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Antonios Tzanakopoulos
University College London

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Domestic Courts in International Law: The International Judicial Function of National Courts

ANTONIOS TZANAKOPOULOS*

I. INTERNATIONAL LAW IN DOMESTIC COURTS OR DOMESTIC COURTS IN INTERNATIONAL LAW?

Globalization has augmented the permeability of domestic legal orders, while at the same time it has led to a considerable increase in international regulation. It was only natural then that domestic courts would be faced ever more frequently with having to apply rules promulgated at the international level. This in turn has led to a proliferation of studies and projects as to how domestic courts deal with international law questions that arise, directly or incidentally, in the course of domestic proceedings.¹ No doubt this is a very important, if

* Lecturer in International Law, University College London and University of Glasgow [a.tzanakopoulos@ucl.ac.uk]. This paper served as the background paper for one of the panels at the symposium on “The International Judicial Function,” which took place in Amsterdam in March 2011. It is an evolution of the paper presented at the 4th Biennial ESIL Conference in Cambridge in September 2010 and published as *Domestic Courts as the “Natural Judge” of International Law: A Change in Physiognomy*, in 3 SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW 155 (James Crawford & Sarah Nouwen eds., 2012), from which it also draws in relevant parts. Many thanks are due to Lord Mance of the U.K. Supreme Court, Professors David D. Caron, Christian J. Tams, Jean d’Aspremont, and George Pavlakos, as well as to the participants in the Seminar on the International Judicial Function and in Agora 12 of the 4th Biennial ESIL Conference for their comments on earlier incarnations of this paper. Further comments are invited and may be directed at the address above. The usual disclaimer applies.

1. One could cite, by way of example, the study by SHAHEED FATIMA, USING INTERNATIONAL LAW IN DOMESTIC COURTS (2005; 2d ed. forthcoming 2012); the comparative study INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS: INCORPORATION, TRANSFORMATION, AND PERSUASION (Dinah Shelton ed., 2011); the collective work CHALLENGING ACTS OF INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS (August Reinisch ed., 2010); and the ACIL/OUP project and electronic database OXFORD REPORTS ON INTERNATIONAL LAW IN DOMESTIC COURTS, <http://www.oxfordlawreports.com> (last visited Apr. 23, 2012) [hereinafter ILDC]. These are only some of the most recent incarnations of the interest

very comparative research-intensive question. Yet in this article, the subject is not “international law in domestic courts,” but rather “domestic courts in international law”; that is to say, this article seeks to establish the position of domestic courts in the international legal order. The question is then whether domestic courts are assigned an international judicial function by international law, and whether they in fact assume and exercise that function.

This necessarily leads to a consideration of what is an “international judicial function.” While this is a question of considerable complexity,² the structure of the Project on International Courts and Tribunals’ symposium on “The International Judicial Function” can be employed as a guide to and a distillation of the main aspects of that function.³ These are: the aspect of dispute resolution and/or law enforcement and the aspect of law-interpretation and/or -development. It should be clarified, however, that dispute settlement and enforcement form one single aspect, as judicial dispute settlement “is indeed a primary form of law enforcement.”⁴ Similarly, law-interpretation and law-development are but points on a spectrum—only a thin line separates interpretation from “amendment.”⁵ This thin line is also notoriously difficult to pin down with any certainty.⁶ The task of fact-finding can be seen as necessarily included in these two

on international law in domestic courts. Coming closer to the topic of this article is ANDRÉ NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW (2011).

2. For example, a whole doctoral thesis was recently devoted to analyzing how the ICJ understands its international judicial function: GLEIDER I. HERNÁNDEZ, JUDICIAL CONSCIOUSNESS, JUDICIAL FUNCTION, AND THE INTERNATIONAL COURT OF JUSTICE (forthcoming 2012). The ICJ itself has devoted considerable attention to elaborating its “judicial function,” particularly in the context of Advisory Opinions. Its judges have done this even more so in their relevant separate and dissenting opinions.

3. See Cesare P.R. Romano, *Introduction*, 34 LOY. L.A. INT’L & COMP. L. REV. 1, 3 (2011) (discussing the structure of the panels at the symposium).

4. Christian J. Tams, *Enforcement*, in MAKING TREATIES WORK: HUMAN RIGHTS, ENVIRONMENT AND ARMS CONTROL 391, 394 (Geir Ulfstein ed., 2007). Indeed it is instructive to compare two contributions under the very same title (albeit once in German), by Robert Jennings, *The Judicial Enforcement of International Obligations*, 47 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VOLKERRECHT [ZAÖRV] (1987) 3 [hereinafter Jennings, *International Obligations*], and by Rudolf Bernhardt, *Die gerichtliche Durchsetzung völkerrechtlicher Verpflichtungen*, 47 ZAÖRV 17 (1987) (Ger.). The former deals primarily with enforcement of international judicial decisions, while the latter focuses on dispute settlement as judicial law enforcement. See Part III.A, *infra*.

5. See Michael Akehurst, *The Hierarchy of the Sources of International Law*, 1974–75 BRIT. Y.B. INT’L L. 273, 277 [hereinafter Akehurst, *Hierarchy of Sources*].

6. Cf. Gerrit Betlem & André Nollkaemper, *Giving Effect to Public International Law and European Community Law Before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation*, 14 EUR. J. INT’L L. 569, 584 (2003).

fundamental aspects of the judicial function of a court, namely settlement/enforcement and interpretation/development, as it is their prerequisite.⁷ These two aspects constitute then the “core meaning” of the judicial function, according to the “common understanding” shared by international judicial institutions.⁸

The two aspects are inseparable from each other.⁹ The resolution of a dispute and the enforcement of the law that will go with it cannot be divorced from the interpretation and potential development of the law being applied. Since every norm may be able to sustain a number of possible interpretations, its application by the judge in the case before her in effect leads to the authoritative selection of one of the possible interpretations, making law for the specific case.¹⁰ As such, decisions of courts are not simply declaratory of the law, but rather, on some micro-level at the very least,¹¹ constitutive of it.¹² They are thus means by

7. The task of fact-finding thus will not be treated separately. Domestic courts are undoubtedly better equipped to be fact-finders than international courts, if for no other reason than at least due to their power to compel production of evidence. See Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 919 (2005) [hereinafter Shany, *General Margin*].

8. Cf. *The International Judicial Function: Discussion*, in THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY: AN ANNIVERSARY SYMPOSIUM 1, 4 (James Crawford & Margaret Young eds., 2008), available at http://www.lcil.cam.ac.uk/Media/25_anniversary/Judicial_Function_discussion.pdf (comments of Yuval Shany).

9. For a brief consideration of the conflicting assumptions as to the “lawmaking” power of the ICJ and a way to reconcile them, see Christian J. Tams & Antonios Tzanakopoulos, *Barcelona Traction at 40: The ICJ as an Agent of Legal Development*, 23 LEIDEN J. INT'L L. 781, 782–86 (2010) [hereinafter Tams & Tzanakopoulos, *Barcelona Traction*]. The position of other international courts could be seen as analogous, at least in their respective “field” of international law or “sectoral regime.”

10. For an explicit recognition of this, see Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 art. 17.6(ii), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, 1867 U.N.T.S. 3 [hereinafter *Anti-Dumping Agreement*].

11. For an expression of this, see Christopher G. Weeramantry, *The Function of the International Court of Justice in the Development of International Law*, 10 LEIDEN J. INT'L L. 309, 320 (1997).

12. HANS KELSEN, REINE RECHTSLEHRE 242 *et seq.* (2d ed. 1960); cf. Iain G.M. Scobbie, *The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function*, 8 EUR. J. INT'L L. 264, 273–74 (1997); HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 100 (1933); see also Hersch Lauterpacht, *Decisions of Municipal Courts as a Source of International Law*, 1929 BRIT. Y.B. INT'L L. 65, 85 (1929) [hereinafter Lauterpacht, *Municipal Courts*].

which the law is developed,¹³ and courts serve as the “agents” of that development.¹⁴

That these two aspects are inseparable, and constitute the “core meaning” of the international judicial function is supported by the authority of two former Presidents of the ICJ, among other commentators.¹⁵ Yet this authority does not refer to the *international* judicial function specifically, but rather to the judicial function in general. Indeed, is it not also the function of domestic courts to resolve disputes and thus to enforce the law within their jurisdiction, which will invariably serve to both clarify and develop the relevant law?

The two fundamental and inseparable aspects of the international judicial function (for brevity, dispute resolution and law-development) are then nothing but fundamental aspects of any judicial function (i.e., also of the domestic judicial function).¹⁶ Indeed, “the essential features of the judicial settlement of disputes,” whether by domestic or by international courts, “seem to be universally recognized,”¹⁷ and hand-in-hand with judicial settlement goes the development of the law.

This brings up the question of what—if anything—separates the international from the domestic judicial function. A very simple answer would be to distinguish between courts established by international

13. Manfred Lachs, *Some Reflections on the Contribution of the International Court of Justice to the Development of International Law*, 10 SYRACUSE J. INT'L L. & COM. 239, 241 (1983).

14. Tams & Tzanakopoulos, *Barcelona Traction*, *supra* note 9, at 785. See also THIRD ILDC COLLOQUIUM ON DOMESTIC COURTS AS AGENTS OF LEGAL DEVELOPMENT <http://www.ejiltalk.org/third-ildc-colloquium-on-domestic-courts-as-agents-of-legal-development/> (articles on file with author, forthcoming 2012) (program available).

15. See Robert Y. Jennings, *The Role of the International Court of Justice*, 1997 BRIT. Y.B. INT'L L. 1, 41 (stating that the primary task of a court of justice is to dispose, in accordance with the law, of the particular dispute between the particular parties before it, as well as the development of the law, if only integral and incidental to the disposal of the issues before the court). See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 583, 591–92 (July 8) (dissenting opinion of Judge Higgins) (expressing an opinion similar to that of Jennings).

16. See the consideration of (domestic) “judicial functions” in interpreting Article 2(1)(a) of the 2004 UN Convention on Jurisdictional Immunities of States and their Property in Rep. of the Int'l Law Comm'n, 43d Sess., Apr. 29–July 19, 1999, U.N. Doc. A/46/10 (Sept. 10, 1991), *reprinted in* [1991] 2 Y.B. INT'L L. COMM'N 14, U.N. Doc. A/CN.4/SER.A/1991Add.1 (Part 2) (stating that these functions comprise adjudication of litigation, dispute settlement, determination of questions of law or fact, orders of provisional or enforcement measures, and other functions related to a proceeding); cf. Gerhard Hafner & Ulrike Kohler, *The United Nations Convention on Jurisdictional Immunities of States and Their Property*, 35 NETH. Y.B. INT'L L. 3, 12 (2004); cf. COUNCIL OF EUROPE, EXPLANATORY REPORTS ON THE EUROPEAN CONVENTION ON STATE IMMUNITY AND THE ADDITIONAL PROTOCOL ¶ 8 (1985).

17. CHRISTOPH SCHREUER, DECISIONS OF INTERNATIONAL INSTITUTIONS BEFORE DOMESTIC COURTS 6 (1981).

treaty (i.e., under international law), which exercise an international judicial function, and those established under the law of a state, which do not. This highly formalistic criterion for distinction would halt the enquiry at a very early stage. More importantly, however, it leaves certain issues unaddressed. There is no doubt that domestic courts apply international law in a variety of cases, and with increasing regularity—why should they then not be seen as exercising an international judicial function? In the final analysis they are applying (international) law to facts, thereby settling a dispute under (international) law, and further contributing to the development of that law. Both fundamental aspects of the (international) judicial function seem fulfilled in such a case.

