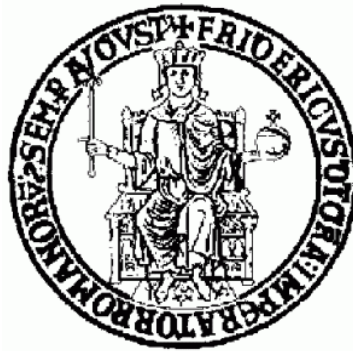


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DOTTORATO DI RICERCA IN DIRITTO DELL'ECONOMIA

XXX CICLO

**DOMESTIC APPLICATION OF INTERNATIONAL LAW
AND THE LATITUDE OF NATIONAL POLITICAL AUTHORITIES**

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1. Introduction to the topic.

The role of domestic political actors in the application of international law has undergone a steady and momentous transformation.

Under the Westphalian conception of sovereignty, the separation line between international law and matters of purely domestic concern was clear-cut: virtually all relations between national governments and their subjects were deemed to fall under the exclusive domestic jurisdiction of states.¹ As late as in 1950, the International Law Commission could observe that “many of the provisions of international law serve little purpose in national law”.² Across the vast expanse of *domaine réservé*, the regulatory powers of domestic political authorities were left unaffected by international law.³

These circumstances, however, are long gone. The expansion in subject-matter experienced by international law has caused its domain to overlap to a great extent with the areas regulated by national law.⁴ Contemporary international law increasingly claims to influence, regulate and control political decisions internal to municipal legal systems.⁵ It seems, therefore, that ensuring that domestic political actors obey international law is more vital to the effectiveness of the international legal order than it ever was.

¹ R.A. FALK, “The Interplay of Westphalia and Charter Conceptions of the International Legal Order”, in R.A. FALK, C.E. BLACK (eds.), *The Future of the International Legal Order, Volume 1*, Princeton, 1969, p. 32 ff.

² Report of the International Law Commission covering its second session, 5 June – 25 July 1950, *Yearbook of the International Law Commission 1950, Vol. II*, p. 364 ff., p. 370, para. 53.

³ On the classical understanding of sovereignty, see generally J. MATTERN, *Concepts of State, Sovereignty and International Law*, Baltimore-Oxford, 1928. See also S.D. KRASNER, *Sovereignty: Organized Hypocrisy*, Princeton, 1999, p. 20 (criticizing the Westphalian conception of the state as a territory where “political authorities are the sole arbiters of legitimate behavior”).

⁴ R. JENNINGS, A. WATTS, *Oppenheim’s International Law*, Vol. 1, London-New York, 1992, p. 54; C. TOMUSCHAT, “International Law: Ensuring the Survival of Mankind on the Eve of a New Century”, *Recueil des cours* 1999, Vol. 281, p. 9 ff., p. 63 (describing international law as a “comprehensive blueprint for social life”); R. PISILLO MAZZESCHI, “Human Rights and the Modernization of International Law”, in F. LENZERINI, A.F. VRDOLJAK (eds.), *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature*, Oxford-Portland, 2014, p. 89 ff., p. 90; J. CRAWFORD, “International Law and the Rule of Law”, *Adelaide Law Review* 2003, p. 3 ff., p. 6-8 (noting that “[i]nternational law is concerned increasingly with matters internal to the state – human rights, the environment, investment protection, criminal law, intellectual property, the conditions of free trade in terms of the WTO, the control of civil conflict and so on”).

⁵ A.M. SLAUGHTER, W. BURKE-WHITE, “The Future of International Law is Domestic (or, The European Way of Law)”, *Harvard International Law Journal* 2006, p. 327 ff., p. 338 (international law puts increasing emphasis on “shaping or influencing political outcomes within sovereign states”).

And yet, despite its tendency to regulate matters of domestic concern, international law remains – somewhat paradoxically – entirely dependent for its domestic implementation on the very subjects whose actions it aims to constrain. Indeed, national governments retain exclusive control of coercive authority within the state.⁶ Heinrich Triepel, who famously likened international law to a field marshal who can reach his goals only if the generals (i.e. national legal systems) issue orders to their subordinates, would probably be pleased to see how accurate his metaphor remains.⁷

What has changed, though, is that the generals have become much more assertive in ensuring that subordinates do not break ranks with international law. National legal systems, indeed, commonly establish a number of legal devices aimed at ensuring that their own governments comply with international obligations. Such devices can be classed in two categories. Firstly, domestic law may curb the lawmaking, i.e. political authorities may be deprived of the capacity to determine whether and how international law should be imported in the domestic legal system. This may happen, for example, by means of constitutional provisions establishing the automatic incorporation of international sources within domestic law, or their primacy over domestic sources of law. Secondly, domestic law may also constrain the domestic enforcement of international law. Compliance of governmental action with international law may be subject to external review and, most notably, to judicial control. In certain legal systems, judicial review may extend to the conformity of legislation with international law. Because of their capacity to be entrusted with powers of review of governmental action which are unknown to any international institution, national courts are increasingly regarded as a backbone of the effectiveness of international law as a whole.⁸

The choice to submit the latitude of the political branches to the authority of international law, however, is at the crossroads of competing considerations in domestic law. While it can greatly facilitate state compliance with international obligations, it can also entail a tension with principles and values embodied by the prerogatives of the political authorities. A notable example is the protection of domestic democracy. Limitations on the acts of the political branches may be perceived to impinge on the democratic process, to the extent that such acts are regarded as expressions of the democratic will. Furthermore, the division of competence between state organs in the application of international norms may raise concerns with regard to the separation of powers. The automatic incorporation of international agreements, for example, may seem to empower the executive to the detriment of the legislature. Judicial

⁶ *Ibid.*, p. 343. See also M. KANETAKE, A. NOLLKAEMPER, “The International Rule of Law in the Cycle of Contestations and Deference”, in M. KANETAKE, A. NOLLKAEMPER (eds.), *The Rule of Law at the National and International Levels: Contestations and Deference*, Oxford-Portland, 2016, p. 445 ff., p. 455 (“national and international law are dependent on each other in order to achieve certain purposes”).

⁷ H. TRIEPEL, “Les rapports entre le droit interne et le droit international”, *Recueil des cours* 1923, vol. 1, p. 73 ff., p. 106 (international law “est semblable à un maréchal qui ne donne ses ordres qu’aux chefs des troupes et ne peut atteindre son but que s’il est sûr que les généraux, se conformant à ses instructions, donneront de nouveaux ordres à ceux qui leur sont soumis”). For a more recent restatement of the same concept, see B. CONFORTI, *International Law and the Role of Domestic Legal Systems*, Dordrecht-Boston-London, 1993, p. 9 (contending that “[o]nly a State’s internal system can act effectively to prevent the State from violating international law”).

⁸ On this point, see generally A. NOLLKAEMPER, *National Courts and the International Rule of Law*, Oxford, 2011. For a more thorough analysis of the role of national courts in the enforcement of international law, see Chapters 3 and 4.

checks on the acts of the political branches, for their part, may seem to increase the power of the judiciary vis-à-vis the political authorities.

The influence of these concerns potentially impacts on all aspects of the domestic implementation of international law, from the choices of constitutional drafters to the everyday activities of national courts. Such principles of domestic law may be perceived to offset the desirability and the legitimacy of a purely internationalist approach to international law implementation. This, in turn, might induce domestic organs to dodge international obligations.

The tension between compliance with international obligations and domestic concerns relating to democracy and separation of powers stirs a number of complex questions. To begin with, it seems inevitable to wonder if this tension constitutes a structural feature of the relationship between international law and domestic law or, to the contrary, if it can be reconciled. But either of the two possible answers begs further questions. On the one hand, assuming that ways to reconcile this tension do exist, the question is whether they should be devised at the level of international law or, instead, a balance can only be pursued within national legal systems. If, on the other hand, this tension is to some extent unavoidable, the most crucial question becomes whether it inevitably leads to disregarding international obligations. These questions go to the heart of international law's capability to be effectively implemented and respected in domestic legal systems.⁹ They deserve, therefore, to be addressed analytically.

2. Hypotheses and goals.

This thesis aims to explore and systematize the theoretical and practical implications of the tension that has just been outlined. It is underlied by three research hypotheses, which can be summarized in the following terms.

The first hypothesis is that the aforementioned tension is to some extent inevitable. The reason why this hypothesis seems tenable is simple. International law's claim to supremacy is absolute and generally unconcerned by any obstacles set by domestic political processes. To the contrary, in a domestic legal system the interest in compliance with international law can reasonably be expected to interact with other fundamental principles of domestic law relating to the prerogatives of the political branches.¹⁰

⁹ As noted by A. NOLLKAEMPER, "Rethinking the Supremacy of International Law", *Zeitschrift für öffentliches Recht* 2010, p. 65 ff., p. 71, "the question of conformity of national law with international obligations is a matter of international law because, first, it undermines the effectiveness of international law and, second, States can incur responsibility at the international level for failing to abide by their international obligations".

¹⁰ On the broader topic of the interplay between international law and fundamental principles of domestic law, see generally F.M. PALOMBINO, "Compliance with International Judgments: Between Supremacy of International Law and National Fundamental Principles", *ZaöRV* 2015, p. 503 ff., particularly p. 510 (noting, with reference to the US Supreme Court decision *Medellín v. Texas*, that the separation of powers can constitute one of such fundamental principles that national courts may wish to safeguard). On *Medellín*, see Chapter 3, Section 3.2. See also A. PETERS, "Supremacy Lost: International Law Meets Domestic Constitutional Law", *Vienna Online Journal on International Constitutional Law* 2009, p. 170 ff.; E. BENVENISTI, A. HAREL, "Embracing the Tension between National and International Human Rights Law: The Case for Discordant Parity", *International Journal of Constitutional Law* 2017, p. 36 ff.

The second hypothesis is that international law is scarcely suited to addressing and solving such concerns. This assumption stems from two considerations. First, international decision-making still is (or is perceived to be) scarcely democratic, a feature which seems unlikely to change anytime soon. Second, and most importantly, there is no universally agreed definition of democracy or of separation of powers. It seems therefore sensible to assume that the conundrum can have no uniformly accepted solution, and that every national legal system will try to safeguard the prerogatives of its political branches in accordance with its own domestic specificities. For this reason, the tension can be explored effectively only if one adopts a chiefly domestic law perspective, as will be done in the following chapters.

The third hypothesis is that the tension, however inevitable, does not necessarily lead to non-compliance. Although this might occasionally happen, the supposition is that this tension is mostly vented in ways which do not compromise respect for international obligations. This means, otherwise stated, that the domestic countervailing concerns are – or, at the least, potentially *could be* – addressed through the physiological processes of implementation of international law in domestic law, and that chronic conflicts represent – or *could* represent – exceptions. In order to prove if this is true, it will be necessary to explore in detail how specific legal systems relate to the prerogatives of the political branches in the implementation of international obligations.

Against the backdrop of these hypotheses, the analysis of domestic legal systems will be guided by the following aims. Firstly, it will seek to assess why and how national legal systems ensure that political authorities comply with international law and how pervasive is the impact of domestic countervailing concerns. Secondly, it will analyze in detail how national courts grappling with such competing inputs behave and what judicial techniques have been devised to manage this tension. Thirdly, it will advance propositions on how domestic organs, and particularly national courts, *should* behave when addressing these issues and which rules or techniques can contribute to effectuating a balance between competing needs.

3. The principle of freedom in implementation of international law and its limits: implications for the role of national political authorities.

Before embarking on the analysis of the main questions underpinning this research, it is necessary to briefly explore the international legal framework governing the implementation of international obligations in national legal orders and to enquire into the role for national political authorities resulting from this regime.

The default approach of international law to its implementation in domestic legal orders is moulded by the interplay of two fundamental rules. Firstly, a state cannot justify non-compliance with international obligations by pleading provisions of its own domestic law. Secondly, it is immaterial how a state concretely performs its international obligations, as long as it complies with them in practice. These two principles are often respectively referred to as the principle of supremacy and that of neutrality.

The principle of supremacy is supported by compelling international authority. Its earliest formulation dates back to the 1872 *Alabama Claims* arbitration award. The U.S. claimed that

Great Britain had violated its obligation to remain neutral in the course of the Civil War by allowing Confederate vessels to use its ports. The tribunal held that Great Britain could not justify itself by adducing that it did not possess the necessary legislation to prevent access to its ports to commerce raiders.¹¹ This principle has been consistently restated in the case law of both the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ). For example, in the *Free Zones* case, the PCIJ held that “it is certain that France cannot rely on her own legislation to limit the scope of her international obligations”.¹² International law’s claim to supremacy over domestic law is all-encompassing, therefore including also supremacy over domestic constitutional law.¹³ This principle has also been codified in Art. 27 of the Vienna Convention on the Law of Treaties, pursuant to which “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”,¹⁴ and in Art. 32 of the International Law Commission’s (ILC) Articles on Responsibility of States for Internationally Wrongful Acts.¹⁵

The principle of neutrality arises as a consequence of the principle of supremacy’s exclusive emphasis on compliance. So far as deficiencies of domestic law do not cause non-compliance, general international law is unconcerned with the manner in which states set out their municipal legal systems.¹⁶ This principle is usually understood as indifference towards

¹¹ *Alabama claims of the United States of America against Great Britain*, Award of 14 September 1872, reprinted in J.B. MOORE (ed.), *History and Digest of the International Arbitrations to which the United States has been a Party*, Washington, 1898, p. 653 ff.

¹² *Case of the Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, Order of 6 December 1930 (Series A, No. 24), p. 12. See also *Anglo-Norwegian Fisheries Case (United Kingdom v. Norway)*, Judgment, I.C.J. Reports 1951, p. 116, Individual Opinion of Judge Alvarez, p. 152 (“[i]nternational law takes precedence over municipal law. Acts committed by a State which violate international law involve the responsibility of that State”).

¹³ *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory*, Advisory Opinion of 4 February 1932 (Series A/B, No. 44), p. 24 (“a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force”); *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, Judgment, I.C.J. Reports 2004, p. 12 ff., p. 65 (“The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law”).

¹⁴ Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, entered into force 27 January 1980 (VCLT). The only exception to Art. 27 is set forth by Art. 46: “A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance”.

¹⁵ International Law Commission, “Articles on Responsibility of States for Internationally Wrongful Acts”, *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, p. 31 ff. See Art. 32: “The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part”; and Art. 3: “The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law”. On these provisions, see P.M. DUPUY, “Relations Between the International Law of Responsibility and Responsibility in Municipal Law”, in J. CRAWFORD, A. PELLET, S. OLLESON (eds.), *The Law of International Responsibility*, Oxford, 2010, p. 173 ff.

¹⁶ R. JENNINGS, A. WATTS, cit., p. 82; P. MALANCZUK, *Akehurst’s Modern Introduction to International Law*, London-New York, 1997⁷, p. 64; T. BUERGENTHAL, “Self-Executing and Non-Self-Executing Treaties in National and International Law”, *Recueil des cours* 1992, vol. 235, p. 303 ff., p. 320; E. BORCHARD, “The Relation Between International Law and Municipal Law”, *Virginia Law Review* 1940, p. 137 ff., p. 143; M. MENDEZ, *The Legal Effects of EU Agreements*, Oxford, 2013, p. 58 (“Strikingly, international law continues to have remarkably little to say on the issue of the domestic legal effects of treaties, with the basic rule remaining in place that States are free to determine how they meet their treaty obligations”). For an isolated dissenting voice, see P. PESCATORE, “Conclusion”, in F.G. JACOBS, S. ROBERTS (eds.), *The Effect of Treaties in Domestic Law*,

various implementation techniques (e.g. between automatic incorporation and *ad hoc* transformation)¹⁷ but it implicates, in fact, a more radical corollary: states are not required to conform their domestic legal orders to international law, as long as the substance of international law is respected in concrete cases.¹⁸ Even though prominent commentators contend that a general obligation to bring national law in agreement with international law does in fact exist, they nonetheless acknowledge, at the same time, that states disregarding this obligation would not commit an internationally wrongful act unless compliance is hampered.¹⁹ In reality, as the ILC noted in 1977, “the commands of international law in many cases, especially where they have to be enforced through the State’s internal system, stop short at the outer boundaries of the State machinery”.²⁰

General international law’s minimalist approach to the regulation of domestic implementation processes is first and foremost a reflection of state practice. States do not protest against the way in which other states carry out their obligations.²¹ But it is also revealing to put this approach into a broader perspective. The principle of neutrality as regards the means of international law’s domestic implementation is but an aspect of a wider principle, i.e. the one according to which, where international law provides no binding rules, state sovereignty is presumed to be unconstrained. This is commonly referred to as the “Lotus principle” after the 1927 *Lotus* case, where the PCIJ resorted to this background presumption.²² It is not within the scope of this work to assess whether this presumption is still tenable in contemporary international law, a point which is debated in scholarship.²³ Be that as it may, this principle,

London, 1987, p. 273 ff., p. 275 (“Incorporation procedures and methods based on ‘transformation’ are therefore by their very essence incompatible with good faith in international relations. By ratification a state promises unqualified implementation of a treaty [...] while by using the ‘transformation’ method for incorporation the same state retains the possibility of not implementing a treaty at all, or of implementing only part of it, or of altering its effect unilaterally”).

¹⁷ See e.g. P. MALANCZUK, *cit.*, p. 64.

¹⁸ A. CASSESE, *International Law*, Oxford, 2005², p. 218; A. NOLLKAEMPER, *National Courts*, *cit.*, p. 70.

¹⁹ J. CRAWFORD, *Brownlie’s Principles of Public International Law*, Oxford, 2012⁸, p. 52 (arguing that “there is a general duty to bring national law in conformity with” international law, but that “normally a failure to bring about such conformity is not in itself a breach of international law”); G. FITZMAURICE, “The General Principles of International Law Considered from the Standpoint of the Rule of Law”, *Recueil des cours* 1957, vol. 92, p. 1 ff., p. 89 (speaking of a “general obligation to harmonize the state’s domestic law with its international obligations [...] But a State does not commit a direct breach of international law merely by not doing this. The immediate breach strictly arises only if and when the State, by reason of the failure or deficiency, is actually unable to carry out a specific international obligation on a definite occasion”). See also R. JENNINGS, A. WATTS, *cit.*, p. 85-86 (whether international law requires states to harmonize domestic law to international law is “uncertain”: it depends on whether a specific international norm is about possessing a certain law or performing a certain act).

²⁰ Report of the International Law Commission on the work of its twenty-ninth session, 9 May-29 July 1977, UN Doc. A/32/10, *Yearbook of the International Law Commission, 1977*, vol. II, Part Two, p. 19.

²¹ A. NOLLKAEMPER, *National Courts*, *cit.*, p. 71.

²² *The Case of the S.S. “Lotus” (France v. Turkey)*, Judgment of 7 September 1927 (Series A, No. 10), p. 30-31 (“there is no principle of international law [...] which precludes the institution of the criminal proceedings under consideration. Consequently, Turkey, by instituting, in virtue of the discretion which international law leaves to every sovereign State, the criminal proceedings in question, has not, in the absence of such principles, acted in a manner contrary to the principles of international law”). On the “Lotus principle”, see M. KOSKENNIEMI, *From Apology to Utopia. The Structure of International Legal Argument*, Cambridge, 2005, p. 255-258; A. PETERS, “Does Kosovo Lie in the Lotus-Land of Freedom?”, *Leiden Journal of International Law* 2011, p. 95 ff.

²³ For critical views on the “Lotus principle”, see e.g. G. FITZMAURICE, “The General”, *cit.*, p. 56-59; C. TOMUSCHAT, “Obligations Arising for States Without or Against Their Will”, *Recueil des cours* 1993, vol. 241, p. 195 ff., p. 210-212.

despite being a product of its time, still provides an accurate description of the default approach of general international law toward domestic implementation of international obligations.

The freedom of states to choose the means of international law implementation should not be absolutized, though. Such freedom, however broad, is merely interstitial. It stops where international law establishes more specific rules on how states should carry out their obligations.

First of all, the content of domestic law is not altogether irrelevant from the perspective of general international law.²⁴ States are required to carry out their obligations in good faith.²⁵ This entails the necessity to harmonize national law with international law, if and to the extent that the harmonization is necessary to ensure compliance with international obligations. This cannot but be appreciated on a case-by-case basis. In *Exchange of Greek and Turkish Populations*, the PCIJ held that a state is obliged to change its domestic law in such a way “as may be necessary to ensure the fulfilment of the obligations undertaken”.²⁶ In *LaGrand*, the ICJ remarked that “a distinction must be drawn between that rule as such and its specific application in the present case”, thus denying that legislation as such could amount to a breach of international law.²⁷ The same approach underpinned the *Avena Interpretation Judgment*, where the ICJ held that, in order to comply with the earlier *Avena Judgment*, the United States could “choose the means of implementation, *not excluding the introduction [...] of appropriate legislation*, if deemed necessary [...]”.²⁸ Changes in legislation, therefore, are not required *per se*. Ultimately, compliance remains the focal point.²⁹

Furthermore, more detailed international obligations concerning domestic implementation are frequently established by treaty. It would be impossible to explore all such obligations in this introduction. However, it is opportune to briefly describe the two most prominent and widespread categories of such obligations: namely, obligations bring domestic law into

²⁴ Such a position was seemingly espoused by Judge Percy Spender in his Separate Opinion in the *Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)*, Judgment, ICJ Reports 1958, p. 55, p. 125-126: “it is competent for a State party to any treaty or convention to pass a law binding on its own authorities to the effect that, notwithstanding anything in the treaty or convention, certain provisions thereof binding on that State shall not apply, or to legislate in terms clearly inconsistent with, and intending to override, the terms of an existing treaty [...] But that in no way would be relevant to the question whether that legislation [...] is or is not in breach of [...] obligations binding upon the State”.

²⁵ See Art. 26 VCLT (*Pacta sunt servanda*): “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”; UN General Assembly, *Draft Declaration on Rights and Duties of States*, 6 December 1949, A/RES/375, Art. 13: “Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty”.

²⁶ *Exchange of Greek and Turkish Populations*, Advisory Opinion of 21 February 1925 (Series B, No. 10), p. 20.

²⁷ *LaGrand Case (Germany v. United States of America)*, Judgment, ICJ Reports 2001, p. 466, p. 497.

²⁸ *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2009, p. 3, para. 44 (emphasis in text added).

²⁹ W.N. FERDINANDUSSE, *Direct Application of International Criminal Law in National Courts*, The Hague, 2006, p. 135 (“All liberties flowing from the freedom of implementation are subject to the condition of effective compliance with international law”).

conformity with international law, and obligations to ensure judicial control over violations of international law committed by public authorities.³⁰

As regards the former category, i.e. the obligations to ensure that domestic legislation is compatible with international law, typical examples can be found in the field of the unification of private law,³¹ or in treaty obligations to make certain conducts punishable offenses under domestic law.³² But the most prominent examples of the category under analysis are included in regional and universal human rights conventions. Although the formulations vary significantly from case to case, such instruments frequently require states to ensure, *inter alia*, the compatibility of their internal law. Take, most notably, Art. 2(2) of the ICCPR: “[w]here not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant”.³³ Art. 2(1) of the ICESCR establishes an obligation to pursue the progressive realization of its rights “by all appropriate means, including particularly the adoption of legislative measures”.³⁴ Finally, the European Court of Human Rights (ECtHR) found that “in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it”.³⁵

³⁰ On the idea that some international norms would behave differently from other norms as far as their domestic reception is concerned, see J. NIJMAN, A. NOLLKAEMPER, “Beyond the Divide”, in J. NIJMAN, A. NOLLKAEMPER (eds.), *New Perspectives on the Divide Between National and International Law*, Oxford, 2007, p. 341 ff., p. 343.

³¹ See e.g. Convention relating to a Uniform Law on the International Sale of Goods (1 July 1964), 834 UNTS 107, Art. 1(1): “[e]ach Contracting State undertakes to incorporate into its own legislation, in accordance with its constitutional procedure [...] the Uniform Law on the International Sale of Goods [...] forming the Annex to the present Convention”.

³² International Convention for the Suppression of Terrorist Bombings (27 November 1997), UN General Assembly Res. A/52/653, Art. 4(a) (setting forth an obligation to “establish as criminal offences under [...] domestic law” the terrorist acts that the Convention aims to repress).

³³ International Covenant on Civil and Political Rights (16 December 1966), 999 UNTS 171. A nearly identical provision is included in Art. 2 of the American Convention on Human Rights (22 November 1969), 1144 UNTS 123. See O. SCHACHTER, “The Obligation to Implement the Covenant in Domestic Law”, in L. HENKIN (ed.), *The International Bill of Rights: the Covenant on Civil and Political Rights*, New York, 1981, p. 311 ff.

³⁴ International Covenant on Economic, Social and Cultural Rights (16 December 1966), 993 UNTS 3. For further cases, see Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984), 1465 UNTS 85, Art. 2(1): “[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”; International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965), 660 UNTS 212, Art. 2(d): “Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization”; African Charter on Human and Peoples’ Rights (27 June 1981), 1520 UNTS 217, Art. 1: states parties “shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them”; Convention on the Rights of the Child (20 November 1989), 144 UNTS 123, Art. 4: “States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention”.

³⁵ *Maestri v. Italy*, App. No. 39748/98, Judgment, 17 February 2004, p. 15, para. 47. Art. 1 of the European Convention on Human Rights (4 November 1950), 213 UNTS 222 does not refer to legislative implementation but merely establishes an obligation for states parties to “secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”. Another multilateral human rights treaty lacking explicit reference to legislative implementation is the Convention on the Elimination of All Forms of Discrimination Against Women (18 December 1979), 1249 UNTS 14.

As regards the scope of all these obligations, it is possible to advance the argument that the fundamentals of the principle of neutrality generally remain operational. The requested result of conforming internal law to international law may be achieved in a variety of ways, not only through the passing of new legislation, but also by means of executive exercise of legislative power, by judicial pronouncements striking down inconsistent legislation, or even through inaction, if the substance of the international legal standards is thought to be already guaranteed in domestic law. Finally, for such obligations to be effectively carried out, it is not sufficient to merely conform domestic law to international law: ultimately, the substance of international law ought to be respected in practice.³⁶

This is all the more evident with regard to the abovementioned provisions of human rights treaties calling for legislative implementation. The language of such provisions clearly entails broad discretion.³⁷ Essentially, these norms require states to guarantee the effective protection of the treaty rights by all means that may be necessary,³⁸ which constitutes no derogation from the ground principles analyzed before. In fact, these norms are nothing else than restatements of the rule that states must carry out international obligations in good faith. Accordingly, the Human Rights Committee (HRC) stated in its General Comment 3 that “article 2 of the Covenant generally leaves it to the States parties concerned to choose their method of implementation”.³⁹ Similarly, in *Litgow* the ECtHR confirmed that, in principle, it maintains a position of neutrality over the means adopted by states to ensure an effective realization of the convention rights.⁴⁰

³⁶ S. BARIATTI, *L'interpretazione delle convenzioni internazionali di diritto uniforme*, Padova, 1986, p. 61 (for uniform law conventions to be properly implemented, “non basta [...] l’emanazione di una norma interna che riproduca il contenuto della norma internazionale, ma è necessario che questa riceva completa e corretta attuazione nello Stato per raggiungere concretamente lo scopo per cui è preordinata”); B. CONFORTI, “Obblighi di mezzi ed obblighi di risultato nelle convenzioni di diritto uniforme”, *Rivista di diritto internazionale privato e processuale* 1988, p. 233 ff., p. 243.

³⁷ Y. SHANY, “How Supreme is the Supreme Law of the Land? Comparative Analysis of the Influence of International Human Rights Treaties upon the Interpretation of Constitutional Texts by Domestic Courts”, *Brooklyn Journal of International Law* 2006, p. 341 ff., p. 348 (describing Art. 2(2) ICCPR as “discretionary language”).

³⁸ S. JOSEPH, J. SCHULTZ, M. CASTAN, *The International Covenant on Civil and Political Rights. Cases, Materials, and Commentary*, Oxford, 2000, p. 9 (“article 2 [ICCPR], the general obligation provision, essentially requires States Parties effectively to protect rights at the municipal level”); M. CRAVEN, *The International Covenant on Economic, Social and Cultural Rights. A Perspective on its Development*, Oxford, 1995, p. 128 (“[w]atever the intricacies of the implementation process, it would appear that the ultimate objective of the Covenant is the ‘full realization’ of the rights”).

³⁹ HRC, “General Comment 3 – Article 2 (Implementation at the National Level)”, 29 July 1981, HRI/GEN/1/Rev.9.

⁴⁰ *Litgow and Others v. United Kingdom*, App. No. 9006/80, Judgment, 8 July 1986, p. 68, para. 205 (“Although there is thus no obligation to incorporate the Convention into domestic law, [...] the substance of the rights and freedoms set forth must be secured under the domestic legal order, in some form or another”). See also *Colozza v. Italy*, App. No. 9024/80, Judgment, 12 February 1985, p. 11, para. 30 (“The Contracting States enjoy a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of Article 6 [...]. The Court’s task is not to indicate those means to the States, but to determine whether the result called for by the Convention has been achieved”). As noted by A. NOLLKAEMPER, “The Effect of the ECHR and Judgments of the ECtHR on National Law – Comments on the Paper of Enzo Cannizzaro”, *Italian Yearbook of International Law* 2009, p. 189 ff., p. 196, with reference to the obligations formulated by the ICJ, they “generally are obligations of result. They require that particular remedies are provided, but are agnostic on the question of whether such remedies are performed by the courts or by the legislature”.

Nonetheless, it should also be considered that carrying out international human rights obligations may be difficult, or even impossible, in presence of structural deficiencies of national law. A dysfunctional implementation within domestic law can give rise to large-scale violations, which, in turn, can make it indispensable to conform internal law to international law. This is the reason why regional and international human rights bodies often recommend or require changes in legislation.⁴¹ While adhering in principle to the rule of freedom of means of implementation, the Committee on Economic, Social and Cultural Rights has held that “in many instances legislation is highly desirable and in some cases may even be indispensable”.⁴² The Human Rights Committee is commonly assertive in requiring changes in the domestic legislation of states parties.⁴³ The ECtHR has introduced a procedure (so-called pilot judgment) to deal with systemic deficits in implementation which give rise to a spate of identical (“repetitive”) cases: the Court commonly indicates to state authorities how to remedy these deficiencies at the national level, which often entails changes in domestic law.⁴⁴

As for the obligations to provide effective domestic remedies available to private parties, by which they can seek redress for infringements of international law committed by state authorities, they too are commonly included in human rights instruments. For example, Art. 2(3)(a) of the ICCPR establishes an obligation upon states parties to provide effective remedies for violations of treaty rights “committed by persons acting in an official capacity”. This article also establishes, at the letters (b) and (c), that such a remedy must consist in a determination by a judicial, administrative or legislative authority, or by any other competent authority, and that the remedies shall be enforced by domestic authorities. Pursuant to Art. 13 of the ECHR, “[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”. Similar effective remedy clauses are included in most human rights instruments, including Art. 8 of the Universal Declaration of Human Rights.⁴⁵

⁴¹ For general thoughts on this point, see W.N. FERDINANDUSSE, *cit.*, p. 160; F. MCKAY, “What Outcomes for Victims?”, in D. SHELTON (ed.), *The Oxford Handbook of International Human Rights Law*, Oxford, 2013, p. 921 ff., p. 939-940.

⁴² Committee on Economic, Social and Cultural Rights, “General Comment No. 3: The Nature of States Parties Obligations”, 14 December 1990, E/1991/23, para. 3. See also, *inter alia*, “General Comment No. 5: Persons with disabilities”, 25 November 1994, E/C.12/1994/13, para. 13 (“The methods to be used by States parties in seeking to implement their obligations under the Covenant [...] include [...] the need to legislate where necessary and to eliminate any existing discriminatory language”); “General Comment No. 7: The right to adequate housing (Art. 11.1): forced evictions”, 20 May 1997, E/1998/22, para. 10 (“it is clear that legislation against forced evictions is an essential basis upon which to build a system of effective protection.”).

⁴³ See e.g. HRC, “Concluding observations on the sixth periodic report of Italy”, 1 May 2017, CCPR/C/ITA/CO/6, para. 9 (requiring to “take all measures necessary, including the adoption of comprehensive anti-discrimination legislation, to ensure that its legal framework [...] provides full and effective protection against discrimination”).

⁴⁴ See e.g. *Torreggiani and Others v. Italy*, App. No. 43517/09, Judgment, 8 January 2013 (dealing with the structural overcrowding of Italian prisons and prompting changes in domestic legislation to establish an effective redress). On this case see F. FAVUZZA, “Torreggiani and Prison Overcrowding in Italy”, *Human Rights Law Review* 2017, p. 153 ff.

⁴⁵ Universal Declaration of Human Rights (10 December 1948), UN Doc. A/810, Art. 8 (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”). See also International Convention on the Elimination of All Forms of Racial Discrimination, *cit.*, Art. 6 (“States Parties shall assure to everyone within their jurisdiction effective protection

A violation of the obligation to ensure effective remedies may occur in two different situations: firstly, where domestic law provides for effective remedies, but they have not been available in the concrete case; or, secondly, where domestic law does not provide for effective remedies at all. In the latter case, the obligation under scrutiny overlaps in scope with the obligation to conform domestic law to international law, in that compliance with the right to an effective remedy requires the necessary changes in domestic law.⁴⁶ In this regard, the ECtHR case law concerning Art. 13 is particularly revealing. On multiple occasions, the Court has required states to amend structural shortcomings in their legislation concerning remedies for actions of state authorities. In *Varga v. Hungary*, for instance, the Court was faced with issues arising from the systemic overcrowding of Hungarian prisons. In a pilot judgment, it held that the Hungarian government was under an obligation to make substantive changes to municipal law in order to ensure the availability of effective domestic remedies allowing detainees to complain about their conditions of detention.⁴⁷

In this case, too, the principle of state freedom to choose the means of international law implementation is compressed, but its most basic tenets are not contradicted. In particular, it should be considered that it is indifferent whether individuals are entitled to invoke domestic law or international law, as long as the substance of the treaty rights is complied with. Furthermore, human rights instruments are generally indifferent to whether a state establishes judicial, administrative or other means of redress. As regards the ECHR, for example, “[t]he authority referred to in Article 13 [...] may be a court [...] as well as an administrative authority, a governmental authority or a parliamentary body”.⁴⁸

Finally, it can be contended that the external checks on law-enforcing domestic authorities required by the obligations under consideration are essentially result-oriented. Their goal is to ensure the effective realization of substantive rights, not to establish limits on political power *per se*. It follows from this premise that international law allows for the role of executive authorities to re-expand whenever their intervention is required for the substance of international law not to be violated.

Several factors support this conclusion. For example, in general terms, an independent judiciary is necessary to ensure a proper implementation of international human rights law at the domestic level.⁴⁹ However, from the viewpoint of international law, independent courts

and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention”). The ICESCR does not have an effective implementation clause; however, the Committee on Economic, Social and Cultural Rights held that “in many cases, the other ‘means’ used could be rendered ineffective if they are not reinforced or complemented by judicial remedies”: see “General Comment 9: The domestic application of the Covenant”, 3 December 1998, E/C.12/1998/24, para. 3.

⁴⁶ See e.g. HRC, “General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)”, 10 March 1992, para. 14 (“Article 7 should be read in conjunction with article 2, paragraph 3, of the Covenant. [...] The right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law.”).

⁴⁷ *Varga and Others v. Hungary*, App. No. 14097/12 *et al.*, Judgment, 10 March 2015.

⁴⁸ C. GRABENWARTER, *European Convention on Human Rights – Commentary*, Munich, 2014, p. 333. However, in order for the remedy to be effective, the deciding authority must not have been involved in the alleged violation of the right: see e.g. *Calogero Diana v. Italy*, App. No. 15211/89, Judgment, 15 November 1996, para. 41.

⁴⁹ See e.g. Art. 14(1) ICCPR (in criminal proceedings, “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”); Art. 6(1) ECHR (“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a

are only a means to an end, i.e. ensuring compliance. If an independent judiciary does not achieve the right substantive result, it is not only acceptable but even required that political authorities step in and override the incorrect judicial decision. From this perspective, judicial independence is but another feature of domestic law which the state cannot plead to justify its non-compliance.⁵⁰ For the same reason, the courts' interpretive reliance on the political authorities is generally acceptable as long as it produces the right result.⁵¹ The same can be said with regard to actions taken by the political branches in violation of domestic law, if such actions prevent international law from being violated.⁵² In sum, the international obligation to ensure effective remedies may be regarded as obligations to adopt a cooperative model of implementation between state organs, in which each organ – be it the judiciary or one of the political branches – can competitively correct the mistakes of the others in the application of international law.

The above sheds light on important characteristics of the relationship between international law and domestic legal systems. International law's approach to its domestic implementation is generally focused on the achievement of effective compliance.⁵³ While the principle of neutrality may be compressed, to a certain extent, by special sets of treaty obligations, the compliance-centered approach remains the bedrock of the international normative framework concerning domestic application. As a consequence, the international legal framework is generally indifferent to domestic political processes.⁵⁴ International law limits the actions of state organs from the outside: political branches, just like any other state organ, are agencies for carrying out international obligations, and are therefore required to ensure respect for international law. As a rule, this does not entail any *internal* component, i.e. does not translate

fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"). It should be noted that these provisions apply to claims based not only on international law, but also on domestic law. On the role of independent courts in international law implementation, see also Chapter 3, Section 2.

⁵⁰ A. NOLLKAEMPER, *National Courts*, cit., p. 55 ("the state (ie the government) needs to be in a position to correct or intervene in acts of the judiciary that may contravene international law. When courts apply international law correctly, no tension will exist. But in view of the (not merely hypothetical) possibility that courts do make incorrect decisions, international law requires the political branches to exercise a control that, by definition, may limit independence. [...] In this respect at least, the independence of courts is not an end in itself but a means toward an effective performance of legal rights and obligations, which may be duly limited when independent courts cannot provide for such performance").

⁵¹ J. ARATO, "Deference to the Executive. The US Debate in Global Perspective", in H.P. AUST, G. NOLTE (eds.), *The Interpretation of International Law by Domestic Courts. Uniformity, Diversity, Convergence*, Oxford, 2016, p. 198 ff., p. 202-203. See also D. SLOSS, "United States", in SLOSS (ed.), *The Role of Domestic Courts in Treaty Enforcement. A Comparative Study*, Cambridge, 2009, p. 504 ff., p. 524 ("deference to the executive is not always unilateralist").

⁵² P. MALANCZUK, cit., p. 71 ("if the enforcement of the rule is left to the executive, which enforces it in such a way that no breach of international law occurs, all is well").

⁵³ A. MARSCHIK, "Hard Law Strikes Back – How the Recent Focus on the Rule of Law Promotes Compliance with Norms in International Relations", in I. BUFFARD, J. CRAWFORD, A. PELLET, S. WITTICH (eds.), *International Law between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner*, Leiden-Boston, 2008, p. 61 ff., p. 68-69; M. KUMM, "International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model", *Virginia Journal of International Law* 2003-2004, p. 19 ff., p. 22 (the international rule of law "is best understood more narrowly to mean literally what it says: that nations, in their relationships to one another, are to be ruled by law. The addressees of international law, states in particular, should obey the law. They should treat it as authoritative and let it guide and constrain their actions. The international rule of law is realized to the extent states do in fact obey international law").

⁵⁴ R. SUMMERS, "A Formal Theory of the Rule of Law", *Ratio Juris* 1993, p. 12 ff. (formal conceptions of rule of law are content independent and thus preferable because politically neutral).

into any obligation to create *domestic* legal constraints on the authority of national political authorities to choose the means of international law implementation.

The above proves two points. Firstly, states retain substantial room for maneuver in the domestic application of virtually all international norms. Secondly, international law is endowed with a considerable capacity to adapt to, or rely on, the role of national political authorities under domestic law. It has been contended that “[t]o secure the space for national competences for the matters regulated by international law [is] one way to defer to political legitimacy attached to national law”.⁵⁵ Therefore, in discharging international obligations, national legal systems are allowed to take into account relevant domestic policy concerns, within the ceiling set by the requirement of compliance. Against this normative backdrop in international law, an accurate description of the role of national political authorities in the application of international law can only be charted by shifting the focus to the practice of national legal systems.

4. Fundamental policy factors influencing the way international law is implemented in domestic legal systems.

From the viewpoint of international law, the role of national political branches is easy to describe: *qua* components of the state, they are expected to carry out international obligations. If one looks at their role in the implementation of international law from the perspective of domestic law, however, the situation appears more complex. In domestic legal systems, limitations on the prerogatives of national political authorities are generally perceived to come at a price: they may be regarded, for example, as limiting democratic decision-making, or as upsetting the constitutional balance of state powers. These concerns operate also in the field of the domestic application of international obligations. The willingness of domestic legal orders to commit the political branches to comply with international law largely depends on such policy considerations.

This section aims to identify the countervailing factors that are potentially relevant in the domestic application of international law. Its scope is not to describe the way in which specific legal systems implement international obligations, which will be done in the following chapters, but only to set the stage of the future analysis by providing a concise overview of the main problematic points. In one way or another, the policy concerns which come into play are similar in all domestic legal environments. The following paragraphs, more specifically, outline the three most oft-invoked concerns: namely, domestic democracy, separation of powers, and national sovereignty. They also try to assess to what extent these concerns are *prima facie* justified and whether international law can do something to resolve them.

⁵⁵ M. KANETAKE, “The Interfaces Between the National and the International Rule of Law: A Framework Paper”, in M. KANETAKE, A. NOLLKAEMPER (eds.), *cit.*, p. 11 ff., p. 39. See also P.M. MCFADDEN, “Provincialism in United States Courts”, *Cornell Law Review* 1995, p. 4 ff., p. 47 (“black-box theory [i.e. freedom of implementation] makes a great deal of sense, from a global perspective, because it recognizes both the fact and legitimacy of states having organized themselves in different ways. It would be an unwarranted interference in domestic affairs, as well as impractical, to require that specific institutions carry out international obligations”).

4.1. Safeguard of democratic legitimacy.

The role of national political authorities in the domestic application of international law can be influenced, first and foremost, by a concern about the protection of domestic democracy.

The concept of democracy does not have any uniformly accepted meaning,⁵⁶ nor does this research aim to provide one. For the present purposes, it is sufficient – and most explanatory – to take a relativist approach to the concept. Regardless of how democracy is construed in a specific legal environment, the acts of the legislature and, to a lesser but significant extent, of the executive are usually deemed to be the primary means through which the democratic will expresses itself.⁵⁷ To the extent this is the case, any limitation on the freedom of action of the political branches may potentially affect the democratic process and counter the aspirations of the prevailing majority.⁵⁸ When applied to the domestic implementation of international law, this concern tends to emphasize the need for political supervision in the discharge of international obligations.⁵⁹

The problem is of course magnified by the alleged lack of democratic legitimacy of international law.⁶⁰ In domestic legal environments, indeed, there could be a reluctance to

⁵⁶ C. TOMUSCHAT, “Democracy and the Rule of Law”, in D. SHELTON (ed.), *The Oxford*, cit., p. 469 ff., p. 482-483. On the many possible notions of democracy, see generally D. HELD, *Models of Democracy*, Stanford, 2006³.

⁵⁷ This relativist understanding of democracy has a limit, in that it also applies to legal environments which should be considered, for all intents and purposes, authoritarian. Here, of course, the asserted intention of protecting the democratic will may hinge on different underlying concerns. As noted by B.Z. TAMANAHA, “A Concise Guide to the Rule of Law”, in G. PALOMBELLA, N. WALKER (eds.), *Relocating the Rule of Law*, Oxford-Portland, 2009, p. 3 ff., p. 5, “[i]n democratic societies, the limitation of the law-making power of the government is criticised for overruling or restricting democratic law-making; in authoritarian states, it hampers the ruling authority from using the law to do as it desires”.

⁵⁸ In US constitutional theory, this problem is generally referred to as “countermajoritarian difficulty”. This concept was first conceived in 1962 in relation to the judicial checks on congress and the executive: see A.M. BICKEL, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Indianapolis, 1962, p. 16 (“judicial review is a countermajoritarian force in our system”). For a critical analysis of this concept, see B. FRIEDMAN, “The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy”, *New York University Law Review* 1998, p. 333 ff.

⁵⁹ See e.g. J. GOLDSMITH, “Should International Human Rights Law Trump US Domestic Law?”, *Chicago Journal of International Law* 2000, p. 327 ff., p. 338-339 (“When the human rights community demands that the United States make international human rights treaties a part of domestic law in a way that circumvents political control, it evinces an intolerance for a pluralism of values and conditions, and a disrespect for local democratic processes”); R.P. ALFORD, “Misusing International Sources to Interpret the Constitution”, *American Journal of International Law* 2004, p. 57 ff., p. 58-61 (“The international countermajoritarian difficulty would suggest that international norms cannot be internalized within our Constitution unless such norms are first internalized by our people as our community standards”); J.H. JACKSON, “Status of Treaties in Domestic Legal Systems: A Policy Analysis”, *American Journal of International Law* 1992, p. 310 ff., p. 313 and 330-331 (suggesting that democratic countries should avoid the combined effect of automatic incorporation of international law and higher status of treaties in domestic law); W.J. HOPKINS, “New Zealand”, in D. SHELTON (ed.), *International Law and Domestic Legal Systems. Incorporation, Transformation, and Persuasion*, Oxford, 2011, p. 429 ff., p. 446 (“International law can be bad law. Given the limited legitimacy that international law has, it is constitutionally questionable whether such ‘bad law’ should be applied uncritically in the domestic context”).

⁶⁰ The literature on the democratic deficit of international law and institutions is extensive. See, *ex multis*, J. CRAWFORD, *Chance, Order, Change: The Course of International Law*, The Hague, 2014, p. 400 (democracy is not a feature of the international legal order, but emerging principles of international law may tend toward its protection); J. RUBENFELD, “The Two World Orders”, *Wilson Quarterly Autumn* 2003, p. 22 ff., p. 34 (“international law is a threat to democracy and to the hopes of democratic politics all over the world”); J. RUBENFELD, “Unilateralism and Constitutionalism”, *New York University Law Review* 2004, p. 1971 ff. (contrasting domestic “democratic constitutionalism” with an “international constitutionalism” seeing

apply norms that are assumed – rightfully or otherwise – not to be subject to the same standards of democratic legitimacy as domestic norms.⁶¹ An involvement of the national political branches in the implementation process may be seen to remedy this shortcoming, at least in part, by operating as a democratic filter on the reception of international norms.

This view is not uncontroversial. In particular, two major criticisms have been levelled at the idea that the asserted democratic deficit of international norms should or could be addressed at the domestic level in the process of implementing international law.

It has been suggested, first of all, that it would be misleading to see international law as a system of norms superimposed on the will of national political authorities, because national political branches participate in multiple ways in the process of creation of international norms. As argued by Basak Cali, “democratic-friendly theoretical approaches [...] contain[...] the idea of the illegitimate imposition of external commands over the domestic political authority – an authority whose primary duty is to respect and reflect the will of its citizens”.⁶² However, “[j]urisdictional limits to the authorities of sovereigns, and participation, implying active agency of sovereigns in the making of international laws demand that we conceive political authorities not as recipients of imposed international law, but as actors co-operating, albeit imperfectly, to create international regulation”.⁶³ By adopting this position, in whole or in part, the problem of the lack of democratic legitimacy of international law would seem to be defeated at the source: being created through the acts of national political organs, international norms would share the same legitimizing basis as domestic norms.

This view is not wholly convincing, though, because of the unexpressed voluntarist argument that lies at its heart. Voluntarism, i.e. the idea that all rules of international law would find their origin in some form of state will, has been persuasively debunked in scholarship.⁶⁴ The lack of actual control of state authorities over the country’s international obligations is quite evident in the case of general international law, which may bind states without or even against their consent.⁶⁵ But perhaps even more importantly, state authorities do not necessarily have full *de facto* control over the treaty obligations they undertake. Although the international law

“constitutional law not as an act of democratic self-government, but as a check or restraint on democracy”); S. WHEATLEY, “A Democratic Rule of International Law”, *European Journal of International Law* 2011, p. 525 ff.; A. BERNARDINI, *La sovranità popolare violata nei processi normativi internazionali ed europei*, Napoli, 1997; J. D’ASPROMONT, “The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks”, *European Journal of International Law* 2011, p. 549 ff.; G.H. FOX, B.R. ROTH, “Introduction: The Spread of Liberal Democracy and Its Implications for International Law”, in G.H. FOX, B.R. ROTH (eds.), *Democratic Governance and International Law*, Cambridge, 2010, p. 1 ff.

⁶¹ M. KANETAKE, “The Interfaces”, cit., p. 39 (“Behind national contestations and avoidance always lies the democratic (il)legitimacy of international law and institutions in the eyes of the national guardians of the rule of law”); D. BODANSKY, “The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?”, *American Journal of International Law* 1999, p. 596 ff., p. 606 (arguing, with reference to international environmental law, that international law impinging on domestic law “will be held to the same standards of legitimacy”).

⁶² B. CALI, *The Authority of International Law: Obedience, Respect, and Rebuttal*, Oxford, 2015, p. 97.

⁶³ *Ibid.*, p. 127.

⁶⁴ For a vigorous criticism of voluntarism see A. PELLET, “The Normative Dilemma: Will and Consent in International Law-Making”, *Australian Yearbook of International Law* 1992, p. 22 ff. See also R.A. FALK, cit., p. 55-57 (analyzing the erosion of the consent-oriented basis of authority of international law). For a defense of consent as the basis of international law, see P. WEIL, “Towards Relative Normativity in International Law?”, *American Journal of International Law* 1983, p. 413 ff.

⁶⁵ C. TOMUSCHAT, “Obligations”, cit., p. 275 ff.

of treaties formally safeguards the freedom of states with regard to treaty-making,⁶⁶ political and factual pressures may considerably limit this freedom in practice.⁶⁷ For example, weak states may undergo strong pressures to participate in treaty regimes; the content of treaties evolves over time in manners which may deviate considerably from the states' initial undertakings; and the power to interpret and modify treaties may be entrusted to international institutions largely independent from state control.⁶⁸

Finally, even assuming that states ultimately do have control over their international obligations, voluntarism would still be a poor surrogate of democracy. As compellingly noted by Joseph Weiler, although it might be “tempting to conflate the principle of Consent, so deeply rooted in the normative discourse of international law and its principal legitimating artifact, with democracy”, this principle is in fact “part of a very different vocabulary, namely that of sovereignty and sovereign equality (and inequality). It is, in some ways, the opposite of democracy, since it is based on the legal premise, even if at times a fiction, that the collectivity has neither the power nor, certainly, the authority to impose its will on individual subjects other than through their specific or systemic consent, express or implied”.⁶⁹

Another scholarly view – which may well combine with the one just described – holds that, if international law does indeed suffer from a deficit of democratic legitimacy, this issue should be resolved primarily at the international level and cannot be healed within the national legal system.⁷⁰ In the words of Ward Ferdinandusse, “democratic legitimacy is not substantially furthered by requiring implementing legislation that does not leave any substantial choices. If one wants to enhance the quality of the law-making process, that improvement must take place where the law is actually made, which is on the international level”.⁷¹

Although this argument has its merits, it is also open to some objections. Firstly, because the process of democratization of international law is still in its infancy, a tension with domestic democratic processes is inevitable at least in the current state of international law. Secondly,

⁶⁶ See e.g. Arts. 48-52 VCLT, regulating the following causes of invalidity of treaties: error, fraud, corruption of a representative, coercion of a representative and coercion of the state by threat or use of force.

⁶⁷ A. PELLET, “The Normative”, cit., p. 42-43 (it is “pure hypocrisy” to “assume that, when a State concludes a treaty without error or fraud, corruption or coercion in the sense of the Vienna Convention, its will is [...] free”).

⁶⁸ A. NOLLKAEMPER, “The Effects of Treaties in Domestic Law”, in C.J. TAMS, A. TZANAKOPOULOS, A. ZIMMERMANN (eds.), *Research Handbook on the Law of Treaties*, Cheltenham-Northampton, 2014, p. 123 ff., p. 125-127 (criticizing the idea that a state is in full control of its treaty obligations); A. NOLLKAEMPER, “Inside or Out: Two Types of International Legal Pluralism”, in J. KLABBERS, T. PIIPARINEN (eds.), *Normative Pluralism and International Law: Exploring Global Governance*, Cambridge, 2013, p. 94 ff., p. 104 (“where consent might formally be available, its role is reduced by the fact that it appears late in the process and for many states, nonparticipation in international regimes is not an option”). See also S. KADELBACH, “Domestic Constitutional Concerns with Respect to the Use of Subsequent Agreements and Practice at the International Level”, in G. NOLTE (ed.), *Treaties and Subsequent Practice*, Oxford, 2013, p. 145 ff. (analyzing issues of domestic democratic legitimacy raised by treaty interpretation in light of subsequent practice).

⁶⁹ J.H.H. WEILER, “The Geology of International Law – Governance, Democracy and Legitimacy”, *ZaöRV* 2004, p. 547 ff., p. 548.

⁷⁰ A. PETERS, “The Globalization of State Constitutions”, in J. NIJMAN, A. NOLLKAEMPER (eds.), cit., p. 251 ff., p. 284 (“the hollowing out of domestic democracy can hardly be counteracted by reforms on the national level alone. Notably, the strengthening of the rights of domestic parliaments in governmental decision-making in foreign affairs is necessary, but not sufficient to safeguard democracy. This insight leads to the quest for a compensatory *democratization of global governance*”); B. CALI, cit., p. 15 (“Instead of insisting that domestic procedures are more deliberative – and, therefore, superior – we ought to think about the duties that domestic authorities have in making international law more deliberative – and enhance its legitimacy repertoire”).

⁷¹ W.N. FERDINANDUSSE, cit., p. 100.

and perhaps more importantly, there is no universal concept of democracy to implement at the international level. For this reason, it is strongly debatable that democratic concerns could be addressed in the international sphere in a manner which could satisfy all national sensibilities and approaches. At best, submitting international norms and institutions to – however rudimentary – forms of democratic legitimation might decrease the occurrence of national contestation on grounds of democratic deficit of international law.⁷² Ultimately, however, the protection of democracy remains an intrinsically domestic problem. It seems therefore inevitable that domestic legal orders will shape the techniques of implementation of international law in such a way as to render them compatible with their own understanding of domestic democracy.

4.2. Separation of powers.

A second prominent policy factor influencing the attitude of national legal systems toward the reception of international law is the domestic separation of powers. This term is used here to refer to the constitutional equilibrium between the legislature, the executive and the courts. In specific legal environments, issues of separation of powers may also arise with regard to the relationship between the central government and local authorities.⁷³

Considerations of separation of powers are to some extent intertwined with the safeguard of democracy,⁷⁴ but they do not correspond in full to the policy concerns analyzed in the previous paragraph. There, the focus was on the protection of domestic democracy as a whole from the potentially disruptive external influence of international law, under the assumption that democratic decision-making can be channeled through the acts of both the legislature and the executive. On the other hand, in a perspective of domestic separation of powers, the focus is not so much on the protection of state democracy as a whole vis-à-vis international law, but rather on protecting state organs – and their constitutional prerogatives – from each other. In the division of competence between the various components of the state machinery involved in the application of international law, the influence of the domestic separation of powers plays out in all cases, regardless of the democratic legitimation that international norms are perceived (not) to possess.

A first prong of this policy concern relates to the interactions between the executive and the legislature. National executives are generally entrusted with their country's international relations, thus playing a primary role in the formation of international norms. Most notably, virtually all national legal systems empower the executive to negotiate international agreements and to manage the state's participation in international organizations and in inter-governmental policy-making. This generates a widespread concern that national executives might use international law as a lever to increase their lawmaking powers to the detriment of the prerogatives of the legislature.⁷⁵ This concern becomes more pressing where international

⁷² See e.g. S. KADELBACH, cit., p. 153 (arguing that the existence of a body entrusted with treaty interpretation may help overcome the constitutional legitimacy issues raised by the evolutionary interpretation of the treaty).

⁷³ A. NOLLKAEMPER, "The Effects", cit., p. 127-130 (distinguishing between horizontal and vertical separation of powers).

⁷⁴ W.N. FERDINANDUSSE, cit., p. 101.

⁷⁵ See e.g. E. BENVENISTI, G.W. DOWNS, "Court Cooperation, Executive Accountability, and Global Governance", *New York University Journal of International Law and Politics* 2008-2009, p. 931 ff., p. 931-932

norms are meant to be applied in domestic legal orders in a position which potentially competes with domestic legislation.

National constitutions commonly attempt to remedy these issues by involving the legislature either in the treaty-making process or in the implementation phase.⁷⁶ Whether the legislature actually retains any substantive powers or can only rubber-stamp executive choices depends on the political dynamics of each legal system.⁷⁷ It is also true, on the other hand, that the powers of executives in international law-making should not be overstated. One may refer again to the above-mentioned argument that a state does not always have full control over its treaty obligations. An executive with quasi-exclusive constitutional authority to stipulate treaties does not necessarily have an actual power to determine the content of the treaty obligations it undertakes.⁷⁸

Separation of powers concerns considerably influence the application of international law by the judiciary. National courts may be reluctant to apply international law in ways which appear to them to overstep the boundaries of the judicial function. A large number of factors can be relevant in this regard, such as the courts' independence from the political branches, the scope of judicial review of executive action, and the possibility or otherwise to strike down primary legislation. The courts' attitude in this field may be aimed not only at protecting legislative prerogatives from executive intrusion, for example by limiting the domestic effects of agreements stipulated by the executive in lack of authorization from the legislature,⁷⁹ but also at protecting the prerogatives of the executive.⁸⁰ The two considerations are often strictly interconnected, in that the protection of executive powers can indirectly safeguard the prerogatives of the legislature, as the organ conferring authority to the executive.⁸¹

("the regulatory power that globalization has transferred to international organizations [...] operating at the international level has been vested in the executive branches of a few powerful states that were the system's principal architects").

⁷⁶ D.B. HOLLIS, "A Comparative Approach to Treaty Law and Practice", in D.B. HOLLIS, M.R. BLAKESLEE, L.B. EDERINGTON (eds.), *National Treaty Law and Practice*, Leiden-Boston, 2005, p. 1 ff., p. 32 ("no state has a situation where the executive operates entirely without legislative limitations on the exercise of its authority"). See generally S.A. RIESENFELD, F.M. ABBOTT (eds.), *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study*, Dordrecht, 1994.

⁷⁷ A. NOLLKAEMPER, "The Effects", cit., p. 128.

⁷⁸ E. BENVENISTI, "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts", *European Journal of International Law* 1993, p. 159 ff., p. 177 (arguing that concerns that the application of international law not expressly approved by the legislature should be limited on grounds of separation of powers are "unpersuasive in many respects"); M.A. WATERS, "Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties", *Columbia Law Review* 2007, p. 628 ff., p. 695 (in many countries of common law, "structural changes have rendered this separation of powers concern much less problematic").

⁷⁹ See e.g. *Higgs and Mitchell v. The Minister of National Security and others* [2000] 2 AC 228, Privy Council Appeal No. 45 of 1999, paras. 10-11 ("The Crown may impose obligations in international law upon the state without any participation on the part of the democratically elected organs of government. But the corollary of this unrestricted treaty-making power is that treaties form no part of domestic law unless enacted by the legislature").

⁸⁰ E. BENVENISTI, "Judicial Misgivings", cit., p. 164 (commenting on the "attitude shown by some courts towards the executive's role in treaty-making and its effects on the domestic legal system. In this context the courts' interpretation increased the Government's power").

⁸¹ On this point see E. BENVENISTI, "United We Stand: National Courts Reviewing Counterterrorism Measures", in A. BIANCHI, A. KELLER (eds.), *Counterterrorism: Democracy's Challenge*, Oxford, 2008, p. 251 ff., p. 258-259.

4.3. National sovereignty.

The need to protect national sovereignty is sometimes presented as a relevant policy concern in the field of domestic application of international law.⁸²

In its most common usage, sovereignty is a catchword denoting all rights held by a state both domestically, in the form of control over its territory, and externally, in the form of capacity to act on the international plane.⁸³ The exact definition of the concept, however, is a matter of dispute among scholars of international law. Martti Koskenniemi has famously distinguished between “pure fact” and “legal” approaches to sovereignty.⁸⁴ In the former perspective, state sovereignty is an occurrence which precedes international law and is not dependent on it: the state’s sphere of liberty is unconstrained, unless the state itself chooses to restrain it.⁸⁵ The latter perspective sees sovereignty as a product of the law, which can only be exercised within the boundaries of international norms.⁸⁶ Others have simply done away with the concept.⁸⁷

Probably as a consequence of the uncertainties over its definition, the argument that sovereignty could be undermined in the process of domestic implementation of international obligations lacks clarity to some extent, if compared to the safeguard of democracy and of the separation of powers. On the one hand, commentators who raise sovereignty concerns in this field commonly refer to the need to preserve room for domestic decision-making processes.⁸⁸

⁸² On the impact of considerations related to sovereignty on the domestic application of international law in the US, see J.T. PARRY, “International Law in State Courts: Sovereignty, Resistance, Contagion, and Inevitability”, *Willamette Journal of International Law and Dispute Resolution* 2013, p. 76 ff.

⁸³ J. CRAWFORD, *Brownlie’s*, cit., p. 448. On the concept of sovereignty, see *SS “Wimbledon” (UK v. Germany)*, Judgment of 17 August 1923 (Series A, No. 1), p. 15 ff. The PCIJ was called upon to decide whether under the Treaty of Versailles, which provided for freedom of transit through the Kiel Canal, Germany could prevent shipments of arms to Poland during the Polish-Soviet War, to which it was neutral. Germany contended that this right was an “essential part” of its sovereignty. Although conceding a restrictive interpretation of the Treaty, the Court rejected Germany’s argument and famously held that it “decline[d] to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty” (p. 25).

⁸⁴ M. KOSKENNIEMI, cit., p. 228-233.

⁸⁵ See e.g. C. SCHMITT, *Political Theology. Four Chapters on the Concept of Sovereignty*, Chicago, 2005 (translation by G. Swab; 1st ed. 1922), p. 5 (defining sovereignty as the ability to decide on the exception, e.g. to rule in situations where the legal system breaks down) and p. 12 (“The existence of the state is undoubted proof of its superiority over the validity of the legal norm. The decision frees itself from all normative ties and becomes in the true sense absolute. The state suspends the law in the exception on the basis of its right of self-preservation”).

⁸⁶ H. KELSEN, “Théorie générale du droit international public: problèmes choisis”, *Recueil des cours* 1932, vol. 42, p. 121 ff., p. 182-192.

⁸⁷ L. HENKIN, “That ‘S’ word: Sovereignty, and Globalization, and Human Rights, et cetera”, *Fordham Law Review* 1999, p. 1 ff.

⁸⁸ R.P. ALFORD, cit., p. 58 (arguing, with reference to the usage of “global opinions” – a concept which includes human rights treaties – in constitutional interpretation, that it “dramatically undermines sovereignty by utilizing the one vehicle – constitutional supremacy – that can trump the democratic will reflected in state and federal legislative and executive pronouncements”); A. BERNARDINI, cit., p. 14 (constitutional mechanisms of automatic incorporation of customary international law, such as Art. 10 of the Italian Constitution, “completely elude the aspect of state sovereignty [...] and even more that of popular sovereignty”); D. FELDMAN, “Monism, Dualism and Constitutional Legitimacy”, *Australian Yearbook of International Law* 1999, p. 105 ff., p. 105 (the “monist” constitutional model – i.e. automatic incorporation of international law – “restricts the sovereignty of the state, and may accordingly limit the capacity of the internal political process to oversee the extent of the state’s international obligations and domestic powers”); T. CRUZ, “Defending U.S. Sovereignty, Separation of

In this case, the term alludes in fact to *popular* sovereignty and, therefore, does not appear different from the concept of domestic democracy, as defined in Paragraph 3.1.

On the other hand, the way in which international obligations are discharged in a national legal order does not seem to have the capacity to encroach upon state sovereignty, because it does not modify the extent of the state's international obligations.⁸⁹ Furthermore, state sovereignty is safeguarded by the background presumption of neutrality of international law as to the means of domestic implementation, which makes it so that the allocation of the implementing powers between state organs is by and large a matter of domestic concern. Against this backdrop, it seems inappropriate to consider state sovereignty as an autonomous policy concern influencing the modalities of international law reception in domestic law.

5. Structure of the work.

To summarize, international law and national law approach limitations on national political authorities in different ways. On the one hand, international law generally takes a compliance-centered approach to domestic implementation. Being organs of the state, national political authorities are required to act in conformity with international law. On the other hand, from the standpoint of domestic legal systems, submitting the political branches to the authority of international law entails a tension with a number of fundamental policy considerations, which boil down to the safeguard of the majoritarian will and of the separation of powers.

