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The Independence of the Domestic Judiciary in International Law

Andre Nollkaemper*

Introduction

On 28 May 2008, the International Criminal Tribunal for Rwanda decided that it could not transfer the case of Yussuf Munyakazi to Rwandese domestic courts.¹ The Trial Chamber was concerned that the trial of the accused by a single judge in Rwanda might violate his right to be tried before an independent tribunal.² While the Chamber noted that Rwanda had accepted international obligations guaranteeing the right to be tried before an independent tribunal, and that Rwanda had included that right in its domestic law, it found that ‘sufficient guarantees against outside pressures are lacking in Rwanda.’³ The fact that the Rwandese Government had interrupted cooperation with the Tribunal following the dismissal of an indictment, as well as its negative reaction to foreign indictments of former members of the Rwandan Patriotic Front, made the Chamber concerned that the Government would pressure the judiciary, a pressure to which ‘a judge sitting alone would be particularly susceptible.’⁴

Whether the *Munyakazi* decision will be upheld on appeal remains to be seen, but it does illustrate that international courts may use the principle of independence to allocate adjudicative power between international and domestic courts.

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¹ *Prosecutor v. Munyakazi*, Case No. ICTR-97-36-R11bis, Decision on the Prosecutor’s Request for Referral of Case to the Republic of Rwanda, 28 May 2008.

² *Ibid.*, para. 39.

³ *Ibid.*, para. 40.

⁴ *Ibid.*, para. 40.

International courts may be willing to entrust domestic courts to do what they would have done themselves, but only if and to the extent that such domestic courts are sufficiently insulated from pressures from the political branches of their state.

Thus, international courts may use the principle of independence in solving the conundrum that is caused by the fact that while international law needs to rely on domestic courts for the adjudication of international claims,⁵ such courts are closely tied to the state of which they are an organ and may not always be trusted to properly hold their state to the requirements of international law.

Treaties and international institutions rely strongly on domestic courts to perform adjudicatory functions, in particular in international human rights law⁶ and international criminal law.⁷ This preference for domestic courts as a venue for the resolution of international claims is induced by states' sovereignty, their will to keep control over adjudication,⁸ the intimate connection of many cases to local factual

⁵ I use the term 'international claims' in a broad manner, referring to cases where persons (whether states or natural persons) initiate a demand against a state or other person for redress in respect of a breach of international law, whether directly on the basis of international law or on the basis of a rule of domestic law that incorporates international law. This definition includes domestic prosecutions of international crimes. Compare for the classic (and narrower) definition of international claims in the context of diplomatic protection: John P. Grant and J. Craig Barker, *Encyclopedic Dictionary of International Law* (2nd edn, Oceana, New York, 2004) at 83.

⁶ Art. 2(3) of the International Covenant on Civil and Political Rights, 16 December 1966, in force 23 March 1976, 999 *United Nations Treaty Series* 171; Art. 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, Rome, 4 November 1950, in force 3 September 1953, 213 *United Nations Treaty Series* 222. See generally on the reliance on the domestic level and domestic courts in human rights law: Paul Mahoney, 'Universality Versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining Some Recent Judgments', *European Human Rights Law Review* (1997) 364-379; Paolo G. Carozza, 'Subsidiarity as a Structural Element of International Human Rights Law', 97 *American Journal of International Law* (2003) 38-80.

⁷ For instance through the obligation to prosecute or extradite suspects of international crimes; see Zdzislaw Galicki, ILC *Preliminary report on the obligation to extradite or prosecute* ("aut dedere aut judicare"), UN Doc. A/CN.4/571 (2006), paras 35-48. The preamble of the ICC Statute 'recalls' 'that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. Rome Statute of the International Criminal Court, Rome, 17 July 1998, in force 1 July 2002, 2187 *United Nations Treaty Series* 90; 37 *International Legal Materials* (1998) 998. It has been argued that the complementarity regime of Art. 17 of the ICC Statute would at least implicitly allocate such tasks; see Jann Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law', 1 *Journal of International Criminal Justice* (2003) 86-113 at 88.