Another seemingly simple answer, flowing from the previous paragraph, would be one that focuses on the nature of the rules that the relevant court applies (i.e., whether they are “international” or “domestic”). Consequently, domestic courts could only ever be seen as engaging in an international (as distinct from domestic) judicial function when they deal with international, rather than domestic, norms.¹⁸ This distinction is taken up in the following part, as it seems to furnish the only meaningful criterion for telling apart the international from the domestic judicial function.

II. INTERNATIONAL AND DOMESTIC NORMS BEFORE DOMESTIC COURTS

The basic argument in this part is that the distinction between international and domestic norms has become increasingly blurred, and that it is complicated by two related factors: the directionality of international obligations undertaken by States (Part II.A); and the variety in the methods of internalization or domestication of international norms (Part II.B).

18. In that latter case, when acting to decide claims under international law, they would be “doubling” as international (judicial) organs, thus undertaking an international judicial function. See, e.g., Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EUR. J. INT’L L. 73, 74–75 (2009); M. Shah Alam, *Enforcement of International Human Rights Law by Domestic Courts: A Theoretical and Practical Study*, 53 NETH. INT’L. L. REV. 399, 400 (2006); Schreuer, *supra* note 17, at 7; RICHARD A. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* xi (1964). This is along the lines of Scelle’s theory of *dédoublement fonctionnel*. GEORGES SCELLE, *II PRÉCIS DE DROIT DES GENS: PRINCIPES ET SYSTÉMATIQUE* 10–12 (1934); see also generally Yuval Shany, *National Courts as International Actors: Jurisdictional Implications* (Hebrew Univ. Int’l Law Forum, Research Paper No. 22-08, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1292056 [hereinafter Shany, *Jurisdictional Implications*] (arguing that empirical evidence shows that national courts are more readily acting like international courts and thus a more robust framework for coordinating domestic and international legal procedures and judicial decisions is needed).

A. *The Directionality of International Obligations*

Not only is there a proliferation of regulation taking place at the international level, but also a great number of norms adopted at that level is characterized by a distinct and peculiar “directionality.” Many international norms are no longer traditional, almost exclusively “extrovert” or “outward-looking” obligations imposed on States with respect to their interaction with other States on the international plane. Rather, most are increasingly “introvert” or “inward-looking” norms;¹⁹ that is to say, norms that aim to regulate State conduct *within* the domestic jurisdiction (or, to put it another way, norms whose intended operation is through—direct or indirect—implementation within the domestic jurisdiction).²⁰ Further, certain (“traditional”) norms regulating State-to-State conduct on the international plane may also have an “introvert” aspect: they may have the effect of creating rights for individuals by requiring that certain conduct be taken within the domestic jurisdiction.²¹ This highlights the difficulty in clearly distinguishing between outward- and inward-looking norms,²² but it does not stop one from considering whether a particular aspect of a norm is outward- or inward-looking, depending on where and how it seeks to produce its effects (i.e., horizontally [State-to-State] or vertically [within the State]).

Inward-looking norms, or inward-looking aspects of norms, may demand (i) that the State undertake, or refrain from, certain conduct within its domestic jurisdiction; (ii) that certain limits be imposed on previously unregulated State conduct within its jurisdiction; or (iii) that the State prohibit, regulate, or permit certain conduct by natural persons

19. For the terminology and similar definitions, albeit in a slightly different context, see Shany, *General Margin*, *supra* note 7, at 920.

20. See Antonios Tzanakopoulos, *Domestic Courts as the “Natural Judge” of International Law: A Change in Physiognomy*, in 3 SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW 155, 158 (James Crawford & Sarah Nouwen eds., 2012) [hereinafter Tzanakopoulos, *Domestic Courts*]; Jean d’Aspremont, *The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order*, in THE PRACTICE OF INTERNATIONAL AND NATIONAL COURTS AND THE (DE-) FRAGMENTATION OF INTERNATIONAL LAW 141, 142 (Ole Kristian Fauchald and André Nollkaemper eds., 2012) [hereinafter d’Aspremont, *Domestic Judges as Architects*].

21. For an example of such a norm, see Vienna Convention on Consular Relations art. 36(1), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 and the relevant jurisprudence of the ICJ in *LaGrand* (Ger. v. U.S.), Judgment, 2001 I.C.J. 466, 494, ¶ 77 (June 27); *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12, 35–36, ¶ 40 (Mar. 31). See also d’Aspremont, *Domestic Judges as Architects*, *supra* note 20, at 142–43 with further references; David Sloss, *Treaty Enforcement in Domestic Courts: A Comparative Analysis*, in THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT—A COMPARATIVE STUDY 1, 6 (David Sloss ed., 2009).

22. Shany, *General Margin*, *supra* note 7, at 920–21.

and legal entities within its jurisdiction. While few traditional international norms could permeate the protective veil of domestic jurisdiction, most prominently those dealing with immunity²³ and with the treatment of aliens, many modern international norms are of the inward-looking type. A number of areas of international law, such as international human rights law,²⁴ international economic law,²⁵ international investment law,²⁶ international criminal law,²⁷ international humanitarian law,²⁸ the international law of the sea,²⁹ international

23. In his Report to the Sixth Committee of the General Assembly, Gerhard Hafner, the Chairman of the Working Group on the Convention on Jurisdictional Immunities of States and Their Property, discussed the possible form of the outcome of the work on the topic, and reported the views of delegations as to whether a convention or a model law would be preferable. Convention on Jurisdictional Immunities of States and their Property, Rep. of the Chairman of the Working Group of the 6th Comm., 54th Sess., Nov. 8–9, 1999, ¶¶ 7–12, U.N. Doc. A/C.6/54/L.12 (Nov. 12, 1999). Commenting later on the adopted Convention, he reflected that in the view of some delegations, a convention was preferable because only a binding instrument would allow the generation of uniform state practice in an area of law where the rules were to be applied by national courts. Hafner & Kohler, *supra* note 16, at 9. See also COE EXPLANATORY REPORTS ON STATE IMMUNITY, *supra* note 16, ¶ 9 (implying that the Convention aims at “a harmonisation of the laws of the member States of the Council of Europe”).

24. See, e.g., CHRISTIAN TOMUSCHAT, HUMAN RIGHTS—BETWEEN IDEALISM AND REALISM 110–12 (Marise Cremona et al. eds., 2d ed. 2008).

25. See, e.g., Anti-Dumping Agreement, *supra* note 10; Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, 1867 U.N.T.S. 3.

26. See, e.g., the tension between a State’s regulatory powers and the explicit and implicit limitations to these powers imposed by obligations not to expropriate or to accord “fair and equitable treatment” customarily found in Bilateral Investment Treaties and in multilateral treaties like the North American Free Trade Agreement arts. 1105 and 1110, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, 605 (1993) and the Energy Charter Treaty arts. 10(1) and 13, Dec. 17, 1994, 2080 U.N.T.S. 95.

27. International criminal law, especially as found in specific treaties, establishes obligations on States to criminalize certain conduct within their jurisdictions and to prosecute such conduct. See, e.g., Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents arts. 2–3, Dec. 14, 1973, 1035 U.N.T.S. 167; International Convention against the Taking of Hostages arts. 2–3, Dec. 17, 1979, 1316 U.N.T.S. 205; International Convention for the Suppression of Terrorist Bombings arts. 3–6, Dec. 15, 1997, 2149 U.N.T.S. 284; International Convention for the Suppression of the Financing of Terrorism arts. 4–8, Dec. 9, 1999, 2178 U.N.T.S. 197.

28. See, e.g., Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 49–54, Aug. 12, 1949, 75 U.N.T.S. 31 (“Geneva Convention I”); Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea arts. 50–52, Aug. 12, 1949, 75 U.N.T.S. 85 (“Geneva Convention II”); Convention relative to the Treatment of Prisoners of War arts. 129–31, Aug. 12, 1949, 75 U.N.T.S. 135 (“Geneva Convention III”); Convention relative to the Protection of Civilian Persons in Time of War arts. 146–48, Aug. 12, 1949, 75 U.N.T.S. 287 (“Geneva Convention IV”); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts arts. 85–87, Jun. 8, 1977, 1125 U.N.T.S. 3 (“Additional Protocol I”); Protocol Additional to the Geneva Conventions of 12 August 1949, and

environmental law,³⁰ and the derivative (or secondary) law (*droit dérivé*) of some international organizations, primarily the UN when acting through the Security Council,³¹ are either exclusively made up of such inward-looking norms, or contain them to a significant degree. This has significant consequences for the implication of international norms with an inward-looking aspect in proceedings before domestic courts.

When inward-looking international norms, which in effect impose obligations on the State to take certain conduct or measures within its domestic jurisdiction, are looked at from within the State, the relevant obligations appear to be placed primarily on the State Executive, since it is the Executive who usually has both the legislative³² and the executive initiative. Domestic courts have a reactive role in this connection: they are called upon to check that the Executive is acting in compliance with the law.³³ This law will include international law requiring certain conduct within the domestic jurisdiction.³⁴ Further, individuals and other entities may derive rights from the international obligations

relating to the Protection of Victims of Non-International Armed Conflicts art. 1, Jun. 8, 1977, 1125 U.N.T.S. 609 (“Additional Protocol II”).

29. See, e.g., United Nations Convention on the Law of the Sea arts. 94 (on State obligations to legislate domestically in various matters regarding ships flying its flag on the high seas) and 98 (on the obligation to legislate regarding search and rescue on the high seas), Dec. 10, 1982, 1833 U.N.T.S. 396.

30. See, e.g., Convention for the Protection of the Marine Environment of the North-East Atlantic art. 9, Sept. 22, 1992, 2354 U.N.T.S. 67 (“OSPAR Convention”); Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters art. 3(1), June 25, 1998, 2161 U.N.T.S. 447 (“Aarhus Convention”); Kyoto Protocol to the United Nations Framework Convention on Climate Change arts. 2–3, Dec. 11, 1997, 2303 U.N.T.S. 148.

31. See, e.g., SC Res. 1373, ¶¶ 1–2, U.N. Doc. S/RES/1373 (Sept. 28, 2001); SC Res 1988, ¶ 1, U.N. Doc. S/RES/1988 (June 17, 2011); SC Res 1989, ¶ 1, U.N. Doc S/RES/1989 (June 17, 2011).

32. For an explicit recognition of the limitation imposed by international law (*in casu jus cogens* and thus also outward-looking rules having that nature) on legislative initiative by the Swiss authorities and subsequently also by the Swiss Constitution, see Erika de Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law*, 15 EUR. J. OF INT’L L. 97, 101–05 (2004).

33. Lord Bingham of Cornhill, *The Rule of Law*, 66 CAMBRIDGE L.J. 67, 78 (2007) (“The historic role of the courts has . . . been to check excesses of the executive power . . .”).

