bradley (ed.), supra note 27, 549, 555-556; the Supreme People's Court (SPC) recognized the lack of professional competence of judges and proposed in 2015 a variety of measures as the establishment of Judicial Selection Committees at the national and provincial levels, more appointment of attorneys, legal scholars as judges, and more cooperation with law schools. In 2000, it directed judges to improve their knowledge of international law; ibid.

[34] Vladislav Starzhenetskiy, 'The Execution of ECtHR Judgments and the "Right to Object" of the Russian Constitutional Court' in Marten Breuer (ed.), *Principled Resistance to ECtHR Judgments – A New Paradigm?* (Springer, New York, 2019), 245, 251.

[35] Jan M. Passer, 'Les Rapports entre les Cours Tchèques, la Cour de Justice des Communautés Européennes et la Cour Européenne des Droits de l'Homme: Entre Loyauté et Résistance' in Emmanuelle Bribosia, Laurent Scheeck and Amaya Ubeda De Torres (eds.), *L'Europe des Cours Loyautés et Résistances* (Bruylant, Bruxelles, 2010), 317, 319-320.

[36] Jan Wouters, 'Customary International Law before National Courts: Some Reflections from a Continental European Perspective' (2004) 4 Non-State Actors and International Law 25, 36.

legal order, is exacerbated when the judge systematically adopts a strategy of avoidance and dismissal of international law.

b) Intentional omission: Avoidance Strategies of International Law

Through these strategies, national courts aim either to avoid a particularly sensitive issue on which they do not wish to hinder the action of the government or on the contrary to force the other powers of the State apparatus to adopt a particular posture on the international scene. This second, rather rare, approach, which has been illustrated above all in the context of the implementation of the United Nations Security Council sanctions regime in the fight against terrorism, allows national courts to participate indirectly in foreign policy by indicating the principles that the state must defend in the context of the adoption of rules of international law. In general, however, the use of avoidance strategies falls under the first hypothesis. By resorting to them, the judge avoids pronouncing on the legality of a State action or policy. By refusing to apply international law to a situation, the judge indicates that he/she has doubts about the conformity with international law of the State act in question but does not wish to denounce it as such, while also refusing to legitimise it. This is why some authors consider these strategies to be the lesser evil: instead of issuing a decision that misuses international law for nationalistic interests, the judge, by refraining, avoids setting a bad precedent that could be taken up and copied by other national judges.[37]

The technique that most closely follows this logic is for the national judge to ignore the international law arguments raised by a party. The judge chooses not to rule on the international law grounds put forward by a party to criticise a State act or action and decides the dispute on other domestic law grounds. This is what the Beninese Constitutional Court does when it prefers to review the validity of a law with a principle of constitutional value, rather than in relation to the provisions of the African Charter on Human and Peoples' Rights (ACHPR), which are expressly invoked by the applicant.[38] It also condemned acts of torture without explicitly referring to the Convention against Torture, to which the Beninese State is a party.[39] In the same vein, the First Chamber of Traditional Law of the Cotonou Court of Appeal, to rule out local customary practices that excluded women from inheriting property, preferred to refer to the 'texts in force' to which these practices were contrary rather than to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[40] The Italian Constitutional Court has also followed a similar approach by referring exclusively to the Constitution to the detriment of the European Convention on Human Rights (ECHR), which is excluded from the standard of review for assessing domestic acts.[41]

The same logic, but in the opposite direction, is followed by Russian judges, by laconically dismissing the parties' arguments based on the European Convention on Human Rights (ECHR) and the relevant case-law of the ECtHR, copies of which parties took the time to annex to their application. The judges refused to take into account these points of international law and therefore limited their examination to the sole angle of domestic law, arguing in one case that the case law invoked is not applicable because Russia is not a party to the case decided by the ECtHR; and in the other, that the facts of the case are different from those brought before the ECtHR without specifying the nature of

[37] See Weill, supra note 32, 195-196.

[38] Cour Constitutionnelle (Benin), Decision n° DCC 06-74, 8 July 2006; see also Decision n° DCC 07-175, 27 December 2007.

[39] Cour Constitutionnelle (Benin), Decision n° DCC 99-011, 4 February 1999; Decision n° DCC 98-065, 5 August 1998.

[40] Cour d'Appel de Cotonou, First Chamber of Traditional Law, Judgment n° 102, 24 October 2001; Judgment n° 077, 4 July 2001; Judgment n° 182/97, 18 November 1997; Judgment n° 007, 21 January 1998.

[41] Constitutional Court (Italy), Decision n° 278/2013, 18 November 2013; Decision n° 162/2014, 9 April 2014; Decision n° 286/2016, 8 November 2016.

the differences.[42] In these cases, the judge seems to avoid interfering in the debate on the character of certain international conventions and their impact on the domestic legal order. One study has shown that national courts in French-speaking African States, for example, are more inclined to apply international law, and even to be more active in doing so, when this application concerns procedural or peripheral issues without any real risk of clashing with the legislature or the executive.[43]

This strategy has also been used extensively by the Israeli High Court of Justice (HCJ) to avoid ruling on the sensitive issue of Israeli settlements in the occupied Palestinian territories. The first technique is to declare an issue of international law irrelevant to the dispute before it. Contrary to the ICJ, which had considered that the question of the international legality of the settlements in occupied territory was a fundamental question for ruling on the legality of the wall,[44] the HCJ persistently avoids addressing the issue, ruling that the legality of the settlement is an irrelevant question.[45] The second technique is for the HCJ to rely increasingly on domestic law rather than international law to assess the legality of acts and facts that are nevertheless referred to it for alleged violations of international law. Avoiding the field of international law, the Court prefers to limit its analysis to Israeli administrative and constitutional law, for facts relating to the occupied Palestinian territories (OPT), in principle outside the territorial scope of Israeli domestic law.[46] Indeed, the framing of the Israeli occupation as a special situation, raising issues that customary international law of occupation cannot resolve,[47] has enabled the High Court to apply Israeli constitutional law as the legal framework for judicial review of violations of rights in the OPT in lieu of international law. Thus, in *Adalah,* the HCJ discussed the constitutionality of a law that limited Palestinians in 'conflict areas' from bringing tort claims against Israel. It thus avoids the inconvenient question of whether the State of Israel has the competence under international law to extend its legislation into the occupied territories, and instead focuses on the question of whether the legislation enacted conforms to Israeli Basic Laws.[48]

By using these strategies, the HCJ can act to protect individual rights without questioning the general policy of the government. The HCJ is thus careful not to pronounce on a particularly sensitive issue that has the support of domestic public opinion and that could lead, if it were to apply international law rigorously, to it losing its legitimacy in the eyes of Israeli society. Above all, it is aware that such a decision could irreparably damage its credibility and authority: the 'executive might not respect its judgment and the legislator would probably overrule the judgment anyway'.[49] Moreover, by resorting to Israeli constitutional law rather than international law to ensure the protection of Palestinian rights in the occupied territories, the Israeli judge avoids competition with interpretations of international courts or other national courts applying the same instruments. Indeed, contrary to what

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[42] Zamoskvoretskiiy District Court of Moscow, *Sabina and Others v Moscow City Hospital and Others,* n° 2-557/2015, 7 April 2015; Babushkinskiy District Court of Moscow, *Korolevs v FSIN,* IK-18, 25 December 2014.

[43] Brusil Miranda Metou, 'Le Moyen de Droit International devant les Juridictions Internes en Afrique: Quelques exemples d'Afrique Noire Francophone' (2009) 22 RQDI 129, 139-140.

[44] *Legal Consequence on the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, ICJ Reports 2004, 136, para. 120.

[45] Israel HCJ 8414/05, *Yassin, Bil'in Village Council Chairman v The State of Israel et al.,* (2007), para. 28; Israel HCJ 7957/04, *Mara'abe et al. v The Prime Minister of Israel et al.,* (2005), para.19.

[46] See for an overview on the question, Tamar Hostovsky Brandes, 'The diminishing Status of International Law in the Decisions of the Israeli Supreme Court Concerning the Occupied Territories' (2020) 18 I.CON 167; Guy Harpaz, 'Being Unfathful to One's Own Principles: The Israeli Supreme Court Demolitions in the Occupied Palestinian Territories' (2014) 4 Israel Law Review 401; Yoram Dinstein, 'The Israel Supreme Court and the Law of Belligerent Occupation: Demolitions and Sealing Off of Houses' (2000) 29 Is YHR 285.

[47] See below IV (A).

[48] Israel HCJ 8276/05, *Adalah v Minister of Defense,* (2006), 62 (1) PD 1; see also Israel HCJ 1661/05, *Gaza Coast Regional Council v the Israeli Knesset,* (2005), 59 (4) PD 481.

[49] Weill, supra note 32, 108; see also Brandes, supra note 46, 769.

has been written,[50] relying solely on constitutional provisions or domestic law that take up or reflect provisions of international law (the 'mirror effect' theory) is not necessarily equivalent to compliance with international law. By ignoring the international law provision and focusing solely on the corresponding provisions of domestic law, the national court gives itself the leeway to exclude the interpretations of international bodies where appropriate, while at the same time allowing itself the possibility of revising its case law more easily without being constrained by the need to take account of external interpretations of the same treaty instrument. Recourse to domestic law thus makes it easier, if necessary, to seek judicial legitimisation of state foreign policy, particularly in terms of fundamental rights. Conversely, recourse to constitutional law may also appear to provide a more acceptable framework, from a public legitimacy perspective, for limiting the State's actions, in comparison to international law. This is certainly the case when a domestic court wishes to limit or prohibit a policy of house demolitions in occupied territories, which enjoys strong popular support at home despite international criticism of the practice.[51]

The domestic judge may also decide, in order not to have to apply international law, to use the argument of the separation of powers to refuse to interfere in what he/she considers to be the field of action of other branches of the State. Thus, through the doctrines of the Act of State and non-justiciability, American and British judges refrain from inquiring into the validity of the public acts of a foreign sovereign State committed within its own country.[52] Based on the traditional assumption that the 'nation should speak in one voice' in matters concerning foreign affairs, those doctrines are designed to avoid 'embarrassing' the executive in its conduct of foreign relations and to reflect the proper separation of powers between the judicial and political branches of government.[53] Beyond the doubts that one may have about the soundness of the argument in the relationship between respect for the rule of law and the separation of powers, the discomfort arises above all from the double standard in the application of these doctrines. In fact, recourse to the doctrines of Act of State or Non-justiciability will in reality depend on the nationality of the defendant State and its relationship with the forum State. These doctrines are part of the foreign legal policy of the State and thus often allow the latter, via its domestic courts, 'to maintain its reputation as a worldwide human rights defender while at the same time shielding its own officials and allies from judicial scrutiny'.[54]

The application of the Alien Tort Statute (ATS) by US courts illustrates well that reality. Adopted in 1789, the ATS allows US federal courts to exercise jurisdiction over 'any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.[55] It was quickly presented as an instrument in the service of international law and in particular for the repression of serious crimes committed by former foreign dictators, non-state actors, private corporations and military companies.[56] But as writers on the subject have pointed out, it soon became clear that these

[50] See Tzanakopoulos, 'Domestic Courts in International Law', supra note 1, 144, 158.

[51] Brandes, supra note 46, 784-785.

[52] See US Supreme Court, *Banco Nacional de Cuba v Sabbatino,* 376 US 398 (1964); *First National City Bank v Banco Nacional de Cuba,* 406 US 759 (1972); *Alfred Dunhill of London Inc. v Republic of Cuba,* 425 US 682 (1976); UK House of Lords, *Buttes Gas and Oil Co. v Hammer (N°3)* [1982] AC 888 UKHL 931.

[53] Weill, supra note 32, 71; see also Eyal Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: an Analysis of Attitudes of National Courts' (1993) 4 EJIL 159, 168-171.

[54] Weill, supra note 32, 84.

[55] US Code – Section 1350: Alien's action for tort, 28 USC para. 1350.

[56] See for few emblematic cases in a rich and varied jurisprudence, *Filártiga v Peña-Irala*, 630 F.2d 876 (2d Cir. 1980); *Kadic v Karadzic,* 70 F.3d 232 (2d Cir. 1995); *Wiwa v Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Flores v Southern Peru Copper Corp.*, 406 F.3d 65 (2d Cir. 2003); *Aldana v Del Monte Fresh Produce,* 416 F.3d 1242 (11th Cir 2005); *Corrie v Caterpillar Inc.*, 503 F.3d 974 (9th Cir. 2007); *Khulumani v Barclay National Bank Ltd,* 504 F.3d 254 (2d Cir. 2007); *Presbyteran Church of Sudan et al. v Talisan Energy Co.*, 582 F.3d 244 (2d Cir. 2009); *Saleh et al. v Titan Corp. et al.,* 580 F.3d 1 (DC Cir. 2009).

'landmark cases', where courts have not hesitated to sanction foreign States and organisations for violations of international law, were consistent with the US State Department's position. Therefore, not surprisingly, when cases started to go against the interests of the State Department, as reflected in their *amicus* briefs, courts have relied more and more on avoidance doctrines. This strategy was endorsed by the Supreme Court which, in its first decision on the ATS, used particularly cautious language, urging lower courts to exercise restraint, and instructing federal courts to give serious weight to the executive's view of the case's impact on foreign policy.[57]

Another main strategy used by national courts to avoid applying international law, including treaty provisions, invoked by one of the parties to the dispute before them is the lack of direct effect or applicability of the instrument or provision concerned. Whether they refer to the doctrine of 'self-executing' treaties or norms, 'direct applicability' or 'direct effect', the domestic courts are similarly examining the question of whether the treaty provision or the international Court decision in question is capable of judicial enforcement or whether an intervening domestic act is required. The national court then decides to carry out an analysis of the provision or instrument in question, looking at whether the parties intended to give it direct effect and/or it is sufficiently precise and capable of being applied by it.[58] The problem is that this assessment often appears to be very subjective and may vary according to the national interest that the court intends to protect. As pointed out by Forteau, in many instances, domestic courts do not explain on which legal grounds they accept or refuse to grant direct effect to a treaty provision. At best, the courts indicate the applicable criteria of direct effect, only to then immediately jump to the provision at hands to determine whether, in fact, it fulfils these criteria.[59]

For example, Shelton noticed that in *Sanchez-Llamas v Oregon,*[60] the US Supreme Court referred to what it characterised as 'a long-established presumption that treaties and other international agreements do not create judicially enforceable individual rights', ignoring long-standing precedents that held that a treaty is directly applicable federal law 'whenever its provisions prescribe a rule of law by which the rights of the private citizen or subject may be determined' and 'when such rights are of a nature to be enforced in a court of justice'.[61] For the Israeli HCJ, the technique is to assert the non-customary nature of Article 49 (6) of the Fourth Geneva Convention of 1949 (on the protection of civilians) in order to find that it cannot be directly applied by Israeli courts.[62] This allows the Court to not have to assess the conformity with international law of Israeli settlements in the occupied Palestinian territories.[63]

In Japan, judges use this technique to avoid examining and sanctioning state policies, particularly in the social field, and the accusations of racial discrimination that these policies raise. They concluded that, unlike the International Covenant on Civil and Political Rights (ICCPR), which has direct effect,

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[57] US Supreme Court, *Sosa v Alvarez-Machain et al.,* 542 US 692 (2004); see on the double standards application of ATS and deferral to the Executive branch via avoidance doctrines, see amongst others Weill, supra note 32, 81-100; Lee K. Boyd, 'Universal Jurisdiction and Structural Reasonableness' (2004) 40 Texas Int'l L.J. 1.

[58] Machiko Kanetake, 'The Interfaces between the National and International Rule of Law: A Framework paper' in Kanetake and Nollkaemper (eds.), supra note 2, 1, 13; Dinah Shelton, 'Introduction' in Dinah Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP, Oxford, 2011), 1, 11-12.

[59] Mathias Forteau, 'The role of the international rules of interpretation for the determination of direct effect of international agreements' in Aust and Nolte (eds.), supra note 18, 96, 105.

[60] US Supreme Court, *Sanchez-Llamas v Oregon,* 548 US 331 (2006).

[61] See Shelton, supra note 58, 12.

[62] The Israeli Supreme Court has already established the principle that domestic courts in Israel may not enforce treaties that bind the State in international law unless the provisions of such treaties have been incorporated by parliamentary legislation; C.A. 22/55, *Custodian of Absentee Property v Samara* (1956), 10 PD 1825.

