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# Rethinking the Supremacy of International Law

André Nollkaemper

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**Zusammenfassung** Dieser Beitrag untersucht die Frage, ob ein absoluter Anwendungsvorrang des internationalen Rechts besteht bzw. ob und mit welchen Begründungen dieser von nationalen Gerichten verneint werden kann. Nach einer Analyse verschiedener Szenarien für Konflikte zwischen internationalem und nationalem Recht plädiert der Beitrag schließlich für eine differenzierte Herangehensweise an das Prinzip des Anwendungsvorrangs, mittels derer sowohl die Integration internationalen Rechts in nationale Rechtsordnungen als auch die Integration nationaler Verfassungsprinzipien, etwa des Grundrechtsschutzes, in internationales Recht verbessert werden kann.

**Abstract** This paper reviews whether the principle of supremacy, claimed by international law, is absolute or whether and on which grounds domestic courts might refrain

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from applying international obligations. Following an analysis of various scenarios for conflicts between international and domestic law, the paper argues that a differentiated, substantive understanding of the principle of supremacy might support both the allowance of international law into domestic legal systems and the better integration of concepts like the protection of fundamental rights into international law.

## I. Introduction

In this article I will review whether domestic courts can duly refrain from giving effect to an international obligation on the ground that performance of that obligation would contravene a fundamental right recognized by the domestic law of that state.

The problem that is considered here can be illustrated by the Judgment of the European Court of Justice in *Kadi v Council of the European Union*.<sup>1</sup> The ECJ refrained from giving effect to Security Council Resolution 1333 (2000) on the ground that performance of the obligations contained in the Resolution would conflict with fundamental rights under EU law. The question is whether and how international law can accommodate such a decision. One might argue that international law should, in those areas where it prescribes or supervises domestic law, be sensitive to domestic (constitutional) law.<sup>2</sup> However, non-performance of international obligations with reference to fundamental rules of national law, or internal rules of international organizations, sits uneasily with the supremacy of international law.

The supremacy of international law prioritizes international law over national law. Gerald Fitzmaurice wrote that the principle of supremacy is ‘one of the great principles of international law, informing the whole system and applying to every branch of it’.<sup>3</sup> In general terms, the principle of supremacy of international law seeks to subordinate the sovereignty of states to international law.<sup>4</sup> One of its manifestations is that international law is supreme over, and takes precedence in the international legal order, national law.<sup>5</sup> In the event of a conflict between international law and domestic law, international law will have to prevail in the international legal order, domestic law being considered a fact from the standpoint of international law. This aspect is at the heart of the law of treaties<sup>6</sup> and the law of international responsibility.<sup>7</sup>

<sup>1</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council*, Judgment of 3 September 2008.

<sup>2</sup> *James Crawford*, International Law and Australian Federalism: Past, Present and Future, in: Opeskin/Rothwell, International Law and Australian Federalism (1997), 325 ff, 333; *James Crawford*, International Law and the Rule of Law (2004) 3 ff; *Andrea Bianchi*, International Law and US Courts: The Myth of Lohengrin Revealed (2004) 751 ff, in particular at 781.

<sup>3</sup> *Gerald Fitzmaurice*, The General Principles of International Law Considered from the Standpoint of the Rule of Law (1957) RdC, 85 ff.

<sup>4</sup> *Fitzmaurice*, General Principles (Fn 3) 6.

<sup>5</sup> See for a comprehensive treatment of this aspect of the principle of supremacy: *Dominique Carreau*, Droit International<sup>8</sup> (2004) 43 ff; *Fitzmaurice*, General Principles (Fn 3) 68 ff. See also *Carlo Santulli*, Le Status International de L’Ordre Juridique Étatique (2001) 427.

<sup>6</sup> Art. 27 and 46 of the Vienna Convention on the Law of Treaties.

<sup>7</sup> Art. 3 and 32 of the Articles on the Responsibility of States for Internationally Wrongful Acts (hereafter Articles on State Responsibility). The Articles are contained in the Annex of UN Doc A/Res/56/83 (28 January 2002) and reproduced in *James Crawford*, The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries (2002). A comparable principle is contained

The principle of supremacy of international law is central to the international rule of law, which, if anything, requires that states exercise their powers in accordance with international law, not domestic law.<sup>8</sup> There cannot be any rule of law without the precedence of some principles over others deemed of a lesser importance.<sup>9</sup> Allowing states to prioritize fundamental rules of domestic law over international law would undermine the efficacy of international law and the international rule of law.

This article will review whether this principle of supremacy is absolute in the sense that it will reject any attempt to give precedence to a fundamental right over conflicting international obligations. In particular, it explores whether an exception could be based on the fact that some of such attempts have been based on fundamental rights that conform to international law.<sup>10</sup> If so, this might be a way to distinguish between a case like *Kadi*, on the one hand, and challenges based on, say, the Sharia, on the other.

I will first summarize the dynamics of international law-making that may induce challenges to the performance of international obligations based on fundamental rules of domestic law (Sect. 2). Even though international law is not insensitive to fundamental rules of national law (Sect. 3), the formal nature of the principle of supremacy of international law in principle prevents international law from accepting such challenges (Sect. 4). I then discuss whether the tension between domestic challenges to international obligations may be resolved on the basis of the international nature of fundamental rights that may be invoked as justification for non-compliance with an international obligation (Sects. 5–7). Section 7 contains brief conclusions.

## II. Domestic Resistance to the Supremacy of International Law

In principle, the claim to supremacy of international law is confined to the international level. It is at that level that states cannot invoke domestic law to justify the non-performance with an international obligation and that international courts, by virtue of their establishment under international law, have to give precedence to in-

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in Art. 35 of the Draft Articles of the ILC on the Responsibility of International Organizations, UN Doc A/CN.4/L.270 (2007). The Draft Articles of the ILC on the Responsibility of International Organizations do not contain an article comparable to Art. 3 of the State Responsibility Articles, see discussion in Report of the ILC on the work of its 55<sup>th</sup> Session (2003), UN Doc A/58/10, Suppl. 10, par. 9–10 of the Commentary to draft Article 3.

<sup>8</sup> *Ian Brownlie*, The Rule of Law in International Affairs, International Law at the Fiftieth Anniversary of the United Nations (1988) 213 f. See also *Gerald Fitzmaurice*, The Law and Procedure of the International Court of Justice, Vol. II (1986) 587 (noting that the principle is generally accepted as ‘a *sine qua non* of the efficacy and reality of international obligation’).

<sup>9</sup> *Fitzmaurice*, General Principles (Fn 3) 69 (equating the principle that the sovereignty of states is subordinated to the supremacy of international law with the rule of law in the international field). See also (more critically) *Arthur Watts*, The International Rule of Law, in: GYIL (1993) 15 (22 f).

<sup>10</sup> The prime focus of the article is the principle of supremacy of international law over domestic law. To some extent, the analysis will also apply to the relationship between international law and the internal law of international organizations; the *Kadi* case above is a case in point. See generally on this relationship: *Gaetano Arangio-Ruiz*, International Law and Interindividual Law, in: Nijman/Nollkaemper, New Perspectives on the Divide between International and National Law (2007) 15 (39–43). However, in several respect the latter category raises distinct questions, a full analysis of which lies beyond the scope of this article. In its work on responsibility of international organizations, the ILC recognized the different nature of these issues; see eg Report of the ILC on the work of its 55<sup>th</sup> Session (2003), UN Doc A/58/10, Suppl. 10, par. 9–10 of the Commentary to draft Article 3.

ternational law over domestic law.<sup>11</sup> Contrariwise, it is traditionally thought that the principle of supremacy does not, by its own force, make international law supreme in the domestic legal order, at least not in the same manner as European law has relatively successfully claimed supremacy over, and forced itself into, domestic law.<sup>12</sup>

Some states nonetheless have perceived the principle of supremacy of international law as requiring that international law – provided that it has been duly introduced in domestic law – also prevails over domestic law in the *domestic* legal order. For instance, the open nature of the Dutch legal system can be traced to the legislature's belief that international law required that Dutch law is set aside whenever it conflicts with treaty law.<sup>13</sup> Courts in Belgium,<sup>14</sup> Indonesia<sup>15</sup> and Latvia<sup>16</sup> have set aside domestic law that conflicted with international law, expressly referring to Article 27 of the Vienna Convention on the Law of Treaties.