The following chapters will analyze how these policy considerations influence the way in which national legal systems implement international obligations; whether such policy hurdles inevitably lead states to non-compliance with international obligations; and whether and how competing demands relating to compliance with international law and the safeguard of domestic political processes can be balanced in practice.

Chapter 2, in particular, will analyze the relationship between the prerogatives of the national political branches and the techniques through which international norms are formally made part of domestic law. It will classify such techniques according to the amount of legal constraints they impose on the national lawmaking authorities and will analyze their policy rationale and implications.

Chapter 3 will examine the application of international law by national courts against state authorities and, in particular, will try to assess the impact of considerations relating to the prerogatives of the political branches on the determination of the direct applicability of international law. This chapter will critique in detail the tendency of national courts to limit

Powers, and Federalism in *Medellín v. Texas*”, *Harvard Journal of Law and Public Policy* 2010, p. 25 ff. (arguing, with reference to the US Supreme Court decision *Medellín v. Texas* which held an ICJ judgment to be non directly applicable, that “the central issue in *Medellín* was a question of U.S. sovereignty – who makes the laws that bind the citizens of the United States. Are the American people governed by judges, courts, and laws of nations other than our own, or are they governed by the United States Constitution, by the U.S. Congress, the United States government, and ultimately by ‘We the People?’”). On *Medellín v. Texas*, see Chapter 3, Section 3.2.

⁸⁹ See e.g. J.H. JACKSON, cit., p. 323 (“it is sometimes argued that urging the direct application of treaties is tantamount to ‘interference in the internal affairs’ of a sovereign state”).

the domestic application of international norms in order to safeguard the prerogatives of state authorities.

Chapter 4 will turn its focus to the techniques of consistent interpretation, i.e. to the use of international law in the interpretation of domestic norms. It will examine the most common arguments advanced by national courts to limit the extent of consistent interpretation in ways that are perceived to protect the prerogatives of the political authorities and will put forward an understanding of consistent interpretation aimed at overcoming such arguments.

Finally, a short concluding chapter will summarize the research findings and will attempt a final assessment against the backdrop of the three research hypotheses outlined above.

Chapter 2

The Status of International Law in Domestic Legal Systems and Constraints on Political Authorities

CONTENT: 1. Introduction. The domestic status of international law as a limit on political authorities. – 2. The overarching notions of monism and dualism: a critique. – 3. Supremacy of international law over primary legislation. – 3.1. The domestic law dimension of the concept of supremacy. – 3.2. Supremacy of international law in the practice of national legal systems. – 3.3. Policy implications: issues of democratic legitimacy and separation of powers and their influence on national case law. – 4. Automatic standing incorporation of international law without supremacy over primary legislation. – 4.1. Automatic incorporation without supremacy in the practice of national legal systems. – 4.2. Policy implications: the debate on the legitimacy of the incorporation of customary international law in common law legal systems. – 5. Lack of formal constraints on national political authorities in the implementation of international law. – 6. Conclusions: compliance with international law as a fundamental principle in domestic legal systems.

1. Introduction. The domestic status of international law as a limit on political authorities.

This chapter analyzes the formal interactions of national legal systems with international law, i.e. the *de jure* status that international law is granted in domestic legal orders. The reception of international norms within the hierarchy of municipal norms constitutes the most immediate way in which future actions of state authorities can be compelled to comply with international law.¹

Domestic legal systems deal with the issue of international law implementation by resorting to a staggering variety of techniques. Such techniques impose differing curbs on the lawmaking powers of the political branches, in order to ensure their compliance with international obligations. The intensity of these limitations may be described by resorting to a spectrum. Legal curbs on the lawmaking are at their zenith in situations where, first, the reception of international law in domestic law is not made contingent upon any decisions by political authorities, and second, international law is prioritized over all the acts of the political branches, including primary legislation. At the opposite extreme of the spectrum there are cases where international law can be implemented domestically only through the acts of the political branches, which retain full discretion on whether to act contrariwise. In between these two extremes, a great supply of intermediate solutions can be found.

¹ A. CASSESE, “Modern Constitutions and International Law”, *Recueil des cours* 1985, vol. 192, p. 342 ff., p. 444 (noting that states may create “internal machinery for ensuring that [international obligations] are complied with by all national authorities, including the lawmakers”). See also T. GINSBURG, “Locking In Democracy: Constitutions, Commitment, and International Law”, *New York University Journal of International Law and Politics* 2005-2006, p. 707 ff. (arguing, from the perspective of constitutional precommitment theory, that constitutional provisions incorporating international law represent “means of placing policies beyond the control of any domestic actor”); and, in a similar vein, T. GINSBURG, S. CHERNYKH, Z. ELKINS, “Commitment and Diffusion: How and Why National Constitutions Incorporate International Law”, *University of Illinois Law Review* 2008, p. 201 ff.

It has been noted that the choice to commit the political branches to the respect of international law is a “deeply political question” which reflects “political decisions on the allocation of power” both between different state powers and between the state and the international legal order.² Given the nature of such decisions, it comes at no surprise that they are commonly made in constitutional texts.³ Whenever the choices regarding the status of international law in domestic law are made by a constitution, the component of constraint of political authorities is self-evident.⁴ However, it would be simplistic to think that limits on the powers of political authorities in implementing international obligations can only stem from a constitution. Even where international law can be applied domestically only through acts of the legislature or the executive, the freedom of these organs may encounter a number of limits, controls and external influences.

In the choices regarding how to implement the various sources of international law within a domestic legal system, the influence of the interests and values described in the previous chapter manifests itself in very clear terms. Each legal system is called upon to resolve the tension between the intention to facilitate state compliance with international obligations and the will to preserve room for maneuver for domestic political actors. The clashing, interacting and blending of these competing values in light of national interests and sensibilities gives shape to the multitude of implementation techniques that can be met in practice.

The attitudes of domestic legal systems toward the reception of international norms have already been the subject of detailed analysis in legal doctrine.⁵ For this reason, this chapter does not aim to make an encyclopedic description of the solutions adopted in domestic law. It aims, instead, to look at this issue exclusively from the perspective of the constraints on political discretion as regards implementation of and compliance with international law, in order to single out relevant tendencies which are common to a significant number of national legal systems.

In order to do so, the chapter is structured along these lines. Firstly, Section 2 will lay down the theoretical foundations of the chapter by introducing the concepts of monism and dualism, which are commonly used to describe the interactions between national law and international law. This section will argue that these concepts are not able to provide a clear description of how national legal relate to international law, and that different categories should be used to this end. Accordingly, the subsequent sections will describe three large-scale approaches to international law that can be identified in national legal systems. Section 3 will deal with the cases in which all political authorities appear to be ousted from any decisions concerning the reception of international law in domestic law, because the former is incorporated automatically and is granted primacy over domestic primary legislation. Section 4 will

² A. NOLLKAEMPER, “The Effects of Treaties in Domestic Law”, in C.J. TAMS, A. TZANAKOPOULOS, A. ZIMMERMANN (eds.), *Research Handbook on the Law of Treaties*, Cheltenham-Northampton, 2014, p. 123 ff., p. 124.

³ V. JACKSON, “Constitutional Comparisons: Convergence, Resistance, Engagement”, *Harvard Law Review* 2005, p. 109 ff., p. 112 (arguing that national constitutions have become “sites for implementation of international law”).

⁴ T. GINSBURG, “Locking”, cit., p. 710 (“Constitutions represent self-binding acts, whereby drafters restrict the actions available to future politicians”).

⁵ See in particular the extensive surveys of domestic constitutional law performed by A. CASSESE, “Modern Constitutions”, cit., and G. BARTOLINI, “A Universal Approach to International Law in Contemporary Constitutions: Does It Exist?”, *Cambridge Journal of International and Comparative Law* 2014, p. 1287 ff.

analyze cases in which the automatic incorporation of international law is not coupled with its primacy over the acts of the legislature. Section 5 will explore the residual category where the implementation of international law requires an intervention by the political branches. Lastly, Section 6 will draw some general conclusions and will lay the foundations of the enquiries to be conducted in the following two chapters.

2. The overarching notions of monism and dualism: a critique.

The monism-dualism debate is the *locus classicus* of the topic of the status of international law in domestic legal systems. These two concepts have shaped nearly every discussion on this subject for decades and have exercised a significant influence over state practice.⁶ For these reasons, an introductory analysis of these terms is unavoidable.⁷

To begin the analysis, it must be underscored that such concepts have been defined in inconsistent ways.⁸ In particular, it is possible to identify two radically different usages in legal discourse. On the one hand, they have been used to describe the theoretical relationship between domestic law and international law in general and abstract terms, with the aim to identify inherent features which would inform the very essence of that relationship.⁹ On the other hand, the two terms have also been employed to describe the attitudes of specific national legal systems towards international law.¹⁰ The following discussion will start off with the former usage and will describe how the meaning of the two terms evolved toward the latter usage.

The debate over the relationship between the international and the national legal orders, which revolved around abstract notions of monism and dualism, peaked in the 19th century and in the early 20th.¹¹ Simply put, the concept of monism describes the idea that law is a unitary phenomenon and, thus, that international law and national law necessarily constitute parts of the same legal order. Conversely, dualism depicts national law and international law as separate realms of law, each supreme in its own field of operation.¹²

⁶ D.T. BJÖRGVINSSON, *The Intersection of International Law and Domestic Law. A Theoretical and Practical Analysis*, Cheltenham, 2015, p. 16.

⁷ J. NIJMAN, A. NOLLKAEMPER, "Introduction", in J. NIJMAN, A. NOLLKAEMPER (eds.), *New Perspectives on the Divide Between National and International Law*, Oxford, 2007, p. 1 ff., p. 6 (it is inevitable "to build on the legacy of what historically have been the two main theories on the matter").

⁸ D. SLOSS, "Domestic Application of Treaties", in D.B. HOLLIS (ed.), *The Oxford Guide to Treaties*, Oxford, 2012, p. 367 ff., p. 368 (noting that "there is no single, agreed definition of the terms").

⁹ D.T. BJÖRGVINSSON, cit., p. 17 ff. (describing this approach as "philosophical").

¹⁰ D. SLOSS, "Domestic Application", cit., p. 368-369 (distinguishing the two usages of monism and dualism).

¹¹ J. NIJMAN, A. NOLLKAEMPER, "Introduction", cit., p. 6-10.

¹² The literature on the subject is extremely vast. On the difference between these notions, see, *ex multis*, J. CRAWFORD, *Brownlie's Principles of Public International Law*, Oxford, 2012⁸, p. 48-50; R. QUADRI, "Cours général de droit international public", *Recueil des cours* 1964, vol. 113, p. 239 ff., p. 280-290; G. SPERDUTI, "Le principe de souveraineté et le problème des rapports entre le droit international et le droit interne", *Recueil des cours* 1976, vol. 153, p. 319 ff., p. 333-337; P.M. DUPUY, "International Law and Domestic (Municipal) Law", *Max Planck Encyclopedia of Public International Law*, 2011; D.P. O'CONNELL, "The Relationship Between International Law and Municipal Law", *The Georgetown Law Journal* 1960, p. 431 ff.; K.J. PARTSCH, "International Law and Municipal Law", *Encyclopedia of Public International Law* 1987, p. 238 ff.; G. SLYZ, "International Law in National Courts", *New York University Journal of International Law and Politics* 1995-1996, p. 65 ff., p. 67-71; M.N. SHAW, *International Law*, Cambridge, 2014⁷, p. 92-95; M. VIRALLY, "Sur un pont

To put this debate into the right perspective, it should be noted that it was underpinned from the outset by political ideologies.¹³ Monist thinkers, such as Alfred Verdross and Hans Kelsen, generally sought to assert the superiority of international law as a limit to the absolute power of nation-states, a position which was often permeated by “universal, cosmopolitan, or even utopian connotations”.¹⁴ As a theoretical construct, monism bore in itself the promise of quasi-unfiltered constraints on domestic political authorities. In the purest form of monism, international law would have automatically been part of domestic legal systems – actually, no separation fence could have even been conceived between the two realms – and it would have done so from a general position of supremacy over national law.¹⁵

Dualist thinking, for its part, started off at the hands of Heinrich Triepel and Dionisio Anzilotti with the ambition to provide a realistic description of the interrelationship between national legal systems and international law.¹⁶ It arose, in particular, from the recognition that the (domestic) validity of domestic law was not contingent on whether it conformed with international obligations.¹⁷

It is commonly acknowledged that the course of dualism was deviated by subsequent, less refined legal thinking towards a deferential attitude for absolute state sovereignty.¹⁸ It is interesting to recall, however, that dualism itself was born as a reaction to the (then widespread) theories contesting the legal character of international law on the grounds that only state law could be qualified as law proper. This idea stemmed from two assumptions: that all law had to originate from the will of the sovereign, and that the only sovereign entities were nation-states. Strongly influenced by the Hegelian conception of state and by Austinian

aux anes: les rapports entre droit international et droits internes”, *Mélanges offerts à Henri Rolin*, Paris, 1961, p. 488 ff.

¹³ J. NIJMAN, A. NOLLKAEMPER, “Introduction”, cit., p. 6.

¹⁴ *Ibid.*, p. 10. Among authors espousing a monist viewpoint, see most notably A. VERDROSS, “Le fondement du droit international”, *Recueil des cours* 1927, vol. 16, p. 247 ff., in particular p. 287-296 (introducing “la primauté du droit des gens et la conception unitaire du droit”); H. KELSEN, “Les rapports de système entre le droit interne et le droit international public”, *Recueil des cours* 1926, vol. 14, p. 227 ff., in particular p. 275-288 for his criticism of dualism and p. 289-298 for an exposition of his positivist and logical monism, where the validity of all national legal orders is ultimately traced back to the *Grundnorm* of international law; J.G. STARKE, “Monism and Dualism in the Theory of International Law”, *British Yearbook of International Law* 1936, p. 66 ff.; G. SCELLE, *Précis de droit des gens*, Paris, 1932, p. 31-32.

¹⁵ See e.g. J.G. STARKE, cit., p. 75-78; D.T. BJÖRGVINSSON, cit., p. 20 (but noting that many monist scholars did not espouse this premise, which they evidently considered unrealistic).

¹⁶ H. TRIEPEL, “Les rapports entre le droit interne et le droit international”, *Recueil des cours* 1923, vol. 1, p. 73 ff.; D. ANZILOTTI, *Corso di diritto internazionale*, Roma, 1928³. More recently, see G. ARANGIO-RUIZ, “International Law and Interindividual Law”, in J. NIJMAN, A. NOLLKAEMPER (eds.), cit., p. 15 ff. On the realistic basis of dualism, see G. SPERDUTI, “Dualism and Monism: A Confrontation to Be Overcome”, *Italian Yearbook of International Law* 1977, p. 31 ff., p. 31-32. See also G. ARANGIO-RUIZ, *Gli enti soggetti dell’ordinamento internazionale*, Milan, 1952, commented on in the following terms by J.L. KUNZ in *American Journal of International Law* 1953, p. 512: “The author of the volume under review shares the dualistic doctrine, but blames many of its representatives for logical fallacies. He gladly admits that the monistic doctrine of the primacy of international law is logically unattackable, and more coherent and elegant; but he holds that the starting-point of the monistic doctrine is in utter contradiction with the reality of international law as actually in force”. As is well known, dualist thinking has historically had a long-lasting influence on Italian legal thought: see C. SANTULLI, *Le statut international de l’ordre juridique étatique*, Paris, 2001, p. 266-267, ft. 556 (describing the “croisade permanente” fought by J.L. Kunz against generations of Italian dualists).

¹⁷ D. ANZILOTTI, cit., p. 54; G. SPERDUTI, “Dualism”, cit., p. 32.

¹⁸ J. NIJMAN, A. NOLLKAEMPER, “Introduction”, cit., p. 8.

positivism,¹⁹ this premise led to relegate international law to an external projection of state will, or “external public law” (*äusseres Staatsrecht*).²⁰ With a view to reassert the fully legal character of international law, dualist thinkers argued that international law, as a legal system different from national law, could legitimately have a different origin than the sheer will of a single sovereign entity, just as much as it had different subjects: states, instead of individuals.²¹ However, in order not to depart from rigidly positivist foundations, which traced back the very concept of law to some form of sovereign will, early dualists had to postulate that international law originated from the *collective* will of states. This proposition was fundamentally dogmatic in nature and later came to be discarded by Anzilotti himself.²² Some scholars have argued that, from a logical point of view, there seems to be no alternative to the concepts of monism and dualism.²³ On the other hand, the rigidity of the dichotomy has also prompted doctrinal attempts to overcome it. According to a widespread opinion, the monism-dualism debate has lost most of its meaning and the topic of the domestic application of international law should be addressed pragmatically, by looking at the practice of each legal system.²⁴ Others have tried to devise alternative theoretical frameworks, or to discard the very logical roots of the debate as shaky.

Gerald Fitzmaurice famously tried to resolve the debate by denying that international law and national law could share any field of operation. In his words, “the entire monist-dualist controversy is unreal, artificial and strictly beside the point, because it assumes something that has to exist for there to be any controversy at all – and which in fact does not exist – namely a common field in which the two legal orders under discussion both simultaneously

¹⁹ J. AUSTIN, *The Province of Jurisprudence Determined*, London, 1832, p. 268 (“Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme. Or (changing the expression) it is set by a monarch, or sovereign number, to a person or persons in a state of subjection to its author”).

²⁰ G. SPERDUTI, “Dualism”, cit., p. 31; D.T. BJÖRGVINSSON, cit., p. 26-28. This position is sometimes referred to as a “state-centric” form of monism: see e.g. D.P. O’CONNELL, cit., p. 432 (speaking of “monism in reverse”); A. VERDROSS, cit., p. 289 (“La théorie de la primauté du droit national [...] qui cherche à fonder le droit des gens sur le droit national, veut [...] créer une construction moniste, c'est-à-dire une construction unitaire du droit”). But see J. NIJMAN, A. NOLLKAEMPER, “Introduction”, cit., p. 7, speaking of these theories as a form of dualism.

²¹ D.T. BJÖRGVINSSON, cit., p. 32-33.

²² G. SPERDUTI, “Dualism”, cit., p. 32, ft. 3. As noted by G. GAJA, “Dualism – A Review”, in J. NIJMAN, A. NOLLKAEMPER (eds.), cit., p. 52 ff., p. 57, dualism does not necessarily have roots in voluntarism.

²³ J.H.F. VAN PANHUYS, “Relations and Interactions Between International and National Scenes of Law”, *Recueil des cours* 1964, vol. 112, p. 1 ff., p. 14 (“Writers pretending that an intermediate position is possible often only camouflage a dualist or monistic point of view”); R. QUADRI, cit., p. 280 (“ce débat est destiné à se prolonger même si ses termes doivent subir des changements essentiels”) and p. 290 (“it is necessary to be a dualist or a monist”); for the notion of “structural monism” embraced by the Italian author, see *ibid.*, p. 290-297; more recently, see J. KLABBERS, *International Law*, Cambridge, 2013, p. 290 (“*tertium non datur*”).

²⁴ G. SPERDUTI, “Le principe”, cit., p. 333 (citing C. ROUSSEAU, *Droit international public*, Paris, 1970, p. 48, who called the debate a “vaine querelle”); R. JENNINGS, A. WATTS, *Oppenheim’s International Law*, Vol. 1, London-New York, 1992, p. 54 (“the doctrinal dispute is largely without practical consequences”); B. CONFORTI, “Cours général de droit international public”, *Recueil des cours* 1988, vol. 212, p. 9 ff., p. 41 (speaking of “disputes stériles et anachroniques entre monistes et dualistes”); J. NIJMAN, A. NOLLKAEMPER, “Introduction”, cit., p. 11 (“Neither dualism nor monism in their traditional form are able to capture the diversity of the processes of globalization”); M. SORENSEN, “Principes de droit international public”, *Recueil des cours* 1960, vol. 101, p. 1 ff., p. 109 (“ce débat théorique est épuisé”).

have their spheres of activity”.²⁵ However, this contestation is now untenable, because international law regulates a wide array of matters of direct domestic concern and commonly overlaps in scope with domestic law.²⁶ Moreover, in any event, the attempt to contest the roots of the debate led Fitzmaurice to nothing else than embracing a strongly dualist proposition.²⁷

Another – perhaps even more blunt – attempt to overcome the dichotomy is ascribable to Armin von Bogdandy, who has contended that “[m]onism and dualism should cease to exist as doctrinal and theoretical notions for discussing the relationship between international law and internal law”, and should give way to a theory of legal pluralism.²⁸ However, the concept of legal pluralism does not appear to indicate a way to get past the dichotomy, because dualism and pluralism are in fact synonyms.²⁹ Speaking of pluralism may be more appropriate only in the sense that it can more effectively reflect the variety of features among national legal systems.³⁰

Nonetheless, it can be argued that the classical debate has not lost all of its relevance and that it can still illuminate some fundamental characteristics of both the international and the national legal order. From a conceptual point of view, the fundamental premise of dualism seems to be able to withstand objection: legal systems *theoretically can* be self-contained, in the sense that “within each system the only existing rules are those that are part of the system”.³¹ This, however, does not necessarily imply that they are in practice, to the point that

²⁵ G. FITZMAURICE, “The General Principles of International Law Considered from the Standpoint of the Rule of Law”, *Recueil des cours* 1957, vol. 92, p. 1 ff., p. 71. See also P. MALANCZUK, *Akehurst’s Modern Introduction to International Law*, London-New York, 1997⁷, p. 64 (quoting Fitzmaurice’s passage in text).

²⁶ G. ARANGIO-RUIZ, “International Law”, cit., p. 32 (such a supposed “*ratione materiae* separation” is “surely inexistent”).

²⁷ It is sufficient to note the similarities between the passage by Fitzmaurice quoted in text and the following point made by H. TRIEPEL, “Les rapports”, cit., p. 83: “Puisque le droit interne et le droit international ne régissent pas les mêmes rapports, il est impossible qu’il y ait jamais une «concurrency» entre les sources des deux systèmes juridique”. See also R. QUADRI, cit., p. 290 (“L’affirmation des juristes anglais qu’il n’y a pas de domaine commun en ce qui concerne l’action des deux ordres juridiques, n’est que l’argument dualiste de la distinction des matières et des sources”); G. ARANGIO-RUIZ, “International Law”, cit., p. 32.

²⁸ A. VON BOGDANDY, “Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law”, *International Journal of Constitutional Law* 2008, p. 397 ff., p. 399-401. Among other authors embracing legal pluralism, see, most notably, N. KRISCH, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford, 2012.

²⁹ According to A. VERDROSS, cit., p. 289, who first used the term “dualism”, “la construction dualiste du droit [...] vaudrait mieux dire construction pluraliste du droit”. See also G. SPERDUTI, “Le principe”, cit., p. 336 (“le dualisme est une des manières d’entendre le pluralisme juridique, c’est-à-dire de représenter la réalité du monde juridique comme résultant de la coexistence d’une pluralité d’ordres juridiques originaires et, à ce titre, formellement séparés et distincts l’un de l’autre. Mais, justement, la notion de dualisme doit être considérée comme comprise dans celle de pluralisme, sans en épuiser la portée”); R. QUADRI, cit., p. 280 (“l’*école dualiste* ou mieux *pluraliste*”; italics in the original); G. ARANGIO-RUIZ, “International Law”, cit., p. 17.

³⁰ G. GAJA, cit., p. 53. See also J. CRAWFORD, *Brownlie’s*, cit., p. 50, ft. 17 (“to talk simply of dualism is to imply that national legal systems all have the same features. Why should this be?”).

³¹ G. GAJA, cit., p. 52-53 (defining dualism by reference to the self-contained character of international law and domestic law). For similar views, see also D. HALJAN, *Separating Powers: International Law Before National Courts*, The Hague, 2013, p. 73 (“Each legal system establishes its own criteria for the validity and legitimacy of the laws applied in it”); F.G. JACOBS, “Introduction”, in F.G. JACOBS, S. ROBERTS (eds.), *The Effect of Treaties in Domestic Law*, London, 1987, p. xxiii ff., p. xxiv (“the effects of international law [...] within the legal order of a State will always depend on a rule of domestic law”); T. TREVES, *Diritto internazionale. Problemi Fondamentali*, Milano, 2005, p. 647-648.

the self-contained nature of legal systems can often be regarded as no more than a formality.³² In fact, whether or not a legal system is concretely self-contained depends on the setting of the legal system itself.³³ Moreover, although the statement according to which there is no *tertium* besides the two theories may be justified when reasoning in strictly positivist terms,³⁴ one cannot deny that there are significant extra-positivist rapprochements which blur the distinction between the two doctrines.³⁵

All this notwithstanding, it is still useful to conceptualize international law and domestic legal systems as separate realms of law. This theoretical premise, indeed, has significant practical implications. Monism's promise of unfiltered constraints on national governments has remained unkept. The international rules governing the process of domestic implementation acknowledge the theoretical separation between legal systems. International law does not automatically become part of national law. Instead, it confines itself to regulating certain profiles of how domestic legal orders should implement international obligations.

The meaning of monism and dualism, for its part, has commonly shifted towards a descriptive usage, which is not incompatible with the self-contained nature of the legal orders.³⁶ Monism and dualism, in other words, have thus more commonly come to define the way in which specific national legal systems choose to relate to international law. In this case, the two terms refer to the role of national legislatures and, in particular, to whether the national constitutional setting requires domestic legislation to give effect to international obligations.³⁷ By and large, if a constitution automatically incorporates international law in domestic law, without the need for further legislation, the legal system as a whole is deemed to be monist. Conversely, a dualist legal system is one where the parliament needs to legislate in order to make international law part of domestic law.³⁸ In this case, the terms monism and dualism are

³² E. CANNIZZARO, B.I. BONAFÈ, "Beyond the Archetypes of Modern Legal Thought. Appraising Old and New Forms of Interaction Between Legal Orders", in M. MADURO, K. TUORI, S. SANKARI (eds.), *Transnational Law. Rethinking European Law and Legal Thinking*, Cambridge, 2014, p. 78 ff., p. 80-81 (contemporary legal orders are "interdependent, interconnected, permeable with each other or even porous") and p. 95 (noting the "emergence of relations between legal orders that escape the alternative between supremacy and subordination, and are rather based on mutual recognition and cooperation"); G. SPERDUTI, "Dualism", cit., p. 49 (accepting the monist idea of an institutional link between legal systems and the dualist distinction of legal system, thus formulating a principle of "coordination of legal systems on institutional bases"); A. NOLLKAEMPER, *National Courts and the International Rule of Law*, Oxford, 2011, p. 13.

³³ G. GAJA, cit., p. 62.

³⁴ As noted by E. CANNIZZARO, B.I. BONAFÈ, cit., p. 80-81, both monism and dualism build on the strongly positivist premise of exclusivity of legal orders, i.e. "the premise that a legal order is either completely dependent or completely independent". This is not to deny that monist thought was often influenced by natural law conceptions. This was the case, most notably, of Verdross: see B. SIMMA, "The Contribution of Alfred Verdross to the Theory of International Law", *European Journal of International Law* 1995, p. 33 ff. Conversely, Kelsen's monism was a purely formal and, thus, strongly positivist construct: see D.T. BJÖRGVINSSON, cit., p. 23-26.

³⁵ J. NIJMAN, A. NOLLKAEMPER, "Beyond the Divide", in J. NIJMAN, A. NOLLKAEMPER (eds.), cit., p. 341 ff. (analyzing emergence of values common to both international law and domestic law, dispersion of authority and deformalization).

³⁶ G. SLYZ, cit., p. 113; D.T. BJÖRGVINSSON, cit., p. 17.

³⁷ D. SLOSS, "Domestic Application", cit., p. 367 (noting that "the monist-dualist divide hinges on the role of the legislative branch") and p. 368-369 (differentiating between theoretical and descriptive usages of the terms and favoring the latter).

³⁸ C. BRÖLMANN, "Deterritorialization in International Law: Moving Away from the Divide Between National and International Law", in J. NIJMAN, A. NOLLKAEMPER (eds.), cit., p. 84 ff., p. 85 ("the monist-dualist opposition is used also (and nowadays perhaps foremost) to refer to a classification of existing constitutional

usually considered interchangeable with other terms, e.g., respectively, incorporation and transformation. Incorporation, in particular, has been defined as the approach under which international law becomes internal law once it enters into force on the international plane, while transformation as the requirement for “additional domestic procedures” for international law to become part of domestic law.³⁹

This usage of the terms most likely originated from the recognition that the doctrinal stances on monism and dualism, particularly at the early stages of the dispute, had some influence on the drafters of national constitutions.⁴⁰ For example, the technique of incorporation of international law is often described as a product of monist thought and that of transformation as a byproduct of theoretical dualism.⁴¹ However, one should be careful in drawing facile parallelisms between the theoretical usage of monism and dualism and their descriptive usage. In fact, contemporary domestic mechanisms of reception of international law seem to be quite independent from any ideological underpinning.⁴² Furthermore, as noted by Matthias Kumm, “[t]he very idea that that the national constitution is decisive for generating the doctrines that structure the relationship between national and international law is dualist. This is true, even where the constitution determines that international law is part of the law of the land”.⁴³

The usage of monism and dualism to describe the constitutional set-ups of national legal systems is problematic for a number of reasons. Firstly, most countries adopt a variety of solutions with reference to different sources of international law.⁴⁴ Secondly, the dichotomy

systems, based on the way in which these incorporate international law”); R. HIGGINS, *Problems and Process: International Law and How We Use It*, Oxford, 1994, p. 207 (similarly arguing that “the difference in response to a clash of international law and domestic law in various domestic courts is substantially conditioned by whether the country concerned is monist or dualist in its approach”). For usages of monism and dualism to classify legal systems, see e.g. J.H. JACKSON, “Status of Treaties in Domestic Legal Systems: A Policy Analysis”, *American Journal of International Law* 1992, p. 310 ff., p. 313-315; A. AUST, *Handbook of International Law*, Cambridge, 2010², p. 76; J. KLABBERS, cit., p. 294 (dividing states between dualist and monist); Y. SHANY, *Regulating Jurisdictional Relations Between National and International Courts*, Oxford, 2007, p. 11 ff. 48 (terming France and the U.S. “monist countries” and the U.K. “dualist”); L. FERRARI-BRAVO, “International and Municipal Law: The Complementarity of Legal Systems”, in R. MACDONALD, D.M. JOHNSTON (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory*, The Hague-Boston-Lancaster, 1983, p. 715 ff., p. 743, ff. 45 (terming the Italian constitution “dualistic”); T.M. FRANCK, A.K. THIRUVENGADAM, “International Law and Constitution-Making”, *Chinese Journal of International Law* 2003, p. 467 ff., p. 470; L.F. DAMROSCH, S.D. MURPHY, *International Law. Cases and Materials*, Saint Paul, 2014⁶, p. 621-622 (dividing state approaches between monist and dualist).

³⁹ D.B. HOLLIS, “A Comparative Approach to Treaty Law and Practice”, in D.B. HOLLIS, M.R. BLAKESLEE, L.B. EDERINGTON (eds.), *National Treaty Law and Practice*, Leiden-Boston, 2005, p. 1 ff., p. 40.

⁴⁰ See e.g. G. SPERDUTI, “Dualism”, cit., p. 44-46 (noting influence of dualist thought in the practice of Italy, Germany and Scandinavian countries).

⁴¹ See e.g. D.T. BJÖRGVINSSON, cit., p. 32 (linking transformation to the thought of Triepel).

⁴² G. GAJA, cit., p. 60. As a vivid example of this, it can be recalled that, during the drafting of the Italian Constitution, *dualist* Gaetano Morelli proposed, together with Roberto Ago, the adoption of a broad automatic incorporation clause (which many would certainly term *monist*), spanning both general international law and treaties. The proposal failed to be approved, so that the Constitution only provided for the automatic incorporation of general international law (see Art. 10, para. 1). See R. AGO, G. MORELLI, “I rapporti internazionali dello Stato nella futura Costituzione italiana”, report discussed on 12 February 1946 before the 1st Sub-commission of the Italian Constituent Assembly, reproduced in *Rivista di diritto internazionale* 1977, p. 334 ff.

⁴³ M. KUMM, “Democratic Constitutionalism Encounters International Law: Terms of Engagement”, in S. CHOUDHRY (ed.), *The Migration of Constitutional Ideas*, Cambridge, 2007, p. 256 ff., p. 258.

⁴⁴ See e.g. A. PAULUS, “National Courts and the International Rule of Law – Remarks on the Book by André Nollkaemper”, *Jerusalem Review of Legal Studies* 2012, p. 5 ff., p. 9 (criticizing the classification of the German legal order as dualist: “it is ‘monist’ with regard to general international law, but does not recognize its

“tends to obscure key *functional* differences” among legal systems, i.e. does not give an adequate account of how national organs, particularly courts, interact with international norms.⁴⁵ And thirdly, this usage places nearly-exclusive emphasis on the component of automatic incorporation of international law and leaves in the shadow another fundamental point of the interplay between international law and domestic law, i.e. the domestic hierarchical rank granted to international law.⁴⁶

Also a narrower descriptive usage, consisting in referring to specific techniques of implementation and to specific sources of international law, can generate confusion.⁴⁷ Indeed, it is not at all clear whether some mechanisms of reception of international law should be described as monist, dualist, or possibly hybrid.⁴⁸ For example, the German and Italian practice to implement a treaty via an *ad hoc* piece of legislation containing a *renvoi* to the international source achieves the practical effect of giving the treaty domestic legal effects on its entry into force; moreover, in Italy the treaty is introduced in domestic law with a rank higher than ordinary laws. Inconsistent views have been expressed on whether this practice would represent a form of monism-incorporation or dualism-transformation.⁴⁹

This confusion depends on the fact that too many different legal phenomena are put under the same descriptive heading of monism and dualism. For example, the 2016 ILA Final Report *Mapping the Engagement of Domestic Courts with International Law* describes all judicial doctrines restricting or enhancing the field of application of international law in a domestic legal system by resorting to the monism-dualism spectrum.⁵⁰ The tendency to conflate such a

supremacy vis-à-vis the constitution; it requires parliamentary consent to the ratification of important international agreements, but does not require their separate transformation in domestic law as, for instance, UK law does; and, lastly, allows European and some other international law to have direct effect in the domestic legal system.”). See also G. ARANGIO-RUIZ, “International Law and Interindividual Law”, in J. NIJMAN, A. NOLLKAEMPER (eds.), cit., p. 15 ff., p. 20; J. CRAWFORD, *Chance, Order, Change: The Course of International Law*, The Hague, 2014, p. 218 (“classifying a state’s constitutional design as either monist or dualist is not so much an exercise in absolutes as a matter of degree”).

⁴⁵ D. SLOSS, “Domestic Application”, cit., p. 368. On the “functional differences” in the practice of legal systems, i.e. the use of international sources in the practice of national courts, see below Chapters 3 and 4.

⁴⁶ See, for example, E. DE WET, “South Africa”, in D. SHELTON (ed.), *International Law and Domestic Legal Systems. Incorporation, Transformation, and Persuasion*, Oxford, 2011, p. 567 ff., p. 580, noting that the South African Constitution has a “monist approach” to international custom since it provides for its automatic incorporation. At the same time, however, that constitution ranks custom in a position subordinate to acts of Parliament.

⁴⁷ See e.g. T. BUERGENTHAL, “Self-Executing and Non-Self-Executing Treaties in National and International Law”, *Recueil des cours* 1992, p. 303 ff., p. 316 (distinguishing monist and dualist states only with reference to treaties).

⁴⁸ See e.g. M.P. VAN ALSTINE, “The Role of Domestic Courts in Treaty Enforcement. Summary and Conclusions”, in D. SLOSS (ed.), *The Role of Domestic Courts in Treaty Enforcement. A Comparative Study*, Cambridge, 2009, p. 555 ff. (speaking of “traditional dualist states” and “hybrid monist states”).

⁴⁹ See T. BUERGENTHAL, “Self-Executing”, cit., p. 341 (considering Italy and Germany “monist states” vis-à-vis treaties); A. NOLLKAEMPER, “The Effects”, cit., p. 140 (mentioning transformation of treaties as the ordinary practice of Italy); G. SPERDUTI, “Dualism”, cit., p. 44 (with the Italian *ordine di esecuzione*, “dualism triumphs”). The ambivalent nature of the German approach to treaties is correctly described in D.B. HOLLIS, cit., p. 40-41. For a more thorough analysis of the techniques of international law implementation in Germany and Italy, see the next two sections of this chapter.

⁵⁰ A. TZANAKOPOULOS, “Final Report. Mapping the Engagement of Domestic Courts with International Law”, presented at the International Law Association Johannesburg Conference, 2016, p. 9-11. More specifically, the Report argues that constitutional set-ups of “monism/incorporation” and “dualism/transformation” are positioned “at the opposite ends of a spectrum” and that a number of judicial doctrines “come into play and position the various legal orders all along the spectrum”. Among the techniques asserted to moderate “monism/incorporation”, and which are collectively termed “blunting” or “avoidance

wide array of legislative and judicial techniques under the same two headings further impoverishes the descriptive ability of these concepts.

In sum, the descriptive usages of these terms appear to be inherently ambiguous, as much as their philosophical prototypes. At most, the two terms can loosely describe different attitudes or degrees of openness towards international law.⁵¹ By using the terms in this way, one does nothing else than recognize the unquestionable influence of monist and dualist ideals on political and constitutional theory. Monism, for example, soon came to be acknowledged not as a faithful description of reality but as an aspiration to be realized within national legal systems; and under a clear monist influence, many scholars concluded that “constitutions of states should provide for the status of international law and accept its superiority over domestic law”.⁵²

Most notably, Hersch Lauterpacht, while recognizing that “la suprématie formelle du droit interne à l'intérieur de l'Etat est encore un principe de droit positif”, wondered – in the light of his belief in monism, “si les Etats civilisés ne devraient pas non seulement adopter le droit international comme partie intégrante de leur Constitution, mais encore se priver du pouvoir d'édicter, même par voie de modification constitutionnelle, des lois contraires à la disposition constitutionnelle fondamentale qui fait du droit international une partie intégrante de leur système”. By doing so, he envisioned what he termed (at the time of his third Hague lectures, in 1937) “a radical innovation”: “un frein au pouvoir législatif” operated by national courts.⁵³ For all the foregoing reasons, the analysis contained in the following pages will not be articulated around the concepts of monism and dualism. Instead, it will conceptualize the relationship between the domestic and the international realms of law by having regard to both the role of state organs in the implementation phase (i.e. the issue of domestic validity) and the hierarchical interactions between international and national sources of law (i.e. the issue of domestic supremacy). The role of political authorities in the domestic application of international law is shaped, in its formal dimension, by the interplay of these two elements.

3. Supremacy of international law over primary legislation.

Today, the “radical innovation” envisioned by Lauterpacht in 1937 has consistently found its way into national legal systems. Although it has been argued that, from a purely numerical viewpoint, the most common practice in legal systems seems to be the prioritization of conflicting domestic law over international law,⁵⁴ cases of prioritization of international law over domestic law are far from rare or isolated and span a significant number of legal systems. Such cases concern both general international law and international agreements.

techniques”, are “non-justiciability (wherein one might include the political question doctrine), the act-of-state doctrine, denials of standing, and the doctrine of non-self-execution of treaties, among others”. On the other hand, “dualism/transformation” is said to be moderated by a series of “blunting techniques” which principally include consistent interpretation and the concept of legitimate expectations.

⁵¹ E. CANNIZZARO, B.I. BONAFÈ, cit., p. 79 (noting that the two terms only depict “mental archetypes”).

⁵² D.T. BJÖRGVINSSON, cit., p. 29.

⁵³ H. LAUTERPACHT, “Règles générales du droit de la paix”, *Recueil des cours* 1937, vol. 62, p. 95 ff., p. 145-146.

⁵⁴ A. NOLLKAEMPER, “The Effects”, cit., p. 143.

National constitutions ensuring the supremacy of international law in the national legal order aim to constrain the actions of both the executive and the lawmakers. The constraining effect is maximized if supremacy is coupled with a mechanism of automatic standing incorporation of international law, i.e. a system whereby the domestication of international law is not made contingent upon the will of the political branches. In such cases, deviations from international law obligations could be achieved only through complex processes of constitutional revision or quasi-constitutional lawmaking.

The following pages will first of all clarify the scope of the concept of supremacy as used in this section, and will distinguish it from the international law dimension of the concept of supremacy (Section 3.1). Section 3.2 will provide a rundown on relevant examples of prioritization of international law over acts of national parliaments and will briefly examine the policy reasons which lead domestic legal systems to adopt this approach to the implementation of international norms. Section 3.3 will then attempt a policy assessment of these techniques with reference to both domestic democracy and the separation of powers and will argue that these considerations may prove very influential on the practice of national courts.

3.1. The domestic law dimension of the concept of supremacy.

Before turning to the relevant practice of domestic legal systems, a few remarks on the concept of supremacy are needed. In general terms, supremacy can be defined as the prioritization of international law over national law.⁵⁵ Such a concept can be applicable in both the international and the domestic legal orders; however, there is no necessary logical or institutional connection between the international and the domestic dimensions of the principle.

Put differently, supremacy of international law in the domestic legal sphere is not a consequence of the undisputed supremacy of international law in the international legal order.⁵⁶ International law does not provide for any obligation to grant its norms constitutional or supra-statutory status in national law, as long as effective compliance is not hampered.⁵⁷ This is a direct consequence of the formal self-contained nature of the legal orders, as has been described in the previous section. What is supreme in one legal system may well not be supreme in another – or, for that matter, may well not be recognized as valid and applicable within the other legal order. As clearly expressed by the ICJ in the *ELSI* case, “[c]ompliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision”.⁵⁸ Even more

⁵⁵ *Ibid.*, p. 142.

⁵⁶ On the international law principle of supremacy, see more thoroughly Chapter 1, Section 3.

⁵⁷ G.L. NEUMAN, “International Law as a Resource in Constitutional Interpretation”, *Harvard Journal of Law and Public Policy* 2006-2007, p. 177 ff., p. 184 (“International law does not require its norms to be given constitutional status even when they are directly at issue, let alone when they are relevant only by analogy”). For a contrary view, see Y. SHANY, “How Supreme is the Supreme Law of the Land? Comparative Analysis of the Influence of International Human Rights Treaties upon the Interpretation of Constitutional Texts by Domestic Courts”, *Brooklyn Journal of International Law* 2006, p. 341 ff., p. 355 (adopting, however, a very broad understanding of “incorporation into constitutional law”, which encompasses also techniques different from formal incorporation, i.e. consistent interpretation).

⁵⁸ *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, Judgment, I.C.J. Reports 1989, p. 15 ff., para. 73.

explicitly, the ECtHR has consistently taken the view that the right to an effective remedy does not include the right to challenge domestic legislation before a national authority, on the grounds of its inconsistency with the Convention or equivalent domestic legal norms.⁵⁹

The international law principle of supremacy, then, must be understood in the sense that international law must prevail over national law in the international legal order itself.⁶⁰ This section, in its turn, only deals with the cases in which international law is granted supremacy in the domestic legal order. Because this type of supremacy cannot be traced back to the authority of international law, it cannot but derive from a fundamental constitutional choice of the domestic legal order itself.⁶¹

A further clarification is in order. Supremacy is here understood as the prioritization of international law over statutes or other domestic sources having the same rank, i.e. over ordinary acts issued by national legislatures. This implies that a source of international law, although not supreme in the present sense, may prevail over other municipal sources which rank lower in the domestic hierarchy: these cases will be dealt with in the next section.⁶²

This limitation also implies that, for the scope of the present section, the hierarchical relation between international law and a country's constitution is not taken into consideration, as long as international sources are supreme over ordinary legislation. The relationship between international law and national constitutions has momentous theoretical and practical implications, which have been subject to detailed analysis in legal scholarship.⁶³ Admittedly, this feature of the present study, whereby all cases of prioritization of international law over legislation are conflated, may come at the price of some oversimplification. This restriction appears nonetheless justified because, as will be more thoroughly demonstrated below, the key point in the assessment of the latitude of national political authorities in the implementation of international obligations is the extent to which international norms have the capacity to outdo the acts of parliament.

3.2. Supremacy of international law in the practice of national legal systems.

Turning now to some relevant examples from the practice of domestic legal systems, national constitutions can first of all accord supremacy to general norms of international law.⁶⁴ These

⁵⁹ See e.g. *Greens and M.T. v. U.K.*, App. No. 60041/08 and 60054/08, Judgment, 23 November 2010, para. 90.

⁶⁰ A. NOLLKAEMPER, *National Courts*, cit., p. 280-281.

⁶¹ G. FITZMAURICE, cit., p. 68-69; D.B. HOLLIS, cit., p. 39 ("although states accept the VCLT rules on treaty priority as a matter of international law, they have not always viewed these rules as requiring specific consequences for the role of treaties as a matter of national law").

⁶² For example, the uptake of international agreements in the US legal system is not dealt with in this section, although treaties do prevail over certain domestic law sources such as state laws: see T. BUERGENTHAL, "Self-Executing", cit., p. 344.

⁶³ See e.g. F.M. PALOMBINO, "Compliance with International Judgments: Between Supremacy of International Law and National Fundamental Principles", *ZaöRV* 2015, p. 503 ff.

⁶⁴ This category includes, first and foremost, customary international law, i.e. the source referred to by Art. 38(1)(b) of the Statute of the ICJ (26 June 1945), 33 UNTS 993. Here the expression general international law is preferred, because provisions incorporating international custom are often held to refer as well to other unwritten sources of international law, notably the general principles of law recognized by civilized nations (see Art. 38(1)(c) of the ICJ Statute) or general principles of international law. This notwithstanding, as noted by G. BARTOLINI, cit., p. 1310, ft. 58, it should be considered that these latter sources receive scant application in domestic law practice, and for this reason customary international law represents by far the most relevant part of the category analyzed here.

sources are often neglected by constitutional texts.⁶⁵ However, relevant examples of prioritization of general international law can be found, *inter alia*, in the constitutions of Germany, Italy and (according to some scholars) Austria.

Art. 25 of the 1949 German Basic Law is explicit in providing for the supremacy of generally recognized rules of international law over ordinary laws, in that it reads as follows: “[t]he general rules of public international law shall be an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory”. This article is commonly understood as giving international customary law a rank higher than statutes but inferior to the Constitution.⁶⁶

Unlike the Basic Law, Art. 10(1) of the Italian Constitution (pursuant to which “[t]he Italian legal system conforms to the generally recognised principles of international law”) and Art. 9(1) of the Austrian Constitution (“The generally recognized rules of international law are regarded as integral parts of federal law”) do not specify the hierarchical rank, which has to be established by interpretive means. In Italy, there is agreement among commentators and in case law that the norms referred to by Art. 10 are granted constitutional status.⁶⁷ This outcome derives from a reading of the provision as implying that the *whole* Italian legal system shall conform to general international law,⁶⁸ thus including ordinary laws and, in principle, the Constitution itself.

Conversely, there is no shared understanding of Art. 9 of the Constitution of Austria. While some have contended that this provision confers upon general international law the rank of federal statutory law, others maintain that this rank should always be equal to federal constitutional law. The view which seems to be most commonly accepted lies somewhere in between, arguing that the rank would depend on the content of the norm and that general international law may have constitutional status if the enactment of a rule of that same content could only be achieved by a constitutional law.⁶⁹

Interestingly, all the aforementioned articles have been claimed to incorporate not only general norms of international law but also treaties, as an effect of the reception of the principle *pacta sunt servanda*. These arguments, however, have always been rejected by Constitutional Courts.⁷⁰

Turning to the prioritization of international treaties, as recently as in 1987, Antonio Cassese noted that “very few states [were] willing to go so far [...] as to ensure at the constitutional

⁶⁵ G. BARTOLINI, *cit.*, p. 1310; T. GINSBURG, S. CHERNYKH, Z. ELKINS, *cit.*, p. 223-226 and 233; A. CASSESE, “Modern Constitutions”, *cit.*, p. 368.

⁶⁶ B. SIMMA, D.E. KHAN, M. ZÖCKLER, R. GEIGER, “The Role of German Courts in the Enforcement of International Human Rights”, in B. CONFORTI, F. FRANCONI (eds.), *Enforcing International Human Rights in Domestic Courts*, The Hague-Boston-London, 1997, p. 71 ff., p. 75-76; H.P. FOLZ, “Germany”, in D. SHELTON (ed.), *cit.*, p. 240 ff., p. 245-246.

⁶⁷ F. FRANCONI, “The Jurisprudence of International Human Rights Enforcement: Reflections on the Italian Experience”, in B. CONFORTI, F. FRANCONI (eds.), *cit.*, p. 15 ff., p. 28-29; G. CATALDI, “Italy”, in D. SHELTON (ed.), *cit.*, p. 328 ff., p. 344-345.

⁶⁸ A. CASSESE, “Modern Constitutions”, *cit.*, p. 371.

⁶⁹ E. HANDL-PETZ, “Austria”, in D. SHELTON (ed.), *cit.*, p. 55 ff., p. 89.

⁷⁰ See generally A. CASSESE, “Modern Constitutions”, *cit.*, p. 398-399; E. BENVENISTI, “Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts”, *European Journal of International Law* 1993, p. 159 ff., p. 162. For an example of this viewpoint, see R. QUADRI, *cit.*, p. 304-306.

level that treaties are not disregarded by national authorities”.⁷¹ Instances of prioritization of international agreements, after the historical first of the 1931 Spanish Constitution,⁷² remained somewhat desultory. The situation has changed significantly over the course of the last decades, to the point that granting supremacy to international agreements seems to be a rather common solution in contemporary constitutions.⁷³

In Italy, for example, the hierarchical rank of treaties is considered to be above that of ordinary laws. This can be traced back to a 2001 constitutional amendment and to its interpretation rendered by the Constitutional Court. Originally, the Italian Constitution did not deal with any aspects of the domestic implementation of treaties. In the debates held in the Constituent Assembly, proposals were put forward to provide for the automatic standing incorporation of both general international law and international agreements.⁷⁴ However, influential members of the Assembly contended that the Constitution should give leeway to the state to adopt sovereign acts in contravention of treaty obligations.⁷⁵ For this reason, as seen above, Art. 10(1) of the Italian Constitution only provides for the automatic standing incorporation of general international law.

However, pursuant to post-reform Art. 117, para. 1, “[i]n performing their legislative powers, the State and the Regions shall respect the Constitution and obligations arising from international law and European Community law”. Shortly after the reform, there was disagreement among commentators on the impact of the new text of Art. 117(1) on the relationship between Italian law and international law: while some favored a literalist reading of the provision, thus arguing that it elevated the rank of international treaties in the hierarchy of norms,⁷⁶ others contested this conclusion based on a systematic reading of new Art. 117(1) – chiefly, on its location in Title V of Part II of the Italian Constitution, dealing with the division of powers between the Regions and the Central Government – and on concerns relating to the separation of powers between the executive, the legislature and the regions.⁷⁷ The former interpretation was later espoused by the Constitutional Court.⁷⁸

Interestingly, while the Italian Constitution provides for a generalized supremacy of international law over domestic law, it does not set forth a mechanism of automatic standing incorporation of treaties. Instead, in a similar way as in Germany, treaties are incorporated by means of an *ad hoc* provision (*ordine di esecuzione*). Because of this, Italy is frequently

⁷¹ A. CASSESE, “Modern Constitutions”, cit., p. 411-412.

⁷² *Ibid.*, p. 360-361; see also T. GINSBURG, S. CHERNYKH, Z. ELKINS, cit., p. 209 (arguing that making treaties superior to domestic law is a post-1944 phenomenon).

⁷³ G. BARTOLINI, cit., p. 1301-1302.

⁷⁴ See the report drafted by R. AGO, G. MORELLI, cit., and, for a comprehensive appraisal, A. CASSESE, “Il contributo degli internazionalisti ai lavori del Ministero per la costituente”, *Rivista di diritto internazionale* 1977, p. 47 ff., particularly p. 52-53.

⁷⁵ This was, most notably, the opinion of the leader of the Italian Communist Party, Togliatti. See on this point A. BERNARDINI, *La sovranità popolare violata nei processi normativi internazionali ed europei*, Napoli, 1997, p. 19.

⁷⁶ B. CONFORTI, “Reflections on the Recent Amendments to the Italian Constitution Concerning Respect for International and European Community Law”, *Italian Yearbook of International Law* 2001, p. 3 ff.

⁷⁷ E. CANNIZZARO, “La riforma ‘federalista’ della Costituzione e gli obblighi internazionali”, *Rivista di diritto internazionale* 2001, p. 921 ff.

⁷⁸ Constitutional Court, Judgment No. 348 of 24 October 2007 and Judgment No. 349 of 24 October 2007 (so-called “twin judgments”, or *sentenze gemelle*). See the comment by G. CATALDI in *Italian Yearbook of International Law* 2007, p. 292 ff.

described as “dualist”,⁷⁹ but this view somewhat neglects the practical reality of the legal system. Since the *order of execution* is routinely approved and included in the act of Parliament which authorizes the ratification, treaties normally become part of domestic law.⁸⁰ This comes very close to an automatic incorporation, if not in form at least in substance. But this, of course, does not rule out the hypothetical possibility for the Parliament not to enact the *ordine di esecuzione*, thus not incorporating the treaty and making it necessary to provide for transforming legislation.

In Russia, Art 15(4) of the Constitution states that “international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied”. Although there is some controversy in legal scholarship as to exact status of international agreements in domestic law, this constitutional provision is at the very least clear in incorporating all treaties and in establishing their priority over conflicting laws.⁸¹ It has also been noted that this constitutional provision enjoys a special status because it is inserted in the first chapter of the Constitution, which can only be amended through a special procedure: in practice, this makes Art. 15(4) unchangeable by the Parliament.⁸²

Among other relevant examples of prioritization of treaties, one should recall the Dutch Constitution, which establishes, at Art. 93, the automatic incorporation of international treaties in domestic law, and whose Art. 94 provides as follows: “Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties [...] that are binding on all persons”.⁸³ Mention should be made also of Art. 55 of the French Constitution, pursuant to which “Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie”.⁸⁴ This article has exercised significant influence over the constitutions of the Francophone world; particularly, the constitutional texts of French-speaking African countries manifest a clear openness to international law and often textually reproduce Art. 55 of the French Constitution.⁸⁵

It should be added, in conclusion, that another way of committing the actions of all state authorities to international law compliance is to enshrine the relevant principles of international law within a constitution. Both general international law and international

⁷⁹ See e.g. A. NOLLKAEMPER, “The Effects”, cit., p. 140.

⁸⁰ F. FRANCONI, “The Jurisprudence”, cit., p. 25.

⁸¹ D. SLOSS, “Domestic Application”, cit., p. 374 (hierarchical status of treaties in Russia is contested); G.M. DANILENKO, “International Law in the Russian Legal System”, *American Society of International Law Proceedings* 1997, p. 295 ff., p. 296 (Art. 15 “establishes a higher normative status for treaty rules”); T. GINSBURG, “Locking”, cit., p. 719-720 (arguing that the Russian legal system is more “internationalist” than those of Germany or the Netherlands); Y. TIKHOMIROV, “Russia”, in D. SHELTON (ed.), cit., p. 517 ff., p. 523-524; W.E. BUTLER, “Russian Federation”, in D. SLOSS (ed.), cit., p. 410 ff., p. 427-432.

⁸² S.Y. MAROCHKIN, “International Law in the Courts of the Russian Federation: Practice of Application”, *Chinese Journal of International Law* 2007, p. 329 ff., p. 330.

⁸³ On this provision, see A. NOLLKAEMPER, “The Netherlands”, in D. SLOSS (ed.), cit., p. 326 ff., p. 333-334.

⁸⁴ On this article, see E. DECAUX, “France”, in D. SHELTON (ed.), cit., p. 207 ff., p. 216 and p. 223-226.

⁸⁵ M. KILLANDER, H. ADJOLOHOUN, “International Law and Domestic Human Rights Litigation in Africa: An Introduction”, in M. KILLANDER (ed.), *International Law and Domestic Human Rights Litigation in Africa*, Pretoria, 2010, p. 3 ff., p. 5.

agreements can exercise such an influence over the drafting of a constitution.⁸⁶ The inclusion of internationally-oriented norms, or of norms which are substantially equal in content to international law, is not always easy to detect. In the field of human rights, for example, it is common for constitutions to contain extensive bill of rights which may embody principles drawn from international custom and agreements and blend them with broader – or also narrower – guarantees.⁸⁷

This rundown on the relevant practice of national legal systems begs one fundamental question as regards the policy underpinning of the techniques of implementation which have been just described. More specifically, given that the choice to prioritize international law over domestic law depends solely on the national legal order, the question arises of which factors lead a legal system to accord this much authority to international legal sources.

This is a question which cannot have one single answer. At the most basic level of understanding, and as in all forms of legislative implementation of international law, the (constitutional) legislature manifests its intention to ensure or facilitate the state's compliance with international obligations.⁸⁸ But this is merely a general statement, in that facilitating compliance with international law may not necessarily require its formal primacy over acts of Parliament. Besides the intention to ensure compliance, then, other factors must be present which lead a national legal system to value compliance with international law to the point of granting it a trumping effect over all acts of domestic political authorities.

The choice to restrict the latitude of future political choices through the operation of international law may depend on a variety of historical and political considerations which it is impossible to list exhaustively. Constitutional commitments to respect international law may be introduced after a period of war or revolution in order to prevent a conflict from occurring again,⁸⁹ or may signal the highest commitment of a newly born state – or a former authoritarian state – to be a law-abiding member of the international community.⁹⁰ Not unexpectedly, the tendency to open up constitutions to international law peaked particularly in

⁸⁶ See the examples in A. CASSESE, “Modern Constitutions”, cit., p. 419 ff. (bans on war included in the constitutions of Italy, Germany and Japan); L. FERRARI-BRAVO, cit., p. 743 ff. 38 (noting that Art. 111 of the Italian Constitution, as amended in 1999, reproduces Art. 6 ECHR almost verbatim); G. BARTOLINI, cit., p. 1307 (on the influence of international human rights standards on the drafting of the Couth African Constitution); V.S. VERESHCHETIN, “New Constitutions and the Old Problem of the Relationship between International Law and National Law”, *European Journal of International Law* 1996, p. 29 ff., p. 32-33.

⁸⁷ On this point, see generally A. TZANAKOPOULOS, “Judicial Dialogue as a Means of Interpretation”, in H.P. AUST, G. NOLTE (eds.), *The Interpretation of International Law by Domestic Courts. Uniformity, Diversity, Convergence*, Oxford, 2016, p. 72 ff., p. 86-88 (terming these instances “consubstantial norms”). For specific cases in national law, see e.g. F. FRANCONI, “The Jurisprudence”, cit., p. 20-21 (arguing that customary international law is “a meaningful addition” to the human rights catalogue of the Italian Constitution); B. SIMMA, D.E. KHAN, M. ZÖCKLER, R. GEIGER, cit., p. 77 (on the tendency of German courts to rely on domestic human rights standards, assuming that they are more favorable than international customary law).

⁸⁸ G. BARTOLINI, cit., p. 1302 (“The clear aim of these constitutional provisions is mainly to avoid the infringement of international obligations by the State in question”). See also B. CONFORTI, *International Law and the Role of Domestic Legal Systems*, Dordrecht-Boston-London, 1993, p. 44 (according to whom “international law, once it becomes formally valid within the State, is sustained by a dual normative aim of the internal system: first, that certain relations be regulated in conformity with international norms, and, second, that international obligations be complied with”).

⁸⁹ V.S. VERESHCHETIN, cit., p. 30; A. CASSESE, “Modern Constitutions”, cit., p. 351.

⁹⁰ L. FERRARI-BRAVO, cit., p. 733; V.S. VERESHCHETIN, cit., p. 38; A. CASSESE, “Modern Constitutions”, cit., p. 357 (on the international law provisions of the 1919 Weimar Constitution being “a sort of *captatio benevolentiae* vis-à-vis the victors”).

Western countries after World War II;⁹¹ and this tendency has again manifested itself after the dissolution of the socialist block in the wave of new constitutions of Eastern European and Central Asian countries.⁹²

Other reasons for devising stable constitutional mechanisms to receive international law within national legal systems may be identified in the objectives to pursue the protection of human rights,⁹³ to safeguard a market-oriented economy⁹⁴ or to facilitate admission to international organizations.⁹⁵ These exigencies are again more pressing when a country is overcoming an authoritarian regime, which produces a more critical necessity to control the actions of national political authorities.⁹⁶ Lastly, the choices of constitutional legislators can be shaped by a country's legal and doctrinal traditions,⁹⁷ or by reason of the influence exercised by the constitutions of other countries.⁹⁸

In sum, the variety of factors leading to the prioritization of international law in domestic law, as well as their chiefly domestic character, allows for no *reductio ad unum*. Moreover, one should not underestimate that such considerations do not necessarily lead constitutional drafters to bestow domestic supremacy on international norms. In certain legal systems, these reasons lay at the roots of the choice to give international norms a hierarchical primacy over domestic legislation; however, in other national legal systems the very same reasons may involve the creation of mechanisms of automatic incorporation of international law which, although aimed at facilitating compliance with international obligations, are devoid of special hierarchical features. Whether one or the other implementation technique is chosen depends primarily on the significance that the concept of parliamentary supremacy has in a given legal environment. This point will be explored more thoroughly in Section 4.

3.3. Policy implications: issues of democratic legitimacy and separation of powers and their influence on national case law.

⁹¹ P. DE VISSCHER, "Les tendances internationales des constitutions modernes", *Recueil des cours* 1952, vol. 80, p. 511 ff., p. 573 ("la fièvre internationaliste de l'immédiat après-guerre").

⁹² E. STEIN, "International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?", *American Journal of International Law* 1994, p. 427 ff., p. 447 (arguing that "Cassese's model of interaction between postrevolutionary democratization and an 'opening' of new constitutions to the international system may be readily applied to post-Communist Central-Eastern Europe"); G. BARTOLINI, cit., p. 1293; A. ALBI, *EU Enlargement and the Constitutions of Central and Eastern Europe*, Cambridge, 2005, p. 31-32; K. KORKEKELIA, "New Trends Regarding the Relationship between International and National Law (With a Special View Towards the States of Eastern Europe)", *Review of Central and East European Law* 1997, p. 227 ff.

⁹³ V.S. VERESHCHETIN, cit., p. 30-31.

⁹⁴ J.H. JACKSON, cit., p. 332.

⁹⁵ G. BARTOLINI, cit., p. 1304.

⁹⁶ G.L. NEUMAN, "The Uses of International Law in Constitutional Interpretation", *American Journal of International Law* 2004, p. 82 ff., p. 85; G. BARTOLINI, cit., p. 1293 and 1306; T. GINSBURG, "Locking", cit., p. 712 (noting that "new democracies tend to be more open to customary international law, and to provide for treaty-making structures that build on the logic of precommitment"); T. GINSBURG, S. CHERNYKH, Z. ELKINS, cit., p. 236.

⁹⁷ See e.g. V.S. VERESHCHETIN, cit., p. 37 ("The higher hierarchical status accorded to the treaty norms may be explained by the traditionally circumspect approach of the Soviet and Russian legal doctrine to customary norms of international law").

⁹⁸ The drafting of constitutional provisions is often influenced by constitutions of foreign countries. See J. ELSTER, "Forces and Mechanisms in the Constitution-Making Process", *Duke Law Journal* 1995, p. 364 ff.; E. MCWHINNEY, *Supreme Courts and Judicial Law-Making: Constitutional Tribunals and Constitutional Review*, Dordrecht-Boston-Lancaster, 1986, p. 3-9.

The exact identification of the sources of international law which are to be held supreme based on constitutional provisions may be a contentious point. This issue may be disputed, for example, in cases where a constitution generically refers to all international agreements *en bloc*. In cases where the same constitution also requires some form of parliamentary approval in the making of certain categories of treaties, it may be uncertain whether also executive agreements should rank higher than ordinary legislation. It may also be uncertain, for instance, whether supremacy should extend to acts of international organizations established by treaties which rank higher than legislation, or to treaties concluded by local authorities in federal and regional states.⁹⁹

In such cases, the delimitation of the extent of domestic supremacy of international law is an interpretive question that should be addressed by the courts, primarily constitutional and supreme courts. Policy considerations relating to domestic democracy and separation of powers are potentially crucial factors in the courts' assessment in this regard.

For this reason, without neglecting the variety of practical solutions and of underlying rationales, it is opportune to make some general remarks as regards the way in which the granting of domestic supremacy to international law interacts with possible concerns relating to the safeguard of domestic democracy and separation of powers, and how such concerns may influence the activities of supreme and constitutional courts called upon to interpret, clarify and delimit the scope of the constitutional provisions establishing the priority of international law.