[63] Israel HCJ 606/78, *Ayyub v Ministry of Defense*, (1978); Israel HCJ 390/79, *Duikat v Government of Israel,* (1979).

the International Covenant on Economic, Social and Cultural Rights (ICESCR) does not have direct effect in the Japanese legal order. They explain this difference by the fact that the ICESCR states that the rights it enshrines are to be realised 'progressively'; which the Japanese judges interpret as some indefinite point in the future.[64] This approach has enabled the Osaka High Court to avoid the issue of judging the wisdom or comprehensiveness of the Government's provision of pensions to Koreans residents.[65] Similarly, the judges consider that the Convention on the Elimination of All Forms of Racial Discrimination (CERD) has no direct effect between private persons and the State. Therefore, private persons cannot demand that the State complies with the obligation under Article 2 (1) (d) of the Convention by adopting a law prohibiting racial discrimination in private acts. For the Japanese courts, the obligation in Article 2 of the Convention is a 'political obligation', not a legal one, which 'should not be interpreted to impose a clear and uniform obligation to prohibit and bring to an end specific acts of racial discrimination by enacting laws for individual citizens'.[66] Since the content of the 'provision is general and abstract, it cannot lead inexorably to only one kind of law or policy that a state party must take'.[67]

The argument of lack of direct effect is particularly popular with national courts when it is a question of setting aside the decision of an international court or quasi-judicial body and thus allowing the State not to comply with the contested decision. It is this argument that was used by the Venezuelan Supreme Court to declare a decision of the Inter-American Court of Human Rights (IACtHR) unenforceable.[68] In Canada, this argument has enabled courts to set aside the enforcement of decisions of human rights treaty bodies. The Ontario Court of Appeal has held that interim measures indicated by the UN Human Rights Committee can be ignored because to do otherwise would lead to convert a non-binding request into a binding obligation enforceable in Canada by Canadian courts, and into a constitutional principle of fundamental justice. The Court points out that, in the Committee's own view, its 'decisions' are not binding.[69] In the same logic, the US Supreme Court affirmed the ruling of the lower US court and declined to follow the course of action suggested by the ICJ. Interpreting Article 94 of the UN Charter which requires each UN Member State to 'comply with' ICJ decisions, the Supreme Court affirmed that the formulation of the article evidences that ICJ judgments were not intended to be directly applicable in the legal systems of UN member States, or at least that of the permanent members such as the USA who, by virtue of their veto power, did not intend to submit to a future binding decision. Therefore, Article 94 is merely a promise to take action in the future rather than a duty to accord the ICJ judgments immediate domestic effect.[70]

This avoidance technique is used even by domestic judges who do not claim it openly. For example, a detailed study of the judicial practice of Belgian courts, which are known to adopt a bold stance on the direct effect determination, identified a spate of Supreme Court rulings rejecting the direct effect of various provisions of human rights treaties on the basis that the obligations are created only for the contracting parties. For the authors of the study, Belgian courts use the direct effect

[64] Judgment, 1055 Hanrei Jihô 9, 18 (Tokyo D Ct, 22 September 1982); this and following quoted in Timothy Webster, 'Racial Discrimination in Japan: Unity, Diversity and International Law' in Ole Kristian Fauchald and André Nollkaemper (eds.), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart Publishing, Oxford, 2012), 295, 304.

[65] *Shiomi,* 35 Gyôsaishû 2282 (Osaka D Ct, 29 October 1980) with 35 Gyôsaishû 2220 (Osaka H Ct, 19 December 1984).

[66] *Arudou v Earth Cure,* 1150 Hanrei Taimuzu 185, 194 (Sapporo D Ct, 11 November 2002).

[67] Judgment, 2000 Hanrei Jihô 79, 83 (Osaka D Ct, 18 September 2007).

[68] Sala Constitucional del Tribunal Supremo de Justicia (Venezuela), Judgment 1939/2008, 18 December 2008.

[69] Ontario Court of Appeal, *Ahani v Canada (Attorney General)*, 58 O.R. (3d) 107, 8 February 2002.

[70] US Supreme Court, *Medellin v Texas,* 128 S Ct 1346 (2008).

avoidance technique in a non-transparent manner.[71] The argument of direct effect, or more precisely of the absence of direct effect, thus remains a very practical tool that any national judge can use to preserve an important interest in the eyes of his/her government, to avoid applying an international norm that is controversial within public opinion, or simply to ensure the pre-eminence of his/her legal order while avoiding direct confrontation with international law.

This is, for example, the strategy used by the CJEU, which since the famous *Haegeman* case law has affirmed that Community agreements 'form an integral part of Community law'.[72] Despite this clearly international law-friendly approach, the Court has not hesitated to affirm the lack of binding effect of World Trade Organisation (WTO) Dispute Settlement Body (DSB) decisions, particularly where the ruling establishes that an EU measure is incompatible with WTO obligations. The core of the reasoning advanced for precluding review is that the WTO's dispute settlement understanding (DSU) permits, at least temporarily, alternatives other than full implementation of a ruling, including mutually agreed compensation and countermeasures, and that judicial intervention would deprive the Community of the DSU sanctioned room for manoeuvre enjoyed by its trading partners.[73] In 2014, another multilateral treaty had been held unable to form a validity review criterion for EU action. The CJEU ruled that the EU-concluded UN Convention on the Rights of Persons with Disabilities could not be used to challenge EU action. The Convention was considered 'programmatic', as its provisions were subject in their implementation or effects to the adoption of subsequent measures by the contracting parties and thus not unconditional and sufficiently precise to be directly effective.[74]

The same approach is followed in the *Intertanko* case, where after affirming that the United Nations Convention on the Law of the Sea (UNCLOS) is binding on the Community and forms an integral part of the Community legal order, the Court nevertheless refuses to apply it on the grounds that 'UNCLOS does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States'.[75] The resurrection of a pre-*Haegeman* jurisprudence that was thought to have been abandoned by the Court has not failed to arouse surprise.[76] The explanation for this jurisprudential comeback can no doubt be found in the desire of the Luxembourg court to avoid a review that would have led it to examine or even sanction the measures referred to by the Community. As one observer has noted, the 'ECJ opted to resurrect the individual rights criterion; however it could equally have opted to ignore individual rights and to explore whether the nature or broad logic of UNCLOS precluded review. To resort to the argument that the absence of individual rights is a manifestation of the nature or broad logic of an Agreement precluding review is for the ECJ to endow itself with a safeguard argument which could often be invoked to reject review of Community measures vis-à-vis Community Agreements when politically contentious challenges arise'.[77]

When national courts are confronted with acts of international institutions drafted in terms too precise and clear to allow them to avoid them by taking refuge behind the argument of lack of direct effect, they resort to another avoidance strategy consisting in depriving the international act of its

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[71] Arne Vandaele and Erik Claes, 'L'Effet Direct des Traités Internationaux – Une Analyse en Droit Positif et une Théorie du Droit Axée sur les Droits de l'Homme' (2001) 34 RBDI 401, 451.

[72] European Court of Justice, Case 181/173, *Haegeman* [1974] ECR 449, para. 5.

[73] See European Court of Justice, Case C-377/02, *Van Parys* [2005] ECR I-1465; joined Cases C-120/06 P, *FIAMM & Others v Council and Commission* [2008] ECR I-6513.

[74] European Court of Justice, Case C-363/12, *Z* [2014] ECLI:EU:C:2014:159.

[75] European Court of Justice, Case C-308/06, *Intertanko* [2008] ECR I-4057.

[76] European Court of Justice, joined Cases 21-24/72, *International Fruit* [1972] ECR 1219; see the analysis of Mario Mendez, 'The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques' (2010) 21 EJIL 83, 99-104.

[77] Mendez, 'The Application of International Law by the CJEU', supra note 27, 100-101.

effects by focusing on the act of domestic law which implements it while ignoring the international obligation implemented. This strategy thus allows the domestic court to compel the State not to comply with an international obligation without having to rule on the validity or legal conformity of the international act itself. This strategy, implemented by the constitutional courts of some countries in Europe to paralyse the EU Council Framework Decision on the European arrest warrant,[78] has been used extensively by national courts to indirectly control the sanctions regime imposed by the United Nations Security Council under Resolution 1267 (1999) and subsequent resolutions (the '1267 Regime'),[79] which were considered to violate the right to a fair trial. To avoid directly violating their State's obligation under the UN Charter to comply with Security Council resolutions, it was necessary for the national courts to argue that judicial review of domestic measures implementing the Council's resolution was not the same as reviewing the resolution itself. Only after having thus succeeded in 'isolating', artificially, the act of domestic law from the international act could the judge proceed to the review of the validity, or even the annulment, of the former.[80]

It is through this operation that the 10th Division of the Turkish Council of State were able to annul the decree of the Council of Ministers freezing the assets of Mr Kadi. The 10th Division found that under the Turkish Constitution an asset freeze can only be initiated by a court decision, and not by an administrative act. Thus, rather than reviewing the relevant resolutions of the UN Security Council or the decisions of its sanctions ommittee, the Court evaluated the legality of the implementing measures taken by the Council of Ministers.[81] A similar approach was followed by the UK High Court of Justice. The High Court focused on the 2006 national Order implementing the Security Council sanctions, avoiding the resolutions of the Council.[82] In all these cases, the paralysis of the Security Council resolution, and thus the violation by the State of its international obligations, results from the annulment of an act of domestic law isolated from its international context. The avoidance strategy is for the national judge to suggest that his/her review is limited to the way in which the resolution has been implemented in the domestic legal order and that the government could still comply with its international obligation while respecting the requirements of domestic law. But by refusing to examine the reality of the room for manoeuvre left to States by the Council resolution and by compelling its State to comply with domestic law rigorously, the judge is, in fact, obliging the State to violate the Security Council resolution and the UN Charter.[83]

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[78] See Constitutional Tribunal (Poland), 1/05, 27 April 2005; Constitutional Court (Germany), Order of the Second Senate, 18 July 2005, 2 BvR 2236/04; Cyprus Supreme Court, Judgment of 7 November 2005 (Civil Appeal no. 294/2005) on the Cypriot European Arrest.

[79] In the context of the fight against terrorism, the Security Council established this regime under Article 41 of the UN Charter. Under the '1267 regime' the Security Council designates, through a Sanctions Committee ('the 1267 Committee'), individuals, groups, undertakings, and entities 'associated with' Al-Qaida and the Taliban. UN Member States were therefore, under the obligation to freeze the funds and other economic resources of designated persons, and must subject them to a travel ban and an arms embargo. See UNSC Res 1267 (15 October 1999), UN Doc. S/RES/1333; UNSC Res 1822 (30 June 2008), UN Doc. S/RES/1822; UNSC Res 1390 (28 January 2002), UN Doc. S/RES/1390.

[80] See for an overview of the reactions of national courts to the 1267 Regime, Antonios Tzanakapoulos, 'Domestic Court Reactions to UN Security Council Sanctions' in August Reinisch (ed.), *Challenging Acts of International Organizations before National Courts,* (OUP, Oxford, 2010), 54.

[81] Turkey, Council of State, 10th Division, 4 July 2006, Sixth report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Security Council resolutions 1526 (2004) and 1617 (2005) concerning Al-Qaida and the Taliban and associated individuals and entities, UN Doc. S/2007/132, Annex I, para. 8.

[82] See UK High Court, *A, K, M, Q & G v HM Treasury* [2008] EWHC 869 (Admin); *Hay v HM Treasury* [2009] EWHC 1677 (Admin).

[83] See for a similar conclusion following the annulment by European domestic courts of national measures implementing the European arrest warrant, Luca Barani, 'L'Europe des Cours: Entre Résistances et Loyautés Nationales face à la Cour de Justice des Communautés Européennes' in Bribosia, Scheeck and De Torres (eds.), supra note 35, 87, 103-106.

3. Rejection of International Law in the Name of the Preservation of the Domestic Legal Order

The 'judicial rebellion' against the 1267 regime described above also highlighted another strategy of resistance by domestic courts based on a values argument. The latter, irrespective of the monistic or dualist nature of the national legal order, resorted to a dualist argument consisting in considering the two legal orders, domestic and international, as distinct orders whose essential values had to be safeguarded. The argument is not new and has been used whenever the national judge, guardian of the rule of law at the domestic level, considered that substantial formalities of his/her legal order had not been respected or that fundamental values of that legal order were threatened. Although these arguments are closely related and, in practice, all proceed from the same strategy, this section will distinguish between the dualist argument used to demand compliance with domestic formalities, its mobilisation to preserve national sovereignty, and its application because of the importance of the issue at hand.

a) Recourse to the 'Essential' Formal Obstacles of the Domestic Legal Order

The modalities of entry and application of international law in the internal legal order are generally defined by the constitution of the country. The failure to comply with the constitutional formalities for committing the State at the international level is, therefore, an argument on which the national judge relies to refuse compliance or to support the non-compliance of an international instrument by the judge. This is particularly the case with the 'imperfect ratification' argument, which relies on the failure to comply with the procedural formalities prescribed by the Constitution to exclude the application of an international agreement in the domestic legal order. In general, judges invoke the separation of powers doctrine to block international norms that did not receive the express approval of the country's legislature.

This is what the Constitutional Court of Benin is doing by invoking article 147 of the Constitution to deprive of effect the ECOWAS Additional Protocol relating to the Community Court of Justice of 2005, which broadens the jurisdiction of this Court to human rights issues and allows citizens of member states to seize it.[84] For the Constitutional Court, 'without ratification the process by which the Beninese State has intended, with regard to the protocol, to limit its sovereignty to this international commitment, cannot be considered as having resulted in this submission can be neither full nor total'.[85] Such ratification is only valid if it is carried out by a ratification decree, taken following a ratification authorisation law adopted by the National Assembly, promulgated by the President of the Republic and published in the Official Gazette of the Republic of Benin. Without the scrupulous respect of these formalities, the Additional Protocol, and therefore the new jurisdiction of the Court in matters of human rights, cannot be invoked against the Beninese State. This very rigorous and rigid approach of the Beninese constitutional judge leading to the non-application of treaties even in case of non-observance of the publication formality is also followed by the Ivorian judge.[86]

In the end, it does not matter that 15 years have passed since the adoption of the Protocol in question, and that cases have been brought on this basis and that subsequently, the Beninese State has executed the decisions pronounced in this framework by the ECOWAS Court of Justice. The successive governments that have executed these decisions of the ECOWAS Court of Justice up to date have 'deprived their action of the duties of conscience, competence and probity in the sense of

[84] Cour Constitutionnelle (Benin), Decision DCC 20-434, 30 April 2020.

[85] Ibid. Author translation.

[86] Cour Constitutionnelle (Benin), Decision DCC 03-009, 19 February 2003; Cour Suprême (Côte d'Ivoire), *Mailland*, 16 March 1966.

Article 35 of the Constitution'. Consequently, these acts of implementation of the decisions of the Court of Justice of ECOWAS, seized under the Protocol of 2005, 'are not valid concerning Benin' by application of the Constitution.[87] Contrary to what has been indicated by international jurisprudence and doctrine on Article 46 of the Vienna Convention on the Law of Treaties (VCLT), which is the basis for the Court's approach to international law,[88] the Constitutional Court considers that the passage of time without contesting the treaty and even its implementation by the State has no impact on its 'imperfect ratification'. The Constitutional Court nullifies the effects of the treaty not only for the future but also for the past, without taking into account the consequences for the rights acquired by individuals following the decisions of the ECOWAS Court of Justice. It is probably not insignificant that this decision of the Beninese court comes in a tense political context between the government in place and the opposition, which has referred the matter to the ECOWAS Court of Justice and the African Court of Human and Peoples' Rights (ACtHPR) to request invalidation of the electoral process in the country. The position of the Constitutional Court is in line with those defended by the National Assembly and the Minister of Justice in their observations submitted to the Court. The Court's position comes at a time when the Beninese government has withdrawn the declaration allowing its citizens to bring actions against it before the ACtHPR.[89]

The Dominican Constitutional Court used the same strategy to challenge the jurisdiction of the IACtHR and thus remove the country from its decisions. The Constitutional Court ruled that the instrument of recognition of the contentious jurisdiction of the IACtHR did not enjoy congressional approval and was therefore in contravention of constitutional provisions. Here too, the decision of the constitutional court espoused a policy of the executive branch of the State to oppose and evade a controversial decision of the international court.[90] The Russian Constitutional Court proceeds to an equally questionable application of article 46 VCLT when it held that judgments of the ECtHR based on an interpretation of the ECHR which is incompatible with the Russian constitution cannot be implemented in the Russian legal order. Without contesting the validity of the initial ratification of the Convention by Russia, the Court considers that this initial ratification was rendered

[87] Ibid.

[88] Article 46 VCLT: '1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith'. See on the conditions of application of the article and notably good faith and the effect of the passage of time, *Delimitation of Maritime Boundary Between Guinea-Bissau and Senegal (Guinea-Bissau v Senegal),* (1989) 20 RIAA 119, paras 56-59; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, ICJ Reports 2002, 303, paras. 265, 267; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya*), Preliminary Objections, Judgment, ICJ Reports 2017, 3, paras. 48-49; Supreme Court (Israel), *Attorney General of Israel v Kamiar,* Criminall Appeal 131/67,22 (2) PD 89 (1968); Thilo Rensmann, 'Article 46' in Oliver Dörr and Kirsten Schmalenbach (eds.), *Vienna Convention of the Law of Treaties: A Commentary* (Springer, Berlin/Hendelberg, 2018), 837; Robert Kolb, 'Note sur un problème particulier de "ratification imparfaite": article 46 de la Convention de Vienne sur le droit des traits de 1969' (2011) 21 Swiss Review of International and European Law 429.

[89] See Apollin Koagne Zouapet, '"Victim of its Commitment … You, Passerby, a Tear to the Proclaimed Pirtue": Should the epitaph of the African Court on Human and Peoples' Rights be prepared?' EJILTalk, 5 May 2020, available on https://www.ejiltalk.org/victim-of-its-commitment-you-passerby-a-tear-to-the-proclaimed-virtue-should-the-epitaph-of-the-african-court-on-human-and-peoples-rights-be-prepared/, last accessed 16 April 2021.