Such a 'domestication of supremacy of international law' can significantly strengthen the power of the principle of supremacy to foster the efficacy and the effectiveness of international law. It leads to a monist model where in the hierarchy of norms international law features at the summit.

However, these practices are clearly exceptional. On the whole, states have reserved the power under domestic law to limit the performance of international obligations on the basis of conflicting rules of domestic law. Such domestic reluctance to embrace the supremacy of international law at the domestic level is as old as international law itself. Many states determine that in the case of a conflict between international law and domestic law, the latest expression of the will of parliament determines which rule is supreme – whether that rule is international or national.<sup>17</sup> Most states have declared their constitutions to be supreme.

This latter practice indicates that states, at the domestic level, generally do not accept the supremacy of international law as a formal principle, but make its acceptance contingent on substantive conformity with fundamental values enshrined in national law. Supremacy cannot be presumed; it has to be earned on substance. The strength

<sup>11</sup> *Joe Verhoeven*, Article 21 of the Rome Statute and the Ambiguities of Applicable Law, in: NYIL (1992) 3 ff.

<sup>12</sup> Judgment of the ECJ of 15 July 1964, Case 6/64, *Flaminio Costa v ENEL*. See for the dominant (dualist) position that the supremacy at domestic level depends on domestic law: *Giorgio Gaja*, Dualism – A Review, in: Nijman/Nollkaemper, *New Perspectives on the Divide between International and National Law* (2007) 52 (61).

<sup>13</sup> *André Nollkaemper*, The Application of Treaties in the Netherlands, in: Sloss, *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009) 326.

<sup>14</sup> *ING België v B I, Appeal Judgment*, Nr C.05.0154.N; ILDC 1025 (BE2007), 2 March 2007.

<sup>15</sup> Constitutional review of Law No 22 of 1997 on Narcotics, No 2–3/PUU-V/2007; ILDC 1401 (ID 2007), 23 October 2007.

<sup>16</sup> *Judgment of the Constitutional Court of the Republic of Latvia on a request for constitutional review*, ILDC 189 (LV 2004). The court had to consider whether the Latvian Code of Administrative Penalties was compatible with the International Convention on Facilitation of International Maritime Traffic, which provides that states shall not impose any penalty upon ship owners if their passengers possess inadequate control documents. The Court derived from the obligations of Latvia under the Vienna Convention on the Law of Treaties (VCLT), in particular the obligation to perform treaties in good faith that in a case of contradiction between rules of international law and national legislation, the provisions of international law must be applied. Hence, the court set aside the domestic law.

<sup>17</sup> *Anne Peters*, The Globalization of State Constitutions, in: Nijman/Nollkaemper, *New Perspectives on the Divide between International and National Law* (2007) 251 (260). See also the overview in *Carreau*, *Droit International* (Fn 5) 58–68.

and persuasive power of the principle of supremacy at the domestic level depends on its ability to conform to such fundamental values.<sup>18</sup> In this respect it is not insignificant that many states restrict the precedence of international law in the domestic legal order to international human rights treaties.<sup>19</sup>

Based on the formal precedence of (particular) rules of national law, domestic courts have regularly been involved in such challenges to the performance of international obligations. Consider the following cases. In 2003, the Constitutional Chamber of the Supreme Court of Justice of Venezuela declared that ‘above the Supreme Court of Venezuelan Justice, and to the effects of the domestic law, there is no supranational, transnational or international court’ and that decisions of such organs ‘will not be executed in Venezuela if they contradict the Venezuelan Constitution.’<sup>20</sup> In 2006, the Supreme Court of Sri Lanka held that it could not give effect to views of the Human Rights Committee that would be in conflict with the Constitution.<sup>21</sup> The Supreme Court of Sierra Leone had to consider whether it had supervisory jurisdiction over the Special Court for Sierra Leone that was established under a treaty with the United Nations.<sup>22</sup> The US Supreme Court’s judgment in *Sanchez-Llamas* assumed the power of the Court to moderate the effect of decisions of the ICJ in accordance with domestic law.<sup>23</sup>

The widespread practice of protecting (fundamental rules of) domestic law against conflicting international obligations has received a new impulse by the combination of two features of the modern process of international lawmaking. The first is the ‘internal focus’ of much of modern international law. Much of international law has become more regulatory in nature and now governs domestic matters, including legal rights and obligations of private persons.<sup>24</sup> The second feature is that the protection of human rights against international decisions, in particular against decisions of international organizations is relatively underdeveloped. It is a plausible hypothesis that states will be more reluctant to allow full domestic effect of international obligations when those obligations result from processes that do not conform to the standards of the protection of the rule of law, and in particular the protection of fundamental rights, that apply at the domestic level.<sup>25</sup> The criterion of equivalent protection in the ECtHR’s judgments in cases such

<sup>18</sup> *Thomas Cottier/Daniel Wüger*, Auswirkungen der Globalisierung auf das Verfassungsrecht: Eine Diskussionsgrundlage, in: Sitter-Liver, Herausgeforderte Verfassung: Die Schweiz im globalen Konzert (1999) 263 f, cited in *Peters*, Globalization (Fn 17) 267.

<sup>19</sup> *Peters*, Globalization (Fn 17) 260 ff, 269 f. But see the *Görgülü* case, in which the BVerfG said that ECHR only enjoys rank of a federal acts and needs to be applied within the confines of the Basic Law (BVerfG, 2 BvR 1481/04 of 14. 10. 2004 at par. 30, 35. For a translation into English see [http://www.bverfg.de/entscheidungen/rs20041014\\_2bvr148104en.html](http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104en.html)).

<sup>20</sup> Judgment 1942 of the Constitutional Chamber from of Supreme Court of Justice dated July 17, 2003, citing the 2005 Annual Report of the Inter-American Commission on Human Rights, par. 275, <http://www.cidh.org/annualrep/2005eng/chap.4d.htm>, accessed 7 January 2010.

<sup>21</sup> *Singarasa v Attorney General*, Application for judicial review, SC Spl (LA) No 182/99; ILDC 518 (LK 2006).

<sup>22</sup> *Sesay and ors v President of the Special Court for Sierra Leone and ors*, Original application, SC no 1/2003; ILDC 199 (SL 2005).

<sup>23</sup> United States Supreme Court, *Sanchez-Llamas v Oregon & Bustillo v Johnson*, 126 S.Ct. 2669.

<sup>24</sup> See generally on the increasing role of international law in this area: *Joseph H. H. Weiler*, The Geology of International Law – Governance, Democracy and Legitimacy, *ZaöRV* 64 (2004) 547; *Mattias Kumm*, The Legitimacy of International Law: A Constitutionalist Framework of Analysis, *EJIL* 15 (2004) 907.

<sup>25</sup> *Crawford*, Rule of Law (Fn 2) 10. Compare *Daniel Bodansky*, The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?, *AJIL* 93 (1999) 596 (606) (noting that the more international law resembles domestic law, the more it should be subject to the same standards of legitimacy).

as *Bosphorous*<sup>26</sup> is a manifestation of a much wider phenomenon: states will accept the performance of international obligations as long as it is secured that the pre-existing fundamental rights are secured – whether at the international or at the domestic level. If that standard cannot be met, backlashes at the domestic level are likely to emerge.