First of all, it is clear that democratic concerns surrounding the domestic implementation of international law may seem particularly pressing when constitutions try to submit the activities of future legislatures to compliance with international law.¹⁰⁰

This argument, however, requires caution. More specifically, this paragraph submits that it is necessary to distinguish between two different situations, depending on whether or not the material content of the international norms that are granted supremacy over domestic legislation is substantially equivalent (or at least homogeneous) to the content of a national constitution, as may happen in the field of the protection of fundamental human rights.

If this is the case, the effects of the supremacy of international norms over domestic legislation do not differ, in substance, from the effects of the supremacy of the constitution over legislation. This is because the granting of constitutional (or quasi-constitutional) rank to international law is a way of protecting the very same values and rights safeguarded by domestic constitutionalism.¹⁰¹ Simply, a constitution may show higher trust in the protection of these rights at the international level, rather than at the domestic level.¹⁰² In this case, the policy implications of the domestic supremacy of the national constitution and of

⁹⁹ See e.g. J. POLAKIEWICZ, "International Law and Domestic (Municipal) Law, Law and Decisions of International Organizations and Courts", *Max Planck Encyclopedia of Public International Law* 2011, para. 5 (arguing that national constitutions had better clarify the status of acts of international organizations). As noted by G. BARTOLINI, *cit.*, p. 1314-1315, very few constitutions explicitly establish the status of these acts.

¹⁰⁰ According to J.H. JACKSON, *cit.*, p. 338, constitutional drafters should refrain from providing for automatic incorporation and higher hierarchical status of international law, because this would produce rigid constraints on future government action and "the possible avoidance of democratic procedures for rule making".

¹⁰¹ In this sense, see T. DAINITH, "Is International Law the Enemy of National Democracy?", *European Review* 1999, p. 441 ff., p. 444 (noting that international law and constitutional law can both serve as stabilizing factors of domestic policies in the face of "future changes of popular sentiment").

¹⁰² J.H. JACKSON, *cit.*, p. 313, 332 and 335.

international law are identical and, therefore, the supremacy of international law over domestic legislation does not appear problematic from a policy perspective of domestic democracy.

This assessment finds consistent empirical evidence in the fact that the constitutions of democratizing countries – where the need to constrain political action to safeguard democracy is more pressing – are more likely to give international law a domestic status higher than legislation.¹⁰³ Moreover, this is also particularly clear in the case of prioritization of international human rights, whose supremacy in the domestic legal order may guarantee a more effective protection of the same substantial rights typically enshrined in a constitution.¹⁰⁴ This explains the choice of several national constitutions not to grant supremacy to international treaties *en bloc* but only to human rights treaties,¹⁰⁵ as goes for a number of constitutions in Latin American and Eastern European countries.¹⁰⁶ Similarly, in Austria the European Convention of Human Rights has been incorporated within the body of constitutional law by means of a constitutional statute.¹⁰⁷ In these cases, it is clear that international law is prioritized because its *material content* deserves prioritization. The content of such international norms is essentially constitutional in nature.

This argument, however, has a limit, because it only applies to international law rules which, by reason of their content, may be considered of constitutional or quasi-constitutional relevance in a given legal system. To the contrary, the argument expressed above would not suffice to defend, on policy grounds, the granting of supremacy to international agreements relating to trivial matters or, more generally, to matters that are not considered of fundamental importance by a domestic legal system.¹⁰⁸ In such cases, one should conclude that it is only the interest in ensuring respect of international obligations that weights the constitutional balance in favor of prioritization of international law regardless of its material content. These constitutional provisions could signal that ensuring compliance with international obligations is appraised as so much of a fundamental axiom that some degree of compression of domestic democracy should be regarded as a tolerable collateral damage.

But this conclusion is rather problematic: indeed, in principle, constitutional compression of future government action should be confined to “norms deemed so essential to government that they *need* to impose rigidity”.¹⁰⁹ It should be recalled, incidentally, that also in the

¹⁰³ T. GINSBURG, “Locking”, cit., p. 755. See also the following passage by G.L. NEUMAN, “The Uses”, cit., p. 85, which, although originally formulated in reference to the usage of international law in constitutional interpretation, can illuminate some general aspects of the relationship between domestic constitutions of democratizing countries and international law: “[f]or new constitutions in fledgling democracies, anchoring constitutional rights in the jurisprudence of more established systems supplies a body of precedent and decreases the likelihood of repressive interpretations”.

¹⁰⁴ A. PETERS, “The Globalization of State Constitutions”, in J. NIJMAN, A. NOLLKAEMPER (eds.), cit., p. 251 ff., p. 268-270 (considering that the ECHR is “a kind of ‘constitutional instrument’”).

¹⁰⁵ See generally T. BUERGENTHAL, “Modern Constitutions and Human Rights Treaties”, *Columbia Journal of Transnational Law* 1998, p. 211 ff. See also A. PETERS, cit., p. 269-270; J.H. JACKSON, cit., p. 336.

¹⁰⁶ V.S. VERESHCHETIN, cit., p. 33; G. BARTOLINI, cit., p. 1304-1305.

¹⁰⁷ A.H.E. MORAWA, C. SCHREUER, “The Role of Domestic Courts in the Enforcement of International Human Rights – A View from Austria”, in B. CONFORTI, F. FRANCONI (eds.), cit., p. 175 ff., p. 176-177.

¹⁰⁸ L. CONDORELLI, “La Corte costituzionale e l’adattamento dell’ordinamento italiano alla CEDU o a qualsiasi obbligo internazionale?”, *Diritti umani e diritto internazionale* 2008, p. 301 ff., p. 305-309 (arguing, with reference to the status of treaties in the Italian legal system, that conflating the ECHR and any bilateral treaty on trivial economic matters would be an “irrazionale amalgama”).

¹⁰⁹ J.H. JACKSON, cit., p. 331 (emphasis in the original).

international legal order the hierarchical supremacy of norms is grounded on their substantive content.¹¹⁰ It would not seem inappropriate to apply the same logic to the prioritization of international norms within national legal systems.

Secondly, the granting of supremacy to international agreements may also entail a tension with the domestic separation of powers. This tension can manifest itself in two somewhat different respects.

Firstly, as in all situations in which international agreements negotiated or concluded by the executive are given domestic force of law without the need for an act of parliament, an issue of separation of powers between the executive and the legislature arises. There is a concern, more specifically, that the executive's exclusive or predominant authority in the stipulation of international treaties, when coupled with automatic treaty incorporation, may give the executive a *de facto* legislative power, thus encroaching on the prerogatives of the legislature. When treaties are granted supremacy over ordinary legislation, this concern, of course, may appear more pressing, because the hands of the legislature would be tied.

Secondly, a more peculiar issue arises when treaties are granted a status equal to the constitution. Besides – or instead of – being seen as a curb on political authorities, this mechanism of treaty implementation may also be regarded as *strengthening* the scope of authority of the political branches. This is because, in the event of such an enhanced form of supremacy, political authorities, by adhering to a treaty, may be able to supplement or even alter the constitution, i.e. the very law by which they are supposed to be controlled.¹¹¹ On closer inspection, this assertion closely echoes the former: the argument in question simply applies the same logic to the treaty-making power of executive and legislature combined, and conjures up possible malign alterations of the constitutional setting.

These arguments could seem preposterous. Indeed, to the extent the supremacy of international law is enshrined in the constitution, it could be argued that separation of powers concerns should be discarded *ab initio*, because a constitution – by definition – can modify the ordinary setting of the domestic separation of powers. With particular regard to the latter criticism, moreover, international law which is supreme over national law in the domestic legal order ultimately constrains the authority of state organs irrespective of the fact that state organs themselves have consented to it. This is particularly clear for inward-looking treaty norms – i.e. norms regulating matters of domestic concern – that oblige domestic organs to behave in a certain way towards individuals. It is hard to imagine how these norms, if effectively enforced, could enhance the latitude of political authorities in contravention of the provisions of a constitution.

Although these counter-arguments are generally sound, they may lose weight in seemingly uncertain situations, i.e. where it is not entirely clear whether a particular source of international law should be included among those to be prioritized according to the relevant constitutional provisions. One can refer again to the examples made at the beginning of this

¹¹⁰ M. IOVANE, “Metodo costituzionalistico e ruolo dei giudici nella formulazione dei principi generali del diritto internazionale”, *Ars interpretandi* 2008, p. 103 ff., p. 107.

¹¹¹ R.P. ALFORD, “Misusing International Sources to Interpret the Constitution”, *American Journal of International Law* 2004, p. 57 ff., p. 61-62 (arguing, although with reference to the use of treaties in interpreting the Constitution, that this “has the potential to elevate impermissibly their constitutionally circumscribed authority” and that “if Congress cannot define the contours of a constitutional guarantee by statutory enactment, neither can it do so [...] through the treaty-making power”).

section, e.g. to executive agreements. In such cases, whether or not to extend the higher rank to those categories of acts depends on a choice between an extensive or a restrictive reading of the constitutional provision. This is an interpretive choice which is not policy neutral. Indeed, some have argued that the extension of the hierarchical supremacy to those cases should be avoided insofar as it risks altering the ordinary configuration of the separation of powers in a significant way.¹¹²

Similarly, also the rank of binding acts produced by international organizations could stir significant separation of powers concerns in some circumstances. Obviously, such concerns would be groundless where a constitution clarifies the domestic status of these acts. However, this rarely occurs in practice.¹¹³ A significant exception is provided by Arts. 93 and 94 of the Dutch Constitution, pursuant to which the status of “resolutions by international institutions” is equivalent to that of treaties and is thus superior to ordinary laws. Where the constitution is silent on the point, the domestic status of these acts could be disputed.

In this regard, it seems appropriate to deal separately with the issue of automatic incorporation and with that of the hierarchical rank. As regards the former, it has been argued that, where a treaty is part of domestic law, also the treaty-based sources should be considered as automatically incorporated.¹¹⁴ Whether this approach should be adopted is outside the scope of the present work, and may certainly depend also on the nature of the acts of a specific organization. In any event, the most significant separation of powers concerns are raised not by the incorporation of such acts *per se*, but by the hierarchical rank that they could be granted. As has been correctly noted, participation in international organizations enhances the law-making role of executives,¹¹⁵ so that allowing the acts in question to automatically supersede all acts of national parliaments, in lack of an express constitutional stipulation in this sense, might constitute an undesirable outcome. Conversely, it appears that separation of powers concerns cannot be convincingly expressed with regard to decisions of international tribunals, by reason of their institutional independence from national executives.

To summarize, the above has shown three points. Firstly, the extent to which international law norms should be held supreme in a domestic legal system is not always clear-cut and can be subject to clarification by the courts by means of interpretation. Secondly, there are peculiar situations in which the supremacy of international law is hardly justifiable on policy grounds, both in terms of domestic democracy and of separation of powers. And thirdly, these two

¹¹² For example, see, with reference to the status of treaties in the Italian legal system, E. CANNIZZARO, “La riforma”, cit., p. 924-925. But see B. CONFORTI, “Reflections”, cit., p. 6 (“if the Executive takes action within the boundaries of its competence [...] I do not see any reason why Parliament should not respect these obligations”).

¹¹³ On this subject, see generally C. SCHREUER, “International Law in Municipal Law: Law and Decisions of International Organizations and Courts”, *Encyclopedia of Public International Law* 1987, p. 262 ff.; A. CASSESE, *International Law*, Oxford, 2005², p. 232-234; A. GIARDINA, “La mise en oeuvre au niveau national des arrêts et des décisions internationaux”, *Recueil des cours* 1979, vol. 165, p. 233 ff.

¹¹⁴ B. CONFORTI, *International Law*, cit., p. 34-40; Y. SHANY, *Regulating*, cit., p. 83; Y. IWASAWA, “Domestic Application of International Law”, *Recueil des cours* 2015, vol. 378, p. 12 ff., p. 207.

¹¹⁵ E. BENVENISTI, G.W. DOWNS, “Court Cooperation, Executive Accountability, and Global Governance”, *New York University Journal of International Law and Politics* 2008-2009, p. 931 ff., p. 931-932 (“it is widely acknowledged that the regulatory power that globalization has transferred to international organizations (IOs) operating at the international level has been vested in the executive branches of a few powerful states that were the system’s principal architects. From a democratic standpoint, such unchecked and overly concentrated executive power is worrisome independent of whether it is representative”).

problematic scenarios overlap to a large extent, i.e. policy concerns may be caused precisely because (and to the extent that) the relevant constitutional provisions are indeterminate.

Under these conditions, one might expect national courts to exploit the margin for interpretation left by the constitution and to refrain from interpreting the relevant provisions too extensively, in order to alleviate or fix such policy concerns.

The most obvious yardstick that the courts may resort to in the determination of the extent of supremacy is the role played by national legislatures in the formation of the international norms at issue. Indeed, when constitutions provide for automatic incorporation and higher status of international agreements, legislatures are usually involved in the treaty-making process. Clearly, this reflects precisely the concern that the executive may alter the domestic separation of powers if it could form international obligations which automatically become part of domestic law without any legislative approval; indeed, the legislature usually retains a stronger role in the implementation phase where executives can bind the state without limitations.¹¹⁶ Notably, also supreme courts and the population may be involved in the treaty-making, e.g. to verify a treaty's compatibility with the constitution or to approve the ratification of a certain treaty by popular vote.¹¹⁷

Admittedly, the control that parliaments exercise on the treaty making is more often than not devoid of real substantive power; moreover, parliamentary approval may be required by a constitution for reasons which are not related to the domestic effects of the treaty in question.¹¹⁸ However, according to the features of each specific legal system, it would seem reasonable for courts to give due weight to these domestic guarantees of democratic decision-making by limiting the effects of domestic supremacy to agreements (and likewise treaty-based sources) to which the legislature has in some way assented; all the more so since such agreements are usually those deemed more important by reason of their material content.

Interestingly, this has not always been the case. The judiciaries of different countries have addressed the problem of delimiting the extent of the prioritization of international law (specifically, international agreements) in radically different ways. A comparison between Russian and Italian courts can illustrate this point.

On the one hand, considerations of separation of powers have surfaced in the jurisprudence of the Russian Supreme Court. In a judicial decree binding on lower courts, this court has circumscribed the scope of Art. 15(4) of the Russian Constitution by differentiating between several categories of treaties according to the attribution of treaty-making power between state organs. According to the Court, only agreements whose ratification received prior approval by means of federal law can have trumping effect over domestic legislation. All other treaties would only prevail over subordinate normative acts.¹¹⁹

¹¹⁶ A. NOLLKAEMPER, "The Effects", cit., p. 127-129; D.B. HOLLIS, cit., p. 37-38.

¹¹⁷ G. BARTOLINI, cit., p. 1297-1298; D.B. HOLLIS, cit., p. 23-24 and 30, ft. 115.

¹¹⁸ See, for example, G. SPERDUTI, "Dualism", cit., p. 38-39.

¹¹⁹ See the Russian Supreme Court's Decree No. 5 "On the Application by Courts of General Jurisdiction of Generally-Recognized Principles and Norms of International Law and International Treaties of the Russian Federation", adopted on 10 October 2003, cited in W.E. BUTLER, cit., p. 415-416. This author criticizes this limitation in the scope of Art. 15(4) as "unconstitutional": see p. 428. However, his position seems isolated: see M.P. VAN ALSTINE, cit., p. 574. On this aspect of the status of treaties in Russia, see also D.B. HOLLIS, cit., p. 42; B.R. TUZMUKHAMEDOV, "International Law in the Russian Constitutional Court", *American Society of International Law Proceedings* 2000, p. 166 ff., p. 170 (noting that this interpretation is consistent with a reading of an early draft of the Constitution, which only mentioned ratified treaties); S.A. MALININ, "Operation of Rules

Conversely, considerations relating to separation of powers seemed completely off the radar of the Italian Constitutional Court when it held that, following the 2001 constitutional amendment, all treaties had to be considered as ranking higher than ordinary laws in the Italian legal system. Although this interpretation of Art. 117 was made in reference to the ECHR, the Court did not differentiate between the ECHR and other, less fundamental, treaties.¹²⁰ The attitude of the Italian Constitutional Court is all the more relevant when considering that it is not altogether clear whether the hierarchical elevation of treaties in the Italian legal system was an outcome that the 2001 constitutional legislator really intended to reach.¹²¹

In sum, this highlights somewhat contradictory elements regarding the policy implications of the domestic prioritization of international law. To the extent the letter of the constitution allows, national courts may – and this work submits that, on many counts, they *should* – clarify and restrict the extent of international law supremacy to cases in which a higher status of international law is materially justified and does not raise too serious issues of separation of powers. Notwithstanding this, national courts may prove reluctant to deal with the scope of international law supremacy in the domestic legal order.

This apparent inconsistency can be explained. National courts could perceive not to possess sufficient authority to determine the scope of domestic supremacy of international sources. Instead, they could prefer to address the policy problems relating to treaty supremacy on the level of direct application, which they perceive as providing a firmer ground for judicial interventionism. In John H. Jackson's words, "if the court has some leeway regarding direct applicability, but worries that it may not have such leeway regarding higher status, it would be highly tempted to discover an appropriate way to refuse direct application".¹²² The peculiar problems raised by limitations on direct application will be addressed in the following chapter.

4. Automatic standing incorporation of international law without supremacy over primary legislation.

This section analyzes a lower stage of constraint on the role of domestic political authorities in the implementation of international law, i.e. cases where a mechanism of automatic standing incorporation of international law is in place, but domesticated international norms

of International Law in the Territory of Russia under the 1993 Constitution", *Finnish Yearbook of International Law* 1997, p. 336 ff., p. 339 (agreements concluded by governmental departments would not be covered by Art. 15, hence not becoming part of domestic law). But see I.I. LUKASHUK, "Treaties in the Legal System of Russia", *German Yearbook of International Law* 1997, p. 141 ff., p. 146-147 (arguing that pursuant to Art. 15 treaties are not superior to domestic laws but only have priority of application in the specific case, and reconnecting this priority not to hierarchical supremacy but to the principle of speciality. The author also states that the general priority of treaties over laws descends not from Art. 15 but from "the general principles of the state under the rule of law as set forth in the constitution").

¹²⁰ This outcome has been staunchly criticized by L. CONDORELLI, cit., p. 305-309.

¹²¹ E. CANNIZZARO, "La riforma", cit., p. 928-931, according to whom the reform was originally intended only to have effect on the relationship between the regions and the central government.

¹²² J.H. JACKSON, cit., p. 333.

are not considered formally supreme over the acts of parliament. Instead, they may assume a rank equal to or lower than that of primary legislation.

Such mechanisms of incorporation reflect a different balance between the need to ensure compliance with international obligations and domestic countervailing concerns. On the one hand, the effectiveness of international norms is enhanced by the fact that the political branches are stripped of the authority to decide whether or not to implement it within the country's national law. On the other, however, the political authorities retain leeway to disregard international law by adopting acts in its violation.

This section is divided in two paragraphs. Paragraph 4.1 will include an analysis of relevant examples of implementation techniques of this kind and a brief assessment of the policy rationales which underpin them. Paragraph 4.2 will expound on some peculiar issues of democratic legitimacy and separation of powers which have been raised with regard to the incorporation of customary international law in several common law legal systems.

4.1. Automatic incorporation without supremacy in the practice of national legal systems.

Mechanisms of automatic incorporation of international law which do not grant any hierarchical supremacy over ordinary law are commonly found in national constitutions. Like the cases of supremacy previously analyzed, they span both general international law and treaty law.

As far as the former is concerned, the first historical example was set by the 1919 Weimar Constitution, which provided that “[t]he generally recognized rules of international law are deemed to form part of German federal law and, as such, have binding force”.¹²³ The Russian Constitution provides a more recent instance. The already mentioned Art. 15(4) sets forth a mechanism of automatic incorporation of both general international law and international treaties (“[t]he universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system [...]”) but only provides for the prevalence of treaties over domestic statutes.¹²⁴ At a yet lower level of constitutional deference for international custom, Art. 232 of the Constitution of South Africa incorporates this source “unless it is inconsistent with the Constitution or an Act of Parliament”.¹²⁵

Cases of national constitutions incorporating international agreements without proclaiming their primacy over national statutes abound. A prominent example is the Supremacy Clause of the US Constitution (Art. VI, clause 2), according to which treaties, just like the Constitution and the laws of the US, constitute “the supreme law of the land”. According to the literal wording of this provision, treaties have an rank equal to federal statutes;¹²⁶ they prevail over

¹²³ On this provision, see A. CASSESE, “Modern Constitutions”, cit., p. 357-358.

¹²⁴ V.S. VERESHCHETIN, cit., p. 37; G.M. DANILENKO, “International Law”, cit., p. 296. But see S.A. MALININ, cit., p. 337 (arguing first that this provision refers only to “an imperative rule of the general international law (*jus cogens*)”, then saying that this notion should include also “special principles of branches of international law”, such as principles of economic law).

¹²⁵ E. DE WET, cit., p. 580-581.

¹²⁶ D. SLOSS, “United States”, in D. SLOSS (ed.), cit., p. 504 ff., p. 509 and 513.

state laws and constitutions.¹²⁷ This interpretation of the formal status of treaties has been espoused, in principle, by US courts as early as in *Foster v. Neilson*, where Chief Justice Marshall notably stated that a treaty “is [...] to be regarded in courts of justice as equivalent to an act of the legislature [...]”.¹²⁸

In Germany, strictly speaking, the constitution provides for no mechanism of automatic implementation of treaties. However, as argued above, and in a manner similar to Italy, the incorporation of a treaty in domestic law immediately follows from the treaty’s attainment of binding force on the international plane. This is because the legislature’s assent to treaty ratification, given pursuant to Art. 59, para. 2, of the Basic Law, is also interpreted as giving the treaty domestic legal force. The hierarchical rank of treaties thus incorporated is held to be equal to ordinary statutes, i.e. to the act by which the Bundestag expressed its consent.¹²⁹ Prior to the 2001 constitutional amendment and the 2007 Constitutional Court intervention on the matter, also the Italian legal order dealt with the incorporation of treaties in this fashion.¹³⁰ Another meaningful example of this trend is Egypt, where treaties have been deemed by the Court of Cassation to possess the status of domestic legislation since as early as 1956.¹³¹ Art. 151 of the 2014 Constitution confirms that treaties acquire force of statutory law upon publication.¹³²

Lastly, a mention should be made of Art. 231(4) of the South African Constitution, which adopts a quite unique ambivalent attitude towards treaty implementation. According to this provision, “any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic [...]”.¹³³ A literal interpretation of this article seems to confine the automatic incorporation of treaties only to those possessing “self-executing” character. This reference, however, is rather confusing because of its technical inaccuracy. As will be more thoroughly exposed in Chapter 3, the concept of self-executing

¹²⁷ P.R. DUBINSKY, “United States”, in D. SHELTON (ed.), cit., p. 631 ff., p. 641-642; T. BUERGENTHAL, “Self-Executing”, cit., p. 344.

¹²⁸ *Foster & Elam v. Neilson*, 2 Pet. 253 (1829). The Supreme Court went on to establish the well-known distinction between self-executing and non-self-executing treaties, which will be covered in depth in the next chapter. It should also be noted that some interpret the Supreme Court’s decision in *Medellin v. Texas*, 128 S.Ct. 1346 (2008), as establishing that non-self-executing treaties do not form part of the U.S. legal system: see e.g. D. SLOSS, “United States”, cit., p. 512-513, who rightly criticizes the decision, if thus construed. However, this is not the only possible reading: see e.g. C.A. BRADLEY, “Intent, Presumptions and Non-Self-Executing Treaties”, *American Journal of International Law* 2008, p. 540 ff. (construing the court’s dicta in *Medellin* as pertaining to the issue of judicial applicability of treaty provisions). In reality, as noted by P.R. DUBINSKY, cit., p. 653, the language of *Medellin* is ambiguous on this point.

¹²⁹ H.P. FOLZ, cit., p. 245; A. PAULUS, “Germany”, in D. SLOSS (ed.), cit., p. 209 ff., p. 217. This description of the German practice intentionally avoids delving into the intricacies of the debate among German scholars on whether the reception of treaties should be described as an act of incorporation, transformation or execution: on the point see A. PAULUS, “Germany”, cit., p. 217-218 (noting that most writers lean towards the theory of execution) and B. SIMMA, D.E. KHAN, M. ZÖCKLER, R. GEIGER, cit., p. 78.

¹³⁰ F. FRANCONI, “The Jurisprudence”, cit., p. 29.

¹³¹ See Judgment No. 137, 8 March 1956, Cass. Repertoire of Decisions, pt. III, 274, 23 I.L.R. 472 (1956), cited in N. ELARABY, M. GOMAA, L. MEKHEMAR, “National Treaty Law and Practice: Egypt”, in D.B. HOLLIS, M.R. BLAKESLEE, L.B. EDERINGTON (eds.), cit., p. 227 ff., p. 238.

¹³² A.M. EL-HAJ, “The Relationship between International Law and National Law in New and Amended Arab Constitutions”, in R. GROTE, T.J. RÖDER (eds.), *Constitutionalism, Human Rights, and Islam after the Arab Spring*, Oxford, 2016, p. 763 ff., p. 786.

¹³³ E. DE WET, cit., p. 568.

treaty should be understood as referring not to the incorporation of treaties within the domestic legal order but only to their applicability by domestic courts. In practice, there have seemingly been no cases in which a treaty provision has been deemed automatically incorporated within the South African legal system.¹³⁴

To summarize, this technique of implementation of international law presents both similarities with and differences from the instances of prioritization of international law dealt with in the previous section.

On the one hand, also in the cases analyzed in this section no sanction by domestic lawmaking authorities is needed in order for international law to become internally valid.¹³⁵ In principle, the determinants of this choice do not differ from those that in other contexts lead to the choice to prioritize international law: the primary objective of automatic incorporation is always to ensure state compliance with international obligations. The insertion of the Supremacy Clause in the US Constitution, for example, rested on the urge to put an end to the states' repeated violations of the treaties binding on the United States.¹³⁶ The automatic incorporation "decrease[s] the likelihood that national authorities will refuse or neglect to provide transforming norms".¹³⁷

In the present case, however, the weight of domestic countervailing concerns leads the balance between freedom of political action and legal curbs over its compliance with international law to a different, less drastic outcome. In particular, the idea of "sacredness of legislation",¹³⁸ as the primary embodiment of democratic will, advises against implementation mechanisms which leave no opportunity to the legislature to adopt acts in contravention of international obligations. The result is a mechanism of incorporation which leaves more scope to the action of political branches and, most notably, confers upon them an "option to breach" international law.¹³⁹

In particular, where international law is granted a status equal to ordinary law, the distinguishing feature of this mechanism is that it is devised first and foremost to limit executive action, while seeking to preserve the latitude of the legislature.¹⁴⁰ In this case, the relation between statutes and international law is usually regulated by the later-in-time rule and the principle *lex specialis derogat generali*.¹⁴¹ The "option to breach", moreover, is obviously more pervasive in legal systems (like South Africa's) where domestic law generally prevails over inconsistent international law, the latter's rank being lower than statutes.¹⁴²

¹³⁴ E. DE WET, cit., p. 574.

¹³⁵ M.P. VAN ALSTINE, cit., p. 581.

¹³⁶ C.M. VÁZQUEZ, "The Four Doctrines of Self-Executing Treaties", *American Journal of International Law* 1995, p. 695 ff., p. 699.

¹³⁷ J.H. JACKSON, cit., p. 322.

¹³⁸ G. SPERDUTI, "Dualism", cit., p. 41. See also, e.g., G.M. DANILENKO, "International Law", cit., p. 296 (tracing back the fact that general international law cannot prevail over statutory law in Russia to the "lack of parliamentary participation in customary lawmaking").

¹³⁹ J.H. JACKSON, cit., p. 324-325.

¹⁴⁰ A. NOLLKAEMPER, "The Effects", cit., p. 139; D. SLOSS, "Domestic Application", cit., p. 393.

¹⁴¹ B. CONFORTI, "National Courts and the International Law of Human Rights", in B. CONFORTI, F. FRANCONI (eds.), cit., p. 3 ff., p. 11-12; A. CASSESE, "Modern Constitutions", cit., p. 396; D.B. HOLLIS, cit., p. 48-49; M.P. VAN ALSTINE, cit., p. 577; B. SIMMA, D.E. KHAN, M. ZÖCKLER, R. GEIGER, cit., p. 87-88 (on the application of the *lex posterior* rule in Germany); D. SLOSS, "United States", cit., p. 509. For an application of the later-in-time rule in the U.S., see e.g. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), p. 602.

¹⁴² D.B. HOLLIS, cit., p. 49.

The policy function of this *option* could not be overstated. In systems where the ideal weight of parliamentary supremacy is strong, a constitutional commitment to compliance with international law is only acceptable insofar as compensatory guarantees of the democratic process are also in place. In certain legal environments, the reassuring existence of a safety valve for national political actors may be regarded as a necessary precondition for allowing for the automatic incorporation of international law, that is, an element without which there would most likely be no constitutional commitment at all.

This underlying policy motivation (i.e. protection of the role of the legislature and, broadly speaking, of democratic processes) helps explain the reason why national courts have generally proven assertive in safeguarding the role of national legislatures, when called upon to elucidate the scope of automatic international law incorporation and its relationship with domestic statutes. In particular, in many legal systems only treaties whose stipulation has received some form of parliamentary approval are placed on the same footing as ordinary laws. The relevant separation of powers considerations are in no way different from those which may influence the delimitation of the extent of domestic supremacy of international law, so that it is sufficient to refer to what has been argued above in that regard.

In Germany, for example, these considerations exclude that executive agreements, although automatically incorporated in domestic law, could trump domestic legislation. Such lower-ranking treaties – besides being subordinate to acts of Parliament – may also manifest a tension with expressions of the democratic will other than statutes. In the *Waldschlösschen* case, the Federal Constitutional Court of Germany was called upon to decide over an apparent conflict between a treaty concluded without prior consent by the Parliament (specifically, the UNESCO World Heritage Convention) and the outcome of a local referendum. Although it eventually tried to reconcile the two by interpretation, the Court said in an *obiter* that a manifestation of domestic democracy, in principle, should prevail over such treaties.¹⁴³

4.2. Policy implications: the debate on the legitimacy of the incorporation of customary international law in common law legal systems.

The process of incorporation of customary international law in several common law jurisdictions deserves a separate analysis, insofar as it does not depend on any express constitutional or statutory provision.

International custom is generally held to be automatically incorporated within the English common law.¹⁴⁴ Admittedly, this seemingly straightforward statement does not come free of complexities. One of the earliest formulations of this classic proposition is ascribable to William Blackstone, who wrote that “the law of nations [...] is here adopted in [...] full extent by the common law, and is held to be part of the law of the land”.¹⁴⁵ At the time it was formulated, however, this position did not find much corroboration in the practice of English courts and was probably perceived by the author more as a principle of “irrefutable

¹⁴³ Bundesverfassungsgericht, 2 BvR 695/07, 29 May 2007. On this case, see A. PAULUS, “Germany”, cit., p. 213 and 239-241.

¹⁴⁴ R. JENNINGS, A. WATTS, cit., p. 56-57; R. HIGGINS, “The Role of Domestic Courts in the Enforcement of International Human Rights: The United Kingdom”, in B. CONFORTI, F. FRANCONI (eds.), cit., p. 37 ff., p. 51.

¹⁴⁵ W. BLACKSTONE, *Commentaries on the Laws of England*, book IV, chapter 5, 1765-1769.

rationality”;¹⁴⁶ let alone that the eighteenth century notion of *jus gentium* was in fact very different from what is meant today by customary international law in that, besides questions of international law proper, it included, *inter alia*, maritime law and the *lex mercatoria*.¹⁴⁷

Notwithstanding these early intricacies, the authority supporting the traditional understanding of the principle of incorporation of customary international law is presently undisputable.¹⁴⁸ Even oft-cited judicial cases purported to hold the contrary – more specifically, the *dicta* of some judges in the 1876 *R v. Keyn* case and various individual *obiter* from time to time – are, at most, ambiguous on the point, and do not adequately support the view that the reception of custom should be performed through transformation by legislation.¹⁴⁹ The only necessary specification is that, as authoritatively argued in legal scholarship, the principle should preferably be construed in the sense that international customary law – rather than being *part of* the English common law – is one of its *sources*.¹⁵⁰ For the purpose of this work, the adoption of the classic formulation of the principle of automatic incorporation of international custom will do no harm.

In effect, with occasional uncertainties and national peculiarities, the principle in this formulation has flowed into the practice of numerous legal systems where international custom is considered to be incorporated pursuant to the Westminster model – i.e. hierarchically subject to the authority of parliamentary acts. This is the case, for example, of Nigeria, New Zealand, Canada, India and, more controversially, Australia.¹⁵¹ Also in Israel, the common law model of incorporation is followed.¹⁵²

That being said with regard to the received doctrine, it should be noted, however, that this principle’s long-standing status as a tenet of common law has not spared it occasional

¹⁴⁶ H. LAUTERPACHT, “Is International Law a Part of the Law of England?”, *Transactions of the Grotius Society* 1939 (vol. 25), p. 51 ff., p. 53.

¹⁴⁷ *Ibid.*, p. 52. See also D.L. SLOSS, M.D. RAMSEY, W.S. DODGE, “International Law in the Supreme Court to 1860”, in D.L. SLOSS, M.D. RAMSEY, W.S. DODGE (eds.), *International Law in the U.S. Supreme Court. Continuity and Change*, p. 7 ff., p. 8 (discussing the eighteenth-century conception of law of nations).

¹⁴⁸ See, *ex multis*, *West Rand Central Gold Mining Co v. R* (1905) 2 KB 391; *Trendtex Trading Corp. v. Central Bank of Nigeria* (1977) QB 529 (CA), where Lord Denning held (p. 554) that “the rules of international law are incorporated into English law automatically and considered to be part of English law unless they are in conflict with an Act of Parliament”; *I Congreso del Partido* (1981) 3 WLR 328; *Al-Adsani v. Kuwait* (1995) 103 ILR 420.

¹⁴⁹ *R v. Keyn* (1876) 2 Ex D 63; *Chung Chi Cheung v. The King* (1939) AC 160, where Lord Atkin held that “international law has no validity save in so far as its principles are accepted and adopted by our own domestic law”, but also added: “[t]he Courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law”. On this point, see R. O’KEEFE, “The Doctrine of Incorporation Revisited”, *British Yearbook of International Law* 2008, p. 7 ff., p. 19-20.

¹⁵⁰ J.L. BRIERLY, “International Law in England”, *Law Quarterly Review* 1935, p. 24 ff., p. 31; J. CRAWFORD, *Brownlie’s Principles of Public International Law*, Oxford, 2012⁸, p. 68; J.G. COLLIER, “Is International Law Really Part of the Law of England?”, *International and Comparative Law Quarterly* 1989, p. 924 ff., p. 935; R. O’KEEFE, *cit.*, p. 58. See also Lord Bingham in *R v. Jones (Margaret)* (2007) 1 AC 136, p. 155.

¹⁵¹ See respectively B. AKINRINADE, “Nigeria”, in D. SHELTON (ed.), *cit.*, p. 448 ff., p. 462; W.J. HOPKINS, “New Zealand”, in D. SHELTON (ed.), *cit.*, p. 429 ff., p. 442-446 (noting that, in New Zealand’s judicial practice, the only field of application is state immunity); S. BEAULAC, J.H. CURRIE, “Canada”, in D. SHELTON (ed.), *cit.*, p. 116 ff., p. 137-142; N. JAYAWICKRAMA, “India”, in D. SLOSS (ed.), *cit.*, p. 243 ff., p. 244-245. On Australia, see A. DE JONGE, “Australia”, in D. SHELTON (ed.), *cit.*, p. 23 ff., p. 42-47 (although “the transformation theory (...) currently seems to hold sway”, there is evidence that Australian courts can refer to international custom when developing the common law).

¹⁵² E. BENVENISTI, “Judicial”, *cit.*, p. 176-179.

criticism based on arguments of domestic democratic legitimacy and separation of powers. Given the peculiar features of this model of incorporation, the reasons are easy to grasp. As all forms of automatic incorporation of international norms, this mechanism can be perceived as (actually or potentially) compressing the democratic will or impinging on the physiology of the lawmaking power. But differently from the other models of automatic incorporation analyzed so far, the one under scrutiny cannot be easily justified by relying on an express constitutional provision. Instead, it could be regarded as a product of judicial activism or even as outright judicial lawmaking, something which could appear to question the overall legitimacy of the process.

Such democratic legitimacy issues have been voiced in particularly clear terms in the United States. Customary international law has traditionally been held to be part of the US legal system in a hierarchical position subordinate to the Constitution but equal to federal law.¹⁵³ This position is supported by compelling authority, both in case law and in legal scholarship. In the *Paquete Habana*, the leading case on the Supreme Court's attitude towards customary international law, the Court famously held that "[i]nternational law is part of our law [...] where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations", and enforced customary international law against US authorities.¹⁵⁴ In *Filártiga*, the 2nd Circuit Court of Appeals acknowledged the incorporation within the US legal system of the customary prohibition of torture, and held that its violations, committed outside the territory of the United States, were actionable under the Alien Tort Statute, a 1789 statute granting jurisdiction to US federal courts for torts "in violation of the law of nations".¹⁵⁵ Also the American Law Institute's influential Third Restatement on Foreign Relations espoused this view.¹⁵⁶

However, in recent years a revisionist trend has emerged in scholarship, challenging the legitimacy of customary international law incorporation on grounds of both democratic legitimacy and separation of powers.¹⁵⁷ As far as the former is concerned, Curtis A. Bradley and Jack L. Goldsmith have contended that a model of automatic incorporation of international custom would be "in tension with basic notions of American representative democracy" because the formation of customary international law is independent from any

¹⁵³ P.R. DUBINSKY, cit., p. 642-643; H.H. KOH, "Is International Law Really State Law?", *Harvard Law Review* 1998, p. 1824 ff.; L. HENKIN, "International Law as Law in the United States", *Michigan Law Review* 1984, p. 1555 ff.; C.M. VÁZQUEZ, "Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position", *Notre Dame Law Review* 2011, p. 1495 ff., particularly p. 1501 (expressing a somewhat more nuanced position: "[a]dherents of the modern position have always accepted that not all of customary international law binds foreign states or the federal Executive as a matter of U.S. domestic law (...) [t]he heart of the modern position is that customary international law binds State actors and thus preempts State law applicable to State officials and private parties").

¹⁵⁴ *The Paquete Habana*, 175 US 677 (1900), p. 700.

¹⁵⁵ *Filártiga v. Peña-Irala*, 630 F.2d 876 (2D Cir. 1980). On this case see J.M. BLUM, R.G. STEINHARDT, "Federal Jurisdiction over International Human Rights Claims: the Alien Tort Claims Act after *Filártiga v. Peña-Irala*", *Harvard International Law Journal* 1981, p. 53 ff.

¹⁵⁶ *Restatement (Third) of the Foreign Relations Law of the United States*, 1987, para. 114. See also para. 111 of the introductory note: "[f]rom the beginning, the law of nations, later referred to as international law, was considered to be incorporated into the law of the United States without the need for any action by Congress or the President, and the courts, State and federal, have applied it and given it effect as the courts of England had done".

¹⁵⁷ P.R. DUBINSKY, cit., p. 642 (calling this trend a "contemporary assault on the traditional understanding").

express support from the US political authorities and because its content would be “often uncertain”.¹⁵⁸ Moreover, in its concurring opinion in *Sosa v. Alvarez-Machain*, Justice Scalia expressed in the following, very vocal, terms his contention that the incorporation model would shatter the separation of powers: “[f]or over two decades now, unelected federal judges have been usurping th[e] lawmaking power by converting what they regard as norms of international law into American law”.¹⁵⁹

It is well outside the scope of this work to determine whether customary international law should be considered as a part of the federal common law of the United States; this is a matter for domestic law scholars to ascertain. What can be argued here, instead, is merely that if the traditional position concerning the status of international custom is accepted, the aforementioned concerns over its legitimacy do not appear particularly convincing.

As for the concerns based on domestic democracy, they are largely unsubstantiated for a number of reasons. First of all, these arguments certainly overdramatize the friction between the content of international law and domestic law; moreover, if custom is really “often uncertain”, as has been argued, then there is ample room for reconciling domestic law (including state law) by interpretive means and avoiding outright conflict resulting in abrogation of inconsistent norms. But let us leave aside these arguments, since the proponents of the revisionist trend tend to deal with the conflict in abstract terms, by treating it as a matter of principle. From this perspective, it should be kept in mind that the US legislature remains theoretically free to disregard custom by passing a conflicting statute. This is the very same *option to breach* which the Constitution leaves to the federal legislature with regard to international treaties. This is a strong argument in the sense that, in the US legal environment, domestic democratic values are considered to be sufficiently safeguarded by a mechanism of automatic incorporation which grants international sources the status of federal law. Moreover, incidentally, the principle of incorporation of customary international law has commonly been accepted also by the US federal political authorities, which makes concerns over the protection of their prerogatives even more untenable.¹⁶⁰

As for the concerns based on separation of powers, portraying the incorporation of customary international law as an (abusive and arbitrary) act of judicial lawmaking fundamentally misses the point. Indeed, this incorporation does not derive from a decision by the judges but has its roots in an implied norm of the domestic legal system – itself the product of a centuries-old legal tradition – which the courts confine themselves to apply. This is not different, in principle, from the situation in legal systems where constitutional provisions incorporating

¹⁵⁸ C.A. BRADLEY, J.L. GOLDSMITH, “Customary International Law as Federal Common Law: A Critique of the Modern Position”, *Harvard Law Review* 1997, p. 815 ff., p. 858. For a similar, but much cruder, criticism of automatic incorporation of customary international law on grounds of lack of democratic accountability see J.O. MCGINNIS, I. SOMIN, “Should International Law Be Part of Our Law?”, *Stanford Law Review* 2006-2007, p. 1175 ff. (see particularly p. 1233 ff., where the two authors indulge in rare legal chauvinism by arguing that “American law [is] better than international law for the rest of the world”). For a criticism of this stance, see G.L. NEUMAN, “Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith”, *Fordham Law Review* 1997, p. 371 ff.

¹⁵⁹ *Sosa v. Alvarez-Machain*, 542 US 692 (2004), p. 750. See also C.A. BRADLEY, J.L. GOLDSMITH, cit., p. 861.

¹⁶⁰ H.H. KOH, cit., p. 1842 (noting that “the executive branch has regularly urged the federal courts to determine [customary international norms] as a matter of federal law”).

international law are regarded as merely declaratory of an unwritten rule which would by itself suffice to make international law part of domestic law.¹⁶¹

But even if one does not accept this view and instead considers the incorporation of customary international law in common law countries as a form of judicial lawmaking, the issues of separation of powers should also not be overplayed. Indeed, it has been maintained that this judicial activity involves much less lawmaking power than the creation of the common law, because – if acting correctly – a court does not *create* custom, but identifies it pursuant to legal principles detailed by international law itself and embraced, in the US, by the case law of the Supreme Court.¹⁶²

5. Lack of formal constraints on national political authorities in the implementation of international law.

After the previous two sections, one last situation remains outstanding. International law may not be granted any qualified effect in domestic law, i.e. it may be neither automatically incorporated nor supreme over primary legislation. In these situations, in absence of formal constraints devised by domestic law, all choices concerning the application of international law rest upon the political branches. In such an event, several scenarios may take place. First, international law may be incorporated by an *ad hoc* provision containing a *renvoi*. Second, it may be transformed into domestic law by means of legislation. Or third, it may not be domesticated at all, either because its content is considered not to be at variance with domestic law, so that no amendment is needed, or for a deliberate choice to disregard it.

The analysis performed in this section will proceed as follows. Firstly, it will categorize the most relevant cases of lack of qualified domestic effect of international law and will attempt to single out their main underlying rationales. Secondly, it will attempt to weigh up in a more analytic way the amount of latitude that political authorities enjoy in the application of international law in such cases. By doing so, the analysis will search for relevant exceptions to the ground rule, i.e. for cases where international law can have limited qualified effects in the domestic legal sphere, as well as for cases at the opposite extreme of the spectrum, i.e. where the lack of formal constraints in the domestication of international law translates in a *de facto* unbound latitude of national political authorities.

The textbook example of international law lacking any qualified effect in domestic law can be drawn from the practice of several countries of common law with regard to international agreements. In English law, for instance, treaties which bind the UK on the international plane do not automatically become part of domestic law. In order for the content of the treaty

¹⁶¹ See G. GAJA, cit., p. 60 (the application of international law by national courts may be seen as “the effect of an unwritten or implied norm of the municipal system that renders international law applicable”). For a similar contention, see W.N. FERDINANDUSSE, *Direct Application of International Criminal Law in National Courts*, The Hague, 2006, p. 66-67 (arguing that both treaties and customary international law are incorporated in the Netherlands by means of an “unwritten rule of reference”).

¹⁶² H.H. KOH, cit., p. 1853; “Judicial Enforcement of International Law Against the Federal and State Governments” (Note), *Harvard Law Review* 1990-1991, p. 1269 ff., p. 1278.

to be domesticated, an act of Parliament will be necessary.¹⁶³ In *In re McKerr*, Lord Hoffman found this principle to be so incontrovertible that he asserted that “it should no longer be necessary to cite authority for the proposition that [a] Convention, as an international treaty, is not part of English domestic law”.¹⁶⁴ The same rule is adopted in several other common law countries, such as Australia and Canada.¹⁶⁵ It should be noted, however, that not all common law countries adopt the same approach: for example, the previous section has shown that the constitutions of the US and (to a minor extent) South Africa do provide for automatic incorporation of treaties.

This approach is mainly a byproduct of considerations of separation of powers. In the UK and in countries adopting the same approach, treaties are traditionally concluded by the Crown, that is, under the sole authority of the executive. Because the principle of parliamentary sovereignty prescribes that all legislation must be approved by the Parliament, the latter’s intervention is deemed indispensable in the implementing phase.¹⁶⁶ This rule is still firmly applied, even in spite of a gradual increase of the role of the legislature in the process of treaty-making. This role may range from mere consultation before the conclusion of treaties which are considered of particular relevance to a more forceful, or even binding, role.¹⁶⁷ Under the so-called “Ponsonby rule”, ascribable to a constitutional convention dating back to the 1924, treaties subject to ratification are laid before (i.e. notified to) Parliament for 21 sitting days before ratification.¹⁶⁸ In the UK, according to the traditional formulation of this rule, the Parliament had no power to prevent ratification; however, this power has been formally conferred on it by the Constitutional Reform and Governance Act 2010.¹⁶⁹

The common law model with respect to treaties, however, is not the only case in which the implementation of international obligations depends entirely on acts of the political branches. The situation in other legal systems appears to be even more radical. Indeed, differently from the English model, which transposes customary international law into the common law, the

¹⁶³ R. JENNINGS, A. WATTS, cit., p. 58-59; S.C. NEFF, “United Kingdom”, in D. SHELTON (ed.), cit., p. 620 ff., p. 622; *ex multis*, *Maclaine Watson & Co. Ltd. v. Department of Trade and Industry* (1989) All ER 523 (one of the stages of the famous International Tin Council litigation, where the principle of lack of legislative effect of unincorporated treaties was reasserted).

¹⁶⁴ *In re McKerr* (2004) UKL 12, para. 63.

¹⁶⁵ D.R. ROTHWELL, “Australia”, in D. SLOSS (ed.), cit., p. 120 ff., p. 129-130; W.A. SCHABAS, “Twenty-Five Years of Public International Law at the Supreme Court of Canada”, *The Canadian Bar Review* 2001, p. 174 ff., p. 177 (“[u]nder Canadian law, it is axiomatic that treaties do not have a direct effect before national courts where they have only been ratified by the executive and not implemented by the legislature”). For case law, see in particular *Minister of State for Immigration and Ethnic Affairs v. Teoh* (1995) 128 ALR 353 (“[i]t is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless these provisions have been validly incorporated into our municipal law by statute”) and the Canadian *Labour Conventions* case, *Attorney-General for Canada v. Attorney-General for Ontario* (1937) AC 326.

¹⁶⁶ J. CRAWFORD, *Brownlie’s*, cit., p. 63. For a classical definition of parliamentary sovereignty, see A.V. DICEY, *Introduction to the Study of the Law of the Constitution*, London-New York, 1914⁸, p. 3: “Parliament [...] has, under the English constitution, the right to make or unmake any law whatever; and, further, [...] no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament”. On this concept, see, *ex multis*, M. GORDON, *Parliamentary Sovereignty in the UK Constitution. Process, Politics and Democracy*, Oxford-Portland, 2015.

¹⁶⁷ D. SLOSS, “Domestic Application”, cit., p. 370-371.

¹⁶⁸ See House of Lords Constitution Committee, *Fifteenth Report of Session 2005-2006, Waging war: Parliament’s role and responsibility*, HL 236, p. 186-189.

¹⁶⁹ S.C. NEFF, cit., p. 621-622.

constitutions of several countries do not provide for the automatic incorporation of any international sources.

The 1982 Chinese Constitution, for example, does not define the status of either general international law or treaties in the domestic legal order.¹⁷⁰ The constitutions of Uzbekistan, Turkmenistan and Belarus make vague reference to the generally accepted norms of international law, but such statements seem to refer primarily to the handling of the countries' international relations and are not intended to have domestic legal effects.¹⁷¹ Issues concerning the domestic application of international law are completely neglected also by the constitutions of certain Islamic countries, such as Saudi Arabia or the United Arab Emirates.¹⁷²

A brief analysis of the situation in the Chinese legal system can help illuminate some of the peculiar features of these constitutional models of (non-)interaction with international law. China constitutes the primary case study among these legal systems both because of its relevance and for reasons of accessibility of sources.

The lack of express constitutional regulation on the domestic status of international law has stirred controversy in Chinese scholarly circles. This can be explained in that, if put into perspective, some features of the Chinese model are rather unique. While the constitutional text ignores general international law altogether, it does consider treaties from the perspective of the distribution of the treaty-making power and establishes a fairly strong legislative control on the stipulation of treaties. Pursuant to Arts. 67(14), 81 and 89(9), treaties are concluded by the State Council, i.e. the executive branch, but the ratification of certain categories of treaties which are considered to be particularly relevant requires legislative approval by the Standing Committee of the National People's Congress. A first distinguishing feature of this constitutional set-up is that, in other countries, constitutional provisions establishing an enhanced form of control by the legislature on the conclusion of treaties are often (although not necessarily) coupled with some mechanism of automatic incorporation. Second, a rigid divide between the conclusion of treaties and their domestic implementation cannot be justified on grounds of separation of powers, because there is no separation of powers in the Chinese legal system.¹⁷³ Third, such a rigid divide is also in no way attributable to common law influence, since China does not belong to that legal tradition.¹⁷⁴

¹⁷⁰ A. CASSESE, "Modern Constitutions", cit., p. 437 (arguing that "[...] no doubt, the People's Republic of China should be located at one extreme of the spectrum. China's 1982 Constitution is indeed striking for the minimal attention it pays to the international community. [...] in so far as China's attitude towards international law is *crystallized*, as it were, in the Constitution, it is an attitude of scant interest in international rules"; emphasis in the original).

¹⁷¹ G.M. DANILENKO, "Implementation of International Law in CIS States: Theory and Practice", *European Journal of International Law* 1999, p. 51 ff., p. 53; V.S. VERESHCHETIN, cit., p. 34-35.

¹⁷² S. BOURUBA, *Jurisprudence in the Application of Human Rights Standards in Arab Courts*, Lund, 2013, p. 44-45.

¹⁷³ J. CHEN, *Chinese Law: Context and Transformation*, Leiden-Boston, 2008, p. 119, who adds that China "practices the principle of 'unity of deliberation and execution'", which means that all state powers are formally concentrated in the system of central and local people's congresses. In line with this approach, Art. 85 of the Constitution describes the State Council as "the executive body of the highest organ of state power", i.e. of the legislature.

¹⁷⁴ The Chinese socialist legal system has been consistently influenced by the European continental tradition. See J. CHEN, *Chinese Law*, cit., p. 338.

Similar considerations must have influenced the thought of some scholars who, particularly in the early years after the 1982 Constitution's entry into force, tried to derive an implied mechanism of automatic incorporation of treaties from the constitutional provisions regulating the treaty-making power. They noted, more specifically, that the legislative act authorizing the ratification was similar in nature to the passing of a new law, from which it followed that it had to be regarded also as incorporating the treaty in domestic law. As Wang Tieya, an influential Chinese academic, put it, "[i]n the Chinese legal system [...] laws and treaties appear to have equal legal force. In the P.R.C., as a general rule, there is no need of legislative enactment for the implementation of treaties. The internal effect of treaties comes immediately upon promulgation of the President of the P.R.C."¹⁷⁵

It is interesting to note that representatives of the Chinese government seemingly embraced the automatic incorporation theory in some (now outdated) statements before human rights treaty bodies. For example, in 1990 the representatives of the Chinese government to the Committee Against Torture declared that "[w]hen China acceded to any convention, it became binding as soon as it entered into force. China then fulfilled all its obligations, and it was not necessary to draft special laws to ensure conformity. If an international instrument was inconsistent with domestic law, the latter was brought into line with the former".¹⁷⁶ But these declarations are certainly not decisive, being just as trustworthy as all political statements trying to shield the government from international responsibility.¹⁷⁷

As a matter of fact, more recent scholarship has debunked this view, based mainly on the consideration that it is not borne out by any evidence in the practice of state organs. For this reason, as contended by Xue Hanqin and Jin Qian, the general rule is that treaties binding on China do not become part of national law automatically.¹⁷⁸ The domestic application of international law rests upon *ad hoc* acts by the political authorities.¹⁷⁹

¹⁷⁵ WANG T., "International Law in China: Historical and Contemporary Perspectives", *Recueil des cours* 1990, vol. 221, p. 195 ff., p. 329. For similar positions, see S. SHAO, "The Theory and Practice of the Implementation of International Law in China", in J. CHEN, Y. LI, J.M. OTTO (eds.), *Implementation of Law in the People's Republic of China*, The Hague, 2002, p. 197 ff., p. 198-199; J.Z. LI, S. GUO, "China", in D. SHELTON (ed.), cit., p. 158 ff., p. 187-188 (taking further the comparison between treaty-making and law-making processes and arguing that treaties concluded by the executive without legislative authorization rank lower in the hierarchy of domestic law, in a position equal to government regulations). This view has leaked in the works of Western scholars who have relied on those Chinese sources: see e.g. T.M. FRANCK, A.K. THIRUVENGADAM, cit., p. 487-489; D. SLOSS, "Domestic Application", cit., p. 373-374; A. NOLLKAEMPER, *National Courts*, cit., p. 73 and 133; G.M. RUOTOLO, "L'applicazione interna degli accordi OMC, la prassi occidentale e le peculiarità di alcuni Paesi emergenti", in A.R. GURRIERI, M. LORIZIO, C. NOVI (eds.), *L'ascesa delle economie emergenti. Implicazioni economiche e giuridiche*, Milan, 2010, p. 323 ff., p. 340.

¹⁷⁶ B. AHL, "Statements of the Chinese Government before Human Rights Treaty Bodies: Doctrine and Practice of Treaty Implementation", *Australian Journal of Asian Law* 2010, p. 82 ff., p. 87.

¹⁷⁷ On states' assertions that national law is consistent with international law and on the careful and strict approach that international tribunals should adopt, see *Portugal v. Liberia (ILO Complaint)* (1963), ILR 36, p. 351 ff., p. 397-403 (holding that such assertions from states should not be lightly accepted).

¹⁷⁸ XUE H., JIN Q., "International Treaties in the Chinese Domestic Legal System", *Chinese Journal of International Law* 2009, p. 299 ff., p. 300. This view is shared by W. SHI, "The Application of Treaties in China: Practice, Problems and Prospects", *AALCO Journal of International Law* 2012, p. 115 ff., p. 130. For a more thorough analysis of the doctrinal debate, see P. ROSSI, "L'adattamento al diritto internazionale nell'ordinamento giuridico della Repubblica popolare cinese", *Rivista di diritto internazionale* 2016, p. 425 ff.

¹⁷⁹ B. JIA, "A Synthesis of the Notion of Sovereignty and the Ideal of the Rule of Law: Reflections on the Contemporary Chinese Approach to International Law", *German Yearbook of International Law* 2010, p. 11 ff., p. 41.

The Chinese Constitution's disregard for the domestic application of international law can be easily traced back to historical and socialist influences.¹⁸⁰ A similar pattern of strong cultural resistance to the acceptance of international law standards can arguably be identified at the root of all the other constitutions which ignore this subject. This is the case, for example, of the influence of Islamic law on a number of national constitutions.¹⁸¹

To sum up, a number of legal systems require that some or all sources of international law can only be implemented by means of acts of the political branches. Faced with this description of the ground rule, however, one should not rush to conclude that such constitutional set-up inevitably results in total freedom – let alone arbitrariness – of the political authorities in this field. In order to have a clearer picture of how much leeway state authorities actually retain, it is opportune to briefly look at the way international obligations are executed in practice in the domestic legal systems under scrutiny. By doing so, it may be possible to identify relevant exceptions and specifications to the basic principle.

To a first approximation, the lack of predetermined qualified effects of international norms in the domestic legal order grants political branches a virtually exclusive authority in determining whether and how to implement those norms. In other words, their law-making prerogatives appear free from constraint. With regard to international agreements, evidence from several legal systems shows that, at least in theory, state authorities tend to ensure that the content of domestic law is in line with the international instrument before the latter becomes binding for the state on the international plane;¹⁸² but, as is clear, this assertion of principle not only does not entail any legal obligation to act accordingly, but is also wholly subject to discretionary assessment. For example, no external review is available if state authorities, as is often the case, refuse to make any changes to domestic law, based on the alleged consistency of domestic law with international law.¹⁸³

The same is true for the cases in which a treaty is made part of domestic law, in whole or in part, by means of *ad hoc* legislation: here as well, political authorities are free to determine whether or not to incorporate the treaty. The practice concerning the incorporation of treaties in common law legal systems is rather complex and multifaceted. In the UK, for example, the Parliament may incorporate a treaty or a part of it by attaching (or scheduling, in jargon) its text to a statute and explicitly clarifying that it gives effect to the said treaty,¹⁸⁴ but the

¹⁸⁰ C. CAI, "International Law in Chinese Courts During the Rise of China", *American Journal of International Law* 2016, p. 269 ff., p. 272 (identifying "two straightforward explanations [...] for China's silence regarding international law in its Constitution": the influence of Soviet legal thought and "China's history", i.e. the "hostility" manifested by China to international law on account of bad memories dating back to the period of the so-called unequal treaties, which lasted from the First Opium War to the Second World War).

¹⁸¹ On this issue, see generally R. MOSCHTAGHI, "The Relation between International Law, Islamic Law and Constitutional Law of the Islamic Republic of Iran – A Multilayer System of Conflict?", *Max Planck Yearbook of United Nations Law* 2009, p. 375 ff. See also A. CASSESE, "Modern Constitutions", cit., p. 343-344 (analyzing reasons behind "nationalist introversion" of state constitutions).

¹⁸² See e.g. A. AUST, "United Kingdom", in D. SLOSS (ed.), cit., p. 476 ff., p. 486; for example, the State Immunity Act 1978 was adopted with the main purpose to enable the U.K. to ratify the European Convention on State Immunity (16 May 1972) ETS No. 074 (*ibid.*, p. 479). See also XUE H., JIN Q., cit., p. 306-308 (various examples from the practice of China, including, most notably, implementation of the WTO agreements).

¹⁸³ See, for example, G. VAN ERT, "Canada", in D. SLOSS (ed.), cit., p. 166 ff., p. 170 (noting that in Canada treaty conformity is often ensured simply by retaining laws predating the treaty, especially in the field of human rights).

¹⁸⁴ D. SLOSS, "Treaty Enforcement in Domestic Courts. A Comparative Analysis", in D. SLOSS (ed.), cit., p. 1 ff., p. 18; A. AUST, "United Kingdom", cit., p. 479-480. An example of partial incorporation is the

incorporation may also result implicitly from the fact that a certain act was unequivocally adopted with a view to implement a treaty.¹⁸⁵ The act of incorporation may be regarded as stripping the legislature of some discretion in the determination and selection of the international norms to import in domestic law, but this limitation would be merely *de facto* and certainly not *de jure*.¹⁸⁶ It would then seem that the freedom of the lawmaking authorities remains always untouched.

With regard to the practice of the UK, however, the above requires a caveat. Given that the UK does not have a codified constitution, it is unsurprising that it is not technically possible to grant international law a status higher than primary legislation in a way comparable to the practice of other legal systems which establish the domestic supremacy of international law. This notwithstanding, the UK Human Rights Act 1998, which incorporates large portions of the ECHR in national law,¹⁸⁷ is commonly considered to have become part of the UK constitution.¹⁸⁸ This was acknowledged, for example, by Lord Justice Laws in *Thoburn v. Sunderland City Council*.¹⁸⁹

The Act puts in place an interesting mechanism which allows courts to review the conventionality of both primary and subsidiary legislation without formally affecting the principle of parliamentary sovereignty.¹⁹⁰ On the one hand, it establishes that courts can quash acts of public authorities held in violation of Convention rights – but this notion of public authorities does not include “either House of Parliament”.¹⁹¹ On the other hand, however, should a court find that a domestic piece of legislation violates one of the Convention rights, it can only issue a “declaration of incompatibility” which has no binding effect on Parliament and which may, but not must, trigger changes in domestic law.¹⁹² Despite its non-binding character, the declaration has proven an effective instrument in practice and has consistently

implementation of the Vienna Convention on Diplomatic Privileges and Immunities (16 April 1961) 500 UNTS 95 by the U.K. Diplomatic Privileges and Immunities Act: see S.C. NEFF, cit., p. 622. For other examples of partial incorporation, see S. BEAULAC, J.H. CURRIE, cit., p. 120.

¹⁸⁵ S.C. NEFF, cit., p. 622; G. VAN ERT, cit., p. 171 (criticizing as unsophisticated recent decisions by Canadian courts holding treaties not incorporated “simply, it seems, because the treaties were not mentioned expressly in any statute”); S. BEAULAC, J.H. CURRIE, cit., p. 129 (treaty incorporation must be ascertained by reference to the intention of the legislature).

¹⁸⁶ For general considerations also applicable to legislative acts of transformation, see T. GINSBURG, “Locking”, cit., p. 727 (arguing that also legislation can constrain future choices of political leaders, but this depends on how cumbersome the legislative process is and, consequently, how likely the revision).

¹⁸⁷ See e.g. Section 1(1) of the Act, incorporating the rights included in Arts. 2 to 12 and 14 of the ECHR.

¹⁸⁸ A. PETERS, cit., p. 299-300. On this subject, see generally A. LESTER, “Human Rights and the British Constitution”, in J. JOWELL, D. OLIVER (eds.), *The Changing Constitution*, Oxford, 2011⁷, p. 70 ff.

¹⁸⁹ *Thoburn v. Sunderland City Council* [2003] QB 151, para. 62: “[w]e should recognise a hierarchy of Acts of Parliament: as it were ‘ordinary’ statutes and ‘constitutional’ statutes”. The Human Rights Act was cited among the latter. See also *McCartan Turkington Breen v. Times Newspapers* [2001] 2 AC 277, p. 297.

¹⁹⁰ See generally A. KAVANAGH, *Constitutional Review under the UK Human Rights Act*, Cambridge, 2009. As well captured by A. PAULUS, “The Emergence of the International Community and the Divide Between International and Domestic Law”, in J. NIJMAN, A. NOLLKAEMPER (eds.), cit., p. 216 ff., p. 245, “[t]he British drafters have developed a host of ingenious instruments to square the circle and combine parliamentary supremacy with direct effect of international human rights jurisprudence”.

¹⁹¹ For a critical assessment of this provision, see R. WINTEMUTE, “The Human Rights Act’s First Five Years: Too Strong, Too Weak or Just Right?”, *King’s College Law Journal* 2006, p. 209 ff., p. 213.

¹⁹² See Section 4 of the Human Rights Act.

resulted in the adoption of necessary changes in legislation.¹⁹³ For example, in *A v. Secretary of State* (the *Belmarsh detainees* case), the Appellate Committee of the House of Lords found the provisions of the UK Anti-terrorism Act 2001 on the arrest of foreign terror suspects to be in violation of Arts. 5 and 14 ECHR (right to liberty and prohibition of discrimination). The judgment triggered the passing of the Detention of Terrorism Act 2005, by which the Parliament changed legislation in a way consistent with the judgment.¹⁹⁴

This description of the UK practice concerning the implementation of the ECHR also allows to clarify another crucial point. Even where political authorities retain nearly-unbound freedom as regards the way to achieve the domestication of international law, this of course does not mean that they retain a comparable freedom in its enforcement. Once a treaty right is incorporated within the UK legal system, there is nothing, in principle, which prevents domestic courts from enforcing it against public authorities; and the same goes for all other legal systems of common law with a similar attitude towards treaties. This clarification is made in passing, because the issues relating to the judicial application of international law against public authorities will be the object of detailed analysis in the next chapter. Moreover, and also in passing, the judiciaries of these countries – by virtue of their position of independence from their respective governments – have often been able to compensate for a defective implementation of international obligations by resorting to interpretive techniques of consistent interpretation. This will be the subject of Chapter 4.