[90] See Jorge Contesse, 'Resisting the Inter-American Human Rights System' (2019) 44 Yale Journal of International Law 179, 199-203; Ximena Soley and Silvia Steininger, 'Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights' (2018) 14 International Journal of Law in Context 237, 249-250.

unconstitutional by the subsequent interpretation of the Convention by the ECtHR, and thus in manifest violation of a fundamental rule of its internal law within the meaning of Article 46 VCLT.[91]

For its part, the Supreme Court of Ghana places an obligation on the country's co-contractors to ensure that any international agreement is concluded in accordance with Ghana's constitutional rules. It thus declared unconstitutional and inapplicable an agreement between Ghana and the USA relating to the transfer of two prisoners from Guantanamo Bay to Ghana, because the approval of Parliament had not been required prior to its conclusion. The Supreme Court was emphatic that foreign States are 'duty bound to conduct the necessary due diligence when entering into international agreements with Ghana to ensure that such agreements are in consonance with our Constitution, and, therefore enforceable'.[92]

The US Supreme Court has also used a constitutional expedient related to the separation of powers, combining it with the argument of lack of direct effect to avoid compliance with the ICJ's *Avena* decision.[93] For the Supreme Court, the ICJ's decision is not binding because neither the Additional Protocol to the Vienna Convention on Consular Relations founding the ICJ's jurisdiction nor the UN Charter 'creates a binding federal law in the absence of implementing legislation, and because it is uncontested that no such legislation exists'.[94] The Supreme Court does not feel obliged to comply with the ICJ decision because, under the separation of powers, such an obligation rests only on the branch of government responsible for international relations, namely the Executive. The Court thus notes that, on the one hand, the ICJ judgment did not address itself to the Judicial Branch, and on the other hand, the President's authority to represent the United States before the UN, the Security Council and the ICJ does not include the power to create domestic law.[95] The Supreme Court, in turn, and the other courts of the United States have been given exclusive authority by the Constitution to say 'what the law is' within the United States. It is strictly within this framework of the constitutional division of state powers that the United States enters into international agreements.[96] A similar argument put forward by the President of the Chilean Supreme Court to justify the refusal to implement an IACtHR decision requesting the Chilean courts to reopen cases in which it had given effect to a national amnesty law. For the President of the Court, the Supreme Court has no power to rescind the Amnesty; that is the work of the legislature: judges merely apply laws.[97]

Also based on the preservation of the constitutional order of the country, the hierarchy of norms is another tool used by domestic judges to paralyse undesirable international norms in the internal legal order. The judge will thus subject the international norm to a constitutionality review or a legality review, depending on the case, and will very often find that it is incompatible with the domestic legal order and will set it aside. The difference here with the values argument, which will be analysed below,[98] is that the national judge does not base his/her argument on the values

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[91] Constitutional Court (Russia), N 21-P/2015, 14 July 2015, (English Translation); European Commission for Democracy through Law (Venice Commission), CDF-REF (2016) 019, 11-14; see the critical analysis of Rensmann, supra note 88, 845-846.

[92] Supreme Court (Ghana), *Mrs. Margaret Banful & Henry Nana Boakye v The Attorney-General & The Ministry of Interior,* writ No. J1/7/2016, 22 June 2017.

[93] *Avena and Other Mexican Nationals (Mexico v United States of America),* Judgment, ICJ Reports 2004, 128.

[94] US Supreme Court, *Medellin v Texas,* 552 US 491 (2008).

[95] Ibid., 10.

[96] *Sanchez-Llamas v Oregon,* supra note 60.

[97] Quoted in Alexandra Huneeus, 'Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights' in Javier Couso, Alexandra Huneeus and Rachel Sieder (eds.), *Cultures of Legality, Judicialization and Political Activism in Latin American* (CUP, Cambridge, 2010), 112, 122.

[98] See C below. On the general trend of rejection of international law's claim to supremacy over constitutional law, see Anne Peters, 'Supremacy: International Law Meets Domestic Constitutional Law' (2009) 3 Vienna Online J. on Int'l Const. L. 170.

protected and considered essential for the internal legal order to exclude international law, but uses the internal law and the hierarchy of norms to exclude international law without consideration of the importance of the questions dealt with. In principle, the approach is not open to criticism. Indeed, the national courts find the basis of their power to judge in the internal legal order and mainly in the Constitution of the country. The latter is therefore the necessary intermediary between the domestic judge and international law and guides his/her action. It is thus not surprising that, despite the rulings of international courts as the Permanent Court of International Justice (PCIJ),[99] many domestic courts have affirmed the superiority of the constitution over international treaties and international law.[100] To achieve a definitive extinction of dualism, the constitution would first have to be extinguished, which is not possible as long as the State exists as a legal entity.[101] The problem is therefore not that the domestic court refers to the constitution to define the place and effects of international law in the national legal order, but that it proceeds to a particularly restrictive interpretation of the constitution or its instrumentalisation in order to enable the State to evade its international obligations.

Such a result may be the result of a restrictive interpretation of the silence of the constitution. This is what the *Conseil d'Etat* does when it affirms that, unlike treaties that clearly have supra-legislative value, the French Constitution does not contain any rule whose object or effect would lead to customary international law taking precedence over the law. Consequently, no provision of constitutional value prescribes or implies that the administrative judge in France should give precedence to international custom over the law in case of conflict.[102] In sub-Saharan African countries that have inherited the French legal and judicial tradition, the silence of the Constitution on the place of customary international law leads national judges to show what has been described as 'prudishness' towards customary norms, giving them a modest or even insignificant place in the hierarchy of standards. Their mobilisation and application are therefore the exception rather than the rule and depend mainly on the legal culture of a particular judge.[103] This 'hostility' of domestic judges to customary international law is not specific to Africa and elsewhere national judges do not hesitate to declare the claim inadmissible if it is based solely on customary international law, or, as the Belgian Court of Cassation has done, declare that the party invoking international custom lacks the necessary interest to initiate the case.[104]

Instrumentalisation can also result from the abuse of supervisory powers even though the national judge knows that his/her courtroom is being used for political purposes. Thus, the Ivorian government did not hesitate to refer a Security Council resolution on the situation in the country to the Constitutional Council for constitutional review, with which it disagreed.[105] The Italian Constitutional Court also grants itself the right to review the conventionality of the ECHR. It stressed that the ECHR does not enjoy 'constitutional immunity' and is therefore subject to absolute

[99] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory,* Publications of the PCIJ, Series A/B, n° 44 (1932), 24; see also for the affirmation of the priority of European Law over the member State's constitutions, European Court of Justice, Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, para. 3.

[100] See amongst others, Conseil d'Etat (France), *Sarran et Levacher,* N° 200286, 30 October 1998; Cour de Cassation (France), *Pauline Fraisse,* n° 99-60.274, 2 June 2000; Conseil Constitutionnel (France), Decison n° 92-108DC, 9 April 1992; Constitutional Court (Austria), *Miltner,* 14 October 1987, part 4g, VfSlg. 11500/198; Constitutional Court (Germany), *Görgülü,* Order of the Second Senate, 14 October 2004, 2 BvR 1481/04; Constitutional Court (Russia), N 21-P/2015, 14 July 2015.

[101] Metou, supra note 43, 158.

[102] Conseil d'Etat (France), *Aquarone,* n° 148683, 6 June 1997.

[103] Metou, supra note 43, 148-149.

[104] Cour de Cassation (Belgium), *Pittacos,* 26 May 1966; see Wouters, supra note 36, 35.

[105] Conseil Constitutionnel (Côte d'Ivoire), Decision n° 19/CC/SG, 6 December 2006.

constitutionality review. Unlike EU law, which was only subject to counter-limits (a selected version of the domestic constitutional materials), 'the need for a constitutionality test on the Convention norm excludes the possibility of having a limited set of fundamental rights that could serve as a counter-limit; indeed, every norm of the Constitution shall be respected by the international norm challenged'.[106]

b) The Imperative to Preserve State Sovereignty

Guarantors of the rule of law and respect of domestic public policy, national courts also feel invested with the mission of preserving the sovereignty of the State. Consequently, they do not hesitate to ensure that the other State powers do not 'cede' to international law and their partners on the international scene more than the constituent power has granted them and allowed them to do. Thus, on one hand, domestic judges grant themselves the right to control the transfer of competencies to national institutions to ensure that national sovereignty is not emptied of its essence. On the other hand, they recognise themselves the power to control the exercise by international institutions of the competencies that have been transferred to them, in order to ensure that the exercise remains within a framework that respects national sovereignty and respects the national scope of action.

This is the background to the 'stinging warning' issued by the German Constitutional Court on 12 October 1993.[107] Although the Constitutional Court has declared the EU Treaty to conform with the German Basic Law, it has emphasised, in several *obiter dicta*, some conditions and requirements that may be subject to review by the Court. One of the requirements is that the Bundestag, or other national institutions such as the German Central Bank, where appropriate,[108] should retain the necessary influence on the further development of the EU. The second requirement is that the transfer of competencies to the EU must be clearly defined so that the exercise of these competencies remains predictable. In reality, the Karlsruhe Court is part of a trend in the case-law of the European constitutional and supreme courts,[109] all of which, explicitly or implicitly, have made the principle of attribution of competences (principle of speciality) of the EU sacrosanct, condemning any adoption of an act of secondary legislation beyond the competencies transferred by the Member States in the treaties. Indeed, according to the work carried out by the Conference of European Constitutional Courts, if it were established that the Community institutions encroached on the competencies of the national public authorities beyond the provisions of the original treaties, the constitutional judges would consider that there would be an infringement of the attribution of the exercise of competences without authorisation, either by the treaty or by the national constitution (which obviously cannot consent to the transfers of competencies that are not induced by the original Community law).[110]

Despite the harsh criticism that may have been levelled at the German Constitutional Court and other courts following this jurisprudence, one may legitimately wonder whether those courts are not playing their part when international courts and institutions adopt a particularly extensive reading

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[106] Francesca Biondi Dal Monte and Filippo Fontanelli, 'The Decisions No. 348 and 249/2007 of the Italian Constitutional Court: The Efficacy of the European Convention of the Italian Legal System' (2008) 7 German Law Journal 889, 915.

[107] Constitutional Court (Germany), *Maastricht,* Judgment of the Second Senate, 12 October 1993, 2 BvR 2134/92, 2 BvR 2159/92; see Laurence Burgorgue-Larsen, 'Les Résistances des Etats de Droit' in Joël Rideau (ed.), *De la Communauté de Droit vers l'Union de Droit. Continuités et Avatars Européens* (LGDJ, Paris, 2000), 423, 434.

[108] See Constitutional Court (Germany), Order of the Second Senate, 14 January 2014, 2 BvR 2728/13.

[109] See amongst others Constitutional Court (Czech Republic), file no. Pl. ÚS 5/12, 31 January 2012; Conseil d'Etat (France), *Ministre de l'Intérieur/Cohn-Bendit (Daniel),* n° 110604, 22 December 1978.

[110] Burgorgue-Larsen, supra note 107, 435.

of their competencies and powers. As asked elsewhere, can a national constitutional court be reproached for setting itself up as the guardian of Community orthodoxy, certainly breaking with the division of jurisdictional competencies between Luxembourg and the national courts, when the CJEU and the Council of the EU disregard their own competence to interpret?[111] This is true for integrated legal orders such as the EU, but also regional human rights areas and other branches of international law: national courts feel vested with a countervailing power when they perceive an authoritarian and excessive exercise of their powers by international courts and institutions.[112] Such a reaction is understandable from the perspective of democratic theory: 'Courts seek to resist globalization's threat to their own national democratic processes and to their own recent achievements to bolster their institutional independence. (...) Under contemporary conditions, protecting domestic interests and, in particular, reclaiming democratic processes often require that national courts forge coordinated, cross-boundary judicial resistance to the forces of globalization'.[113]

That said, in some cases, the position of national courts may appear singularly reactionary, and the argument of protecting national sovereignty and preserving national competencies may turn into a protectionist nationalist reading of international law. This is the logic followed, for example, by the US Supreme Court, which considers that, under the US Constitution, it alone is able to determine and interpret the law applicable in the territory of the United States, including when it derives from an international treaty, even if the States parties, including the United States, have determined the international body responsible for its interpretation.[114] In contrast to the resistance of the German Constitutional Court described above, that of the US Supreme Court rules out compromise. It is no longer just a question of preserving national sovereignty or competencies, but of elevating the national legal order and its own jurisdiction as a paragon of virtues that cannot suffer any competition with other legal orders and courts, national or international, considered illegitimate.[115] Different arguments but similar logic in the reasoning of the Russian Constitutional Court, which considers that in certain circumstances the ECtHR case law may constitute 'undue external interference', or even a serious threat, and against which it is necessary to take measures to protect national sovereignty and identity.[116] The Court highlights that ratification of a treaty (that becomes an integral part of the Russian legal system) does not mean any repudiation of Russian sovereignty comprising of supremacy, independence and autonomy of State power.[117]

These protectionist reactions of national courts are often part of a context of exacerbated nationalist demands which force them to a judicial and legal nationalism in order not to see their legitimacy challenged. The Argentine Supreme Court has thus had to revise its benevolent and friendly jurisprudence towards IACtHR, following criticism that it was too docile to the dictates of the regional human rights court and did not defend the country's sovereignty.[118] Without totally giving in to these

[111] Ibid., 438; see also Olivied Dord, 'Systèmes juridiques Nationaux et Cours Européennes: De l'Affrontement à la Complementarité' (2001) 1 Pouvoirs 5, 10-11.

[112] See below V (C).

[113] Benvenisti, Benvenisti, 'Reclaiming Democracy', supra note 12, 244.

[114] See *Sanchez-Llamas v Oregon,* supra note 60.

[115] For a nationalistic defence of the US Supreme Court's position on the grounds that it has greater legitimacy than international courts, see Mark L. Movsesian, 'Judging International Judgments' (2007) 48 Virginia Journal of International Law 65.

[116] Starzhenetskiy, supra note 34, 258; Sergey Marochkin, 'ECtHR and the Russian Constitutional Court: duet or duel?' in Lauri Mälksoo (ed.), *Russia and the European Court of Human Rights. The Strasbourg Effect* (CUP, Cambridge, 2017), 93, 145.

[117] Constitutional Court (Russia), N 21-P/2015, 14 July 2015, para. 2.2.

[118] Alexandra Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Struggle to Enforce Human Rights' (2011) 44 Cornell International Law Journal 493, 516.

nationalist pressures, some national judges are taking the debate to the value level, defending their country's constitutional identity and the values they consider fundamental.

c) Dualist Approach in the Name of the Fundamental Values of the Domestic Legal Order: the Right of Resistance of Constitutional Law

On 22 October 2014, the Italian Constitutional Court handed down a decision that was much talked about in the small world of international lawyers. The Court held that the Italian Constitution required Italian courts to disregard the decision of the ICJ upholding Germany's jurisdictional immunity[119] and to continue proceedings against Germany concerning actions for damages arising out of war crimes and crimes against humanity committed by Germany during the Second World War. Without directly questioning the ICJ's interpretation of international immunity law, the Italian Constitutional Court limits itself to the consequences of the ICJ's decision in its legal order and decides that it does not allow the reception of the international law rule as identified by ICJ, as far as the rule collides core Italian 'constitutional values'.[120] As a result, national and international law appear as completely separate legal orders. Therefore, despite its internationalist rhetoric, the Court's reasoning was ultimately 'quite solipsistic': the apparent deference to the ICJ's interpretative authority to define international customary law is there only to enable it to assert its own power to have the final say over its meaning in relation to the Italian constitution. The Italian Court thus develops a doctrine of 'national constitutional counter limits to international law's domestic penetration', in the name of fundamental constitutional values, which allows it 'to vaccinate the Italian legal system against international (experienced as "foreign") norms that would infect its fundamental principles'.[121]

The 'values argument strategy' used by the Constitutional Court to prevent the Italian State from complying with international law is not new and the Court rightly draws a parallel with the approach adopted by the CJEU in the *Kadi* case. So, in reviewing the internal, fundamental rights legitimacy of norms originating in the international order, the Italian Constitutional Court claimed to only be following the CJEU's lead.[122] But long before that, it was the German Constitutional Court that developed this technique of resisting international law in the name of national constitutional values in the famous '*Solange*' jurisprudence. In the famous decision, the German Constitutional Court held that as long as (*so lange*) the European Comunity (EC now EU) does not offer protection of fundamental rights as least equivalent to that guaranteed in the German Constitution, while at the same it has been given the power to adopt decisions that are binding on Germany, and even directly applicable in the domestic order, the Constitutional Court will guarantee the protection of fundamental rights under the German Constitution by reviewing itself the acts of the organisation for the compliance with the provisions of the German Constitution on fundamental rights.[123]

After adopting a 'doctrine of equivalence' which granted a presumption of equal protection of human rights between the German and European legal orders (*Solange II*),[124] the Constitutional Court, in the so-called Maastricht judgment (*Solange III*),[125] reasserted its jurisdiction declaring that EC/EU

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[119] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, Judgment, ICJ Reports 2012, 99.