This makes it perfectly understandable why domestic institutions (and likewise the ECJ at the European level) may have reservations about the wisdom and desirability of accepting, domestically, precedence of international law over conflicting fundamental rules of domestic law. *Kadi* fits this pattern, as the Court of Justice declined to give effect to a resolution of the Security Council that would be incompatible with the fundamental values of the European Union itself.<sup>27</sup> Several claims have been brought before domestic courts, challenging the implementation of Security Council decisions (or rather: of national legislation that incorporated such decisions) based on an alleged conflict with fundamental rights.<sup>28</sup>

Even the Netherlands, often heralded as a monist state that grants supremacy to international law over the constitution, has initiated discussions on the need to protect constitutional values against the effect of international decisions that would fall short of rule of law standards.<sup>29</sup> This approach shows similarities with what in European law has come to be known as the *Solange II* doctrine,<sup>30</sup> as well as with the approach adopted by the ECtHR in regard to its relationship with other international courts.<sup>31</sup>

The scope of the problem (ie: the development of international obligations that may collide with fundamental rights) will differ between various sources of international law. It will be marginal or non-existent with respect to obligations under customary law. The problems arise in respect to the performance of treaty-obligations that, though duly ratified by a state, have insufficiently incorporated human rights standards and collide with fundamental rights at the domestic level. A possible example is the Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Records that may conflict with the right to privacy.<sup>32</sup> However, there is no doubt that the problem is most pervasive in respect to decisions of international organisations. Such decisions may go beyond the initial consent granted by the underlying treaty,<sup>33</sup> generally will not be subjected to

<sup>26</sup> ECtHR, *Bosphorus Airways v Ireland*, App No 45036/98, Judgment of 30 June 2005.

<sup>27</sup> ECJ, Cases C-402/05 P and C-415/05 P (*Kadi*) (Fn 1).

<sup>28</sup> An overview is contained in the UNSC, Eight Report of the Analytical Support and Sanctions Monitoring Team pursuant to resolution 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities (14 May 2008), UN Doc S/2008/324, 36 f.

<sup>29</sup> K. II 2008–2009, 31570 nr 5 (letter of the government to parliament announcing the establishment of a committee for review of the constitution, that will have to consider the relationship between fundamental values and decisions of international organizations).

<sup>30</sup> BVerfG, 2 BvR 197/83 of 22. 10. 1986. See on comparable cases in other states: *Peters*, Globalization (Fn 17) 260 ff, 266 f.

<sup>31</sup> ECtHR, *Bosphorus Airways v Ireland* (Fn 26).

<sup>32</sup> OJ 2007 L 204/18.

<sup>33</sup> See eg *Thomas Gehring*, Treaty-Making and Treaty Evolution, in Bodansky *et al.*, The Oxford Handbook of International Environmental Law (2007) 466. See for an example of domestic resistance to the domestic legal force of decisions of international institutions after the expression of the initial consent: *Natural Resources Defense Council v Environmental Protection Agency et al.*, Appeal Judgment, 464 F3 d 1; ILDC 525 (US 2006); 373 US App DC 223; 63 Env't Rep Cas (BNA) 1203; 36 Envtl L Rep 20181 (DC Cir 2006); ILDC 525 (US 2006), 29 August 2006 (holding that decisions by the parties to the 1987 Montreal Protocol were not judicially enforceable in the United States).



domestic political debate before they acquire binding effect, and will not be embedded in institutional structures that can make up for this. This may make them more prone to deficits in terms of protection of fundamental rights.

Given the fact that a relatively larger part of international law seeks to regulate domestic matters, and given the fact that protection of fundamental rights at international level is relatively poorly ensured, we may see a widening gap between the international level, where the principle of supremacy continues to reject any reliance on domestic law to justify non-performance of an international obligation, and the domestic level, where defects in the procedure and substance of international law may enhance the resistance of a State to the application of international law in the domestic order. Of course, states may prevent such a conflict by not ratifying a treaty that would be in conflict with their constitution, if such conflict cannot be removed through a reservation or through amendment of the constitution.<sup>34</sup> If so, no conflict between international law and national law and no issue of supremacy will arise. However, this practice is unlikely to prevent the situation where states join treaties, at a later stage a conflict with the constitution emerges, and states will as yet give priority to domestic law. Likewise it will be of little avail in regard to decisions of international organizations.

One might take the position that this is just a matter of domestic law, as long as no international claim is brought and the principle of supremacy can fulfill its function at the international level. But that view would be erroneous. Also when no international claim is brought, 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. The proposition that if a particular matter is governed by domestic national law and therefore would be outside the sphere of international law, and thus outside the scope of the principle of supremacy, is 'if accepted, subversive of international law'.<sup>35</sup>

### III. The Sensitivity of International Law

International law is not insensitive to the protection of fundamental constitutional rights. Through a variety of devices states can ensure that such fundamental norms are immune to the effect of international obligations. States can attach reservations to a treaty to safeguard particular provisions of domestic law and thus prevent conflict at the international level.<sup>36</sup> Also, international institutions can allow states room to protect fundamental norms of domestic law via the margin of appreciation.<sup>37</sup>

<sup>34</sup> See eg for the power of the Constitutional Court of Slovenia in this regard: *Case concerning the Constitutionality of the Agreement between the Republic of Slovenia and the Republic of Croatia on Border Traffic and Cooperation*, Official Gazette of the Republic of Slovenia, No. 43/2001; ILDC 402 (SI 2001), 19 April 2001.

<sup>35</sup> ICJ, *Norwegian Loans case*, Sep. Op. Judge *Lauterpacht*, ICJ Reports 1957, 37 f.

<sup>36</sup> Rule 3.1.11 as adopted by the ILC Drafting Committee; UN Doc. A/CN.4/L. 705 (2007) (providing that in order to preserve the integrity of specific norms of the internal law of that State or rules of that organization reservations may be formulated insofar as compatible with the object and purpose of the treaty).

<sup>37</sup> *Eyal Benvenisti*, Margin of Appreciation, Consensus, and Universal Standards, NYU J Int'l L & Pol 31 (1999) 843; *Yuval Shany*, Toward a General Margin of Appreciation Doctrine in International Law?, EJIL 16 (2005) 907 (912); compare *Kumm*, Legitimacy (Fn 24) 927.



Yet another approach is to include an express reference to domestic law in international obligations.<sup>38</sup> An example is Article 36(2) of the Vienna Convention on Consular Relations, providing that ‘The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State’. A state that applies a domestic law in the performance of Article 36(1) in principle will not be in conflict with the international obligation and no issue of supremacy will arise. In *Avena*, the ICJ went to great lengths, though from the perspective of the US perhaps not far enough, to accommodate concerns over the ability of the United States to rely on domestic law in moderating the domestic impact of the Convention and the Court’s earlier judgment in *LaGrand*.<sup>39</sup> The Court of Justice in *Kadi* similarly recognized the role of domestic law when it noted that the UN Charter requires that Security Council resolutions are given effect ‘in accordance with the procedure applicable in that respect in the domestic legal order of each of the Member States of the United Nations.’<sup>40</sup>

Another example of deference to domestic law is Article 41 of the ECHR, providing that ‘if the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.’ Article 41 thus allows states discretion to fashion relief according to their domestic law, reflecting the freedom of choice that states possess under the primary obligations of the Convention.<sup>41</sup>

The effect of reservations, the margin of appreciation and reference to domestic law in international obligations may restrict the potential of conflicts with the principle of supremacy. However, these devices do not exclude the application of the principle of supremacy. For instance, while Article 41 of the ECHR moderates the effects of the general principle of supremacy, the performance of the obligation to provide reparation does remain subject to that principle. If domestic law would not allow full reparation to be made, the ECtHR can still give effect to the obligation to provide reparation<sup>42</sup> and a member state could not rely on domestic law to justify non-performance of that obligation.<sup>43</sup> The situation with respect to the Vienna Convention on Consular Relations is comparable. Article 36(2) provides that the deference to domestic law is ‘subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.’<sup>44</sup> The general point is that it is international law which de-

<sup>38</sup> See generally *Fitzmaurice*, Law and Procedure (Fn 8) 591.