34. For example, under U.K. law, if a public official is not bound to exercise discretion to make a decision in accordance with an unincorporated treaty, but it is still open to her to do so, U.K. courts *may* consider the unincorporated treaty in reviewing the decision. Lord Bingham of Cornhill, *International Law in National Courts, in THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY: AN ANNIVERSARY SYMPOSIUM 1, 2–3* (James Crawford & Margaret Young eds., 2008), available at http://www.lcil.cam.ac.uk/Media/25_anniversary/Int_Law_in_National_Courts_paper.pdf; see also Lord Bingham of Cornhill, *The Rule of Law*, *supra* note 33, at 81–82; TOM BINGHAM, *THE RULE OF LAW 110 et seq.* (2010).

assumed by the State. From the perspective of these individuals and entities, then, whether the right that has been violated by Executive action stems from international or domestic law is irrelevant: they will challenge it on any available legal basis.³⁵ From the perspective of domestic courts, in turn, entertaining the claim should be nothing unusual: it is their proper role to police the actions of political branches for compliance with the law.³⁶

It is then ordinary for individuals to bring claims against the State before domestic courts when they perceive that their rights have been violated or that the Executive has acted illegally within the domestic jurisdiction. Given that a vast array of international obligations nowadays are of the inward-looking type, and given, further, that these obligations cover almost all aspects of contemporary life, many of them will fall to be considered by domestic courts.

Even outward-looking, or traditional State-to-State, rules are not immune from being invoked by individuals before domestic courts in an attempt to restrain Executive action,³⁷ although this will usually refer to action outwith the domestic jurisdiction and will be entertained by domestic courts only with great difficulty.³⁸ To take a few examples, in *U.S. Citizens Living in Nicaragua v. Reagan*, the attempt was to enforce the prohibition of the use of force (as *in casu* found to have been

35. It is instructive, for example, that individuals targeted by the regime imposed by the Security Council under S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999) and subsequent relevant resolutions have challenged their designation under both domestic and international law, many a time in one and the same complaint. See Antonios Tzanakopoulos, *Domestic Court Reactions to UN Security Council Sanctions*, in CHALLENGING ACTS OF INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS (August Reinisch ed., 2010) 54, 54–58 [hereinafter Tzanakopoulos, *Domestic Court Reactions*] with further references to case-law.

36. *But see* R (on the application of Campaign for Nuclear Disarmament) v. Prime Minister, [2002] EWHC (Admin) 2777, ¶ 36 (Eng.) (“[T]he domestic courts are the surety for the lawful exercise of public power *only with regard to domestic law; they are not charged with policing the United Kingdom’s conduct on the international plane*. That is for the International Court of Justice.”) (emphasis added) (note that the reference is to conduct *on the international plane* and not *under international law*). See, however, *supra* note 34, as well as R v. Sec’y of State for Home Dep’t ex parte Lauder, [1997] UKHL 20; and R v. Dir. of Pub. Prosecutions ex parte Kebeline, [1999] UKHL 43.

37. See, e.g., Charles C. Hyde, *The Supreme Court of the United States as an Expositor of International Law*, 18 BRIT. Y.B. INT’L L. 1 (1937) (as early as 1937, Hyde was commenting that a domestic court may “test the propriety of acts, embracing those of its own sovereign, by what it conceives to be the requirements of international law”).

38. This is not necessarily the “fault” of the domestic court. “Political or legislative departments may by appropriate acts *legally* and effectively frustrate the effort to obtain from a local tribunal its own views on the question whether the requirements of international law have been disregarded by the sovereign.” *Id.* (emphasis added). On these, and on “avoidance techniques” invented by domestic courts themselves, see *infra* note 55.

violated by the ICJ in *Nicaragua*) to constrain the actions of the U.S. government.³⁹ Even if the action failed in that instance, the District of Columbia Court of Appeals noted that “[s]uch basic norms of international law (i.e., *jus cogens* norms) . . . may well have the domestic legal effect that appellants suggest. That is *they may well restrain our government in the same way that the Constitution restrains it.*”⁴⁰ In *R v. Jones (Margaret)*, the House of Lords had to consider whether waging an aggressive war, prohibited by international law, constituted a crime under English law and thus justified *prima facie* criminal reaction on the part of citizens (trying to avert the commission of the crime).⁴¹ In a similar case before the German courts, an army officer refused to provide intelligence services in connection with the 2003 Iraq war because the war was allegedly in violation of international law and had his sanction set aside by the *Bundesverwaltungsgericht* (Federal Administrative Court).⁴²

It appears then that domestic courts will naturally come to deal with many disputes involving international law in view of the inward-looking nature of many contemporary international norms. They will not, however, necessarily explicitly acknowledge they are doing so, for in a great many instances (and in a great many domestic legal systems) the international norm will merely remain in the background. This is due to the variety of methods of “internalization” of international norms in different domestic legal systems, to which the next sub-part turns.

B. Variety in the Methods of Internalization of International Norms

There is great divergence and variety in the methods by which domestic legal systems internalize rules of international law, whether from treaty or custom, if they explicitly internalize them at all. Yet, even when not explicitly internalized, international norms may still have an impact on the domestic legal system.

In some domestic legal systems certain international rules are immediately incorporated (e.g., customary norms *en bloc* in some States; international human rights norms in other States; norms in

39. *Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 934–35 (D.C. Cir. 1988).

40. *Id.* at 941 (emphasis added).

41. *R v. Jones (Margaret)*, [2006] UKHL 16.

42. See *International Law in National Courts: Discussion, in THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY: AN ANNIVERSARY SYMPOSIUM 1*, 3 (James Crawford & Margaret Young eds., 2008), available at http://www.lcil.cam.ac.uk/25th_anniversary/book.php (comments of Professor Christian Tomuschat).

ratified international treaties in yet other States; any conceivable mixture of those; and so forth) (*incorporation*); others may need to be transformed or transposed through a domestic implementing act (*transformation*). Beyond these methods of explicit internalization or “domestication” of international law, there are more subtle ways in which international norms operate in the domestic legal order. Even when not incorporated or transposed, international norms may operate domestically through the application of a presumption of conformity of domestic law with international obligations incumbent on the State, which then requires that domestic law be construed consistently with international law if at all possible (*consistent interpretation*). Taking this further still, even pre-existing domestic law may happen to coincide, in substance, with international norms, and thus result in the application of international law domestically in a more or less “unconscious” manner (referred to in this article as “deeply internationalized” or “*consubstantial*” norms; originally a theological term, “*consubstantiality*” denotes that which is “regarded as identical in substance or essence” with something else, “though different in aspect”).⁴³

Examples of such “deeply internationalized,” or “*consubstantial*”—if still domestic—rules could be constitutional rights that *in substance* reflect internationally protected rights,⁴⁴ or more generally domestic rules that are *in substance* reflective of an existing international rule, such as the rules of interpretation.⁴⁵ Rules of international law do not lose their original character and become rules of domestic law by the mere fact of their domestication, or by the parallel existence of a substantively identical, or even merely significantly similar, domestic rule.⁴⁶

43. CORMAC MCKEOWN & ANDREW HOLMES, COLLINS ENGLISH DICTIONARY 367 (15th ed. 2009). The Greek word is *ομοουσιον* (i.e., literally “that which has the same substance”).

44. Making a similar argument, if from the inverse, David Berry has contended that when the Constitution can be interpreted to accord with an (unincorporated) international treaty, it can be seen as a transforming document (i.e., as transforming the treaty into domestic law). *International Law in National Courts: Discussion*, *supra* note 42, at 4 (comments of David Berry). Similarly Armand De Mestral has argued that there are “many ways to incorporate international treaty obligations beyond the explicit statement of obligations in statutory form.” *Id.* at 4–5 (comments of Professor Armand De Mestral). From the perspective of international law then, applying a constitutional norm that has the same content as an international norm can be seen as application of international law.

45. Lord Bingham notes, in this connection, that there is “very little difference between the approach of domestic courts to interpretation and that laid down in the [1969] Vienna Convention on the Law of Treaties.” *International Law in National Courts*, *supra* note 34, at 3.

46. Lauterpacht, *Municipal Courts*, *supra* note 12, at 77. *Cf. id.* at 92 (“For one who chooses to confine himself to the field of municipal law, judges administer in all these cases the law of

C. Substance over Form

Because of the great divergence in domestic legal systems as to the reception of international law, and because of the various ways in which international norms, particularly of the inward-looking type, operate within these domestic legal systems, a clear distinction between international and domestic norms is not possible in a great number of cases. When a domestic court for example applies domestic law giving effect to an international obligation,⁴⁷ or when it applies domestic law that in substance reflects an international norm, or when it uses international law to interpret domestic law in conformity with the former, what kind of law is the domestic court *really* applying? While formally it may be a domestic norm, in substance it will be an international one.

It is then not possible to decide whether a domestic court is exercising an international or a domestic judicial function based simply on the character or nature of the norms applied as “national” or “international.” One would have to look more closely at the two basic aspects of the judicial function exercised by domestic courts, and see to what extent these refer to international law and international disputes. Yet, it would be useful to note, even at this relatively early stage of the inquiry, that from the perspective of international law, *it does not really matter what law the domestic court purports to be applying*. What matters is *whether international law is complied with*.⁴⁸ This will be of crucial importance in the subsequent discussion.

their own country, and nothing else. But one who looks *at the substance of things rather than at their form* must realize that when acting in that capacity municipal judges are the organs of the international legal community.” (emphasis added).

47. For an example of this, see Jennings, *International Obligations*, *supra* note 4, at 12–13.

48. An explicit example of this approach is furnished by the European Convention of Human Rights (ECHR) system. Under Article 1 of the ECHR, the parties must “secure” Convention rights to persons under their jurisdiction; yet this requires neither incorporation, nor transformation, nor for that matter mere reference to the Convention. All that is required is that domestic law and practice do not result in violation of Convention rights (i.e., it is the substantive outcome that matters). *See, e.g.*, Swedish Engine Drivers’ Union v. Sweden, App. No. 5614/72, ¶ 50 (1976); James and others v. United Kingdom, App. No. 8793/79 ¶ 84 (1986); Observer and Guardian v. United Kingdom, App. No. 13585/88, ¶ 76 (1991). By way of corroboration and extension of this point, consider the following statement:

Whether in the human rights field *or otherwise*, the United Kingdom does not lightly become a party to a treaty . . . it will . . . want to be satisfied *that its domestic law and its international obligations are in harmony*. Sometimes it will be necessary to amend legislation to that end.

Rosalyn Higgins, *The Role of Domestic Courts in the Enforcement of International Human Rights: The United Kingdom*, in ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS 37, 37 (Benedetto Conforti & Francesco Francioni eds., 1997) (emphasis added).

III. DOMESTIC COURTS AS INTERNATIONAL DISPUTE SETTLERS AND LAW ENFORCERS

A. *Dispute Settlement as Law Enforcement*

If a judgment can be seen as settling a dispute, it is open to the challenge that it does not actually enforce the law. It may *declare* the law on a given matter, but that law still remains to be enforced. This notion of enforcement of law is inspired by the domestic law fascination with enforcement through coercive measures imposed by some centralized authority. In this sense, enforcement in international law—unlike dispute settlement—has only exceptionally been institutionalized.⁴⁹ Instead, the international legal system has always relied on domestic courts as agencies of enforcement.⁵⁰ But it is not with this *stricto sensu* enforcement that one is concerned here. Rather, the focus is on the *lato sensu* enforcement of law that the handing down of any judicial decision constitutes, even if said decision is merely declaratory in character.