[120] Constitutional Court (Italy), Decision n° 238/2014, 22 October 2014.

[121] Pamela Beth Harris, 'Civil Disobedience to International Law: National Fundamental Rights Resistance and the Power of International Constitutionalism' (2018) 116 Revista Brasileira de Estudos Politicos 443, 456.

[122] Ibid., 458.

[123] Constitutional Court (Germany), *InternationaleHandelsgesellschaftmbH v Einffuhr- und Vorratsstelle für Getreide und Futtermittel,* Order of the Second Senate, 29 May 1974, 2 BvL 52/71.

[124] Constitutional Court (Germany), Order of the Second Senate, 22 October 1986, 2 BvR 197/83.

[125] Constitutional Court (Germany), Order of the Second Senate, 31 March 1998, 2 BvR 1877/97.

measures exceeding the limited EC/EU competences, could not be legally binding and applicable in Germany. In *Solange IV*,[126] the Court was more again prudent and stated that German courts would interfere only if the required level of human rights protection in the EC/EU had generally fallen below the minimum level required by the German Constitution. As can be seen, the mobilisation of the German constitution and the values it contains quickly becomes a tool, an instrument of pressure in the hands of the national court, which can use it according to its reading of the developments of European law. International law and its institutions, in particular the international courts, find themselves under the permanent threat of the cutter of 'constitutional values' which, depending on the interpretation given by national judges, can reduce the scope or even deprive international norms of effect in the domestic legal order.

A victim of this technique in 1970, the CJEU appropriated it and mobilised it in turn against the 1267 Security Council's sanctions regime.[127] The European Court of Justice (ECJ) declared boldly, though implicitly, that unless the UN Security Council ensure, in its exercise of power, protection of fundamental rights which is equivalent to that offered by the EC/EU, it will continue to exercise its review power over EC implementing acts, and thus indirectly over Council resolutions, without deference.[128] Instead of limiting itself to a formal review of whether it has the power to review even indirectly the acts of the Security Council, as the Court of First Instance (CFI) had done, the ECJ chose to examine a possible hierarchy on the substantive level. According to the ECJ, 'the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights'.[129] The Court is careful not to question the nature of the obligations of the EU and its Member States under the UN Charter and in particular Article 103 and opts for a strict dualism, which allows it to categorise the Charter as an evasive 'international agreement' and to focus exclusively on its own legal order. Even though this is one of the main arguments put forward by both Mr Kadi's defence and the UK,[130] the ECJ ignores Article 103 of the UN Charter in order, like the Italian Constitutional Court, not to have to address the consequences for the State or the EU, as the case may be, of its decision.[131]

However, by distancing itself from international law in the name of its own values, the CJEU is adopting an approach that is similar to the one followed by the US Supreme Court and described above. This has been referred to as 'texanization' of the European judge's approach.[132] But unlike the decisions of the US Supreme Court, which are often criticised for their problematic dualism in international law, the decisions of the ECJ, Italian and German Constitutional Court have been enthusiastically welcomed by some international lawyers, as courageous decisions by domestic judges to preserve fundamental rights. For the advocates of these decisions, the application of international law within a domestic legal order cannot be pushed to the point of compromising the

[126] Constitutional Court (Germany), Order of the Second Senate, 7 June 2000, 2 BvL 1/97.

[127] This leads to a kind of vicious or virtuous circle (depending on how you read it) in which each new 'resistance' is a breeding ground for the next. Thus, the German Constitutional Court will in turn refer to the *Kadi* ruling of the CJEU, reminding that the latter itself has placed its assertion of an identity as a 'Community of law' above a respected international commitment. Constitutional Court (Germany), *Lissabon*, Judgment of the Second Senate, 30 June 2009, 2 BvE 2/08, para. 340.

[128] Antonios Tzanakopoulos, 'Judicial Dialogue in Multi-level Governance: The Impact of the Solange Argument' in Fauchald and Nollkaemper (eds.), supra note 64, 203-204.

[129] *Kadi*, supra note 22, para. 285.

[130] Ibid., paras. 250, 276.

[131] Luis M. Hinojosa Martinez, 'Bad Law for Good Reasons: The Contradictions of the Kadi Judgment' (2008) 5 Int'l. Org. L. Rev. 339, 341-343.

[132] Andrea Gattini, 'Joined Cases C-402 & 415/05 P' (2009) 46 Common Market Law Review 213, 230 fn 61.

fundamental values of that state or regional community.[133] The need for 'counter limits' was thus developed, i.e. 'those national fundamental principles, whose safeguarding acts as an unbreakable counter-limit to the limitations deriving from international law'.[134] According to Armin von Bogdandy, there 'should always be the possibility, at least in liberal democracies, to limit, legally, the effect of a norm or an act under international law within the domestic legal order if it severely conflicts with constitutional principles'.[135] In this vein, it is perhaps to be welcomed that the South African Supreme Court, having acknowledged that customary international law does not admit of exceptions to the immunity of a foreign head of state even in the case of accusations of serious crimes, nevertheless prescribes the exclusion of such immunities where the foreign head of state is in South Africa because of the country's constitutional values. The particular history of the country requires, the judge believes, that South Africa should be able to apply its values of access to justice and combating international crimes even in violation of existing international law.[136]

The situation became more disturbing when domestic courts use the same strategy not to demand respect for fundamental rights, but precisely to exempt their State from international law obligations. Naturally, the strategy was emulated and more and more national courts were inspired by the Solange doctrine of the German Constitutional Court to establish constitutional values as a framework for the application and enforcement of international law. The Venezuelan Supreme Court has thus made it a condition for the implementation of IACtHR decisions that they respect fundamental constitutional values. Based on this criterion, the Court refused to review a case as requested by IACtHR on the grounds that this would violate the principle of res judicata, a fundamental Venezuelan national value.[137] But long before that, the Zimbabwean Supreme Court held that Zimbabwe's adherence to international human rights instruments promoting gender equality and prohibiting discrimination against women could not have the effect of nullifying local customs prohibiting women from succeeding to their father's property in the presence of male descendants. The Court justified its position by underlining the inscription in the Constitution of the country's commitment to African culture and values which must not be abandoned.[138]

In the same logic, the Russian Constitutional Court affirmed Russia's 'right to object' when the domestic implementation of an ECtHR decision would result in the violation of constitutional norms or values. According to the Court, although 'the Constitution and the Convention [ECHR] are based on the same basic values of human rights protection', the Russian Federation is obliged to ensure the supremacy of the Constitution and 'therefore is not just to follow an ECtHR decision if implementing it is contrary to constitutional values'.[139] This results in the Russian Constitutional Court having the final say in defining Russia's obligations under the ECHR. As with the German 'Solange' jurisprudential saga, the domestic judge acquires a veto power that allows him/her to define which values of his/her legal order are fundamental, when and how they collide with

[133] See Benedetto Conforti, 'La Cour Constitutionnelle italienne et les Droits de l'Homme Méconnus sur le Plan International' (2015) 2 RGDIP 353, 354.

[134] Palombino, supra note 20, 506.

[135] Armin von Bogdandy, 'Pluralism, Direct Effect and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6 I.CON 397, 412; see for a defence of the resistance of constitutional courts as preserving 'constitutional *plus value*' in the European legal order, Burgorgue-Larsen, supra note 107, 426-430.

[136] Supreme Court of Appeal (South Africa), *The Minister of Justice and Constitutional development et al. v The Southern Africa Litigation Centre (*867/15) [2016] ZASCA 17, 15 March 2016, paras. 63 and 95.

[137] Supreme Tribunal of Justice, *Solicitor General of the Republic v Venezuela,* Final Award on Jurisdiction of the Constitutional Chamber, file n° 08-1572, 18 December 2008.

[138] Supreme Court (Zimbabwe), *Veneria Magaya v Nakayi Shonhiwa Magaya* (SC 210/98), 16 February 1999.

[139] Constitutional Court (Russia), N 12-P, 19 April 2016, paras. 2.2 and 4.

international law and whether or not conciliation is possible.[140] Although its decision seems to lead to a conclusion apparently contrary to those of the above-mentioned domestic courts, the Russian Constitutional Court is not mistaken and takes care to justify and legitimise its decision by relying on German and Italian case law.[141]

Regardless of the result obtained, it is indeed a question of using the same strategy: to invoke values deemed fundamental to the constitution to set aside the application and respect of international norms and decisions. Whether it is the decision of the German Constitutional Court, the decisions of the Italian and Russian Constitutional Courts, that of the Venezuelan Supreme Court or the decision of the European Court of Justice, they follow the same logic and carry the same dangers and threats for international law. 'It is a high peak of a new form of robust dualism. Dualism is here not limited to explain the penetration of international legal norms into the national order. It ventures further, extending to a denial of any constructive "dialogue" with international law and the judgment of [international courts]. [These decisions] will give rise to a shattering schism between internal and international law, the former being pitched against the second in trying to sterilize its effect'.[142] This is not just a banal separation of legal orders to which classical dualism has recourse and which some judges have been able to invoke to subject the entry of international law into their legal order,[143] but a genuine 'divorce of municipal law and international law'. Henceforth, a norm of international law can only penetrate the internal legal order not only if it is 'transformed' by it, but also if it complies with a series of material norms of the international legal order. This 'radical dualism' has rightly been seen as 'a sort of murder of international law through municipal law'.[144]

The perceived nobility or rightness of the values defended by the national judge does little to alter the damaging consequences of the 'values argument' on international law and its universality. Firstly, because once the argument has been accepted for so-called democratic states and legal orders, Pandora's box is open and the argument can be mobilised for and by all. Making the prevalence of international law dependent on the dignity of its content is tantamount to giving each national judge a veto which he/she may use at his/her discretion according to his/her definition of what international law should be. In the absence of a universal judge with the authority to assess which value is legitimate, each national judge will be able to use the argument for any value that he/she considers fundamental. Exceptionalism would thus become the easy tool of all judges hostile to a development of international law or the decision of an international institution. Such a competition of national exceptionalism would lead at best to a weakening of the international rule of law and at worst to a clash of self-proclaimed universal national values.[145] 'Unconstrained by the subtle equilibrium of the international society, domestic judges can be unaware of dangers and oversimplifications in an impulsive and unbridled integration of international law', by giving 'undue

[140] This allows, for example, the Russian constitutional judge to consider the order to pay a monetary compensation from the Russian budget to the shareholders of a company that was involved in vast tax-avoiding activities would violate the constitutional principles of equality and fairness. Constitutional Court (Russia), 1-II/2017, 19 January 2017.

[141] Constitutional Court (Russia), N 21-P, supra note 91; Starzhenetskiy, supra note 34, 261-263.

[142] Robert Kolb, 'The Relationship between the International and the Municipal Legal Order: Reflections on the Decision no 238/2014 of the Italian Constitutional Court' (2014) II QIL, Zoom Out 5, 6; for a more positive reading of this dualism, Jean d'Aspremont and Frédéric Dopagne, 'Kadi: The ECJ's Reminder of the Elementary Divide between Legal Orders' (2008) 5 Int'l. Org. L. Rev. 371.

[143] See supra III (A).

[144] Kolb, 'The Relationship between The International and the Municipal Legal Order', supra note 142, 11.

[145] See on the dangers of exceptionalism and values imperialism for international law, Koagne Zouapet, 'Regional Approaches to International Law (RAIL) Rise or Decline of International Law', supra note 19, 22-26 and 27-33; see the questioning of Aust, Krieger and Lange, supra note 16.

weight to the pipe dream of a constitutional legal order that rests on allegedly universally accepted global values'.[146]

Secondly, because whether it is a question of defending fundamental rights or simply a cultural or religious specificity, the pseudo right of resistance of the constitution results in making international law non-binding, or at best binding but entirely non-executable. International norms and decisions of international institutions, including international courts, become potestative commitments, i.e. valid as long as, and until, a domestic court does not find them to be contrary to values that it holds to be essential for its legal order. Therefore, why should States invest, with all the human, financial and time costs that this entails, in negotiating international agreements, systematising and publishing their practice, commenting on and debating the codification of international custom, litigating in front of an international court, if in the end their co-contractor or adversary in international proceedings can brandish with 'more or less insolence', and a 'certain amount of arrogance', the fundamental values of its domestic legal order to not comply with its international obligations?[147] This would be a renunciation, a challenge to the principle of *pacta sunt servanda*: the very concept of the treaty implies that it can only exist if it binds the parties and that they can only be released from it within the framework of the agreed procedure and not unilaterally in the name of internal values, new or existing at the time of the conclusion of the treaty.[148] As international jurisprudence indicates,[149] the obligation of priority application of international law does not result from a hierarchical construction between the domestic legal order, but from the need to enforce the law, following the paradigm of compliance, a matter of compliance and responsibility for non-observance.[150]

The problem is therefore not the defence by the national judge of certain values or of a value-based approach to international law, but the legal navel-gazing around which it is built. In the cases of the German Constitutional Court on the one hand and the ECJ and the Italian Constitutional Court on the other, the values defended could be found respectively in the European legal order (e.g. by invoking a common constitutional tradition or the ECHR) and in the international order (based on numerous conventions and customary international law on access to the judge). From an international law perspective, it is reasonable and constructive to find an international consensus on applying rules reflecting core values endorsed by the international community than purely domestic legal rules which may be very different from State to State. Disagreement is possible while making use of international law arguments that open and enable dialogue both with international and other national jurisdictions.[151] Insisting on one's own, particular standards when dealing with the global sphere ignores the need to accommodate diversity when cooperating with countries with quite

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[146] Jean d'Aspremont, 'The Systemeic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order', in Fauchald and Nollkaemper (eds.), supra note 64, 141, 164.

[147] Kolb, 'The Relationship between The International and the Municipal Legal Order', supra note 142, 13; Hinojosa Martinez, supra note 131, 344; there is undoubtedly a certain pretentiousness and arrogance in asserting that through its decision of 22 October 2014, 'the Italian Court provides a lesson in juridical civilization to these domestic and international courts, and perhaps even a lesson in civility *tout court*' in Giuseppe Cataldi, 'A Historic Decision of the Italian Constitutional Court on the Balance between the Italian Legal Order's Fundamental Values and Customary International Law' (2014) Italian YB Int'l. L. 37, 38.

[148] Anne Peters, 'Par-delà la Hiérarchie des ordres juridiques – Le Pluralisme Ordonné Vu d'Allemagne' in Baptiste Bonnet (ed.), *Traité des Rapports entre Ordres Juridiques* (LGDJ, Paris, 2016), 1631, 1644.

[149] See *The Greco-Bulgarian "Communities"*, Advisory Opinion, Publications of the PCIJ, Series B, n° 17, 31 July 1930, 32; *Exchange of Greek and Turkish Populations*, Advisory Opinion, Publications of the PCIJ, Series B, n° 10, 21 February 1925, 20; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, ICJ Reports 1988, 12, para. 57; Elettronica Sicula S.P.A. (ELSI), Judgment, ICJ Reports 1989, 15, para. 73.

[150] Peters, 'Par-delà la Hiérarchie des ordres juridiques', supra note 148, 1632.

[151] August Reinisch, 'Introduction' in Reinisch (ed.), supra note 80, 1, 8; Gattini, supra note 132, 226-227.

different sets of values, or at least different interpretations of them. It is just as damaging for international law for a national court to claim to universalise the particular by trying to impose the values of the domestic legal order on the regional or universal legal order, as it is for it to particularise the universal by reading shared values only through the prism of its constitutional values.

4. Resistance through Divergent Interpretation of the International Norm

Resistance to international law by domestic courts may be less frontal, but more roundabout, through the adoption of an original and specific interpretation and application of the international legal norm. In these cases, the domestic court effectively places itself on the ground of international law, acting as an organ of international law to which it affirms that the State is subject to and which it intends to apply. But in applying or interpreting the international rule, it opts for an approach that deviates from the general understanding and application of the rule that had been made until then. This deviating interpretation may be more or less damaging to the international rule of law depending on the objective pursued by the domestic court. A divergent interpretation may thus be a real challenge to the rule of law when it has an apologetic perspective, aiming at legitimising the actions and activities of the State. On the other hand, it may be more enriching for international law and consolidate the rule of law, when it corresponds to the concern of the domestic judge to propose an interpretation of the rule of law that seems to correspond and respond to the evolutions of international society.

a) Accommodation of National Interest in the Interpretation of International Law: Apologist Role of Domestic Courts

International law's reliance on national courts to ensure implementation of and compliance with international law is based in part on the belief that these bodies, despite being part of the State, have, by virtue of their independence and impartiality, the capacity and means to compel governments, including the most recalcitrant, to comply with their international commitments and obligations. So for example, the *Institut de Droit International* calls 'upon national courts to become independent actors in the international arena, and to apply international norms impartially, without deferring to their governments.[152] It is this faith and confidence in the ability of national judges to correct violations committed by their State that underpins also, the rule of prior exhaustion of domestic remedies before referral to international courts in certain branches of international litigation.[153] Nevertheless, as shown by some studies, often, the jurisprudence of the national courts on international law is consistent in protecting short-term governmental interests and is careful not to impinge on the State's international policies and interests as defined by the government. Refusing to live up to the vision of international lawyers, domestic judges tend to interpret international rules so as not to upset their governments' interests, sometimes actually seeking guidance from the executive for interpreting international law, or approaching international law with their national glasses on.[154]

In some countries, this role of legitimising national policy is made clear in the legal framework defining the functions and powers of national courts. For example, the Law of Organization of Courts

[152] Institut de Droit International, 'Resolution: The Activities of National Judges and the International Relations of their State' (1994) 65-II Yearbook of the Institute of International Law 318.