<sup>39</sup> ICJ, *Avena and Other Mexican Nationals (Mexico v United States of America)*, 2004 ICJ Rep 40, (31 March), para. 113; United States Supreme Court, *Sanchez-Llamas v Oregon & Bustillo v Johnson*, 126 S.Ct. 2669.

<sup>40</sup> ECJ, Cases C-402/05 P and C-415/05 P (*Kadi*) (Fn 1), par. 298.

<sup>41</sup> ECtHR, *Papamichalopoulos and Others v Greece* (Article 50), App No 14556/89, Judgment of 31 October 1995, par. 34.

<sup>42</sup> See eg *Ruslan Umarov v Russia*, App No 12712/02, Judgment of 3 July 2008, par. 168 (stating that ‘in the context of the execution of judgments in accordance with Article 46 of the Convention, a judgment in which it finds a breach imposes on the respondent State a legal obligation under that provision to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (*restitutio in integrum*)’).

<sup>43</sup> Compare Article 32 of the Articles on State Responsibility.

<sup>44</sup> The Court concluded in *LaGrand* that the application of the procedural default rule by the United States had the effect of preventing such ‘full effect’ and concluded on that basis that the United States was in breach of its international obligation; ICJ Reports 2001, 497, par. 90–91.

termines what matters are governed by domestic law and the extent to which they are governed by domestic law.<sup>45</sup> Beyond these limits, the principle of supremacy fulfills its normal functions.

The sensitivity of international law to fundamental rules of domestic law, through any of the above devices, thus does not result in a general exception to the principle of supremacy in the international legal order, as it is embodied in Article 27 of the Vienna Convention on the Law of Treaties and Articles 3 and 32 of the Articles on State Responsibility.

#### IV. The Formality of the Principle of Supremacy of International Law

Practices of states that reject full performance of international obligations that would collide with fundamental rights are difficult to square with the principle of the supremacy of international law. The principle of supremacy is a formal principle. It requires that international law prevails over domestic law, whatever the contents of international law and whatever the nature of the decision-making process through which international obligations have come into existence. Whether or not a particular rule that would be set aside because of the principle of supremacy is a *fundamental* rule does not make a difference. It is for this reason that Sir *Arthur Watts* noted that the supremacy of law is not, by itself, a sufficient indication of what the rule of law involves. He wrote that ‘since the law which is to enjoy supremacy may itself be unjust and oppressive; the supremacy of such a law is not what is meant by the rule of law.’<sup>46</sup> Supremacy is, as a formal principle, blind for substance and effect – the rule of law, bare in its most minimalist definition, is not.

Article 27 of the Vienna Convention on the Law of Treaties and Articles 3 and 32 of the Articles on State Responsibility, excluding any reliance on a rule of domestic law, whether fundamental or not, do not appear to be controversial.<sup>47</sup> International courts and tribunals routinely accept that domestic law cannot prevail over international legal obligations and have rejected all claims by states to the contrary.<sup>48</sup>

It is difficult to see how, without a further benchmark, it is possible to qualify the general principle of supremacy without fundamentally undermining the cause of international law. Notwithstanding many common elements in national constitutions, there are significant differences between constitutions across the world. Allowing

<sup>45</sup> *Fitzmaurice*, Law and Procedure (Fn 8) 592.

<sup>46</sup> *Watts*, International Rule of Law (Fn 9) 23 f.

<sup>47</sup> At a more fundamental level, where the principle of supremacy of international law pertains to the relationship between international law and state sovereignty, the principle obviously remains controversial; see eg *Tomer Brode/Yuval Shany* (eds), *The Shifting Allocation of Authority in International Law. Considering Sovereignty, Supremacy and Subsidiarity* (2008) 5 (noting that the ‘movement towards a supremacy-based international system might be limited in its scope’ and that ‘wholesale digression from the horizontal paradigm might be improbably’).

<sup>48</sup> Eg *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, 1932, PCIJ, Series A/B, No. 44, p. 4; *Free Zones of Upper Savoy and the District of Gex*, 1930, PCIJ, Series A, No 24, at p. 12; ICTY, *Prosecutor v Slobodan Milosevic*, case IT-02-54, para 47; Order of Inter-American Court of Human Rights of 11 November 1999, “*Castillo Petruzzi*”, para. 5; *Brazil-Export Financing Programme for Aircraft*, WT/DS46/ARB, 28 August 2000, [http://www.wto.org/english/tratop\\_e/dispu\\_e/46arb\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/46arb_e.pdf), accessed 7 January 2010, para. 3.65; *North American Free Trade Agreement Arbitral Panel in the Matter of Cross-border Trucking Services*, (USA-MEX-98-2008-01), para. 224.

rules of domestic (constitutional) law, without further qualification, to justify non-compliance with international obligations could fundamentally undermine the effectiveness of international law.

It would in effect amount to extending the principle contained in Article 46 of the Vienna Convention on the Law of Treaties to the observance of treaties, but nonetheless allowing a party to a treaty may invoke the provisions of its internal law as justification for its failure to perform that treaty, if that would be a rule of fundamental importance, however. Applying the principle of Article 46 in the context of Article 27 is problematic. Article 46 limits the possibility that a state invokes the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law of fundamental importance regarding competence to conclude treaties, by the requirement that such a violation is ‘manifest’. In *Land and Maritime Boundary between Cameroon and Nigeria*, the ICJ considered the argument by Nigeria that Cameroon knew or ought to have known that the Head of State of Nigeria had no power legally to bind Nigeria without consulting the Nigerian government. The Court noted that there was ‘no general legal obligation for States to keep themselves informed of legislative and constitutional developments in other States, which are or may become important for the international relations of these States.’<sup>49</sup> This would *a fortiori* apply to rules of domestic law that would limit the possibility of a state to observe a treaty, and it is difficult to see how this can be otherwise.

Allowing states to escape compliance with their obligations based on fundamental rules of domestic law would entail serious risks. Recognition, at the international level, of a power of states (or international organisations like the EU) to prioritize domestic law over binding international obligations may obliterate boundaries of legality, and ‘might reinforce perceptions of international law as non-law (or quasi-law) – ie, a loose system of non-enforceable principles, containing little, if any real constraints on state power.’<sup>50</sup>

Limiting this power to an undefined category of ‘fundamental constitutional norms’ will not help, as what is fundamental will differ from one state to the other. This may be different in the EU context. In Europe there is wide support for the proposition that supremacy of EC law should not be understood as blind precedence over fundamental constitutional rules of the Member States.<sup>51</sup> The relative homogeneity arguably would make it possible to accept an exception to the principle of supremacy.<sup>52</sup> Among European States there is some unanimity on what the fundamental constitutional norms are – especially since most of them have been enshrined in EU Law – and there would accordingly be less controversy as to the situations where Courts could decline to give supremacy to international law for incompatibility with

<sup>49</sup> *Land and Maritime Boundary between Cameroon and Nigeria*, ICJ Reports 2002, 10 October 2002, para. 266.

<sup>50</sup> *Shany*, General Margin (Fn 37) 912.

<sup>51</sup> Eg *Christian Joerges*, Rethinking European Law’s Supremacy, EUI Working Paper Law 12/2005 (2005).