⁸ The sovereignty of states has traditionally been used to argue that claims involving (nationals of) other states should primarily be brought in domestic courts. Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* (The Banks Law Publishing Company, New York, 1915), at 817-818 (noting that 'the right of sovereignty and independence warrants the local State in demanding for its courts freedom from interference, on the assumption that they are capable of doing justice'); see also Chittharanjan F. Amerasinghe, *Local Remedies in International Law* (2nd edn, Cambridge University Press, 2005) 62. See for a discussion of sovereignty as a basis for subsidiarity in human rights law Carozza, 'Subsidiarity', *supra* note 6, at 63.

and legal circumstances,⁹ the sheer number of cases involving international law, and the lack of capacity at international level.¹⁰

However, relying on domestic courts for adjudicating international claims involving the forum state¹¹ is a precarious affair. From the perspective of international law, domestic courts are inseparable from the state. International law is based on the unity of the state¹² and it treats the state as a black box.¹³ It may seem incompatible with the rule of law to allow the very party whose compliance is in question to determine whether it is in transgression.¹⁴

In addition to the conceptual unity between courts and their state, at a more practical level, multiple legal, political and cultural ties connect courts to the legal order and society of which they are a part.¹⁵ When states are implicated in violations of international criminal law and human rights law, it may be doubted whether domestic courts can be relied upon to give dispassionate judgments that conform to international law, yet contradict the interests of their state.¹⁶ Courts may protect the state, or may be unjustifiably harsh against enemies of the state, such as members of rebel movements. Friedmann's observation that the role of national courts in the

⁹ For the role of such factors in international human rights law, see *James v. UK*, ECHR Series A (1986), No. 98 at 44; See Lawrence R. Helfer and Anne-Marie Slaughter, 'Towards a Theory of Effective Supranational Adjudication', 107 *Yale Law Journal* (1997) 273-391 at 309-310; Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?', 16 *European Journal of International Law* (2005) 907-940 at 921-922.

¹⁰ Reliance on domestic courts of course is not a new phenomenon. Lillich wrote in 1962 that traditional methods for handling claims by international commissions 'have proved unsatisfactory for the needs of the postwar world' and that states have increasingly resorted to national commissions for handling of international claims; see Richard B. Lillich, *International Claims — Their Handling by National Commissions* (Syracuse University Press, 1962) at 3.

¹¹ This same objection need not apply in cases where a court adjudicates claims not directed against the forum state, such as prosecutions of rebels who challenge the government or cases based on universal jurisdiction. However, some of the problems stated *infra*, text accompanying notes 16-19, may also apply in such cases.

¹² The ICJ held that the internal organization of the state is a matter for domestic law; see *Western Sahara, (Advisory Opinion)*, ICJ Reports (1975) 12, at 43-44.

¹³ Patrick M. McFadden, 'Provincialism in United States Courts', 81 *Cornell Law Review* (1995) 4-65 at 44-45 (noting that the 'black-box theory conceives international law as imposing its obligations only on each state as a whole, and not on any of its constituent organs. It is a matter for each state to determine which of its organs shall execute the nation's international responsibilities, and each of these organs, consequently, must await an internal signal to operate.');

Ward Ferdinandusse, 'Out of the Black-box? The International Obligation of State Organs', 29 *Brooklyn Journal of International Law* (2003) 45-127.

¹⁴ Jan Paulsson, *Denial of Justice in International Law* (Cambridge University Press, 2005) at 4.

¹⁵ Obviously, the conceptual unity and the multiple practical ties at the domestic level are related. These ties limit, in terms of state practice, the possibility that international law would recognize a more independent status of domestic courts in the international arena.

¹⁶ Wolfgang Friedmann, *The Changing Structure of International Law* (Stevens & Sons, London, 1964) at 146-147.

application of international law is limited and distorted by the predominance of national prejudice in domestic courts and by the fact that few national courts 'have been able to resist the temptation of modifying doctrine when national passions are aroused', remains accurate for many courts across the world.¹⁷ Taking also into account divergent economic interests that may lead a court to side with 'its' government,¹⁸ one may understand why it has been said that domestic courts should not be allowed to sit in judgment of the state of which they are a part.¹⁹

In view of the legal and practical unity between courts and the states of which they are an organ, it is not surprising that litigants are often not inclined to litigate in foreign courts and have sought resort in their own courts, or, as in the case of investment law, international courts, where they hope to find dispassionate consideration of the requirements of international law.²⁰ It is equally unsurprising that many observers have looked with suspicion to the prosecution of suspects of the crimes committed under the Khmer Rouge in the Extraordinary Chambers in the Courts of Cambodia (ECCC),²¹ to plans of Uganda to try suspects of war crimes in domestic courts rather than sending them to the ICC,²² or to the wish of some Lebanese parties to keep the Hariri trial in a domestic court.²³

¹⁷ *Ibid.*, at 146-147

¹⁸ Eyal Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts', 4 *European Journal of International Law* (1993) 159-183.

¹⁹ Paulsson, *Denial of Justice*, *supra* note 14, at 4. This is also implied by the general principle against self-judging (*nemo iudex in sua causa*); see Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons, London, 1953) at 279-289, 357; Yuval Shany, *Regulating Jurisdictional Relations Between National and International Courts* (Oxford University Press, 2007) at 87.