What has just been pointed out allows to draw an important distinction from the practice of the legal systems whose constitutions – as outlined in the previous section – completely ignore any issues of domestic application of international law. Also these legal systems present a number of cases in which international treaty obligations have been incorporated in domestic law. Here, however, the trend seems to be in the direction of not incorporating norms of international law which may potentially impinge on the authority of the political branches, i.e. treaties potentially conferring rights to private parties against the government.

One may again refer to China as the most prominent example. The PRC ordinary legislation includes numerous *ad hoc* provisions effectively establishing a mechanism of automatic incorporation of treaties regulating legal relations between private parties, and occasionally envisaging that treaties should take precedence over inconsistent national legislation.¹⁹⁵ Based on these provisions, treaties regulating transnational civil relations, such as the 1958 New York Convention, have been consistently applied by Chinese courts.¹⁹⁶ The incorporation of such treaties is admitted because they can have no effects on the extent of governmental

¹⁹³ C. CRAWFORD, “Dialogue and Declarations of Incompatibility Under Section 4 of the Human Rights Act 1998”, *Denning Law Journal* 2013, p. 43 ff., particularly p. 86 (noting that the vast majority of final declarations of incompatibility – 17 out of 18 – have resulted in changes in legislation); A. LESTER, cit., p. 87.

¹⁹⁴ *A v. Secretary of State for the Home Department* [2004] UKHL 56. See A. PAULUS, “The Emergence”, cit., p. 245-247.

¹⁹⁵ See, most notably, Art. 260 of the Civil Procedure Law, pursuant to which “[i]f an international treaty concluded or acceded to by the People’s Republic of China contains provisions differing from those found in this Law, the provisions of the international treaty shall apply, unless the provisions are ones on which China has announced reservations”. Other examples are listed in XUE H., JIN Q., cit., p. 302-305.

¹⁹⁶ P. ROSSI, “Public Policy and Enforcement of Foreign Awards: An Appraisal of China’s Judicial Practice”, *Diritto del commercio internazionale* 2017, p. 299 ff., particularly p. 302-305.

authority.¹⁹⁷ Furthermore, the legislature retains full freedom to repeal the legislative provisions on treaty incorporation, as it has done on several occasions.¹⁹⁸ Finally, and incidentally, it should be kept in mind that, in absence of real separation of powers, courts cannot be expected to play any supplementary role in the application of treaties vis-à-vis public authorities.

In sum, this shows that, at a *prima facie* examination, China seems to be the prime example of a legal system in which the authority of state organs in the implementation of international obligations is not subject to any real form of constraint. Indeed, on the one hand, political authorities retain full control over the domestication of all international norms, with only exceptions *minoris generis* in the field of private international law; and on the other hand, in lack of effective judicial scrutiny, there appear to be no curbs on the enforcement of international law as well. In this respect, and more generally, it is also noteworthy that there are significant obstacles to the enforcement of private rights against public authorities before Chinese courts, which may effectively impair the domestic operation of international law even where it is transformed in national law.¹⁹⁹

6. Conclusions: compliance with international law as a fundamental principle in domestic legal systems.

This chapter has surveyed the ways in which international law is implemented in domestic legal systems at a formal level. It has looked at this topic from one particular perspective, i.e. the relationship between domestic methods of implementation of international law and the prerogatives of the national law-making authorities. To this end, it has classified domestic mechanisms of international law implementation in three categories, depending on whether (i) international law can prevail over the acts of the legislature; (ii) international law is automatically incorporated into domestic law but the legislature retains the power to act in breach of international obligations; or (iii) a discretionary intervention of the political branches is needed in order to implement international norms. As has been thoroughly demonstrated, each of these categories has a different policy rationale and raises peculiar policy issues.

In conclusion of this analysis, the variety of different approaches is the first feature that catches the eye. At least on paper, the degree of openness to international law varies

¹⁹⁷ C. CAI, cit., p. 273 (“the maintenance of executive authority [...] tends not to support the use of automatic incorporation of international law. But, since automatic incorporation can have little effect on executive authority in cases where the international legal rules govern solely the legal relations between private parties, no relative authority concerns arise in these contexts, and automatic incorporation is accordingly sometimes used”).

¹⁹⁸ C. CAI, cit., p. 274 (on the abrogation of Art. 72 of the Administrative Procedure Law).

¹⁹⁹ For example, it is generally acknowledged that in China human rights treaties are not part of domestic law and are implemented by means of domestic legislation: see XUE H., JIN Q., cit., p. 309. However, the extent to which citizens are allowed to implead the state for infringement of their rights under domestic administrative law is very limited, to the point that administrative litigation is in practice confined to non politically-sensitive personal and property rights. On this point see S. GUO, “Implementation of Human Rights Treaties by Chinese Courts: Practice and Problems”, *Chinese Journal of International Law* 2009, p. 161 ff., p. 177; J. CHEN, *Chinese Law*, cit., p. 248-249.

substantially between different legal systems. This chapter has advanced the argument that this variety can be traced back, first and foremost, to the different weight that national legal systems attach to the prerogatives of the political branches. Many legal systems embrace international law even to the point of committing the acts of the legislature to respect it. But in many legal environments, granting full-scale supremacy to international law over domestic legislation is not a feasible option. Fundamental considerations of domestic law, as well as historical, political and cultural factors, may make this impossible in practice.

This diversity of national attitudes has contributed to fragmenting the study of the domestic application of international law. This explains the general turn to pragmatism which has occurred in legal doctrine with the fall of the grand theoretical edifices of monism and dualism.²⁰⁰ The belief has taken hold that the only information having a tangible practical utility is the content of each legal system's positive legal rules governing the domestic implementation of international obligations. This position, at first glance, seems irrefutable. There can still be no unified theory of the relationship between international and domestic law.

Notwithstanding this, at a closer scrutiny, the above analysis may also reveal a partial unity of the relevant trends. Indeed, the vast majority of legal systems do establish mechanisms aimed at facilitating compliance with international law. Even where the domestic supremacy of international law is impossible to achieve in practice, legal systems often commit the political branches to respecting international law. They do so, in particular, by creating legal mechanisms that constrain the acts of the political branches while, at the same time, leaving them an option to breach international law through the adoption of contrary acts. These legal systems, in sum, do commit the political branches to complying with international law, but also establish theoretical safety valves of domestic political processes.

Against this backdrop, one could advance some conclusions. Admittedly, national legal systems balance the relevant interests at stake in different ways. And yet, the demand of compliance with international law appears always, with very few exceptions, to be a component of the balancing equation. Otherwise stated, most domestic constitutional frameworks allow to identify a principle demanding compliance with international law as a fundamental normative aim.²⁰¹

In some legal systems, the fundamental importance of compliance with international law has been expressly recognized. The German Bundesverfassungsgericht, for example, has extracted an unwritten constitutional principle of *Völkerrechtsfreundlichkeit des Grundgesetzes* (i.e. constitutional *friendliness*, or openness, toward international law) from a systematic reading of all constitutional provisions in the field of international law.²⁰² The same fundamental objective can undoubtedly be derived from the relevant provisions of the Italian Constitution, as well as in other countries whose constitutions provide for the incorporation of

²⁰⁰ R. JENNINGS, A. WATTS, cit., p. 54; J. NIJMAN, A. NOLLKAEMPER, "Introduction", cit., p. 2-3; P. MALANCZUK, cit., p. 64.

²⁰¹ F.M. PALOMBINO, *Gli effetti della sentenza internazionale nei giudizi interni*, Napoli, 2008, p. 161-164.

²⁰² H.P. FOLZ, cit., p. 245-246; D. SLOSS, "Treaty Enforcement", cit., p. 13-14 (also noting that a similar principle has been recognized in Polish case law).

international law in national law.²⁰³ But this does not only apply to countries where the incorporation of international law is made to some extent not contingent on the approval of the political branches. Indeed, the same can be said with regard to domestic legal orders traditionally considered to show less proclivity for the reception of international law.²⁰⁴

As shown in the previous pages, national legal systems where it is hard to single out such a fundamental axiom appear to be the exception rather than the rule. Based on the empirical data analyzed so far, probably the only real exception is provided by legal systems with distinctively authoritarian traits, such as China. Here, as argued in the previous pages, the primacy that political authorities retain in international law implementation is nearly absolute. What is most unique is that in such legal environments not only law-making authorities but also, to a large extent, law-enforcing authorities retain – at least on paper – nearly unbound discretion in international law implementation.

The concluding submission of this chapter is that the diffusion in national legal systems of a principle favoring respect of international obligations may be conceptualized in the terms of a mutualization of interests among national legal systems.²⁰⁵ Indeed, as demonstrated extensively in this chapter, all domestic law mechanisms facilitating compliance with international obligations are not superimposed from the outside, but are a byproduct of domestic factors enhancing the interest in ensuring that the state meets its international obligations. The scope of this interest, however, evidently overlaps with the corresponding interest of other states and with the interest in the effectiveness of the international legal order. In this sense, the interest in compliance with international law can be defined *mutualized*.

Nevertheless, the principle favoring compliance with international law remains one of domestic law. It interacts and blends in various ways with other interests and values of the domestic legal order and, not unlike any other principle of domestic law, may be molded, compressed or annulled depending on the contextual weight of the countervailing concerns. How national courts deal with such competing considerations will be the object of the next two chapters.

²⁰³ A. BERNARDINI, *cit.*, p. 9 (arguing that the provisions of the Italian Constitution regarding international law – including Arts. 10, 11, 35(3), and today 117(1) – have been read as “strumenti [...] dell’adeguamento, o comunque di un *favor*, nei confronti di un ordine esterno”).

²⁰⁴ B. CONFORTI, *International Law*, *cit.*, p. 44, ft. 102 (contending that this aim can be perceived even in the English practice “of incorporating the international norm into an internal rule, as long as it is somehow possible to prove that the internal rule was adopted with a view to implementing the international norm”). See also L. WILDHABER, S. BREITENMOSER, “The Relationship between Customary International Law and Municipal Law in Western European Countries”, *ZaöRV* 1988, p. 163 ff., p. 204 (finding that, at the time of writing, the principle of “friendliness to international law” underpinned most Western European legal systems, to the point that “the practice in states without an explicit provision concerning the relationship between international law and municipal law is no different from the practice in states with such a clause in their constitutions”).

²⁰⁵ The concept of mutualized interests has been formulated, in a different context, by J. D’ASPREMONT, “The Foundations of the International Legal Order”, *Finnish Yearbook of International Law* 2007, p. 219 ff., p. 229-230 (arguing that the international legal order should be understood as “based on interests rather than global values”). For a more thorough discussion on this point, see also J. D’ASPREMONT, “Contemporary International Rulemaking and the Public Character of International Law”, *Institute for International Law and Justice Working Papers* 2006/12, particularly p. 12 ff.

Chapter 3

Direct Application of International Law by National Courts and Constraints on Political Authorities

CONTENT: 1. Introduction. – 2. Theoretical foundations: national courts as the primary enforcers of international law. – 3. International law and assessment of direct applicability. – 3.1. Foundations: the PCIJ Advisory Opinion on the Jurisdiction of the Courts of Danzig. – 3.2. The outgrowth of Danzig: determination of direct applicability as a matter of international law. – 3.3. Assessment: marginal role of international law in the determination of direct applicability. – 4. The domestic law perspective: direct applicability as an issue of separation of powers. – 4.1. Direct applicability as a consequence of the incorporation of international law in domestic law. – 4.2. Constitutional limits on the direct applicability of international norms. – 4.3. Limitations on direct applicability mandated by the political branches. – 4.4. Limitations on direct applicability based on the content of the international norms. – 4.4.1. An interpretive process governed by domestic law. – 4.4.2. International norms considered incomplete or vague. – 4.4.3. International norms having an inter-state character. – 4.4.4. International norms conferring rights or faculties to states. – 4.5. Concluding assessment: direct applicability and protection of the prerogatives of the political branches. – 5. Direct applicability of international law and judicial abstention in foreign affairs. – 6. Direct applicability and international law supremacy in domestic law. – 7. Extra-legal factors impairing direct applicability of international law. – 8. Conclusions.

1. Introduction.

The previous chapter has shown that national legal systems can establish a number of formal limits to the leeway of political authorities in the implementation of international law. For such limits not to remain just hollow statements of intent, however, the *de jure* status of international law in the domestic hierarchy of norms should correspond to its position and application in practice.¹ As a matter of fact, a constitution's *friendliness* towards international law and, more generally, the status that international sources are granted in domestic law, only increase the probability of international law being implemented. Whether this actually happens depends on the practice of national organs.² For this reason, the goal of this chapter is to go beyond the formal analysis of national legal systems and to examine the functional variations occurring in practice.

¹ D. SLOSS, "Domestic Application of Treaties", in D.B. HOLLIS (ed.), *The Oxford Guide to Treaties*, Oxford, 2012, p. 367 ff., p. 368; A. NOLLKAEMPER, "The Effects of Treaties in Domestic Law", in C.J. TAMS, A. TZANAKOPOULOS, A. ZIMMERMANN (eds.), *Research Handbook on the Law of Treaties*, Cheltenham-Northampton, 2014, p. 123 ff., p. 141-142 (noting that "the explanatory power of [monism and dualism] is relatively limited" because of the practical variations among legal systems); D.B. HOLLIS, "A Comparative Approach to Treaty Law and Practice", in D.B. HOLLIS, M.R. BLAKESLEE, L.B. EDERINGTON (eds.), *National Treaty Law and Practice*, Leiden-Boston, 2005, p. 1 ff., p. 47 (the differences between states which incorporate international law and states that do not are "diluted" in practice).

² P. MALANCZUK, *Akehurst's Modern Introduction to International Law*, London-New York, 1997⁷, p. 68 ("the actual implementation of such provisions by the courts and administration will matter more than lofty constitutional texts"). See also A. DENZA, "The Relationship between International Law and National Law", in M.D. EVANS (ed.), *International Law*, Oxford, 2014⁴, p. 412 ff. (considering the constitution only "the starting point for any examination of the relationship" between international and national law) and, in the same vein, G. BARTOLINI, "A Universal Approach to International Law in Contemporary Constitutions: Does It Exist?", *Cambridge Journal of International and Comparative Law* 2014, p. 1287 ff., p. 1288.

The assessment of the functional variations among legal systems is of primary importance from the perspective of the international legal system, too. Even where international law requires states to conform their domestic laws to the standards it sets forth, the fact that international norms are formally incorporated in a national legal system is immaterial if this validity is not matched by the actual practice of national organs.³ The case law of international courts and human rights treaty bodies regarding the rule of exhaustion of local remedies is particularly illustrative in this regard. Just to name an example, in the 2001 *Ogoni* case, the African Commission of Human and Peoples' Rights found that, although the African Charter of Human Rights had been incorporated in Nigerian Law, decrees by the former Military government of Nigeria had in practice deprived the courts of jurisdiction over human rights violations; hence, it held that no domestic remedy could have been deemed available to the parties.⁴

The main focus of this chapter is the analysis of the domestic effects of international law which derive from its direct applicability by national courts. According to the terminology adopted here, direct applicability is the possibility for domestic courts to apply international law *as such* as the rule of decision.⁵ The question whether international law is directly applicable arises in consequence of the incorporation of international sources in domestic law, regardless of whether this happens through standing or *ad hoc* incorporation or whether the incorporation is realized by means of a constitutional provision or a statutory provision. The distinguishing feature of direct application, therefore, is that it does not require the adoption of further measures by the legislature or the executive other than the act which incorporates international law in domestic law. This implies, for example, that issues of direct application arise *de facto* also in common law countries adopting the Westminster approach to treaties, as long as a treaty is incorporated in domestic law by an act of Parliament.⁶

³ On this point, see also Chapter 1, Section 3.

⁴ *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Comm. No. 155/96, 27 October 2001, para. 41.

⁵ The present terminology largely conforms to the definition of direct application provided by Y. IWASAWA, "Domestic Application", *cit.*, particularly p. 21-28.

⁶ Y. IWASAWA, "Domestic Application", *cit.*, p. 27; D. SLOSS, "Treaty Enforcement in Domestic Courts. A Comparative Analysis", in D. SLOSS (ed.), *The Role of Domestic Courts in Treaty Enforcement. A Comparative Study*, Cambridge, 2009, p. 1 ff., p. 19 (noting that in the U.K. courts formally apply implementing statutes and not the treaty if the former incorporates the latter, but such a distinction is merely formal); D. SHELTON, "Introduction", in D. SHELTON (ed.), *International Law and Domestic Legal Systems. Incorporation, Transformation, and Persuasion*, Oxford, 2011, p. 1 ff., p. 11, ft 46 ("[e]ven dualist countries where treaties must be incorporated into domestic law face this issue [i.e. direct applicability]"). Admittedly, this view is not shared by a large portion of commentators: see e.g. J. CRAWFORD, *Brownlie's Principles of Public International Law*, Oxford, 2012⁸, p. 64, for the view that in the U.K. all treaties are non-self-executing. Similarly, see C.M. VÁZQUEZ, "The Four Doctrines of Self-Executing Treaties", *American Journal of International Law* 1995, p. 695 ff., p. 697; T. BUERGENTHAL, "Self-Executing and Non-Self-Executing Treaties in National and International Law", *Recueil des cours* 1992, p. 303 ff., p. 318 ("in dualist states all treaties are non self-executing"); S. BEAULAC, J.H. CURRIE, "Canada", in D. SHELTON (ed.), *cit.*, p. 116 ff., p. 130 (holding that, "[s]ince Canada uses a dualist model, it does not address treaties in terms of self-executing [...]"); S.C. NEFF, "United Kingdom", in D. SHELTON (ed.), *cit.*, p. 620 ff., p. 622 ("there is no distinction in UK law between self-executing and non-self-executing treaties"). See also L. ERADES, *Interactions between International and Municipal Law*, The Hague, 1993, p. 957 (arguing not only that "[i]n countries in which the courts apply English law, there can be no question of internal effects of treaties", but even that "[t]he same is true with regard to other countries adhering to similar doctrines, such as Austria, Germany and Italy").

To the contrary, two types of interactions of national courts with international law are not addressed by this chapter: firstly, the application of domestic legislation whose content is equal in substance to international law; and secondly, the techniques of consistent interpretation of domestic legislation, i.e. the usage of international law to interpret domestic law. This latter form of judicial application of international law – which, in certain circumstances, may yield results very similar in substance to (or barely distinguishable from) direct application – will be the subject of Chapter 4.

One further clarification as regards the terminology is required. In other contexts, the question of direct applicability is often referred to with a number of other captions, including direct effect or self-execution. These terms, however, are shrouded with ambiguity in practice.⁷ In particular, the inconsistencies surrounding the concept of self-execution suggest the adoption of the clearer expression direct application, while the other terms will be treated here as synonyms. Always for the sake of simplicity, this section focuses on direct application by national courts, although the assessment of direct applicability is just as compelling for executive organs.

Another point which needs clarification is that of the creation of private rights which can be enforced by individuals before a national court, a feature which is referred to in this section as individual enforceability of international norms. Other terms are often used to indicate similar concepts, for example standing, private cause of action, private right of action, or individual invocability. Although the precise contours of these terms may diverge in different national legal systems, they will be treated here as synonyms of individual enforceability.⁸

The relationship between direct applicability and individual enforceability is somewhat problematic. On the one hand, the two concepts are sometimes used interchangeably in literature and case law.⁹ On the other hand, several commentators have underscored that they overlap only in part.¹⁰ In point of fact, the latter terminology is more rigorous, because the

⁷ See generally M.P. VAN ALSTINE, “The Role of Domestic Courts in Treaty Enforcement. Summary and Conclusions”, in D. SLOSS (ed.), cit., p. 555 ff., p. 600 (noting the ambiguities in the idiom of the debate on this point). On the conflicting usages of the terms referred to in text, see C.M. VÁZQUEZ, “The Four”, cit. (analyzing four different usages of the term “self-execution” in U.S. case law); C.M. VÁZQUEZ, “Four Problems with the Draft Restatement's Treatment of Treaty Self-Execution”, *Brigham Young University Law Review* 2015, p. 1747 ff. (critiquing the definition of self-execution in the draft *Restatement (Fourth) of the Foreign Relations of the United States*); E.T. SWAINE, “Taking Care of Treaties”, *Columbia Law Review* 2008, p. 331 ff., p. 353 (self-executing is a “label used in maddeningly inconsistent ways”); A. NOLLKAEMPER, *National Courts*, cit., p. 117 ff. (using “direct effect” in a sense even broader than what is termed here direct application, including some forms of consistent interpretation). For yet another usage, see also T. BUERGENTHAL, cit., p. 321 (using the concept of self-execution to indicate that a treaty is subject to application by domestic organs, and that of direct application to refer to international law obligations to make a treaty self-executing).

⁸ A. NOLLKAEMPER, “The Effect of the ECHR and Judgments of the ECtHR on National Law – Comments on the Paper of Enzo Cannizzaro”, *Italian Yearbook of International Law* 2009, p. 189 ff., p. 190 (using these terms interchangeably to refer to “the entitlement of a person to rely on a rule of international law in national court proceedings”).

⁹ E.T. SWAINE, cit., p. 355 (arguing that a non-self-executing treaty is one which cannot be invoked by a party in court without implementing legislation). The two concepts have often been conflated in U.S. case law: see e.g. *Mannington Mills Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3rd Cir. 1979), p. 1298-1299 (“unless a treaty is self-executing, it must be implemented by legislation before it gives rise to a private cause of action”).

¹⁰ M.P. VAN ALSTINE, cit., p. 604; J.H. JACKSON, “Status of Treaties in Domestic Legal Systems: A Policy Analysis”, *American Journal of International Law* 1992, p. 310 ff., p. 317-318; C. FOCARELLI, *Diritto internazionale*, vol. I, Padova, 2012², p. 282 (distinguishing between “applicabilità diretta” and “azionabilità individuale”). It should be noted that the concept of individual enforceability is sometimes referred to as “direct effect” or in similar terms: see e.g. P. PICONE, A. LIGUSTRO, *Diritto dell'Organizzazione mondiale del*

creation of individual rights is not a prerequisite of direct applicability. A norm of international law may well be directly applicable by a national court without allowing private parties to enforce it against other parties: for example, an individual may only be able to invoke the norm defensively during criminal proceedings, or the norm may be actionable only by governments and not by individuals.¹¹ For this reason, it seems preferable to treat individual enforceability as a subset of direct application. A non-directly applicable norm of international law will also be, by necessity, not individually enforceable; but if it is directly applicable, it may or may not be individually enforceable.¹²

Notwithstanding the above, it is clear that the two concepts are closely interrelated and that individual enforceability represents the most prominent form that direct applicability can take.¹³ This is all the more true for the purpose of this chapter, whose main focus is on the capacity of private parties to invoke international law against state authorities.¹⁴ Moreover, as will be seen below, given the close interrelation between the two concepts, the positions of commentators and courts over the issue of individual enforceability mirror to a great extent the array of viewpoints expressed, more generally, on the nature of direct application. The interplay between these two categories will be further explored in the following pages.

The main argument advanced in this chapter is that direct applicability is fundamentally a question of domestic law and ultimately depends on considerations of separation of powers. The following pages will try to prove this argument and to untangle the complexities of the problems raised by the concept of direct application. Section 2 will briefly expound, in general terms, on the role of national organs in the domestic enforcement of international law, with a particular focus on the role of national courts in the enforcement of international law against state authorities. Sections 3 and 4 will investigate respectively into the role of international law and domestic law in the delimitation of the extent of direct application. Section 5 will attempt an assessment of the interplay between direct applicability of international law and the doctrines favoring judicial abstention in foreign affairs. Finally, the chapter will turn to examine the way in which national legal systems put into operation the constitutional provisions granting international law supremacy over primary legislation (Section 6), and some residual – and mostly extra-legal – factors which may impair the application of international law by national organs (Section 7).

commercio, Padova, 2002, p. 544 (“applicabilità diretta” versus “efficacia diretta”). This terminology was first adopted in the context of EU (then EEC) law by J. WINTER, “Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law”, *Common Market Law Review* 1972, p. 425 ff., p. 438.

¹¹ For example, pursuant to Section 102(c)(1)(A) of the U.S. Uruguay Round Agreement Act 1994, “No person *other than the United States* [...] shall have any cause of action or defense under any of the Uruguay Round Agreements [...]” (emphasis added). The WTO treaties can still be invoked by the federal authorities to challenge the validity of state laws.

¹² Y. IWASAWA, “Domestic Application”, cit., p. 148 (the creation of individual rights is not a condition for direct applicability).

¹³ As noted by A. NOLLKAEMPER, “The Effects”, cit., p. 146, the relation between direct application (which he calls direct effect) and allocation of individual rights is that of a “close connection”.

¹⁴ H.G. SCHERMERS, “The Role of Domestic Courts in Effectuating International Law”, *Leiden Journal of International Law* 1990, p. 77 ff., p. 79 (“if we want questions of international to come before courts, then we should allow individuals to raise them”).

2. Theoretical foundations: national courts as the primary enforcers of international law.

As a rule of thumb, the effectiveness of the *de jure* status of international law in a domestic legal order should be measured against the practice of all state organs.¹⁵ This includes, first and foremost, executive officials and organs of the administration. Such organs, just as much as they are called upon to apply domestic legislation, should also interpret and apply international law binding upon the state to the extent it is made part of national law. The fulfillment of this function is of paramount importance. If executive officials correctly interpret and apply international law, a corrective intervention by national courts may not be needed in the first place.¹⁶

The above being said, the general understanding in legal doctrine is that the primary role of ensuring the correct application of (domesticated) international law within a country's legal system pertains to national courts. This role is particularly sensitive in the field of *vertical* international obligations (i.e. norms regulating legal relationships between the state and private parties) and primarily, although not exclusively, of human rights obligations: here, domestic courts may have the power to verify that violations of international law are not committed by the executive or even by the legislature, where the national legal system allows. Thus, they may play the crucial role of constraining governmental action and ensuring respect of international obligations.¹⁷

From the perspective of international law, whether or not national courts embrace and fulfill this function has profound implications. Giving shape to what has become a widely accepted scholarly adage, multiple commentators have argued that domestic courts may contribute to filling the enforcement gap that international law continues to experience and that could mar its effectiveness.¹⁸ This position originates from the observation of two fundamental features of the international legal order. On the one hand, the reach of international law has expanded considerably in recent decades and has come to cover an extremely vast range of areas, spanning matters of purely domestic concern and – most importantly for the topic of this

¹⁵ B. CONFORTI, *International Law and the Role of Domestic Legal Systems*, Dordrecht-Boston-London, 1993, p. 13.

¹⁶ D. SLOSS, "Domestic Application", cit., p. 392-393. As noted by M. KUMM, "International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model", *Virginia Journal of International Law* 2003-2004, p. 19 ff., p. 22, "it is not necessary to assume that political actors, without civilizing judicial intervention, are generally inclined to run amok and disregard international legal obligations. They are not. It is generally acknowledged that most states obey most tenets of international law almost all of the time, without much judicial enforcement".

¹⁷ Y. IWASAWA, "Domestic Application of International Law", *Recueil des cours* 2015, vol. 378, p. 12 ff., p. 184 ("Direct application is an effective means to enforce international obligations against the reluctant Government and promote the rule of law in the state").

¹⁸ The body of literature on this point is extensive. See, *ex multis*, A. NOLLKAEMPER, *National Courts and the International Rule of Law*, Oxford, 2011, p. 6; S.Y. MAROCHKIN, "Contemporary Approaches of the Russian Doctrine to International Law: Identical to Western Ones?", *Baltic Yearbook of International Law* 2012, p. 29 ff., p. 50 (citing Nollkaemper); F. FRANCONI, "The Jurisprudence of International Human Rights Enforcement: Reflections on the Italian Experience", in B. CONFORTI, F. FRANCONI (eds.), *Enforcing International Human Rights in Domestic Courts*, The Hague-Boston-London, 1997, p. 15 ff., p. 15-16; R.B. LILLICH, "The Role of Domestic Courts in Promoting International Human Rights Norms", *New York Law School Law Review* 1978-1979, p. 153 ff. (advocating a greater role of U.S. courts in the enforcement of human rights treaties); H.G. SCHERMERS, cit., particularly p. 78-79.

study – legal interactions between public authorities and private individuals; but on the other hand, in the face of this substantive expansion, the development of international mechanisms of enforcement of international law has not coped with the pace.¹⁹ In the words of Benedetto Conforti, “international law displays an increasing disparity between its growth of normative content and its lack of enforcement mechanism”,²⁰ from which the Italian commentator drew the conclusion that a “truly legal function of international law” could only be achieved through the action of “domestic legal operators”.²¹

Against this backdrop, the view which sees national courts as a (actual or potential) backbone of the enforcement of international law can certainly be shared. Indeed, its foundations rest on a realistic assessment of the functioning of international law: in lack of international mechanisms of coercive enforcement, particularly against state authorities, there normally is no real alternative to enforcing international law through domestic courts. This view is further supported by two other factors. Firstly, as far as control on national governments is concerned, national courts are usually better placed than international tribunals and may even enjoy a broader autonomy from national governments.²² And secondly, several norms of international law are based on the idea that national courts can be expected to remedy wrongs done by national governments to individuals, such as the rule of exhaustion of local remedies or the obligations, included in human rights treaties, to establish effective judicial remedies against international law violations committed by state authorities.²³

But one should also be careful not to overstate or idealize the role that national courts can perform in the enforcement of international law. This chapter builds on the assumption that national courts, even where they apply international law against their governments, remain subject to the legal constraints set by their domestic legal order and that, therefore, their role as enforcers of international law has a limit: they cannot ensure compliance with international obligations beyond what is allowed by the national legal system to which they belong. This leads to the rejection of the famous theory of *dédoublement fonctionnel*, or role splitting, first expounded by Georges Scelle in 1932, according to which a domestic court enforcing international law should be regarded as fulfilling an international function, or even as a veritable organ of the international legal order.²⁴

¹⁹ See also Chapter 1, Section 1.

²⁰ B. CONFORTI, *International Law*, cit., p. 7.

²¹ *Ibid.*, p. 12.

²² E. BENVENISTI, G.W. DOWNS, “Court Cooperation, Executive Accountability, and Global Governance”, *New York University Journal of International Law and Politics* 2008-2009, p. 931 ff., p. 932 (“progress in containing executive power via judicial oversight is possible, [and] it is likely to be driven from below and led by national courts”) and p. 935 (finding reasons to be skeptical that effective control of executives can be attained at the international level). See also E. BENVENISTI, G.W. DOWNS, “National Courts, Domestic Democracy, and the Evolution of International Law”, *European Journal of International Law* 2009, p. 59 ff., p. 68-69 (“Judges in national courts are relatively more independent than judges in international tribunals”).

²³ E. BENVENISTI, “Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts”, *European Journal of International Law* 1993, p. 159 ff., p. 160. On this point, see generally A. TZANAKOPOULOS, “Domestic Courts as the ‘Natural Judge’ of International Law: A Change in Physiognomy”, in J. CRAWFORD, S. NOUWEN (eds.), *Select Proceedings of the European Society of International Law*, Oxford, 2012, p. 155 ff. On the treaty obligations to ensure effective remedies, see Chapter 1, Section 3.

²⁴ G. SCELLE, *Précis de droit des gens: principes et systématique*, Paris, 1932-1934, vol. I, p. 43, 54-56 and 217. See also G. SCELLE, “Règles générales du droit de la paix”, *Recueil des cours* 1933, vol. 46, p. 327 ff., p. 358-359 (terming the *dédoublement fonctionnel* “la loi essentielle des rapports internationaux”) and 426-427.

In order to clarify this point, it is opportune, first of all, to describe the details of this theoretical construct and to analyze the most relevant views which have been put forward by commentators in this regard. The initial configuration of *dédoublement fonctionnel* originated from Scelle's belief that any legal system proper must be equipped with organs fulfilling legislative, executive and judicial functions. In lack of centralized international organs with such roles, the celebrated French author came up with the idea that these three functions of the international legal order necessarily had to be performed, so to say, in a delocalized form. According to this view, despite remaining components of the state from an institutional (or formal) point of view, national organs would fulfill a twofold function in practice: they would act as national organs when they act within the national legal system, and as international organs fulfilling an international function whenever they are active in the international legal sphere. This way, they would function as lawmakers, executive organs or judiciary of the international legal system.²⁵

Contemporary proponents of this theory do not usually subscribe to all these theoretical premises. Those who embrace this notion confine themselves to generally noting, for instance, that "national courts may [...] compensate for the lack of international courts as a systemic force in the protection of the international rule of law [and] act as agents of the international legal order [...]".²⁶ According to another formulation of this concept, national courts should be institutionally allowed by their domestic legal orders to operate in the guise of international courts, so to overcome the constraints of national law and function as effective and impartial enforcers of international law.²⁷ Finally, Yuval Shany has expressed the view that, in cases where "national courts render decisions which apply international law *qua* law in a serious and credible manner", they should be regarded as international law adjudicators. In cases where they misapply international law they would, of course, entail the international responsibility of the state to which they are institutionally bound; but this

²⁵ A. CASSESE, "Remarks on Scelle's Theory of 'Role Splitting' (*dédoublement fonctionnel*) in International Law", *European Journal of International Law* 1990, p. 210 ff., p. 212-214. For a thorough analysis of Scelle's thought, see also generally O. DE FROUVILLE, "On the Theory of the International Constitution", in D. ALLAND, V. CHETAÏL, O. DE FROUVILLE, J.E. VIÑUALES (eds.), *Unité et diversité du droit international – Unity and Diversity of International Law: Ecrits en l'honneur du professeur Pierre-Marie Dupuy – Essays in Honour of Professor Pierre-Marie Dupuy*, Leiden-Boston, 2014, p. 77 ff.

²⁶ A. NOLLKAEMPER, *National Courts*, cit., p. 8. This theory is also embraced, *ex multis*, by Y. SHANY, "Dédoublement fonctionnel and the Mixed Loyalties of National and International Judges", in F. FONTANELLI, G. MARTINICO, P. CARROZZA (eds.), *Shaping Rule of Law Through Dialogue. International and Supranational Experiences*, Groningen, 2010, p. 27 ff.; R.A. FALK, "The Role of Domestic Courts in the International Legal Order", *Indiana Law Journal* 1964, p. 429 ff., p. 436-437 (speaking of "national courts as international institutions, that is, as institutions responsible for upholding international law and for displaying it as a common system of law peculiar to no single state"). See also J.H.F. VAN PANHUYS, "Relations and Interactions Between International and National Scenes of Law", *Recueil des cours* 1964, vol. 112, p. 1 ff., p. 8-11 (commenting on *dédoublement fonctionnel*).

²⁷ In this sense, see the resolution of the Institut de droit international "The Activities of National Judges and the International Relations of their State", *Annuaire de l'Institut de droit international* 1994, vol. 65(II), p. 318 ff., Art. 1.2 (national courts should "bas[e] themselves on the methods followed by international tribunals") and Art. 5.3 (they should "mak[e] every effort to interpret it as it would be interpreted by an international tribunal and avoid [...] interpretations influenced by national interests"). For a criticism, see O. FRISHMAN, E. BENVENISTI, "National Courts and Interpretive Approaches to International Law", in H.P. AUST, G. NOLTE (eds.), *The Interpretation of International Law by Domestic Courts. Uniformity, Diversity, Convergence*, Oxford, 2016, p. 317 ff.

phenomenon is explained by the Israeli author as a *dédoublement fonctionnel* in reverse, whereby “an international actor fulfill[s] a role under national law”.²⁸

This theory, however, has proven very controversial. Wolfgang Friedmann, for example, emphasised that national courts, *qua* organs of the national legal system, are prone to national biases even where they apply – or should apply – international law.²⁹ Antonio Cassese criticized Scelle for neglecting the cases in which national organs, although acting within the international legal sphere, pursue chiefly national interests instead of “metanational values or long-term, communal objectives”.³⁰ More recently, Eyal Benvenisti has similarly affirmed that the growing trend of national courts toward the application of international law is being driven by “parochial, even selfish concerns”, i.e. that courts instrumentally refer to international law as a tool to safeguard the leeway of national governments against “the attempts of interest groups and powerful foreign governments to influence them”.³¹

Such objections find corroboration in the practice of national legal systems. First of all, national courts’ role as enforcers of international law against national political branches is fettered, in many legal systems, by their lack of independence.³² Not all legal systems guarantee the independence of the judiciary,³³ let alone that, as is quite obvious, the formal guarantee of independence does not necessarily correspond to an *actual* independence of courts from political influence.³⁴ Where courts are not independent from political oversight, ex-post judicial control of the actions of national authorities with respect to private parties has no chances of success.³⁵ In such a domestic legal environment, the only international norms

²⁸ Y. SHANY, “*Dédoublement*”, cit., p. 39-41.

²⁹ W. FRIEDMANN, *The Changing Structure of International Law*, London, 1964, p. 146-147 (noting national courts’ “temptation of modifying doctrine when national passions are aroused”).

³⁰ A. CASSESE, “Remarks”, cit., p. 219.

³¹ E. BENVENISTI, “Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts”, *American Journal of International Law* 2008, p. 241 ff., p. 244; see also E. BENVENISTI, G.W. DOWNS, “National Courts”, cit., p. 61 (arguing that most national courts perceive themselves principally as guardians of the domestic legal order, not the international one).

³² G.M. DANILENKO, “Implementation of International Law in CIS States: Theory and Practice”, *European Journal of International Law* 1999, p. 51 ff., p. 55 (“an independent and professional judiciary is often considered to be a crucial element in the effectiveness of constitutional provisions which declare the supremacy of international law”).

³³ For express recognitions of the independence of the judiciary, see for example Article 97, para. 1, of the German Basic Law; Art. 104, para. 1, of the Italian Constitution; and Art. 120, para. 1, of the Russian Constitution. Conversely, the independence of judges is not guaranteed in the Chinese legal system. Art. 126 of the Chinese Constitution establishes a pretense of independence of the judiciary, by stating that “[t]he people’s courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals.” However, the Constitution also states, at Arts. 3, para. 3, and 128, that the courts are created and supervised by the people’s congresses. For example, the President of the Supreme People’s Court is elected and removed directly by the National People’s Congress: see Art. 11 of the P.R.C. Judges Law of 1 July 1995, amended in 2001.

³⁴ See e.g. R. TKATOVA, “Russian Spirit, Soviet Heritage and Western Temptation: Un-‘Peaceful Coexistence’ in Russia’s International Doctrine and Practice”, *Baltic Yearbook of International Law* 2012, p. 1 ff., p. 26 (although judicial independence is enshrined in the Russian constitution, “the separation of powers is unbalanced: the executive retains a decisive role, the role of Parliament is limited and the judiciary remains weak and subject to political influence”); G.M. DANILENKO, “Implementation”, cit., p. 59, ft. 9 (warning that “in all countries politics may undermine judicial independence in various and indirect and subtle ways”). For a more radical position, see E. BENVENISTI, “Comments on the Systemic Vision of National Courts as Part of an International Rule of Law”, *Jerusalem Review of Legal Studies* 2012, p. 42 ff., p. 45 (arguing that national courts “can never be truly ‘independent’ – or more accurately ‘impartial’ [...]”).

³⁵ D. SLOSS, “Domestic Application”, cit., p. 380 (without independence “transnationalism is not a viable option because judges lack institutional authority” to constrain governmental action) and p. 380, ft. 118 (citing

which can be expected to be effectively applied by the courts are inter-personal horizontal provisions of international law, which do not impinge on the powers of the political branches. The practice of China, as briefly sketched out in the previous chapter, suffices to prove this point.

Secondly, the guarantee of an actual independence of the judiciary does not necessarily imply that courts will exercise effective control over executive (or legislative) actions. Independent courts in democratic countries have traditionally maintained very different attitudes in this regard and have devised a variety of ways to shield the political branches from judicial control.³⁶

Of course, domestic case law is also replete with cases whereby national courts have faithfully applied international law vis-à-vis state authorities, and have done so not with parochial motivations, but with the purpose to ensure that international law is actually complied with.³⁷ The existence of such cases is undeniable, as acknowledged by Benvenisti himself.³⁸ According to the most restrictive formulations of the theory under analysis, only these cases should be regarded as cases of role-splitting.³⁹

However, even when they apply international sources in a credible manner against national authorities, national courts remain state organs and to detach them from the forum state of which they are a part is a pure fiction.⁴⁰ Indeed, they operate under institutional and legal constraints set forth by national law, which determines the extent of their jurisdiction and the content of the applicable law.⁴¹ More generally, it has been persuasively noted that conceiving national courts as organs occupying a position of otherness to their national legal order “overlook[s] that the domestic interpretation of international law is not simply a conveyor belt that delivers international law to the people”.⁴² In other words, national courts interpret and

the study Polity IV Project, according to which “approximately half of the countries in the world have independent judiciaries”); E. BENVENISTI, G.W. DOWNS, “Court Cooperation”, cit., p. 942; G.M. DANILENKO, “Implementation”, cit., p. 62 (“neo-authoritarian tendencies” in certain CIS states “render constitutional provisions on international law irrelevant”).

³⁶ See generally E. BENVENISTI, “Judicial Misgivings”, cit., and E. BENVENISTI, G.W. DOWNS, “Court Cooperation”, cit., p. 942-943.

³⁷ Y. SHANY, “*Dédoublement*”, cit., p. 36-39.

³⁸ E. BENVENISTI, “Reclaiming”, cit., p. 244 (mentioning *The Paquete Habana*, *Hilton v. Guyot* and *The Schooner Exchange*).

³⁹ A. NOLLKAEMPER, *National Courts*, cit., p. 7.

⁴⁰ M. IOVANE, “L’influence de la multiplication des juridictions internationales sur l’application du droit international”, *Recueil des cours* 2017, vol. 383, p. 233 ff., p. 320 (noting that “les tribunaux internes [...] fonctionnent normalement comme des instruments de la justice nationale, même quand ils sont tenus d’appliquer des normes internationales”, and adding in ft. 127: “[a] moins d’accepter la thèse du dédoublement fonctionnel qui finit par considérer tous les organes internes comme des organes internationaux”); D. AMOROSO, “Judicial Abdication in Foreign Affairs and Effectiveness of International Law”, *Chinese Journal of International Law* 2015, p. 99 ff., p. 133 (excluding that national courts could be seen as occupying a position of otherness towards the forum state to which they belong); E. BENVENISTI, “Comments”, cit., p. 45 (national courts “would betray their domestic constituencies if they would regard themselves ‘as if they were [international tribunals]’. Their allegiance is first and foremost to their own demoi, and they must remain faithful to the domestic authorities in whose name they issue their judgments”).

⁴¹ On these points, see extensively A. NOLLKAEMPER, *National Courts*, cit., p. 23 ff. and 68 ff.

⁴² K. KNOP, “Here and There: International Law in Domestic Courts”, *New York University Journal of International Law and Politics* 1999-2000, p. 501 ff., p. 505. For similar observations, see A. ROBERTS, “Comparative International Law? The Role of National Courts in Creating and Enforcing International Law”, *International & Comparative Law Quarterly* 2011, p. 57 ff., particularly p. 74 ff.

apply international norms in a way which is influenced by their legal and cultural background.⁴³ This is an inescapable feature of the national judicial function.

This being said, rejecting the idea of a fictional role splitting of national organs does not mean to subscribe to skeptical or realist views and, in particular, does not imply that national courts cannot pursue genuinely international goals or “regard themselves as administering a law of a unit greater than the state”.⁴⁴ These phenomenon, however, should be interpreted for what it really is, i.e. a manifestation of the national legal system’s reception of international law. National courts should apply international law consistently with their domestic legal framework; and they should also embrace compliance with international law as a fundamental aim to be pursued, to the extent this principle is accepted by the national legal system and, particularly, if it is enshrined in the constitution.⁴⁵ At the same time, they cannot but be expected to respect the policy limits and the countervailing values that their legal system sets forth.

The tension between these two factors in domestic case law is not the product of any “double bind”.⁴⁶ Instead, it is the manifestation of potentially competing interests which are equally recognized by the domestic legal order and, as is in the essence of the judicial function, require to be appraised and balanced.

3. International law and assessment of direct applicability.

The key question concerning the direct applicability of international law is eminently practical, and concerns the way in which a domestic court should determine whether a norm of international law which is part of domestic law should also be subject to direct application. The first step to take is to ascertain whether international law dictates workable criteria in this regard, which is the object of the present section. The next section will instead look into how much of this assessment depends on domestic law.

3.1. Foundations: the PCIJ Advisory Opinion on the Jurisdiction of the Courts of Danzig.

Speaking hypothetically, there are two ways in which international law could influence the assessment of direct applicability of its own norms. On the one hand, it could play a positive role, i.e. it could mandate direct application of certain norms to national legal systems. Or, on the other hand, it could play a negative role, barring direct application in certain situations.

⁴³ R. BAHDI, “Truth and Method in the Domestic Application of International Law”, *Canadian Journal of Law and Jurisprudence* 2002, p. 255 ff., p. 258 (critically observing that “international law’s authority is predicated, at least implicitly, upon its ability to produce homogeneous results across cultures”). See e.g. F. FRANCONI, “The Jurisprudence”, cit., p. 16 (arguing that independent judges should act, *inter alia*, “as *la bouche de la loi*, as instruments of the impartial application of international law”).

⁴⁴ H. LAUTERPACHT, *International Law: being the Collected Papers of Hersch Lauterpacht – Vol. 2*, Cambridge, 1970, p. 567.

⁴⁵ D. HALJAN, *Separating Powers: International Law Before National Courts*, The Hague, 2013, p. 218-219 (“why and how a court [...] may choose to apply international law qua law does not depend on the court’s function, but to what extent international law is recognised as legitimate and valid law”).

⁴⁶ This expression is used in A. NOLLKAEMPER, *National Courts*, cit., p. 13-15.

The view according to which the direct applicability of international law would stem from requisites set forth by international law itself is usually grounded on the Advisory Opinion on the *Jurisdiction of the Courts of Danzig*, rendered by the Permanent Court of International Justice (PCIJ) in 1928.⁴⁷ On that occasion, the Court stated that an international agreement could create rights and obligations upon individuals and be directly enforceable in national courts if the parties intended it to have such an effect.

A brief rundown on the facts and the views expressed by the PCIJ is necessary to contextualize *Danzig*. A treaty (called *Beamtenabkommen*) had been concluded between Poland and the Free City of Danzig in 1921 to regulate the status of certain railway officials who, once employed by the Danzig railways, had passed into the service of the Polish state railways. When these officials brought an action for pecuniary damages before the courts of Danzig based on the terms of the treaty, a dispute arose between the two states as to whether the treaty had been intended by the two states parties to form part of the officials' contract of service. Danzig took this view and contended that, for this reason, its courts had jurisdiction. Eventually, the Council of the League of Nations asked the Court to deliver an advisory opinion.

The Court found that claims arising from the *Beamtenabkommen* could be brought before the courts of Danzig. A passage of the Court's reasoning is particularly illustrative: "The point in dispute amounts therefore to this: Does the *Beamtenabkommen*, as it stands, form part of the series of provisions governing the legal relationship between the Polish Railways Administration and the Danzig officials who have passed into its service (contract of service)? The answer to this question depends upon the intention of the contracting Parties. It may be readily admitted that, according to a well established principle of international law, the *Beamtenabkommen*, being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts. [...] The intention of the Parties, which is to be ascertained from the contents of the Agreement, taking into consideration the manner in which the Agreement has been applied, is decisive".⁴⁸ Thus, based on the wording of certain provisions of the agreement and on some subsequent actions by the parties, the Court established that "the *Beamtenabkommen* constitutes part of the provisions of the 'contract of service', that is, 'the series of provisions which constitute the legal relationship between the Railways Administration and its employees'".⁴⁹

Although the Court used the expression "directly applicable" with reference to the agreement,⁵⁰ this short summary of the Opinion suffices to demonstrate that it did not, properly speaking, held that the *Beamtenabkommen* was directly applicable as such by the courts of Danzig. Instead, it merely held that the treaty's terms clarified that it had to be considered as incorporated into a contract; it was this contract, in turn, which was applicable

⁴⁷ *Jurisdiction of the Courts of Danzig*, Advisory Opinion, 1928 PCIJ (Series B, No. 15). On this advisory opinion, see, *ex multis*, T. BUERGENTHAL, cit., p. 322 ff.; J.H.F VAN PANHUYS, cit., p. 24-28.

⁴⁸ *Jurisdiction of the Courts of Danzig*, cit., para. 37.

⁴⁹ *Ibid.*, para. 55(2).

⁵⁰ *Ibid.*, para. 38.

by the national courts. Moreover, as pointed out by Dionisio Anzilotti, who served as the PCIJ President when *Danzig* was given, the reason why the Court found that the treaty could create individual rights enforceable in national courts, even though Poland had not enacted implementing legislation of said treaty, “c’est parce qu’elle a retenu que la partie qui s’était obligée d’adopter les dites règles ne pouvait en aucun cas se prévaloir du fait de ne pas avoir exécuté cette obligation pour se soustraire aux devoirs que l’accord lui imposait [...]”.⁵¹ In other words, Anzilotti assigned a purely remedial function to the court’s findings, pursuant to the principle of general international law according to which a state cannot justify its non-compliance with international obligations by pleading a shortcoming of its own legal system.⁵²

3.2. The outgrowth of Danzig: determination of direct applicability as a matter of international law.

As is clear from the above analysis, the *Danzig* Advisory Opinion provides a rather shaky foundation to the claim that the direct applicability of international treaties depends on what they themselves provide. But be that as it may, the idea that the issue of direct application would be positively governed by international law is still widespread among commentators.⁵³ This view also holds sway in the case law of many domestic courts, which, in order to assess the direct applicability of international treaties, have embarked in painstaking searches for the exact intent of the parties.⁵⁴

This approach to the assessment of direct applicability has taken particularly deep roots in the US, where the stance according to which the self-executing character of a treaty would depend on the terms of the treaty was expressed by the Supreme Court as early as in the 1829 *Foster v. Neilson* case.⁵⁵ On that occasion, Chief Justice Marshall famously stated that “when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the Political, not the Judicial, Department, and the Legislature must execute the contract before it can become a rule for the Court”. This oft-cited decision laid the foundations of the US doctrine of self-execution in subsequent case

⁵¹ D. ANZILOTTI, *Cours de droit international*, Paris, 1929, p. 408.

⁵² On this principle, see Chapter 1, Section 3.

⁵³ See e.g. J. KLABBERS, *International Law*, Cambridge, 2013, p. 293; P. DE VISSCHER, “Les tendances internationales des constitutions modernes”, *Recueil des cours* 1952, vol. 80, p. 511 ff., p. 560; H. RUIZ FABRI, “Is There a Case – Legally and Politically – for Direct Effect of WTO Obligations?”, *European Journal of International Law* 2014, p. 151 ff., p. 152 (arguing that “[i]t is commonly acknowledged that an international treaty can be granted direct effect only in accordance with the intention of the parties”, but that, since this intention “usually remains unformulated”, “direct effect [is made] a matter of treaty interpretation”); G. ZICCARDI CAPALDO, *Diritto globale: il nuovo diritto internazionale*, Milano, 2010, p. 379-380 (arguing that “[p]er non impedire ‘the due performance’ del trattato di cui è parte, lo Stato deve [...] dotare il proprio ordinamento di un sistema idoneo ad assicurare che trattati ed atti internazionali self-executing [...] possano essere invocati direttamente dagli individui davanti ai tribunali interni senza che siano necessarie misure attuative”).

⁵⁴ It should be noted that some authors and courts believe that only the intent of the forum state’s treaty makers should be dispositive, not the collective intent of the parties: see e.g. C.A. BRADLEY, *International Law in the U.S. Legal System*, Oxford, 2015², p. 42. This unilateral intent, as is obvious, would not establish any international law obligation of direct application. Thus, these cases will not be dealt with in this section and will instead be analyzed in the section concerning the assessment of direct applicability under domestic law.

⁵⁵ *Foster & Elam v. Neilson*, 27 U.S. 253 (1829).

law.⁵⁶ A closer examination reveals that the decisions inspired by *Foster v. Neilson* have expressed at least two conflicting views.

On the one hand, some courts have looked for express indications by the parties. For example, in *McKesson v. Iran*, the DC Court of Appeals held that a private cause of action should be granted only if a treaty unambiguously provides for it itself.⁵⁷ The court had been called upon to decide whether the 1955 US-Iran Treaty of Amity provided the plaintiff company with a private cause of action against Iran, which had allegedly expropriated investment without compensation. According to the court, Art. IV(2) of the treaty, pursuant to which “property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation”, created no private cause of action, because it did not “explicitly called upon the courts for enforcement”. As an example of a treaty expressly providing for a cause of action, the court cited the Warsaw Convention’s provisions on air carrier liability, which expressly mention the possibility to bring an “action for damages”.⁵⁸

Most courts, on the other hand, have embraced a more liberal view concerning the determination of the intention of the parties, and have acknowledged that it could be inferred from the terms of the treaty even if the latter is not considered explicit. For example, in *Fujii v. California*, the self-executing character of some provisions of the UN Charter was in doubt.⁵⁹ The plaintiff, a Japanese national, contended that a Californian law escheating his land was discriminatory by reason of race, thus violating both the US Constitution and a purported norm prohibiting racial discrimination set forth by Arts. 55 and 56 of the Charter. Pursuant to Art. 55, the UN “shall promote [...] universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”; to which Art. 56 adds the following: “All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55”.

The Supreme Court of California expressed the following principle: “In determining whether a treaty is self-executing courts look to the intent of the signatory parties as manifested by the language of the instrument, and, if the instrument is uncertain, recourse may be had to the circumstances surrounding its execution”. Based on this view, the court ruled against the self-executing character of Arts. 55 and 56 of the Charter. Interestingly, by way of example, the court also stated that the language of other provisions of the Charter, namely Arts. 104 and

⁵⁶ For a comprehensive analysis, see Y. IWASAWA, “The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis”, *Virginia Journal of International Law* 1986, p. 627 ff.

⁵⁷ *McKesson Corporation and ors v. Iran and ors*, Appeal judgment, 539 F 3d 485 (DC Cir 2008), ILDC 1105 (US 2008).

⁵⁸ Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed in Warsaw on 12 October 1929 and amended in 1955 and 1975, 137 LNTS 11. See particularly Arts. 17 ff. For example, pursuant to Art. 24, “any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention [...]”. On the Warsaw Convention as a treaty establishing a private cause of action, see also *Curtin v. United Airlines, Inc.*, 275 F.3d 88, 90 (D.C. Cir. 2001) (holding that “Article 18 of the Warsaw Convention [...] creates a cause of action against an air carrier for loss or damage to a passenger's checked baggage.”).

⁵⁹ *Sei Fujii v. State of California*, 38 Cal.2d 718 (1952). On this case, see J. MENZEL, “Sei Fujii v California Case”, *Max Planck Encyclopedia of Public International Law* 2008.

105, was “clear and definite” in manifesting the intention of the framers of the Charter “to make [those] provisions effective without the aid of implementing legislation”.⁶⁰

The contextual approach to the search for the intention of the parties, as perfected in *Fujii*, has often been adopted in later US case law.⁶¹ The most prominent example in this regard can be found in the Supreme Court judgment in the case of *Medellin v. Texas*,⁶² which held that the ICJ *Avena* judgment was not self-executing in US courts and thus could not supersede inconsistent state law pursuant to the US Constitution’s Supremacy Clause.⁶³ Although the Supreme Court had already been confronted with the effects of ICJ decisions in the aftermath of the *Breard* and *LaGrand* cases, and had already declined to implement them on different grounds, *Medellin* was the first occasion in which the Court dealt with the domestic effects of a final ICJ judgment.⁶⁴

In order to better grasp the Court’s reasoning on the matter of self-execution, the facts of the case ought to be briefly summarized. The *Avena* case originated from an action in diplomatic protection brought by Mexico on behalf of 51 of its nationals who had been sentenced to

⁶⁰ The provisions referred to by the court read as follows. Art. 104: “The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes”; Art. 105(1) and (2): “The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes” and “Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization”.

⁶¹ See, inter alia, *Diggs and The South West Africa People’s Organization v. Richardson and The Fouke Co.*, Appeal judgment, 555 F.2d 848 (DC Cir 1976), ILDC 2136 (US 1976) (quoting the passage of *Fujii* reported in text); *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542 (D.D.C. 1981); *Columbia Marine Services, Inc. v. Reffet, Ltd.*, 861 F.2d 18, 21 (2d Cir.1988) (“an action arises under a treaty only when the treaty expressly or by implication provides for a private right of action”).

⁶² *Medellin v. Texas*, 552 U.S. 491 (2008). A second question dealt with by the Supreme Court, which it answered in the negative, was whether the President had authority to enforce the ICJ judgment against states in lack of a congressional act. For a general account of this case, see M.E. MCGUINNESS, “Medellin v. Texas”, *American Journal of International Law* 2008, p. 622 ff. For negative appraisals, see, *ex multis*, D. SLOSS, “Taming Madison’s Monster: How to Fix Self-Execution Doctrine”, *Brigham Young University Law Review* 2015, p. 1691 ff.; J. QUIGLEY, “A Tragi-Comedy of Errors Erodes Self-Execution of Treaties: *Medellin v. Texas* and Beyond”, *Case Western Reserve Journal of International Law* 2012, p. 403 ff. For positive views, see J.O. MCGINNIS, “Medellin and the Future of International Delegation”, *Yale Law Journal* 2008-2009, p. 1712 ff.; T. CRUZ, “Defending U.S. Sovereignty, Separation of Powers, and Federalism in *Medellin v. Texas*”, *Harvard Journal of Law and Public Policy* 2010, p. 25 ff.

⁶³ *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, Judgment, ICJ Reports 2004, p. 12.

⁶⁴ With regard to the two ICJ cases mentioned in text – both concerning, as *Avena*, the right to consular access of death row inmates – the U.S. Supreme Court refused to give effect to ICJ provisional measures ordering the stay of execution. For the ICJ decisions, see *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Provisional Measures, Order of 9 April 1998, ICJ Reports 1998, p. 248; *LaGrand Case (Germany v. United States of America)*, Provisional Measures, Order of 3 March 1999, ICJ Reports 1999, p. 9; and *LaGrand Case (Germany v. United States of America)*, Judgment, ICJ Reports 2001, p. 466. With regard to the former decision, the Supreme Court denied relief to the Paraguayan national *Breard* by applying procedural default rules: see *Breard v. Greene*, 523 U.S. 371 (1998). As to the latter case, which Germany sought to enforce before U.S. courts, the Supreme Court declined jurisdiction in *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999). In *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), which ruled over two consolidated consular access cases brought by a Honduran national and a Mexican national not listed in *Avena*, the Supreme Court held that the Vienna Convention on Consular Relations does not prevent the application of state procedural default rules. On this saga, see, *ex multis*, B. SIMMA, C. HOPPE, “From *LaGrand* and *Avena* to *Medellin* – A Rocky Road Toward Implementation”, *Tulane Journal of International and Comparative Law* 2005, p. 7 ff.; M.K. ADDO, “Interim Measures of Protection for Rights under the Vienna Convention on Consular Relations”, *European Journal of International Law* 1999, p. 713 ff.

death in the US without being informed of their rights under Art. 36 of the Vienna Convention on Consular Relations (VCCR). Pursuant to Art. 36(1)(b) VCCR, the authorities of a state party must inform “without delay” any foreign national under arrest or detention of a right to contact the consular office of the individual’s state of nationality. In *Avena*, the ICJ found that the US had breached its obligations under the VCCR and that “the legal consequences of this breach [had] to be examined and taken into account in the course of review and reconsideration” of the criminal convictions.⁶⁵ Medellín, one of the 51 Mexican nationals covered by *Avena*, filed a petition for reconsideration before the Texas Court of Criminal Appeals, but the court held that procedural default rules established by the laws of Texas prevented Medellín from raising this type of challenge to his conviction.

Medellín then lodged an appeal before the Supreme Court, restating his claim that the US international obligations resulting from the ICJ judgment superseded state procedural default rules under the US Constitution’s Supremacy Clause. In deciding the case, the Supreme Court rested on two ground assumptions: firstly – pursuant to a principle which it traced back to *Foster v. Neilson* – that only self-executing treaties can function as federal law and trump state legislation; and secondly, that the domestic legal effects of an ICJ judgment depend on the domestic status of the underlying international treaties.⁶⁶ In accordance with these premises, the Court proceeded to ascertain whether the relevant treaties were, in fact, self-executing, and did so primarily by searching for the intention of the parties (although not exclusively, since it occasionally referred to the unilateral intent of the US treaty-makers). This is what the Court referred to when it mentioned its “obligation to interpret treaty provisions to determine whether they are self-executing”; and indeed, it also held that the negotiation and drafting history and the “postratification understanding” of the signatory states could be referred to in the assessment of self-execution.⁶⁷ The ensuing parts of the judgment are a compendium of the most prominent techniques devised in US case law to assess the intention of the parties in the field of self-execution.

As regards Art. 94(1) of the UN Charter, pursuant to which “[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party”, the Court drew indications of a negative intent of the parties in the expression “undertakes to comply”, which it held to constitute – quoting from the Executive *amicus curiae* brief – “a commitment on the part of UN Members to take *future* action through their political branches to comply with an ICJ decision”.⁶⁸ This part of the judgment follows in the footsteps of those decisions which, particularly in the US but also elsewhere, including Italy,⁶⁹ have drawn indications of a purported negative intent of the parties in treaty

⁶⁵ *Case Concerning Avena and Other Mexican Nationals*, cit., para. 140.

⁶⁶ *Medellín v. Texas*, cit., p. 499 and 514-515. It may be to some extent surprising that the court acknowledged that the domestic status of international decisions depends on the status of the underlying treaties. In order to bar the direct application of the ICJ decision, the court might also have resorted to a literalist interpretation of the U.S. Constitution’s Supremacy Clause, which mentions treaties but not rulings of international tribunals. This literalist argument was one of those listed in C.A. BRADLEY, “Enforcing the Avena Decision in U.S. Courts”, *Harvard Journal of Law and Public Policy* 2006, p. 119 ff., particularly p. 121, which for the rest anticipates most of the views later espoused by the majority in *Medellín*.

⁶⁷ *Medellín v. Texas*, cit., p. 509 and 501.

⁶⁸ *Ibid.*, p. 502-503 (emphasis in the original).

⁶⁹ T. SCOVAZZI, “The Application by Italian Courts of Human Rights Treaty Law”, in B. CONFORTI, F. FRANCONI (eds.), cit., p. 59 ff., p. 60-61.

provisions calling for domestic implementation of the treaty.⁷⁰ In *Tel-Oren v. Libya*, for example, the court bluntly held that “[i]f the treaty calls for the signatory nations to enact legislation implementing the agreement, the treaty is considered executory and no private rights are conferred by it”.⁷¹ And in *United States v. Postal*, it was contended that provisions beginning with “each party shall take the necessary legislative measures to...” are “uniformly declared executory”.⁷²

Secondly, in order to dismiss the direct applicability of Art. 94(2) of the Charter, which provides for the possibility to resort to the UN Security Council in case a party fails to comply with an ICJ judgment, the Court in *Medellín* applied the rule according to which treaty provisions establishing implementation mechanisms at the international level would signal an implied intention not to make the treaty self-executing. In the view of the majority, referral to the Security Council would constitute, in the intention of the parties, “the sole remedy for noncompliance”. Rather confusingly, however, the Court immediately conflated this argument with a reference to the unilateral intent of the US treaty-makers, in that it held that “[i]n light of the UN Charter’s remedial scheme, there is no reason to believe that the President and the Senate signed up for such a result”.⁷³

Thirdly, and finally, besides the textual approach, the Court in *Medellín* turned to the “postratification understanding” of the states parties as a confirmation of the non-self-executing character of ICJ judgments. Specifically, the Court – by having recourse to the plaintiff’s memorial and the *amici curiae* briefs – could not identify “a single nation that treats ICJ judgments as binding in domestic courts”.⁷⁴ This argument reminds that of the Fifth Circuit Court of Appeals in the aforementioned *United States v. Postal* decision, where a treaty was held non-self-executing in the US because, *inter alia*, that treaty had been ratified by countries where treaties are not generally considered part of domestic law.⁷⁵

Also in other countries, domestic courts frequently conceptualize the direct applicability of international agreements as a feature which would be regulated by international law.⁷⁶ Although in less straightforward terms than in US case law, effects of this conception can be

⁷⁰ See e.g. International Covenant on Civil and Political Rights (16 December 1966), 999 UNTS 171, Art. 2, para. 2: “Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”

⁷¹ *Hanoch Tel-Oren v. Libyan Arab Republic*, cit.