49. The Security Council acting under Chapter VII of the UN Charter could be mentioned as one of the few relevant examples of institutionalization of enforcement in international law, but even in this instance it could be argued that the Council was established to keep the peace rather than enforce the law (paraphrasing Judge Fitzmaurice in his dissenting opinion in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, 294, ¶ 115 (June 21)); cf. Karel Wellens, *The UN Security Council and New Threats to the Peace: Back to the Future*, 8 J. CONFLICT & SECURITY L. 15, 48–50 (2003). For the argument that keeping the peace in the case of the Council is the same as enforcing the law, in the sense that a threat to the peace constitutes a breach of an international obligation, see ANTONIOS TZANAKOPOULOS, *DISOBEYING THE SECURITY COUNCIL—COUNTERMEASURES AGAINST WRONGFUL SANCTIONS* 78–79 (2011) [hereinafter TZANAKOPOULOS, *DISOBEYING THE SECURITY COUNCIL*].

50. An obvious example, in the strict sense of enforcing an international decision, is the recognition and enforcement of international arbitral awards in the area of international commercial and investment arbitration. See, e.g., *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, and *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* art. 54, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention]. There have also been attempts to enforce ICJ judgments through domestic court decisions, which were found to be justiciable in U.S. courts. See, e.g., *Reagan*, 859 F.2d. at 934–35 (holding the attempt at enforcement to be justiciable, even if it ultimately came to nothing for having failed to state a claim upon which relief could be granted). Another example of the problems that attempts to enforce international judicial decisions through national courts are faced with is furnished by “*Socobel*” v. the Greek State, Apr. 30, 1951, 18 I.L.R. 3 (1951) (the Belgian court refused enforcement of a Permanent Court of International Justice (PCIJ) decision between Belgium and Greece, *inter alia*, for lack of an *executur* of the decision in Belgium (i.e., it treated the PCIJ decision as a foreign award). For comment, see E.K. NANTWI, *THE ENFORCEMENT OF INTERNATIONAL JUDICIAL DECISIONS AND ARBITRAL AWARDS IN PUBLIC INTERNATIONAL LAW* 143–45 (1966).

First of all, many a time a declaratory judgment is all the “enforcement” that States seek in international law. Gray notes the new importance that declaratory judgments have taken in the practice of the ICJ, when compared for example with that of the Permanent Court of International Justice (PCIJ), and highlights that States seem satisfied with a declaratory judgment when they could have sought an award of compensation.⁵¹ Similarly, a domestic decision bearing on the interpretation or application of an international norm, even if simply declaratory, can be seen as a form of enforcement of international law.

Much more importantly, however, there are decisions of domestic courts, whether declaratory or constitutive, that—in settling a dispute (e.g., between the Executive and an individual)—can be seen as *stricto sensu* enforcing international law. The example would be when a domestic court strikes down or disapplies legislation, or executive acts, or even decisions of lower courts that are in violation of international law. In such a case, the court is resolving a dispute between the parties before it (in part at least as to the meaning of an international norm) and in that it enforces the international norm, thereby avoiding the breach and the concomitant engagement of the international responsibility of the State. More pertinently still, a domestic court can address a violation of international law by the State of which it is an organ *ex post facto*, thereby offering “juridical restitution” (i.e., the reversal of a juridical act in breach of international law).⁵² In extreme cases, domestic courts could even be considered as applying countermeasures against another State—the enforcement mechanism *par excellence* of international law.⁵³

51. See CHRISTINE D. GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 98–100 (1990).

52. See Commentary on the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts in Report of the International Law Commission to the General Assembly. Rep. of the Int’l Law Comm’n, 53d Sess., 63–67, Apr. 23–June 1, July 10–Aug. 10, 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001), reprinted in [2001] 2(II) Y.B. Int’l L. Comm’n 26, 97, ¶ 5 U.N. Doc A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter ASR and Commentary].

53. For the argument, see TZANAKOPOULOS, DISOBEYING THE SECURITY COUNCIL, *supra* note 49, at 126–28, 194–97. Note that in the oral pleadings in Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Verbatim Record, ¶ 14, (Sept. 12, 2011, 10 a.m.), Christian Tomuschat, pleading for Germany, rejects the argument that Italian court decisions denying Germany’s sovereign immunity can be qualified as countermeasures, but not in principle; rather he rejects the argument solely because the substantive and procedural requirements for resorting to countermeasures are not met *in casu*:

[I]t would be outright absurd to argue that the jurisdiction of the Italian courts may be justified as a countermeasure responding to Germany’s failure to fulfill its duty of reparation. There is no such failure, and for more than 40 years, from the conclusion of the

With this in mind, it becomes clear that all inward-looking international norms depend on domestic organs, and in the last instance domestic courts, for their enforcement.⁵⁴ A prime example here are international human rights norms, but also norms of international criminal law, the international law of the sea (e.g., with respect to prompt release of vessels), international investment law, as well as all other areas of international law where inward-looking norms are preponderant (see Part II.A above). Further, an argument could be made that domestic courts are in fact enforcing international norms even when they do not (explicitly) refer to international law. This would be the case when they apply a domestic norm adopted to give effect to an international obligation; when they interpret a domestic norm in harmony with an international obligation; or even when they enforce a “deeply internationalized” (or “consubstantial”) domestic rule (i.e., a domestic rule that has a parallel existence in international law) (see Part II.B above).

B. Settlement v. Creation of Disputes—Enforcement v. Violation of the Law

It should be mentioned at the outset that domestic courts have a seemingly very limited role—if they have one at all—in the settlement of traditional State-to-State disputes. First of all, domestic courts themselves have devised a number of “avoidance techniques” so as not to have to adjudicate matters of “international relations,” which they have traditionally viewed as more properly within the ambit of the Executive.⁵⁵ After all, the Executive is in almost all domestic legal systems the branch entrusted with the conduct of foreign affairs.⁵⁶ Yet,

two compensation treaties of 1961 until the culmination of the *Ferrini* case, Italy never made any representation to Germany in that sense.

But see the clearly different position of Andrea Gattini, also pleading for Germany, *id.* ¶ 33 (“. . . it is not the business of domestic courts to decide and enforce countermeasures against a foreign State.”) Gattini does not offer any justification for this position.

54. Cf. Jennings, *International Obligations*, *supra* note 4, at 9 (stating that “considerable and important parts of international law have long been applied and enforced by domestic courts—but to individuals and corporations . . . not to sovereign States”).

55. See generally Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT’L L. 159 (1993) (addressing avoidance techniques adopted by national courts when dealing with international norms); see generally also AUGUST REINISCH, INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS 391 (2000) (summarizing the discussion of the same or similar devices being used by courts to avoid review of acts of international organizations).

56. See draft article 9(3) as proposed by Special Rapporteur G.G. Fitzmaurice, First Report on the Law of Treaties, U.N. Doc. A/CN.4/101 (Mar. 14, 1956), *reprinted in* [1956] II Y.B. Int’l

if anything, even when domestic courts do engage with such disputes, it could be argued that their role is to *create* them, rather than to resolve them. If the domestic court of State A resolves a dispute between “its own” State and State B, the expectation would be that State B will protest, and the dispute between the two states will “mature.” Domestic courts being the organs of a State, their actions are attributable to that State, and since they may well be in breach of international obligations incumbent upon the State, these actions will engage the State’s international responsibility.⁵⁷ Examples would include anything from a denial of sovereign immunity, to the decision not to apply a treaty provision for lack of reciprocity in the application of the provision by the other State.

On the other hand, if one were to cast the net very widely, with an eye to the “directionality” of international norms mentioned in Part II above, one would qualify as “international” disputes all disputes before a domestic court that implicate an international norm.⁵⁸ If this is “casting the net widely,” it is not really contentious. Surely prize courts have been seen traditionally as exercising a truly international judicial function in this respect, being “free judicial agencies impartially administering international law”⁵⁹ in disputes relating to the seizure and condemnation of ships, including merchant ships, and their cargo, in accordance with the international law of armed conflict.⁶⁰ If prize courts

L. Comm’n 104, 109, and commentary at 118–19 (giving an example of the primary role reserved to the executive branch).

57. See ASR and Commentary art. 4, *supra* note 52, at 40–41, ¶ 6; *LaGrand*, 2001 I.C.J., at 508, ¶¶ 114–15; Case C-224/01, *Köbler v. Republik Österreich*, 2003 E.C.R. I-10239; see generally CONSTANTIN TH. EUSTATHIADÈS, 1 LA RESPONSABILITÉ INTERNATIONALE DE L’ÉTAT POUR LES ACTES DES ORGANES JUDICIAIRES (1936) (giving an early iteration of this principle).

58. Extrapolating from Bernhardt, *supra* note 4, at 24, it is arguable that an international dispute exists when individuals or legal entities bring a claim against their own or another State, when that claim is “framed” (*umschrieben*) by international law (e.g., when it is made under a human rights treaty, or other treaty granting rights to individuals and legal entities, or under customary international law).

59. Lauterpacht, *Municipal Courts*, *supra* note 12, at 65.

60. See, e.g., SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, ¶ 116 (1994), *reprinted in* SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed., 1995); DEP’T OF THE NAVY, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 7.10 (2007); CANADA OFFICE OF THE JUDGE ADVOCATE GENERAL, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS: JOINT DOCTRINE MANUAL ¶ 870 (2001); BUNDESMINISTERIUM DER VERTEIDIGUNG, HUMANITÄRES VÖLKERRECHT IN BEWAFFNETEN KONFLIKTEN: HANDBUCH ¶¶ 1144–46 (1992).

are not exactly a common occurrence these days,⁶¹ they do serve to demonstrate that domestic courts exercise an international judicial function when deciding a dispute by “administering” international law. It is no longer the case that international law “regulates only the relations between States” so that “the proper and normal occasion for the judicial application of rules of international law is the existence of disputes between States.”⁶² The need to consider and apply international law should be deemed sufficient to characterize a dispute before a domestic court as an “international” dispute.

As discussed in Part II.B above, however, it is rather difficult to determine whether an international norm is at bar. The international norm being “administered” by the domestic court may have been internalized through incorporation, transformation, adoption of relevant legislation in compliance with the international norm, or may not have been explicitly internalized at all; but it may still operate through a presumption for the interpretation of domestic law in harmony with international obligations of the State (“consistent interpretation”), or through pre-existing “consubstantial” domestic law. In cases where individuals or legal entities within the domestic jurisdiction of a State bring a case in domestic court against the State for violation of its obligations or limits to its discretion, as these have been imposed, in the final analysis, by international—if inward-looking (aspects of)—norms, the domestic court will be engaged in the settlement of a dispute under international law (i.e., a dispute whose subject-matter is regulated by international law), and, in that, in the settlement of an international dispute, even if it claims to be applying only domestic law. This is either because the source of the domestic norm will be in international law, or because the two will be “consubstantial.”

However, even in such a situation it may still very well be that the domestic court is in fact *creating*, rather than settling, the international dispute (or it is allowing it to “mature”); it is *violating* rather than enforcing international law. This would be the case if the domestic court misinterprets, misapplies, or disregards the international norm. The court would thereby engage the State’s international responsibility, and invite claims against it by other States, or, as the case may be, by other beneficiaries of the international norm that are given standing under international law to bring a claim in the particular instance (e.g.,

61. See, e.g., MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 366 Mn. 13.89 (2004) (noting at footnote 103 that the U.K. “has not used prize courts for many years and is unlikely to do so in the future”).

62. Lauterpacht, *Municipal Courts*, *supra* note 12, at 73.

individuals protected under international human rights law, or investors protected under international investment law). It would appear then that the role of domestic courts as settlers of international disputes and enforcers of international law is limited only to when it can be argued that they applied international law *correctly*: only then will an international dispute have been settled and international law enforced. But who decides whether international law was correctly applied by the domestic court? Who decides if the domestic court has enforced, rather than violated, international law?