[153] Benvenisti, 'Judicial Misgivings Regarding the Application of International Law', supra note 53, 160.

[154] Ibid., 161; Georg Nolte, 'Introduction' in Aust and Nolte (eds.), supra note 18, 1, 3-4; Michael Waibel, 'Principles of treaty interpretation developed for and applied by national courts' in Aust and Nolte (eds.), supra note 18, 9, 17-18.

in China clearly indicates that Chinese courts shall 'protect the regimes of dictatorship of the proletariat (...) and guarantee the successful conducting of the course of socialist revolution and socialist construction'.[155] This means, in the context of foreign policy, that Chinese courts should contribute to the development and consolidation of the country's foreign legal policy guidelines. To ensure compliance with this roadmap, the Supreme People's Court (SPC) has reminded Chinese judges that they should 'effectively serve and guarantee the successful implementation of "One Belt One Road" Initiative'.[156] Therefore, Chinese courts follow a structural approach to international law pursuant to which international legal rules are applied in a way that does not meaningfully challenge the executive.[157] This accommodation of the national interest is not the sole preserve of Chinese judges and judges whose requirement is explicitly prescribed in law. Indeed, Judges in many countries have developed techniques and strategies to support and legitimise the political action of their state, or at least not to challenge it.

This approach may stem firstly from a general practice linked to an ideological reading of international law, sometimes unconscious, but corresponding to the positioning of the State in international relations. It has thus been pointed out that the methods of inquiry and identification of a customary norm reflect national affiliation. Courts in the South and developing countries will tend to invoke more often multilateral instruments and UN General Assembly resolutions where their States have a greater role, while those in the West and North have a clear preference for the conduct of States within a given time frame, which privileges power relations in favour of powerful states. This methodological choice is therefore in reality a response to a desire, whether assumed or not, to satisfy municipal standards and accommodate national interests.[158]

A divergent interpretation of international law may secondly result from the desire of national courts to protect the domestic legal order from the 'revolutionary' impact of international law norms. In such cases, the protectionist reflex towards the domestic legal order pushes it to adopt an interpretation of international law that does not lead to the invalidity of domestic laws. Instead of proceeding with a conciliatory reading of national law with international law as a reference, the judge will adopt the opposite logic which can be termed 'reverse Charming Betsy'),[159] proceeding with an interpretation in conformity with international law in relation to domestic legislation, insidiously calling into question the asserted primacy of international law which is bent to the requirements of domestic law.[160] This conciliatory reading of international law with domestic law is particularly strong when domestic legislation is the expression of a part of national policy about a specific issue under debate on the international scene. When this conciliatory interpretation proves impossible, the judge will then choose to evade the international law invoked in favour of domestic legislation that is close to or goes in the same direction as international law, and which he/she can handle with greater freedom of interpretation and which the other powers can accept more easily because they have drawn it up.[161]

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[155] Article 3 (1) Law of Organization of Courts (1979 as amended in 2006).

[156] Cai, supra note 33, 553.

[157] Ibid.

[158] Antonio Cassese, 'Modern Constitutions and International Law' (1985) 192 Recueil des Cours 331, 439; Benvenisti, 'Judicial Misgivings Regarding the Application of International Law', supra note 53, 165.

[159] The 'Charmig Betsy' theory refers to US case law in which the Supreme Court has established the principle that the law must be interpreted under the presumption that the national legislature did not intend to violate international law; US Supreme Court, *Murray v The Schooner Charming Betsy*, 6 US 2 Cranch 64 (1804).

[160] See for example Cour Suprême, Chambre Judiciaire (Benin), Arrêt n° 34/CJ-P/98-09/CJP, 1998; Tribunal de Première Instance de Ngaounderé (Cameroon), *Maïramou Oumarou*, Jugement n° 404/cor., 12 May 2003.

[161] Metou, supra note 43, 163.

The most problematic and arguably most apologetic technique is for domestic courts to adopt a nationalistic approach to the interpretation and application of international law. In doing so, national judges allow their States to rely on them as a legitimising factor for their foreign legal policy and their political choices more broadly. This is what the Israeli HCJ does, for example, by interpreting the international law of occupation in a way that does not call into question the general policy of the government in the occupied Palestinian territories. The Court emphasises the exceptional nature of the Israeli occupation to circumvent the limits placed on the Occupying Power by Article 43 of The Hague Regulations. It explained that in a long-term occupation, such as the Israeli occupation of the Palestinian territories, the local occupied population also has an interest in projects designed to develop infrastructure and promote its welfare. This enables the Court not to condemn or even legitimise the de facto annexation of land by the Israeli State (with the passage of laws regulating taxes, electricity supply, infrastructure and employment) and the physical separation of the populations in the OPT. Through the use of the law of military occupation, the Palestinian population could be kept under a military regime, while on the other hand through the misuse and selective application of the same law, distinct legislation could be created for the Israeli population.[162]

The same strategy is adopted for Article 49 of the Geneva Convention IV where, while stating that it is not bound by the interpretation given by the executive branch, the HCJ adopts the interpretation that legitimises government policy. The Court held on one hand that the asserted absolute prohibition on all deportations in article 49 is not part of customary international law but decide on the other hand to abandon the clear meaning of Article 49 (1) and to look for the purpose the inclusion of the provision in the Convention. This leads it to accept the State's position that the prohibition on deportation of the civilian population in occupied territories does not apply to the deportation of residents on security grounds.[163] The Court develops an exception that does not exist in the text, to prevent a decision of the illegality of a national policy from being pronounced.

Similarly, the HCJ does not hesitate to introduce elements of Israeli administrative law into international law to give itself room to redress possible abuses, without delegitimizing the general policy of the State of Israel in the occupied territories. The introduction of the proportionality test in points of international humanitarian law which do not contain it, thus allows the Court to grant reparations to some Palestinians in extreme cases, without having to question the conformity with international law of the construction of a separation wall.[164] Moreover, as pointed by Harpaz, the doctrine of proportionality has been used only partially. In the vast majority of house demolitions cases in the OPT, there is no meaningful attempt to analyse the adverse effects of house demolitions for security reasons on Palestinian rights. Voices within the Court itself, which suggested the need for a stricter judicial approach, remained unheeded.[165] In Japan, this restrictive and apologetic interpretation of international law allows judges to assert that State institutions are not violating international law by not putting in place a legal framework to sanction discriminatory and racist practices in the private sphere, as the Convention against the Elimination of All Forms of Racial Discrimination might suggest.[166] The same trend has also been identified in the case law of the CJEU, which has hardly ever annulled an EU measure for breach of trade, association, cooperation or

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[162] Israel HCJ, *Jami'at Ascan al-Mu'aliman Altauniya Almahduda Almasauliya Cooperative Society v The Military Commander in the West Bank,* 1983, 37 (4) PD 785; HCJ 7957/04, *Mara-abe et al. v Israel Prime Minister et al.*, 15 September 2005, para.19. See Weill, supra note 32, 41-46.

[163] Israel HCJ 698/80, *Kawase v Minister of Defense,* 35 PD (1) 617; 785/87, *Afu v IDF Commander,* 42 (2) PD 4. See also on the the selectivity of the Israeli Supreme Court in identifying customary law according to the issues, David Kretzmer, 'Israel' in Sloss (ed.), supra note 26, 273, 305-309.

[164] See *Mara-abe et al. v Israel Prime Minister et al.*, supra note 162, para. 30. See in general on the proportionality test's structural bias and its use as legitimization tool by the HCJ, Weill, supra note 32, 35-40.

[165] Harpaz, supra note 46, 410.

[166] See Webster, supra note 64, 308-309, 314.

partnership agreement. The judges in Luxembourg opt for a regionalist reading of international law and agreements entered into by the EU or its Member States which allows them to support and legitimise the action of the EU and its institutions.[167] There is 'a judicial willingness to acquiesce in the submissions advanced by the Community's political institutions in order to shield Community action from review'.[168]

Reliance on other branches of the State, and especially on the executive, is another heavy strategy employed by domestic judges to apply international law in a way that corresponds to national interests. This can be done either by the judge deferring to the government's interpretation of the international rule of law or by giving the government's version of the facts a quasi-irrefutable presumption of truth. The first scenario can be found in Switzerland, where judges have shown a tendency to accept the statements made by the executive regarding the nature of specific obligations, particularly in politically sensitive areas such as international trade.[169] Some authors have explained the reluctance of Swiss courts to give direct effect to rules liberalising international trade in regional and global trade agreements as stemming from the court's fear of interfering illegitimately with the executive branch of the country. 'As with regard to foreign policy in general, courts fear that they might harm the interests of the country and lack legitimacy to give effect to rules that would grant market access to foreign exporters and service suppliers'.[170] A similar logic can be found in the 2002 decision of the English Court of Appeal. Although the Court sent clear signals of disapproval of the policy pursued by the British government in the fight against terrorism and the abuses it had committed with its American ally concerning the prisoners at Guantanamo Bay, it preferred to defer completely to the judgement of the executive 'whether to make any representations in a particular case, and if so in what form, is left entirely to the discretion of the Secretary of State'. Concerning the habeas corpus, the Court cannot offer any remedy as 'the United States Government is not before the court, and no order of this court would be binding upon it' and that the UK 'has no direct responsibility for the detention'.[171]

In the highly sensitive *Hamdan* case, the US Supreme Court, while ruling that the structure and procedure of the military commissions were illegal, used the referral technique by emphasizing that the State can seek Congress' approval for derogating from the requirements of international law.[172] Similarly, in the *Khadr* cases, the Supreme Court of Canada, after declaring the State official's acts (detention in Guantanamo Bay of a Canadian citizen arrested in Afghanistan) was illegal, granted the government entire discretion as to how to proceed for the remedy. Indeed, the Court deferred the decision of what evidence to disclose to the State, pointing out that this disclosure was subject to the balancing of national security with other considerations and whether this disclosure 'would be injurious to international relations or national defence or national security, and whether the public interest in disclosure outweighs in importance the public interest in non-disclosure'.[173] As another

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[167] See European Court of Justice, C-213/03, *Pêcheurs de l'Etang de Berre v EDF* [2004] ECR I-7357; C-344/04, *IATA and ELFAA* [2006] ECR I-403; C-366/10, *ATAA,* ECLI:EU:C:2011:864 ; C-363/12, *Z,* ECLI:EU:C:2014:159.

[168] Mendez, 'The legal Effect of Community Agreements', supra note 76, 104. See also Mendez, 'The application of International Law by the CJEU', supra note 27, 614-617.

[169] Tribunal Fédéral (Suisse), BGE 120 Ia 1, 11 February 1994; BGE 98 Ib 385, *Banque de Crédit international c Conseil d'Etat du canton de Genève,* 13 October 1972; BGE 112 IV 53, 17 February 1986; BGE 114 Ib 168, 11 November 1988; BGE 131 II 13, *Swisscom Fixnet AG c TDC Switzerland AG,* 30 November 2004.

[170] Andreas R. Ziegler, 'Subtle but Enduring- The Role of Domestic Courts in the Shaping of International Economic Law through Proper Interpretation of Domestic Law: The WTO Agreement before Swiss Courts' in Fauchald and Nollkaemper (eds.), supra note 64, 321, 328.

[171] *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2003] UKHHR 76 CA, para. 67.

[172] US Supreme Court, *Salim Ahmed Hamdan v Donald H. Rumsfeld et al.,* 548 US 557 (2007).

[173] Supreme Court (Canada), *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 125, 2008 SCC 28, para. 26; see also *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, para. 46.

example, the Israeli Supreme Court considers torture and interrogation methods to be illegal, not under international law as it has argued in the past, but simply because the investigators were acting without an authorizing law. With this, the Court deferred to the legislature the possibility of codifying torture instead of preventing it.[174] Apparently concerned not to handicap the action of the defence forces, the Court also ruled that the 'Attorney-General can establish guidelines regarding circumstances in which investigators shall not stand trial, if they claim to have acted from "necessity"'.[175] Thus, on the one hand, the Court affirmed that the 'necessity defence' cannot serve as a legal authorization to use torture methods. However, on the other, it deferred to the State's attorney general the authority to define the circumstances in which interrogators would not be prosecuted, when they claim to have used a prohibited method of torture due to 'necessity'. The Israeli judge's decision paved the way for the Attorney General to adopt an interrogation guide authorising the use of certain interrogation techniques constituting torture.[176]

The jurisprudence of the Israeli HCJ in cases concerning the occupied territories illustrates the second type of deference, in which the national judge considers the version of the facts provided by his government to be indisputable. The HCJ has held that on questions of fact relating to the relation with other States it will accept the government's position as stated in a certificate issued by the minister of foreign affairs.[177] Also, the HCJ does not itself assess the nature of the security threats, once they are invoked by the State and the armed forces to justify its action in the OPT, but gives the greatest weight and credibility to the allegations of the State and the armed forces on the grounds that they are necessarily bona fide: 'We have no reason not to give this testimony less than full weight, and we have no reason not to believe the sincerity of the military commander (...) our long-held view is that we must grant special weight to the military opinion of the official who is responsible for security'.[178] In the same vein, in disputes on professional military questions, in which the Court does not have any expertise of its own, it gives considerable weight to the professional opinion of the military authorities.[179] Therefore, as the intentions presented by the State are difficult to challenge as a matter of evidence and as State agencies are attributed a greater weight for their versions of the facts through the presumption that State agencies 'tell the truth', it becomes almost impossible to challenge the State's arguments.[180]

As noted above with avoidance strategies, this deference to the government's vision or the choice of an apologetic interpretation of international law is a result of the constraints on the national court and its awareness of the consequences of a decision perceived to be contrary to the national interest on its legitimacy and even its future as an institution within the State apparatus. For example, throughout the proceedings before it, the Belgrade War Crimes Chamber carefully avoided any analysis that would have made it possible to establish a link between the various crimes for which it was seized (and handed down convictions) and that could have opened up the possibility of the commission of genocide. It was indeed unimaginable for domestic judges in the post-conflict political context in the Balkans to dare to pronounce a decision or conclusions recognising genocide

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[174] Israel HCJ, 5100/94, *Public Committee Against Torture in Israel,* 6 September 1999, 53 (4) PD 817, paras. 37-39.

[175] Ibid., para. 38.

[176] Weill, supra note 32, 138-142; Amichai Cohen, 'International law in Israeli Courts' in Bradley (ed.), supra note 27, 519, 532.

[177] Israel HCJ, 2717/96, *Wafa v Minister of Defense,* 4 July 1996, 50 (2) PD 848.

[178] Israel HCJ, 2056/04, *Beit Zourik Village Council v The Government of Israel,* 30 May 2004, paras. 28, 47.

[179] Israel HCJ, 180/03, *Municipality of Bethlehem v Ministry of Defense,* 3 February 2005, para. 19; 390/79, *Duikat et al. v Government of Israel et al.,* 10 October 1979, 34 (1) PD 1, 10; 7015/02, *Ajuri v The Commander of IDF Forces in the West Bank,* 3 September 2002, 56 (6) PD 652, 375; 10356/02, *Hass v IDF Commander in West Bank,* 4 March 2004; 124/09, *Dawiat v Minister of Defense,* 18 March 2009; 5696/09 *Mugrabi v Commander of Homme Front Command,* 15 February 2012.

[180] Weill, supra note 32, 34-35; Harpaz, supra note 46, 404-414.

in total opposition to the official State rhetoric and narrative.[181] Similarly, according to Kretzmer, for a long time in Israel, 'it seemed that the main function of the Court in petitions relating to the OT, those in which issues of international law arose, had been to legitimize almost everything that the authorities wished to do'.[182] Hence, in general, national courts show a self-limitation in the interpretation and application of international law that underlines their cautious reflex concerning the way they understand their relationship with the executive and the legislature, but also the relationship between their State and international society.

Very often, however, this approach is justified by the 'prisoner's dilemma': the national judge is afraid of handicapping his/her government in the efficient and effective conduct of international relations without having the certainty that his/her counterparts elsewhere will do the same for their respective governments. Therefore, the judge prefers not to harm national interests by tying the government's hands with an overly rigorous interpretation of international law and leaves political and diplomatic negotiations between governments to define the framework and limits of government action.[183] Thus, the domestic courts suggest that they would be more inclined to a more rigorous interpretation and application of international law if they were confident that this principle and logic of action would be followed by all other domestic courts. They are only willing to ensure compliance with the rule of international law and restrict their government's free hand if other governments would be likewise restrained. 'But in the current status of international politics, such cooperation is difficult to achieve, and rational judges act like the prisoner who cannot be sure that his or her fellow prisoner will cooperate'.[184]

Resigned to having to support national policy, the domestic judge nonetheless wishes to assert his/her independence and membership of the community of judges who are guardians of international legality and the international rule of law. This is why the national court will place its arguments in the field of international law, to convince its readers that its decision, and consequently the acts of its State that it wants to legitimise, conform with international law. The long developments on international law are not intended for the domestic public, which is more interested in the operative part than in the legal nuances, but are addressed to the international legal community, in whose eyes the national judge wants to legitimise the State's action while affirming his/her own legitimacy through his/her interpretation, which he/she wants to present as rigorous. This probably explains why more and more national courts, especially constitutional and supreme courts, which do not have English as their official language, publish their decisions relating to international law or a summary of them in English, in order to ensure their accessibility to this international legal community.

b) Resisting a Vision/Approach to International Law

Interpreting and applying international law, national courts do not hesitate to imprint on it their vision and approach to what they believe should be the international legal order and the international rule of law. They perform sometimes a 'utopian role' as 'law developers' in the name of ethical and cosmopolitan values.[185] In doing so, they try to 'correct' what they see as a misdirection of international law or to 'redirect' it in a way that they see as more consistent with an ideal of justice

[181] See for the apologist approach of the WCC, Weill, supra note 32, 45-67.