⁷² *United States v. Postal and ors*, Appeal judgment, 589 F2d 862 (5th Cir 1979), ILDC 1876 (US 1979).

⁷³ *Medellín v. Texas*, cit., p. 504-505.

⁷⁴ *Ibid.*, p. 511-512. It should be noted, however, that with an apparent twist of logic the Court did not look at the practice of the states parties to the U.N. Charter (whose intent, after all, it had been looking for throughout the judgment) but at the practice of the states parties to the VCCR and to its Optional Protocol.

⁷⁵ *United States v. Postal and ors*, cit. The court held that “[t]he Convention [in question] is a multilateral treaty which has been ratified by over fifty nations, some of which do not recognize treaties as self-executing. It is difficult therefore to ascribe to the language of the treaty any common intent that the treaty should of its own force operate as the domestic law of the ratifying nations.”

⁷⁶ As noted by D. SHELTON, “Introduction”, cit., p. 11, references to the intention of the parties as dispositive in matters of direct application are frequent. For cases from Germany and France, see respectively S.A. RIESENFELD, “The Doctrine of Self-Executing Treaties and GATT: A Notable German Judgment”, *American Journal of International Law* 1971, p. 548 ff. (commenting a judgment of the Tax Court of Hamburg holding “that the executory or self-executing character of treaties was to be determined on the basis of the intent of the contracting parties, as deduced from the language and the character of the treaty as well as from other relevant materials”); E. DECAUX, “France”, in D. SHELTON (ed.), cit., p. 207 ff., p. 233.

found also in the case law of Italian courts. It is useful, in particular, to briefly describe the approach taken by the Italian courts with regard to the direct applicability of the European Convention on Human Rights (ECHR).

Starting from the 1980s, the applicability of ECHR provisions as rules of decision in domestic proceedings had been relatively uncontroversial in Italian case law. The Court of Cassation adopted this approach in a spate of oft-cited judgments which included, for example, its decisions in the *Iaglietti*, *Polo Castro* and *Medrano* cases.⁷⁷ However, in judgment 349/2007, the Italian Constitutional Court seemingly steered toward the non direct applicability of the ECHR by ordinary judges. The court, in particular, reached this conclusion by referring to the text and the aims of the Convention, which, in its view, would not sustain a direct applicability of the treaty. In the court's words, "at present, no elements relating to the structure and objectives of the ECHR, or to the characteristics of its specific norms, allow [...] to maintain that the legal position of the individuals may be directly and immediately beneficiary of it, independently from the traditional legal filter of their respective States, so as to entitle the judge not to apply the conflicting national rule".⁷⁸

It should be noted that it is controversial whether the Constitutional Court really intended to bar any direct application of ECHR provisions or, instead, it only aimed to direct ordinary courts not to apply ECHR provisions in lieu of inconsistent domestic legislation and to refer all apparent conflicts to the Constitutional Court itself: in the latter case, the application of the ECHR as the governing rule of a case should still be possible when it does not entail any conflict with existing legislation.⁷⁹ Subsequent judgments of the Constitutional Court only added fuel to this confusion. In judgment 311/2009, for instance, the court first conceded that "it is a matter for the national court, as the ordinary court applying the Convention, to apply the relevant provisions", but added immediately afterwards that "the ordinary courts [...] cannot proceed to apply the ECHR provision (at present, in contrast to Community law which is endowed with direct effect) in place of the contrasting internal provision".⁸⁰ In fact, although the court apparently conflated the two planes, considering international law directly applicable does not necessarily imply that national courts are also entitled to disapply domestic legislation inconsistent with international law: they may well be endowed with the former power, without possessing the latter.⁸¹

⁷⁷ *Iaglietti* case, Judgment No. 6978 of 14 July 1982; *Polo Castro* case, Judgment No. 15 of 8 May 1989; First Criminal Section, *Medrano* case, Judgment of 12 May 1993.

⁷⁸ On this aspect of the judgment, see G. CATALDI, M. IOVANE, "International Law in Italian Courts 1999-2009: An Overview of Major Methodological and Substantive Issues", *Italian Yearbook of International Law* 2009, p. 3 ff., p. 22-23.

⁷⁹ On this point, see the comment by C. FOCARELLI in *EP v Municipality of Avellino*, No 349/2007, ILDC 301 (IT 2007) ("the intent of the Constitutional Court seems clear enough: by stating that the ECHR rules were not directly applicable, the court only meant that an ordinary court could not simply abstain from applying a national rule conflicting with a ECHR rule, as actually occurs with EC law, but was bound to refer the case to the Constitutional Court itself for a constitutionality ruling. However, the words used by the Constitutional Court, if taken literally, implied that both the ECHR and the ECtHR's decisions are only directed to the legislature").

⁸⁰ Judgment No. 311 of 16 November 2009, para. 6.

⁸¹ On the difference between the two planes, see e.g. U. VILLANI, "Sull'efficacia della Convenzione europea dei diritti dell'uomo nell'ordinamento italiano dopo il Trattato di Lisbona", *Diritti comparati* 2012, available at <<http://www.diritticomparati.it/sullefficacia-della-convenzione-europea-dei-diritti-delluomo-nellordinamento-italiano-dopo-il-tratt/>>. See also Section 7 below.

Be that as it may, because the Constitutional Court expressly held that the limitations that it set on the domestic effects of the ECHR derived from the structure of the Convention itself, most ordinary judges have understandably interpreted the court's holding in Judgment 349 as barring the direct applicability of the ECHR *in toto*.⁸² For example, in the 2008 *Zullo* judgment, the Court of Cassation denied the direct applicability of the Convention because it held, citing the abovementioned 2007 Constitutional Court judgment, that "the ECHR does not create a supranational legal system and therefore does not produce directly applicable norms in the contracting states".⁸³ More recently, in 2015, the Council of State referred to the same constitutional judgment and held that the only domestic effects that ECHR provisions can produce are the declaration of unconstitutionality of inconsistent legislation by the Constitutional Court and the consistent interpretation of domestic law, thus excluding any form of direct applicability by ordinary judges (i.e. different from the Constitutional Court).⁸⁴ To conclude this paragraph, it is opportune to draw attention to one last point. When courts look for a positive intention of the parties (or for any explicit or implicit indication arising from the text of an international agreement) to make a treaty directly applicable, they obviously do so by assuming that there is a presumption (or a default rule) of non-applicability, which can only be defeated if the treaty allows or requires the direct applicability of its norms. Also this position represents an outgrowth of *Jurisdiction of the Courts of Danzig*, insofar as the PCIJ held that "according to a well established principle of international law [...] an international agreement cannot, as such, create direct rights and obligations for private individuals".

Usually, this negative presumption is explicitly or impliedly based on a conception of international law as a system of obligations primarily among states. In the most restrictive understanding of this presumption, only states should be allowed to enforce international law obligations, so that individuals' reliance on international law should be barred by reason of the structure of the international legal order itself.⁸⁵ For example, in *Matta-Ballesteros v. Henman*, the US Seventh Circuit Court of Appeals argued that "[i]t is well established that individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved".⁸⁶ But such a drastic assertion is as rare as it is blatantly untenable, because it is commonplace for contemporary international law to provide for

⁸² Note that not all ordinary judges have conformed to this view. For a recent restatement in favor of the direct applicability of ECHR provisions, see for example Court of Cassation, Judgment No. 19985 of 30 September 2011, para. 2 ("va ribadito l'orientamento di questa Corte circa l'immediata rilevanza nel nostro ordinamento delle norme della suddetta Convenzione (art. 6) e circa l'obbligo per il giudice dello Stato di applicare direttamente la norma pattizia").

⁸³ Judgment No. 14 of 3 January 2008 (translation by the author).

⁸⁴ Council of State, Adunanza Plenaria, Order of 4 March 2015, para. 11.

⁸⁵ On this point, see generally G. MANNER, "The Object Theory of the Individual in International Law", *American Journal of International Law* 1952, p. 428 ff. (critiquing, *inter alia*, the assumption that the individual "has no right and duty whatsoever" under international law and that "he cannot invoke it for his protection or violate its rules").

⁸⁶ *Matta-Ballesteros v. Henman*, 896 F.2d 255 (7th Cir. 1990); see also, e.g., *United States v. Zabaneh*, 837 F.2d 1249 (5th Cir. 1988) (arguing, with reference to some international extradition treaties, that "[t]reaties are contracts between or among independent nations. The treaty provisions in question were designed to protect the sovereign interests of nations, and it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress. [...] Because neither Guatemala nor Belize protested appellant's detention and removal to the United States, appellant lacks standing to raise the treaties as basis for challenging the court's jurisdiction.").

obligations owed by states towards individuals as well as for interpersonal obligations.⁸⁷ More commonly, the negative presumption is deemed rebuttable by the intent of the states parties, as in *Medellín*,⁸⁸ or by the objectives and goals of the agreement, as in judgment 349/2007 of the Italian Constitutional Court.

However, not all courts which resort to the intention of the parties as the primary criterion of direct application also rely on a background presumption against direct application. The Dutch case law provides a relevant alternative. Although the Supreme Court has commonly referred to the intention of the parties as a first step in the assessment of direct applicability, it has not consider the lack of a positive intent as evidence that the parties meant to exclude direct applicability. Instead, it has held that, where a clear intention lacks, “only the content of the provision itself [is] decisive”.⁸⁹

3.3. Assessment: marginal role of international law in the determination of direct applicability.

All the views described above, however, do not withstand closer scrutiny. Specifically, this paragraph intends to prove that – save for specific exceptions – the direct applicability of international norms is not dependent on any international obligations. This is true both on the positive plane (i.e. international law does not *require* direct application) and on the negative plane (i.e. international law does not *prohibit* it either).

First of all, let us examine the soundness of purported positive international obligations in the field of direct application. To start off by stating the obvious, nothing prevents the parties to a treaty from specifically agreeing to make said treaty directly applicable in their national courts. No doubt, in such a case the direct applicability might still be barred by domestic law, for example by reason of specific constitutional requirements. However, in presence of an express treaty provision positively imposing direct application, such domestic law limitations would constitute a breach of the treaty.

But this scenario, although conceivable, is mostly theoretical. Indeed, it has been conclusively demonstrated that a specific positive intent of states parties to this regard almost never exists. In particular, this has been proven to be the case with all major multilateral human rights instruments, most notably the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the European Convention on Human Rights.⁹⁰ This is not at all surprising, because many countries would not agree to ratify a treaty (particularly a human rights treaty) mandating direct application against state authorities in domestic courts. Unsurprisingly, all multilateral instruments do not deal with this point expressly. In the aforementioned case *McKesson v. Iran*, the court failed to consider that the express language of the Warsaw Convention is obviously influenced by

⁸⁷ See Chapter 1, Section 1.

⁸⁸ *Medellín v. Texas*, cit., p. 500. Note that in ft. 3 the Court referred to an *additional* presumption against individual enforceability of self-executing treaties.

⁸⁹ A. NOLLKAEMPER, “The Netherlands”, in D. SLOSS (ed.), cit., p. 326 ff., p. 341-342; E.A. ALKEMA, “Netherlands”, in D. SHELTON (ed.), cit., p. 407 ff., p. 417 (both citing the Dutch Supreme Court judgment of 30 May 1986, NJ 1986, 688).

⁹⁰ For an extensive demonstration of these points, see Y. IWASAWA, “Domestic Application”, cit., p. 36-53. See also T. BUERGENTHAL, cit., p. 336.

the fact that it establishes inter-personal civil obligations, not a cause of action against state authorities.

National courts go astray also when they look for an implied obligation to make a treaty directly applicable. In particular, the fact that a treaty establishes *vertical* relations between a state and individuals, thereby creating rights and obligations for the latter, cannot be regarded as creating “a presumption of individual standing” in national courts.⁹¹ From the perspective of international law, such a presumption does not hold. Indeed, a person with treaty rights is not necessarily entitled by international law to a particular forum.⁹²

Conversely, it is equally true that the lack of a positive intent does not imply the existence of a negative intent of the parties as regards direct application. In particular, the existence of a negative intent should not be fabricated by courts based on treaty provisions whose scope has no relation whatsoever with the question of direct application. This is the case of treaty clauses calling for domestic implementation, which, as noted by the PCIJ as early as in *Exchange of Greek and Turkish Populations*, are no more than pleonastic restatements of the obvious obligation of states parties to comply with the treaty.⁹³ The same goes for provisions establishing international mechanisms of implementation. The argument, put forward by the majority in *Medellín*, that Art. 94(2) of the UN Charter would provide for the *only* means of implementation of ICJ decisions is altogether arbitrary,⁹⁴ all the more so when considering that implementation by the national judiciary is precisely a way to avoid non-compliance on the international plane and an ensuing action by the Security Council.

⁹¹ In the sense that these obligations would create such a presumption, see A. NOLLKAEMPER, “The Effects”, cit., p. 137.

⁹² For a thorough demonstration of this point, see S.D. MURPHY, “Does International Law Obligate States to Open Their National Courts to Persons for the Invocation of Treaty Norms That Protect or Benefit Persons?”, in D. SLOSS (ed.), cit., p. 61 ff., particularly p. 83-85 (proving that the maxim *ubi jus ibi remedium* does not apply in international law and concluding that “international law has never viewed the entitlement to a remedy as entailing a right to compulsory dispute settlement”). See, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, ICJ Reports 2012, p. 99, p. 142-144 (holding that state immunity applies even though no effective alternative means of redress are available in domestic legal systems to victims of *jus cogens* violations). In general international law, a very limited exception could be seen in the concept of denial of justice. The exact nature and scope of this concept are controversial in scholarship, commentators having defined the prohibition of denial of justice as a rule of substantive, merely procedural, or intermediate character. Suffice it to say that, however interpreted, the principle only applies to the treatment of aliens; moreover, it does not concern only the domestic implementation of international norms, but also the application of domestic law to aliens. For these reasons, this norm is of limited interest to this study. On denial of justice, see, for a substantive understanding, G. FITZMAURICE, “The Meaning of the Term ‘Denial of Justice’”, *British Yearbook of International Law* 1932, p. 93 ff. (defining denial of justice as any injury against foreigners committed by any state authority). For a procedural understanding, see J. PAULSSON, *Denial of Justice in International Law*, Oxford, 2005. For a comprehensive analysis of denial of justice and its relationship to the fair and equitable treatment standard in international investment law, see F.M. PALOMBINO, *Il trattamento «giusto ed equo» degli investimenti stranieri*, Bologna, 2012, p. 61-99. See also F. FRANCONI, “Access to Justice, Denial of Justice and International Investment Law”, *European Journal of International Law* 2009, p. 729 ff.; J. CRAWFORD, *Brownlie’s*, cit., p. 619-620.

⁹³ *Exchange of Greek and Turkish Populations*, Advisory Opinion of 21 February 1925 (Series B, No. 10): the PCIJ held that a treaty clause of implementation “merely lays stress on a principle which is self-evident, according to which a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken”. On this point, see Y. IWASAWA, “Domestic Application”, cit., p. 163-166; B. CONFORTI, *International Law*, cit., p. 30-33; T. BUERGENTHAL, cit., p. 337-338.

⁹⁴ D. SLOSS, “Taming”, cit., p. 1723 (correctly noting that this provision only identifies one option and nowhere implies that it is the only one).

Equally arbitrary is the argument that relies on the implementation practice of other states. As shown in Chapter 2, many countries commonly implement treaties by transfusing their content in domestic sources of law. Obviously, these countries would hardly undertake any obligation to make a treaty directly applicable in court, because such an obligation would sit uneasily with their constitutional setting. When such states are involved, then, one cannot expect any express or tacit manifestation of the intent of the parties to make the treaty directly applicable.⁹⁵ But this attitude has nothing to say on the domestic effects of international obligations in different constitutional settings.

Finally, it should be underscored that the intent criterion would only apply to international treaties and would not be able to provide any indication as to the direct applicability of other sources of international law, such as customary international law, which are also commonly applied in the practice of national courts.⁹⁶ Suffice it to remember the practice of Italian courts, which routinely apply norms of general international law pursuant to Art. 10 of the Italian Constitution, for example in the fields of state immunity and of fundamental human rights.⁹⁷

Based on the above, one must conclude that international law does not *positively* or *negatively* determine whether or not its rules are directly applicable by domestic organs.⁹⁸ Nothing in a treaty's silence on the point of the direct applicability of its norms allows to interpret that silence as either an obligation or a prohibition: it simply indicates that the background principle of neutrality applies, so that the point of direct applicability is a matter of domestic concern.⁹⁹ The criterion of the intent of the parties, in particular, is unworkable, because such an intent is in fact purely fictitious. In the words of Carlos M. Vázquez, “[a] court that relies on the particular wording of a treaty provision as reflecting the parties’ intent to require legislative implementation is almost certainly attributing to the parties a nonexistent intent”.¹⁰⁰

⁹⁵ S.A. RIESENFELD, “The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?”, *American Journal of International Law* 1980, p. 892 ff., p. 898 (noting that “the intent of other state parties is irrelevant, and even the treaty-making authorities of the state party whose domestic law is involved may have little or no choice according to the governing constitutional provisions”).

⁹⁶ But see J. KLABBERS, *cit.*, p. 295 (seemingly ruling out direct applicability of customary international law because it would not be possible to identify the intention of the parties in such a case).

⁹⁷ For various relevant examples of direct application of customary international law in Italian courts, see e.g. the saga concerning compensation proceedings brought against Germany by Italian victims of crimes committed by Nazi troops on Italian territory during the Second World War. For example, in its landmark judgment in the case of *Ferrini v. Repubblica Federale di Germania*, No. 5044, of 11 March 2004, the Cassation directly applied customary international law on state immunity and fundamental human rights (the latter *qua jus cogens*). On this case, see M. IOVANE, “The Ferrini Judgment of the Italian Supreme Court: Opening Up Domestic Courts to Claims of Reparation for Victims of Serious Violations of Fundamental Human Rights?”, *Italian Yearbook of International Law* 2004, p. 165 ff.

⁹⁸ Y. IWASAWA, “The Doctrine”, *cit.*, p. 650 (criticizing what he termed the “given-theory” of direct application); A. NOLLKAEMPER, “The Effects”, *cit.*, p. 145 (“[i]nternational law is neutral on the question of direct effect”); T. BUERGENTHAL, *cit.*, p. 320; L. REYDAMS, *Universal Jurisdiction: International and Municipal Legal Perspectives*, Oxford, 2003, p. 137, ft. 40 (“Whether an international convention can be directly applicable in the domestic legal order is [...] purely a matter of national law”).

⁹⁹ As rightly noted by J.J. PAUST, “Self-Executing Treaties”, *American Journal of International Law* 1988, p. 760 ff., p. 782, “no treaty is inherently non-self-executing”.

¹⁰⁰ C.M. VÁZQUEZ, “Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties”, *Harvard Law Review* 2008-2009, p. 599 ff., p. 607.

An actual intent of the parties was undoubtedly lacking in the case of *Medellín*. In the *Avena Interpretation* Judgment, the ICJ declined to render any interpretation on whether the obligation to ensure review and reconsideration, as provided for in *Avena*, was self-executing before US courts. The Court had simply no international obligation to interpret on that point: as it argued, “[t]he *Avena* Judgment nowhere lays down or implies that the courts in the United States are required to give direct effect to paragraph 153 (9). [...] the Judgment leaves it to the United States to choose the means of implementation, not excluding the introduction within a reasonable time of appropriate legislation, if deemed necessary under domestic constitutional law. Nor moreover does the *Avena* Judgment prevent direct enforceability of the obligation in question, if such an effect is permitted by domestic law”.¹⁰¹ The Supreme Court’s findings on the direct applicability of *Avena*, in conclusion, were based on non-existing international obligations. This could support the view that the intent criterion served as a cover-up for the judges’ policy preferences.¹⁰²

In conclusion of this section, one may finally summarize what portion, if any, of the issue of direct applicability is determined by international law, by either mandating or barring direct application by national courts. This role is very marginal. The parties to a treaty may express a positive or a negative intent as regards its direct application, which however is an extremely rare occurrence.¹⁰³ In the case of international law sources different from treaties, such as customary international law, international law never regulates this issue. Insofar as international law does not determine the extent of its direct applicability in domestic courts, this question cannot but become a question of domestic law.

4. The domestic law perspective: direct applicability as an issue of separation of powers.

Given that international law does not appear to be the controlling factor of the assessment of direct applicability, one cannot but turn to domestic law to determine the criteria relevant in this regard.¹⁰⁴ This section will demonstrate, first of all, that direct application, as a question of domestic law, should be treated as strictly interconnected to the formal status that international law is granted in domestic legal orders. Afterwards, the following pages will critically address the limits on direct application which may derive from domestic law. The argument advanced throughout this section is that the extent of the direct applicability of international norms ultimately depends on considerations of domestic separation of powers

¹⁰¹ *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America)*, Judgment, ICJ Reports 2009, p. 3, para. 44.

¹⁰² D. SLOSS, “Taming”, cit., p. 1724 and 1734.

¹⁰³ A. NOLLKAEMPER, *National Courts*, cit., p. 135 (“the role of intent is most obvious when states express a negative intent: that is, an intention not to allow for direct effect”). For an example, see Art. 37(1) of the US-Switzerland Treaty on Mutual Assistance in Criminal Matters (25 May 1973) 27 UST 2019, according to which “the existence of restrictions in this Treaty shall not give rise to a right on the part of any person to take action in the United States to suppress or exclude any evidence or to obtain other judicial relief with requests under this Treaty”. In *Cardenas v. Smith*, 733 F. 2d 909, 918 (DC Cir. 1984) this provision was held to bar the direct application of the treaty. The insertion of such provisions in treaties is a clear influence of the U.S. domestic practice on the treaty-making.

¹⁰⁴ T. BUERGENTHAL, cit., p. 317 (arguing that self-execution is a domestic law question).

and, most notably, on the courts' fear to overstep the boundaries of the legislative or executive functions.¹⁰⁵

4.1. Direct applicability as a consequence of the incorporation of international law in domestic law.

In principle, domestic legal force, i.e. the incorporation of international law in domestic law, and the concept of direct applicability operate on distinct planes. The formal status acquired by sources of international law in a domestic legal system does not necessarily imply that those sources can be applied by national organs. Were it otherwise, as in the views of certain judicial and scholarly doctrines,¹⁰⁶ it would be pointless to speak of direct applicability in the first place, as the only meaningful issue would be the assessment of domestic validity.

And yet, even if logically and practically distinct, the two issues are strictly entangled. Generally speaking, if a national legal system really equates international law to a source of domestic law, one would expect it to be applied domestically on an equal footing with a municipal source. If one accepts this premise, the direct applicability of international law by domestic organs should be regarded as the most immediate logical consequence of making international law formally part of domestic law, as well as the clearest way to make this *de jure* status effective in practice.¹⁰⁷ Admittedly, international norms that acquire domestic validity may have a number of other domestic effects different from direct applicability, but

¹⁰⁵ The idea that the issue of direct application is a matter of domestic constitutional setting has been expressed by A. VON BOGDANDY, "Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law", *International Journal of Constitutional Law* 2008, p. 397 ff., p. 403: "The doctrine's constitutional dimension rests on the fact that it affects various constitutional issues, such as the separation of powers between the domestic institutions [...]"; J.H. JACKSON, cit., p. 333, 336; A. NOLLKAEMPER, "The Effects", cit., p. 144 (noting that limitations on direct application are used by national courts to fix issues of separation of powers).

¹⁰⁶ In the US, for example, non-self-executing treaties have sometimes been held "not part of the law of the land": see US Supreme Court, *Trans World Airlines Inc. v. Franklin Mint Corp.*, 466 US 243 (1984) (holding that "the Convention is a self-executing treaty, [hence] no domestic legislation is required to give it force of law in the United States). On this point, see C.M. VÁZQUEZ, "The Four", cit., p. 702-703. For an example of conflation of domestic legal force and direct application outside of the US context, see N. MARIE-SCHWARTZENBERG, "Droit russe", in A. CASSESE, M. DELMAS-MARTY (eds.), *Juridictions nationales et crimes internationaux*, Paris, 2002, p. 259 ff., p. 263 (arguing that in Russia all treaties would be directly applicable pursuant to Art. 15 of the Russian Constitution). For a critique of this stance, see S. VASILIEV, A. OGORODOVA, "Implementation of the Rome Statute in Russia", *Finnish Yearbook of International Law* 2005, p. 197 ff., p. 201-202.

¹⁰⁷ The functional equivalence between incorporated international law and domestic law is underscored by many authoritative commentators. See, *ex multis*, B. CONFORTI, "National Courts and the International Law of Human Rights", in B. CONFORTI, F. FRANCONI (eds.), cit., p. 3 ff., p. 7 (once international law acquires formal validity in domestic law, it "must necessarily be applied by the courts"); B. CONFORTI, "Cours général de droit international public", *Recueil des cours* 1988, vol. 212, p. 9 ff., p. 31 (advocating that international law "soit plainement considéré comme un droit à l'intérieur de l'Etat et qu'il y reçoive toutes les garanties qui reviennent au droit, en particulier les garanties juridictionnelles"; emphasis in the original); C.M. VÁZQUEZ, "The Four", cit., p. 708 (the Supremacy Clause allocates courts the duty to enforce treaties "as they enforce the Constitution and federal statutes"); T. GINSBURG, "Locking In Democracy: Constitutions, Commitment, and International Law", *New York University Journal of International Law and Politics* 2005-2006, p. 707 ff., p. 749 ("we assume that the domestic judiciary will enforce international legal norms in the manner the constitutional designer provides for"); J.I. CHARNEY, "Judicial Deference in Foreign Relations", *American Journal of International Law* 1989, p. 805 ff., p. 808 ("Since rules of international law have been incorporated into the law of the United States, they are enforceable by the courts, as is any other applicable law").

none of them seems to be as pervasive and effective.¹⁰⁸ Hence, it is safe to state that the lack of direct applicability deprives domestic validity of *most* of its effects.

The proposition according to which the possibility to apply international law as the rule of decision is an immediate logical consequence of domestic validity requires some explanation. Firstly, it should not be understood as implying that, once incorporated, international law should be applied by national organs no matter what. A large portion of this section will deal precisely with the analysis of the factors which bar or limit the direct applicability of international law despite it being full-fledged part of domestic law. This in no way contradicts the view that direct applicability is fundamentally a matter of domestic law. Indeed, the same phenomenon affects the judicial application of domestic legislation: there, too, there can be norms which, despite being valid and binding, are deemed non-directly applicable or non-judicially enforceable.¹⁰⁹ For example, in the early years of the Italian Constitution, many constitutional provisions were considered “merely aspirational” by the courts, which refused to apply them.¹¹⁰ The distinction between directly applicable and non-directly applicable constitutional provisions (*norme precettive* and *norme programmatiche*) was later discarded by the Constitutional Court in 1956.¹¹¹ A definitely more extreme situation is that of China, where the whole constitutional text is considered to be non-justiciable.¹¹²

Secondly, this statement implies that, once a norm of international law is made part of a domestic legal system, what should logically follow from the perspective of domestic law is a presumption of direct applicability. This involves a paradigm shift compared to the presumption against direct applicability which usually underpins the conceptions of direct applicability as based on international law. In the present perspective, the existence of grounds for non application should be demonstrated *in concreto*.¹¹³ This determination is a

¹⁰⁸ J.H. JACKSON, cit., p. 313 and 319 (noting that non-directly applicable international norms can have “certain ‘internal effects’ other than ‘statutelike direct application’”, such as “influencing the interpretation of municipal statutes and laws, operating through a statutory provision that makes reference to ‘international law’ or a treaty standard, or influencing an appraisal of public policy”). It should be noted, however, that at least some of these effects can be achieved in judicial practice also without formal incorporation of international law: see Chapter 4 for a discussion on the use of international sources in the interpretation of domestic law. See also Y. IWASAWA, “Domestic Application”, cit., p. 191-192 (a non-directly applicable treaty may be subject to judicial review, for example by a constitutional court, or in some contexts may be the basis for granting compensation for failure to implement).

¹⁰⁹ P. REUTER, “Principes de droit international public”, *Recueil des cours* 1961, vol. 103, p. 423 ff., p. 472.

¹¹⁰ B. CONFORTI, *International Law*, cit., p. 29, ft. 63.

¹¹¹ See Constitutional Court, Judgment No. 1 of 5 June 1956.

¹¹² B. AHL, “Exploring Ways of Implementing International Human Rights Treaties in China”, *Netherlands Quarterly of Human Rights* 2010, p. 361 ff., p. 379. Non-justiciability is a common feature of socialist constitutions, which are “normally regarded as general guidelines for the actions of State bodies and citizens” rather than “strict legal prescriptions”: see A. CASSESE, “Modern Constitutions and International Law”, *Recueil des cours* 1985, vol. 192, p. 342 ff., p. 348. The Chinese Supreme People’s Court has applied the Constitution only once in a 2001 case (*Qi Yuling v. Chen Xiaoqi et al.*, 5 SPC Gazette (2001), 158) which has however remained an isolated precedent: see R.J. MORRIS, “China’s Marbury: Qi Yuling v. Chen Xiaoqi – The Once and Future Trial of Both Education & Constitutionalization”, *Tsinghua China Law Review* 2012, p. 273 ff. The issue of direct applicability of the Chinese constitution is currently the subject of intense (and, to date, inconclusive) scholarly discussion: see T.E. KELLOGG, “Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China”, *International Journal of Constitutional Law* 2009, p. 215 ff.

¹¹³ Y. IWASAWA, “Domestic Application”, cit., p. 161; J.J. PAUST, “Self-Executing”, cit., p. 773-775; *Restatement (Third) of Foreign Relations Law of the United States*, 1986, §111(3) and (4) (recognizing non-self-execution as an exception to the courts’ duty to apply international law as law). But see P. DE VISSCHER, “Les

matter for the national organ which is called upon to apply international law to a particular case. Indeed, both the concept of direct applicability and its limits have been elaborated predominantly by national courts, in lack of conclusive indications on this point by domestic legislation.

From what has been said, it follows that, being a subset of direct applicability, also the individual enforceability of international norms should be regarded fundamentally as a matter of domestic law.¹¹⁴ Once international law is made part of a domestic legal system, courts should apply it in a manner equal to statutory rights;¹¹⁵ or, in other words, like direct application in general, individual enforceability should be considered from the perspective of the normal effects stemming from the domestication of international law.¹¹⁶ This point was described by the US Supreme Court in *Head Money Cases* in the following terms: “A treaty [...] is a law of the land, as an act of Congress is whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute”.¹¹⁷ Although the court mischaracterized self-execution only in terms of individual enforceability, it addressed the latter issue in a way which can be fully shared.

Indeed, there seems to be no reason why an international source should be treated any different from a domestic source as for the derivation of individual rights. Differentiating between the two would lead to illogical and inequitable outcomes. One might conclude, for example, that the individual enforceability of a treaty which has been incorporated by means of a mechanism of automatic standing incorporation or by *ad hoc* incorporation should be different from the individual enforceability of a domestic statute which textually reproduces the words of the treaty. In both situations, however, the content of domestic law is the same; hence, in both cases “the recognition of individual rights derived from a treaty” should equally follow “standard interpretive rules for legislation”.¹¹⁸

Under the approach proposed here, then, the extent to which private parties can seek judicial redress in court for international law violations will depend on the contours of the power of judicial review in every particular national legal system, i.e., ultimately, on grounds of separation of powers. In countries where the right of access to court is conceived broadly, a presumption of individual enforceability should be in place. This is the case, for instance, of

tendances internationales des constitutions modernes”, *Recueil des cours* 1952, p. 511 ff., p. 560 (espousing the opposite presumption of non-self-execution).

¹¹⁴ M.P. VAN ALSTINE, cit., p. 604.

¹¹⁵ See “Judicial Enforcement of International Law Against the Federal and State Governments” (Note), *Harvard Law Review* 1990-1991, p. 1269 ff., p. 1283; C.M. VÁZQUEZ, “The Four”, cit., p. 719-720 (arguing that “[i]t is a mistake [...] to assume that a treaty may be enforced in court by private parties only if it confers a private right of action itself. Many treaties, like most constitutional provisions and many federal statutes, do not themselves purport to confer private rights of action. [...] A treaty that does not itself address private enforcement is no less judicially enforceable by individuals than constitutional or statutory provisions that do not themselves address private enforcement. The ‘private right of action’ to enforce a treaty may have its source in laws other than the treaty itself.”).

¹¹⁶ A. NOLLKAEMPER, *National Courts*, cit., p. 109-110 (noting that the recognition of standing to individuals in domestic law has no connection with whether international law relies that individual to rely on it).

¹¹⁷ *Head Money Cases*, 112 U.S. 580 (1884).

¹¹⁸ M.P. VAN ALSTINE, cit., p. 607 (the passage quoted in text is referred by the author to the approach of “traditionalist dualist states” to treaty obligations once they have been implemented through legislation).

Germany, where Art. 19(4) of the Basic Law generally provides: “Should any person’s rights be violated by public authority, he may have recourse to the courts”.¹¹⁹ Similarly, pursuant to Art. 24 of the Italian Constitution, “Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law”.

A presumption of individual enforceability should also be the natural effect of the US Supremacy Clause with regard to international treaties.¹²⁰ The early jurisprudence of the US courts relied consistently on this premise, then termed “canon of liberal interpretation” of treaties.¹²¹ Such a presumption has also been formulated in more recent Supreme Court case law, including e.g. *United States v. Alvarez-Machain*.¹²² However, the current posture of US courts seems to have steered towards an opposite presumption against the individual enforceability of international agreements. Notably, this position was expressed in an obiter by the Supreme Court in *Medellín v. Texas*, which seemingly presented the presumption against the creation of individually enforceable rights as one distinct from – and additional to – the aforementioned presumption against self-execution.¹²³ The US courts are the only ones to have adopted this approach, at least among Western countries.¹²⁴ On the basis of the arguments made above, this approach is deeply unpersuasive: indeed, it sits uneasily with the

¹¹⁹ B. SIMMA, D.E. KHAN, M. ZÖCKLER, R. GEIGER, “The Role of German Courts in the Enforcement of International Human Rights”, in B. CONFORTI, F. FRANCONI (eds.), *Enforcing International Human Rights in Domestic Courts*, The Hague-Boston-London, 1997, p. 71 ff., p. 71.

¹²⁰ C.M. VÁZQUEZ, “The Four”, cit., p. 700 (arguing that “[b]y virtue of the Supremacy Clause [...] the judicial mechanisms available generally to enforce laws in the United States are available to enforce treaties” and that the Supremacy Clause “gives treaties the character of municipal law enforceable in domestic courts at the behest of private individuals”); T.M. FRANCK, A.K. THIRUVENGADAM, “International Law and Constitution-Making”, *Chinese Journal of International Law* 2003, p. 467 ff., p. 472-473.

¹²¹ See the U.S. Supreme Court judgment *Shanks v. Dupont*, 28 U.S. 242 (1830) (holding that “[i]f the treaty admits of two interpretations and one is limited and the other liberal, one which will further, and the other exclude private rights, why should not the most liberal exposition be adopted?”). On this point see D. SLOSS, “United States”, in D. SLOSS (ed.), cit., p. 504 ff., p. 525-526 (describing the “canon of liberal interpretation” as expressing the idea that “treaties should be interpreted in a way that promotes broader protection for the rights of private parties”; however, in more recent times the canon has been invoked “as a rule that promotes more liberal use of extratextual sources”, often with the practical effect of compressing private rights: see *ibid.* p. 537).

¹²² *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), in which the Supreme Court held: “The Extradition Treaty has the force of law, and if [...] it is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation”; consequently, the Court held that the private individual could invoke treaty provisions also in lack of a formal protest of the offended government. See also *United States v. Puentes*, 50 F.3d 1567 (11th Cir. 1995) and *Sanchez-Llamas v. Oregon*, cit. (Breyer J., dissenting, quoting from the U.S. government’s amicus brief that alleged that “there is a long-established presumption that treaties [...] do not create judicially enforceable individual rights” and affirming that “no such presumption exists”).

¹²³ *Medellín v. Texas*, cit., p. 506, ft. 3: citing in part from *Restatement (Third) of Foreign Relations Law of the United States*, cit., §907, Comment a, p. 395, the Court held that “[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that ‘[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts’”. For applications of a negative presumption against direct application, see also *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990), p. 1533: in this case, the plaintiff had invoked treaty provisions defensively during criminal proceedings, but the court held that “individuals lack standing to assert violations of international treaties in the absence of a protest from the offended government”; *Cardenas v. Dretke*, 405 F.3d 244 (5th Cir. 2005), denying defensive reliance on the Vienna Convention on Consular Relations; *United States v. Rashed*, 83 F. Supp. 2d 96 (D.D.C. 1999), barring defensive invocation of the Convention on Suppression of Unlawful Acts against the Safety of Civil Aviation.

¹²⁴ D. SLOSS, “Domestic Application”, cit., p. 384.

Supreme Court's long-lasting stance according to which, "when possible, courts should fashion remedies to give contents to rights".¹²⁵

This has inevitably led US courts to adopt double standards in inferring private causes of action from treaties and from domestic legal texts, which has brought about incongruous results. Again with reference to *McKesson v. Iran*, which espoused a negative presumption of direct applicability, the court also dismissed the argument that an implied cause of action could be recognized, as a matter of federal common law, based on the text of the Treaty of Amity. The plaintiff's position, however, appeared persuasive. Indeed, it had been contended that Art. IV(2) of the treaty was practically identical to a passage of the US Constitution's Fifth Amendment ("nor shall private property be taken for public use, without just compensation") whose enforceability by private individuals had never been put in doubt.¹²⁶

4.2. Constitutional limits on the direct applicability of international norms.

Having determined the rule, one should now look for the exceptions. The inquiry should commence with an analysis of national constitutions.

Constitutions usually do not deal explicitly with the issue of direct application of international law. References to the concept of direct applicability or self-execution have sometimes been inserted in legislative acts, including some recent constitutions, but the wording of such references is so vague that all they end up doing is to furnish a circular definition of the concept of direct application which is of little or no practical use. For example, Art. 4 of the Constitution of Kazakhstan provides that treaties "are directly implemented except in cases when the application of an international treaty shall require the promulgation of a law". Art. 231(4) of the South African Constitution states that "any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic [...]". Finally, Art. 5(3) of the Russian Law of International Treaties (which, despite not being of formally constitutional nature, regulates the making and the domestic application of treaties in general terms) states that "the provisions of officially published international treaties of the Russian Federation, which do not require the promulgation of domestic acts of application, shall operate in the Russian Federation directly". These provisions do nothing more than to acknowledge the existence of treaty provisions which are not directly applicable.¹²⁷ The identification *in concreto* of such cases is left entirely to the judiciary or to subsequent intervention by the political branches.

By contrast, it is certainly possible to draw implied limitations on direct application from the provisions of a constitution, but this conclusion should not be reached lightly. The preferable approach is to rule out direct application only in cases where, according to the constitution, a formal act of the legislature is required to regulate the subject-matter of the international norm at issue. In such cases, indeed, there are inescapable reasons of separation of powers.

¹²⁵ "Judicial Enforcement of International Law Against the Federal and State Governments" (Note), cit., p. 1282.

¹²⁶ *McKesson v. Iran*, cit., paras. 11-12.

¹²⁷ I.I. LUKASHUK, "Treaties in the Legal System of Russia", *German Yearbook of International Law* 1997, p. 141 ff., p. 161 (the Russian law on treaties "does no more than confirm the well-known separation of treaties into self-executing and non-self-executing ones").

Examples of such limitations abound in the practice of states. The most obvious field where this is the case is that of substantive criminal law:¹²⁸ the constitutional settings of many countries do not allow for the creation of new criminal offences by means of direct application of international law and require a specific act of parliament.

In Russia, for example, the direct application of international norms in the field of substantive criminal law is considered to be barred pursuant to the principle of legality, which is protected under art. 54(2) of the Constitution and art. 3(1) of the Criminal Code.¹²⁹ Art. 25(2) of the Italian Constitution (“No punishment may be inflicted except by virtue of a law in force at the time the offence was committed”), has identical implications.¹³⁰ In *R v. Jones*, the House of Lords held that customary international law cannot have the effect of creating new offences in the law of England.¹³¹ Finally, US courts have considered treaty norms to be non-self-executing in certain subject-matters deemed to be within exclusive congressional power by reason of Art. I of the US Constitution. These matters include, besides criminalization of conducts, appropriation of money and declaration of war.¹³² It should be underscored, however, that most Art. I congressional powers are not considered exclusive and cannot sustain a claim for non-self-execution.¹³³

It is noteworthy that the prohibition of the direct application of international criminal law as for the creation of new offences may not prevent courts from drawing other types of direct effects from the relevant international norms, for example in the field of procedural law. In the *Scilingo* case, the Supreme Court of Spain refused to convict the defendant for crimes against humanity based on the constitutional principle of legality and instead convicted him for murder. Significantly, however, the Court did apply the customary international law norms on the prohibition of core crimes to justify the exercise of universal jurisdiction.¹³⁴

4.3. Limitations on direct applicability mandated by the political branches.

A second category of limitations on direct application includes those which are required by the political authorities. Such prescriptive restrictions are usually given on an *ad hoc* basis.¹³⁵

A relevant example can be found in the US practice to attach declarations to the instruments of ratification of human rights treaties with a view to making those treaties non-self-executing. These declarations are usually adopted by agreement of the Senate and the Executive.¹³⁶ For example, when ratifying the International Covenant on Civil and Political Rights, the US declared that “the provisions of articles 1 through 27 of the Covenant are not self-executing”. In *Sosa v. Alvarez-Machain*, the Supreme Court seemingly considered this

¹²⁸ For a detailed analysis of this topic, see W.N. FERDINANDUSSE, *Direct Application of International Criminal Law in National Courts*, The Hague, 2006.

¹²⁹ S. VASILIEV, A. OGORODOVA, cit., p. 202-203. For a different view, see W.N. FERDINANDUSSE, cit., p. 37-38.

¹³⁰ B. CONFORTI, *Diritto internazionale*, Napoli, 2014¹⁰, p. 339.

¹³¹ *R v. Jones (Margaret)* (2007) 1 AC 136. See S.C. NEFF, cit., p. 627.

¹³² E.T. SWAINE, cit., p. 354; C.M. VÁZQUEZ, “The Four”, cit., p. 718.

¹³³ C.A. BRADLEY, *International Law*, cit., p. 49-50.

¹³⁴ *Scilingo Manzorro (Adolfo Francisco) v. Spain*, Appeal judgment, No 798, ILDC 1430 (ES 2007).

¹³⁵ E.T. SWAINE, cit., p. 353.

¹³⁶ For a survey of the U.S. practice in this field see C.A. BRADLEY, J.L. GOLDSMITH, “Treaties, Human Rights, and Conditional Consent”, *University of Pennsylvania Law Review* 2000, p. 399 ff., particularly p. 446 ff. For a documented historical analysis of the U.S. Senate’s hostility to human rights treaties, see N.H. KAUFMAN, *Human Rights Treaties and the Senate: A History of Opposition*, Chapel Hill-London, 1990.

declaration as dispositive, in that it argued that “the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts”.¹³⁷ In other contexts, limitations on the direct applicability of international agreements by US courts have also been mandated by statutes. For example, pursuant to Section 102(c)(1)(A) of the 1994 Uruguay Round Agreement Act, “No person other than the United States [...] shall have any cause of action or defense under any of the Uruguay Round Agreements [...]”. This provision, then, is devised to prevent the invocation of the WTO agreements by private parties, while the federal authorities remain free to rely on such agreements to challenge the validity of state laws and to support the legitimacy of their acts.

Similarly to the US, it had for some time been the practice of Germany to attach treaty declarations to preclude direct applicability. For example, upon ratification of the Convention on the Rights of the Child, Germany declared, *inter alia*, “that domestically the Convention does not apply directly. It establishes state obligations under international law that the Federal Republic of Germany fulfils in accordance with its national law, which conforms with the Convention”. This declaration was later withdrawn in 2010. These manifestations of intent have usually been treated as binding by German courts.¹³⁸

As far as the legal effects of these limitations are concerned, one may wonder if they are sufficient to deprive *tout court* international law of all forms of domestic applicability. Although this question may, of course, receive different answers depending on the national legal environment, it is nonetheless possible to make some general remarks on the role of political authorities in delimiting the extent of direct application.

As regards declarations of non-self-execution and like acts, it should be first of all underscored that, differently from what some scholars have claimed, they do not produce any international obligation not to make the treaty applicable in court. It is mistaken to argue that “non-self-execution declarations are [...] part of the terms of the treaties. They are included within the US instrument of ratification that defines the nature of the US obligations to other countries”.¹³⁹ This argument neglects that these declarations are by no means equivalent to reservations: since human rights treaties are neutral toward questions of direct application, non-self-execution declarations do not impinge on the scope of the treaty obligations.¹⁴⁰ For the very same reason, it is also true that such declarations are certainly not prohibited in terms of international law.¹⁴¹

¹³⁷ *Sosa v. Alvarez-Machain*, 542 US 692 (2004).

¹³⁸ B. SIMMA, D.E. KHAN, M. ZÖCKLER, R. GEIGER, cit., p. 79-80.

¹³⁹ C.A. BRADLEY, J.L. GOLDSMITH, “Treaties”, cit., p. 448.

¹⁴⁰ Y. IWASAWA, “Domestic Application”, cit., p. 77.

¹⁴¹ C.A. BRADLEY, J.L. GOLDSMITH, “Treaties”, cit., p. 423. Note that, in the same pages, the two authors also defend the legitimacy of substantive reservations attached by the U.S. to human rights treaties. It is outside the scope of the present work to determine whether these acts (which, unlike non-self-execution declaration, are reservations proper) should be considered to defeat the object and purpose of the treaty, pursuant to Art. 19(c) of the 1969 Vienna Convention on the Law of Treaties. For more insights on the debate surrounding this question, see generally C.J. REDGWELL, “Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties”, *British Yearbook of International Law* 1993, p. 245 ff. For the argument that (some of) the U.S. reservations to the ICCPR are invalid, see W.A. SCHABAS, “Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?”, *Brooklyn Journal of International Law* 1995, p. 277 ff.

As is usually the case with issues of direct application, then, the prescriptive limitations at hand should be analyzed within the framework of domestic law. The argument advanced here is that the national constitutional framework on the domestic status of international law is decisive in the assessment of the legitimacy of the limitations under scrutiny. Specifically, in countries where international law is incorporated with a status higher than ordinary legislation, limiting the domestic effect of international law should simply be outside the powers of the political branches. Chapter 2 has demonstrated that these kinds of constitutional mechanisms of international law incorporation are intended precisely to curb the lawmaking power. The purpose of the constitutional provisions would be defeated by the reintroduction of political leeway through the back door of non-self-execution declarations or of statutes limiting direct applicability, which would deprive incorporated international norms of a significant portion of their ordinary effects *qua* domestic law.

Conversely, the conclusion is necessarily different with regard to implementation mechanisms which do not grant international sources any primacy over domestic legislation. Again with reference to Chapter 2, it has been shown that the policy rationale of such provisions is to leave to the legislature the possibility to breach international law, as a safety valve protecting the democratic decision-making process. If the legislature is constitutionally entitled to exercise this option by removing international norms from the realm of domestic law, then it should *a fortiori* be able to rule out the direct applicability of international sources.

This raises, however, certain problems as regards who and how can exercise this power. In principle, if international law is automatically incorporated with a status equal to ordinary legislation, this authority is vested by the constitution in the legislature and should also be exercised through legislation, i.e. a genuine embodiment of democratic will. This option should not be presumed, because it runs counter to the background principle favoring compliance with international obligations which underpins any constitutional mechanism of automatic standing incorporation.

In this regard, another perplexing feature of *Medellin* is that, by resorting to a negative presumption of self-execution, the US Supreme Court in fact interpreted the inaction of Congress and the ICJ judgments in favor of non-compliance – or, in other words, the Court looked for positive actions by the Congress showing the latter’s intent to comply with international law. That inaction, however, provided no indication that the Congress intended to breach international law.¹⁴² This way, the Court caused the violation of treaty obligations even if “no national political authority ever decided to violate the treaty”.¹⁴³ This outcome is in tension with the US constitutional setting, which does allow for international law violations but entrusts this power to the federal legislature. In practice, the US Supreme Court arrogated this authority to itself, despite being an organ which lacks political accountability.¹⁴⁴

¹⁴² O.A. HATHAWAY, S. MCELROY, S.A. SOLOW, “International Law at Home: Enforcing Treaties in U.S. Courts”, *Yale Journal of International Law* 2012, p. 51 ff., p. 53 (“the Court reasoned that the treaties granting jurisdiction to the ICJ were non-self-executing and thus not enforceable unless implemented into law by Congress. They were, in other words, among those treaties the legislature must execute. Congress, of course, had not passed implementing legislation – probably because nearly everyone had long assumed that the treaties at issue were legally binding, making implementing legislation unnecessary”).

¹⁴³ D. SLOSS, “Taming”, cit., p. 1692.

¹⁴⁴ *Ibid.*, p. 1694.

Similar considerations lead to reject the view according to which the determinant factor in the assessment of direct applicability should be the unilateral intent of (any) state authorities, thereby including the Executive, in that one of the main goals of automatic standing incorporation of international law is precisely to constrain executive action.¹⁴⁵

With this in mind, while it is clear that limitations on direct application mandated by law – like in the case of Section 102 of the Uruguay Round Agreement Act – are wholly admissible in terms of national constitutional setting, some doubts may arise with regard to non-self-execution declarations. It should be noted, in particular, that their approval can be triggered by a minority of the US Senate,¹⁴⁶ that the Executive has played, in practice, a decisive role in their drafting and approval,¹⁴⁷ and that, in any event, they may often be hardly justified by the substantive content of the treaty provisions at issue.¹⁴⁸ These factors sit uneasily with the policy rationale underlying the relevant constitutional mechanisms of international law implementation.

Although it is outside the scope of this work to conclusively determine whether, in light of these factors, these declarations are legitimate as a matter of US constitutional law, it is nonetheless possible to share the view of those who believe that they should be interpreted in a restrictive manner, in order to limit their effects on the ordinary constitutional setting. Notably, David Sloss has put forward the view that non-self-execution declarations should be interpreted only as limiting the individual enforceability of treaties, not all forms of direct application: for example, individuals should be able to invoke human rights treaties defensively in the course of criminal proceedings.¹⁴⁹ This restrictive interpretation would be acceptable not only in cases where prescriptive limitations, which may be included in statutes, leave a broader margin for interpretation (a relevant example is the text of the US Military Commission Act, which bars invocation of the Geneva Conventions by individuals)¹⁵⁰ but, more broadly, in all cases where the express intent of the Senate is not to bar *in toto* the domestic effects of international treaties.¹⁵¹

¹⁴⁵ For the view that the unilateral intent of the U.S. should be dispositive, see C.A. BRADLEY, *International Law*, cit., p. 42. The same view has been expressed in the *Restatement (Third) of Foreign Relations Law of the United States*, cit., §111, Comment h: “In the absence of special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations. Accordingly, the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action”.

¹⁴⁶ S.A. RIESENFELD, F.M. ABBOTT, “The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties”, *Chicago-Kent Law Review* 1991, p. 571 ff., p. 572-601.

¹⁴⁷ J.J. PAUST, “Avoiding ‘Fraudulent’ Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights”, *DePaul Law Review* 1992-1993, p. 1257 ff.

¹⁴⁸ L.F. DAMROSCH, “The Role of the United States Senate Concerning ‘Self-Executing’ and ‘Non-Self-Executing’ Treaties”, *Chicago-Kent Law Review* 1991, p. 515 ff., p. 532 (convincingly advocating that the Senate should discontinue the practice of non-self-execution declarations and, at best, limit them to cases where a parliamentary intervention in the implementation phase is imposed by the material content of the norms to apply).

¹⁴⁹ D. SLOSS, “The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties”, *Yale Journal of International Law* 1999, p. 129 ff., p. 165-170.

¹⁵⁰ See Section 5(a): “No person may invoke the Geneva Conventions or any protocol thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories”).

¹⁵¹ For the opposite view that such declarations would bar all judicial effects of treaties because such would be the arguable intent of the U.S. treaty makers, see C.A. BRADLEY, J.L. GOLDSMITH, “Treaties”, cit., p. 421.

A few remarks are needed also on the requirement of publication, when it is established by law as a precondition for the domestic operation of international treaties.¹⁵² This requirement may be used by national authorities as a tool to prevent the direct application of international law and, for this reason, can be analyzed in this paragraph.

In France, for example, treaties must be published before they can affect the rights and duties of individuals. This, in practice, gives authority to the executive to decide whether or not a treaty should be applied in domestic courts.¹⁵³ Conferring such an authority to the executive, as is obvious, gives rise to particularly alarming consequences in authoritarian contexts. Judgment No. 24128/1984 of the Supreme Court of Chile, rendered under Pinochet's rule, is emblematic. On that occasion, the applicant had invoked some provisions of ICCPR, which had been ratified by Chile and promulgated by presidential decree. The court, however, held the Covenant non judicially enforceable because it had not been formally published.¹⁵⁴

As a matter of fact, the rationale of the requirement of publication of treaties lies in the necessity to "let [...] the persons concerned know the rules they must observe".¹⁵⁵ Accordingly, the most correct way to construe this limitation on the operation of international law is that unpublished treaties should not be invocable to the detriment of individuals, but may well have the effect to constrain the actions of public authorities. Consistently with this rationale, for example, the Russian Constitutional Court ruled that the direct application of provisional treaties impinging on human rights without prior publication was contrary to the constitutional principle of legal certainty.¹⁵⁶ This approach has also been adopted by the Dutch courts. Art. 93 of the Constitution of the Netherlands says that only published treaties may have direct application; however, courts have held that treaties have nonetheless binding effect on state organs, which must comply with them even though they have not been published.¹⁵⁷

4.4. Limitations on direct applicability based on the content of the international norms.

The third and last category of limitations on direct application groups the restrictions which derive from the substantive content of international law. Unlike the two cases analyzed above, these limitations are exclusively judicial constructs. For example, national courts in a great many jurisdictions refuse to apply international law which they deem too vague, undetermined or incomplete, or which they consider as exclusively directed at regulating

¹⁵² On the requirement of publication for the domestic operativeness of treaties, see D.B. HOLLIS, cit., p. 42-43.

¹⁵³ P.M. EISEMANN, R. RIVIER, "National Treaty Law and Practice: France", in D.B. HOLLIS, M.R. BLAKESLEE, L.B. EDERINGTON (eds.), cit., p. 253 ff., p. 266-267 ("The Government may therefore block the application of the agreement at the domestic level by failing to publish it").

¹⁵⁴ Chile, Supreme Court, Decision of 22 October 1984 No. 24128, *Fallos del mes* 1984, p. 588. On this judgment, see F.O. VICUÑA, F.O. BAUZÁ, "The Implementation of International Law of Human Rights by the Judiciary: New Trends in the Light of the Chilean Experience", in M.T. INFANTE CAFFI, R. CAVE SCHNÖHR (eds.), *Solucion judicial de controversias. El derecho internacional ante los tribunales internacionales e internos*, Santiago, 1995, p. 15 ff., p. 20; A. CASSESE, "Modern Constitutions", cit., p. 397.

¹⁵⁵ G. SPERDUTI, "Dualism and Monism: A Confrontation to Be Overcome", *Italian Yearbook of International Law* 1977, p. 31 ff., p. 41.

¹⁵⁶ *Ushakov v. Russian Federation*, Constitutional proceedings, No 8-π, No. 15 item 1810, ILDC 1930 (RU 2012). As noted by S.Y. MAROCHKIN, "International Law in the Courts of the Russian Federation: Practice of Application", *Chinese Journal of International Law* 2007, p. 329 ff., p. 336, the importance of the requirement of publication in Russia derives from the U.S.S.R. practice of unpublished laws and regulations.

¹⁵⁷ A. NOLLKAEMPER, "The Netherlands", cit., p. 340.

relations between states. The broadness of these criteria and their inconsistent application in case law raise particularly intricate issues.

4.4.1. An interpretive process governed by domestic law.

To start off, a clarification is necessary. Because these limitations are grounded in the content of the international norms, they might seem to contradict the view that direct application is fundamentally a matter of domestic law: it has been argued, for example, that “standing and completeness [...] are questions of international and national law” and that “the question of whether an international obligation does accord a right, or is complete, is a matter of treaty interpretation”.¹⁵⁸ This opinion cannot be fully shared. Indeed, the interpretive process by which national courts assess whether an international norm can be directly applied or further legislative measures are required is inherently different from what is usually referred to as treaty interpretation. As pointed out by Enzo Cannizzaro, “[t]he identification of the self-executing character of a treaty provision is not aimed at determining the international obligations flowing from it, but rather the effect which this provision is likely to produce in the municipal legal order, in the absence of implementing legislation. This, in turn, depends on a number of factors which can vary considerably in the municipal legal order of different States”.¹⁵⁹

It should be noted that this opinion does not second the view according to which national courts should interpret international law in the same way as domestic legislation.¹⁶⁰ To the contrary, it is compatible with the view that the ascertainment of the content of international obligations should be performed through international law’s own canons of interpretation, and particularly through Arts. 31 to 33 of the Vienna Convention on the Law of Treaties.¹⁶¹ In the assessment of the specific issue of direct applicability, however, the canons of interpretation of international law would usually lead to inconclusive outcomes because of the neutrality of international law on that point.

To be more explicit, a national court might resort to international law’s own canons of interpretation to establish, for example, that a treaty obliges the state to behave in a certain

¹⁵⁸ A. NOLLKAEMPER, “The Effect”, cit., p. 192.

¹⁵⁹ E. CANNIZZARO, “The Effect of the ECHR on the Italian Legal Order: Direct Effect and Supremacy”, *Italian Yearbook of International Law* 2009, p. 173 ff., p. 174. On this point, see M. FORTEAU, “The Role of the International Rules of Interpretation for the Determination of Direct Effect of International Agreements”, in H.P. AUST, G. NOLTE (eds.), cit., p. 96 ff., particularly p. 112 (concluding, in light of an extensive survey of national case law, that “direct effect is not (necessarily) a matter of interpretation”); D. SLOSS, “Taming”, cit., p. 1741 (“self-execution is not a treaty interpretation question unless the treaty-makers adopted explicit language addressing self-execution in the treaty text”) and 1733 (“the question whether a treaty is self-executing is a domestic separation-of-powers issue”).

¹⁶⁰ See e.g. A. MESTRE, “Les traités et le droit interne”, *Recueil des cours* 1931, vol. 38, p. 233 ff., p. 299-301.

¹⁶¹ J. D’ASPREMONT, “The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order”, in O.K. FAUCHALD, A. NOLLKAEMPER (eds.), *The Practice of International and National Courts and the (De-)Fragmentation of International Law*, Oxford-Portland, 2012, p. 141 ff., p. 152 (“when applying the rules of another legal order, judges should heed the rules of interpretation of that legal order”). On the interpretation of international law by national courts (a subject which is outside the scope of this research), see, *ex multis*, M. WAIBEL, “Principles of Treaty Interpretation. Developed for and Applied by National Courts?”, in H.P. AUST, G. NOLTE (eds.), cit., p. 9 ff.; A. NOLLKAEMPER, “Grounds for the Application of International Rules of Interpretation in National Courts”, in H.P. AUST, G. NOLTE (eds.), cit., p. 34 ff.

way vis-à-vis its own nationals, i.e. grants them a right under international law. Still, this assessment would not provide the national court with conclusive indications as to the direct applicability of that international norm in national law, and this for a number of reasons. Firstly, international law does not *require* courts to directly apply a treaty establishing obligations of states toward individuals. Secondly, for that matter, it also does not *prohibit* them from drawing individually enforceable legal rules from norms regulating inter-state horizontal relations (i.e. which do not create individual rights in the international legal order), just as much as it does not prohibit the application of vague or *uncertain* international norms. If international law does not furnish conclusive indications on these point, one can only conclude, again, that these matters are governed by factors and principles set forth in domestic law.

In line with the above, the following pages attempt to further demonstrate that, although domestic courts, in their reasonings, anchor limitations on direct application to the content of the norm to apply, the standards they elaborate are by and large reflections of purely domestic concerns. As a rule of thumb, courts tend to consider as non directly applicable those international norms from which the derivation of justiciable rights would require a higher degree of judicial creativity. If that is the case, then the decisive factor again seems to be the domestic separation of powers.¹⁶²

Such boundaries, however, vary greatly between different legal systems. For this reason, the present analysis cannot aim to provide rules universally valid in all legal systems. Instead, it will attempt to sketch out some general guidelines with regard to three individual standards often referred to by national courts to deny direct application: (i) incompleteness of the norm or equivalent standards, such as imprecision, vagueness, and the like; (ii) inter-state character of the international norm; and (iii) norms conferring rights or faculties to states.

4.4.2. International norms considered incomplete or vague.

The requirement of completeness is by far the criterion most widely referred to by national courts in the assessment of direct applicability.¹⁶³ In the aforementioned *Polo Castro* case, for example, the Italian Court of Cassation held that the provisions of the ECHR were directly applicable if they contained “the model of a national act complete in its essential elements”. In that particular case, Art. 5(4) ECHR was considered complete enough to sustain direct application.¹⁶⁴

The popularity of this standard is not surprising, completeness being a catch-all term that courts can dish out in all sorts of circumstances. At close scrutiny, its exact meaning is unclear. National courts, for example, have sometimes considered “incomplete” international norms which are undoubtedly “complete” in their own nature, such as, for example, norms purportedly not conferring rights upon individuals, or norms not laying down obligations but

¹⁶² A. VON BOGDANDY, *cit.*, p. 403: “[m]any authors argue that direct effect hinges largely on the determinedness of the international provision in question. This understanding is not convincing [...] [T]he approach does not do justice to the coupling role and the constitutional function of the doctrine of direct effect”.

¹⁶³ As noted by D. SHELTON, “Introduction”, *cit.*, p. 12, completeness is usually the decisive criterion.

¹⁶⁴ Pursuant to Art. 5(4), “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”.

only providing authority.¹⁶⁵ These two cases will be addressed individually below. Here, the focus will be on norms which might be deemed “incomplete” according to an (arguably) more proper understanding of the term, i.e. norms establishing broad principles and general standards.

As a matter of principle, there seems to be no reason why national courts should not be able to draw legal effects from vague or programmatic norms of international law, when considering that they routinely do so with broad principles and standards set forth by domestic law.¹⁶⁶ US courts, for example, have shown reluctance in applying principles enshrined in international instruments, but they have not had any difficulty in fashioning the content of broad constitutional clauses, such as those referring to due process, equal protection or uncompensated takings.¹⁶⁷

Of course, deriving manageable rules of decision from broad and general principles entails a degree of judicial discretion,¹⁶⁸ and may require to construe the international norm in connection with other norms of the domestic legal order which provide for individual enforceability.¹⁶⁹ Each legal system determines how much judicial discretion is admissible according to its own understanding of the separation of powers:¹⁷⁰ the same standards, however, should be applied to international and national norms.

In this regard, considering that vagueness and determinedness are more a matter of degree than precise legal yardsticks,¹⁷¹ it would be advisable for the courts to adopt a case-by-case approach, having regard not just to the content of the norm to apply but also to the domestic law context in which it must be applied.¹⁷² For example, it may be assumed that the courts require higher standards of precision to sustain a positive application of international law, i.e. when a private party enforces international norms against public authorities, because in such situations separation of power concerns would be particularly intense;¹⁷³ but the standards should logically be more lax when a private party is resisting against government action, or in a criminal case when international law is invoked in favor of the accused.¹⁷⁴

4.4.3. International norms having an inter-state character.

Let us now turn to the second category, i.e. the purported non direct applicability of international norms having an inter-state character. As argued above, the idea that the

¹⁶⁵ A. NOLLKAEMPER, *National Courts*, cit., p. 136-137 (not contesting the usefulness or validity of the criterion of completeness, but acknowledging that “what is meant by saying that a norm has direct effect if it has complete content may not always be obvious”).

¹⁶⁶ B. CONFORTI, *International Law*, cit., p. 28-29. But see G.M. DANILENKO, “Implementation”, cit., p. 65 (criticizing the Russian Constitutional Court’s reliance on, *inter alia*, provisions of the ICESCR because they are “essentially programmatic”).