C. Who Decides? Domestic Courts as the “Natural” Judges of International Law

In the decentralized international legal system, there is no final arbiter of legality other than States themselves. As the addressees of international norms, States interpret and apply them in the first instance,⁶³ thereby being the *prima facie* arbiters of legality of their own—and anyone else’s—conduct.⁶⁴ If this power of auto-interpretation and application of international law sounds ominous, that is probably because it *is* rather ominous. But States always interpret and apply international law *at their own risk*:⁶⁵ it is possible that their interpretation and application will be challenged, and will be found lacking before an international court, or in the context of some other procedure for the peaceful settlement of international disputes. In international law then, authoritative interpretation and the final

63. See Georges Abi-Saab, “Interprétation” et “Auto-Interprétation”—*Quelques réflexions sur leur rôle dans la formation et la résolution du différend international*, in RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG—FESTSCHRIFT FÜR RUDOLF BERNHARDT 9, 14–15 (Ulrich Beyerlin ed., 1995); see generally JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 93 (2003) (providing that “norms of international law are seldom ‘finished products’, simply requiring implementation”).

64. See Air Service Agreement of 27 March 1946 Between the United States of America and France (U.S. v. Fr.), 18 R.I.A.A. 417, 443, ¶ 81 (1978) (providing that “each State establishes for itself its legal situation vis-à-vis other States”); Lac Lanoux Arbitration (Fr. v. Spain), 12 R.I.A.A. 281, 310, ¶ 16 (1957) (providing that “il appartient à chaque État d’apprécier, raisonnablement et de bonne foi, les situations et les règles qui le mettent en cause”); United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 28, ¶ 53 (May 24); Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 26 (May 28) [hereinafter Reservations to the Genocide Convention]; Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, 134, ¶ 268 (June 27). See also KELSEN, REINE RECHTSLEHRE, *supra* note 12, at 324.

65. Cf. James Crawford, *Countermeasures as Interim Measures*, 5 EUR. J. INT’L L. 65, 66 (1994); ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 459, 471 (2006).

settlement of a dispute can only come from a centrally instituted third-party instance,⁶⁶ or through agreement between the States-parties to the rule or the dispute.⁶⁷ All exercises of the power of auto-interpretation by States unilaterally are then subject to this proviso: that they are not authoritative or final, but they are at the acting State's own risk.

For lack of a third-party instance or an agreement, however, the first instance exercise of the power of auto-interpretation also becomes, *de facto*, the last. This means that States, and courts as their organs, are the natural judges of international law (i.e., the immediate judges, the ones who will interpret and apply international law when no centrally instituted judge exists).⁶⁸ And while the auto-interpretation and application of the law by the Executive is usually merely implicit in the actions that it takes, domestic courts are the ones who will be called upon to consider the conformity of State conduct with international law, precisely because of the abundance of inward-looking rules. The nature of these rules necessitates that in the last instance, looked at from within the State, executive or legislative action will be challenged before the domestic court, often by reference to an international inward-looking rule, even if that rule has been (explicitly or implicitly) domesticated—as described in Part II above.

66. It is for this reason, not merely because of the lack of a centralized legislator, that judges in international law play allegedly “a far more important role” than at the domestic level. *Cf. The International Judicial Function: Discussion, supra* note 8, at 4 (comments by Professor Alain Pellet). *Cf. also* HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 159 (1958). *See* J. L. Brierly, *Sanctions*, 17 *TRANSACTIONS GROTIUS SOC'Y* 67, 70–71 (1932). *See also* Peter Malanczuk, *Zur Repressalie im Entwurf der International Law Commission zur Staatenverantwortlichkeit*, 45 *ZAÖRV* 293, 296 (1985). *Cf. Appellate Body Report, Canada—Continued Suspension of Obligations in the EC—Hormones Dispute*, ¶ 371, WT/DS321/AB/R (Oct. 16, 2008). In the law of treaties, it has been noted that the only alternative to an agreement of the parties (as to the existence of the invalidity of a treaty or to the bringing about its termination or suspension) is the “sentence d'un juge international.” Francesco Capotorti, *L'extinction et la suspension des traités*, 134 *RECUEIL DES COURS* 417, 564 (1971). *Cf. Antonios Tzanakopoulos, Article 67 of the 1969 Vienna Convention, in THE VIENNA CONVENTIONS ON THE LAW OF TREATIES* 1546, 1551–55, ¶¶ 11–21, in particular at 1554–55, ¶¶ 17, 20 (Olivier Corten & Pierre Klein eds., 2011).

67. This is in line with the “established principle” enunciated by the PCIJ that a rule can only be authoritatively interpreted by the one who can amend or repeal it. *Question of Jaworzina (Polish-Czechoslovakian Frontier)*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 8, at 37 (Dec. 6). *See also* HANS KELSEN, *ALLGEMEINE STAATSLEHRE* 174–75 (1925).

68. *See* JEREMY BENTHAM, *Draught of a Code for the Organization of the Judicial Establishment in France*, in 4 *THE WORKS OF JEREMY BENTHAM* 296–97 (1843) (commenting on Title V, § 1, arts. I–III). The term “natural judge” seems to have been employed in this sense by the Swiss Federal Tribunal in *Librairie Hachette v. Société Coopérative*, 72 *INT. L. REP.* 78, 80–81 (1987). *See also* Tzanakopoulos, *Domestic Courts, supra* note 20, at 156–57.

As organs of the State, courts have a mandate to interpret and apply these international rules. That mandate is granted to them by virtue of international law, quite apart from potential domestic constitutional provisions to similar or even converse effect. Admittedly, international law imposes international obligations on the unitary State, of which courts are merely organs. But international law assigns to domestic courts a position more important to that of the Executive or the Legislature in the implementation of the State's international obligations. It establishes them as the "natural judges" of international law, at one and the same time the point of first contact and the last line of defense, the last opportunity for the State to comply with its international obligations.

A number of arguments can be invoked to support the assertion that international law establishes domestic courts as the natural judges of international law. An "important principle of customary law"⁶⁹ requires the exhaustion of local remedies before a claim that an (inward-looking)⁷⁰ international norm has been violated is made admissible on the international plane.⁷¹ In this rule, international law acknowledges the international judicial function of domestic courts as dispute-settlers and law-enforcers, and reserves a mere subsidiary monitoring function for the international instance. The domestic court is given the opportunity to successfully deal with the essence of the international claim,⁷² by correctly applying (but only *in substance*, not necessarily explicitly) international law.⁷³

The subsidiary role of international courts in comparison to the primary role reserved for their domestic counterparts is made explicit in international criminal law, namely in the Rome Statute of the International Criminal Court.⁷⁴ Further, the important role of domestic

69. Elettronica Sicula S.p.A. [ELSI] (U.S. v. It.), 1989 I.C.J. 15, 42, ¶ 50 (July 20).

70. The relationship between inward-looking rules and the local remedies rule is evident in that the rule does not apply in cases where the breach took place outside the jurisdiction of the state. Cf. Nsongurua J. Udombana, *So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights*, 97 AM. J. INT'L L. 1, 5-6 (2003) with further references.

71. See further commentary to art. 44(b) ASR and Commentary, *supra* note 52, at 121, ¶ 3 (noting that the local remedies rule applies to claims that are not necessarily limited to the field of diplomatic protection).

72. Cf. ELSI, *supra* note 69, at 46, ¶ 59; Avena and Other Mexican Nationals, *supra* note 21, at 35-36, ¶ 40.

73. Cf. Certain Norwegian Loans (Fr. v. Nor.), Judgment, 1957 I.C.J. 9, 40-41 (July 6) (separate opinion of Judge Sir Hersch Lauterpacht).

74. See Rome Statute of the International Criminal Court art. 17, July 17, 1998, 2187 U.N.T.S. 90.

courts in the enforcement of international criminal law is highlighted in the international obligations to extradite or prosecute offenders included in various treaties, and possibly existing under general international law.⁷⁵ In this latter case the domestic court is in fact the only judicial body that will administer international law with respect to the international crime.

In the field of human rights, as well as in many other fields of international law, the gradual acceptance of a margin of appreciation in favor of domestic authorities, including domestic courts, points in the same direction of subsidiarity between national and international courts.⁷⁶ In international economic law there is even explicit reference to a similar concept: Article 17.6(ii) of the Anti-Dumping Agreement provides, for example, that “[w]here the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, *the panel shall find the [domestic] authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.*”⁷⁷ Even in the field of international investment law the international judicial function of the domestic court is retained unless explicitly contracted out of in favor of an international instance.⁷⁸ Then again, in many agreements it is potentially retained through “fork in the road” provisions.

Finally, even State Executives have themselves used their State’s domestic courts as the final opportunity to comply with international obligations.⁷⁹

But the question remains: who decides authoritatively, with binding force, whether the domestic court has—in any given case—lived up to the expectation of being the “natural judge” of international law? Who decides whether in the instance the domestic court settled the dispute/enforced the law or rather created a dispute by not enforcing the law? The answer would have to be: States themselves do, either in the

75. See generally M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* (1995); Zdzislaw Galicki, Preliminary Report on the Obligation to Extradite or Prosecute (“*aut dedere aut judicare*”), Rep. of the Int’l Law Comm’n, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, U.N. Doc. A/CN.4/571 (June 7, 2006). The International Law Commission’s (ILC) work on the topic is still ongoing.

76. See Shany, *General Margin*, *supra* note 7, at 926–31.

77. Anti-Dumping Agreement, *supra* note 10, art. 17.6(ii) (emphasis added).

78. See, e.g., ICSID Convention, *supra* note 50, art. 25(1).

79. See, e.g., *Tachiona v. United States*, 386 F.3d 205, 213 (2d Cir. 2004) (the U.S. Court of Appeals for the Second Circuit acknowledging the legal interest of the State to intervene in judicial proceedings between private parties, and even appeal the decision of a lower court, where that decision would result in a breach of U.S. international obligations).

traditional decentralized manner (lack of protest/acquiescence)⁸⁰ or through the introduction of a third-party instance at the international level to “supervise” the domestic court.

This, in turn, points to domestic courts being integrated in the system of international dispute settlement. Domestic courts are instituted as the last instance *within the State* that can uphold international law and in that way avoid its violation by the State and the concomitant engagement of the State’s international responsibility. Domestic courts, however, are also subject to the supervision of States as the “lawmaking” organ of international law, which in the instance perform a “corrective function” akin to that performed by the Legislature in response to court decisions in some domestic legal orders, and of the international courts that these States institute. What remains to be seen is whether the consideration of domestic courts as law-interpretters and -developers yields the same answers to the same questions.

IV. DOMESTIC COURTS AS INTERNATIONAL LAW-INTERPRETERS AND -DEVELOPERS

If international law assigns domestic courts an international judicial function in the settlement of disputes and law enforcement, what does this mean for the courts’ potential role in developing international law? It has already been argued that the settlement of disputes and the concomitant enforcement of the law in any particular instance cannot be separated from the interpretation and further development of the law, which are both points on a spectrum.⁸¹ To the extent that domestic courts undertake an international judicial function in settling *lato sensu* international disputes and thus enforcing international law, they will also help to develop international law. Justice Cardozo embraced the international law-development function of domestic courts when he stated that international law “has at times, like the common law within States, a twilight existence . . . till at length *the imprimatur of a [domestic] court attests its jural quality.*”⁸² Attesting the “jural quality” of a rule in heretofore “twilight existence” is not all that different from constituting the rule, thereby developing existing law.