<sup>52</sup> *Leonard F.M. Besselink*, A Composite European Constitution (2007) 10 f (arguing on the basis of Article 5 of the Treaty on the European Union that ‘European acts which do not respect [...] fundamental values do not take precedence over national rules and acts which express that national identity and the common values of the democratic rule of law.’).

these standards. At the international level such an exception would be much more difficult to accept as its risks for instability in treaty performance would be much greater.

For instance, international law could not possibly accept attempts to prioritize domestic law based on the argument that international decisions suffer democracy deficits.<sup>53</sup> Also the rule of law is not a useful criterion here.<sup>54</sup> Although the General Assembly has repeatedly reaffirmed the value of the rule of law both at international and at national levels,<sup>55</sup> the concept is too ill-defined to function as a workable limitation on the operation of the principle of supremacy. Likewise, international law will not be able to accept challenges to the domestic application of international law based on a perceived lack of legitimacy of international obligations. *Kumm* argues for instance that the presumption of compliance with international law can be overridden by reason of the weight of the criteria subsidiarity, procedure and outcomes.<sup>56</sup> These bases for non-performance of international obligations may, however, be too open-ended. As to subsidiarity, who is to determine what issues are best dealt with at the domestic level and whether international law had ‘illegitimately’ dealt with an issue that should have been dealt with domestically? And as to outcomes, can states be trusted to second-guess outcomes of international decision-making procedures without relatively clear methods of determining which standards can be accepted and which can not? If international law would allow such challenges, the end of international law as an effective and stable set of norms, and indeed of the international rule of law, will be near.

The inability of international law to accommodate exceptions based on the primacy of fundamental constitutional rules in some respect mirrors the fact that states have been reluctant to accept broadly formulated constitutional reservations to treaties.<sup>57</sup> While the ILC supported the permissibility of reservations by which a State or an international organization purports to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole ‘in order to preserve the integrity of *specific* norms of the internal law of that State or rules of that organization,<sup>58</sup> a reservation that does not refer to a specific norm of internal law, presumably would fall in the category of vague reservations and run the risk of being incompatible with the object or purpose of a treaty.<sup>59</sup> Such reservations have been consistently opposed

<sup>53</sup> *Cottier/Wüger*, Auswirkungen (Fn 18).

<sup>54</sup> In this regard it is perhaps significant that the Court of Justice in *Kadi* (Fn 1) said in par. 281 that ‘it is to be borne in mind that the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions’. The rule of law thus provided part of the review which led to eventual denial of effect of a Security Council.

<sup>55</sup> See eg UNGA Resolution 62/70 of 8 January 2008.

<sup>56</sup> *Kumm*, Legitimacy (Fn 24) 920.

<sup>57</sup> Eg *Edward Swaine*, Reserving, Yale J Int'l L 31 (2006) 307 (348).

<sup>58</sup> Rule 3.1.11 as adopted by the Drafting Committee; UN Doc A/CN.4/L. 705 (2007).

<sup>59</sup> Tenth Report of Special Rapporteur *Pellet*, Tenth Report, UN Doc A/CN.4/558/Add.1 (June 14, 2005) 115 (draft guideline 3.1.7) (stating that ‘A reservation worded in vague, general language which does not allow its scope to be determined is incompatible with the object and purpose of the treaty’). Rule 3.1.7 as adopted by the Drafting Committee provides: ‘A reservation shall be worded in such a way as to allow its scope to be determined, in order to assess in particular its compatibility with the object and purpose of the treaty’; UN Doc A/CN.4/L. 705 (2007).

as being in conflict with the object and purpose of a treaty.<sup>60</sup> The European Court of Human Rights has declared such reservations illegal.<sup>61</sup>

The combination of domestic challenges to international obligations based on fundamental rights, on the one hand, and the inability of the formal principle of supremacy at the international level, on the other, is likely to lead to an increasing collision between the international and the domestic legal orders, with neither system recognizing the internal effects of the claim to supremacy of the other legal order.

## V. The International Nature of Fundamental Rights

It may be possible, however, to identify a criterion for qualifying the principle of supremacy that may lead to synergies between the international and domestic legal orders. This criterion is the conformity of a rule of fundamental rights under domestic law with international rights. Decisions to refrain from giving effect in domestic legal orders to international obligations that formally are based on a conflict with a fundamental rule of domestic law may in fact conform to or give effect to another rule of international law. When a state denies the domestic effect of an international obligation because doing so would violate the right to a fair trial, the right to property or another human right, such a right may be consistent with internationally recognized human rights.

Domestic constitutional, legislative and judicial challenges to the full application of international law need not be seen as nationalistic reflexes that seek to undermine the performance of international obligations or more generally the international rule of law. Rather, they may be seen as legitimate responses that are necessary to preserve the rule of law – both at the domestic level and at the international level. The approach proposed here is based on a substantive overlap between international law and domestic law and a commonality of constitutional values at the international and the domestic level.<sup>62</sup> That commonality presents us with a criterion to distinguish these cases from, say, Medellín or from challenges to international law based on the Sharia.<sup>63</sup>

A seemingly increasing number of cases in domestic courts may be explained and justified from this perspective. One example is the *Görgülü* decision, in which the German *Bundesverfassungsgericht* declined to give effect to a judgment of the European Court of Human Rights when that would restrict the protection of the individual's fundamental rights under the Constitution. The Court held that, while it normally should give effect to a judgment of the European Court, this would not be so when that would *restrict or reduce the protection of the individual's fundamental rights under the Constitution*.<sup>64</sup> The Court noted that the commitment to international

<sup>60</sup> See the references in the Tenth Report of Special Rapporteur *Pellet*, Tenth Report, UN Doc A/CN.4/558/Add.1 (June 14, 2005), par. 110–112.

<sup>61</sup> ECtHR, *Belilos*, App no 10328/83, Judgment of 29 April 1988, par. 55.

<sup>62</sup> See further discussion in *Janne Nijman/André Nollkaemper*, *Beyond the Divide*, in: Nijman/Nollkaemper, *New Perspectives on the Divide between International and National Law* (2007) 341.

<sup>63</sup> Though obviously not all such challenges would necessarily violate international law, see discussion by *Javaid Rehman*, *The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq*, *Int J Law & Fam* 21 (2007) 108.

<sup>64</sup> BVerfG, 2 BvR 1481/04 (Fn 19), par. 32 (emphasis added); see also par. 62.

law takes effect only within the democratic and constitutional system of the Basic Law. Significantly, it referred in this context to a joint European development of fundamental rights.<sup>65</sup> As to the effects on third parties, it stated that it is the task of the domestic courts to integrate a decision of the ECHR into the relevant partial legal area of the national legal system by balancing conflicting rights and that the ECtHR could not aim to achieve such solutions itself.<sup>66</sup>

Another example is a decision of the Italian Court of Cassation, affirming Italian jurisdiction over an employment dispute between an Italian citizen and the International Plant Genetic Resources Institute (IPGRI). The Court ruled that the IPGRI did not enjoy immunity from jurisdiction with regard to employment disputes on the grounds that it had not set up an alternative judicial remedy to ordinary domestic court proceedings, thereby infringing Article 24 of the Italian Constitution.<sup>67</sup> The domestic constitutional right at issue, that was given precedence in relation to the right to immunity, was substantively similar to the right contained in article 13 of the ECHR. The Court thus did not just prioritize a rule of domestic law over the international obligation to recognize the immunity of foreign states, but supported that rule of domestic law by an international norm.