¹⁶⁷ “Judicial Enforcement of International Law Against the Federal and State Governments” (Note), cit., p. 1279-1280.

¹⁶⁸ C.M. VÁZQUEZ, “The Four”, cit., p. 715.

¹⁶⁹ L. CONDORELLI, *Il giudice italiano e i trattati internazionali*, Padova, 1974, p. 89.

¹⁷⁰ Y. IWASAWA, “Domestic Application”, cit., p. 174 ff. (noting that the required degree of precision varies greatly between different legal systems) and p. 200 (“[t]he principle of separation of powers requires that a norm is sufficiently precise to be applied by courts. The judiciary would usurp the power of the legislature if it applied an imprecise norm”).

¹⁷¹ A. VON BOGDANDY, cit., p. 403 (“determinedness is a most undetermined criterion”).

¹⁷² Y. IWASAWA, “Domestic Application”, cit., p. 185 ff.

¹⁷³ C.M. VÁZQUEZ, “The Four”, cit., p. 715; Y. IWASAWA, “Domestic Application”, cit., p. 186-187.

¹⁷⁴ C.M. VÁZQUEZ, “The Four”, cit., p. 720.

provisions of international law only regulate relations between states is fundamentally flawed, but contemporary international law certainly does include also this type of norms: take, for example, the prohibition of the use of armed force.¹⁷⁵ Based on this distinction, Lea Brilmayer has proposed as a possible solution to the conundrums of self-execution that individuals should have a right of action before national courts only in case of “vertical” international law norms, i.e. norms granting rights to individuals vis-à-vis a state.¹⁷⁶

Still, this criterion is far from definitive. On the one hand, it is certainly true that a norm of international law deemed to grant a right to an individual on the international plane (a “vertical” norm, so to say) is most likely to be applied by a national court.¹⁷⁷ The reason lies in the fact that the structure of this norm – in case of a treaty provision, its wording – is likely to closely resemble the structure of domestic norms. For this reason, the derivation of domestic individual rights from such norms should not create pervasive issues of separation of powers, because their application is rightly perceived to be within the full domain of the judiciary’s functions. This is evident from the words of Brilmayer herself: “[c]ourts should be less reluctant to adjudicate vertical international cases because these cases are more consistent with traditional conceptions of judicial protection of individual rights”.¹⁷⁸

On the other hand, the inter-state character of the norm on the international plane does not necessarily prevent direct applicability before national courts. Notwithstanding the non-existence of an individual right to peace in international law, it is perfectly conceivable for a national judge to construe this norm so as to draw a private cause of action in national law; for this purpose, also this kind of international norms may be construed in connection with other norms of the domestic legal order which provide for individual enforceability. The construction of meaningful judicial standards to the benefit of individuals falls squarely within the domain of national judiciaries.¹⁷⁹ The *Institut de droit international*’s 1993 Final Report on the Activities of National Judges and the International Relations of their State explicitly seconds this view, by noting that “one can reasonably propose that the courts have the power to decide on compensation for damages caused to private persons as a consequence of a war or of a use of force contrary to international law”.¹⁸⁰

Of course, speaking hypothetically, there is an upper limit beyond which national courts cannot derive any standard applicable to or invocable by individuals. This limit, however, does not depend on whether individuals are granted a *right* under international law, but on whether individuals have an *interest* in the international norm being properly applied. Consequently, domestic legal systems may well craft individually enforceable rights from inter-state *horizontal* international law norms, as long as individuals have a legally

¹⁷⁵ See D. AMOROSO, “Judicial Abdication”, cit., p. 126-127. B. CONFORTI, *International Law*, cit., p. 28-29, referred to “areas of international law where the political-diplomatic aspects prevail”.

¹⁷⁶ L. BRILMAYER, “International Law in American Courts: A Modest Proposal”, *Yale Law Journal* 1990-1991, p. 2277 ff., particularly p. 2300.

¹⁷⁷ A. NOLLKAEMPER, *National Courts*, cit., p. 136.

¹⁷⁸ L. BRILMAYER, cit., p. 2307.

¹⁷⁹ “Judicial Enforcement of International Law Against the Federal and State Governments” (Note), cit., p. 1280.

¹⁸⁰ For the Final Report, see *Annuaire de l’Institut de droit international* 1994, vol. 65(II), p. 437 ff.

meaningful interest.¹⁸¹ The examples provided in the next sub-paragraph, concerning the (inter-state) international norm on diplomatic protection, can help clarify this point.

Putting theory into practice, this process requires an amount of judicial discretion which may or may not be considered acceptable. Whether the derivation of such standards can be performed by the courts or is a matter for the legislature depends, again, on the contours of the principle of separation of powers in a specific legal system.

Going back to the example of the prohibition of the use of armed force, the general tendency in domestic case law appears to be in the direction of denying the individual enforceability of this norm.¹⁸² For example, in the 2004 case *Association of Lawyers for Peace v. Netherlands*, the Dutch Supreme Court held that individuals could not invoke the international norm prohibiting the use of armed force to challenge the Dutch government's support for the US military intervention in Afghanistan.¹⁸³ Notably, however, the German Federal Administrative Court allowed for a defensive invocation of the same rule in the *Attorney of the Federal Armed Forces v. Pfaff* case. On that occasion, a member of the armed forces had been convicted for refusal to obey an order. The court held that the soldier's refusal was justified for reasons of freedom of conscience given his fear that his actions could contribute to further Germany's involvement in the Iraq war, which was held to be in violation of international law.¹⁸⁴

4.4.4. International norms conferring rights or faculties to states.

The third and last category to examine is that of norms which do not establish any obligations upon states but instead grant them rights or faculties. This category of norms is commonly considered to be non directly applicable.¹⁸⁵ The reason lies once again in the domestic separation of powers, which may pose unavoidable limitations to the direct applicability of these rules.¹⁸⁶

An example would be the two options which the UN Convention on the Law of the Sea (UNCLOS) confers on states as for the drawing of the territorial sea baselines. Art. 5 provides that the low-water line is the normal baseline, but Art. 7 (following the 1951 ICJ ruling in the *Fisheries Case*) also allows states to draw straight baselines provided that the coast has the required features.¹⁸⁷ Pursuant to Art. 3 UNCLOS, “[e]very State has the right to establish the breadth of its territorial sea [...] measured from baselines determined in accordance with this

¹⁸¹ Not every international norm which concerns individuals should be regarded as granting them a right. See P.M. DUPUY, “L’unité de l’ordre juridique international”, *Recueil des cours* 2000, vol. 297, p. 9 ff., p. 414 (underlining the difference between the international law of human rights, where the individual is considered “en raison de ses caractères inhérentes, de personne humaine”, and the older “conventions internationales d’établissement”, where the individual was addressed only as “national” or “foreigner”). Similarly, see A.M. SLAUGHTER, W. BURKE-WHITE, “The Future of International Law is Domestic (or, The European Way of Law)”, *Harvard International Law Journal* 2006, p. 327 ff., p. 327 (classifying diplomatic protection among “inter-state obligations”).

¹⁸² D. AMOROSO, “Judicial Abdication”, cit., p. 127-128.

¹⁸³ *Association of Lawyers for Peace (Vereniging van Juristen voor de Vrede) and ors v. Netherlands*, Judgment on Appeal in Cassation, ILDC 152 (NL 2004).

¹⁸⁴ *Attorney of the Federal Armed Forces v. Anonymous (a Major of the Armed Forces)*, Final appeal, BVerwG 2 WD 12.04, ILDC 483 (DE 2005).

¹⁸⁵ B. CONFORTI, “National Courts”, cit., p. 8.

¹⁸⁶ C.M. VÁZQUEZ, “The Four”, cit., p. 712.713 (tracing back the non-self-executing character of “precatory” and “hortatory” provisions to domestic issues of separation of powers).

¹⁸⁷ *Anglo-Norwegian Fisheries Case (United Kingdom v. Norway)*, Judgment, ICJ Reports 1951, p. 116.

Convention”. It can be argued that the intrinsic nature of national courts, which rule on concrete cases, would make them not institutionally suited to exercise the definitive choice under Art. 3. Normally, then, this choice will be exercised by the executive – although, incidentally, an intervention by a supreme or constitutional court with the power to render pronouncements with *erga omnes* effects cannot be hypothetically ruled out.

Also in this case, however, the content of the international norms does not necessitate to exclude *in toto* every form of direct applicability. Indeed, these norms can be construed by domestic courts in a way that allows the derivation of certain individual rights. Relevant examples can be found in the field of diplomatic protection. Although international law provides for no individual right to diplomatic protection from one’s state of nationality,¹⁸⁸ this does not rule out that the government’s refusal to intervene may be subject to judicial review before national courts. This point was explicitly discussed by the ICJ in a passage of *Barcelona Traction* which deserves to be quoted in full: “within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is to resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress. The municipal legislator may lay upon the State an obligation to protect its citizens abroad, and may also confer upon the national a right to demand the performance of that obligation, and clothe the right with corresponding sanctions. However, all these questions remain within the province of municipal law and do not affect the position internationally”.¹⁸⁹

Clearly, then, the interstate character of diplomatic protection in the international legal order does not prevent domestic law from fashioning this norm in the form of a justiciable right. Domestic separation of powers, in turn, governs whether national courts may have the authority to construe such a right by interpretive means, often in combination with other norms of the national legal order, or, to the contrary, whether this right can only be created by means of a specific intervention by the national legislature. In several countries, national courts have proved rather assertive in reviewing governmental refusals to exercise diplomatic protection, but – in lack of legislation on this point – have generally confined themselves to perform a purely procedural review of the exercise of executive discretion.¹⁹⁰

The *Abbasi* case before the Court of Appeal of England and Wales provides a prominent example.¹⁹¹ One of the issues was whether the British government had an obligation to exercise diplomatic protection on behalf of Abbasi, a UK national detained by US authorities

¹⁸⁸ For a thorough analysis of this point and for a critique of the views favoring the existence of an individual right to diplomatic protection as a matter of international law, see M.I. PAPA, “Protezione diplomatica, diritti umani e obblighi erga omnes”, *Rivista di diritto internazionale* 2008, p. 669 ff., particularly p. 674-681. For the opposite view, see M. BENNOUNA, “Preliminary Report on Diplomatic Protection”, A/CN.4/484 (1998).

¹⁸⁹ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, ICJ Reports 1970, p. 3, para. 78.

¹⁹⁰ P. PUSTORINO, “Recenti sviluppi in tema di protezione diplomatica”, *Rivista di diritto internazionale* 2006, p. 68 ff., p. 86-95. See also V. PERGANTIS, “Towards a ‘Humanization’ of Diplomatic Protection?”, *ZaöRV* 2006, p. 351 ff.

¹⁹¹ *R. (on the application of Abbasi (Feroz Ali) and Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department*, Original application for judicial review, [2002] EWCA Civ 1598, ILDC 246 (UK 2002).

in Guantanamo. On the one hand, the court correctly dismissed the claimants' contention that the UK was under an international customary obligation to exercise diplomatic protection. On the other hand, however, the court found that the claimant had a right to have his petition for diplomatic assistance properly taken into account by the Foreign Office, and dismissed the claim because it found that the government had in fact given due consideration to Abbasi's request. This case clearly shows how a court can blend international norms with domestic norms so to craft judicially manageable standards.¹⁹² the Court of Appeal, in particular, created a norm suitable for direct application by referring to the English administrative law doctrine of legitimate expectations (which, incidentally, had not been invoked by the claimants). No doubt, this exercise of judicial creativity left separation of powers unharmed by reason of the purely procedural nature of the review.

Italian courts, by contrast, have generally taken a different approach and have never explicitly held that the international norms on diplomatic protection may give rise – in combination with domestic legislation and, particularly, with administrative law – to directly applicable standards of review of executive action. Nonetheless, they have sometimes reached similar outcomes in practice. The traditional position was reaffirmed by the Council of State in the 2009 *Il Mio Viaggio* judgment, which arose from an Italian shipping company's claim that the Italian government was obliged to exercise diplomatic protection on its behalf.¹⁹³ Notably, however, in the final appeal phase, the Court of Cassation reversed the administrative court's decision and held that the company had in fact a legitimate interest in governmental action. The Court reached this conclusion by considering the issue only as a matter of domestic law and by (mistakenly) holding that such a governmental intervention would not have constituted an exercise of diplomatic protection on the international plane.¹⁹⁴

4.5. Concluding assessment: direct application and protection of the prerogatives of the political branches.

By way of conclusion of the present discussion, it is opportune to note that, given its intertwinement with considerations related to the separation of powers, the assessment of direct applicability has been construed by some commentators and courts as essentially discretionary in nature, insofar as it is based on political considerations.¹⁹⁵ The idea that the assessment of direct applicability would have an inherently political character has surfaced in the views expressed by authoritative commentators. In blunt terms, Andre Nollkaemper has written that “the concept of direct effect shifts [political decisions to moderate the influence of international law in national legal orders] from the political branches to the court. Hence, the

¹⁹² L. CONDORELLI, *Il giudice*, cit., p. 89.

¹⁹³ *Il Tuo Viaggio srl v. Presidency of the Council of Ministers and ors*, Council of State, No. 8719 of 24 December 2009; ILDC 1730 (IT 2011).

¹⁹⁴ *Il Tuo Viaggio srl v. Presidency of the Council of Ministers and ors*, Final appeal, No. 21581 of 19 October 2011, ILDC 1891 (IT 2011). On this case, see P. PUSTORINO, “Protezione diplomatica e interesse legittimo dell'individuo”, *Rivista di diritto internazionale* 2012, p. 156 ff.

¹⁹⁵ Without embarking on an analysis of the correlation between politics and judicial discretion, which lies well outside the scope of this work, it seems nonetheless sufficiently sound to state that judicial decisions are political, or inherently discretionary, where such yardsticks lack. See, for example, R.A. POSNER, “Foreword: A Political Court”, *Harvard Law Review* 2005, p. 31 ff., p. 40 (noting that “the Supreme Court, when it is deciding constitutional cases, is political in the sense of having and exercising discretionary power as capacious as a legislature's”).

practice of direct effect of international law exposes the political function of domestic courts at the intersection of legal orders”.¹⁹⁶

Whether or not one subscribes to this view may have significant implications as regards the method of assessment of direct applicability. The more the courts’ function in the field of international law application is conceived as political, the less it appears to be governed by clear legal yardsticks. For this reason, this view, in its most extreme form, lends itself to a distrust of the role of judges in crafting a legally sound doctrine of direct applicability, because most choices in this field would be legal in form but discretionary in substance. If one believes that no truly legal standards govern the matter, it would seem legitimate to suggest that, as a rule, courts should abstain from getting involved in the application of international law. Paul de Visscher (who, it should be noted, believed that the intent of the parties governed the issue of direct application of treaties) argued that “engager le juge à renverser la présomption [i.e. the background presumption against direct applicability] et à consacrer le principe de l’applicabilité directe des traités dans les rapports internes, c’est [...] risquer un conflit interne entre le pouvoir judiciaire et le pouvoir législatif”.¹⁹⁷

This view helps illuminate some distinctive features of the US practice concerning non-self-execution, which has been analyzed in detail in the previous paragraphs. A quantitative and qualitative analysis of judicial decisions has proven that the doctrine of self-execution is used by courts as a tool not to get engaged in political conflict with the executive and the legislative branches. Indeed, in practice, limitations on the direct applicability of international law or on its individual enforceability have regularly been used by courts to “shield government actors from judicial review of government compliance” with international law.¹⁹⁸ Moreover, regardless of the multitude of legal criteria invoked by US courts to deny direct application (i.e. the intent of the parties or the vagueness of the norm), it has been maintained that ultimately what seems to matter the most to the courts is the unilateral intent of the US as expressed by the political branches.¹⁹⁹

It appears, however, that a different approach to the nature of direct application is preferable. As a matter of fact, the courts’ assessment in this field is governed by legal rules, and should consequently be conceived first and foremost as a legal problem. More specifically, it is a *non sequitur* to equate considerations of separation of powers to political considerations. The separation of powers is not a hazy prudentialist principle which can be invoked at will to disentangle the functions of the judiciary and the political branches. To the contrary, it is a legal principle which informs the whole constitutional setting, including the legislative process and the reception of international norms, and which is implicitly embedded in the constitutional and legislative processes which grant domestic validity to international norms. Hence, in order not to meddle in the domestic separation of powers, courts should confine

¹⁹⁶ A. NOLLKAEMPER, “The Duality of Direct Effect of International Law”, *European Journal of International Law* 2014, p. 105 ff., p. 108-109.

¹⁹⁷ P. DE VISSCHER, cit., p. 560.

¹⁹⁸ D. SLOSS, “United States”, cit., p. 539-547. See particularly p. 538 (arguing that the presumption against private enforceability is almost only invoked to limit judicial review of governmental conduct).

¹⁹⁹ C.A. BRADLEY, *International Law*, cit., p. xiii (generally noting that the U.S. judiciary’s approach to international law application is characterized by “a preference for political branch control over how international law operates within the U.S. legal system”).

themselves to comply with the constitutional setting and to apply international norms in accordance with their status in the domestic legal order.

In this perspective, it should be kept in mind that the incorporation of international law in domestic law by whatever means – be it by constitutional standing incorporation or by *ad hoc* statutory provisions – is the result of a choice by the constitutional drafters or the legislature. Hence, broadly speaking, to the extent national courts apply incorporated international law *qua* law, they are executing, not making, a political choice. By putting the brakes on the effects of international law which is domestically valid, national judges might aim to protect the political branches' prerogatives and the proper lawmaking process, but they might actually end up avoiding the constitutional setting and the proper process of lawmaking themselves.²⁰⁰

Of course, to say that, when they apply international law having domestic legal force, courts do not make any political choice does not mean that the judicial application of international law does not pursue policy goals. Ultimately, it has the policy function of ensuring that a state complies with its international law obligations. As demonstrated in the previous chapter, this is the rationale of the choice to grant domestic validity to international law from the outset. In giving effect to the formal incorporation of international law, it is in no way surprising that direct applicability also effectuates its underlying policy goals.

In conclusion, this supports the view that national courts should limit to a minimum the instances in which the presumption of direct applicability of incorporated international norms is reversed by reasons of separation of powers, and in any event they should reach such a conclusion by resorting to the same criteria which would limit the judicial applicability of domestic norms. Specifically, the goal of protecting the separation of powers is ingrained in the constitutional and prescriptive limitations on direct applicability of international law which have been described in the previous section of this chapter. Outside of these relevant but exceptional cases, limitations on direct applicability would seem to be an improper means to pursue the safeguard of the prerogatives of the political branches.

Other judicial doctrines should be used to these ends. The prerogatives of the legislature, in particular, should be protected by national judges by resorting to the ordinary rules of legal interpretation as for the derivation of individual rights and applicable standards. As for the powers of the executive, they should be safeguarded through a balanced consideration of governmental discretionary powers,²⁰¹ which should lead courts to limit their review to an assessment of the reasonableness and proportionality of government measures when appropriate circumstances occur, irrespective of whether the norm to apply originates in international law or domestic law.²⁰²

5. Direct applicability of international law and judicial abstention in foreign affairs.

²⁰⁰ “Judicial Enforcement of International Law Against the Federal and State Governments” (Note), cit., p. 1285.

²⁰¹ B. CONFORTI, *International Law*, cit., p. 17 (noting that some international prerogatives of the executive branch lie outside judicial scrutiny, such as the *agrément* of foreign diplomats).

²⁰² See generally E. BENVENISTI, “United”, cit. (analyzing different degrees of review of executive action as alternatives to refusals of direct application or invocation of political question).

A problematic point which needs to be clarified is the one concerning the interaction between direct applicability of international law and the set of judicial constructs commonly referred to as non-justiciability or abstention doctrines.²⁰³

From an initial impression, there would appear to be remarkable coincidences between these two legal phenomena. Firstly, as has long been acknowledged in legal doctrine, the theories favoring judicial abstentionism, in so far as they are applied in the realm of foreign affairs, may have the practical effect to impair the application of international law vis-à-vis state authorities.²⁰⁴ Secondly, judicial abstention doctrines are generally based on the courts' interest in preserving the prerogatives of the national political authorities; but, as has been proved in the previous section, also the limitations on direct applicability of incorporated international norms can be traced back to this rationale. The question then arises as to the relationship between direct applicability and judicial abstentionism in foreign affairs, and in particular as to whether the considerations previously expressed with reference to the former can also apply to the latter, in whole or in part.

Doctrines favoring judicial abdication in foreign affairs are applied by courts both in common law and in civil law countries. In the US legal system, but also in the UK, they are generally labeled as “political question doctrine”, while in countries of civil law a different terminology is adopted (e.g. *atto politico*, in Italian, or *acte de gouvernement*, in French).²⁰⁵ Whatever the terminology, judicial abstentionism derives from the idea that certain choices and decisions should pertain to the political branches only, and not to the courts.²⁰⁶ In the *Markovic* case, for example, the Italian Court of Cassation held that the Italian courts had no jurisdiction over a claim for compensation brought against Italy by Serbian nationals whose relatives had been killed or injured in the 1993 NATO bombing of Belgrade. The Court held that the conduct of hostilities by the executive branch constituted a political question and was thus outside the reach of judicial review.²⁰⁷ As for the US legal system, the classic definition of political question was formulated – in rather broad and all-encompassing terms – by the Supreme Court in *Baker v. Carr*.²⁰⁸

²⁰³ The terminology is not always used consistently. For a survey of divergent usages of the terms, and particularly of the concept of non-justiciability, see D. AMOROSO, “Judicial Abdication”, cit., p. 102-103 (noting that, although “the notion of ‘non-justiciability’ is generally viewed as all-encompassing” in common law countries, it would be more appropriate to limit it to cases where judges abstain by reason of an alleged “technical impossibility to resolve a case”).

²⁰⁴ B. CONFORTI, *International Law*, cit., p. 13-17. In passing, it should also be recalled that comparable effects may be achieved, as regards the judicial review of acts of foreign states, by means of the “act of state” doctrine, notably applied by the U.S. Supreme Court in *Banco Nacional de Cuba v. Sabbatino*, 376 US 398 (1963), p. 423. This doctrine lies outside the scope of this chapter, which focuses on the judicial curbs on the authorities of the state of the forum. According to the classic definition of the act of state doctrine, “[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory”: see *Underhill v. Hernandez*, 168 US 250 (1897). For a general overview of the act of state doctrine, see *ex multis* J.W. DELLAPENNA, “Deciphering the Act of State Doctrine”, *Villanova Law Review* 1990, p. 1 ff.

²⁰⁵ J. CRAWFORD, *Brownlie’s*, cit., p. 83-87 and 103-110.

²⁰⁶ L. HENKIN, “Is There a ‘Political Question’ Doctrine?”, *Yale Law Journal* 1976, p. 597 ff., p. 597.

²⁰⁷ *Presidency of the Council of Ministers v. Markovic and ors.*, Order No. 8157 of 8 February 2002, ILDC 293 (IT 2002).

²⁰⁸ *Baker v. Carr*, 369 US 186 (1962). In the court’s words: “Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion;

The observation that the doctrine of non-justiciability may lead to the same practical outcomes as the denial of direct application, i.e. to the non-application of international law to governmental action, has led some scholars to conflate the two categories outright. Quincy Wright, for example, once held that “the doctrine of self-executing treaties in American constitutional law is an aspect of the doctrine of ‘political questions’”.²⁰⁹ It should be underscored, however, that the two doctrines differ on several levels.

Firstly, the doctrine of direct applicability (or self-execution) has its roots in the fact that the norm to apply originates in the international legal order, and thus only applies to international norms. Conversely, resort to abstention doctrines does not depend on the nature or content of the norm to apply but on the party against which the norm should be applied, i.e. the government, so that – as it was once commonly the case – also governmental acts relating to the handling of purely domestic matters may be held non-justiciable. Admittedly, this difference between the two doctrines has been partially made up because of the shrinking of the contours of non-justiciability, at least in contexts where domestic rule of law is guaranteed.²¹⁰ today, they are commonly invoked exclusively with reference to the executive handling of foreign affairs.²¹¹ Still, also in this case non-justiciability does not necessarily influence the application of international law. Frequently, it may impinge on the application of *domestic* law to foreign affairs. For example, in *Lowry v. Reagan*, where a US court applied the political question doctrine, the issue was whether the President’s conduct of hostilities abroad conformed with a domestic act, the 1973 War Powers Resolution.²¹² These cases, as such, do not fall within the scope of this work.

Secondly, the application of the two doctrines produces different outcomes. While the exemption of political power from judicial review makes claims against the government fail on procedural grounds, the issue of direct application usually relates to the law to apply to the merits of the claim. If the international norm is considered not to be individually enforceable, the claim may also fail on procedural grounds because of the plaintiff’s lack of standing or of cause of action; however, also this outcome is different from a non-justiciability argument, where the plaintiff may well have standing and the claim is rejected because of the identity of the defendant.

In sum, a court may deny to adjudicate a claim which it deems non-justiciable, even if said claim is based on a norm which is deemed both directly applicable and individually

or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question”.

²⁰⁹ Q. WRIGHT, “National Courts and Human Rights – The Fujii Case”, *American Journal of International Law* 1951, p. 62 ff., p. 64.

²¹⁰ “Judicial Enforcement of International Law Against the Federal and State Governments” (Note), cit., p. 1284 (differentiating the domestic and the foreign aspects of the political question doctrine).

²¹¹ C.M. VÁZQUEZ, “The Four”, cit., p. 717; D. AMOROSO, “Judicial Abdication”, cit., p. 100 (arguing that “[a]lthough the affirmation of the (national) rule of law principle has gradually eroded the scope of these doctrines with regard to purely domestic issues, they are still consistently applied in the fields of defence and foreign affairs, with the result that the notion of “political” in fact overlaps with that of “international”).

²¹² U.S. District Court, District of Columbia, *Lowry v. Reagan*, 676 F.Supp. 333 (1987). For other cases of invocation of the political question without impinging on the application of international law, see M.J. GLENNON, “Foreign Affairs and the Political Question Doctrine”, *American Journal of International Law* 1989, p. 814 ff.; F.A. MANN, *Foreign Affairs in English Courts*, Oxford, 1986, particularly p. 67 ff.

enforceable. Clearly, it cannot be denied that the two doctrines operate on profoundly different levels.

The analysis, however, may yield partially different outcomes moving into the level of underlying policy rationales. The policy bases of judicial abstention in foreign affairs have been convincingly assessed in legal doctrine. In particular, it has been demonstrated that they may be grouped in three categories, according to whether a court abstains by reason, first, of a perceived lack of jurisdiction attributable to the constitutional setting; second, of a lack of adequate applicable standards; and third, of a prudential self-limitation based on reasons of opportunity.²¹³ A closer look at these rationales may clarify to what extent the doctrines of non-justiciability and of direct applicability *substantially* – although not formally – overlap.

To start off, the coincidence stands out in cases where courts decline jurisdiction because they hold that international law provisions are vague or indeterminate and thus cannot give rise to any manageable legal standard.²¹⁴ The reasons of separation of powers driving judicial abstentionism in such cases relate to the protection of the legislature's law-making functions. This ground of non-justiciability is functionally equivalent to denials of direct applicability of international norms deemed vague or incomplete. As a matter of fact, in these cases US courts have resorted indifferently to either the doctrine of self-executing treaties or the political question doctrine, reaching identical outcomes.²¹⁵ This judicial practice, then, can be subject to criticism identical to the one previously addressed to the alleged non applicability of vague or incomplete international norms. One may only add that, if a matter really turns out not to be regulated by any legal standard, be it international or domestic, it seems more correct for a court to reject the claim against the government on the merits.

The connection between the two doctrines is less evident in cases whereby a national court perceives to lack jurisdiction to review governmental action by reason of an express or implied constitutional limitation.²¹⁶ Such was the case, for example, of the aforementioned *Markovic* case, where the Cassation held the conduct of hostilities to be “the manifestation of a political function with regard to which the Constitution requires attribution to a constitutional body”.

In these cases, non-justiciability is a by-product of the extent of judicial review of executive action, which is a matter for each legal system to determine. For these reasons, the analysis of these limitations is first and foremost a matter of domestic constitutionalism, which falls outside the scope of the present work. Indeed, in principle, a constitutional exclusion of any form of judicial checks on governmental acts relating to foreign affairs (or, for that matter, on governmental acts *tout court*) cannot be ruled out, and it is in fact a rare but not unknown occurrence.²¹⁷ It is here sufficient to remark, however, that (where no express constitutional

²¹³ D. AMOROSO, “Judicial Abdication”, cit. See also D. AMOROSO, “A Fresh Look at the Issue of Non-justiciability of Defence and Foreign Affairs”, *Leiden Journal of International Law* 2010, p. 933 ff.

²¹⁴ D. AMOROSO, “Judicial Abdication”, cit., p. 114-119.

²¹⁵ “Judicial Enforcement of International Law Against the Federal and State Governments” (Note), cit., p. 1276; T. BUERGENTHAL, cit., p. 380 (arguing that in *Foster* and *Fujii* “the doctrine of non-self-executing treaties serves the same purpose as the ‘political question’ doctrine”).

²¹⁶ D. AMOROSO, “Judicial Abdication”, cit., p. 103-109.

²¹⁷ See Art. 19(3) of the Hong Kong Basic Law: “The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence

provision governs the matter) judicial abstentionism has been persuasively contested also on grounds of domestic constitutional law.²¹⁸ Generally speaking, the idea that national constitutions would entrust all matters relating to foreign affairs exclusively to the political branches, and thus that the judiciary should play no role whatsoever in this realm, is far from being a truism.²¹⁹

Also in this case, as has been argued above in more general terms, the extent of national courts's review of executive action should be based on an appraisal of the ladder of executive discretionary powers. Accordingly, while it is obvious that courts cannot conduct foreign relations,²²⁰ the exercise of judicial functions in the field of foreign affairs should be expected to follow the ordinary principles which govern judicial review of governmental acts in a given legal system. By way of example, one may again refer to the *Markovic* case before the Italian Court of Cassation. It has been accurately noted, on the one hand, that the Italian Constitution undoubtedly entrusts decisions to engage in military operations to the parliament, which also confers upon the executive the necessary authority in this field, and that as a consequence such political decisions should not be subject to judicial scrutiny. On the other hand, however, specific military actions "are not to be considered as political decisions, but rather as executive activities undertaken in the implementation of a previous political decision" and should thus be amenable to judicial review.²²¹

As for the third and last type of judicial abstention, i.e. the one grounded on prudential reasons, its rationale is usually traced back by the courts to the need to avoid divergent pronouncements on the same issue from the judiciary and the executive (the so-called *speak with one voice* principle) and to avoid irredeemable conflicts between the two. It is doubtful, however, that judicial abstention constitutes an appropriate means to pursue this legitimate policy aim. Firstly, at least in some cases, an authoritative judicial decision may serve precisely to put an end to conflicts between different branches of government.²²² Secondly, these aims had better be pursued through a reasonable coordination between the courts and the executive within the realm of the exercise of judicial review, without going so far as entailing a decline of jurisdiction. This coordination may assume different forms which vary considerably according to the features of each legal system.²²³

and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts".

²¹⁸ L. HENKIN, cit., *passim*.

²¹⁹ J.I. CHARNEY, cit., p. 806 (arguing that "[t]raditional separation of powers analysis cannot therefore be easily invoked to decide the distribution of foreign affairs authority" and the U.S. Constitution provides "no textual basis for excluding, limiting or altering the role of the courts when the cases or controversies they are called upon to decide relate to U.S. foreign relations").

²²⁰ J.I. CHARNEY, cit., p. 807.

²²¹ M. FRULLI, "When Are States Liable Towards Individuals for Serious Violations of Humanitarian Law? The *Markovic* Case", *Journal of International Criminal Justice* 2003, p. 406 ff., p. 411-412.

²²² M.J. GLENNON, cit., p. 821.

²²³ For some relevant examples, see D. AMOROSO, "Judicial Abdication", cit., p. 129-132 (naming, *inter alia*, staying the proceedings or delaying the declaration of invalidity of domestic measures implementing international law to allow for governmental reconsideration). See also M. KUMM, cit., p. 28-30 (national courts should coordinate with the executive when reciprocity and flexibility are at stake).

It could be argued that this coordination may also take the form of reasonable deference to the executive in matters of interpretation of the law or of ascertainment of relevant facts.²²⁴ On the one hand, forms of total deference, whereby courts take executive interpretation as final and binding, should certainly be avoided, in that they would account for judicial abstentionism in disguise. Notably, the French practice to reserve treaty interpretation to the Minister of Foreign Affairs was found by the European Court of Human Rights to be illegitimate, because in violation of the right to access to an independent and impartial tribunal.²²⁵

On the other hand, however, it does not seem possible to condemn altogether the practice of courts of certain countries to attach presumptive weight to the indications of the executive in matters of international law interpretation, as long as courts are not bound to follow executive directions.²²⁶ The stance usually adopted by US courts is described by the *Restatement (Third) of Foreign Relations Law of the United States* in the sense that the judges retain final authority on matters of interpretation, but “give great weight to an interpretation made by the executive branch”.²²⁷ The soundness of this approach’s constitutional foundations are outside the scope of this work. Be that as it may, it is sufficient to recall that US courts are free to disregard executive interpretation whenever they think appropriate. In *BG Group PLC v. Argentina* and in *Hamdan v. Rumsfeld*, for example, the Supreme Court openly discarded the executive’s interpretation of the relevant treaties.²²⁸

²²⁴ The term judicial deference is generally used to describe all situations where national courts, “out of respect for the legislature or the executive [...] decline to make their own judgment on a particular issue”: see R. CLAYTON, “Principles for Judicial Deference”, *Judicial Review* 2006, p. 109 ff., p. 109.

²²⁵ *Beaumont and ors. v. France*, Merits and just satisfaction, App. No. 15287/89, 24 November 1994.

²²⁶ In this sense, see J. ARATO, “Deference to the Executive. The US Debate in Global Perspective”, in H.P. AUST, G. NOLTE (eds.), cit., p. 198 ff., particularly p. 213 (noting that “a degree of interpretive discretion for national executives may be a good thing for the international legal order”); for a similar position in the context of the U.K. Human Rights Act 1998, see A.L. YOUNG, “In Defence of Due Deference”, *The Modern Law Review* 2008, p. 554 ff. Different views have been expressed in legal scholarship: see B. CONFORTI, *International Law*, cit., p. 17-20 (advocating the disposal of all forms of judicial deference to the executive); P. PESCATORE, “Conclusion”, in F.G. JACOBS, S. ROBERTS (eds.), *The Effect of Treaties in Domestic Law*, London, 1987, p. 273 ff., p. 277 (judicial deference to the executive in treaty interpretation “cannot be reconciled with the very idea of the rule of law”); at the opposite extreme, see J. YOO, “Treaty Interpretation and the False Sirens of Delegation”, *California Law Review* 2002, p. 1305 ff. (arguing that courts should take executive interpretation as dispositive in all cases). For yet another (intermediate) view, see C.A. BRADLEY, “Chevron Deference and Foreign Affairs”, *Virginia Law Review* 2000, p. 649 ff. (defending judicial deference to the executive in matters of treaty interpretation by drawing an analogy with the deference to interpretations by administrative agencies); for a critical view of Bradley’s approach to deference, see E. CRIDDLE, “Chevron Deference and Treaty Interpretation”, *Yale Law Journal* 2002-2003, p. 1927 ff.

²²⁷ *Restatement (Third) of Foreign Relations Law of the United States*, cit., §326(2).

²²⁸ See *BG Group PLC v. Republic of Argentina*, 134 S.Ct. 1198 (2014), where the Court held, with reference to the interpretation of the U.K.-Argentina BIT, that “while we respect the Government’s views about the proper interpretation of treaties, [...] we have been unable to find any other authority or precedent [...]”; *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (calling the government interpretation “erroneous”). For a comment on a case of total deference to executive interpretation, see D. WIDEN, “Judicial Deference to Executive Foreign Policy Authority”, *Chicago-Kent Law Review* 1981, p. 345 ff. On the progressive erosion of deference in the jurisprudence of the U.S. Supreme Court, see H.G. COHEN, “The Death of Deference and the Domestication of Treaty Law”, *Brigham Young University Law Review* 2015, p. 1467 ff. For a critical view of *Hamdan v. Rumsfeld*, favoring total deference to the executive on purported grounds of separation of powers, see J. KU, J. YOO, “Hamdan v Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch”, *Constitutional Commentary* 2006, p. 179 ff.

As a matter of fact, a cooperation between courts and executives may well help the courts to reach more correct results in matters of international law application, considering that the courts may lack technical information and expertise to correctly interpret certain international instruments. Also in the assessment of the existence of international customary law, courts may choose to rely on the executive's expertise.²²⁹ Striking the rightful balance would be a matter for judicial determination.

In conclusion, it appears that there is a partial functional equivalence between (some) cases of judicial abstention in foreign affairs and denials of direct applicability. This partial overlap does not depend only on the fact that the practical outcome could be the same (i.e. the non-application of international law to a concrete case) but also on the observation that the two doctrines share, to some extent, the same policy foundations. This correlation has been captured by those scholars who have collectively described these doctrines as "avoidance techniques", i.e. as judicial means which "relieve national courts of the duty to enforce norms of international law in some politically sensitive situations".²³⁰ Hence, it seems legitimate to search for common solutions to the underlying policy problems. And to the extent the doctrines of judicial abstention do not withstand scrutiny, these solutions should be realized through a sound combination of direct applicability of international law and of the ordinary domestic principles regulating judicial review of governmental action.

6. Direct applicability and international law supremacy in domestic law.

The previous chapter has shown that a great number of national constitutions prioritize general international law, international agreements or both sources over domestic acts of parliament. These constitutional provisions raise distinctive issues, because they set forth a limit on the activities of all political authorities, including the legislature. In order for them to be effective, it is not sufficient that international norms are applied *qua* domestic legislation. They also require that some form of control should be exercised over the acts of the legislature in order to ensure their consistency with international law. It is necessary, in other words, to devise ways to achieve the prevalence of international norms over conflicting domestic legislation.

It goes without saying that this form of control cannot be exercised by any state organ possessing legislative powers, because it is precisely the exercise of these powers that needs to be restrained. Besides, executives are generally not institutionally suited to exercising control over legislatures. Accordingly, domestic courts are the only state organs which may be institutionally capable to exercise this form of control over legislation.

²²⁹ J.I. CHARNEY, *cit.*, p. 809 (courts may prefer to rely on the executive due to its expertise, but the role of courts in this field is no different than in other fields of law: courts are equipped to ascertain custom). Note that an interesting alternative to compensate for the courts' lack of expertise is provided by the German so-called norm verification procedure, whereby the Constitutional Court has the power to ascertain whether "a rule of [general] international law is an integral part of federal law and whether it creates rights and duties for the individual": see Art. 100(2) of the Basic Law. On this procedure, see K.J. PARTSCH, "International Law and Municipal Law", *Encyclopedia of Public International Law* 1987, p. 238 ff., p. 255.

²³⁰ E. BENVENISTI, "Judicial Misgivings", *cit.*, p. 169; A. TZANAKOPOULOS, "Final Report. Mapping the Engagement of Domestic Courts with International Law", presented at the International Law Association Johannesburg Conference, 2016, p. 9-10.

There are essentially two ways in which courts can ensure the conformity of legislation to international law: firstly, they can be empowered to perform an abstract review of legislation in the form of a constitutionality control; or, secondly, they can prioritize international law on a case-by-case basis. The former technique constitutes a subset of direct application *lato sensu*. In this case, depending on the characteristics of a legal system, international law is not used by the courts as the governing rule of a case in a strict sense, but as a parameter of an abstract review of legislation.²³¹ The latter technique, to the contrary, presupposes that the international norm is considered to be directly applicable by national courts in the sense described in the previous paragraphs, i.e. as the only or principal rule of decision. The international norm, however, must be deemed to possess also an additional feature, i.e. the capability to displace inconsistent domestic legislation.

Because both techniques constitute peculiar forms of direct applicability of international norms, the capability of national courts to exercise this type of review may be impaired, generally speaking, by the same factors which limit the direct applicability of international law. For example, in a context where a constitution is considered more as a political manifesto than as an applicable or justiciable legal text, it would obviously be impossible for courts to give effect to constitutional provisions prioritizing international law over domestic law.²³² Furthermore, the lack of independence of the judiciary would most likely also prejudice any control of legality of legislation.

Let us analyze more in detail the former technique, i.e. granting municipal courts with the power to strike down legislation inconsistent with international obligations possessing a supra-statutory rank in domestic law. The 1931 Spanish Constitution, in placing treaties for the first time on a higher footing than domestic legislation, was also the first to provide the Constitutional Court with the effective power to invalidate statutes inconsistent with international agreements.²³³ This solution is now adopted in a number of legal systems. Some constitutions expressly allow for relevant international law to be used as primary or exclusive parameter of review of legislation.²³⁴ For example, the 1991 Constitution of Bulgaria declares in Art. 149 that the Constitutional Court has the power to verify “the compatibility of domestic laws with the universally recognized norms of international law and the international treaties to which Bulgaria is a party”.

Other legal systems, on the other hand, simply resort to the normal mechanism of constitutional review of legislation, even if this is not expressly provided for by the constitution. This is the case, for example, of Italy. Since judgments 348 and 349 of 2007, the

²³¹ Y. IWASAWA, “Domestic Application”, cit., p. 187-190 (arguing that abstract review of legislation in light of international law might be considered a form of judicial application “only if one adopts a broad definition of application”).

²³² A. CASSESE, “Modern Constitutions”, cit., p. 349.

²³³ A. CASSESE, “Modern Constitutions”, cit., p. 360-361. Art. 145 of the 1920 Austrian Constitution, which was drafted under the guidance of Hans Kelsen and is still in force, provides: “The Constitutional Court has jurisdiction over violations of international law according to the provisions of a special federal statute”. This provision, however, does not provide the Court with the power to strike down legislation inconsistent with international law. First, it has been interpreted only as conferring a special competence for the prosecution of individuals who violated international law; and second, the federal statute referred to by the article has never been enacted, so that the provision has remained dormant. On this point see E. HANDL-PETZ, “Austria”, in D. SHELTON (ed.), cit., p. 55 ff., p. 70-71.

²³⁴ G. BARTOLINI, cit., p. 1302 and 1311.

Constitutional Court has treated international agreements as parameters of constitutional review of legislation, even though treaty provisions are themselves subject to review of constitutionality: consequently, domestic legislation which cannot be interpreted consistently with the provisions of a treaty should be referred by ordinary judges to the Constitutional Court, which has the authority to invalidate it.²³⁵ Also general international law, pursuant to Art. 10 of the Constitution, can work as a parameter of control of constitutionality. For example, in judgment 131/2001, the Constitutional Court quashed a statutory provision which did not exempt former citizens who renounced Italian nationality from compulsory military service, because it found it to be in violation of customary international law.²³⁶

The boundaries and modalities of this form of review of legislation necessarily depend on how the control of constitutionality works in every specific legal system. It is then the task of national constitutional or supreme courts to determine the degree of specificity that the international norm should have to justify the setting aside of a statute. This evaluation, which is chiefly domestic in nature, should nonetheless take account of two competing factors. On the one hand, since this form of control is performed by the courts in abstract terms, courts may apply international norms even if such norms, by reason of their content, are deemed not to confer an individually enforceable right in a specific legal system.²³⁷ On the other hand, however, the discretionary power of courts would appear to dilate indefinitely if they could set aside a statute based on too vaguely worded international norms. National constitutional and supreme courts, being regularly confronted with similar issues when dealing with constitutional challenges to legislation, are fully competent to strike an adequate balance between these two competing considerations.

As noted before, however, the prevalence of international law over inconsistent legislation can be realized in different forms than the centralized control of constitutionality. The judicial practice of several legal systems shows that the courts have devised an array of judicial techniques with a view to ensure the prioritization of international law over inconsistent legislation in concrete cases, without however invalidating the inconsistent domestic provision. This has happened both in countries which do not have a centralized control of constitutionality at all and in countries where this kind of control exists but international law is not considered amenable to being used as a parameter of constitutional control of legislation.

A prominent example is that of the Netherlands, where Art. 120 of the Constitution establishes that courts cannot review the constitutionality of any parliamentary acts. The courts, however, in giving application to Art. 94 (which establishes the priority of treaties over inconsistent legislation), commonly verify the compatibility of legislation with international treaties and, when necessary, prioritize the latter.²³⁸

²³⁵ Judgment No. 348 of 24 October 2007 and Judgment No. 349 of 24 October 2007. See the comment by G. CATALDI in *Italian Yearbook of International Law* 2007, p. 292 ff.; A. NOLLKAEMPER, *National Courts*, cit., p. 131, ft. 88.

²³⁶ Judgment No. 131 of 15 May 2001. For a similar earlier precedent, see Judgment No. 278 of 17 June 1992, in which the Constitutional Court held that “[i]n base alla conformazione dell’ordinamento giuridico italiano alle norme del diritto internazionale generalmente riconosciute, stabilita dall’art.10, primo comma, della Costituzione, una normativa che continuasse a richiedere il servizio militare ai non cittadini contrasterebbe la norma generale internazionale, violando la Costituzione”.

²³⁷ A. NOLLKAEMPER, *National Courts*, cit., p. 112-113.

²³⁸ A. NOLLKAEMPER, “The Netherlands”, cit., p. 334.

A different situation is that occurring in legal systems where the judiciary does not review the legitimacy of laws in respect to international law even though, first, the constitution provides for the *de jure* supremacy of international law, and second, there is a judicial organ tasked with control of constitutionality of legislation. The cases of France and Russia are revealing. The French Conseil constitutionnel, which performs a chiefly preventive constitutionality review of legislative acts, has consistently denied to have competence over the control of conformity of statutes to treaties (*contrôle de conventionnalité*).²³⁹ Ordinary courts, for their part, generally used to hold that allowing earlier treaties to supersede later statutes would have amounted to a constitutionality control, which they do not have the power to perform. Under these circumstances, the implementation of Art. 55 of the Constitution remained defective until the 1980s, as the relationship between treaties and statutes was regulated in practice by the later in time rule.²⁴⁰ More recent trends signal that French courts have embraced the task to disapply acts of parliament when they conflict with treaty provisions and they have also devised other peculiar ways of giving effect to Art. 55 in the field of state liability.²⁴¹ In the *Gardedieu* case, for example, the Conseil d'Etat awarded compensation for damages caused by legislation held in contravention with the European Convention of Human Rights.²⁴² The situation is somewhat similar as far as the Russian legal system is concerned. The Russian Constitutional Court can review the constitutionality of all kinds of federal normative acts, irrespective of whether they are issued by the Parliament, the President or the government.²⁴³ The Court also has the power to review the constitutionality of treaties prior to their entry into force,²⁴⁴ to regulate conflicts of competence among state powers on the treaty-making process,²⁴⁵ and – according to a recent judgment of the Constitutional Court – to bar the domestic implementation of judgments of the European Court of Human Rights if they are deemed to violate the Constitution.²⁴⁶ All this notwithstanding, it does not seem to possess the power to verify the conformity of domestic laws with international law.²⁴⁷ This view was endorsed by the Constitutional Court in judgment 2531-O of 2014, in which the Court

²³⁹ See e.g. Conseil constitutionnel, *Interruption volontaire de grossesse (conformity to the European Convention on Human Rights)*, DC n° 74–54, 15 January 1975. On this point, see T. BUERGENTHAL, cit., p. 346-347.

²⁴⁰ A. PETERS, “The Globalization of State Constitutions”, in J. NIJMAN, A. NOLLKAEMPER (eds.), cit., p. 251 ff., p. 264-265; E. BENVENISTI, “Judicial Misgivings”, cit., p. 167 (noting that French courts also refused to review the legitimacy of administrative acts with respect to international treaties).

²⁴¹ On this evolution, see V. KRONENBERGER, “A New Approach to the Interpretation of the French Constitution in Respect to International Conventions: From Hierarchy of Norms to Conflict of Competence”, *Netherlands International Law Review* 2000, p. 323 ff., p. 328-333.

²⁴² *Gardedieu v. France*, Cassation Appeal Judgment, ILDC 738 (FR 2007). On the evolution on the French case law, see more thoroughly E. DECAUX, cit., p. 223-226.

²⁴³ B.R. TUZMUKHAMEDOV, “International Law in the Russian Constitutional Court”, *American Society of International Law Proceedings* 2000, p. 166 ff., p. 166-167.

²⁴⁴ I.I. LUKASHUK, cit., p. 154 and 158. For a recent case of prior constitutional revision of treaties see Russian Constitutional Court, *Members of the State Duma*, Final decision, N 17-[], ILDC 1940 (RU 2012).

²⁴⁵ B.R. TUZMUKHAMEDOV, cit., p. 168.

²⁴⁶ A. CALIGIURI, “La recente giurisprudenza costituzionale russa sui rapporti tra Convenzione europea dei diritti umani e ordinamento interno”, *Diritti umani e diritto internazionale* 2016, p. 703 ff., commenting on the judgment *On resolving the matter of the possibility of implementing the Judgment of the European Court of Human Rights of 4 July 2013 in the Anchugov and Gladkov v Russian Federation case in accordance with the Constitution of the Russian Federation*, Constitutional proceedings, No 12-P, ILDC 2590 (RU 2016).

²⁴⁷ I.I. LUKASHUK, cit., p. 157.

contended in general terms that it was not within its competences to assess whether a statute conflicted with international treaties.²⁴⁸

Admittedly, there have been cases in Russia in which a national law was struck down because it was held in violation of the Constitution *and* international law;²⁴⁹ however, in these cases international law was cited alongside constitutional provisions for interpretive purposes or merely in support of findings which were entirely based on domestic law. These cases of consistent interpretation should not be conflated with an actual control of legality directly based on international law.²⁵⁰

This brief survey of state practice prompts some more general comments on the status of international law in countries where courts do not conduct abstract review of legislation vis-à-vis international norms which the constitution proclaims supreme. In the cases scrutinized above, although the constitutional provisions may appear to confer upon international law a hierarchical status superior to domestic legislation, the mechanism of prioritization operates in the same way as the principle of speciality.²⁵¹ Put differently, the constitutional provisions on international law supremacy operate in practice as rules of conflict: their actual effect is that international norms should be prioritized over inconsistent statutes on an individual case basis.²⁵² A domestic law provision remains part of the national legal order even if it clashes with international law.

These two techniques of prioritization of international law over domestic legislation have differing policy implications. Prioritizing international law in the concrete case is more protective of legislative prerogatives, because inconsistent legislation is not struck down once and for all. Instead, it remains theoretically applicable to future cases. To the contrary, the former technique, i.e. the constitutional control of legality of legislation based on international norms, is much more intrusive in legislative prerogatives, because it can obliterate all competences of national legislatures in the subject-matters regulated by supra-statutory international norms.

Which one of the two techniques is preferred in practice and whether they can coexist in application largely depends on the features of each national legal system. More specifically, if a legal system does not provide for any constitutionality control, the control of legality of legislation in light of international law will not be institutionally feasible and the only way to prioritize international law will be to empower courts to disapply inconsistent legislation in concrete cases. However, in countries where a constitutionality control is in place and can be used to ensure the conformity of legislation to international law, the question arises as to

²⁴⁸ *On the Constitutionality of Part 3 of Article 1244 of the Civil Code of the Russian Federation*, Constitutional proceedings, No 2531-O, ILDC 2448 (RU 2014).

²⁴⁹ G.M. DANILENKO, "International Law in the Russian Legal System", *American Society of International Law Proceedings* 1997, p. 295 ff., p. 298.

²⁵⁰ For an analysis of the issues raised by the usage of international law to interpret national constitutions, see Chapter 4, Sections 2.3 and 3.3.

²⁵¹ See, in the context of Russia, I.I. LUKASHUK, *cit.*, p. 146-147 (arguing that treaties are not superior to domestic laws, but have only priority of application in the specific case, and reconnecting this priority not to hierarchical supremacy but to the principle of speciality). For a similar view on the legal system of Mexico, see D.B. HOLLIS, *cit.*, p. 48 ("Mexican treaties and federal statutes operate as different types of legal instruments that cannot abrogate each other; however, in the event they both regulate the same subject, the treaty will prevail as the more specific rule").

²⁵² B.R. TUZMUKHAMEDOV, *cit.*, p. 170-171.

whether the courts can be *also* empowered to prioritize international norms on a case-by-case basis or whether the constitutionality control should be considered the only legitimate means to prioritize international law.

In order to fully understand the policy implications underpinning this choice, it is useful to briefly return to the controversies over the domestic legal effects of the ECHR in the Italian legal system. As seen above in Section 3.2, the Constitutional Court has directed ordinary courts to refer all presumed incompatibilities between primary legislation and international treaties, including the ECHR, to the centralized constitutionality control. Most ordinary judges have interpreted the dictum of the Constitutional Court in the sense that it would prohibit them from applying treaty provisions where such an application requires at the same time to disapply an incompatible domestic norm of primary legislation. Generally, courts have also refrained from performing any type of direct application of conventional provisions, even where such an applicability does not involve the displacement of inconsistent primary legislation. It would appear, therefore, that in the Italian legal order the two abovementioned techniques of prioritization of international law cannot coexist, and that it is the exclusive task of a centralized control of constitutionality to perform the conventionality control of legislation and to strike down inconsistent provisions of domestic law.

Scholars of international law and constitutional law have expressed a variety of views with regard to the approach taken by the Constitutional Court. Commentators who have positively appraised this approach have underscored that this choice helps preserve the centralized control of constitutionality of legislation established by the Italian Constitution. It has been contended, in particular, that, because of the material content of the ECHR, most constitutional challenges to statutes can also be construed as contrasts between the statutes and the ECHR: if the ordinary courts were able to directly apply conventional provisions in lieu of inconsistent legislation, most of the incompatibilities between legislation and the Constitution would probably be construed in the latter way by the parties and, therefore, would never be brought before the Constitutional Court.²⁵³ The view that the direct applicability of conventional provisions would produce the disruption of the centralized control of constitutionality, however, is not unanimous. Other commentators have maintained that considering the Convention direct applicable does not necessarily entail that ordinary courts should have the authority to prioritize international law in concrete cases;²⁵⁴ or that the two techniques of prioritization can coexist, a centralized control of conventionality being necessary only in cases of “systemic conflicts” between national law and international law.²⁵⁵ In fact, both views have certainly a point. On the one hand, where the content of a treaty substantially overlaps with the content of constitutional texts, as is the case with all major human rights instruments, the assessment of the consistency between national statutes and the treaty may take the form of a *de facto* control of constitutionality, which entails a skilful consideration of the scope of the treaty rights in question and a balance of competing interests

²⁵³ This is the view expressed by E. LAMARQUE, “Le relazioni tra l’ordinamento nazionale, sovranazionale e internazionale nella tutela dei diritti”, *Diritto pubblico* 2013, p. 727 ff., p. 751.

²⁵⁴ U. VILLANI, cit.

²⁵⁵ G. CATALDI, “La natura self-executing delle norme della Convenzione europea dei diritti umani e l’applicazione delle sentenze della Corte europea negli ordinamenti nazionali”, in A. CALIGIURI, G. CATALDI, N. NAPOLETANO (eds.), *La tutela dei diritti umani in Europa: tra sovranità statale e ordinamenti sovranazionali*, Padova, 2010, p. 565 ff., p. 573.

and values. Some doubts might legitimately arise as to the institutional and technical capability of ordinary judges to perform such a task.

On the other hand, however, the argument of the material equivalence between constitutional and treaty rights does not appear sufficient to prohibit ordinary courts from applying international law in lieu of domestic legislation in all cases. Firstly, the Italian Constitutional Court generally referred to all international treaties; however, only a handful of multilateral instruments can be deemed to possess a materially constitutional content. Where a treaty does not possess these characteristics, there seems to be no good reason to refer all apparent contrasts to a centralized constitutionality control. Furthermore, even where – as for the ECHR – a treaty has a materially constitutional content, a centralized and a diffused control of compatibility of legislation can coexist. In Italian case law, for example, it is generally recognized that, notwithstanding the existence of a court tasked with a centralized control of constitutionality, the constitutional text can be applied directly by ordinary courts as the governing rule of a case in a range of circumstances. For example, courts have applied the Constitution as *lex posterior* in cases of clear conflict with prior legislation; or have resorted to constitutional provisions to craft norms directly applicable to cases which were *prima facie* not governed by any primary legislation.²⁵⁶ If the constitutionality control and the direct applicability of the Constitution can coexist, there seems to be no reason not to apply the same logic also to the prioritization of international law in a national legal system.

7. Extra-legal factors impairing direct applicability of international law.

To conclude this survey of national practice in the field of direct applicability of international law, one last point should be made concerning some problematic extra-legal factors which may impair the application of international law in practice and thus produce a gap between the *de jure* and the *de facto* status of international law in a domestic legal system. In a number of countries, the discrepancy between the position of international law on paper and the practice of state organs appears to be so intense that it cannot be sufficiently explained by referring to the factors analyzed above in this chapter. More specifically, such limitations on the judicial application of international norms certainly do not stem from international law, constitutional law, explicit directions by the political authorities, or judicial doctrines. Insofar as this is the case, the reasons for such a discrepancy must necessarily lie outside of the realm of positive law.

A cursory analysis of a number of legal systems may suffice to prove this point. Frequently, constitutional provisions theoretically incorporating international law may be considered, *de facto*, as a dead letter.²⁵⁷ Examples of this abound. In some Eastern European and Central Asian countries, although the Constitution sets forth a mechanism of automatic standing incorporation of international law, there is no available judicial practice on the

²⁵⁶ See on this point F. MANNELLA, “Giudice comune e Costituzione: il problema dell’applicazione diretta del testo costituzionale”, *Federalismi.it* n. 24/2010.

²⁵⁷ G.M. DANILENKO, “International Law”, *cit.*, p. 297.

implementation of international sources.²⁵⁸ A similar situation applies to several African countries whose technique of reception of international law is modeled after Art. 55 of the French Constitution: also in these cases, so broad an openness to international law at the formal level is not reflected in the practice of state organs.²⁵⁹ In Iran, Art. 9 of the Civil Code formally grants domestic validity to international agreements with a rank equal to ordinary laws,²⁶⁰ but treaties are not applied in judicial practice.²⁶¹

Also in Russia, it would seem that the attitude of ordinary courts towards the application of international law does not live up to the expectations raised by Art. 15 of the Constitution.²⁶² This situation, however, is rather complex and multifaceted, because international law is far from absent from the case law of Russian courts. International law, in particular, has been widely referred to as a parameter of interpretation of constitutional provisions concerning human rights;²⁶³ moreover, the arbitrazh (i.e. commercial) courts have developed an extensive case law on the application of private international law treaties.²⁶⁴ What seems to be sporadic, by contrast, is case law in which international law has been directly invoked by private individuals against the actions of public authorities.²⁶⁵ As contended by David Sloss, “the available evidence suggests that Russian courts do not regularly apply human rights or humanitarian treaties as a constraint on government action”.²⁶⁶

²⁵⁸ G.M. DANILENKO, “Implementation”, cit., p. 61. This is the case, for example, of Azerbaijan. Although Art. 148(II) of the Constitution provides that “International treaties, to which the Azerbaijan Republic is a party, are an inalienable substantive part of the legislative system of Azerbaijan” and Art. 151 establishes treaty priority over inconsistent legislation, it appears that the courts of Azerbaijan have never applied international law.

²⁵⁹ See generally M. KILLANDER, H. ADJOLOHOUN, “International Law and Domestic Human Rights Litigation in Africa: An Introduction”, in M. KILLANDER (ed.), *International Law and Domestic Human Rights Litigation in Africa*, Pretoria, 2010, p. 3 ff., in particular p. 10 (“African civil law countries have a monist constitutional framework but their judicial cultures create dualism in practice”).

²⁶⁰ R. MOSCHTAGHI, “The Relation between International Law, Islamic Law and Constitutional Law of the Islamic Republic of Iran – A Multilayer System of Conflict?”, *Max Planck Yearbook of United Nations Law* 2009, p. 375 ff., p. 386-387 (claiming that, pursuant to Art. 9, “Iranian law also provides for the possibility to invoke provisions of international treaties before domestic courts”); H. MOVASSAGH, “International Law and Domestic Law Project – Country Report: Islamic Republic of Iran”, 2016, available at <<https://ssrn.com/abstract=2813006>>, paras. B(1) and (2) (arguing that the legal effect of treaties in Iran is not limited by the doctrine of non-self-executing treaties, so that “the treaty provisions have the force of law and must be implemented by all branches of government”).

²⁶¹ See Committee on the Rights of Persons with Disabilities, *Replies of the Islamic Republic of Iran to the list of issues*, 13 January 2017, CRDP/C/IRN/Q/1/Add.1, para. 1 (“According to Article 9 of the Civil Code, the treaties which were acceded in accordance with the constitution are considered as domestic law. [...] Although the judges could invoke provisions of international conventions, they tend to judge according to domestic laws [...]. Invoking the provisions of international legal documents is not ordinary yet.”).

²⁶² G.M. DANILENKO, “International Law”, cit., p. 297 (criticizing a 1994 Council of Europe report arguing that the domestic effects of Art. 15 are “more theory than practice”).

²⁶³ On this point see I.I. LUKASHUK, cit., p. 162 (arguing that “for the most part, treaties are being applied in cases relating to human rights violations”). This form of indirect application of international law sources had better be regarded as a phenomenon detached from the *de jure* formalization of the status of international law: on this point, see Chapter 4, Section 4.

²⁶⁴ G.M. DANILENKO, “Implementation”, cit., p. 58-59.

²⁶⁵ D. SLOSS, “Treaty Enforcement”, cit., p. 8 (arguing that “domestic courts in [...] Russia routinely apply treaties to help resolve transnational disputes between private actors. However, [they] rarely grant judicial remedies to private parties who are the victims of treaty violations committed by the host government”). But see S.Y. MAROCHKIN, “International Law”, cit., p. 344 (contending that international law application is “a reality in the activities of the courts of all levels and of all types”).

²⁶⁶ D. SLOSS, “Treaty Enforcement”, cit., p. 42, also reporting two Supreme Arbitrazh Court cases in which international law was invoked against government action in the field of economic law (specifically, concerning

In assessing the reasons behind these circumstances, extra-legal factors should not be underestimated. As a matter of fact, to think that the judicial application of international law depends exclusively on a country's legislative framework as combined with carefully crafted judicial doctrines would run the risk of being unrealistic and disconnected from the everyday practice of national courts.

Specifically, a country may lack a sophisticated state apparatus capable of effectively applying international law.²⁶⁷ In a context of neo-authoritarian tendencies, national courts may be (expressly or indirectly) influenced into not applying international law vis-à-vis public authorities.²⁶⁸ International law may also not be applied simply because of the lack of familiarity of judges and lawyers with it, or because of the national courts' penchant for applying domestic law.²⁶⁹

The solutions to these problems lie mostly outside the scope of this work. Just by way of example, legal systems address these issues by promoting better legal training and information,²⁷⁰ by adopting legislation implementing or reproducing international norms which would be already part of national law,²⁷¹ or by empowering supreme courts to guide the application of international law by lower courts, sometimes – as in Russia – through the issuance of binding directives.²⁷² Most importantly for the subject of this chapter, these factors underscore that, in many legal environments, the involvement of national courts with international norms – even though these have been incorporated in national law – may depend also on some form of approval or support from the other state authorities. It is inconceivable that national courts, so to say, could survive alone on an island. Ensuring the effectiveness of the status of international law in domestic legal systems requires an effort which pertains to the state machinery as a whole.²⁷³

8. Conclusions.

After the analysis of the formal interactions between international law and national law performed in Chapter 2, this chapter has turned its focus to the practice of state organs and,

tax law and customs duties). On these cases, see also W.E. BUTLER, "Russian Federation", in D. SLOSS (ed.), cit., p. 410 ff., p. 422.

²⁶⁷ A. CASSESE, "Modern Constitutions", cit., p. 441-442.

²⁶⁸ D. SLOSS, "Treaty Enforcement", cit., p. 41 (on Russia); G.M. DANILENKO, "Implementation", cit., p. 61.

²⁶⁹ A.A. ASOUZU, "African States and the Enforcement of Arbitral Awards: Some Key Issues", *Arbitration International* 1999, p. 1 ff., p. 18-19; S. VASILIEV, A. OGORODOVA, cit., p. 204, ft. 41; E. DE WET, "South Africa", in D. SHELTON (ed.), cit., p. 567 ff., p. 593; G.M. DANILENKO, "Implementation", cit., p. 69 (referring to lack of training and translations); B.R. TUZMUKHAMEDOV, cit., p. 170 (citing as hearsay the case of a U.S. judge who refused to apply the ICCPR "because he had never heard of it"); H.H. KOH, "Why the President (Almost) Always Wins in Foreign Affairs – Lessons on Iran-Contra Affair", *Yale Law Journal* 1988, p. 1255 ff., p. 1315-1316 (noting the importance of the background and personality of judges).