80. See, e.g., Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT’L L. 1, 39 (1974–75).

81. See text at *supra*, note 5.

82. *New Jersey v. Delaware*, 291 U.S. 361, 383 (1934) (emphasis added).

A. Domestic Courts as State Organs

It is a trite observation that domestic courts, as State organs, produce State practice and utter *opinio juris*, and are therefore capable of creating or contributing to the creation of customary norms.⁸³ Domestic courts are at the same time law-appliers and law-creators, and officially so. And if one reminds us that from the perspective of international law domestic court decisions are merely facts,⁸⁴ we can quickly retort that in international law *ex factis jus oritur*. Because of the decentralized method of production of international law, whole areas of it have been almost exclusively developed through the jurisprudence of domestic courts. The laws of jurisdiction and of immunity from jurisdiction can be invoked as convenient cases in point.⁸⁵ Both the International Law Commission⁸⁶ and the ICJ⁸⁷ have recognized the potential of domestic courts for further developing the law of immunity through their practice. But the crucial question—as with any instance of State conduct capable of contributing towards law-creation—is how to determine whether domestic court practice violates international law rather than correctly interpreting it and thus contributing to its development.

B. Consistent Interpretation

Before we proceed to discuss the distinction between violation and development of international law on the part of domestic courts, it is necessary to devote some brief comments to the courts' interpretative function. Domestic courts necessarily engage in interpreting international law directly when they are faced with applying an international norm. This will be the case, for example, when a state's domestic law incorporates international law through a constitutional

83. See Lauterpacht, *Municipal Courts*, *supra* note 12, at 80 *et seq.*

84. Certain German Interests in Polish Upper Silesia, 1926 P.C.I.J. (ser. A) No. 7, at 19 (May 25).

85. See Jennings, *International Obligations*, *supra* note 4, at 12.

86. See, for example, Jurisdictional Immunities of States and their Property: Information and Materials Submitted by Governments, Rep. of the Int'l Law Comm'n, 33rd Sess., May 4–July 24, 1981, U.N. Doc. A/CN.4/343, at 17, ¶ 1 (Apr. 14, 1981), where the UN Legal Counsel, pursuant to the request of the ILC, which had just taken up the subject of jurisdictional immunities of States, requests UN Member States to submit relevant material “including . . . decisions of national tribunals.” For the importance given to domestic court decisions, and judicial practice generally in this context, a cursory look at the questions addressed to Member States in the document cited would suffice.

87. See, e.g., Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 24, ¶ 58 (Feb. 14, 2002).

provision or as common law.⁸⁸ But domestic courts will also interpret and apply international law when they engage in the interpretation and application of a domestic implementing act. Many rules of international law, particularly inward-looking norms, require the State to take action to implement them in the domestic jurisdiction.⁸⁹ In claims before domestic courts, it will be the immediate or proximate source of regulation that is usually invoked (domestic implementing act), rather than the more remote one (international norm).

In those latter cases, and especially when the international norm does not leave any margin of appreciation, or any room for discretion, to the domestic implementing authorities, interpretation of the proximate (domestic) act will at one and the same time constitute an interpretation of the more remote one (the international norm). Courts may take cognizance of that and even have recourse to the international norm in order to decide on the interpretation or application (or even validity) of the domestic act.⁹⁰ Yet they may also ignore the existence of the international norm and proceed with the interpretation only of the domestic act invoked. Further, even if they do acknowledge the international norm as the source of the domestic regulation, they may

88. Examples include the United States, where treaties of the U.S. are treated as “law of the land,” see U.S. Const. art. VI, cl. 2; and the United Kingdom, where international customary law is considered as law of the land (though the situation is much more complicated than this statement might suggest), see *International Law in National Courts: Discussion*, supra note 42, at 5 (comments of Roger O’Keefe). Many continental European States, such as Germany, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [Basic Law], May 23, 1949, BGBl. 25, and Greece, 2008 SYNTAGMA [SYN.] [CONSTITUTION] 28(1), also incorporate rules of international law, whether customary or stemming from treaties to which they have become parties, respectively.

89. To take but one example, the implementation of binding Security Council Resolutions under Chapter VII of the UN Charter requires in most States the adoption of domestic implementing acts, whether legislation or executive/administrative action. See generally Vera Gowlland-Debbas, *Implementing Sanctions Resolutions in Domestic Law*, in NATIONAL IMPLEMENTATION OF UNITED NATIONS SANCTIONS: A COMPARATIVE STUDY 33 (Vera Gowlland-Debbas ed., 2004).

90. See, e.g., the case of the Al-Haramain Foundation before Dutch courts, reported in U.N. Chairman of the S.C. Comm., Letter dated Mar. 8, 2006 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities addressed to the President of the Security Council, U.N. Doc. S/2006/154, at 46, ¶¶ 8–9 (Mar. 10, 2006); cf. R (on the application of M) v. HM’s Treasury, [2008] UKHL 26; and Case C-340/08, The Queen, M and Others v. Her Majesty’s Treasury, 2010 E.C.R. I-3913. These cases refer to the interpretation of domestic implementing acts and legislation with respect to the sanctions regime established by the Security Council under Resolutions 1267 (1999) *et seq.* The relevant courts have direct recourse to the international norm in order to interpret the domestic act.

proceed to interpret both of them in a questionable manner,⁹¹ risking breach of the international obligations of the State. On the other hand, such questionable interpretation may impact the interpretation of the international norm by other courts or by its creators, or even lead the creators of the international norm to amend it.⁹²

Finally, and most importantly, interpretation (and thus clarification and development) of international law may take place in cases where the domestic court applies exclusively domestic law but finds that it must interpret it in such a way so as not to conflict with international obligations incumbent upon the State. In such cases, interpretation of the international norm and its requirements is necessary, as it is this interpretation that will inform the interpretation of the (potentially unrelated) domestic norms. This principle of “consistent interpretation” is to be found in the law or judicial practice of many States, and highlights how the relevant domestic courts exercise an international judicial function even when not at all engaged in the direct application of international law.⁹³

91. For example in *Bosphorus Hava v. Minister for Transport, Energy and Communications*, and the Attorney General, [1994] ILRM 551, 557–58, the Irish High Court acknowledged the connection between a domestic regulation and a Security Council Resolution but proceeded to interpret both norms contrary to the interpretation that had been offered by the Security Council, the creator of the international norm in the instance. See also Tzanakopoulos, *Domestic Court Reactions*, *supra* note 35, for further examples.

92. This is, for example, what happened in *R (on the application of Othman) v. Sec’y of State for Work and Pensions*, [2001] EWHC (Admin) 1022, ¶ 57, where the judge “read into” a Security Council Resolution imposing sanctions some exceptions in order to safeguard a sanctioned individual’s right to life and health. A year later the Security Council had adopted similar exceptions for humanitarian reasons. See S.C. Res. 1452, ¶ 1, U.N. SCOR, U.N. Doc. S/Res/1452 (Dec. 20, 2002). For a further example in an unrelated field of international law see Part IV.C *infra*.

93. For reasons of space, only a brief overview will be given here. The *locus classicus* of “consistent interpretation” is the U.S. Supreme Court’s “*Charming Betsy*” principle. See *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804); see also *MacLeod v. United States*, 229 U.S. 416, 434 (1913). In Germany, the rule of consistent interpretation is seen as flowing from the *Völkerrechtsfreundlichkeit* of the Basic Law, and has been reiterated by the Federal Constitutional Court. *Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Mar. 26, 1987, 74 BVerfGE 358*, at 370; see also, e.g., Bruno Simma et al., *The Role of German Courts in the Enforcement of International Human Rights*, in *ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS* 71, 94–96 (Benedetto Conforti & Francesco Francioni eds., 1997). In Switzerland, the principle of consistent interpretation is called “*Schubert-Praxis*” and flows from the relevant practice of the Federal Supreme Court. See de Wet, *supra* note 32, at 104 & n.37. A principle of consistent interpretation exists in Australia, as enunciated by the High Court. See *Kruger v. Commonwealth of Australia*, 118 INT. L. REP. 371, 374, 377–79 (2001); see also *The International Judicial Function: Discussion*, *supra* note 8, at 3 (comments of Melissa Perry). In New Zealand there exists a very strong presumption of conformity with international law. See Philip Sales & Joanne Clement, *International Law in Domestic Courts: The Developing Framework*, 124 L. Q. REV. 388, 393–94 (2008) (U.K.); see also *International Law in National*

What is more, it could be said that domestic courts even interpret international norms when they engage in interpretation of a “consubstantial,” if formally unrelated, domestic norm.⁹⁴ For example, some domestic courts consider international law as informing the interpretation of their Constitution.⁹⁵ Even when they do not, the interpretation of a domestic norm that is in substance similar or identical to an international norm is bound to have repercussions as an instance of State practice. In all these cases, again, the question is how to distinguish between proper “interpretation” (and development) and violation of international law: domestic court interpretations may not accord with the (alleged) position under international law. It is to this issue that we must now turn.

C. Violation or Development?

Domestic courts undertake an international law-developing function even when they are ostensibly violating international law. At the outset it should be noted that violation of the law always has in it the seeds for future development, or change, of the law. Who, for example,

Courts: Discussion, supra note 44, at 5 (comments by Sir Kenneth Keith). Canada also has a principle of consistent interpretation both with respect to treaty obligations and obligations under international law. See *Bouzari and others v. Islamic Republic of Iran*, (2004) 71 O.R. 3d 675, ¶¶ 64–66 (Can. Ont. C.A.). As does Canada, so does, arguably, South Africa. See *Azanian People’s Organization (AZAPO) v. President of the Republic of South Africa*, 1996 (4) SA 671 (CC) at 25, ¶ 26 (S. Afr.). Italian courts engage in a rather peculiar construction with results similar to those of adopting a principle of consistent interpretation: they consider international law rules as special norms that are not superseded by later (domestic) general norms. See Benedetto Conforti, *National Courts and the International Law of Human Rights*, in *ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS* 3, 11–12 (Benedetto Conforti & Francesco Francioni eds., 1997). The Polish Constitution provides in Article 91 that if domestic statutes cannot be reconciled with international treaties ratified with prior parliamentary consent, the international treaty shall prevail over the domestic statute. *KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [KRP] [CONSTITUTION]* Apr. 2, 1997, art. 91 (Pol.). As for the United Kingdom, there is (a) a presumption of compatibility in the common law regarding unincorporated treaty obligations, and (b) a statutory provision in § 3 of the Human Rights Act 1998, which requires that U.K. legislation be interpreted in a manner compatible with ECHR rights “so far as it is possible to do so.” Human Rights Act, 1998, c. 42, § 3 (U.K.) (I must thank Shaheed Fatima for clarifying this point). Finally, the European Court of Justice has adopted a principle of consistent interpretation of European Union (E.U.) law with international obligations of the E.U. See *Case C-286/90, Anklagemyndigheden v. Poulsen and Diva Navigation Corp.*, 1992 E.C.R. I-6019, ¶ 9; *Case C-308/06, Interanko 2008 E.C.R. I-4057*, ¶ 51. See also generally Betlem & Nollkaemper, *supra* note 6, and d’Aspremont, *Domestic Judges as Architects, supra* note 20, at 143–44 (on consistent interpretation).