[182] Kretzmer, supra note 163, 315.

[183] See US Supreme Court, *United States v Alvarez-Machain*, 504 US 655 (1992), fn 16; UK House of Lords, *Williams & Humbert v W & H Trade* Marks [1986] 1 Appeal Cases 386; Constitutional Court (Germany), *Stocke v The Federal Republic of Germany,* Order of the Second Senate, 17 July 1985, EuGRZ (1986) 18, 20.

[184] Benvenisti, 'Judicial Misgivings Regarding the Application of International Law', supra note 53, 175. See also Metou, supra note 43, 164.

[185] Weill, supra note 32, 157; Harris, supra note 121, 450.

and fairness. Indeed, one cannot reduce the role of national courts to that of mere 'enforcers' of international law and deny them any legitimacy or competence to create international law in the same way as other organs of the State. If the domestic courts can engage the international responsibility of the State by an erroneous interpretation or application of international law, one should also admit that they can contribute by their decisions to the expression of the State's vision of international law, and the development of the latter in the same way as the executive and legislative branches of the State. As implementing organs of international law, they are at the forefront of observing possible gaps and deficiencies in international law and formulating proposals for the strengthening and consolidation of the international rule of law. 'Just as domestic courts a cog in the machinery of dispute settlement and enforcement: their decisions will either resolve disputes, thus enforcing, but also interpreting and thus developing international law (...); or they will instigate protest and reaction, thus either forcing a dispute to mature – and eventually to be resolved, or forcing the principal actors – States – to change (read: develop) the law'.[186]

This reorientation of international law can be done gently. The domestic judge interprets international law in a way that is consistent with values that appear to him/her to be fundamental, including those drawn from other branches of international law. The judge assumes and takes for granted that international institutions did not intend to violate these values and principles and that consequently the international rule must be interpreted and applied in a manner compatible with these higher norms, very often norms of *jus cogens*. This is what the Swiss and Dutch judges do, for example, by assuming that the procedures before international criminal courts guarantee human rights and the rights of defence, because the Security Council and the States, as the case may be, by creating them, surely did not intend to call into question these fundamental rights.[187] Similarly, the UK High Court has held that the UN Security Council's sanctions regime in the context of the fight against terrorism necessarily includes the preservation of certain rights of those sanctioned. The domestic judge recognised that although the assets of the individual could be frozen, the Security Council resolution had to be read as including an implicit humanitarian limitation which would allow minimum payments to be made to the applicant to provide for his basic needs or 'bare necessity of life'.[188]

As explained, applying such a presumption of 'legality' to international judicial decisions not only shifts the burden of proving a violation of a legal norm onto the applicant, but also affirms a certain understanding about international institutions; that is, the understanding that international bodies do not have the intention to carry out actions that violate international human rights standards, peremptory norms of international law, non-derogable rights, or those that are not strictly proportionate.[189] This reading, which may seem both binding (by subjecting the rule of international law to compliance with certain principles) and deferential (the presumption makes it possible not to proceed with a scrupulous review of the international decision), thus allows the international courts to confine the decisions of international institutions to what seems acceptable to them with regard to the international rule of law and to oblige them to comply with it. It is indeed doubtful that an international institution would object to this interpretation of national courts by claiming that it

[186] Tzanakopoulos, 'Domestic Courts in International Law', supra note 1, 163.

[187] Tribunal Fédéral (Suisse), *Emmanuel Rukundo c Office Fédéral de la Justice,* 3 September 2001, n° 1A.129/2001; The Hague District Court (Netherlands), *Slobodan Milošević v The State of the Netherlands*, 31 August 2001 (2002) 41 ILM 86.

[188] UK High Court, *R (on the application of Othman) v Secretary of State for Work and Pensions* [2001] EWHC Admin 1022, para. 60. See in general on the issue, Robert Kolb, 'Le Contrôle des Résolutions Contraignantes du Conseil de Sécurité des Nations Unies sous l'Angle du Respect du Jus Cogens' (2008) 18 Swiss Review of International and European Law 401.

[189] Fikfak, supra note 2, 58.

intended to violate norms of *jus cogens*, fundamental rights and the international rule of law in general.

Despite the apparent deference, this strategy constitutes a genuine resistance, gentle but resistance nonetheless, by domestic judges to decisions of international institutions that they feel run counter to their vision of international law and legal order. National courts are well aware that very often, 'only a domestic court that expresses "significant deference" to the international institution can "expect influence" it "to any significant degree". At most, therefore, domestic courts can draw the international institution's attention to an incompatibility, an error or an oversight, and frame its judgment as a suggested reading of the international decision'.[190]

Opposition may be more head-on, with domestic courts rejecting an approach and view of international law that they simply refuse to apply. This opposition may be expressed either by arguing that there is a contradiction between two norms of international law and therefore choosing the norm that seems more satisfactory to the domestic court; or for the latter by expressly acknowledging that it is violating an unsatisfactory norm of international law, to work towards its development. The international law of immunities is a good example of these different strategies of resistance by international courts.[191]

The Brussels Court of Appeal uses the first strategy when it invokes the general principle of the prohibition of denial of justice and the right to a fair trial enshrined in Article 6 (1) of the ECHR and Article 14 (1) of the ICCPR to reject the Western European Union's (WEU) internal dispute resolution procedure and consequently refuse to grant it immunity from jurisdiction under international law.[192] In the same vein, resisting courts have invoked human rights and international environmental law to counter claims based on general trade law or specific treaties. The Indian judge refused to accept that the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) could have the effect of preventing the State from taking measures in patent law to ensure access to patients in India and other developing countries and thus guarantee the right to life of these patients.[193]

The reasoning of the South African Constitutional Court of 15 March 2016 is illustrative of the second strategy. The Court after a careful examination of international practice and the Rome Statute comes to the conclusion, regrettable from its point of view, that customary international law does not recognise any exception to the immunities and inviolability of a head of state before foreign jurisdictions even in cases of international crimes.[194] However, while recognising that its role is limited to identifying customary international law as it is and not as it should be, the Court decides on behalf of the values upheld by the Republic of South Africa, stemming in part from its troubled history, and its willingness to participate fully in the evolution of the values upheld by the 'international community' of which South Africa is a worthy member, to put itself at the forefront of efforts to prevent and punish international crimes. If the Court departs from customary international law, which it is violating, 'it is a departure in a progressive direction'.[195] The domestic court thus assumes to violate international law but to ensure its development. It hopes that its violation will constitute an evolution of international law. A similar approach was taken in the decision of the

[190] Ibid., 63-64.

[191] See for an overview Apollin Koagne Zouapet, *Les Immunités dans l'Ordre Juridique International. Le prisme de la Constance* (Pedone, Paris, 2020) 296-308, 392-407.

[192] Cour d'Appel de Bruxelles (Belgium), 4ème Chambre, *Siedler (S.M.) c Union de l'Europe Occidentale,* 17 September 2003, para. 40.

[193] High Court in Madras (India), *Novartis AG v Union of India,* 6 August 2007.

[194] *The Minister of Justice and Constitutional Development v Southern African Litigation Centre,* supra note 136, paras. 74, 84.

[195] Ibid., para. 103.

Italian Constitutional Court which, while preventing the Italian State from implementing the ICJ decision, therefore, preventing it from complying with international law, expresses the ambition that its judgment 'may (...) contribute to a desirable – and desired by many –evolution of international law itself'.[196] Some authors have argued that, provided that such resistance is based on international law and not on internal values, it could be described as 'international civil disobedience': 'a violation of specific international law commands, in service to its own higher law of universal humanitarian values, may be ultimately justifiable from the perspective of a coherent international law itself'.[197]

In the context of the national courts' opposition to the 1267 regime, some domestic judges have also followed this position. For example, some Lords have recognised that by sanctioning domestic measures taken by the UK to implement Security Council sanctions, they were in effect forcing upon the UK a breach of its international obligations under the UN Charter and the relevant Security Council relevant resolutions.[198] However, for the UK Supreme Court, it was a matter of presenting the executive branch with a stark choice, forcing it to bring its weight to bear to change the international legal order, and more specifically the Security Council sanctions regime, in the desired direction: either pass a law through Parliament that expressly suspends the right of access to justice, or negotiate the inclusion of procedural safeguards and access to justice in the sanctions regime, or accept that it is in breach of its obligations under the UN Charter.[199] The same is true for the ECJ in *Kadi,* which has been qualified as 'somewhat rebellious',[200] even if the European judge avoids claiming a violation of existing international law. The ECJ has tried to find a way out to force the European States and the UN Security Council to safeguard some very fundamental rights before adopting serious restrictive measures, while at the same time not explicitly challenging the hierarchical position of the UN Charter under general international law.

Even if they mainly invoke their domestic legal order, the German Constitutional Court in *Solange* and the ECJ in *Kadi* invite international institutions to organise the international legal order in such a way that it satisfies the rules of the rule of law as they see it. The 'equivalent protection' argument thus serves as an argument either to demand an approach to international law that is in line with the vision of the domestic judge (*Solange I* and *Kadi*) or to assume that this approach is shared in both legal orders (*Solange II*). They express principled disobedience, and at the same time sets forth what must be done for normalisation to ensue. *Solange II* chooses a more conciliatory approach where *Kadi* and *Solange I* choose to issue an ultimatum.[201] Even if the German ultimatum was taken very seriously by the European institutions and eventually led to progressive governance reform, one can ask whether the softer resistance, not placing the internal legal order above the international legal order and institutions, is not more efficient and effective, at least in an internationalist perspective.[202] Indeed, a rigid posture can lead to an 'aporia', which as such does not lend itself to any formal solution.[203] The recommended 'reasonable resistance' approach[204] allows domestic

[196] Judgment n° 238/2014, supra note 120, para. 3.3.

[197] Harris, supra note 121, 460. See also Tzanakopoulos, 'Domestic Courts in International Law', supra note 1, 158-162.

[198] UK Supreme Court, *R (on the application of Hani El Sayed Sabaei Youssef) v HM Treasury* [2010] UKSC 2.

[199] Tzanakopoulos, 'Judicial Dialogue in Multi-level Governance', supra note 128, 207-208.

[200] Larissa van den Herik and Nico Schrijver, 'Eroding the Primacy of the UN System of Collective Security: The Judgment of the European Court of Justice in the Cases of Kadi and Al Barakaat' (2008) 5 Int'l. Org. L. Rev. 329, 330.

[201] See Tzanakopoulos, 'Judicial Dialogue in Multi-level Governance', supra note 128, 205.

[202] See Bill Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European Law* (CUP, Cambridge, 2012), 180-200.

[203] Palombino, supra note 20, 527.

[204] Ibid.

courts to challenge international norms and propose development and reform without challenging, at least not directly, the legitimacy of international institutions.

Once more, by paying 'appropriate deference', even if it is paid lip service in some cases, to the international institution, and explaining their reasons for re-interpretation or reading-in, domestic courts provide 'carefully evaluated' arguments to the international institution about how its decision ought to be amended to comply with the international rule of law, at least how domestic courts perceive it. This strategy is much more effective if, instead of referring to 'fundamental constitutional values' as decried above, the national judge places himself/herself on the ground of international law and uses common terms of reference that avoid locking the debate into national particularities. This makes it possible to open a dialogue between national courts and international institutions on the evolution and future of the international legal order and the construction of a genuine international rule of law.[205] This is what some national courts are doing by adding foreign case law to their decisions.

Indeed, when opposing a vision of international law or seeking to develop international law, domestic courts tend to build coalitions to demonstrate that the movement for which they are the spokesperson goes beyond their individual action and responds to a social requirement. This coalition manifests itself through mutual citations and cross-references to case law, which makes it possible to weaken a particular legal regime or at least to point out that it is unsatisfactory. Some courts do not hesitate to 'call to arms' the domestic courts of other countries in their decisions in order to combine their efforts to ensure respect for what they consider to be the international rule of law. A striking manifestation of this strategy is the mobilisation of the jurisdictions of several countries against the 1267 regime of the Security Council presented above. The Monitoring Team set up to supervise the regime made no mistake about it and has indicated the risk to the sanctions regime of decisions to overturn domestic implementation measures. The Monitoring Team urged that the criticisms made by the domestic courts should be taken into account, as they would otherwise reinforce each other's resistance and ultimately undermine the very authority of the Security Council.[206]

When domestic courts cannot find foreign decisions to build their coalition, they will resort to a distorted representation of the dominant judicial opinion, relying on dissenting opinions of international or foreign judges, illustrative in their view of 'judicial common sense', selectively giving them significant weight, choosing to ignore the fact that these opinions have been in the minority. This strategy has been used extensively by Italian judges to challenge the current regime of immunities in international law and to propose reform. For example, the judgment in *Germany v Mantelli* cites the dissenting opinion in the ECtHR's *Al-Adsani* and *obiter dictum* in *Kalogeropoulou* cases to support its point that there is the emergence of a customary rule denying immunity where the defendant State is accused of crimes against immunities.[207] Webb has even identified a

[205] Fikfak, supra note 2, 66.

[206] See Second Report of the Analytical Support and Sanction Monitoring Team Appointed Pursuant to Resolution 1526 (2004) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, UN Doc. S/2005/83, 15 February 2005, para. 58; Report of the Analytical Support and Sanction Monitoring Team Appointed Pursuant to Resolution 1735 (2006) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, UN Doc. S/2007/677, 30 September 2007, para. 56; Tenth Report of the Analytical Support and Sanction Monitoring Team Appointed Pursuant to Resolution 1822 (2008) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, UN Doc. S/2009/502, 2 October 2009, para. 45; Eleventh Report of the Analytical Support and Sanction Monitoring Team Appointed Pursuant to Resolution 1526 (2004) and Extended by Resolution 1904 (2009) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, UN Doc. S/2011/245, 13 April 2011, para. 30.

[207] Court of Cassation (Italy), *Germany v Mantelli and Ors,* Preliminary Order on Jurisdiction, n° 14201/2008, 29 May 2008. See Philippa Webb, 'Immunities and Human Rights: Dissecting the Dialogue in National and International Courts' in Fauchald and Nollkaemper (eds.), supra note 64, 245, 253; Roberts, supra note 9, 65.

hypothesis in which national (dissenting) judges will cite international judgments in support of their position, truncating them in such a way as to make the international courts ultimately say the opposite of what the international courts intended to show.[208]

Some have pointed out that this coalition of national judges was never fully constituted in the interest of international law and ultimately corresponds to a nationalistic aim of promoting one's vision of international law and national interests and is therefore limited to matters where these interests are not contradictory. The contradictory positions of the Italian Court of Cassation in the Markovic and Ferrini cases,[209] depending on whether the Italian State was a defendant against a foreigner or an Italian citizen plaintiff against a foreign State, indicate that the utopian and progressive discourse of international law by national judges is never completely free of political considerations and a certain amount of judicial nationalism. The Court of Cassation does not hesitate to promote access to justice for Italian victims of international crimes in the name of fundamental values, while it rejected a similar action against Italian officials two years earlier.[210] The coalition of domestic judges is thus often guided more by a convergence of interests than by the defence of truly universal values.[211] This shared interest may be the will to form a common front against an international court or courts, presented and perceived as a 'common threat to national courts'.[212]

5. Opposing international Courts, Not International Law

In February 2017, the Argentinean Supreme Court, long considered to be one of the strongest allies of the IACtHR, issued a judgment in which it declared its unwillingness to execute a prior judgment of the IACtHR because of the latter's alleged overstepping of competencies.[213] In Europe, it is another court that until then had affirmed its strong attachment to the implementation of ECtHR decisions, the Italian Constitutional Court, which indicated that it would henceforth ensure that the decisions of the Strasbourg court were in line with its established case law. If this was not the case, the Constitutional Court reserved the right not to follow it.[214] These reactions, far from being isolated, are now part of a global movement of mistrust by national courts towards international courts.[215] The former, while affirming their attachment to international law and the rule of international law, no longer hesitate to oppose the latter and challenge their interpretation and application of international law.

Although at the invitation of the international courts, the domestic courts have gradually contributed actively to the implementation of the decisions of the international courts, they do not seem to be ready to follow the latter unconditionally and are increasingly assuming the power to review not only the decisions of the international courts but also how they exercise their jurisdiction. It is therefore more a question of challenging the interpretation and application of international law by international courts than of genuine resistance to international law *per se*. This trend has developed

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[208] Webb, supra note 207, 257.