²⁷⁰ M. KILLANDER, H. ADJOLOHOUN, cit., p. 18; G.M. DANILENKO, "Implementation", cit., p. 56 (on judges' professionalism).

²⁷¹ D. SLOSS, "Domestic Application", cit., p. 375-376 (noting that national courts tend to prefer indirect rather than direct application of international law).

²⁷² W.E. BUTLER, cit., p. 415-425.

²⁷³ J. D'ASPREMONT, "The Systemic", cit., p. 145 (correctly arguing that "[t]he growing place of international law in domestic legal orders is thus not solely an accomplishment of domestic judges").

above all, of national courts. In particular, it has analyzed in detail the concept of direct applicability of international law, with special emphasis on the issues raised by the judicial application of international norms against public authorities. It has tried to systematize the techniques elaborated by national courts to give effect to incorporated international norms through direct application, as well as the domestic law impediments to this application.

Some interim conclusions can be inferred. The analysis supports the view that the contours of direct application in a given legal system are always explicitly or implicitly influenced by considerations relating to the domestic separation of powers. This appears to be true even when domestic courts justify their recourse to international law by invoking international norms purportedly imposing to apply – or not to apply – international law. As seen in the previous pages, there are simply no such norms in the international legal system. International law neither imposes nor prohibits its direct application by national courts. Similarly, also the content and structure of the international norms do not provide conclusive indications as to whether such norms can be directly applied by national judges. One should conclude that, when courts purport to rely on international law itself to determine if an international norm is directly applicable, what they are in fact doing is to rely – however tacitly, and perhaps even unknowingly – on considerations of domestic law.

To summarize, the extent of the direct applicability of international law by domestic courts is shaped by two main factors.

The first one is the formal status of international law in the national legal system. On the one hand, this status is the foundation of the judicial application of international law, because the incorporation of international law in domestic law empowers courts to apply international law on an equal footing with domestic legal sources. On the other hand, the formal status is also a limit: international law cannot be applied as a rule of decision by domestic judges unless it is made part of domestic law. Against this backdrop, the direct applicability of international law in a national legal system should be neither extensive nor restrictive. Instead, in principle, it should simply be expected to be in line with the status that international law has in the domestic hierarchy of norms.

The second factor influencing the assessment of direct applicability of international norms is the domestic separation of powers. This relates, in particular, to the role of national courts vis-à-vis political authorities. Domestic law may bar the application of international norms regulating certain areas of law, without some form of authorization from the legislature. Or, more generally, courts may be reluctant to directly apply norms setting forth international standards that they perceive as vague or incomplete, if they believe that the institutional competence to define the content of such norms should belong to the political branches. Although these limitations should be interpreted restrictively, as this chapter has argued, they cannot be nullified by the courts. National courts always operate within the web of limitations set forth by the domestic legal system and cannot be expected to act at variance with their institutional position.

There is, however, one way for national courts to draw domestic effects from international norms beyond the limits of their direct applicability and – so to say – to pierce the veil of the *de jure* status of international law in national law. This can happen by relying on international sources in the interpretation of domestic law. The practice of using international norms in interpretation will be the object of Chapter 4.

Chapter 4

Consistent Interpretation of Domestic Law with International Law and Constraints on Political Authorities

CONTENT: 1. Introduction. – 2. The techniques of consistent interpretation in the practice of national courts. – 2.1. Consistent interpretation of primary legislation with incorporated international law. – 2.2. Consistent interpretation of primary legislation with unincorporated international law. – 2.3. Consistent interpretation of national constitutions. – 3. Consistent interpretation and the prerogatives of the political authorities. – 3.1. Consistent interpretation and legislative intent. – 3.2. Consistent interpretation and textual ambiguity. – 3.3. Consistent interpretation and domestic hierarchy of norms. – 4. An assessment: consistent interpretation as a policy-based canon of construction. – 4.1. Policy rationale of consistent interpretation. – 4.2. Separation of powers function of consistent interpretation. – 5. Conclusions.

1. Introduction.

The analysis performed in the previous chapter does not exhaust all ways in which national courts can interact with international norms. Instead of applying international law directly as the only, or principal, rule of decision, domestic judges can interpret and apply domestic norms in ways which conform to the relevant international obligations. In such cases, although it is a norm of domestic law which furnishes the rule of decision, international law can play a defining role in informing the substantive content of the relevant domestic norm. This usage of international norms in domestic proceedings is commonly referred to as consistent interpretation of domestic law with international law. Other expressions, such as “presumption of conformity”, “presumption of compatibility”,¹ or “indirect application of international law”,² are also commonly used in practice and will be treated as synonyms for the purposes of this chapter.

Consistent interpretation is widely practiced by national courts across jurisdictions. By reason of its diffusion, some commentators have considered this technique to be to a great extent unproblematic.³ It has also been argued that the interpretive presumption that domestic law conforms to international law should be regarded as a general principle of law in the sense of Art. 38(1)(c) of the Statute of the ICJ.⁴ These views, however, neglect that the application of

¹ D. SLOSS, “Domestic Application of Treaties”, in D.B. HOLLIS (ed.), *The Oxford Guide to Treaties*, Oxford, 2012, p. 367 ff., p. 380.

² See e.g. D. SLOSS, M. VAN ALSTINE, “International Law in Domestic Courts”, in W. SANDHOLTZ, C.A. WHYTOCK (eds.), *Research Handbook on the Politics of International Law*, Cheltenham-Northampton, 2017, p. 79 ff.

³ See for example D. SHELTON, “Introduction”, in D. SHELTON (ed.), *International Law and Domestic Legal Systems. Incorporation, Transformation, and Persuasion*, Oxford, 2011, p. 1 ff., p. 12 (“[a]s a matter of statutory construction, the presumption of conformity between international and domestic law has not proven particularly controversial”).

⁴ W.N. FERDINANDUSSE, *Direct Application of International Criminal Law in National Courts*, The Hague, 2006, p. 147. See also Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, para. 15: “It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State’s international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of

this principle of interpretation encounters wide disparities between legal systems and that its foundations and extent are often a matter of controversy.⁵ In fact, the “apparent simplicity” of this interpretive technique has been very aptly described as “hid[ing] a deep and characteristic complexity that goes to the heart of how international law should be applied” in a national legal system.⁶

Much of the cause of this complexity can ultimately be traced back to the way consistent interpretation interacts with and impinges on the prerogatives of the national political branches. In a sense, consistent interpretation of domestic legislation may prove more problematic than direct application of international law from the viewpoints of democratic legitimacy and separation of powers. This could seem counter-intuitive to some extent. After all, when it is applied indirectly, international law cannot displace national law and its content is filtered through domestic legislation. However, while direct application is always grounded on the domestic status of international norms, and is thus bound to comply with their domestic validity and hierarchy, consistent interpretation can potentially extend the domestic effects of international law beyond the status which is formally granted to it in a national legal order. Moreover, the degree to which the meaning of domestic law provisions can be moulded to make them conform to international law is also exclusively controlled by the courts.

Compared to direct application, then, the boundaries of this form of international law application are defined much more loosely – if at all – by positive law and seem to fundamentally depend on the approach taken by the courts. This setting makes indirect application a particularly interesting field to explore for the present research, because legal scholarship can play a defining role in guiding and influencing the practice of national judges. Against this backdrop, the main goal of this chapter is to develop a theory of consistent interpretation which may allow national courts to clearly determine its proper extent, boundaries and objectives.

The structure of the chapter is as follows. Section 2 is chiefly descriptive in nature and contains a general overview of the techniques of consistent interpretation. In particular, it classifies the relevant case law into three broad categories which raise distinctively different issues in practice. Section 3 explores the ways in which the courts’ preoccupation with the safeguard of executive or legislative prerogatives impacts (expressly or tacitly) on the extent of the interpretive usage of international norms, and identifies a number of relevant problems with the approaches taken by the courts. Finally, Section 4 aims to solve these issues by attempting a general assessment of the foundations, functions and limits of consistent interpretation.

domestic law that would place the state in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter”.

⁵ As noted by A. NOLLKAEMPER, *National Courts and the International Rule of Law*, Oxford, 2011, p. 150-151, the view according to which consistent interpretation constitutes a general principle of law does not find adequate support in practice and is, all things considered, rather useless, because courts resorting to consistent interpretation never claim to do so out of a sense of (international) legal obligation.

⁶ R.G. STEINHARDT, “The Role of International Law As a Canon of Domestic Statutory Construction”, *Vanderbilt Law Review* 1990, p. 1103 ff., p. 1113. See also E. CANNIZZARO, “Interpretazione conforme fra tecniche ermeneutiche ed effetti normativi”, in A. BERNARDI (ed.), *L’interpretazione conforme al diritto dell’Unione europea. Profili e limiti di un vincolo problematico*, Naples, 2015, p. 3 ff., p. 3 (“nonostante il successo di tale strumento, esso rimane ancora misterioso nel suo fondamento, nel suo contenuto, nel suo ambito di applicazione, nella sua natura giuridica”).

2. The techniques of consistent interpretation in the practice of national courts.

As noted in the Introduction, the national case law in the field of indirect application of international law is extremely diverse. For the sake of the current analysis, it is therefore necessary to bring some order in the relevant practice and to single out the main species which compose the broader genus. It is also opportune to better clarify the relationship between direct application and consistent interpretation, in order to define the object of this chapter as compared to Chapter 3.

Several systems of classification could be employed. One could look, in particular, at any of the following characteristics: the types of international sources employed as interpretive parameters; the types of domestic sources which form the object of the interpretive process; the way in which courts motivate their resort to international law for interpretation; or the goals that the courts intend to pursue. At this preliminary stage, a classification based on a combination of the first two elements (i.e. the types of sources involved in the interpretive process, either as objects or as parameters) appears most illustrative. The legal foundations and the objectives of consistent interpretation will be dealt with in greater detail in the following sections.

Based on the above, the following paragraphs divide consistent interpretation into three categories, according to whether (i) acts of parliament are interpreted consistently with international norms which are part of the national legal system; (ii) acts of parliament are interpreted in light of unincorporated international law; and (iii) international law is resorted to in the interpretation of the national constitution.

2.1. Consistent interpretation of primary legislation with incorporated international law.

The first case to be examined is a situation where national courts resort to international norms which form part of domestic law to interpret acts of parliament or hierarchically equivalent domestic sources.

This approach is epitomized by the so-called *Charming Betsy* canon employed in statutory construction by the courts of the United States. In an early Supreme Court decision, *Murray v. The Schooner Charming Betsy*, Chief Justice Marshall held that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”.⁷ Despite its initial formulation, which only referred to the law of nations, this principle of interpretation is commonly applied with regard to both general international law and international agreements.⁸

⁷ *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), p. 118. On this canon, see generally P.R. DUBINSKY, “United States”, in D. SHELTON (ed.), cit., p. 631 ff., p. 642. For extensive surveys of the application of the *Charming Betsy* canon by the U.S. Supreme Court, see T.H. LEE, D.L. SLOSS, “International Law as an Interpretive Tool in the Supreme Court, 1861–1900”, in D.L. SLOSS, M.D. RAMSEY, W.S. DODGE (eds.), *International Law in the U.S. Supreme Court. Continuity and Change*, Cambridge-New York, 2011, p. 124 ff.; R.P. ALFORD, “International Law as an Interpretive Tool in the Supreme Court, 1901–1945”, *ibid.*, p. 257 ff.; M.A. WATERS, “International Law as an Interpretive Tool in the Supreme Court, 1946–2000”, *ibid.*, p. 380 ff.

⁸ D. SLOSS, “United States”, in D. SLOSS (ed.), *The Role of Domestic Courts in Treaty Enforcement. A Comparative Study*, Cambridge, 2009, p. 504 ff., p. 526-527.

The rule of consistent interpretation is codified in the UK Human Rights Act 1998, which incorporates large portions of the European Convention on Human Rights in UK law.⁹ Pursuant to Section 3(1) of the Act, “[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights”.¹⁰

The main issue with this prong of consistent interpretation is to set its boundaries with the direct applicability of international law. Indeed, depending on the circumstances, the international norms used as interpretive parameters might also have the potential to be directly applied, in consequence of their validity in the national legal system. In fact, as will be seen, the reach of consistent interpretation is generally wider than direct applicability, so that indirect application may allow courts to give effect to international law in situations where it would not be viable to use international law directly as the rule of decision. However, the two judicial techniques may nonetheless sometimes overlap in application.

First of all, consistent interpretation can apply to situations where it is undisputed that domestic law should be the governing rule, because there is no international norm which could govern the substance of the claim. For example, international law could be relied on to determine the extent of territorial application of domestic norms,¹¹ or to inform the content of governmental discretionary powers where the direct applicability of international law is not an issue before the court at all.¹²

A particularly illustrative example of the former usage is the *R. v. Hape* case before the Canadian Supreme Court. Called upon to decide whether the Canadian Charter of Rights and Freedoms could apply to acts of the Canadian police conducted abroad, the Court resorted extensively to the norms of customary international law regulating the jurisdictional competence of states. As shown in Chapter 2, general international law is incorporated in Canada following the Westminster approach.¹³ Also in *Murray v. The Schooner Charming Betsy*, the issue was whether a US act prohibiting commerce with France, with which the US was at war, was applicable to a Danish national who was born as a US citizen and never renounced his nationality. The latter argued that applying the act to himself would violate the international norms concerning neutrality. This view was espoused by the Supreme Court.¹⁴ Later case law shows that US courts have occasionally taken the stance that the principle would only apply to restrict extraterritorial application of statutes to avoid foreign policy disputes,¹⁵ but this position seems disproven by the broader approach taken by the majority of courts.

⁹ See Chapter 2, Section 5.

¹⁰ On this provision see A. KAVANAGH, *Constitutional Review under the UK Human Rights Act*, Cambridge, 2009, particularly p. 17-117.

¹¹ J. TURLEY, “Dualistic Values in the Age of International Legisprudence”, *Hastings Law Journal* 1993, p. 195 ff., p. 238 (arguing that the *Charming Betsy* canon has been applied “largely to avoid jurisdiction or, more recently, to avoid an international conflict by following the least controversial course available under international law”); A. NOLLKAEMPER, *National Courts*, cit., p. 150.

¹² A. NOLLKAEMPER, “The Netherlands”, in D. SLOSS (ed.), cit., p. 326 ff., p. 351.

¹³ *R. v. Hape*, [2007] 2 S.C.R. 292. On this case, see generally J.H. CURRIE, “Weaving a Tangled Web: Hape and the Obfuscation of Canadian Reception Law”, *Canadian Yearbook of International Law* 2007, p. 55 ff.

¹⁴ *Murray v. The Schooner Charming Betsy*, cit.

¹⁵ See, for example, *ARC Ecology and ors v United States Department of the Air Force and ors*, Appeal Judgment, 411 F.3d 1092 (9th Cir. 2005), ILDC 901 (US 2005).

In other situations, the dividing line between direct and indirect application of international law might be less clear-cut. It could be the case, for instance, that a norm of international law, although part of the domestic legal system and hypothetically able to be the governing rule of a case, is considered – whatever the reason – non directly applicable in that legal system.¹⁶ In such a case, national courts could still be able to extract some effects from the international norm at the level of statutory interpretation. In the case of *Kim Ho Ma v. Ashcroft*, for example, the Ninth Circuit Court of Appeals applied the *Charming Betsy* canon in order to interpret a statute in a manner consistent with the ICCPR, a treaty which has been deemed to be non self-executing by the US Congress.¹⁷

It should be added that, although the difference between the application of international law as the governing rule and its use as an interpretive parameter might seem well-defined in theory, the two techniques might sometimes yield barely distinguishable outcomes.¹⁸ More specifically, there are cases where national courts present their usage of international law as ancillary to the application of domestic law as the rule governing the case, but, in fact, the rule that they apply is in practice entirely derived from international law. In such cases, the reference to the interpretation of domestic law might appear as no more than a formality to justify a more assertive application of international norms.

As an example, consider a 2007 judgment of the Tribunal of Milan.¹⁹ In the course of a criminal trial, a witness had gone missing immediately after testifying against the defendant, so that the defence did not have the opportunity to cross-examine the witness. The issue before the court was whether that testimony had to be considered as legally obtained: while the Italian criminal code allows to receive evidence whose gathering is not repeatable, the defence invoked Art. 6(3)(d) of the European Convention on Human Rights, which guarantees the right of the accused to examine witnesses against him. Having affirmed that the provisions of the criminal code had to be construed consistently with the Convention, as interpreted by the Strasbourg court, the Tribunal ultimately held that the testimony in question could not amount to a proof beyond any reasonable doubt. Despite the court's invocation of the canon of consistent interpretation, however, the supposedly *interpretive* use of the international norm led in fact to the non-application of the domestic norm. Strictly speaking, the governing rule applied to the case was a legal principle that the court extracted exclusively from the ECHR and the ECtHR case law.

Finally, national courts frequently resort to consistent interpretation in lieu of direct application for reasons of opportunity. Such a preference for indirect rather than direct application of international norms could be interpreted, following Mattias Kumm, as part of

¹⁶ A. NOLLKAEMPER, *National Courts*, cit., p. 145 (“the practice of consistent interpretation is not contingent on the question of whether a rule of international law can be given direct effect, and thus may allow a court to circumvent the shield that the concept of direct effect may set up”).

¹⁷ *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095 (9th Cir. 2001). The view that non self-executing treaties can be used for statutory construction is not unanimous. For the opposite view, see *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, (Fed. Cir. 2006), p. 1360. For a critique of the reasons for the non direct applicability of human rights treaties in the US, see Chapter 3, Sections 3 and 4.

¹⁸ For a similar viewpoint, see M. CARTABIA, “Le sentenze «gemelle»: diritti fondamentali, fonti, giudici”, *Giurisprudenza costituzionale* 2007, p. 3564 ff., p. 3567.

¹⁹ Tribunal of Milan, Judgment of 31 October 2007. For a more detailed analysis of this judgment, see I. CARLOTTO, “I giudici comuni e gli obblighi internazionali dopo le sentenze n. 348 e n. 349 del 2007 della Corte costituzionale: un’analisi sul seguito giurisprudenziale (Parte I)”, *Politica del diritto* 2010, p. 41 ff., p. 63-64.

“a shift from rules of conflict to rules of engagement” in the attitude of national courts toward international law,²⁰ i.e. as a sign that courts may prefer to downplay substantive clashes between international and national sources and to look instead for a “conciliatory solution”.²¹ However, this tendency requires a cautious and case-by-case evaluation. A preference for consistent interpretation might also be an indication of a general misuse of or distrust for direct application. In the US, for example, the scholarly interest in consistent interpretation has developed in parallel with the progressive erosion and demise of the self-execution doctrine in judicial practice.²²

2.2. Consistent interpretation of primary legislation with unincorporated international law.

In other contexts, domestic statutes may be construed in accordance with international sources which are not formally incorporated in the domestic legal sphere. This may happen either because the political branches have chosen not to incorporate the source in question, or because that source cannot be possibly incorporated for external reasons, e.g. because it does not bind the state internationally.²³

Questions concerning the legal value of unincorporated international law have typically presented themselves in common law countries with regard to international agreements. Under the Westminster approach to the reception of international law, treaties are not subject to automatic incorporation in domestic law.²⁴ National courts, though, have perfected doctrines allowing them to interpret domestic law in light of unincorporated international treaties.²⁵ These doctrines are commonly based on the presumed intent of the parliament,

²⁰ M. KUMM, “Democratic Constitutionalism Encounters International Law: Terms of Engagement”, in S. CHOUDHRY (ed.), *The Migration of Constitutional Ideas*, Cambridge, 2007, p. 256 ff., p. 292 (noting “a shift from rules of conflict to rules of engagement. These rules of engagement characteristically take the forms of a duty to engage, the duty to take into account as a consideration of some weight, or presumptions of some sort”).

²¹ A. NOLLKAEMPER, “The Netherlands”, cit., p. 349 (referring to Dutch courts, but in terms susceptible of being generalized). See also D. SLOSS, “Treaty Enforcement in Domestic Courts. A Comparative Analysis”, in D. SLOSS (ed.), cit., p. 1 ff., p. 14.

²² C.A. BRADLEY, “The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law”, *Georgetown Law Journal* 1997, p. 479 ff., p. 483 (arguing that lawyers and commentators who have been frustrated by the lack of direct effect given by U.S. courts to international law have to some extent rested their hopes on international law’s interpretive role). On the demise of self-execution in the U.S., see e.g. “Judicial Enforcement of International Law Against the Federal and State Governments” (Note), *Harvard Law Review* 1990-1991, p. 1269 ff., p. 1269 (contending that “litigants and judges have long been reluctant to accord international law the same status as other sources of federal law. Litigants generally invoke international law only for illustrative purposes – to inform the statutory [...] commands that provide the real basis for the action – rather than as a full-fledged source of law in its own right”).

²³ See, for example, *Abagninin and ors v AMVAC Chemical Corporation and ors*, Appeal Judgment, 545 F.3d 733 (9th Cir. 2008), ILDC 1106 (US 2008) (resorting to the Rome Statute, not binding on the U.S., to define the crime of genocide). See also S. BEAULAC, J.H. CURRIE, “Canada”, in D. SHELTON (ed.), cit., p. 116 ff., p. 125 (noting that “Canadian judges rarely, if ever, consider international law sources by taking into account whether they have a legally binding effect on Canada. Instead, they tend to consider *all sources* of international human rights law as ‘relevant and persuasive’”; emphasis in the original). For similar considerations with regard to the European Court of Justice’s use of international sources in interpreting European Union law, see F. CASOLARI, “Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation”, in E. CANNIZZARO, P. PALCHETTI, R.A. WESSEL (eds.), *International Law as Law of the European Union*, Leiden-Boston, 2012, p. 395 ff.

²⁴ See Chapter 2, Section 5.

²⁵ For a concise overview of judicial practice, see M.P. VAN ALSTINE, “The Role of Domestic Courts in Treaty Enforcement. Summary and Conclusions”, D. SLOSS (ed.), cit., p. 555 ff., p. 593-595. It should be noted

textual ambiguity, or a combination thereof. Such legal foundations will be more thoroughly analyzed in the next section.

A typical restatement of the principle in question can be found in *Higgs v. Minister of National Security*, a case decided by the Privy Council. After recalling the default rule according to which “the corollary of [...] unrestricted treaty-making power is that treaties form no part of domestic law unless enacted by the legislature” and “unincorporated treaties cannot change the law of the land”, Lord Hoffmann added that such treaties “may have an indirect effect upon the construction of statutes as a result of the presumption that Parliament does not intend to pass legislation which would put the Crown in breach of its international obligations”.²⁶

This presumption may allow courts to avert a defective application of international law as a result of a lack of formal incorporation. A presumption of compatibility can even yield results similar in practice to a direct application of international law as the rule of decision: what has been said above with regard to international norms incorporated in domestic law can equally apply to unincorporated international law.²⁷ Clearly, however, the substantial difference is that in the present case the effects of international norms come close to an application *qua* domestic law, even though such norms do not formally possess a status equal to domestic legislation.

Consider, for example, the use of the 1997 Oviedo Convention by the Italian Court of Cassation in its 2007 judgment in the *Englaro* case.²⁸ Italy had not (and, to date, has not) ratified the Convention, even though the legislature, with the same act (Law No. 145/2001), authorized its ratification and set forth an *ordine di esecuzione*, i.e. a provision making the Convention part of domestic law as soon as it enters into force on the international plane. In its judgment, the Cassation argued that the Convention could have “an auxiliary function from the interpretative point of view: it will have to give way to a contrary national rule, but can and must be used in interpreting domestic norms consistently with it”. This premise notwithstanding, the court in practice simply proceeded to extract a legal principle from Art. 6

that, although the common law principle of consistent interpretation is a judicial creation, it has sometimes been transposed in legislation. It is enshrined, for example, in Section 233 of the South African Constitution in the following terms: “when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”. On this provision, see J. DUGARD, “South Africa”, in D. SLOSS (ed.), *cit.*, p. 448 ff., p. 457-463.

²⁶ *Higgs and Mitchell v. The Minister of National Security and others* [2000] 2 AC 228, Privy Council Appeal No. 45 of 1999. For another illustrative example, see, *ex multis*, *Salomon v. Customs and Excise Commissioners* [1967] QB 116, where Lord Justice Diplock held that “if the terms of the legislation are not clear but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a *prima facie* presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred”.

²⁷ A. NOLLKAEMPER, *National Courts*, *cit.*, p. 139-140 (consistent interpretation can constitute “a powerful alternative” that national courts may employ to give effect to international obligations in situations where direct application is not allowed for by domestic law; an alternative whose result “may look similar to that of direct effect”).

²⁸ Judgment No. 21748 of 16 October 2007. See the comment by F. PALOMBINO in *Italian Yearbook of International Law* 2008, p. 356 ff. On the use of the Oviedo Convention by the Italian courts, see generally F.M. PALOMBINO, “La rilevanza della Convenzione di Oviedo secondo il giudice italiano”, *Giurisprudenza costituzionale* 2011, p. 4811 ff.; V. TONINI, “La rilevanza della Convenzione di Oviedo sulla biomedicina secondo la giurisprudenza italiana”, *Rivista di diritto internazionale* 2009, p. 116 ff.

(on the protection of persons not able to give consent to medical treatment) and to apply it to the case at hand. The court did not even mention which norm of domestic law it meant to interpret in conformity to the Convention.

Similarly, the effects of consistent interpretation in common law legal systems have sometimes proved so pervasive that the traditional rule on the non automatic incorporation of treaties has become unable to describe the actual weight given to treaties in such systems.²⁹ Notably, before the adoption of the 1998 Human Rights Act, Rosalyn Higgins argued that the non-incorporation of the European Convention on Human Rights “seemed to have become an irrelevance” to certain domestic judges in the UK.³⁰ And Melissa Waters, in yet more general terms, has famously written of a tendency of common law courts towards a “creeping monism”.³¹

Unincorporated international law has also been resorted to in order to ensure compliance on the part of administrative authorities.³² The usage of international law as a standard of review of administrative action should be regarded as a form of consistent interpretation, because international law is used to inform the content and extent of a discretion which is conferred upon the government by an act of parliament.³³ The above is true even though, in certain common law jurisdictions, this usage has rather been traced back to the doctrine of legitimate expectations in administrative law.³⁴

The New Zealand case law provides one of the earliest and most influential examples of this trend. In *Tavita v Minister of Immigration*, the Court of Appeal was confronted with the

²⁹ See generally M.A. WATERS, “Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties”, *Columbia Law Review* 2007, p. 628 ff. This trend has taken roots across common law jurisdictions. See e.g. M. KILLANDER, H. ADJOLOHOUN, “International Law and Domestic Human Rights Litigation in Africa: An Introduction”, in M. KILLANDER (ed.), *International Law and Domestic Human Rights Litigation in Africa*, Pretoria, 2010, p. 3 ff., p. 4 (noting that “African civil law countries have traditionally been seen as monist and common law countries as dualist. However, [...] courts in many traditionally dualist countries in Africa use international law to a larger degree than explicitly monist countries such as those of Francophone Africa”); W.J. HOPKINS, “New Zealand”, in D. SHELTON (ed.), cit., p. 429 ff., p. 446 (noting “a convergence between these two ideal types [i.e. monism and dualism as constitutional set-ups], with the national courts operating as a filter between the international and the domestic legal systems, whatever the source of the international obligation”).

³⁰ R. HIGGINS, “The Role of Domestic Courts in the Enforcement of International Human Rights: The United Kingdom”, B. CONFORTI, F. FRANCONI (eds.), *Enforcing International Human Rights in Domestic Courts*, The Hague-Boston-London, 1997, p. 37 ff., p. 48-49.

³¹ M.A. WATERS, “Creeping Monism”, cit., p. 633 and 652.

³² See generally D. DYZENHAUS, M. HUNT, M. TAGGART, “The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation”, *Oxford University Commonwealth Law Journal* 2001, p. 5 ff., p. 5 (“Courts throughout the common law world have, for some time, given effect to international legal obligations (especially human rights norms) by way of administrative law doctrines and techniques”); W. LACEY, “The Judicial Use of Unincorporated International Conventions in Administrative Law: Back-Doors, Platitudes and Window Dressing”, in H. CHARLESWORTH, M. CHIAM, D. HOVELL, G. WILLIAMS (eds.), *The Fluid State: International Law and National Legal Systems*, Sidney, 2005, p. 82 ff.

³³ A. NOLLKAEMPER, “The Effects of Treaties in Domestic Law”, in C.J. TAMS, A. TZANAKOPOULOS, A. ZIMMERMANN (eds.), *Research Handbook on the Law of Treaties*, Cheltenham-Northampton, 2014, p. 123 ff., p. 148 (considering it a form of consistent interpretation).

³⁴ It is noteworthy that in *Higgs v. Minister of National Security*, cit., para. 12, Lord Hoffmann, writing for the majority, appeared to describe this form of international law application as different from consistent interpretation. In particular, he wrote that unincorporated treaties could have *two kinds of effects* in domestic law: firstly, an interpretive effect on the construction of statutes; and secondly, “the existence of a treaty may give rise to a legitimate expectation on the part of citizens that the government, in its acts affecting them, will observe the terms of the treaty”. “In this respect – he added – there is nothing special about a treaty. Such legitimate expectations may arise from any course of conduct which the executive has made it known that it will follow”.

question whether the Minister was required to consider three relevant international human rights conventions (which New Zealand had ratified but not incorporated in domestic law) in issuing an order of deportation. The court held that the argument that the Minister was entitled to ignore such conventions was “an unattractive [one], apparently implying that New Zealand’s adherence to the international instruments has been at least partly a window-dressing”.³⁵ This decision exercised strong influence on subsequent case law in countries of common law. Most notably, one may refer to the Australian High Court judgment in the case of *Minister of Immigration and Ethnic Affairs v Teoh*.³⁶ Here again, the issue was whether the Minister had to take consideration of a human rights convention when issuing a deportation order. In particular, Teoh – a Malaysian national with seven children of Australian nationality – contended that, pursuant to the Convention on the Rights of the Child, the Minister had to afford primary consideration to the principle of the best interest of his children when considering whether to order his deportation and cause the separation of his family. The judges argued that the Convention’s ratification did in fact create a legitimate expectation that the Executive would act in conformity with it.³⁷

This judicial approach, however, operates under the constraints of each country’s administrative law. This has usually limited judicial review of administrative action to a merely procedural plane.³⁸ In *Tavita*, for example, the court merely adjourned the appeal *sine die* in order to give the Minister an “opportunity of reconsideration” of a new application from the appellant; and the same principle was upheld by the Privy Council in the above-cited decision *Higgs v. Minister of National Security*, where it was held that “the legal effect of creating such a legitimate expectation is purely procedural. The executive cannot depart from the expected course of conduct unless it has given notice that intends to do so and has given the person affected an opportunity to make representations”.

Furthermore, it should be underlined that this approach is not uniformly adopted across common law jurisdictions. By way of example, even though the UK administrative law is quite unique among common law countries for having developed a (however quite restrictive) notion of substantive expectations,³⁹ review of administrative discretion in light of unincorporated international law “has not gained wide traction” in the UK, save for sporadic exceptions.⁴⁰ In the *Venables* case before the House of Lords, one Lord Justice relied on a presumption “that Parliament has not maintained on the statute book a power capable of being

³⁵ *Tavita v Minister of Immigration*, [1994] 2 NZLR 257. On this judgment, see W. LACEY, “The Judicial Use”, cit., p. 100-102; W.J. HOPKINS, cit., p. 438-440; M.A. WATERS, “Creeping Monism”, cit., p. 662.

³⁶ *Minister of Immigration and Ethnic Affairs v. Teoh*, [1995] HCA 20, ILDC 779 (AU 1995). On the influence of *Tavita* on *Teoh* and the following case law, see M.A. WATERS, “Creeping Monism”, cit., p. 666 ff. 178-179 and p. 691.

³⁷ Interestingly, a number of executive and legislative initiatives have since attempted to overcome the legitimate expectations doctrine developed in *Teoh*. It appears, however, that only the state of South Australia has effectively adopted legislation barring the extension of the doctrine to unincorporated international treaties. On the the political reactions to *Teoh*, see A. DE JONGE, “Australia”, in D. SHELTON (ed.), cit., p. 23 ff., p. 38-39.

³⁸ A. NOLLKAEMPER, “The Effects”, cit., p. 148-149.

³⁹ *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213. In *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237, the scope of the substantive legitimate expectations was clarified in the following terms: the administration needs to explain and justify the refusal to give effect to the legitimate expectation, and the court can review the reasonableness of the government’s explanation. On this evolution in U.K. case law, see W. LACEY, “The Judicial Use”, cit., p. 95-96.

⁴⁰ D. SLOSS, “Treaty Enforcement”, cit., p. 22.

exercised in a manner inconsistent with the treaty obligations of this country” and held that the Secretary of State should have taken into account the (unincorporated) Convention on the Rights of the Child in the exercise of statutory discretion. But this appears to have remained an isolated precedent.⁴¹

2.3. Consistent interpretation of national constitutions.

Initially devised with regard to the interpretation of statutes, the judicial tools of consistent interpretation have been later in time extended to the interpretation of national constitutions.⁴² Sometimes, such an extension has been driven by national constitutions themselves. For example, Section 39(1)(b) of the Constitution of South Africa sets forth an obligation upon courts to consider international law in the interpretation of the domestic Bill of Rights. Similar obligations are enshrined in the constitutions of Portugal, Spain and Romania.⁴³ This widening in the scope of interpretive usage of international law can be explained on several levels. The most obvious reason is that virtually all constitutions include explicit or implicit references to some international legal standards or international institutions. In these cases, it seems obvious to resort to international law to clarify the meaning of such expressions.⁴⁴ The use of international law in constitutional interpretation, however, has much wider implications. Constitutional provisions often set forth broad standards and principles, thus leaving much room for judicial interpretation. Since some areas of international law (e.g. international human rights law) are inherently connected to, and substantially overlapping with, the rights protected under domestic constitutionalism,⁴⁵ they represent a natural reference point in the interpretive process of giving content to domestic human rights.⁴⁶

⁴¹ *R v. Secretary of State for the Home Department, ex parte Venables* [1998] AC 407, p. 499 (speech of Lord Browne-Wilkinson). On this decision, see S.C. NEFF, “United Kingdom”, in D. SHELTON (ed.), cit., p. 620 ff., p. 625; A. AUST, “United Kingdom”, in D. SLOSS (ed.), cit., p. 476 ff., p. 492-493.

⁴² A. PETERS, “The Globalization of State Constitutions”, in J. NIJMAN, A. NOLLAEMPER (eds.), *New Perspectives on the Divide Between National and International Law*, Oxford, 2007, p. 251 ff., p. 300; M. KUMM, “Democratic”, cit., p. 278; M.A. WATERS, “Creeping Monism”, cit., p. 679 ff. (terming this usage of international law “constitutional *Charming Betsy* canon”); N. STROSSEN, “Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis”, *Hastings Law Journal* 1990, p. 805 ff. (advocating a greater use of international sources in statutory and constitutional interpretation); R.J. MARTINEAU, “Interpreting the Constitution: The Use of International Human Rights Norms”, *Human Rights Quarterly* 1983, p. 87 ff.; H.A. BLACKMUN, “The Supreme Court and the Law of Nations”, *Yale Law Journal* 1994-1995, p. 39 ff., p. 45 (contending that “International law can and should inform the interpretation of various clauses of the Constitution”. The author was judge at the US Supreme Court from 1970 to 1994).

⁴³ See 1976 Constitution of Portugal, Art. 16(2): “The provisions of the Constitution and laws relating to fundamental rights are to be read and interpreted in harmony with the Universal Declaration of Human Rights”; 1978 Constitution of Spain, Art. 10(2): “The norms relative to basic rights and liberties which are recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain”; 1991 Constitution of Romania, Art. 20(1): “Constitutional provisions concerning the citizens’ rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to”.

⁴⁴ G.L. NEUMAN, “International Law as a Resource in Constitutional Interpretation”, *Harvard Journal of Law and Public Policy* 2006-2007, p. 177 ff., p. 183.

⁴⁵ See e.g. A. PETERS, cit., p. 268-270 (noting the ECHR’s resemblance to national constitutional instruments).

⁴⁶ G.L. NEUMAN, “The Uses of International Law in Constitutional Interpretation”, *American Journal of International Law* 2004, p. 82 ff., p. 84-85 (“[t]he postwar development of international human rights law has widened the field for interaction between international law and constitutional interpretation [...] Juxtaposing the

This point was clearly illustrated in the dissenting opinion rendered by Dickson CJ of the Supreme Court of Canada in the case *Re Public Service Employee Relations Act*.⁴⁷ The issue was whether unincorporated international law could be relevant in the interpretation of the Canadian Charter of Rights and Freedoms, a statute entrenched in the Canadian Constitution.⁴⁸ In the words of the Chief Justice, “[t]he *Charter* [...] incorporates many of the policies and prescriptions of the various international documents pertaining to human rights. The various sources of international human rights law – declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms – must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*’s provisions”. This dissent has proved very influential on later Canadian case law, which has usually subscribed to this approach.⁴⁹

Furthermore, although ensuring conformity of the constitution with international law may be indispensable to guarantee that the state complies with international obligations,⁵⁰ amending a constitution to harmonize it with international law is often made impossible by the complex procedures for constitutional revision or by a country’s political environment. When this is the case, the only way to make constitutional provisions compatible with international law is by means of judicial interpretation.⁵¹

This form of constitutional interpretation may be conceptualized as closer in nature to the second type of consistent interpretation analyzed above, i.e. the one based on unincorporated international law. Indeed, domestic case law across jurisdictions demonstrates that international sources are generally used in constitutional interpretation regardless of their status in the national legal order.

In particular, the domestic validity of the international source in question is in most cases immaterial. This approach to constitutional interpretation is adopted both in countries where international law is formally incorporated and in countries where it is not;⁵² most notably, it is now relatively widespread also in common law legal systems.⁵³ Even where constitutional texts include a specific obligation to interpret their provisions in light of international law, it does not necessarily mean that the international law which should be used for constitutional interpretation is also domestically valid.⁵⁴

constitutional and international systems with regard to a right that they both protect (such as freedom of expression, or fair trial) multiplies the possibilities for competing influences on the interpretation of the right”).

⁴⁷ *Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313, Dickinson CJ dissent.

⁴⁸ W. LACEY, “The Judicial Use”, cit., p. 105.

⁴⁹ S. BEAULAC, J.H. CURRIE, cit., p. 123-124.

⁵⁰ Y. SHANY, “How Supreme is the Supreme Law of the Land? Comparative Analysis of the Influence of International Human Rights Treaties upon the Interpretation of Constitutional Texts by Domestic Courts”, *Brooklyn Journal of International Law* 2006, p. 341 ff., particularly p. 355.

⁵¹ See e.g. A.I. PARK, “Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation”, *UCLA Law Review* 1987, p. 1195 ff. (arguing that the lack of a right to the fulfillment of basic human needs in the US Constitution is at variance with international human rights obligations and advocating to bridge this gap by means of constitutional interpretation).

⁵² See D. SLOSS, “Domestic Application”, cit., p. 384 (“Courts in both monist and dualist states apply treaties to help elucidate the meaning of constitutional provisions”).

⁵³ M.A. WATERS, “Creeping Monism”, cit., p. 680 and 690.

⁵⁴ For example, in South Africa, where Art. 39 of the Constitution sets forth a general obligation to consider international law when interpreting the Bill of Rights, treaties are only incorporated if they are deemed self-executing and, in any event, have a sub-constitutional status. On the hybrid regime of treaty incorporation in South Africa, see Chapter 2, Section 4.1.

Moreover, consistent interpretation of constitutions is often based on a variety of international instruments which do not bind the state internationally, either because the state concerned has not ratified them or because they belong to the so-called soft law.⁵⁵ In *Roper v. Simmons*, for example, the US Supreme Court struck down legislation on execution of juvenile offenders (i.e. between fifteen and eighteen years old) because it found it in violation of the Eight Amendment's prohibition on "cruel and unusual punishment". Justice Kennedy, who authored the majority opinion, wrote that a number of unincorporated or non self-executing human rights instruments had been considered by the Court as "instructive" for the construction of the Eight Amendment's prohibition.⁵⁶ The Russian Constitutional Court has relied on multiple occasions on non-binding international instruments, such as the Universal Declaration of Human Rights, treaties to which Russia is not a party or resolutions of organizations to which Russia is not a member.⁵⁷ And in South Africa, the Constitutional Court explicitly held that international instruments and decisions which are not binding on the country could be used to "evaluate and understand" the content of the Bill of Rights.⁵⁸

Even where national courts interpret constitutional provisions by relying on incorporated international sources, the technique under scrutiny appears disengaged from the hierarchical status of such sources in the domestic legal order. Indeed, international norms with a sub-constitutional rank in the domestic hierarchy of norms are commonly used for interpretive purposes.

The case law of Russian courts is particularly revealing. As seen in Chapter 2, "generally recognized principles and norms of international law" are automatically incorporated in the Russian legal system by virtue of Art. 15(4) of the Constitution, but do not enjoy a status higher than ordinary laws; moreover, similar considerations may be extended to treaties, which – differently from what the letter of the Constitution would suggest – cannot invalidate inconsistent legislation but can only be prioritized over it in concrete cases.⁵⁹ Despite this, both general international law and treaties – chiefly in the field of human rights – are commonly referred to by the Russian Constitutional Court while interpreting constitutional provisions.⁶⁰

⁵⁵ However, as noted by M.A. WATERS, "Creeping Monism", cit., p. 631, ratified treaties "may be a more authoritative source than unratified ones" in constitutional interpretation.

⁵⁶ *Roper v. Simmons*, 543 U.S. 551 (2005). Notably, the majority opinion also referred to comparative law materials, specifically to the fact that the U.S. was arguably the only country in the world to allow for the execution of juvenile offenders. For an analysis of this judgment, see C.B. BUYS, "Burying Our Constitution in the Sand? Evaluating the Ostrich Response to the Use of International and Foreign Law in U.S. Constitutional Interpretation", *Brigham Young University Journal of Public Law* 2007, p. 1 ff.

⁵⁷ B.R. TUZMUKHAMEDOV, "International Law in the Russian Constitutional Court", *American Society of International Law Proceedings* 2000, p. 166 ff., p. 171; S.Y. MAROCHKIN, "International Law in the Courts of the Russian Federation: Practice of Application", *Chinese Journal of International Law* 2007, p. 329 ff., p. 334. See e.g. *Refusal to accept a complaint by Kulanov regarding the infringement of his constitutional rights by Article 14, Part 1, Paragraph 9 of the Federal Municipal Service Law, VG Kulanov*, Constitutional proceedings, Determination no 1818-O, ILDC 2278 (RU 2014), where the Russian Constitutional Court construed the right of freedom of expression under Art. 53(3) of the Constitution by referring also to Art. 19 of the Universal Declaration of Human Rights and Art. 10 of the ECHR.

⁵⁸ *S v. Makwanyane*, 1995 (3) SA 391 (CC), cited in J. DUGARD, cit., p. 458.

⁵⁹ See Chapter 2, Section 3.

⁶⁰ G.M. DANILENKO, "Implementation of International Law in CIS States: Theory and Practice", *European Journal of International Law* 1999, p. 51 ff., p. 62-63.

As an example, one may cite the 2009 judgment in the case of *Lashmankin and others*. The appellants argued that the provisions of a Russian statute *de facto* prohibiting assemblies if local authorities did not agree on the proposed time and place were in violation of the constitutional right of assembly, enshrined in Art. 31. In order to assess whether the limitations on the right were legal, the Constitutional Court recalled the various understandings of the same right in a number of international instruments, including the Universal Declaration on Human Rights, the ICCPR and the ECHR. It concluded that the limitations under scrutiny were legitimate under all said instruments and, thus, did not violate the Constitution.⁶¹

Similarly, international agreements have been used for constitutional interpretation also by the German Bundesverfassungsgericht, despite the fact that their domestic status is equal to ordinary legislation. Reference should be made, in particular, of the *Görgülü* case. A higher court had held that, because of its sub-constitutional rank in domestic law, the European Convention on Human Rights could not have any role in constitutional interpretation. The German Constitutional Court rejected this reasoning outright and held that the courts must take account of the Convention when interpreting the Constitution, under the condition that constitutionally protected rights are not decreased.⁶² The same disparity between the formal status of international law and its role in constitutional interpretation can be found in the use of international sources in the interpretation of the US Constitution⁶³ and, in the case of treaties, of the Italian Constitution.⁶⁴ In both legal systems, such international sources have sub-constitutional rank.

In conclusion, the role of international law in constitutional interpretation is generally much more influential than its formal status in domestic law would suggest. This gap is the principal root of the controversies which surround this practice and that will be analyzed in detail in the next section.

3. Consistent interpretation and the prerogatives of the political authorities.

⁶¹ *Lashmankin and ors*, Constitutional Review, N 484-O-P, ILDC 1480 (RU 2009).

⁶² BVerfG, *Görgülü v. Germany*, 2 BvR 1481/04 (2004). On this decision, see M. KUMM, “Democratic”, cit., p. 280-281; G.L. NEUMAN, “The Uses”, p. 86; S.D. MURPHY, “Does International Law Obligate States to Open Their National Courts to Persons for the Invocation of Treaty Norms That Protect or Benefit Persons?”, in D. SLOSS (ed.), cit., p. 61 ff., p. 82.

⁶³ J.J. PAUST, *International Law as Law of the United States*, Durham, 2003², p. 134 (arguing that “although a treaty could not prevail in the case of an unavoidable clash with constitutional norms, a treaty can be incorporated indirectly in aid of interpreting constitutional precepts, and, of course, in aid of reinterpreting those precepts. In this sense, the domestic status of a treaty norm can be enhanced by incorporation into the Constitution, however indirectly”).

⁶⁴ See, for a notable precedent, the judgment of the Italian Constitutional Court No. 388/1999, where the Court held that the Constitution and international human rights instruments “si integrano reciprocamente nella interpretazione”. At the time the judgment was rendered, the domestic status of international treaties was generally held to be equal to ordinary statutes: see Chapter 2, Section 3. The use of international law in constitutional interpretation, however, has had changing fortunes in Italy and has never conclusively taken root in case law.

This section intends to explore the main contentious issues that underlie the consistent interpretation of domestic law with international law and the way in which such issues influence the practice of national courts.

This interpretive technique could be perceived to raise serious problems of separation of powers.⁶⁵ The matter of contention is generally the protection of the constitutional prerogatives of the legislature. More specifically, the judiciary could be seen as as overstepping its functions and as encroaching upon those of the legislature in a number of cases: for instance, when it refers for interpretation to international norms not having domestic legal force; when it uses international sources in manners inconsistent with their domestic hierarchical status; or, more generally, when consistent interpretation leads to outcomes which contradict the content of domestic legislation. For these reasons, the extent to which international norms are used in domestic law interpretation fundamentally depends on how much weight is given by national courts to the prerogatives of the political authorities.

Unsurprisingly, the fundamental character of the principle of parliamentary sovereignty in many legal systems has led courts to assume a deferential attitude towards legislative prerogatives. In the UK and in other countries of common law following the UK approach, for example, “the judiciary has been extremely sensitive not to usurp the rights of the legislature” by applying unincorporated international law in domestic law interpretation,⁶⁶ for fear of producing an incorporation of international obligations “through the back door” of judicial intervention, in violation of parliamentary sovereignty.⁶⁷ However, as will be seen below, similar issues have presented themselves also in countries where consistent interpretation is usually based on incorporated international law, as with regard to the *Charming Betsy* canon of statutory construction. A protective attitude toward the legislature, however, is not necessarily conditional on a strong domestic principle of parliamentary supremacy. Rather, it can be considered a byproduct of one’s global vision of the relationship between state powers and of the role of the judiciary.

The attempts to safeguard the prerogatives of the legislature in the context of consistent interpretation of domestic law with international law have taken mainly three forms. Each of the following three paragraphs analyzes one of these judicial and doctrinal trends. Paragraphs 3.1 and 3.2, in particular, respectively deal with the reflections of intentionalist and textualist interpretive theories on the application of the canon of consistent interpretation. Intentionalism (i.e. reliance on legislative intent) and textualism (i.e. reliance on the plain meaning of the text of legislation) are the two typical manifestations of the principle

⁶⁵ D. SHELTON, “Introduction”, cit., p. 5.

⁶⁶ R. HIGGINS, cit., p. 37.

⁶⁷ See, for example, D. DYZENHAUS, M. HUNT, M. TAGGART, cit., p. 5 (“When the source of the international obligations constraining executive discretion is a convention ratified by the executive, but not incorporated by parliament into legislation, traditional alarm bells ring. Such ‘backdoor’ incorporation seems to amount to executive usurpation of the legislature’s monopoly of law-making authority, or to judicial usurpation of the same, or a combination of both”). In *Minister of Immigration and Ethnic Affairs v Teoh*, cit., the Australian High Court held that the doctrine of legitimate expectations only generated procedural remedies because there is a “difference between a legitimate expectation and a binding rule of law. To regard a legitimate expectation as requiring the decision-maker to act in a particular way is tantamount to treating it as a rule of law. It incorporates the provisions of the unincorporated convention into our municipal law by the back door”.

according to which courts must act as “faithful agents” of the legislature.⁶⁸ This principle, in turn, is usually justified as a form of respect for domestic democratic processes and for the separation of powers.⁶⁹ Paragraph 3.3 analyzes another protective trend which is grounded on the domestic hierarchy of norms. Arguments based on hierarchy have been relied upon in particular to question the legitimacy of the use of international law in constitutional interpretation.

3.1. Consistent interpretation and legislative intent.

In order to overcome the perceived difficulties arising from the principle of separation of powers, national courts frequently conceptualize consistent interpretation with international law as a way to further legislative intent. More specifically, courts may justify the use of international law in statutory interpretation by invoking a parliament’s presumed intention that national legislation should be interpreted in compliance with international obligations.⁷⁰

The theoretical foundations of this approach are not novel, in that the search for legislative intent is probably the most classical approach to statutory interpretation.⁷¹ Needless to say, it is well outside the scope of the present research to critique intentionalism in general terms. This paragraph adopts a much narrower perspective and aims to analyze the diverging outcomes that the intentionalist paradigm has produced in national case law in the field of consistent interpretation with international law.

In its most restrictive form, this approach only allows for an interpretive use of international law when the parliamentary intent can be drawn from clear legislative indications, particularly when a statute is expressly aimed to implement specific norms of international law or, at the least, explicitly refers to such norms.⁷² In *Yager v. R*, for example, the High Court of Australia

⁶⁸ A.C. BARRETT, “Substantive Canons and Faithful Agency”, *Boston University Law Review* 2010, p. 109 ff., particularly p. 112-113. A popular variant of intentionalism, purposivism, aims to interpret legislation in light of the presumed objectives pursued by the legislator. For a critique of these three approaches, see generally W.N. ESKRIDGE, P.J. FRICKEY, “Statutory Interpretation as Practical Reasoning”, *Stanford Law Review* 1990, p. 321 ff.

⁶⁹ See e.g. A. SCALIA, *A Matter of Interpretation. Federal Courts and the Law*, Princeton, 1997, p. 9-10 and 22-23; F.E. EASTERBROOK, “The Supreme Court 1983 Term. Foreword: The Court and the Economic System”, *Harvard Law Review* 1985-1985, p. 4 ff., p. 60 (contending that judges should behave as the “honest agents of the political branches” in order to respect democracy and the separation of powers).

⁷⁰ C.A. BRADLEY, “The Charming Betsy”, cit., p. 495-497 (describing views seeing Charming Betsy as based on congressional intent, without subscribing to such views). See also, more generally, M.A. WATERS, “Creeping Monism”, cit., p. 701-702 (suggesting that the concerns surrounding the use of international law in interpretation can be resolved if courts take due consideration of the policymakers’ opinions).

⁷¹ A.C. BARRETT, cit., p. 112 (describing the search for legislative intent as “the classical approach to statutory interpretation, [which] claims that a judge should be faithful to Congress’s presumed intent rather than to the statutory text when the two appear to diverge); M.P. HEALY, “Legislative Intent and Statutory Interpretation in England and the United States: An Assessment of the Impact of *Pepper v. Hart*”, *Stanford Journal of International Law* 1999, p. 231 ff. Among the proponents of this approach see, most notably, R.A. POSNER, “Statutory Interpretation – In the Classroom and in the Courtroom”, *University of Chicago Law Review* 1983, p. 800 ff., p. 817 (suggesting that “[t]he judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar”). On this view W.N. ESKRIDGE, P.J. FRICKEY, cit., p. 329 (criticizing Posner’s “imaginative reconstruction”).

⁷² See R. JENNINGS, A. WATTS, *Oppenheim’s International Law*, Vol. 1, London-New York, 1992, p. 62. A similarly restrictive but less drastic stance on consistent interpretation has been taken by J.F. COYLE, “Incorporative Statutes and the Borrowed Treaty Rule”, *Virginia Journal of International Law* 2010, p. 655 ff. (arguing that a presumption of conformity proper should only apply to legislation incorporating – “borrowing” – international treaties, and proposing a more restrictive understanding of the *Charming Betsy* canon to be applied to statutes which do not incorporate international law).

held that statutory ambiguities could be addressed by resorting to an international treaty only if a statute had been introduced with the purpose to implement said treaty.⁷³ This approach is also enshrined in Section 15AB(2)(d) of the Australian Acts Interpretation Act 1901, allowing courts, when interpreting a statute, to resort (only) to a treaty “that is referred to in the Act”.⁷⁴ A slightly broader application of the canon consists in the use of international sources in the interpretation of statutes *implicitly* implementing norms of international law. One may recall the decision of the English Court of Appeal in *Salomon v. Commissioners of Customs and Excise*. The issue concerned the interpretation of a statute which had been adopted to implement the 1950 Convention on the Valuation of Goods for Customs Purposes, but which did not expressly mention the Convention. Nevertheless, the court acknowledged that the statute was implicitly directed at implementing the treaty and, as a consequence, interpreted it in light of the treaty by relying on a presumed legislative intent.⁷⁵

Climbing up the ladder of intentionalism towards less restrictive approaches, other courts and commentators have deemed consistent interpretation permissible with regard to all legislation, by relying on the presumption that the legislature does not intend to violate international obligations in all cases.

The US *Charming Betsy* canon, for example, has frequently been grounded on the assumption that the Congress generally intends statutes to honor international obligations.⁷⁶ The 1884 *Chew Heong v. United States* decision of the US Supreme Court provides a prominent example. A statute enacted in 1882, the Chinese Exclusion Act, restricted the immigration of Chinese laborers to the United States. The statute was in seeming contradiction with an 1880 treaty between the United States and China, which granted a right to Chinese laborers residing in the US to re-enter the country. The court employed the *Charming Betsy* canon in order to reconcile the meaning of the statute with the treaty provisions, and held that the new limitations did not apply to Chinese laborers covered by the treaty. The court based its decision on a presumed intent of the Congress, as showed by the following passage: “it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted”.⁷⁷ More recently, the criterion of legislative intent has also been embraced by the *Restatement (Third) of Foreign Relations Law of the United States*, pursuant to which “[i]t is generally assumed that Congress does not intend to repudiate an international obligation of the United States [...]”.⁷⁸

It is controversial whether this approach can justify limitations on the discretion of executive agencies. The question, more specifically, is whether national courts should presume that the legislature intends administrative authorities to exercise their discretionary powers in accordance with international obligations, even though the power-conferring statute does not mention any such obligations. This problem has been raised particularly in countries of common law in relation to the interpretive weight to be given to unincorporated international

⁷³ *Yager v. R*, [1977] HCA 10, cited in A. DE JONGE, cit., p. 48-49.

⁷⁴ Cited *ibid.*

⁷⁵ *Salomon v. Commissioners of Customs and Excise*, cit.

⁷⁶ A.C. BARRETT, cit., p. 120.

⁷⁷ *Chew Heong v. United States*, 112 U.S. 536 (1884), p. 541.

⁷⁸ *Restatement (Third) of Foreign Relations Law of the United States*, 1986, §115, comment a.

treaties. National courts have adopted differing approaches, as demonstrated by a comparison between the case law of England and New Zealand.

On the one hand, English courts have generally refused to apply the presumption under analysis in the field of administrative law.⁷⁹ This position is well described in the 1991 case *R. v. Secretary of State for the Home Department, Ex p. Brind*. The applicants challenged the legality of a decision of the Secretary of State directing British televisions to refrain from broadcasting speeches by IRA spokespersons. They asserted, among other things, that the Ministry had exceeded the limits of its discretionary powers because its decision violated Art. 10 of the ECHR (right to freedom of expression). At the time, the Convention had not yet been implemented in English law. In dismissing the claim, Lord Donaldson of the Court of Appeal reasoned that “imputing an intention to Parliament that [...] the authority to take executive action [...] shall be subject to the limitation that it be consistent with the terms of the Convention [...] involves imputing to Parliament an intention to import the Convention into domestic law by the back door, when it has quite clearly refrained from doing so by the front door”.⁸⁰ An appeal was later dismissed by the House of Lords on similar grounds. Lord Ackner, most notably, also argued that “[i]f the Secretary of State was obliged to have proper regard to the Convention, i.e. to conform with article 10, this inevitably would result in incorporating the Convention into English domestic law by the back door”.⁸¹

The courts of New Zealand, on the other hand, have adopted a radically different approach. In this regard, two leading cases should be mentioned. The first one is the 1981 judgment in the case of *Ashby v. Minister of Immigration*.⁸² One of the issues before the New Zealand Court of Appeal was whether the Minister of Immigration, before deciding to allow the rugby team of then-apartheid South Africa to enter New Zealand, should have taken into account the (unincorporated) UN Convention on the Elimination of All Forms of Racial Discrimination, and whether the failure to do so constituted a procedural violation. Justice Cooke conceded that “a certain factor” – not excluding an international treaty – “might be of such an overwhelming or manifest importance that the Courts might hold that Parliament could not possibly have meant to allow it to be ignored” by a Minister.

In *Ashby*, this remained only a theoretical possibility, because the UN Convention was held not to meet such criteria in that particular case. But the dictum of Cook J finally found application in the abovementioned judgment *Tavita v. Minister of Immigration*. Here, the Court of Appeal reasoned that the Convention on the Rights of the Child was so fundamental that the Parliament could not have possibly meant to ignore it. This case initiated the judicial trend to make unincorporated treaties mandatory considerations in New Zealand’s administrative law.⁸³

After this brief survey of relevant case law, it is possible to draw some general conclusions on this judicial approach to consistent interpretation. In fact, at closer scrutiny, to base the usage

⁷⁹ S.C. NEFF, cit., p. 625-626.

⁸⁰ *R. v. Secretary of State for the Home Department, Ex p. Brind*, [1991] 1 AC 696, p. 718. See also *Fernandes v. Secretary of State for the Home Department*, [1981] Imm. A.R. 1; and *Chundawadra v. Immigration Appeal Tribunal*, [1988] Imm. A.R. 161. On this approach of English courts, see also R. HIGGINS, cit., p. 45; R. JENNINGS, A. WATTS, cit., p. 60, ft. 27 (with reference to further case law).

⁸¹ *R. v. Secretary of State for the Home Department, Ex p. Brind*, cit., p. 761-762.

⁸² *Ashby v Minister of Immigration*, [1981] 1 NZLR 222.

⁸³ W. LACEY, “The Judicial Use”, cit., p. 100-104.

of international norms in domestic law interpretation on a presumed intent of the legislature is problematic on several fronts.

A first problem is that, with the exception of the most restrictive formulations based on express legislative instructions, the intent on which the courts rely is purely fictitious. Generally speaking, reliance on legislative intent in statutory interpretation has been authoritatively criticized in legal doctrine. Indeed, it has been pointed out that this approach is based on unsound premises regarding how the legislative process really works.⁸⁴ According to this view, the supposed intention of the legislative body is almost certainly imaginary or, at best, undiscoverable by the interpreter.⁸⁵ If one accepts these premises, it should be concluded that a court's reference to legislative intent is a mere rhetorical device.⁸⁶

These general remarks can apply also to the courts' reliance on intent as a basis of consistent interpretation with international law. The weaknesses of this approach were well described in a passage of Justice McHugh's opinion in *Al-Kateb v Godwin*, a case decided in 2004 by the High Court of Australia. In the words of McHugh, "this rule of construction is based on a fiction [...] Given the widespread nature of the sources of international law under modern conditions, it is impossible to believe that, when the Parliament now legislates, it has in mind or is even aware of all the rules of international law. [...] When one adds to the rules contained in [...] treaties, the general principles of law recognised by civilised nations and the rules derived from international custom, it becomes obvious that the rationale for the rule that a statute contains an implication that it should be construed to conform with international law bears no relationship to the reality of the modern legislative process".⁸⁷

Reliance on legislative intent raises other problems, too. In particular, it cannot be convincingly applied to statutes enacted before a certain treaty. As a matter of fact, it would be implausible to argue that, at the time a statute was enacted, the parliament intended not to violate a treaty which was not yet binding upon the state.⁸⁸

Finally, a reference to parliamentary intent is usually unable to explain for the use of international law to interpret domestic sources other than statutes, primarily national constitutions. Admittedly, there is evidence of one court justifying its reliance on international

⁸⁴ W.N. ESKRIDGE, P.J. FRICKEY, cit., p. 327-328; R. DWORKIN, *Law's Empire*, Cambridge-London, 1986, p. 313-354.

⁸⁵ See, for example, C.A. SUNSTEIN, "Interpreting Statutes in the Regulatory State", *Harvard Law Review* 1989, p. 405 ff., p. 428-434.

⁸⁶ R. BIN, "L'interpretazione conforme. Due o tre cose che so di lei", in A. BERNARDI (ed.), cit., p. 17 ff., p. 19 (terming the search for the intent of the legislator a rhetorical device).

⁸⁷ *Al-Kateb v Godwin* (2004) 208 A.L.R. 124, para. 63-65 (opinion of Justice McHugh). McHugh gave up overruling the canon just because he believed it was too well established in case law. See also J.F. COYLE, cit., p. 712 (arguing that, when courts apply the presumption of conformity to domestic legislation which is not intended to incorporate a treaty, they are, "[a]t best, [...] guessing at what the political branches *would* have intended *if* they had been aware of the potential conflict between the statute and international law at the time the statute was enacted. Given this lack of certainty, an interpretive approach whereby the courts conform their construction of ambiguous non-incorporative statutes to any and all relevant norms of international law assumes a level of confidence with respect to the intentions of the political branches that seems unwarranted").

⁸⁸ R. JENNINGS, A. WATTS, cit., p. 61; A. NOLLKAEMPER, *National Courts*, cit., p. 155. See e.g. *Garland v. British Rail Engineering Ltd.*, [1983] 2 A.C. 751 (speech of Lord Diplock: "it is a principle of construction of United Kingdom statutes [...] that the words of a statute *passed after the Treaty has been signed* and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation, and not to be inconsistent with it"; emphasis added).

law in constitutional interpretation with reference to a presumed intention of the constitutional drafters not to permit legislation in violation of international treaties. In *AZAPO v. President of the Republic*, in particular, the South African Constitutional Court held that “[t]he lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the State in terms of international law”.⁸⁹ This line of reasoning, however, has remained very uncommon. This could be explained on at least two levels. On the one hand, the premises of this argument are even more fictitious than those underpinning judicial reliance on parliamentary intent. On the other hand, it has been contended that judges may avoid relying on a presumed intent of the constitution’s drafters in order to retain more discretion as to whether or not to resort to international law in constitutional interpretation.⁹⁰

3.2. Consistent interpretation and textual ambiguity.

The application of international law in the interpretation of domestic law should not overstep what is allowed by the text of domestic legislation. This, by itself, is an uncontentious statement. How to best put this standard into practice, however, may be a matter of contention.

In fact, it is commonly the case that the text of legislation leaves the door open for more than one reading. Such readings may or may not be all equally plausible. When faced with multiple possible interpretations of the same provision, national courts may resort to an array of interpretive options ranging between two extremes. On the one hand, they may stick to what they regard as the plain, ordinary, or most likely meaning of the legislation, regardless of whether or not it conforms to international law. Or, on the other hand, they may be ready to stretch out the meaning of the text as far as it is necessary to ensure its conformity with international law.

This is essentially a problem of how much a court embraces textualism as an interpretive theory. Under a textualist approach to statutory interpretation, reliance on the letter of legislation is regarded as the only way for a court to approximate the actual intent of the lawmaker.⁹¹ Starting from this assumption, a court willing to protect parliamentary prerogatives would be reluctant to depart from the plain meaning of the law; and even in the case of an ambiguous wording, it would refrain from choosing a possible but implausible meaning. In the field of consistent interpretation of international law, this protective attitude toward the legislature significantly limits the ambit of the courts’ reliance on international norms.