94. See *supra* text accompanying notes 43–44.

95. Examples would include the United States (*Roper v. Simmons*, 543 U.S. 551 (2005)), Canada (*Suresh v. Canada*, [2002] S.C.R. 1, ¶ 60 (Can.)), and South Africa (*AZAPO, supra* note 93, ¶ 26).

would argue that the PCIJ did not “violate” the customary principle of exclusive flag State jurisdiction on the high seas in *SS Lotus*⁹⁶ by finding it not to have been proven as existing custom? Or that the ICJ did not violate the principle of integrity of treaties in its Advisory Opinion on *Reservations to the Genocide Convention*?⁹⁷ State reaction to the court judgments in those cases—in the former, the clear establishment of a rule of exclusive flag State jurisdiction;⁹⁸ in the latter, acquiescence to the new principle of universality⁹⁹—either stopped the judicial development of international law or brought it to fruition.

Much more crucially, drawing a dividing line between violation and development is not only difficult in many instances, but also overwhelmingly subjective, at least to the extent that no final and authoritative decision-maker has been instituted or has expressed herself. Domestic courts partake in the law-developing capacity of any judicial institution, and their contribution to the development of international law, even through its violation, is fundamental.¹⁰⁰ This is not only because international law vests in them—as State organs—the capacity to make new law or develop the law through their practice; it is also precisely because international law endows them with an international judicial function and establishes them as the “natural” or first-instance judges of international law. A number of examples will be invoked to corroborate this point.

The first relates to the interpretation and application of international treaty law, and finds a parallel in the cases mentioned earlier on the interpretation of domestic acts implementing Security Council Resolutions.¹⁰¹ In a case relating to the application of the 1992 Civil Liability Convention and the 1992 International Oil Pollution Compensation (IOPC) Fund Convention,¹⁰² the Greek Supreme Court¹⁰³

96. 1927 P.C.I.J. (ser. A) No.10, at 27.

97. See Reservations to the Genocide Convention, *supra* note 64; see also Alain Pellet, *Article 19 of the 1969 Vienna Convention*, in *THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY* 405, 411 (Olivier Corten & Pierre Klein eds., 2011).

98. See International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation art. 1, May 10, 1952, 439 U.N.T.S. 233; Convention on the High Seas art. 11, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11.

99. As finally evident in the provisions on reservations of the Vienna Convention on the Law of Treaties. See Vienna Convention on the Law of Treaties art. 19–23, May 23, 1969, 1155 U.N.T.S. 331.

100. Conforti, *supra* note 93, at 6–7.

101. See *supra* notes 90–93.

102. International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3, amended by Protocol of 1992, Nov. 27, 1992, IMO Doc. LEG/CONF.9/15; International Convention on the Establishment of an International Fund for Compensation for Oil

interpreted the term “ship” in the Conventions clearly contrary to the interpretation of the term that was agreed by the States-parties constituted as the Assembly of the 1992 IOPC Fund.¹⁰⁴ What is more, the Assembly had noted that its interpretations should be considered as subsequent agreement within the meaning of 31(3)(a) of the Vienna Convention on the Law of Treaties, and was thus binding, also for the courts of States-parties.¹⁰⁵ Yet in light of the jurisprudence of the Greek Supreme Court, and in light of the new conditions that were brought to the forefront, *inter alia*, by that case-law with respect to recent changes in international maritime trade,¹⁰⁶ the Assembly is reconsidering its own definition of “ship” in the Conventions, with a view to bringing it up-to-date. This process was still under way in 2012, but the case exemplifies both the potential for international law-development of domestic courts, and the difficulty in clearly qualifying a domestic court decision as being in violation of international law.

Another aspect in which the contribution of domestic courts can be seen as crucial is the elaboration of normative hierarchy in international law. In a number of cases before domestic (and regional international, which in the instance will be assimilated to domestic) courts, individuals targeted by the 1267 sanctions regime of the Security Council sought to attack the Council measures by attacking their domestic implementing acts on the basis of both international and domestic law, primarily on the basis of the internationally and constitutionally protected right to a fair trial.¹⁰⁷ When domestic courts finally upheld their claims and struck down the domestic implementing measures, forcing their States to disobey the Security Council Resolutions, they did so by relying on domestic constitutional provisions safeguarding the right to a fair trial. While this has been criticized as dualism, a closer consideration of the relevant cases

Pollution Damage, Dec. 18, 1971, 1110 U.N.T.S. 57, *amended by* Protocol of 1992, Nov. 27, 1992, IMO Doc. LEG/CONF.9/16.

103. Marine Environmental Services M.C. and Environmental Protection Technical S.A. v. International Oil Pollution Compensation Fund 1992, Final Appeal Judgment in Cassation, No. 23/2006, 6 July 2006, ILDC 586 (GR 2006).

104. See Int'l Oil Pollution Compensation Funds, Record of Decisions of the Eighth Session of the Executive Committee, § 4.3, Doc. 92FUND/EXC.8/8, (2000).

105. See Int'l Oil Pollution Comp. Fund 1992 [IOPCF], *Resolution No. 8 on the Interpretation and Application of the 1992 Civil Liability Convention and the 1992 Fund Convention*, IOPCF Doc. 92FUND/AC.1/A/ES.7/7—Annex (May 9, 2003).

106. See Int'l Oil Pollution Compensation Funds, Application of the 1992 Conventions to Ship-to-Ship Oil Transfer Operations and Floating Storage, Doc. IOPC/OCT10/4/3/1 (2010).

107. See Tzanakopoulos, *Domestic Court Reactions*, *supra* note 35, at 58.

(among them prominently *Kadi*,¹⁰⁸ and the U.K. Supreme Court's *Ahmed*¹⁰⁹) reveals that domestic courts relied on domestic law precisely to avoid the overriding effect of Article 103 of the UN Charter (UNC), which in the instance would be to obliterate the right to a fair trial. While the decisions in both cases were made on domestic law grounds, the constitutional or fundamental right sought to be protected, namely that to a fair trial, is deeply internationalized, having found expression both in widely ratified international treaties, and in customary international law. In substance then, domestic courts in these cases can be seen as preferring one international norm over another. In fact, this reaction of domestic courts has been forcing the Security Council to reconsider the remedies available to individuals sanctioned under the 1267 regime.¹¹⁰ Domestic courts could then be seen either as clarifying the interpretation of Article 103 UNC to the effect that it cannot override, for example, customary law or certain human rights, even if these are not considered *jus cogens*, or as establishing certain rights (in particular the right to a fair trial) as *jus cogens*.¹¹¹

Conversely, it can be argued that the rather consistent approach of domestic courts on the matter of the effects of *jus cogens* norms on the rule of immunity has served to confirm that no change or new understanding of normative hierarchy has taken hold as a matter of general international law.¹¹² In this situation it is clear that, despite the occasional dissenting domestic decision (on which see the immediately following paragraph), State practice through domestic court decisions confirms that *jus cogens* norms do not have the effect of superseding the

108. Joint Cases C-402/05P and C-415/05P, *Kadi, Al Barakaat Int'l Found. v. Council of the European Union, Comm'n of the European Communities, United Kingdom of Great Britain and Northern Ireland*, 2008 E.C.R. I-6351.

109. *Her Majesty's Treasury v. Ahmed*, [2010] UKSC 2.

110. See S.C. Res. 1904, Preamble & ¶ 20, U.N. SCOR, U.N. Doc. S/Res/1904 (Dec. 17, 2009).

111. See generally Antonios Tzanakopoulos, *Collective Security and Human Rights*, in HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS 42 (Erika de Wet & Jure Vidmar eds., 2012). There could be even a third interpretation of domestic court practice, in that they are actually establishing certain human rights as hierarchically superior to UN Security Council decisions, even if the rights at stake do not constitute rules of *jus cogens*. For a similar argument to the effect that between *jus cogens* and *jus dispositivum* there exist intermediate hierarchical levels, on the basis of the importance of the relevant norms, which is positively acknowledged through an extension of the circle of States who have standing to invoke responsibility for their violation, see LINOS-ALEXANDER SICILIANOS, THE HUMAN DIMENSION OF INTERNATIONAL LAW 366–67 (2010) [in Greek], and compare generally Linos-Alexander Sicilianos, *The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility*, 13 EUR. J. INT'L L. 1127 (2002).

112. See generally ORAKHELASHVILI, *supra* note 65, at 552–54.

rule of immunity. That international courts will take this into consideration when faced with a similar question is evident in the ICJ's discussion of domestic court decisions in *Arrest Warrant*.¹¹³ At the same time, it remains open to domestic courts to start consistently acknowledging an exception to immunity for violations of *jus cogens*, thereby developing the principles of normative hierarchy in international law.¹¹⁴

Still on the issue of immunity, a further example is provided by the dispute between Germany and Italy with respect to sovereign immunity.¹¹⁵ The origins of the dispute lie in a series of decisions of Greek¹¹⁶ and Italian courts¹¹⁷ denying the sovereign immunity of Germany for gross violations of international humanitarian law during World War II. In this case, the availability of an international instance has led to the submission of the dispute created by the Italian domestic court decisions to the ICJ. There is no doubt that the ICJ decision in this case may have the effect of halting the development by its offering of an interpretation of the law contrary to that proffered by the Italian courts. This only demonstrates further, however, that domestic courts have a clear and important role in the law-development aspect of an international judicial function, even if only as a cog in the machinery of judicial development of international law.

V. AN INTEGRATED ARCHITECTURE

What then is the position of domestic courts in the international legal order and in the international judicial function? What is it that holds their dispute-settlement and law-development functions together? With respect to both aspects, they have an important role: settling disputes and enforcing international law—or creating disputes (or rather, allowing them to “mature”) and prompting enforcement of the law on the international plane; and interpreting and developing international law—or violating it, depending on the reaction of States on the international plane. The common question is who decides whether the domestic court is fulfilling each aspect of its international judicial

113. *Arrest Warrant*, *supra* note 87, ¶ 58.

114. *Cf.* ORAKHELASHVILI, *supra* note 65, at 555–56 (arguing, however, that this will merely be an acknowledgment of the correct position under international law rather than development).

115. *See* Jurisdictional Immunities of the State (Ger. v. It.), Judgment, ¶¶ 14, 86 (Feb. 2012), available at <http://www.icj-cij.org/docket/files/143/16883.pdf>.

116. *Germany v. Prefecture of Voiotia, Areios Pagos [A.P.]* [Supreme Court] 11/2000, May 4, 2000, ILDC 287 (GR 2000), ¶ 8 (Greece).

117. *Ferrini v. Germany, Corte Costituzionale [Constitutional Court]*, Mar. 11, 2004, ILDC 19 (IT 2004), ¶ 12 (It.).

function or violating the law. And the answer to this question demonstrates how the international judicial function of domestic courts is integrated in the general international judicial function. Just as domestic courts are a cog in the machinery of judicial development, so are they 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 (if States acquiesce to their decisions, or if these are confirmed by an international supervisory instance—an international court); 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.

Domestic courts are thus part of an integrated architecture of the international judicial function, established as the “natural” or “immediate” judges of international law, and subjected to the supervision of international judicial institutions—and in the final analysis, States themselves.