²⁰ Francisco Orrego Vicuna and Christopher Pinto, 'Peaceful Settlement of Disputes: Prospects for the Twenty-first Century. Report prepared for the Centennial of the First International Peace Conference' in Fritz Kalshoven (ed.), *The Centennial of the First International Peace Conference* (Kluwer Law International, The Hague, 2000) 261 at 287. But see George Kahale III, 'A Problem in Investor/State Arbitration', TDM (27 June 2008) (arguing that there is a growing perception that arbitration is not a level playing field for host states in investment disputes).

²¹ See for a historical analysis of the independence of the ECCC: Craig Etcheson, 'The Politics of Genocide Justice in Cambodia' in Cesare Romano, Andre Nollkaemper and Jann Kleffner (eds), *Internationalized Criminal Courts — Sierra Leone, East Timor, Kosovo and Cambodia* (Oxford University Press, 2003) 181-205. See for a critical assessment of the independence of the ECCC after its start of work: Suzannah Linton, 'Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers', 4 *Journal of International Criminal Justice* (2006) 327-341.

²² See on Uganda e.g. Scott Warden, *The Justice Dilemma in Uganda*, USIPeace Briefing (February 2008), available at <www.usip.org/pubs/usipeace_briefings/2008/0222_justice_uganda.html> (visited 1 July 2008) (referring to a concern among some interviewed experts 'as to whether the Ugandan judiciary could remain completely independent in these high-profile cases').

²³ Report of the Secretary General pursuant to paragraph 6 of resolution 1644 (2005), UN Doc. S/2006/176 1644, 21 March 2006, at 5 (stating that '[b]y mandating me to help the Lebanese Government to explore the requirements for a tribunal of an international character, the Security

The principle of independence of the judiciary may be part of the solution to this conflict between the need to engage domestic courts in the adjudication of international claims, on the one hand, and the unity of the state, on the other. The principle will be examined in more detail later,²⁴ but can be defined at this stage as a principle that seeks to liberate courts from their domestic environment by protecting them against improper influences from the executive, the legislature and the parties to the dispute before the court.²⁵ While the principle of independence has had its prime application in a domestic context,²⁶ it has its own role and aspiration in respect to the domestic application of international law. The principle aims to prevent an accumulation of powers with the political branch in matters involving the application of international law.²⁷

By liberating courts from domestic politics, the principle of independence may function as a rule of recognition. It may provide a criterion for distinguishing between domestic judicial decisions that the international legal order can defer to as authoritative settlements of international claims, and those decisions to which it cannot defer because they are too much tied to the domestic legal order. The ICTR reviews the independence of the domestic Rwandan courts in this way in order to determine whether it could entrust them with the task of adjudicating international crimes.²⁸ Likewise, the ICC will accept (in the sense that it will not review such cases

Council reflected a shared assumption that a purely national tribunal would not be able to effectively fulfil the task of trying those accused of the crime’).

²⁴ See *infra*, text accompanying notes 145 *et seq.*

²⁵ The UN Basic Principles on the Independence of the Judiciary provide that ‘the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.’ Principle 2 of the Basic Principles, <www.unhchr.ch/html/menu3/b/h_comp50.htm> (visited 1 July 2008). The ECtHR held that independence aims to prevent that the court is influenced by considerations not pertaining to the nature of the case; see *Çiraklar v. Turkey*, Application No. 70/1997/854/1061, Judgment, 28 October 1998, para. 40.

²⁶ Most general works on judicial independence confine themselves to the domestic level; see e.g. Shimon Shetreet, *Judicial Independence — The Contemporary Debate* (Martinus Nijhoff Publishers, Dordrecht, 1985); Peter H. Russell and David M. O’Brien, *Judicial Independence in the Age of Democracy. Critical Perspectives from around the World* (University Press of Virginia, 2001).

²⁷ The IDI recommended that ‘[n]ational courts should be empowered by their domestic legal order to interpret and apply international law with full independence.’ See *The Activities of National Judges and the International Relations of their State* (Institute of International Law, Milan, 1993).

²⁸ The power of referral of the ICTR is based on Rule 11 *bis* of the Rules of Procedure and Evidence of the ICTR. See discussion in Lisa Yarwood and Beat Dold, ‘Towards the End and Beyond: The “Almost” Referral of Bagaragaza in Light of the Completion Strategy of the International Criminal Tribunal for Rwanda’, 6 *Chinese Journal of International Law* (2007) 95-114. See also *supra* note 1.

on the merits) outcomes of domestic criminal proceedings if they are independent and do not shield the defendants.²⁹

The power of the principle of independence of the domestic judiciary is of great doctrinal significance, related to such fundamental notions as the unity of the state and the separation between the international and the domestic legal order. It is also of much practical relevance. It may tell domestic actors (such as the government of Rwanda in regard to the *Munyakazi* case) what they should do to make decisions of domestic courts acceptable for international courts, and may tell international courts (such as the ICTR in the *Munyakazi* case) when they can rely on and defer to domestic judgments.