The influence of the textualist interpretive paradigm on national case law is easily discernible. The most widespread approach which can be found in national case law is that consistent interpretation is acceptable only as long as the legislation is obscure or ambiguous.⁹² This is

⁸⁹ *Azanian Peoples Org. (AZAPO) v. President of the Republic of South Africa*, 1996 (8) BCLR 1015 (CC) (opinion of Justice Mahomed).

⁹⁰ Y. SHANY, “How Supreme”, cit., p. 401.

⁹¹ A.C. BARRETT, cit., p. 112. For a particularly extreme form of textualism, see the concurring opinion of Justice Scalia in *Conroy v. Aniskoff*, 507 U.S. 511 (1993), p. 528: if “[t]he language of the statute is entirely clear, and if that is not what Congress meant then Congress has made a mistake and Congress will have to correct”.

⁹² A. NOLLKAEMPER, “The Effects”, cit., p. 147.

also the narrowest way to construe consistent interpretation. In a textualist frame of reference, “statutory ambiguity is essentially a delegation of policymaking authority to the governmental actor charged with interpreting a statute”.⁹³ Obscurity in the law being considered functionally equal to a gap in the law, this approach to consistent interpretation (merely) assigns a gap-filling function to international law.⁹⁴

Take, for example, the dictum of Lord Denning in *R. v. Chief Immigration Officer*, a case decided in 1976 by the Court of Appeal of England and Wales. As the judge put it, “if there is any ambiguity in our statutes, or uncertainty in our law, then these courts can look to the Convention as an aid to clear up the ambiguity and uncertainty”.⁹⁵ The same interpretive method was endorsed in the 1988 Bangalore Principles, the concluding statement of a colloquium of high-ranking judges from various countries of the British Commonwealth. The Principles lauded the tendency of national courts “to have regard to [...] international norms for the purpose of deciding cases *where the domestic law [...] is uncertain or incomplete*”.⁹⁶

The limits of this approach to consistent interpretation are self-evident. If a court considers the meaning of legislation unambiguous, the presumption of conformity will not apply, regardless of whether or not its supposedly plain meaning conforms to international law. This limit has constantly been spelt out in national case law. As argued in the 2014 in the Supreme Court of Canada’s decision *Kazemi Estate v. Iran*, “the presumption of conformity does not overthrow clear legislative intent” and “can be rebutted by the clear words of the statute under consideration”.⁹⁷ In the aforementioned judgment in *Salomon v. Commissioners of Customs and Excise*, Lord Justice Diplock held that “[i]f the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty’s treaty obligations”.⁹⁸

Even more bluntly, the High Court of Australia said in *Western Australia v. Ward* that “[t]he task of this Court [...] is to give effect to the will of Australian Parliament as manifested in legislation. Court may not flout the will of Australia’s democratic representatives simply because they believe that, all things considered, the legislation would ‘be better’ if it were to cohere with the mass of (often ambiguous) international obligations and instruments. [...] Where legislation is not genuinely ambiguous, there is no warrant for adopting an artificial presumption as the basis for, in effect, rewriting it”.⁹⁹

The limit of textual ambiguity operates also in the field of review of administrative powers. Here, the problem is whether or not a broad administrative discretion conferred by a statute should be considered as amounting to ambiguity. Just to name a few examples, in the

⁹³ A.C. BARRETT, cit., p. 123.

⁹⁴ M.A. WATERS, “Creeping Monism”, cit., p. 654.

⁹⁵ *R. v. Chief Immigration Officer, Heathrow Airport, Ex parte Salamat Bibi*, [1976] 1 W.L.R. 979.

⁹⁶ The text of the 1988 Bangalore Principles is reprinted in *Developing Human Rights Jurisprudence, Volume 1*, London, 1988, p. ix. On this statement, see M.A. WATERS, “Creeping Monism”, cit., p. 645-646.

⁹⁷ *Kazemi Estate v Islamic Republic of Iran*, [2014] 3 S.C.R. 176. See also *R. v. Hape*, cit., paras. 53-54 (holding that the presumption can be rebutted by clear terms of the statute) and *Daniels v. White and The Queen*, [1968] S.C.R. 517, p. 541 (Justice Pigeon holding that the canon of consistent interpretation based on legislative presumption “is a rule that is not often applied, because if a statute is unambiguous, its provisions must be followed even if they are contrary to international law”).

⁹⁸ As noted above, the judge went on to apply the presumption that Parliament does not intend to act in breach of international law. Similarly, see *Ellerman Lines v. Murray*, [1931] AC 126, p. 147 (speech of Lord Tomlin).

⁹⁹ *Western Australia v. Ward*, [2002] HCA 28.

aforementioned cases *R. v. Secretary of State for the Home Department, Ex p. Brind* and *Ashby v. Minister of Immigration*, the courts bluntly answered in the negative.¹⁰⁰ However, it has been noted – and this position seems perfectly tenable – that the element of ambiguity or uncertainty is to some extent intrinsic to the conferral of discretionary powers.¹⁰¹

Let us suppose now that a court finds that there is an ambiguity in the text of legislation and more meanings can be ascribed to it. If it subscribes to a textualist paradigm, this court would most likely be reluctant to choose a reading that, although theoretically admissible and in line with international obligations, appears to be unnatural or implausible. A court's fidelity to the text, in sum, compels it to choose only between different *plausible* interpretations of legislation.¹⁰² The problem, though, is that it is hard to define the concept of plausibility in objective terms. The way this standard is employed in judicial practice can only be exemplified by looking at some relevant precedents.

A first case which can be cited is an early US Supreme Court decision, *Talbot v. Seeman*.¹⁰³ One of the interesting features of this judgment is that it constituted the first application of the canon of consistent interpretation by Chief Justice Marshall, before *Murray v. The Schooner Charming Betsy*. The facts of the case can be summarized as follows. A statute granted a right to a reward for the salvage of ships owned by “citizens or subjects of any nation in amity with the United States, re-taken from the enemy”. An American captain, Talbot, took control of a ship owned by citizens of Hamburg and controlled by France. Since the US was at peace with Hamburg and at war with France, the captain demanded his reward under the statute. The issue, however, was that Hamburg and France were at peace and the ship's owners did not consider Talbot's feat to be a salvage at all.

Marshall acknowledged that a reading of the statute favorable to Talbot was entirely plausible under the text of the provision, but noted that this would have been at variance with the principles of the law of nations regulating the rate of salvage. He then opted for a reading which conformed to such principles: he understood the statutory provision as if it referred to a ship salvaged from an enemy of both the United States and the state of the ship's owners. While this was arguably not the most natural reading of the text, both interpretations could be regarded as plausible.¹⁰⁴

¹⁰⁰ *R. v. Secretary of State for the Home Department, Ex p. Brind*, cit., p. 748 (speech of Lord Bridge of Harwich: “where Parliament has conferred on the executive an administrative discretion without indicating the precise limits within which it must be exercised, to presume that it must be exercised within Convention limits would be to go far beyond the resolution of an ambiguity. It would be to impute to Parliament an intention not only that the executive should exercise the discretion in conformity with the Convention, but also that the domestic courts should enforce that conformity by the importation into domestic administrative law of the text of the Convention [...]”); *Ashby v Minister of Immigration*, cit. (holding that “[t]o hold that, before exercising an apparently perfectly general statutory discretion in the field of immigration, the Minister was bound, by implication as a matter of domestic statute law, to consider a Convention of doubtful bearing on the subject would be [...] to go beyond the legitimate realm of statutory interpretation”).

¹⁰¹ W. LACEY, “Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere”, *Melbourne Journal of International Law* 2004, p. 108 ff., p. 113.

¹⁰² A.C. BARRETT, cit., p. 123 (noting that, when they are used to choose between equally plausible interpretations, canons of statutory construction are “used as tie breakers”); A. SCALIA, *A Matter*, cit., p. 23 (“A text should not be construed strictly, and it should not be construed leniently; rather, it should be construed reasonably, to include all that it fairly means”).

¹⁰³ *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801).

¹⁰⁴ A.C. BARRETT, cit., p. 136.

Another relevant example, when speaking of plausibility in interpretation, is *Weinberger v. Rossi*. The case before the US Supreme Court concerned the application of a statute which prohibited to treat US personnel working at overseas military bases in a manner less favorable than local personnel, unless “a treaty between the US and the host country” permitted such differential treatment. An executive agreement between the United States and the Philippines signed a few years earlier established a discrimination in favor of local citizens working at US military facilities in the country. The issue revolved around the interpretation of the term “treaty” used in the statute. To interpret it in a strict sense, as only including the agreements that the Constitution terms “treaties” (i.e. agreements “concluded with the advice and consent of the Senate”), would have entailed a breach of the agreement with the Philippines. The court then interpreted the word treaty in a broad sense, as inclusive of executive agreements.¹⁰⁵ In this case, too, both interpretations appeared permissible even under a strictly textualist approach to statutory interpretation.

But, ironically, the concepts of ambiguity and plausibility are themselves ambiguous and interpretable. As is clear from the following examples, the criterion of textual ambiguity is essentially subjective in nature and provides much less certainty than would appear at first sight.¹⁰⁶

One could again cite a Canadian judgment, *National Corn Growers Association v. Canada*. Formally, the Supreme Court of Canada remained faithful to the rule that, where legislation is not ambiguous, international sources cannot be used in interpretation. In practice, however, the court overcame this limit by construing the concept of ambiguity in a manner different from textual ambiguity. In the court’s words, “it is reasonable to make reference to an international agreement at the very outset of the inquiry to determine if there is any ambiguity, even latent, in the domestic legislation. [The argument] that recourse to an international treaty is only available where the provision of the domestic legislation is ambiguous on its face is to be rejected”.¹⁰⁷ In other words, the court predicated that a difference between the (apparently plain) text of the law and a relevant international obligation *created* an ambiguity in the legislation. By means to this artifice, the limit of textual ambiguity was effectively discarded.

Or consider the 1988 decision *United States v. Palestine Liberation Organization*. At issue here was the compatibility between the 1947 Headquarters Agreement between the United Nations and the United States and a US statute, the 1987 Anti-Terrorism Act. The treaty obliged the US to ensure free transit toward the UN headquarters in New York to all representatives of member states and to all other people invited to the UN. In accordance with the treaty, when the Palestine Liberation Organization (PLO) was granted observer status by the UN in 1974, US authorities allowed it to establish an office in New York. The 1987 Act, however, declared the PLO a terrorist organization and forbade it, “notwithstanding any provision of law to the contrary, to establish or maintain an office [...] within the jurisdiction

¹⁰⁵ *Weinberger v. Rossi*, 456 U.S. 25 (1982).

¹⁰⁶ V. NOURSE, “Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers”, *Georgetown Law Journal* 2011, p. 1119 ff. (criticizing textualism and the concept of “plain meaning”).

¹⁰⁷ *National Corn Growers Association v. Canada*, [1990] 2 SCR 1324. On this case, see G. VAN ERT, “Canada”, in D. SLOSS (ed.), cit., p. 166 ff., p. 192-193.

of the United States”. The Department of Justice requested a New York District Court to issue an injunction closing the PLO office.

Both the text and the legislative history of the Act, which the court cited in detail, made absolutely clear that the statute had been enacted precisely with the purpose of closing the PLO office. In a plot twist, however, the court held that the text was not entirely clear: the statute prohibited the establishment of a PLO mission notwithstanding “any provision of *law*”, not “any *treaty*”, to the contrary. It then relied on this made-up ambiguity and interpreted the statute so as not to violate the Headquarters Agreement.¹⁰⁸

3.3. Consistent interpretation and domestic hierarchy of norms.

The use of international sources in constitutional interpretation has raised different types of concerns. Generally speaking, such concerns have not been based on interpretive or textualist premises – which, in the field of constitutional law, are collectively referred to as originalist interpretation¹⁰⁹ – but on arguments based on the hierarchy of domestic norms. The courts, it is asserted, should not use lower-ranking or unincorporated sources to interpret the highest-ranking legal text.¹¹⁰

Contesting the interpretive use of international law on grounds of hierarchy, rather than on the basis of interpretivism or textualism, leads commentators and courts to more radical conclusions. As seen above, reliance on legislative intent and on the text of legislation is invoked to limit, not prohibit, the use of international norms in interpretation. On the contrary, a formalistic reliance on the hierarchy of norms leads to oppose any influence of international law in constitutional interpretation, except maybe for those rare cases in which a norm of international law has a constitutional rank in the domestic legal system.

The main policy argument underpinning this view is that the interpretive technique under scrutiny may create unwarranted restrictions on the authority of the legislature and, in parallel, enhance the discretionary powers of the judiciary.¹¹¹ This concern stems from the

¹⁰⁸ U.S. District Court for the Southern District of New York, *United States v. Palestine Liberation Organization*, 695 F. Supp. 1456 (S.D.N.Y. 1988). On this case, see W.M. REISMAN, “An International Farce: The Sad Case of the PLO Mission”, *Yale Journal of International Law* 1989, p. 412 ff.

¹⁰⁹ As noted by A.C. BARRETT, *cit.*, p. 114, in the U.S. “[t]extualists in statutory interpretation tend to be originalists in constitutional interpretation”. A critique of originalism, which has been the subject of countless scholarly works, falls outside the scope of this research. For a description of this concept see, *ex multis*, L.B. SOLUM, “What Is Originalism? The Evolution of Contemporary Originalist Theory”, in G. HUSCROFT, B.W. MILLER (eds.), *The Challenge of Originalism. Theories of Constitutional Interpretation*, New York, 2011, p. 12 ff.; J. GOLDSWORTHY, “The Case for Originalism”, *ibid.*, p. 42 ff.; O.O. VAROL, “The Origins and Limits of Originalism: a Comparative Study”, *Vanderbilt Journal of Transnational Law* 2011, p. 1239 ff. For a criticism of originalism, see J.E. FLEMING, *Fidelity to Our Imperfect Constitution: for Moral Readings and Against Originalism*, New York, 2015; M. MOORE, “Originalist Theories of Constitutional Interpretation”, *Cornell Law Review* 1988, p. 364 ff.

¹¹⁰ M. KUMM, “Democratic”, *cit.*, p. 275 (terming this position “a Kelsenian argument”).

¹¹¹ It should be noted that the use of international law in constitutional interpretation has also been criticized on the grounds that it would unduly expand the powers of the political branches involved in the treaty-making process. See R.P. ALFORD, “Misusing International Sources to Interpret the Constitution”, *American Journal of International Law* 2004, p. 57 ff., p. 61 (asserting that this interpretive technique “improperly empowers the political branches to create source materials” that serve as “constitutional inputs”). This argument has already been criticized in Chapter 2, Section 3.3, hence it is sufficient here to refer to that discussion. For another critical analysis of this position, see Y. SHANY, “How Supreme”, *cit.*, p. 381-383. Moreover, this interpretive technique has also been criticized on substantive grounds. See, again, R.P. ALFORD, “Misusing”, *cit.*, p. 58-67 (arguing that international human rights could have the practical effect of diminishing the rights

observation that the use of international law in constitutional interpretation has the potential to (indirectly) elevate the status of international sources to a *de facto* constitutional rank, thus shaping the content of a text which regulates and constrains the authority of all state organs.¹¹² This makes the “constitutional *Charming Betsy*” a rather unique canon of interpretation: while the presumption of conformity, when applied to statutes, allows the legislature to disregard international law, in the case at hand the judges may be theoretically able to devise interpretive constraints on the authority of both the executive and the legislature.

This concern has been described in clear words by Justice McHugh in the aforementioned *Al-Kateb v. Godwin* case. He argued that, when the canon of consistent interpretation is applied to statutes, “the legislature is not bound by the implication. It may legislate in disregard of it. If the rule *were* applicable to a Constitution, it would operate as a restraint on the grants of power conferred. The Parliament would not be able to legislate in disregard of the implication”.¹¹³ Expressing a comparable view, Roger Alford has argued that courts should refrain from using international sources to interpret the constitution, because this would lead to the risk of such sources being used to overrule the democratic will of the people (a problem that he terms “international countermajoritarian difficulty”).¹¹⁴

This criticism, however, is not persuasive. In particular, it is possible to put forward at least two counterarguments.

A first counterargument is that critics largely overdramatize the impact on the balance of state powers of the use of international law in constitutional interpretation. It is noteworthy, indeed, that national courts engaged in constitutional interpretation often confine themselves to paying lip service to international sources, without significantly altering the substantive content of the constitutional provisions. Take, for example, Justice Kennedy’s majority opinion in *Roper v. Simmons*, where it was expressly stated that resort on international instruments was not controlling, but merely provided “respected and significant confirmation” for conclusions that the Court reached on grounds of domestic law.¹¹⁵ Mention should be made also of the case law of Russia’s Constitutional Court, which commonly cites international law as an auxiliary resource in constitutional interpretation.¹¹⁶

guaranteed by the U.S. Constitution). For a similar position, although only referred to the use of non-binding international materials, see M.D. RAMSEY, “International Materials and Domestic Rights: Reflections on Atkins and Lawrence”, *American Journal of International Law* 2004, p. 69 ff., p. 76-77. When referred to human rights instruments, this view does not consider that states parties to such treaties remain free to establish higher standards of protection of human rights at the domestic level: see e.g. Art. 5(2) of the ICCPR.

¹¹² M.A. WATERS, “Creeping Monism”, cit., p. 648 (describing the “constitutional *Charming Betsy*” as the “most monistic” judicial technique in common law legal systems); D. SLOSS, “Domestic Application”, cit., p. 384 ff. (noting that this practice has stirred controversy particularly in Australia and the United States).

¹¹³ *Al-Kateb v. Godwin*, cit., para. 66 (emphasis in the original). McHugh went on to say that “[t]he claim that the Constitution should be read consistently with the rules of international law has been decisively rejected by members of this court on several occasions. As a matter of constitutional doctrine, it must be regarded as heretical”. On the Australian debate on the legitimacy of the use of international sources in constitutional interpretation, see A. DE JONGE, cit., p. 47-48; M.A. WATERS, “Creeping Monism”, cit., p. 686.

¹¹⁴ See generally R.P. ALFORD, “Misusing”, cit.

¹¹⁵ *Roper v. Simmons*, cit., p. 578.

¹¹⁶ B.R. TUZMUKHAMEDOV, cit., p. 171 (arguing that “its conclusions are always based on the letter and spirit of the Constitution, and international law serves as an auxiliary resource to substantiate a finding”). For examples of decisions seemingly based solely on domestic law, but in which the court invoked international sources as supplementary authorities, see e.g. Russian Constitutional Court, *Constitutional review of Article 144*

The invocation of international law in such cases is clearly not aimed at constraining public power. The courts' intention, for example, could be to foster judicial dialogue;¹¹⁷ to signal its willingness to comply with international law through the application of domestic law;¹¹⁸ or simply to stress the fact that domestic law is consistent with international obligations. Be that as it may, in these cases the interpretive use of international law does not impinge in the slightest way on the balance of state powers. For this reason, a criticism of these decisions based on the protection of democracy or the separation of powers appears misplaced. As a matter of fact, these interpretive uses of international law might rather be – and have indeed been – criticized for the opposite reason, i.e. for their limited usefulness and effectiveness.¹¹⁹

The second counterargument relates to the cases where international sources are actually used as primary resources in defining the substantive content of constitutional provisions.¹²⁰ As argued above, national constitutions commonly include broad standards and principles and empower (constitutional, supreme or ordinary) courts to enforce them against the acts of the legislature. Such standards constitutively leave broad discretion to the judges as to the definition of their content. Moreover, they also require that the judges resort to some “external interpretive tool” to understand their meaning. They cannot be interpreted in isolation.¹²¹

When used in constitutional interpretation, international law is just one of these external tools. Consequently, one may well argue that, inasmuch as international law is relied on to give content to broad constitutional standards and rights, it actually limits – rather than enhances – the discretion of the courts. As noted by Yuval Shany, “reference to the more precise legal standards found in [international human rights] instruments and the case law of international monitoring bodies *restricts* the ability of judges to mold constitutional texts in accordance with their idiosyncratic personal or institutional preferences”.¹²²

of the Family Code of the Russian Federation, N 1055-O-P, ILDC 1336 (RU 2008); Russian Constitutional Court, *Constitutional review of Article 5(1) of the Federal Law ‘On provision of temporary disability benefits, maternity benefits to the citizens subject to compulsory social security’*, Case No 3-P, ILDC 1335 (RU 2009).

¹¹⁷ G.L. NEUMAN, “The Uses”, cit., p. 87 (asserting that the U.S. Supreme Court should resort to international law-oriented interpretation of the Constitution in order not to undermine its prestige in the global judicial community); F. FRANCONI, “International Law as a Common Language for National Courts”, *Texas International Law Journal* 2001, p. 587 ff.

¹¹⁸ See e.g. A. TZANAKOPOULOS, “Domestic Courts in International Law: The International Judicial Function of National Courts”, *Loyola of L.A. International & Comparative Law Review* 2011, p. 133 ff., p. 143 (using the term “consubstantial norms” to describe “constitutional rights that *in substance* reflect internationally protected rights, or more generally domestic rules that are *in substance* reflective of an existing international rule”; emphasis in the original).

¹¹⁹ M.A. WATERS, “Creeping Monism”, cit., p. 654 (terming the use of international law as supplementary authority in interpretation “gilding the domestic lily”) and p. 658 (criticizing this use as pointless); M. TUSHNET, “International Law and Constitutional Interpretation in the Twenty-First Century: Change and Continuity”, in D.L. SLOSS, M.D. RAMSEY, W.S. DODGE (eds.), cit., p. 507 ff., p. 508-509 (describing references to international law in *Roper v. Simmons* as a “rhetorical flourish”).

¹²⁰ The interpretive use of international law, in fact, can be very proactive. See e.g. W.N. FERDINANDUSSE, cit., p. 161, ft. 986 (noting that in India, in the case *Vishaka v. Rajasthan*, the Supreme Court resorted to an internationally-oriented interpretation of the Constitution to set forth applicable rules).

¹²¹ T.R. HUGHLETT, “International Law: The Use of International Law as a Guide to Interpretation Of the United States Constitution”, *Oklahoma Law Review* 1992, p. 169 ff., p. 183.

¹²² Y. SHANY, “How Supreme”, cit., p. 379-380 (emphasis in the original).

4. An assessment: consistent interpretation as a policy-based canon of construction.

No doubt, the doctrinal and judicial trends analyzed in the previous section provide a rather confusing picture of the rationales and the limits of the use of international law in the interpretation of domestic law. As has been seen, domestic courts resort to inconsistent standards, and motivate their actions in differing – and often unconvincing – ways. A substantial cause of this confusion is the courts’ difficulty in grappling with the underlying policy issues relating to their interactions with the political branches. The core of the problem is in the relationship between the judiciary and the legislature. The more a court feels obliged to preserve the latitude and the prerogatives of the latter, the more likely it is to resort to arguments (based on grounds of legislative intent, textual ambiguity, or domestic hierarchy of norms) which restrict the role of international law in the interpretive process.

To unravel this confusion, it is necessary to delve deeper into the logic behind the indirect application of international law by national courts. The main aim of this section is to propose an understanding of this interpretive technique alternative to those described in Section 3. Paragraph 4.1 will advance the argument that consistent interpretation should be understood as a policy-based canon of legal interpretation and will analyze the limits that it should encounter, if so understood. Paragraph 4.2 will then demonstrate that the use of international law in domestic law interpretation not only does not disrupt the domestic separation of powers, but can often help to protect it.

4.1. Policy rationale of consistent interpretation.

The principle that domestic law should be interpreted in accordance with a country’s international obligations is only one of the many canons of statutory construction which may guide the activities of national courts. Another example of a rule of such kind can be found in the principle that statutes should be interpreted in conformity with the constitution.¹²³

As demonstrated by authoritative legal theorists, the rationale of these rules of interpretation is not to approximate the intent of the legislature. Rather, their aim is the achievement of relevant policy objectives, in the pursuance of the protection of particular values and interests external to the interpreted statute.¹²⁴ In fact, the canons of interpretation differ from the traditional methods of interpretation. Such methods generally set out interpretive procedures

¹²³ See A.C. BARRETT, cit., particularly p. 117 ff.

¹²⁴ See generally W.N. ESKRIDGE, “Public Values in Statutory Interpretation”, *University of Pennsylvania Law Review* 1989, p. 1007 ff.; S.F. ROSS, “Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?”, *Vanderbilt Law Review* 1992, p. 561 ff., p. 563-566 (distinguishing between descriptive canons and normative canons. The former are “principles that involve predictions as to what the legislature must have meant, or probably meant, by employing particular statutory language [...]”, such as “[r]ules of syntax or grammar, principles that statutory provisions should be read to avoid internal inconsistency [...]”. Normative canons “direct courts to construe any ambiguity in a particular way in order to further some policy objective”); C.A. BRADLEY, “The Charming Betsy”, cit., p. 507 (the *Charming Betsy* is normally classified with the normative canons). See also J.M. ROGERS, “Intentional Contexts and the Rule that Statutes Should Be Interpreted as Consistent with International Law”, *Notre Dame Law Review* 1998, p. 637 ff., p. 640 (describing the view according to which, “when a court is faced with two possible constructions of the law, and the court is not entirely sure which is correct, it in effect has a legislative choice. [...] it may be argued that the court should make the choice that better furthers public policy from its own perspective. In this way, the court acts as a sort of interim legislature, deciding which way the statute should operate until the legislature says otherwise”. However, the author also asserts at p. 645 that “if no ambiguity exists, there is no room for interstitial policy-making”).

which are not intended to lead to any specific outcome. Canons of interpretation, on the other hand, single out a policy outcome that the interpreter should chase, not the means by which to obtain it.¹²⁵

In accordance with this theoretical background, it is possible to advance the argument that the canon of consistent interpretation should be understood as based on policy considerations, regardless of the argumentative expedients devised by national courts to justify their interpretive reliance on international law. The rationale of consistent interpretation, in other words, should be traced to the normative assumption that the international sources used as parameters should be complied with. National courts should avoid state infringements of international law as far as it is institutionally possible for them to do so.¹²⁶

National case law is replete with examples of courts that have done away with intentionalist and textualist premises and have resorted to a policy-based approach to consistent interpretation. An expression of this view, for example, is to be found in judicial decisions that motivate their interpretive reliance on international law with considerations of comity, i.e. with the perceived need to ensure respect and *courtoisie* toward those countries to which the international obligation is owed.¹²⁷

A more modern formulation of this approach was expressed by the Supreme Court of Canada in the aforementioned *R. v. Hape* case. The majority held that “[i]t is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law. The presumption of conformity is based on a rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations [...]”. Moreover, the court argued in an obiter that the presumption of compatibility could be overcome only if the legislature demonstrated “an unequivocal legislative intent to default on an international

¹²⁵ As noted by E. CANNIZZARO, *cit.*, p. 11, this reminds of the difference between obligations of means and obligations of conduct. See also p. 6-8 (arguing that consistent interpretation cannot be traced back to systematic interpretation, which, by definition, requires that all the norms used by the interpreter are part of the same legal system). But see R. BIN, *cit.*, p. 17 (asserting that consistent interpretation in general is a subspecies of systematic interpretation).

¹²⁶ A. NOLLKAEMPER, *National Courts*, *cit.*, p. 139 (“Consistent interpretation is a technique to ensure performance of international obligations”); R.G. STEINHARDT, *cit.*, p. 1128 (“The *Charming Betsy* principle places the courts of the United States in a position of oversight to avoid the possibility of international liability for the country as a whole”); M.A. WATERS, “Creeping Monism”, *cit.*, p. 661 (noting that recent cases of consistent interpretation by common law courts show “considerably more interest in ensuring that the government lives up to its international human rights treaties obligations”). See also the 1998 Bangalore Principles, i.e. the concluding statement of the 1998 Bangalore Colloquium on the Domestic Implementation of International Human Rights Norms. The statement read, *inter alia*: “It is the vital duty of [the] judiciary [...] to interpret and apply national constitutions and ordinary legislation in harmony with international human rights codes and customary international law”. The statement has been reprinted in *Developing Human Rights Jurisprudence, Volume 8. Eighth Judicial Colloquium on the Domestic Application of International Human Rights Norms, Bangalore, India, 27-30 December 1998*, London, 2001, p. 267 ff.

¹²⁷ See e.g. P.B. MAXWELL, *On the Interpretation of Statutes*, London, 1896, p. 173 (“every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations, or with the established rules of international law”); P.R. DUBINSKY, *cit.*, p. 638 and 647 (tracing back *Charming Betsy* to comity). On the concept of comity in international law, see generally L.D. PAUL, “Comity in International Law”, *Harvard International Law Journal* 1991, p. 1 ff.; P. MALANCZUK, *Akehurst’s Modern Introduction to International Law*, London-New York, 1997⁷, p. 44; Y. SHANY, *Regulating Jurisdictional Relations Between National and International Courts*, Oxford, 2007, p. 166 ff. (analyzing the concept of judicial comity).

obligation”.¹²⁸ In the Netherlands, too, courts base their interpretive recourse to international law “on a recognition that it is necessary or desirable to harmonize national and international law”.¹²⁹

A policy-based understanding helps illuminate the limits of consistent interpretation, too. If courts should be empowered to enrich the meaning of domestic law in order to harmonize it with relevant values, they should not be limited either by the presumed intent of the legislature or by supposedly unambiguous statutory text.¹³⁰ In this perspective, the outer limit of consistent interpretation, which the courts cannot trespass, is the prohibition of interpretation *contra legem*.¹³¹ In line with this premise, some courts have gone so far as to strain the language of legislation – and choose, if necessary, possible but *implausible* meanings – in order to pursue the policy goal of securing compliance of the state of the forum with international law.

In the 1976 case *Ministero delle finanze v. Società compagnia di navigazione Marsud*, for example, the Italian Court of Cassation pushed this approach to the limits. The case concerned the application of a statutory provision which was in clear violation of the GATT. From an analysis of the legislative history, it was undisputed that the parliament had intended the statute to be applied also to goods to which the GATT applied. However, the court refused to construe the statute in accordance with the intent of the legislature, asserting that the latter had not expressed an explicit intention to breach the treaty. The court reasoned that “[t]he fact that, as the preparatory work on the provision makes clear, the legislature (wrongly) considered the introduction of the new charge to be compatible with the agreement and on that account intended it to apply to GATT-originated goods as well, is in no sense a conclusive reason for the adoption of an interpretation consonant with that intent”.¹³²

Similar outcomes have been reached also in the United States. Indeed, although some have claimed that the *Charming Betsy* canon is only predicated on textual ambiguity,¹³³ in fact it has often led US courts to depart from any textually plausible interpretation on the basis of policy considerations.¹³⁴

A revealing example is the 2013 decision of the DC Circuit Court in the case of *Owner-Operator Independent Drivers Association, Inc. (OOIDA) v. United States Department of Transportation*. Here, the conflict between statute law and international law was apparent. Executive agreements concluded with Mexico and Canada exempted nationals of those two countries operating as truck drivers in the United States from certain medical certificate requirements prescribed under US law. A later in time statute, that made no mention of said

¹²⁸ G. VAN ERT, cit. p. 188-190.

¹²⁹ A. NOLLKAEMPER, “The Netherlands”, cit., p. 350.

¹³⁰ W.N. ESKRIDGE, P.J. FRICKEY, cit., p. 322; A.C. BARRETT, cit., p. 113.

¹³¹ See e.g. A. NOLLKAEMPER, “The Netherlands”, cit., p. 350 (for similar remarks on the practice of Dutch courts).

¹³² Court of Cassation, *Ministero delle finanze v. Società compagnia di navigazione Marsud*, 20 October 1976. The English translation of the passage quoted in text can be found in *Italian Yearbook of International Law* 1978, Vol. 3, p. 361 ff., p. 364.

¹³³ See generally A.H. BEAN, “Constraining Charming Betsy: Textual Ambiguity as a Predicate to Applying the Charming Betsy Doctrine”, *Brigham Young University Journal of Public Law* 2015, 1801 ff.

¹³⁴ A.C. BARRETT, cit., p. 124; M. FRANCK, “The Future of Judicial Internationalism: Charming Betsy, *Medellin v. Dretke*, and the Consular Rights Dispute”, *Boston University Law Review* 2006, p. 515 ff., p. 528 (asserting that the *Charming Betsy* canon is underpinned by the consideration that “[i]nternational obligations are serious matters” and that “[t]he international reputation of the United States ought not to be jeopardized”).

agreements, required the US Department of Transportation to issue regulations obligating *all* commercial vehicle operators to obtain such certificates. The regulation adopted by the Department pursuant to the statute included an exemption for Mexican and Canadian drivers, in compliance with the treaties. The OOIDA invoked the later-in-time rule and claimed that, since the statute had abrogated the earlier inconsistent treaty provisions, the regulation's exemption was invalid.

The court dismissed the claim and interpreted the statute as permitting the exemption. What is most interesting is that it did so by expressly discarding any intentionalist or textualist premise. Firstly, it held that "our decision is directed by a legal presumption, not an inquiry into congressional and presidential motives". Secondly, it resorted to consistent interpretation despite acknowledging that the statute was "facially unambiguous". The majority concluded: "absent some clear and overt indication from Congress, we will not construe a statute to abrogate existing international agreements even when the statute's text is not itself ambiguous".¹³⁵

A policy-based understanding of the canon of consistent interpretation is open to two objections. As will be seen, they both point – although from different perspectives – at the possible indeterminacy that may result from this approach.

First of all, because they are instruments for the promotion of certain given values, the canons of construction have been criticized as empowering courts to make arbitrary choices.¹³⁶

Writing about the *Charming Betsy*, one commentator has provocatively wondered: "US courts try to construe statutes to avoid inconsistencies with international law. Where do they get the authority to apply such a rule? And why this rule and not others – for example, a rule that federal statutes should be construed so as not to be inconsistent with French law, or Talmudic law, or Plato's 'Laws'?"¹³⁷

These criticisms should be taken seriously, insofar as they underline that the legitimacy of any canon of statutory construction lies in the legitimacy of the policy values that it promotes.¹³⁸

The idea that the pursuance of values would necessarily constitute a cover-up for arbitrary judicial choices, however, is unfounded. Such values should be traceable to the fundamental axioms of a legal system. A principle of interpretation pursuing respect for international obligations certainly meets this criterion. It should be recalled here that Chapter 2 has argued that the value of compliance with international law is firmly ingrained in the constitutional fabric of most national legal systems. The diffusion of a judicial canon of interpretation favoring conformity of domestic law with international law further demonstrates that a

¹³⁵ *Owner-Operator Independent Drivers Association, Inc. (OOIDA) v. United States Department of Transportation*, 724 F.3d 230 (D.C. Cir. 2013). For a critical reading of this case, see A.H. BEAN, *cit.*, p. 1810-1812.

¹³⁶ See R.A. POSNER, *cit.*, p. 816-817 ("the canons conceal [...] the extent to which the judge is making new law in the guise of interpreting a statute or a constitutional provision"); K. LLEWELLYN, "Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed", *Vanderbilt Law Review* 1950, p. 395 ff.

¹³⁷ C.A. BRADLEY, "The Charming Betsy", *cit.*, p. 484.

¹³⁸ C.R. SUNSTEIN, *After the Rights Revolution: Reconceiving the Regulatory State*, Harvard, 1990, p. 158 ("interpretive norms will be defensible only to the extent that good substantive and institutional arguments can be advanced on their behalf").

principle of *Völkerrechtsfreundlichkeit* (i.e. friendliness to international law) is to some extent recognized – however implicitly – in the vast majority of legal systems.¹³⁹

A second criticism could point to the fact that this understanding of the canon leaves a broad discretion to the judiciary as to whether or not to apply it.¹⁴⁰ Admittedly, although the courts *should* pursue the policy objective of guaranteeing that the state lives up to its international obligations, the actual realization of this objective essentially depends on whether the judges embrace this policy goal and strive to secure it. In this regard, it is necessary to consider that a certain degree of uncertainty is inherent in all forms of interpretation. The uncertainty resulting from the canon of consistent interpretation, however, is inferior to the uncertainty produced by other methods of interpretation, because the canon pre-determines the goal that the interpreter should chase and requires to pursue it.¹⁴¹

Furthermore, in a number of legal systems this indeterminacy has been remedied by establishing an obligation upon courts to interpret legislation in harmony with international law. The transition from a discretionary to a mandatory recourse to international sources in interpretation has been described as the passage from a weak to a strong interpretive engagement with international law.¹⁴²

A *strong* interpretive use of international law may be established by the law, as is the case with the aforementioned constitutional provisions requiring courts to interpret domestic human rights in light of international human rights law, or with Section 3(1) of the UK Human Rights Act. However, it is interesting to note that, in some legal systems, the obligation to resort to international sources in interpretation has been established through case law. One may again cite the German Constitutional Court decision in *Görgülü*, which established a form of mandatory recourse to international sources in constitutional interpretation. The court held that the European Convention on Human Rights “must be taken into account in making a decision; the court must at least duly consider it” and that “[a]s long as applicable methodological standards leave scope for interpretation and weighing of interests, German courts must give precedence to interpretation in accordance with the Convention”.¹⁴³

Another example can be found in Judgment 349/2007 of the Italian Constitutional Court, which held that lower courts have an obligation to interpret legislation in conformity with international obligations. Should consistent interpretation not be “allowed by the wording of

¹³⁹ See Chapter 2, Section 6.

¹⁴⁰ See e.g. A.M. MANIRABONA, F. CRÉPEAU, “Enhancing the Implementation of Human Rights Treaties in Canadian Law: The Need for a National Monitoring Body”, *Canadian Journal of Human Rights* 2012, p. 25 ff., p. 25 (“Canada cannot afford to adopt such principles as the presumption of conformity and the legitimate expectations doctrine that are characterized by unpredictable outcomes”); Y. SHANY, *Regulating*, cit., p. 169 (noting, with regard to judicial comity, that discretionary rules are always open to abuse); D. SLOSS, “United States”, cit., p. 527 (“U.S. courts have broad discretion to choose when to invoke the canon and when to ignore it”, and noting that they may strategically opt for the latter).

¹⁴¹ A. BERNARDI, “Presentazione. Nei meandri dell’interpretazione conforme al diritto dell’Unione Europea”, in A. BERNARDI (ed.), cit., p. vii ff., p. xii-xiii (“l’interpretazione, per quanto legata al dato testuale, implica un ineliminabile «spazio di libertà» concesso agli operatori del diritto e in particolare ai giudici [...] L’[interpretazione conforme] è invece l’unica forma di interpretazione che si impone vincolativamente, così da conculcare le scelte ermeneutiche del giudice”).

¹⁴² M. KUMM, “Democratic”, cit., p. 278-279; Y. SHANY, “How Supreme”, cit., p. 401 (noting that establishing an obligation to conform constitutional law to international law might be perceived by courts as politically untenable).

¹⁴³ *Görgülü v. Germany*, cit., para. 62.

the provisions”, the judge must refer the issue of the incompatibility of legislation with international law to the Constitutional Court.¹⁴⁴ The obligation for ordinary judges to interpret legislation in conformity with international law has later been confirmed by a consistent line of decisions.¹⁴⁵

It should be specified that the argument that courts *should* pursue – to the limits of their institutional capabilities – the consistency of domestic law and international law can only apply to a state’s international *obligations*. For this reason, national courts should differentiate between the role assigned to binding and non-binding international sources. The use of the latter as interpretive aids cannot *per se* be traced to the policy goal of securing compliance with international obligations, hence there can be no obligation for courts to ensure consistency of domestic law with this type of sources.

It is helpful in this regard to refer to the distinction, recognized in many national legal systems, between binding authority and persuasive authority in interpretation. While the former type of authority must be followed and applied by a court, a persuasive authority is not binding in itself and can only be relevant in addition to a binding authority.¹⁴⁶ Non-binding international sources can be used as persuasive authorities, i.e. they can illuminate the meaning and extent of international obligations,¹⁴⁷ or they can be used as supplementary sources, not sole authorities, of interpretation of domestic law.¹⁴⁸

For the same reason, considering both binding and non-binding international sources merely as persuasive authorities is often incompatible with the policy goal of consistent interpretation.¹⁴⁹ An example is the practice of Canadian courts, which commonly treat both types of sources as “relevant and persuasive” authority.¹⁵⁰ The weakness of this approach was apparent in the *Suresh* case. One of the issues before the Supreme Court of Canada was whether the Canadian Charter allowed for a refugee, who was accused of terrorism, to be deported to a country where he would face a substantial risk of torture. The court acknowledged that the prohibition of *refoulement* to face torture was absolute under international law. However, this prohibition only had the weight of persuasive authority. As a consequence, the court did not interpret the Charter fully in line with international law (although this outcome appeared possible under its text) and held that, “in exceptional circumstances, deportation to face torture might be justified” under Canadian law.¹⁵¹

¹⁴⁴ *EP v Municipality of Avellino*, No 349/2007, ILDC 301 (IT 2007), para. 6.2. Note that in Judgment No. 348, which it rendered on the same day, the Constitutional Court construed the obligation of consistent interpretation only in relation to the European Convention on Human Rights and not to all international agreements (see para. 5 of the section *Considerato in diritto*).

¹⁴⁵ See, e.g., Judgment 239 of 24 July 2009, para. 3.

¹⁴⁶ H.P. GLENN, “Persuasive Authority”, *McGill Law Journal* 1987, p. 261 ff., p. 264; C. MCCRUDDEN, “A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights”, *Oxford Journal of Legal Studies* 2000, p. 499 ff., p. 502-503.

¹⁴⁷ E. CANNIZZARO, cit., p. 9.

¹⁴⁸ See e.g. S.C. NEFF, cit., p. 626 (noting that, in the U.K., non-binding international acts “have been employed to supplement or reinforce other support for judgments reached. They have not, however, been applied entirely on their own as sole authority”).

¹⁴⁹ M. KUMM, “Democratic”, cit., p. 279 (U.S. courts considering all international sources as “persuasive” in constitutional interpretation).

¹⁵⁰ S. BEAULAC, J.H. CURRIE, cit., p. 124-125.

¹⁵¹ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3.

4.2. Separation of powers function of consistent interpretation.

While the primary goal of consistent interpretation is to ensure compliance with international obligations, it can also simultaneously perform another policy function. More specifically, in many instances the use of international law in domestic law interpretation can fulfill a role of protecting the domestic separation of powers.

The idea that the canon of consistent interpretation fulfills a separation of powers function has first been advanced by Curtis Bradley and is now relatively widespread among United States commentators.¹⁵² This view, as originally put forward, interprets the *Charming Betsy* canon as a form of protection of the authority of the political branches – and primarily the executive – in the realm of foreign affairs.¹⁵³ It argues, in particular, that the rationale of the canon is to limit the interference of the Congress in the foreign relations prerogatives of the President. The Congress has the authority to legislate in violation of international law, but its intention to do so should be expressed clearly and not be presumed. In lack of a clear statement from Congress, courts should not create “foreign relations difficulties” to the executive.¹⁵⁴

This understanding of the canon of consistent interpretation has both similarities and differences with the approach described in the previous paragraph. On the one hand, the conception analyzed here is also based on policy considerations and acknowledges that the canon is not based on textual ambiguity or presumed legislative intent. Interestingly, it demonstrates that the prerogatives of the political branches can be protected by a canon of consistent interpretation even if it departs from interpretive or textualist premises. On the other hand, however, this view rejects any understanding of the *Charming Betsy* as directed at furthering compliance with international law. Compliance with international law is neither good nor bad *per se*, but should be pursued to the extent it shields the government from international embarrassment.¹⁵⁵

This latter claim advanced by the theory under scrutiny is unconvincing. Firstly, it is based on the fallacy that the US Constitution would be indifferent as to whether international law is complied with or violated. To the contrary, it has been demonstrated previously that the United States legal system – as much as, for that matter, most other legal systems – expresses a clear preference for compliance over non-compliance with international law. The principle that international law should be respected belongs to the domestic legal order as much as the principle of separation of powers.¹⁵⁶ Secondly, this restrictive understanding of consistent interpretation is disproved by case law. As seen in the previous paragraphs, US courts are in line with the courts of other countries in justifying their interpretive use of international law with the need to ensure respect for international obligations. For these reasons, the idea that

¹⁵² C.A. BRADLEY, “The Charming Betsy”, cit., particularly p. 524 ff.

¹⁵³ R.P. ALFORD, “Foreign Relations as a Matter of Interpretation: The Use and Abuse of Charming Betsy”, *Ohio State Law Journal* 2006, p. 1339 ff., p. 1342 (the canon “eliminate[s] international discord in furtherance of an executive prerogative to comply with international obligations”).

¹⁵⁴ C.A. BRADLEY, “The Charming Betsy”, cit., p. 526. This conception of the *Charming Betsy* canon has been described as “a restrictive and prophylactic doctrine protecting the separation of powers”: see R.G. STEINHARDT, cit., p. 1130.

¹⁵⁵ C.A. BRADLEY, “The Charming Betsy”, cit., p. 497-503 (describing and criticizing the “internationalist conception” of the canon). Some authors consider the canon as a kind of avoidance doctrine: see F. SCHAUER, “Ashwander Revisited”, *The Supreme Court Review* 1995, p. 71 ff., p. 73, ft. 9; R.P. ALFORD, “Foreign Relations”, cit., p. 1356 (“constitutional avoidance is the ‘essence’ of the *Charming Betsy* doctrine”).

¹⁵⁶ Chapter 2, Section 6.

the canon of consistent interpretation would be based exclusively on reasons of separation of powers – compliance with international law merely constituting an inadvertent effect – misses the point.

This does not mean, however, that consistent interpretation cannot perform a function of ensuring compliance with international law and, *at the same time*, a role under the principle of separation of powers, the two functions acting as two sides of the same coin.¹⁵⁷ If one takes this perspective, some points advanced by the theory described above can be generalized so to be applied to other legal systems as well.

In order to better understand how the interpretive use of international law can perform a function of protecting the domestic separation of powers, let us first consider the case of a national legal system where certain international sources are granted hierarchical supremacy over legislation. As seen in Chapter 3, the effective implementation of the primacy of such international norms in the domestic legal order is generally entrusted to the national courts. Every time a lower-ranking statute appears to be inconsistent with a higher-ranking international source, the national court faces a decision whether to displace the statutory provision and let international law prevail.¹⁵⁸

It can be argued that, in order for this judicial process to function properly, it is necessary that the courts subscribe to a canon of consistent interpretation which requires them to interpret legislation in harmony with higher-ranking international norms. This approach limits the prioritization of international sources to cases where there is an actual, and not merely apparent, conflict with domestic legislation. Consequently, it limits the judiciary's power to disapply or invalidate primary legislation by construing it in conflict with the state's international obligations. From this viewpoint, the canon safeguards the prerogatives of the parliament vis-à-vis the judiciary. It also indirectly protects the democratic principle, by ensuring that the compression of the democratic will – as it is enshrined in the acts of the legislature – is reduced to a minimum. In sum, the canon of consistent interpretation acts as a counterbalance to the compression of the latitude of national legislatures caused by the primacy of international sources over domestic legislation.

Section 3(1) of the UK Human Rights Act, for example, besides establishing a mechanism pursuing compliance with the ECHR, also fulfills the function to limit declarations of incompatibility of legislation to exceptional circumstances. Indeed, as noted by Lord Stein in *Ghaidan v. Mendoza*, Section 3 constitutes the “prime remedial measure” in case of conflict between legislation and conventional rights.¹⁵⁹ The same can be said of the obligation of consistent interpretation set forth by the case law of the Italian Constitutional Court. The Court has the power to strike down legislation in violation of both international agreements and general international law, such violation amounting to constitutional illegitimacy.¹⁶⁰ The rule of consistent interpretation drastically reduces the cases in which legislation should be

¹⁵⁷ R.G. STEINHARDT, *cit.*, p. 1115 (terming these two functions “twin rationales”). As rightly pointed out by A.C. BARRETT, *cit.*, p. 158, “a canon’s purpose lies in the eyes of the beholder”.

¹⁵⁸ See Chapter 3, Section 6. For the purposes of this paragraph, it is indifferent whether the control of conformity of legislation with international law is entrusted to a supreme court or to the ordinary courts. It is also indifferent whether the national court has the power to strike down the inconsistent legislation or is only required to disapply it on a case-by-case basis.

¹⁵⁹ *Ghaidan v Mendoza* [2004] 3 WLR 113, paras. 38-49.

¹⁶⁰ See Chapter 2, Section 6.

struck down. Incidentally, Italian courts have the same obligation with regard to inconsistencies between primary legislation and the Constitution: they should not refer a seemingly unconstitutional statute to the Constitutional Court if said statute can be interpreted in a way consistent with the Constitution.¹⁶¹

The situation is partially different when one turns to analyze the cases where international law is incorporated in domestic law with the same hierarchical rank as primary legislation. In this situation, the interaction between statutes and international law is regulated by the later in time rule or by the principle of speciality. As described in Chapter 2, this configuration leaves to the national political authorities (most commonly, the parliament) an option to choose to violate international law. This is to say that the constitutional setting grants an authority to the legislature to disregard international obligations through the adoption of inconsistent measures, in derogation of a background principle of domestic law favoring compliance.¹⁶²

The constitutional authority to violate international law belongs to the legislature, as the prime expression of the democratic will, and not to the judges. It is appropriate, for this reason, that the courts strive to avoid construing a statute in a manner inconsistent with international obligations, unless there is an explicit expression of the legislature's intent to reject an international obligation.¹⁶³ Put differently, the canon of consistent interpretation ensures that the constitutional power to disregard international law is effectively exercised (if ever) by the legislature, and not by the discretion of the courts.¹⁶⁴ One commentator has summarized this feature of the canon of consistent interpretation by saying that it "allows the courts to sound out the political branches as to whether and how they wish to violate international law [and] reduces judicial interpretations mistakenly placing the [state] in conflict with [...] international law".¹⁶⁵ In *Whitney v. Robertson*, the US Supreme Court

¹⁶¹ See the oft-quoted dictum of the Italian Constitutional Court, Judgment No. 356/1996, para. 4: "le leggi non si dichiarano costituzionalmente illegittime perché è possibile darne interpretazioni incostituzionali [...], ma perché è impossibile darne interpretazioni costituzionali".

¹⁶² See Chapter 2, Section 4.

¹⁶³ For U.S. case law acknowledging this principle, see e.g. *Cook v. United States*, 288 U.S. 102 (1933), p. 120 ("A treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed"); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984), p. 252 (refusing to consider a treaty implicitly abrogated by a later statute which did not expressly mention it).

¹⁶⁴ For a similar position see B. CONFORTI, *International Law and the Role of Domestic Legal Systems*, Dordrecht-Boston-London, 1993, p. 44-46 (arguing that there is a clear intent to breach international law only in two situations: first, in the case the legislature expressly manifests its intention to violate a treaty; second, when a subsequent legislation regulates the identical subject-matter of an international obligation in a clearly inconsistent way, which should arguably be regarded a clear – however implicit – statement). For a different view, see A.H. BEAN, *cit.*, p. 1822 (arguing that applying the canon besides situations of textual ambiguity equals to "interfer[ing] with the legislature's constitutionally sanctioned ability to abrogate [international] agreements"). This position, however, neglects that the legislature's ability to violate international law remains untouched, as long as it is exercised in clear terms.

¹⁶⁵ E.T. SWAINE, "The Local Law of Global Antitrust", *William and Mary Law Review* 2001, p. 627 ff., p. 714. See also D.L. SHAPIRO, "Continuity and Change in Statutory Interpretation", *New York University Law Review* 1992, p. 921 ff., p. 944 (arguing that substantive canons of interpretation, including the *Charming Betsy*, "increase the likelihood that a statute will not change existing arrangements [...] unless the legislature – the politically accountable body – has faced the problem and decided that change is appropriate"); A.J. BELLIA, B.R. CLARK, "The Federal Common Law of Nations", *Columbia Law Review* 2009, p. 1 ff., p. 63-64 (tracing the *Charming Betsy*'s rationale to the fact that "the Constitution allocates to the political branches, not courts, the powers to recognize foreign nations and to risk bilateral conflict with such nations by interfering with their perfect rights").

expressly held that the choice to breach international law “belong[s] to diplomacy and legislation, and not to the administration of the laws”.¹⁶⁶

The same rationale underpinning this approach has been pursued in the UK, as well as in other states of the British Commonwealth, through the operation of the principle of legality. In principle, the parliament retains the authority to legislate in contravention with fundamental human rights, including international human rights. However, such derogations cannot be assumed by the courts unless they are stated clearly in legislation. As Lord Hoffman put it, “[t]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual”.¹⁶⁷ As is clear, this formulation of the principle of legality is indistinguishable from a policy-based canon of consistent interpretation.¹⁶⁸

5. Conclusions.

To summarize, the judicial practice of interpreting domestic law in light of international law has the potential to allow courts to trespass the boundaries set by the formal status of international sources within domestic law. This has stirred a widespread perception that consistent interpretation, to the extent it is not contingent upon constitutional or legislative incorporation, might lead courts to invade the boundaries of legislative power. National courts, for their part, have devised a number of argumentative methods aimed at limiting the scope of consistent interpretation in ways which appear to better safeguard the prerogatives of the legislature.

This chapter has argued that such judicial approaches generally rest on flawed assumptions about the limits of the judicial function. When they interpret and apply domestic law, national courts can legitimately act as agents for the promotion of fundamental values and interests of the domestic legal order, such as the interest in ensuring compliance with international obligations. By doing so, they do not transform themselves into agents of the international legal order, as both critics and apologists of this practice have argued.¹⁶⁹ Rather, this understanding of the judicial function simply reflects the idea that courts are agents of the national legal system as a whole, and not of a particular parliamentary majority. In this capacity, they should promote the fundamental values of the national legal system regardless of whether or not they were considered in the enactment of a specific piece of legislation.

¹⁶⁶ *Whitney v. Robertson*, 124 U.S. 190 (1888), p. 195.

¹⁶⁷ *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, p. 130.

¹⁶⁸ W. LACEY, “The Judicial Use”, cit., p. 104-105 (noting that statutory provisions requiring consistent interpretation “have an effect of fusing the principle of legality with the presumption of consistency”).

¹⁶⁹ See e.g. C.A. BRADLEY, “The Charming Betsy”, cit., p. 498 (criticizing the “internationalist conception” of the canon on the grounds that courts would act as “agents of the international legal order, rather than as agents of Congress”).

National courts, nonetheless, keep operating within the framework of domestic law and remain subject to the institutional limits of their function. If, in a given constitutional setting, the legislature has the power to bar the judicial application of international sources or to decide to disregard international obligations, the courts must necessarily pay heed to this prerogative. But a correct operation of this type of constitutional framework requires that the legislature exercises this prerogative expressly and that courts do not presume a violation when this outcome can be avoided. In this perspective, as has been seen above, consistent interpretation of domestic law with international law can be regarded as performing also a function of separation of powers, by preventing courts from ascribing an intention to violate international law to an unaware legislature. Consistent interpretation ultimately entrusts the power to violate international law to the parliament, while at the same time calling on it to sustain the political cost of this decision.

Conclusions

To conclude this thesis, it is opportune to take stock of its findings and to verify whether or not they support the hypotheses put forward in the introductory chapter.

Chapter 1 set the stage of the research by introducing its topic and identifying the key issues to be addressed. The starting points of the research can be summarized as follows. Because international law is increasingly aimed to be applied within domestic legal systems, commentators generally acknowledge that ensuring that state authorities comply with international obligations is crucial to the effectiveness of the international legal order. At the same time, however, international law leaves to the states a significant degree of freedom to choose how to discharge their obligations in conformity to the features of their domestic legal systems and their political set-ups. Generally speaking, from the viewpoint of international law, so far as deficiencies of domestic law do not cause non-compliance, the manner in which states set out their municipal legal systems is immaterial. Ensuring that national political authorities obey international law, therefore, is essentially entrusted to the domestic legal orders themselves. While domestic legal systems, for their part, commonly devise a number of legal techniques to ensure that their political branches conform to the authority of international law, their choices in this field may entail a tension with some fundamental principles of domestic law, primarily the principle of democratic legitimacy and the separation of powers. Accordingly, the chapter identified the main goals of this research, i.e. to assess (i) how considerations relating to the prerogatives of the national political authorities influence the discharge of international obligations within domestic legal systems; (ii) whether and under what conditions the protection of those prerogatives can produce outcomes in violation of international law; and (iii) whether there are ways to avoid such outcomes. It concluded that the answers to such questions can only be answered by looking at the solutions concretely adopted in domestic legal systems.

Chapter 2 analyzed the impact of the considerations connected to the prerogatives of national political branches on the techniques through which international norms are formally made part of domestic law. By incorporating international law, a national legal system can reduce the power of national authorities to legislate or act in contravention of international obligations; therefore, the domestic status of international norms is a primary litmus test for a legal system's determination to yield to the authority of international law. This chapter proposed a classification of domestic techniques of international law implementation in terms of three categories, depending on the amount of legal constraints they impose on the national lawmaking authorities, and demonstrated that each of them is underpinned by different policy rationales and raises different policy issues. The first category groups the instances whereby international law is granted primacy over primary legislation, thus constituting a limit on the prerogatives of all state authorities, including the legislature. It was shown that national courts commonly delimit the extent of hierarchical supremacy of international sources having regard to their substantive content and to their effects on the domestic separation of powers. In the second group of cases the prerogatives of the legislature are limited, international law being incorporated into domestic law without the need of an act of parliament, but not completely eliminated, because legislative authorities remain free to adopt acts in contravention of

international law. This constitutes a more moderate form of constraint on national political branches, which reflects a different balance of the competing policy considerations. Finally, the focus turned to those cases where the incorporation of international law can only be achieved by means of acts of the political branches. Ultimately, the chapter argued that the contextual weight of the relevant countervailing concerns appears to make it impossible for many national legal systems to establish an unconditioned primacy of international law over the acts of the legislature and the executive. Indeed, it is a common solution to facilitate compliance of the political branches to international law, while at the same time establishing a number of safety valves to domestic political processes. Notwithstanding the great variety of approaches, however, the chapter concluded that compliance with international law can be considered as a fundamental principle in the vast majority of national legal systems.

Chapter 3 investigated the impact of considerations relating to the prerogatives of the political branches on the determination of the direct applicability of international law by national courts. By way of premise, the chapter argued that, by reason of the institutional characteristics of both international law and domestic law, national courts potentially constitute the principal agencies for the enforcement of international law against state authorities. At the same time, however, they operate within the web of limitations set forth by domestic law and, therefore, their role as enforcers of international law has a limit: they cannot ensure compliance with international obligations beyond what is allowed by the national legal system to which they belong. For this reason, considerations relating to the prerogatives of the political branches exercise an inevitable influence on how domestic courts apply international law. This statement found consistent confirmation in the analysis of how domestic courts assess the direct applicability of international norms. Having demonstrated that international law does not lay down any criteria as to whether its norms should be deemed to be directly applicable in domestic proceedings, the chapter submitted that the extent to which international norms are considered to be directly applicable by domestic courts entirely depends on considerations of domestic law. Limitations on direct applicability are (usually impliedly) produced by concerns of separation of powers, even where national courts purport to make them contingent on the substantive content of international norms. Building on this assumption, the chapter critiqued the tendency of national courts to resort to limitations on the judicial application of international norms in order to safeguard the prerogatives of the political branches. It contended that such application should be regarded as a natural consequence of international law's incorporation in domestic law; that limitations on direct applicability should be construed restrictively by national courts; and that, in any event, they should be based on the very same criteria used by courts to assess the judicial applicability of domestic law norms. The chapter also analyzed how national courts enforce international norms which the constitution proclaims supreme over domestic legislation, and singled out two possible approaches: either the implementation of the primacy of international law is entrusted to a centralized control of constitutionality, or it is performed by ordinary courts in the concrete case. Finally, it briefly sketched out some extra-legal factors which explain for the lack of tangible effects of the formal incorporation of international law in many legal systems and which demonstrate that, broadly speaking, the domestic application of international law requires an effort of all state authorities and, to some extent, a cooperation between the courts and the political branches.

Finally, Chapter 4 focused on the techniques of consistent interpretation, i.e. the use of international law in the interpretation of domestic norms. By means of these techniques, national courts can draw domestic effects from international norms in ways that do not depend on their formal incorporation in domestic law or on their hierarchical status. It was shown, however, that for this reason the extent of consistent interpretation is generally influenced by a fear on the part of national courts that they may unduly compress or invade the prerogatives of the political branches. The chapter criticized the most common arguments advanced by national courts to limit the extent of consistent interpretation in ways that are perceived to protect such prerogatives: specifically, arguments which ground consistent interpretation on legislative intent, textual ambiguity, or the domestic hierarchy of norms. Ultimately, it was argued that consistent interpretation should be understood as a technique through which national courts pursue a policy goal pertaining to the national legal system as a whole, i.e. ensuring compliance with the state's international obligations, and that, for this reason, the judicial attempts to limit its scope in order to protect the prerogatives of national political authorities are based on flawed assumptions on the nature of the judicial function. At the same time, the chapter also argued that, in many national legal environments, consistent interpretation can fulfill a function of protecting the domestic separation of powers, by entrusting any decisions to violate international law to the national authorities possessing political legitimacy and not to the courts.

Against this backdrop, one may return to the hypotheses that had been advanced at the beginning of this thesis in order to draw more general conclusions.

The first hypothesis, which contended that the tension between compliance with international law and the prerogatives of national political authorities is to a large extent inevitable, appears to be entirely confirmed. Throughout this thesis, such tension has emerged as a structural feature of the interplay of international law and domestic law. These considerations have been demonstrated to exercise a pervasive impact on all the aspects of the domestic implementation of international law, including, in particular, the choices regarding the status of international norms in domestic law and the manner in which national courts apply international law in practice.

The second hypothesis claimed that international law is scarcely suited to addressing and solving such concerns. This contention is partially verified. On the one hand, international law is generally indifferent to safeguarding the prerogatives of national political branches. It does leave to the states a considerable freedom to apply international law in ways which do not disrupt domestic political processes, but this freedom is only interstitial, because it is a byproduct of international law's compliance-centered approach to its domestic implementation. On the other hand, it is also true that some features of international law may decrease the probability of contestations or non-application by organs of the state based on a protective attitude in favor of the national political branches. For instance, the research proved that (i) the perceived need to protect the authority of national legislatures might be made – to a certain extent – less pressing by increasing the democratic legitimacy of international norms; (ii) international norms are more likely to be granted supremacy over primary legislation if their material content is substantially equivalent (or at least homogeneous) to the content of a national constitution, e.g. in the field of the protection of human rights; and (iii) the way in which international law provisions are formulated may have an influence over the

choices of national courts as regards their applicability in judicial proceedings, because, by reason of separation of powers, courts are more likely to apply international norms formulated in clear and specific terms rather than as statements of principle. Ultimately, however, striking a balance between freedom and constraint of domestic political processes is left by international law to the national legal systems, to the extent compliance with international obligations is not jeopardized.

As to the third hypothesis, it claimed that, although considerations relating to the prerogatives of the national political branches necessarily influence the domestic application of international law, they do not necessarily lead to non-compliance with international obligations. This hypothesis is also partially verified. Generally speaking, the tension between compliance with international law and protection of domestic political processes should not be dramatized. National legal systems try to resolve this tension by striking – in a variety of different ways – a fine balance between freedom and constraint of the national political authorities: the tension, therefore, is by and large a benign feature of the interplay of international law and domestic law. Admittedly, the previous pages described many prominent cases in which the tension led to non-compliance: suffice to remember, for example, the decision of the US Supreme Court in *Medellín v. Texas*, or the many cases in which national courts refused to interpret domestic law consistently with international obligations to protect purported legislative prerogatives. But the key submission of this thesis is that the vast majority of such instances of non-compliance, including *Medellín*, were ultimately the product of flawed understandings of the domestic constitutional set-up in the field of the application of international law and of the separation of powers. For this reason, it appears that in many cases the tension can be reconciled by national organs, and primarily courts, simply by resorting to principles, rules and judicial techniques which are ingrained within the fabric of domestic law. The above notwithstanding, considerations relating to the prerogatives of the national political branches necessarily set a ceiling to the expectations one may have about the application of international law in domestic legal systems. This ceiling can be lifted, but not broken. In particular, such considerations may entail a defective implementation of international law by the domestic legal system as a whole, as in the legal systems – analyzed in Chapter 2 – where state authorities control the domestication of all sources of international law and, at the same time, do not allow for the incorporation of international norms establishing obligations of states toward individuals. In such cases, only national political authorities may be institutionally suited to solving the deficiencies in the domestic implementation of international law.

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