If international law establishes domestic courts as the “natural” judges of international law in an integrated architecture with international courts and the decentralized action of States, then perhaps this is cause for alarm. If we heed Lord Bingham’s warning, it is far preferable that disputes between States be resolved by negotiation, compromise, or if need be by decision of an international tribunal. Domestic courts may not be experienced in international law matters. They may give the appearance of partiality if their own State is implicated, as is to be expected, and they may not permit adequate representation of other States with an interest in the question.¹¹⁸ Lord Bingham was undoubtedly right in expressing these reservations, which are shared by others as well. One might add that domestic courts, despite their best efforts (e.g., through consistent interpretation), may in the end feel compelled to disregard international law in favor of the contrary law of the State, despite any demands that international law makes on them as the “natural” judges of international law.

However, a number of points serve to ameliorate any cause for alarm. First of all, any domestic court decision that exercised the domestic court’s international judicial function can be overruled by the agreement of States. This agreement may also be expressed in their institution of an international court to finally resolve an international dispute: the international court is instituted as the supervisory

118. See Lord Bingham, *International Law in National Courts*, *supra* note 34, at 1.

mechanism over domestic courts' exercise of their international judicial function.¹¹⁹ The ICJ proceedings between Germany and Italy again serve as a case in point, as do, among others, the proceedings between Belgium and Switzerland on the *Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*,¹²⁰ the *Certain Property* case,¹²¹ the *ELSI* case,¹²² the *Barcelona Traction* case,¹²³ and the *Guardianship of Infants* case.¹²⁴ State reactions to the *SS Lotus* judgment of the PCIJ,¹²⁵ or to the *South West Africa* judgment of the ICJ,¹²⁶ remind us further that even international courts are supervised, this time by States in a decentralized manner. State agreement can overrule the exercise of the international judicial function even by the "principal judicial organ of the United Nations."¹²⁷

Second, domestic courts only rarely get to exercise their international judicial function with respect to pure State-to-State disputes. Far more often they will have to deal with international disputes (i.e., disputes implicating international law), which are not between States, but rather between other "users" of international law (and States).¹²⁸ While these disputes may evolve or "mature" into State-to-State disputes (viz., *Jurisdictional Immunities of the State*, as well as *Barcelona Traction*) they will not be presented as such before the domestic court. This is because of the augmenting international regulation through the adoption of "inward-looking" norms, which require implementation within the domestic jurisdiction and thus bring domestic courts to the forefront of the international judicial function.

119. See Lauterpacht, *Municipal Courts*, *supra* note 12 (already recognizing this control in 1929).

120. Press Release, Int'l Ct. of Just., Belgium Initiates Proceedings Against Switzerland (Dec. 22, 2009), available at <http://www.icj-cij.org/docket/files/145/15765.pdf>. The case was removed from the list at the request of Belgium. See Press Release, ICJ, *Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters* (Apr. 12, 2011), available at <http://www.icj-cij.org/docket/files/145/16456.pdf>.

121. *Certain Property* (Liech. v. Ger.), 2005 I.C.J. 6 (Feb. 10).

122. *ELSI*, *supra* note 69.

123. *Barcelona Traction*, Light and Power Co. Ltd., Second Phase (Belg. v. Spain), Judgment, 1970 I.C.J. 3 (Feb. 5).

124. Application of Convention of 1902 Governing Guardianship of Infants (Neth. v. Swed.), 1958 I.C.J. 55 (Nov. 28).

125. See *supra* note 98.

126. *South West Africa*, Second Phase, Judgment, 1966 I.C.J. 6 (July 18). For the reactions, see generally JOHN DUGARD, *THE SOUTH WEST AFRICA/NAMIBIA DISPUTE: DOCUMENTS AND SCHOLARLY WRITINGS ON THE CONTROVERSY BETWEEN SOUTH AFRICA AND THE UNITED NATIONS*, especially 332 *et seq.* and 374 *et seq.* (1973).

127. U.N. Charter art. 92; Statute of the International Court of Justice art. 1.

128. For the term "users" with respect to the beneficiaries of international norms, see Emmanuel Roucouas, *Facteurs privés et droit international public*, 299 Rdc 9 (2002) (Fr.).

Third, and most importantly, it is true and it has been highlighted throughout this article, that domestic courts can be seen as violating international law as much as they can be seen as enforcing or developing it when discharging an international judicial function. For example, much criticism has targeted the ECJ's decision in *Kadi*. One of its most notable critics was indeed the General Court of the European Union (GCEU) in *Kadi II*,¹²⁹ even if the GCEU's criticism was implicit and even if the General Court did finally follow the ECJ. Like the U.K. Supreme Court's decision in *Ahmed*, *Kadi* was seen as demonstrating a regression by adopting a sharp distinction between the "domestic" and the international legal order, akin to that adopted by U.S. courts for example in *Sanchez-Llamas*,¹³⁰ and *Medellin*.¹³¹ Both sets of cases rely on domestic norms of constitutional rank to defeat international obligations.

A distinction can be drawn, however, on the basis of an argument relating to "deeply internationalized" constitutional norms. The domestic provisions relied on by the ECJ and the U.K. Supreme Court, which safeguard the right to a fair trial in its various aspects (access to a court, access to an effective remedy, right to be heard), are mirrored in substance in international law, which guarantees these aspects of the right to a fair trial (e.g., in Article 14 of the International Convention of Civil and Political Rights, Article 6 of the European Convention on Human Rights, and also in customary international law).¹³² Much like the District Court of Jerusalem argued in *Eichmann* that Eichmann's crimes were not solely crimes under Israeli law,¹³³ the Canadian Federal

129. Case T-85/09, *Kadi v. Comm'n*, 2010 E.C.R. C 317/52, ¶¶ 113–21.

130. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006).

131. *Medellin v. Texas*, 552 U.S. 491 (2008).

132. See, e.g., A v. B, Case 0345/99, Portuguese Constitutional Court, June 15, 1999, ILDC 1529 (PT 1999) (establishing the parallels between Articles 6 ECHR, 14 ICCPR, and 10 UDHR, and Article 20(4) of the Portuguese Constitution (at H2)). See also the position of the Human Rights Committee (HRC) with respect to the International Covenant on Civil and Political Rights (ICCPR). Christian Tomuschat notes that the HRC has adopted the "substantive criterion" of ICCPR effectiveness within a domestic legal order, rather than rely on formal considerations of whether the Covenant is incorporated into domestic law or is directly invocable before domestic courts. TOMUSCHAT, *supra* note 24, at 117–20. Arguably, the HRC has even opined that protection afforded on the basis of a domestic instrument of constitutional rank is even more effective than protection on the basis of the Covenant itself. Finally, as Bruno Simma et al. have argued, there is a paucity of references to international human rights norms in German jurisprudence, precisely because of the overlap between internationally protected rights and those guaranteed by the fundamental rights provisions of the Basic Law. Simma et al., *supra* note 93, at 75

133. *CrimC (Jer.) 40/61 Attorney General of Israel v. Adolf Eichmann*, (1961) (Isr.), reprinted in 36 I.L.R. 18, ¶ 12.

Court claimed, in upholding the constitutional rights of a Canadian citizen subject to the 1267 regime, that these rights were not just rights under the relevant Canadian Charter, but also under international law.¹³⁴ This claim is in sharp contrast to the U.S. courts' defense of a domestic procedural provision (the procedural default rule); or to the move in Oklahoma to amend the State Constitution in order to prohibit state courts from "considering international law or Sharia law" or indeed "the legal precepts of other nations or cultures," without explaining why such a move was necessary.¹³⁵

As argued from the outset, the two basic and inseparable aspects of the international judicial function of domestic courts are that of dispute settlement/law enforcement and that of law-development. Jennings calls the court judgment, even of a domestic court, the "acid test" of enforcement, as it is in this form that the international obligation appears "not as a proposition of general law, but is applied to particular parties in the circumstances of a particular case."¹³⁶ Shany finds that the core function associated with the international judicial role is "the settlement of disputes by an independent and impartial body of judges through a legal procedure *resulting in* the application of international legal standards."¹³⁷ That is precisely what the decisions of domestic courts above (the ECJ and the U.K. Supreme Court) resulted in, even if they did not explicitly rely on international law. Their pronouncements were definitely judicial pronouncements "of one kind or another," and they "resulted in" the application of standards that exist in the international legal order.

Whatever arguments can be proffered to demonstrate that, in this last example—but also in general—domestic courts implement and develop, rather than violate, international law, can be more or less persuasive, but in the end they are a matter of speculation or construction. What counts (and what remains to be seen in the aforementioned example) is what the reaction of States will be: in the final analysis, they have the power to stop these developments in their tracks by invoking the responsibility of those States with recalcitrant

134. *Abdelrazik v. Minister of Foreign Affairs and Attorney Gen. of Canada*, [2009] F.C. 580 (Can.).

135. See Julian Ku, *Oklahoma's Unnecessary Law to Ban Citation of Sharia Law and International Law*, OPINIO JURIS (June 15, 2010, 8:42 PM), <http://opiniojuris.org/2010/06/15/oklahomas-unnecessary-law-to-ban-reliance-on-sharia-and-foreign-law/>.

136. Jennings, *International Obligations*, *supra* note 4, at 3.

137. Shany, *Jurisdictional Implications*, *supra* note 18, at 3 (emphasis added).

courts. Yet, if they acquiesce, the decisions of these courts will stand and produce effects on the international plane.

As Fitzmaurice stated in *Barcelona Traction*, “judicial pronouncements of one kind or another constitute the principal method by which the law can find some concrete measure of clarification and development.”¹³⁸ It is conceded that he was talking about the value of *obiter dicta* by an international court, while domestic court decisions are mere facts from the perspective of international law. But, to put it as succinctly as Nollkaemper, “a court is a court;”¹³⁹ and, as courts, domestic courts seem to be aware of their position and their power as far as the interpretation and development of law is concerned. Their adoption of a strong presumption of conformity and the concomitant principle of consistent interpretation furnishes them with a very elegant method in which to take up their position in the integrated architecture of an international judicial function and fulfill their role as the natural judges of international law. Claims at the international level become subsidiary, if they are available at all. This means that the international law question can effectively be raised and answered at the domestic level. When the outcome is deemed unsatisfactory, international procedures will be called upon to review the “facts” (including potential decisions of the domestic court) and determine whether a breach of an international obligation has taken place or whether the law has moved on. The process then at the international stage is merely subsidiary or supervisory; intervention will be limited to when the domestic process fails to address the issues appropriately and conform to the international obligation.¹⁴⁰

The blurring of the dividing lines between international and national norms has also blurred the dividing lines between international and national dispute settlement. This has led domestic courts to assume, even if by necessity, an international judicial function as part of their judicial function to decide disputes and thus enforce, but also develop, the law. Their international judicial function is assigned to them, or at least it is acknowledged, by international law with respect to both of its aspects. The blurring of the distinction between violation and enforcement, and between violation and development, which is in part due to the decentralized nature of the international legal order,

138. *Barcelona Traction*, *supra* note 123, ¶ 2 (separate opinion of Judge Sir Gerald Fitzmaurice) (Feb. 5).

139. André Nollkaemper, *The Role of Domestic Courts in the Case Law of the International Court of Justice*, 5 CHINESE J. INT’L L. 301, 308 (2006).

140. *Cf.* Shany, *Jurisdictional Implications*, *supra* note 18, 20–21.

highlights the international judicial function of domestic courts, supervised *in casu* by their international counterparts, or—in the final analysis—by States. It shows domestic courts as an important cog in the machinery of dispute resolution and law-development, as the first—“natural”—judge in the integrated architecture of an international judicial function.