Likewise, challenges in domestic courts to decisions of the Security Council Sanctions Committee that impose restrictions on individual human rights, which would score low on most indicators of the international rule of law, may be seen as justifiable attempts to preserve individual rights and indeed the rule of law.<sup>68</sup> In some respects this also holds for the *Kadi* judgment of the Court of Justice. The Court protected fundamental rules of Community law which in substance overlapped and indeed were informed by international (ECHR) standards.<sup>69</sup>

It might be argued that in at least some of these cases courts do not and indeed cannot present the conflict in terms of a conflict between two international norms. In ‘dualistic’ states like Germany or Italy, the conflict will generally be phrased in terms of a conflict between two domestic (often constitutional) norms, or between a domestic norm on the one hand and a competing international obligation on the other. An example of the former approach is the *von Hannover* case;<sup>70</sup> examples of the latter are the judgment of the *Bundesverfassungsgericht* in *Görgülü* and the judgment of the Court of Justice in *Kadi*. Another example of an approach which did not cast the issue in terms of a conflict between two international obligations is a decision of the French Court of Cassation in a dispute pertaining to the immunity of the African Development Bank. The Court of Appeal of Orléans had denied the immunity on the basis that no administrative tribunal

<sup>65</sup> *Id.* par. 62.

<sup>66</sup> *Id.* par. 58.

<sup>67</sup> *Drago v International Plant Genetic Resources Institute (IPGRI)*, Final appeal judgment, n 3718 (Court of Cassation, All Civil Sections); ILDC 827 (IT 2007); *Giustizia Civile Massimario*, 2007, 2.

<sup>68</sup> *Erika de Wet/André Nollkaemper*, *Review of Security Council Decisions by National Courts* (2002) 166 ff.

<sup>69</sup> ECJ, Cases C-402/05 P and C-415/05 P (*Kadi*) (Fn 1). In par. 283 the Court recalled that ‘according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance’.

<sup>70</sup> ECtHR, *von Hannover v Germany*, App No 59320/00, Judgment of 24 June 2004.



had been established by the Bank; allowing the Bank to rely on immunity would be in breach of the right of access to a court under Article 6 of the ECHR.<sup>71</sup> Though France is a 'monist' state like the Netherlands and thus could have referred to international law, the Court of Cassation held that granting immunity would be in violation of the right to a court which is part of the international public order in France.<sup>72</sup>

However, while such cases display, at the domestic level, a conflict between an international obligation and a rule of domestic law, at the international level a parallel conflict may exist between two international norms. The domestic law in question might be the implementation of an international obligation, or a domestic norm that pre-existed an international obligation, yet that in substance is largely identical. In such cases the conflict between an international and a domestic norm may, at the international level, be transformed into a conflict between two international norms.

An example of such a transformation of domestic constitutional rights into international rights is the case *von Hannover v Germany*, decided by the ECtHR.<sup>73</sup> Princess Caroline of Monaco had brought a claim against the publication of certain photos in newspapers, arguing before the *Bundesverfassungsgericht* that there had been an infringement of her personality rights under Article 2(1) of the German Basic Law. The *Bundesverfassungsgericht* found that Germany had violated the rights of Princess Caroline, in regard to some photos, but dismissed the claim in regard to others. This was based, inter alia, on the principle of freedom of the press in Article 5(1) of the Basic Law.<sup>74</sup> When Princess Caroline petitioned the ECtHR, the parties and the Court construed the legal issue in terms of a conflict between Article 8 and Article 10 of the European Convention. The conflict between these two rights thus is resolved (in this case in favour of the applicant) at the international level.

Likewise, though in *Kadi* the European Court of Justice did not express the conflict exclusively as a conflict between international obligations, the international dimension of the constitutional principles that were invoked lurked in the background. In the hypothetical situation where the state (or organisation) that allegedly fails to comply with an obligation is required to justify itself at the international level, it may well build its defence in such terms. It may be noted in this context that the Court of Justice in *Kadi* understated its case, and perhaps limited its acceptability at the international level, by not putting more emphasis on the commonality between the European standards it sought to protect, on the one hand, and the human rights standards under the UN Conventions and customary law that were relevant to the exercise of powers by the Security Council, on the other.<sup>75</sup>

The conflict that emerges in such cases is of a different nature to a conflict between international law and domestic law conflicts. The fact that a state seeks to justify non-compliance with an international obligation by reference to another international obligation, rather than to a rule of domestic law, changes the parameters of the conflict. Rather than being analysed in a black and white manner (domestic law can never trump international law), the conflict is now subjected to rules of international law pertaining to conflicts between two or more international norms.

<sup>71</sup> 2005 Revue Critique de Droit International Privé 405, 7 October 2003.

<sup>72</sup> *African Development Bank v Mr X*, Appeal No 04-41012, ILDC 778 (2005), 25 January 2005.

<sup>73</sup> ECtHR, *von Hannover v Germany* (Fn 70).

<sup>74</sup> BVerfG, 1 BvR 653/96 of 15. 12. 1999, par. 101.

<sup>75</sup> Article 24(2) of the UN Charter; see further discussion in *De Wet/Nollkaemper*, Review (Fn 68) 166 ff.



The difference may be illustrated by the proceedings instituted by Germany against Italy for failing to respect the jurisdictional immunities of Germany.<sup>76</sup> The dispute may be framed as a conflict between the right of jurisdictional immunity *vis-à-vis* the Italian argument that in case of international crimes no such right exist. If the conflict would be presented purely in terms of an international law versus domestic law dispute, Germany's argument could be endorsed by the Court by simple reference to the principle of supremacy and to Article 3 of the Articles on State Responsibility. If the conflict is, as is likely, presented in terms of two opposing rules of international law, that argument would be immaterial. The question then becomes one of interpretation of the law of immunities and the rules governing the resolution between competing international obligations – a question that leaves room for a wider analysis.

## VI. Resolving Conflicts of Norms at the International Level

It could be argued that analyzing the discussion of conflicts between fundamental rights that conform to international law, on the one hand, and international obligations, on the other, in terms of supremacy is a category mistake, because such conflicts could be resolved at the international level. The issue does not need not to be presented as a conflict between international law and domestic law, but can be construed as a conflict between international legal obligations that can be wholly dealt with at the international level. Indeed, if a state would invoke a fundamental right, corresponding to an international right, to justify non-performance of international obligation, such a conflict can also be presented as a conflict of norms at the international level.

In particular cases, a conflict between an international obligation and international human rights may affect the validity of an international obligation as such. If an international organization would adopt a decision without legal powers to do so, or in contravention of the procedural or substantive limitations of its powers, the decision may lack international validity and as such cannot make a claim to supremacy over domestic law. In a scenario like that of *Kadi*, it could be argued that a Security Council resolution is invalid if the Council would not have acted in conformity with its purposes and principles.<sup>77</sup> In such a case the resolution could not claim supremacy based on Article 103 of the Charter and the competing rule (eg a human right to a remedy) would prevail.<sup>78</sup>

When conflicts between two international norms (one of which is domesticated) cannot be resolved in terms of the invalidity of the international norm that seeks to trump domestic law, it still may be resolved at the international level. Here two situations need to be distinguished: a conflict between a rule of *ius cogens* and an international obligation, and a conflict between two international norms not rising to the level of *ius cogens*.

The first and easiest situation would arise when a fundamental right invoked by a state as justification for non-compliance with an international obligation would

<sup>76</sup> See Press Release 2008/44 of the ICJ (23 December 2008).

<sup>77</sup> *De Wet*, The Chapter VII Powers of the United Nations Security Council (2004) 375.