[209] Court of Cassation (Italy), *Presidency of Council of Ministers v Markovic and ors*, Application for Preliminary Order on Jurisdiction, n° 8157, 8 February 2002; *Ferrini v Germany,* Appeal Decision, n° 5044/4, 11 March 2004.

[210] Weill, supra note 32, 178.

[211] See Benvenisti, 'Reclaiming Democracy', supra note 12, 268-269, 272-273.

[212] Benvenisti, 'United We Stand: National Courts Reviewing Couterterrorism Measures' (2007) 42 Tel Aviv University Law Faculty Papers 31.

[213] Supreme Court (Argentina), 368/1998 (34-M)/CS1, *Ministerio de Relaciones Exteriores y Culto s/informe Sentencia Dictada en El Caso 'Fontevecchia y D'Amico v Argentina' por la Corte Interamericana de Derechos Humanos,* 14 February 2017.

[214] Constitutional Court (Italy), Judgment n° 49/2015, 26 March 2015.

[215] See Kunz, supra note 5; Huneeus, 'Courts Resisting Courts', supra note 118; Movsesian, supra note 115.

mainly in reaction to the decisions and prescriptions of international courts, which are particularly intrusive and directive with regard to the domestic legal order, or perceive as such. In the case of the inter-American human rights system, for example, the tendency of the San José judges to make a judgment of national legal systems has been noted, leading to a defensive movement in the form of a backlash often driven by national courts.[216]

Asserting their independence and rejecting any hierarchical relationship between them and the international courts, national judges refuse to submit either to an interpretation of international law that seems to them to be incorrect (in this case we are approaching the above hypothesis of divergence of approach to international law), or to a specific application of the rule to a particular case by the international court, or finally to the general exercise of its powers by the international court, which in the opinion of the national judge exceeds its powers. These resistances 'occurring within the confines of the system but with the goal of reversing developments in law', involve criticism of specific judgments or exemplify resentment stemming from cultural cleavages in society.[217] However, despite what they may claim, by opposing international courts, national courts indirectly, but effectively, undermine international law which, without the authority of the body vested with the task of providing uniform interpretation and application for all states, runs the risk of becoming fragmented under divergent national interpretations.

a) Challenging the Interpretation of International Law by International Courts

Refusing to be relegated to the role of mere applicators of rules and principles defined by international courts, domestic courts claim the right to participate equally with the latter in the determination of rules of international law and their application. Reversing the hitherto accepted tendency to leave it to the international courts to sanction national interpretations of the international treaty text or custom, and to provide the 'authentic' meaning where appropriate, national courts are gradually setting themselves up as judges of the interpretation and application of the law by international judges. In the words of the Italian Constitutional Court, domestic judges are not 'passive recipients of an interpretative command issued elsewhere in the form of a court ruling'.[218] Hence, in these 'in-system resistance', domestic courts are unsatisfied with the (new) contents of the law as developed by an international court and seek to push back against it to revert to an earlier or different legal situation.

Domestic Courts thus, refuse to follow an interpretation of international law given by international courts that is inaccurate from their point of view. The Swiss Federal Tribunal for example indicated that it did not share the view of the ECtHR in the *Quaranta* case[219] and could therefore not follow it. The Federal Tribunal argued that the position of the Strasbourg judges on the question when free legal advice in criminal proceedings was required was counter to the *telos* of article 6 of the ECHR.[220] In the *Horncastle* case, the UK Supreme Court asserted that there could be cases in which it could decline to follow the ECtHR decisions, 'giv[ing] the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be

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[216] Huneeus, 'Rejecting the Interamerican Court', supra note 97, 127-128; René Urueña, 'Domestic Application of International Law in Latin America' in Bradley (ed.), supra note 27, 565, 572-573.

[217] Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts' (2018) 14 International Journal of Law in Context 197, 203.

[218] Judgment n° 49/2015, supra note 214, para.7. Compare with US Supreme Court, *Breard v Greene,* 523 US 371 (1998), 375.

[219] ECtHR, *Quaranta v Switzerland,* n° 12744/87, Judgment, 24 May 1991.

[220] Federal Tribunal (Switzerland), *X v Canton of Freiburg,* 7 January 1994, BGE 120 Ia 43.

a valuable dialogue between this court and the Strasbourg Court'.[221] In the *Mara'abe* case, the Israeli HCJ refuses to follow the ICJ's interpretation of the Hague Regulations and maintains its own interpretation of international law which was expressly rejected by the ICJ in its Advisory Opinion. For the HCJ, the 'approach of the International Court of Justice cannot detract from this Court's approach regarding the military Commander's authority to take possession o land for constructing the fence'.[222] In the same vein, the Court finds the ICJ's approach to the right to self-defence and the construction of the wall by Israel 'not indubitable' and 'hard to come to terms with'.[223] The Israeli judges find more convincing the interpretations given by some ICJ judges in their separate opinions, which espouse Israeli domestic law. It is this disagreement with the Peace Palace Court that, among other things, justifies the different conclusions they reach and that leads them not to accept the ICJ's findings. A similar approach and result were taken by the Argentine Supreme Court, which said that it could not follow the findings of IACtHR because it considered that the latter prioritizes the investigation and punishment of violations of human rights above the rule of law itself. The Argentine judges, therefore, refuse to give effect to such an interpretation, which they consider contrary to the rule of law.[224]

Faithful to its logic of the superiority of the values of its legal order, it is under the prism of the internal legal order that the German Constitutional Court reserves the right to assess and, if necessary, to challenge the interpretation of the law made by the international courts. In the *GörGülü* case, the Constitutional Court found that 'German courts must observe and apply the Convention within the limits of methodically justifiable interpretation like other statute law of the Federal Government'.[225] Later extending the exception to constitutional interpretation, the Constitutional Court indicated that the jurisprudence of the ECtHR has to be adjusted very carefully to the existing dogmatic framework of national constitutional interpretation.[226] In similar logic, the US Supreme Court held that 'although the ICJ's interpretation deserves "respectful consideration"' it did not compel [the Court] to reconsider [its] understanding of the Convention'.[227] Criticising what he sees as a lack of consideration for the ICJ, from which the Supreme Court has 'repeatedly looked for guidance' in interpreting treaties, Justice Breyer in his dissenting opinion regrets that the interpretation of the Supreme Court stands in direct conflict with the language, history, and ICJ interpretation of the Vienna Convention, and is 'unprecedented'.[228]

Another category of national contestations of international courts jurisprudence concerns alleged violations of the principles of clarity and consistency, which constitute, in the eyes of domestic judges, important elements of the national and international rule of law.[229] This tendency is particularly strong in the field of human rights because of the arguably stronger and more direct impact of the decisions of international judges on the work of the domestic judge. National courts claim that they want to protect domestic legal systems and their own case law from jurisprudence reversals and sudden changes in position from international judges. So, the Italian Constitutional Court stated in 2015 that it is 'only "consolidated law" resulting from the case law of the European

[221] UK Supreme Court, *R v Horncastle and Others,* 9 December 2009, [2009] UKSC 14.

[222] *Mara'abe v The Prime Minister of Israel,* supra note 45, para. 17.

[223] Ibid., para. 23.

[224] *Derecho, René Jesús s/ incidente de prescripción de la acción penal,* causa n° 24.079C, para. VI, in Huneeus, 'Rejecting the Inter-American Court', supra note 97, 125.

[225] *Görgülü*, supra note 100, para.32.

[226] Constitutional Court (Germany), *Preventive Detention,* Judgment, 4 May 2011, 2 BvR 2365/09, para. 94.

[227] *Sanchez Llamas v Oregon,* supra note 60, 341.

[228] Ibid., Dissenting opinion Justice Breyer.

[229] Birgit Peters, 'The Rule of Law Dimensions of Dialogues between National Courts and Strasbourg' in Kanetake and Nollkaemper (eds.), supra note 2, 201, 213.

Court on which the national courts are required to base their interpretation, whilst there is no obligation to do so in cases involving rulings that do not express a position that has not become final'.[230] The Court indirectly reproached the ECtHR for being inconsistent and deviating from its own jurisprudence and highlighted the need for a certain national margin in the area of criminal law.[231] This position has been followed by other national judges.

After adopting the principle in *Horncastle*, the UK Supreme Court clarified in *Cadder* the conditions under which legal predictability and certainty could prevent it from following the case-law of the ECtHR.[232] First, according to the Supreme Court, national courts might ignore ECtHR case law if it departed from previous case law. Second, they could disregard ECtHR jurisprudence if it laid down a new principle that has not been established before. The Court specified that Strasbourg's jurisprudence had to be considered as clear and consistent and therefore in line with elements of the rule of law if it was unanimous, followed repeatedly, and if it included review of other legal systems supporting ECtHR's interpretation. These are particularly high standards and conditions that allow the Court to give national courts a veto power to block and reject any interpretative developments or new interpretations of international law by the international court.[233] The international court's judgments are thus subject to *a posteriori* validation by national judges, the self-proclaimed guardians of jurisprudential consistency and legal predictability.

As might be expected, such a position is hardly acceptable to international courts, whose power of interpretation would regularly be restricted and framed by national courts. Responding directly to the Italian Constitutional Court, the ECtHR specifies that 'its judgments all have the same legal value. Their binding nature and interpretative authority cannot therefore depend on formation by which they were rendered'.[234] In his separate opinion attached to the judgment, Judge Pinto de Albuquerque clarified that this was a response of the Court to the national judges: 'The Court wanted to set a principle before entering into the discussion of the value of Varvara in the following paragraphs 255 to 261. The principle, regarding the "binding nature and interpretative authority" of all Court's judgments, is a direct response to Constitutional Court judgment n° 46/2015 and a message sent to all supreme and constitutional courts in Europe'.[235] In general, while gradually taking into account the legitimate concerns of national judges, the ECtHR has clarified that consistency and coherence cannot have the effect of depriving the international court of the power to adapt its case law and interpretation of the law to developments in international society.[236] In so doing, the Court reaffirmed its power to be the sole judge of the circumstances justifying a departure from its established case law and of the balance to be struck between legal predictability and the progressive adaptation of the law to social realities.

Some authors, however, refuse to be alarmed and see the practice of national courts not as a challenge to international law or the authority of international courts, but as a sign of a dynamic role-defining dialogue between different actors in the international legal order. 'More than actually

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[230] Judgment n° 49/2015, supra note 214, para.7.

[231] Ibid., para. 6.

[232] UK Supreme Court, *Cadder v HM Advocate (Scotland),* 26 October 2010, [2010] UKSC 43. See also *Manchester City Council v Pinnock,* 3 November 2010, [2010] UKSC 45, para 48.

[233] Birgit Peters, supra note 229, 214.

[234] ECtHR, Grand Chamber, *GIEM Srl and Others v Italy,* n° 1828/06, 34163/07 and 19029/11, 28 June 2018, para. 252.

[235] Ibid., Partly concurring, partly dissenting opinion by Judge Pinto de Albuquerque, para 40 fn 133.

[236] ECtHR, Grand Chamber, *Herrman v Germany,* n° 300/07, 26 June 2012, para. 78; *Bayatyan v Armenia,* n° 23459/03, 7 July 2011, para. 102. See for a general presentation of the responses of the ECtHR to national contestations, Birgit Peters, supra note 229, 215-223.

challenging the human rights courts as such, the aim of domestic courts in these cases seems to be to change or reverse a line of jurisprudence. This is commonly referred to as a form of "judicial dialogue", which, in this sense, provides "a constructive way for channelling substantive disagreement or criticism" and enhances ownership.[237] The legitimacy of international courts would thus be closely linked to this exercise of autonomy of national courts, insofar as the latter would allow the building of a broad consensus concerning the jurisprudence of the former and their definition of the international rule of law. The varying reactions of national courts to the jurisprudential proposals of international courts may allow the latter to adapt their jurisprudence and interpretation of the law to the *opinio juris* within the domestic legal orders.[238] National judges by disobeying international courts, try to advance an alternative reading in the relationship between their domestic systems and the Convention, thus contributing to the interpretation of international law. This kind of 'disobedience', Martinico Argues, is functional to a more pluralistic reading of international law and paves the way for dialogical interactions with international courts. This is on the express condition that when they depart from an interpretation and a solution given by the international judge, national judges give substantial reasons for their departure and accept, if necessary, the sanction of the body responsible for ensuring compliance with the decisions of the international jurisdiction (as in the case of the Council of Europe for the ECHR). It is this nuance that distinguishes non-compliance from disobedience in his view.[239]

The main difficulty remains who has the 'power of the last word' in case of persistent disagreement. It is probably true that conflict is not necessarily negative and can even stimulate the development of new ideas and the search for the best possible solutions. However, as Anne Peters rightly points out, an absolutist pluralistic and competitive approach can undermine the binding nature of legal obligations and ultimately lead to the imposition of the law of the strongest. It is clear that the State's ultimate decision-making competence, as some national constitutional and supreme courts seem to want to assert, puts the uniform interpretation and application of international law at risk. Such uniform application is imperative, precisely to ensure legal certainty and legal equality between the addressees and beneficiaries of the rule of law.[240] There is a great risk that if this 'final say' were left to national courts, they would use it to legitimise the actions of their State, or at least be accused of doing so. This is all the more true as any work of interpretation inevitably involves some creation of law; 'process of interpretation is prior to and in service of substance'.[241] There are therefore ideological and political choices that lead a judge to prefer one meaning over another, to advocate one legal construction over another. How then can 'interpretative babelisation' be avoided if the international judge is deprived of the power, without implying a hierarchical relationship with national judges, to indicate a consensual or at least 'authentic' solution? It is undoubtedly more difficult for a national court to accept as 'legitimate' the interpretation of a third-party judge, appointed by the States for this purpose, than that of a counterpart from another country whose nationalist bias it suspects. Pluralism and competition can only be productive and enriching for the international rule of law if they do not lead to questioning the foundations and bases of international law.

[237] Kunz, supra note 5, 1154.

[238] Barani, supra note 83, 102.

[239] Giuseppe Martinico, 'Judicial Disobedience and the ECtHR: The Italian Case' in Breuer (ed.), supra note 34, 137, 159-160. In the same direction, Gareth Davies, 'Does the Court of Justice Own the Treaties? Interpretative Pluralism as a Solution to Over-constitutionalisation' (2018) Eur. Law J. 358, 369-370.

[240] Peters, 'Par-delà la Hiérarchie des ordres juridiques', supra note 148, 1643.

[241] Weill, supra note 32, 16.

b) Challenging the Application of International Law: Reducing the Impact of International Court Decisions

Without challenging the interpretation of the law by the international court, domestic courts may question its application and implementation in a particular case. What the national courts are contesting is not the formulation of the rule itself by the international court, but the international court's assessment of the facts or its disregard of the domestic legal order, which has led to an erroneous judgment. The HCJ's decision in the *Mara'abe* case illustrates well this. The Israeli court points out that the ICJ's advisory opinion, which must be given the highest attention, is handicapped by the bias of the facts submitted to it. If the ICJ, unlike the High Court, does not pay sufficient attention to the security aspects of the equation, it is because neither the report of the UN Secretary General nor those of the two UN Special Rapporteurs on which the Court relies heavily, provide useful data and facts. Therefore, the ICJ has reached its conclusions on a 'minimal factual basis', unlike the HCJ which, having knowledge of all the facts, must, while giving 'the full appropriate weight' to the ICJ's advisory opinion, make a more informed examination of the situation.[242]

This is also the case, when the US Supreme Court rejects the ICJ's application of the Vienna Convention on Consular Relations, arguing that the latter did not understand the nature of the US judicial system, which would have led it to a different conclusion. According to the Supreme Court, the ICJ's interpretation of the Vienna Convention could not be accepted, since it overlooked the basic framework of an adversary system, 'which relies chiefly on the parties to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication. [Accordingly] Procedural default rules are designed to encourage parties to raise their claims promptly and to vindicate the law's important interest in the finality of judgments'.[243] The Supreme Court thus criticizes the ICJ for an overly general and abstract solution that does not sufficiently take into account the specificities of the US judicial system, nor 'the special features (in terms of fundamental principles) of the legal order into which the international interpretation must be integrated and of the fundamental values (like that of legal certainty) which this order is intended to protect'.[244]

The same reproach was formulated by the Russian Constitutional Court towards the ECHR. It considers that the Court does not take sufficiently into account the realities of the country and decides disputes *in abstrato*, instead of assessing the alleged violations *in concreto*. It thus rejected the judgment of the ECtHR in the *Yukos* case on the grounds that the European court failed to take into account the specific social and historical context in Russia at that time, did not pay attention to the fact that the former majority shareholders were those who organised illegal tax-evasion schemes and in no way could be reimbursed for that in any form.[245] Domestic courts in the UK have suggested that they may not follow ECtHR decisions in cases in which the Strasbourg Court has seriously misunderstood the relevant UK law or has not received 'all the help which was needed to form a conclusion'.[246]

By using this argument and emphasising the fact that they are in the best position to take into account all the intricacies of the domestic legal order in the application of international law, domestic judges in fact reserve the ability to shape the decision of the international court so that its impact is not counterproductive for the domestic legal order, or even to overrule it if they deem it

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[242] *Mara'abe v The Prime Minister of Israel,* supra note 45, paras. 57-74.