<sup>78</sup> *De Wet*, Chapter VII (Fn 77) 377.

correspond to a rule of *ius cogens*. In such a situation, at the international level the former would trump the latter and the state in question would be free to prioritize the fundamental right in question. In this situation, no issue of supremacy will arise.<sup>79</sup>

The second situation will arise when the conflict of norms exists between an internationally protected human right, not rising to the level of *ius cogens*, and an obligation arising under a resolution of the Security Council, that by virtue of Article 103 would be superior over conflicting obligations. Unless this conflict could be solved through means of interpretation or through invalidity of the resolution in question, the outcome will be that on the international level the obligation arising under the Resolution would have to prevail. This would hold for a hypothetical scenario where an international court would have to review the international responsibility of member states of the EU that would follow the *Kadi* judgment.<sup>80</sup> An international court may for instance find that it could not, like a state, give precedence to international human rights law in view of the effects of Article 103 of the Charter at the international level – a principle that would not play a role domestically.<sup>81</sup> The ECtHR decisions in *Behrami* and *Saramati*<sup>82</sup> show that that the European Court is likely to arrive at such an outcome.

The third situation arises where the fundamental right in question cannot be categorized a rule of *ius cogens*, or does not conflict with an obligation adopted under Chapter VII of the UN Charter, and we have a conflict between two international norms of equal hierarchical status. In such a case, the usual rules governing conflict between international norms<sup>83</sup> may lead to the priority of the one international norm that corresponds to the fundamental right; if so, no question of supremacy needs to arise. However, it would seem that a conflict between an international obligation and a competing fundamental right cannot always be resolved at the international level in the same way as a domestic court would solve the problem.

For one thing, a domestic court may balance two obligations binding on the forum state (such as the ECHR and an extradition treaty), whereas an international court may not have that power, for instance because one of the parties before an international court is not a party to the ECHR. Consider the example of the judgment of the Supreme Court of the Netherlands in the case *Short v Netherlands*. The Court had to resolve a conflict between an obligation under a bilateral extradition treaty and the ECHR, caused by the fact that the US requested extradition of a US soldier who might have faced the death penalty in the United States.<sup>84</sup> The Court found that the obligation of the ECHR prevailed on the basis of a balance of interests. A similar approach was taken by the Constitutional Court of the Czech Republic in respect of

<sup>79</sup> See the analysis of the CFI in ECJ, Cases C-402/05 P and C-415/05 P (*Kadi*) (Fn 1), par. 226.

<sup>80</sup> ECJ, Cases C-402/05 P and C-415/05 P (*Kadi*) (Fn 1).

<sup>81</sup> Unless it would find that the Council would have acted *ultra vires*; see *De Wet*, Chapter VII (Fn 77) 375; or the Council would have violated a rule of *ius cogens*; see *Alexander Orakhelashvili*, *Peremptory Norms in International Law* (2006) 465.

<sup>82</sup> *Behrami and Behrami v France* (appl. 71412/01) and *Saramati v France, Germany and Norway* (appl. 78166/01), Judgment of 2 May 2007.

<sup>83</sup> See *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, Finalized by *Martti Koskeniemi*, UN Document A/CN.4/L.682 of 13 April 2006.

<sup>84</sup> *C. D. S. v The State of the Netherlands*, 30 March 1990, (1991) NYIL 432.

an extradition request from Thailand.<sup>85</sup> If such conflict would be adjudicated by an international court that only had jurisdiction in respect to the extradition treaty the outcome obviously might have been different.

Moreover, even if an international court would have jurisdiction in respect to all relevant treaties, it may apply a different conflict rule than a domestic court would. The weighing of interests and obligations applied in the Dutch and Czech extraditions referred to above, do not easily conform to international principles for the reconciliation of competing obligations.<sup>86</sup> Domestic courts may establish a hierarchy of norms (with fundamental rights on top), or come to a balance of interests, that international courts need not follow. An international court is likely to reject the attempt of a state to justify non-performance by reference to a fundamental obligation that is not recognized as hierarchically superior.<sup>87</sup>

This also will be the situation when conflicts arise between an internationally protected human right, not rising to the level of *ius cogens*, and an obligation arising under a resolution of the Security Council, that by virtue of Article 103 would be superior over conflicting obligations. Unless this conflict could be solved by interpretation or though invalidity of the resolution in question,<sup>88</sup> on the international level the obligation arising under the Resolution would have to prevail. This would hold for a hypothetical scenario where an international court would have to review the international responsibility of member states of the EU that would follow the *Kadi* judgment.<sup>89</sup> An international court would then most likely find that it could not, like a state, give precedence to international human rights law in view of the effects of Article 103 of the Charter at the international level – a principle that would not play a role domestically.<sup>90</sup>

Thus, conflicts between domestic rights corresponding to international rights, on the one hand, and international obligations, on the other, may not in all cases be resolved at the international level in the same manner as in domestic courts. In such cases, conflict rules of international law do not lead to the outcome favoured at national level, and the conflict is one governed by the principle of supremacy.

## VII. Qualifying the Principle of Supremacy

However, it seems that there is a qualitative difference between the situation where a state invokes a rule of domestic law as a defence for the non-performance of an obligation, and the situation where such a rule of domestic law corresponds to a fundamental right protected under international law.

<sup>85</sup> *Recognition of a Sentence Imposed by a Thai Court*, Constitutional Complaint, ILDC 990, 21 February 2007.

<sup>86</sup> See the various principles governing the conflict of norms discussed in the Report of the Study Group of the ILC on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682 (2006).

<sup>87</sup> This is indeed suggested by the Judgment of the ECtHR in *Al-Adsani v the United Kingdom*, Appl no 35763/97, Judgment of 21 November 2001.

<sup>88</sup> Text to Fn 81, above.

<sup>89</sup> ECJ, Cases C-402/05 P and C-415/05 P (*Kadi*) (Fn 1).

<sup>90</sup> Unless it would find that the Council would have acted *ultra vires*; see *De Wet*, Chapter VII (Fn 77) 375, or the Council would have violated a rule of *ius cogens*; see *Orakhelsashvili*, Peremptory Norms (Fn 81) 465.

The conflict that emerges in such cases is of an essentially different nature than the traditional international law-domestic law conflicts. Rather than seeking to prioritize domestic law over international law, states seek to contribute to the effective performance of international obligations. These need not be nationalistic solutions that undermine the cause of international law, and that for that reason are principally rejected at international level. The international legal order should treat such cases differently than attempt to prioritize domestic law over international law. Indeed, it would be odd if states were compelled to blindly give effect to international obligations at the expense of fundamental domestic rights that conform to the highest ambitions of international law itself.

The question is how international law can give effect to such a differentiation. Two options present themselves. First and most ambitiously, we could seek a formal qualification of the principle. This would make the customary principle, as that contained in Article 27 of the VCLT, read that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty, unless it concerned a rule of its internal law of fundamental importance that corresponded to international obligations pertaining to the protection of fundamental rights. Such a principle arguably would conform to a widespread practice and *opinio iuris*, and bring the principle thus more in line with practice. In the sphere of international responsibility one would have to tinker with the principle laid down in Article 3 and 32 of the Articles on State Responsibility, and possibly also in the sphere of circumstances precluding wrongfulness. Since the qualification is based on international norms, the danger of instability that would be caused by allowing states to back out of international obligations by mere reference to domestic law would be mitigated. Nonetheless, in the absence of international court that routinely could review the application of this principle, it still would be a rather risky step with the potential destabilizing effects.

Moreover, this argument leads to the obvious difficulty of where to draw the line. The core, and a relatively safe common ground, would seem to exist in international civil and political rights. Indeed, the cases cited above (*Görgülü*, *IPGRI* and *Kadi*) all revolve around human rights. But what about social, economic and cultural rights? Dealing with differing interpretations of civil and political rights between states and regions remains problematic. Moreover, at the domestic level the distinction between fundamental rights, democracy and legality may be thin, and one may well be expressed in terms of the other.

It is therefore more appealing to opt for a second solution in the form of a deferential approach to questions of supremacy, recognizing different hierarchies and the possible formation of new hierarchies.<sup>91</sup> There is a good argument to be made that domestic decisions on balancing of international obligations are entitled to a deference that leaves states a wide margin of appreciation in the definition, interpretation and balancing of fundamental rights. That is obviously true in cases which concern a conflict between two norms both covered by the ECHR or the ICCPR, as was the case in the *von Hannover* case.<sup>92</sup> This would in any case hold when a domestic court would apply a principle of proportionality, by reducing the protection of a fundamental right in order to give effect to an international obligation, but not to any greater extent than

<sup>91</sup>) Above, text to fn 77–80.

<sup>92</sup>) ECtHR, *von Hannover v Germany* (Fn 70).

necessary.<sup>93</sup> In that respect also art. 53 of the ECHR is relevant, providing that ‘Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.’<sup>94</sup>

Arguably it also may apply when a domestic court balances a fundamental right with a substantive right of another state. The question is which state should incur the costs of normative ambiguity caused by the conflict between two international norms?<sup>95</sup> Leaving no deference to the state in question ‘marks a questionable policy preference for inaction (ie, the prevailing *status quo*), even when action is legitimized by international law.’<sup>96</sup> In effect, it would freeze the law, precisely in an area where emerging practice at national level can change hierarchies at the international level.

Beyond this, we should recognize the limits of international law in addressing, let alone solving, such normative conflicts. The result will be an opposition between the international and the domestic legal order, with neither system recognizing the internal effects of the claim to supremacy of the other. While that opposition may be problematic from the perspective of international law, from a wider perspective this situation can be assessed in more positive terms. Both systems can complement defects in rule of law protection of the other system.<sup>97</sup> It should be recalled that blind obedience to the supremacy of international law is not the same thing as the rule of law.<sup>98</sup> The complementary relationship (even if at times opposing) between international and national legal systems may help to bring about that rule of law.

## VIII. Concluding Observations

With the increase of decisions of international organizations and perhaps also treaty obligations that may not satisfy the requirements that have been set at domestic level in terms of protection of the rule of law, in particular fundamental rights, we will probably witness a growing reluctance of domestic courts to give supremacy to international law in their domestic legal order. From one perspective, this leads to inter-

<sup>93</sup> This was the approach in *R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)*, [2007] UKHL 58, [2008] 2 WLR 31. See discussion by Lord Bingham, The UK House of Lords’ decision in *Al-Jedda*, [2007] UKHL 58, [2008] 2 WLR 31, paper presented at the First ILDC Colloquium, The Hague, 27 and 28 March 2008, <http://www.jur.uva.nl/aciluk/object.cfm/24A0465F-1321-B0BE-A477AEC5C2BEDC6B>, accessed 7 January 2010.

<sup>94</sup> See for an application: BVerfG, 1 BvR 1602/07 of 26.2.2008, par. 52 (holding that ‘Gewährleistungen der Konvention und die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte dienen darüber hinaus auf der Ebene des Verfassungsrechts als Auslegungshilfen für die Bestimmung von Inhalt und Reichweite von Grundrechten, sofern dies nicht zu einer – von der Konvention selbst nicht gewollten (vgl. Art. 53 EMRK) – Einschränkung oder Minderung des Grundrechtsschutzes nach dem Grundgesetz führt’).

<sup>95</sup> *Shany*, General Margin (Fn 37) 925.

<sup>96</sup> *Id.*

<sup>97</sup> *Armin von Bogdandy*, Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law, *Int J Const Law* 6 (2008) 397. See for the notion of complementary between international and national legal orders *André Nollkaemper*, Multilevel Accountability in International Law: a Case Study of the Aftermath of Srebrenica, in: *Shany/Broude*, The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy, and Subsidiarity (2008) 345.

<sup>98</sup> *Watts*, International Rule of Law (Fn 9) 15 ff, 22 f; see also *Gianluigi Palombella*, The Rule of Law Beyond the State: Failures, Promises and Theory, *Int J Const Law* 7 (2009) 442.

national law and domestic law complementing each other in the protection of the rule of law and fundamental rights. However, without further benchmark international law will not be able to accept domestic challenges to the performance of international obligations based on a conflict with domestic law and will assert the supremacy of international law.

The benchmark on which acceptance by international law may be based can only be found in international law itself. In a substantial and probably increasing number of cases, challenges based on domestic fundamental rights overlap with and thus can also be based on international norms. The substantive overlap and interdependence between international law and domestic law may lead to a qualification of the principle of supremacy as states may acquire more power to assert domestic/international norms to justify non-performance of international obligations. This is not necessarily an apologetic move that sacrifices the normative ideals of international law and its supremacy. Paradoxically, by bringing the (application of) the principle close to domestic practice, the ideals of international law may be better served.

Recognizing a substantive qualification of supremacy may help solve the opposition, and resulting paralysis, between the supremacy of international law and the supremacy of domestic law. States may be more willing to allow international law into their domestic legal orders if they can be relatively certain that they will have a final check that international law does not upset their fundamental rights. This would be in line with the practice of states that allow for domestic precedence of international human rights law.<sup>99</sup> This has the advantage of bringing the principle of supremacy at the international level and the principle of supremacy at the domestic level closer together.<sup>100</sup>

A related asset of this perspective is that it allows us to recognize the role that domestic courts can play in upholding the international rule of law by scrutinizing whether international acts (in particular acts of international organizations, but also treaties) are compatible with fundamental rights. Determining whether or not such international acts of lawmaking conform to fundamental rights ideally would be a task of international courts. But in the absence of such courts with adequate jurisdiction, national courts can provide the missing link by assessing international acts against fundamental rights, whether ‘as international norms’ or in the form of domestic constitutional rights. This does not mean that national courts necessarily view themselves as ‘agents of the international community’ with a task to maintain the international rule of law,<sup>101</sup> but this may well be the result.

Rather than seeing domestic filters as an unwarranted barrier to the full effect of international law, such filters may be complementary to the ambitions of international law itself. Rather than being faithful but blind enforcers of international law, domestic courts may have to fulfill a role as a safety-valve or ‘gate keepers’.<sup>102</sup> Thereby, they also can put pressure on international decision-makers to get it right, much in the

<sup>99</sup> Peters, Globalization (Fn 17).

<sup>100</sup> Compare for a similar argument in the context of EU law *Besselink*, Constitution (Fn 52).

<sup>101</sup> *Georges Scelle*, Règles Générales du Droit de la Paix, in: RdC (1933) 331 ff, 356. See for a discussion of *Scelle*’s theory: *Antonio Cassese*, Remarks on *Scelle*’s Theory of “Role Splitting” (dédoulement fonctionnel) in *International Law*, EJIL 1 (1990) 210.

<sup>102</sup> *Friedrich Kratochwil*, The Role of Domestic Courts as Agencies of the International Legal Order, in: *Falk/Kratochwil/Mendlovitz*, *International Law, A Contemporary Perspective* (1985) 236 (237); *Peters*, *Globalization* (Fn 17) 267.

same manner as the *Solange* case-law in Germany put pressure on decision-makers in the EC to recognize and protect fundamental rights. Similarly, the *Kadi* case may put pressure on the Security Council to adjust the procedures, assuming that the Council is concerned about the effects of its resolutions in the European Union and that the defects in terms of rule-setting cannot be resolved at the European level.

The substantive approach to supremacy advanced here does not at all solve or prevent normative conflicts. Moreover, it is not risk free, in view of the difficulty to distinguishing those international law based principles that might lead to a qualification of and those that do not. The normative conflict thus will not be solved, but just redefined. It is not insignificant; however, that it is redefined in a manner that seeks to give effect to international obligations rather than to preclude such effect and that engages domestic courts in the protection of international rights rather than in their denial. The fact that the outcome of their decisions may not always be shared by international courts reflects the normative ambiguity of international law, not a black and white opposition between international and domestic law.

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