[243] *Sanchez-Llamas v Oregon,* supra note 60, para. 45.

[244] Palombino, supra note 20, 519.

[245] Constitutional Court (Russia), N 1-P, 19 January 2017.

[246] UK House of Lords, *R v Lyons (n°3)* [2003] 1 AC 976, para. 46; *R v Spear and Others* [2003] 1 AC 734, para. 12.

necessary. Thus, after having assumed the role of judge of international jurisprudential coherence, the internal judge also asserts himself/herself as judge of the usefulness and relevance of the international judge's decision for the internal order. The UK Supreme Court has affirmed this about the decisions of the ECtHR: 'The requirement to "take into account" the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course'.[247] The German and Italian constitutional courts have given themselves the same margin of appreciation.

For the Karlsruhe Court, 'if in concrete application proceedings in which the Federal Republic of Germany is involved, the ECtHR establishes that there has been a violation of the convention (...) the judgment of the ECtHR must be taken into account in the domestic sphere, that is, the responsible authorities or courts must discernibly consider the decision and, if necessary, justify understandably why they nevertheless do not follow the international law interpretation of the law'.[248] The Court highlighted the rights of third persons, not parties to the proceeding before the international court to be the limit for the implementation of judgments because of the possibility that a judgment 'does not give a complete picture of the legal positions and interests involved'. In these cases, it is 'the task of the domestic courts to integrate a decision of the ECtHR into the relevant partial area'. Therefore, a departure from an international court judgment is admissible in those areas of law, such as family law, the law concerning aliens and the law on the protection of personality, in respect of which domestic courts are best placed to strike balance between all interests at stake.[249] On its side, the Italian Constitutional Court challenged an ECtHR judgment because of its failure to consider a number of constitutional principles, such as those of equality and solidarity, linked to the Italian pension system. The Court justified the deviation by the fact that in contrast to an international court, a constitutional/supreme court is always required to carry out 'a systemic and not an isolated assessment' of all values at stake, especially where a value which is peculiar to the forum State alone is concerned.[250]

This is not an exclusively European trend and elsewhere in the world, national judges have also suggested that the reception of international judgments is not a mechanical procedure. The Constitutional Court of Peru explicitly stated that the consequence of judgments of the IACtHR is not the 'automatic derogation' of domestic law and that domestic courts should rather strive towards 'harmonization and integration' of the different legal orders.[251] The Venezuelan Supreme Court follows the same logic by insisting on the social purposes of the law and reserves the right to deviate from the decisions of international courts, which would not be in line with the political project of the Venezuelan society. This philosophy leads the Court to conclude that human rights cannot be treated as absolute or ahistorical, but must be fitted to the needs of that political project.[252]

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[247] *R v Horncastle,* supra note 221, para. 11. For a justification of this position by a Supreme Court judge, Brenda Hale, '*Argentoratum Locutum:* Is Strasbourg or the Supreme Court Supreme?' (2012) 12 HRLR 65.

[248] *Görgülü,* supra note 100, para. 50.

[249] Ibid., paras. 58-59.

[250] Constitutional Court (Italy), Judgment n° 264, 28 November 2012, para. 5.4. In general on the use of this argument by European supreme and constitutional courts, Palombino, supra note 20, 518-522.

[251] Constitutional Court (Peru), 679-2005-PA/TC, *Marti Rivas v Constitutional and Social Chamber of the Supreme Court,* 2 March 2007, ILDC 960, para. 35.

[252] Tribunal Supremo de Justitia (Venezuela), *Caso Gustavo Álvarez Arias y otros,* 18 December 2008, in Huneeus, 'Rejecting the Inter-American Court', supra note 97, 128.

These decisions have been explained as an expression of the anxiety of national judges to see their competence and power diminish under the action of their international colleagues who are not only increasingly 'intruding' into the 'terrain' of the national judge but are also more and more prescriptive towards the latter.[253] Aware of their role in the implementation and enforcement of international law, but also concerned to preserve their own competencies and powers, they do not hesitate to defend their legal order against what they perceive as the authoritarianism of international courts.

c) Rejection of the Authoritarianism of the International Court

The resistance, or even rebellion, of certain national courts towards international courts has sometimes been justified by the former by the need to control, or even reframe, the exercise of their powers by the latter. Arguing on the basis of their democratic legitimacy, these national judges contest the excessive power and activism of which are guilty in their view, international judges who largely go beyond the framework established by the States and pose themselves as highest courts of the domestic legal orders. This is the case in the Americas, where the desire of IACtHR to promote and ensure respect for the rule of law in the countries of the region has led to a progressive movement of retreat on the part of certain domestic courts. Operating in a politically and historically challenging environment, the IACtHR, as Kunz explains, started early to develop a very unique and far-reaching jurisprudence, not only filling the American convention on human rights (ACHR) guarantees with life but also enhancing their effectiveness in the domestic realm. The Court thus developed a one-of-a-kind jurisprudence on reparations, oftentimes adding very detailed lists of remedies to be taken as States as a consequence of violations of the ACHR. The Court, for example, has ordered regularly the reopening of domestic procedures in the operative part of its judgments and obliges judges to check whether domestic legislation conforms to the ACHR as interpreted by the Court, and if not, disapply it, thus 'moving the convention in the direction of the supranational effect conferred to European Union Law by the Court of the Justice of the European Union'.[254]

Gradually, national judges have opposed this 'unique regime of injunctive relief' of IACtHR, to the point of becoming the main pocket of resistance to the implementation of the San José Court's decisions. As a result, 'judges and prosecutors are far less likely to undertake the actions demanded by the Inter-American Court rulings than are executives. While states implement the majority of orders that primary require executive action, they implement only one in ten orders that invoke action by justice systems'.[255] This may be explained by the feeling among national judges that in the particular context of international human rights litigation, the trial and conviction of the State is very often that of the national judicial system. The regional human rights judge will only allow the action to proceed if domestic remedies have been exhausted or unavailable. The decision of violation against the State is therefore also a sign that the local judges have not been able to provide the necessary protection under the Convention. Furthermore, by 'prescribing particular remedial actions courts must take, the Court situates itself as hierarchical superior, something local legal actors easily resent. The Court's remedial regime thus pits it against national high courts'.[256] It is this hierarchical relationship that is often vehemently contested by national courts.

In *Fontevecchia and D'Amico v Argentina,* the IACtHR ordered Argentina to 'revoke in its entirety' a decision of the Supreme Court of the country against two publishers for running stories about an unacknowledged child of the President of the Republic. Argentina's executive branch then asked the

[253] Kunz, supra note 5, 1157.

[254] Ibid., 1133-1135. See also Huneeus, 'Courts Resisting Courts', supra note 118, 502-504.

[255] Huneeus, 'Courts Resisting Courts', supra note 118, 494-495.

[256] Ibid., 516.

Supreme Court to comply with the Inter-American Court remedy and revoke its ruling. The Supreme Court declined to do so arguing that, the IACtHR lacked the authority to order the revocation of a domestic judgment, and as doing so, exceeded its powers under the ACHR.[257] For the Supreme Court, an order to revoke a decision can only be given by superior courts to lower courts. Such pretension, the Court underlined, would make the IACtHR a court of 'fourth instance' or cassation in the Argentinean legal order. And this is not definitely the role of the Inter-American Court, which is 'only' the final interpreter of the norms of the ACHR. The Supreme Court would, therefore, violate the Argentinian constitution if it revokes a judicial decision merely upon an order from an international tribunal.[258] The Venezuelan Supreme Court reacted even more strongly when IACtHR reported that Venezuela had violated the ACHR by removing three judges from the bench. IACtHR clarified that by not invalidating this sanction, the Venezuelan Supreme Court violated the three judges' human rights and the principle of judicial independence.[259] The Supreme Court decided that it would not comply with the IACtHR's decision, arguing that it represented a 'usurpation of its functions'. Moreover, it referred to the 'impossibility of implementing the Inter-American Court decision', and issued a plea to the executive to denounce the American Convention, 'in light of the clear usurpation of functions in which the Inter-American Court of Human Rights has incurred'.[260]

This opposition to excessive powers on the part of international courts has also manifested itself in Europe and there is also a 'growing willingness on the part of national judges to draw red lines'.[261] Many courts have formulated certain barriers to the perceived increasing 'intrusion' of international courts and make use of their 'factual veto power' at the intersection of legal orders.[262] The Swiss Federal Tribunal has, for example, argued that the ECtHR has overstepped its competences in one case by basing its findings on facts that had happened after the final decision of the Swiss courts. According to the Federal Tribunal, this violated the principle of subsidiarity, and therefore it refused to submit to the decision of the international court.[263] In the same vein, the Czech Constitutional Court refused to apply a judgment of the CJEU on the interpretation of EU rules regarding the calculation of old-age pensions for workers from former Czechoslovakia. The Constitutional Court held that the calculation of pension rights relating to former Czechoslovakia was not a cross-border issue, that the CJEU had therefore overstepped its boundaries and was wrong to declare itself competent.[264]

A similar accusation has been made against the ECtHR by the Russian Constitutional Court. The latter indicated that the European Court should, in the exercise of its powers, respect the competences which are the 'exclusive prerogative' of the Constitutional Court and which as such 'can be exercised neither by any other national body nor by any interstate body, including the ECtHR'.[265] The grievances of the judges of the Russian Constitutional Court against the ECtHR were expressed in detail in an

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[257] Supreme Court (Argentina), 368/1998 (34-M)/CS1, *Ministerio de Relaciones Exteriores y Culto s/informe Sentencia Dictada en El Caso 'Fontevecchia y D'Amico v Argentina' por la Corte Interamericana de Derechos Humanos,* 14 February 2017, quoted by Jorge Contesse, 'Resisting the Inter-American Human Rights System' (2019) 44 Yale Journal of International Law 179, 219.

[258] Ibid., 220.

[259] IACtHR, *Apitz Barbera et al. ('First Court of Administrative Disputes') v Venezuela*, Preliminary Objections, Merits, Reparations and Costs, Judgment, 5 August 2008.

[260] Sala Constitucional del Tribunal Supremo de Justicia (Venezuela), Judgment 1939/2008, 18 December 2008 (Exp. 08-1572), quoted in Urueña, supra note 216, 578.

[261] Andreas Hofmann, 'Resistance against the Court of Justice of the European Union' (2018) 14 International Journal of Law in Context 258, 266.

[262] Kunz, supra note 5, 1142.

[263] Tribunal Fédéral (Switzerland), *X. c Service de la population du canton du Jura*, BGE 139 I 325, para. 2.4.

[264] Constitutional Court (Czech Republic), Judgment, 31 January 2012, Pl. Ús 5/12.

[265] Constitutional Court (Russia), 4-P, 27 February 2009.

article published in a major Russian newspaper in 2015 by its president. The President of the Constitutional Court reproaches the Strasbourg Court for certain judicial activism, which is a source of conflict between the latter and the national constitutional courts and which manifests itself in particular through an evolutive interpretation allowing to broaden the scope of the ECHR; the concept of autonomous interpretation of legal terms of the Convention and universalisation of basic European legal notions; the concept of implied rights not directly mentioned in the Convention; the concept of positive obligations of States, extraterritorial application of the Convention; the active use of the pilot judgment procedure and the requirements to change national legislation not directly connected to the applicant's claim; the use of the European consensus doctrine which allows imposing a majority opinion on States; the shrinking of the margin of appreciation doctrine; opening access to the ECtHR for different NGOs.[266]

6. Concluding thoughts

The picture painted by this contribution may appear singularly bleak and pessimistic. By focusing on the 'resistance' and so called 'deviations' of domestic courts to international law, the paper aimed at analysing the 'pathological' cases, deliberately ignoring the many cases and situations in which national judges have proven to be effective tools and organs of international law, compelling states, including their own, to respect international law, ensuring the implementation of the decisions of international courts, and ensuring the respect of the international rule of law by various actors. Not surprisingly, cases of contestation tend to receive a great deal of attention, but it is important to stress that they are not the majority. It is also essential to emphasise that it is the courts that have very often been cited in this study as developing strategies of resistance to international law, which are also very often those developing techniques for promoting and applying international law in the domestic legal order, sometimes by forcing the hand of the other branches of the state. There are not really domestic courts that rigorously apply international law and others that are hostile to it. It would be more accurate and appropriate to speak of national judges, applying international law with more or less enthusiasm, depending on the interests of their State and, above all, on their idea of what the international rule of law should be.

This is one of the principal conclusions that this study has been able to highlight. Domestic judges are not schizophrenic: acting sometimes as national bodies, sometimes as agents of international law. They are national organs *and* agents of international law: they can promote the values and rules of international law without ceasing to be organs of a State. This can be explained first of all from a human point of view. There is no such thing as absolute universality: the national judge appreciates and receives international law through the prism of his/her legal culture, which therefore influences his/her reasoning and working methods. What is true for the international judge (who is elected in particular because he/she represents a legal culture/tradition) is even more true for the national judge. It cannot be accepted that the international judge, whose main task is to interpret and apply international law, is marked by a legal culture, and claim that the domestic judge loses his/her own when (occasionally) applying international law. The second reason is related to the context in which the domestic judge operates. Even if he/she were to forget that he/she is first and foremost the guardian of an internal legal order, the other organs of the State apparatus are there to remind him/her of this. No matter how pro-international law he/she may be, the domestic judge must know *jusqu'où ne pas aller trop loin*. Thus, domestic courts must show activism, self-restraint, pedagogy, prudence and, in some cases, reassure about their nationalism, to advance the 'cause' of international law. The apparent backward step in the jurisprudence and deviations from international law (particularly in the face of decisions by international courts that are strongly

[266] Quoted in Starzhenetskiy, supra note 34, 258-259.

contested at the national level) are sometimes the result of this delicate balancing act to which the domestic judge is forced.

The study also highlighted the universality of resistance strategies and techniques. It was difficult to identify techniques that are specific to the courts of certain political systems or the allegedly monistic or dualistic nature of the legal order. While the degree of independence from political powers undoubtedly has an effect on the way national courts perform their functions and on their ability to 'compel' other powers to comply with international law, it does not predispose them to opt specifically for a particular technique. For virtually all techniques and strategies, it was able to find examples of their use in various parts of the world by judges in both democratic and non-democratic States. The techniques of resistance appear as tools in the service of a jurisprudential policy that the judge can mobilise according to the desired result.

However, it should be reiterated that this conclusion is linked to the taxonomy used. By focusing on the process and strategies deployed rather than the motivations of the judges, one finds this universality of techniques and strategies that vary only in their intensity. But if one were to look more closely at the motivations and reasons that guide the national judge's approach, as they sometimes appear in this study, one would arrive at a different taxonomy. This could help to divide the resistance of national courts between ignorance of international law, defence of certain (national or universal) values, defence of sovereignty, and self-protection in the face of a politically sensitive issue at the national level. From this point of view, one could probably observe a clearer difference between the domestic courts of democratic countries and those of countries with less democratic or autocratic regimes. The resistance of the former, because of the relative independence they enjoy in the national order, may sometimes run counter to the official position of the state as embodied by the government, and will very often be about values. Judges in non-democratic regimes, and with very little independence, will have a tendency to base their resistance to international law on the defence of national sovereignty and legal order, defending in the judicial field the political positions of their government. But this is merely a hypothesis that only further study can confirm or invalidate.

Finally, a contestation of the interpretation of a rule of international law or a refusal to implement an international decision does not necessarily amount to a desire on the part of national courts to undermine or reject international law. Any resistance to international law is not motivated by exclusively nationalistic considerations but stems sometimes from a willingness on the part of the domestic judge to propose an alternative view and approach to international law to that followed by international courts or institutions. The domestic courts in those cases want to push for change precisely with a view to an international legal order more respectful of the rule of law. However, this 'resistance in the interest of international law' may also be counterproductive for the rule of international law if it is based exclusively on national values, in a way that may be perceived as a mission to 'civilise' the world by the national judge concerned. Such resistance, like all resistance, can only serve international law and the international rule of law if it has a resolutely internationalist discourse, imbued with modesty and openness, allowing for the initiation of a dialogue respectful of diversity. It is only on this condition that the domestic judge can be fully an organ of international law.

The Author

Apollin Koagne Zouapet is a researcher in international law who is particularly interested in the theory of the sources of international law, and the impact of these sources on the universality of international law as well as on the respect of the Rule of Law in the international legal order. He holds a Doctorate in Law from the University of Geneva and the Diploma of The Hague Academy of International Law. Before joining the Berlin Potsdam Research Group, he was a Judicial Fellow at the International Court of Justice. He has also been a Visiting Fellow at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, and Associate Researcher at the International Law Department of the International Relations Institute of Cameroon (IRIC).

The Kolleg-Forschungsgruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. We assume that a systemically relevant crisis of international law of unusual proportions is currently taking place which requires a reassessment of the state and the role of the international legal order. Do the challenges which have arisen in recent years lead to a new type of international law? Do we witness the return of a ‘classical’ type of international law in which States have more political leeway? Or are we simply observing a slump in the development of an international rule of law based on a universal understanding of values? What role can, and should, international law play in the future?

The Research Group brings together international lawyers and political scientists from three institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Humboldt-Universität zu Berlin and Universität Potsdam. An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.

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