In legal scholarship the principle of independence has rarely been explored as a rule of recognition. Apart from incidental discussion of particular treaty arrangements, notably the ICC,³⁰ the most comprehensive recent analysis relevant to the present article is Yuval Shany's *Regulating Jurisdictional Relations between National and International Courts*. Shany advances a theory of comity, calling on international courts to defer to domestic courts (and *vice versa*) and to treat their procedures and decisions with respect.³¹ However, the book does not discuss the modalities of independence that would be required before such deference would be justified. The present article adds to Shany's analysis by exploring the role of independence as a condition for deference.

The aim of this article then is to explore the hypothesis that the principle of independence can function as a rule of recognition in international law. The article does not engage in an empirical analysis of the actual use of the principle of independence as a rule of recognition, though several examples will be given of its use. Rather, it will explore a number of questions that help us understand the potential role of the concept and that are preliminary to empirical analysis. First, I will examine the concept of the rule of recognition in relation to the principle of independence. What do we mean when we say that independence can function as a rule of recognition? The same section will identify some uses of the principle of independence as a rule of recognition in practice. I then will discuss the basis of the possible use of the principle of independence as a rule of recognition. Why may

²⁹ Art. 17(2) of the ICC Statute. Note that shielding is not necessarily limited to persons related to the government. In the situations of Uganda, it may well be that the need to secure a peace agreement provides the government with an interest to 'shield' Kony (leader of the Lord's Resistance Army) by agreeing *ex ante* on reduced sentences. See 'Uganda Peace Hinges on Amnesty for Brutality', *NY Times*, September 2006.

³⁰ Of particular relevance are the discussions of the complementarity principle in the ICC Statute, see e.g. Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press, 2008, forthcoming).

³¹ Shany, *Regulating Jurisdictional Relations*, *supra* note 19, at 166.

international institutions be interested in using independence as a basis for decisions on the allocation of tasks to domestic courts and, conversely, why would states and their courts have an interest in providing for such independence? That section will in particular focus on the possible contribution of independence to the effective application of international law. In the following section, I will examine the status of the international obligation to provide for an independent domestic judiciary and evaluate its relevance for the use of the principle of independence as a rule of recognition. Then, I will place the connection between independence and effectiveness in a broader context and argue that, in particular cases, international institutions and other interested actors may give priority to other considerations than independence in determining the authority of domestic courts. Next, I will examine the contents of the principle of independence and discuss from what pressures and limitations domestic courts have to be liberated to enhance the possibility that international institutions defer to their decisions as authoritative settlements of disputes. In the following section, I will discuss the responses at the disposal of international institutions and other interested actors when they find that domestic courts are not sufficiently independent to be relied upon to apply international law. The final section contains some concluding observations.

Independence as a Rule of Recognition

The Concept of Recognition

The term recognition has a variety of meanings in international law. For purposes of the present article, two forms of the rule of recognition are of particular interest. The first of these is concerned with the identification of valid rules, the second with the acceptance of foreign judgments.

First, a rule of recognition is a rule defining which norms are part of a legal order.³² In international law, Article 38 of the Statute of the ICJ (or rather the rule that underlies this Article, since the latter is only applicable to the ICJ) functions as a rule of recognition and grants the quality of law to, for example, treaties and custom.³³ A rule of recognition may incorporate rules that, as such, are not legally valid in a particular legal order. After incorporation, such rules form part of that

³² H. L. A. Hart, *The Concept of Law* (Oxford University Press, 1961) at 97.

³³ Georges Abi-Saab, 'Cours general de droit international public', 207 *Recueil des Cours* (1987-VII) 9-463, at 122.

legal order for the particular purposes for which they are incorporated.³⁴ This holds true for moral norms, but it can also apply to rules of domestic law. When international law, through a rule of reference, incorporates rules of domestic law, such as those relating to nationality,³⁵ expropriation,³⁶ corporate law,³⁷ or the definition of state organs,³⁸ such rules acquire indirectly the quality of international law.³⁹ As such, they can be applied by international courts whose powers are limited to the application of international law.

The second form of a rule of recognition that is relevant for the present article can be found in the field of conflict of laws. This concept of recognition sees, in contrast to the first form, specifically to the recognition of judgments. Recognition

³⁴ In positivist theory, the theory of incorporation allows a legal order to treat moral principles to count as part of a community's binding law provided that the relevant rule of recognition includes a provision to that effect.' See Jules Coleman, 'Authority and Reason', in Robert P. George (ed.), *The Autonomy of Law: Essays on Legal Positivism* (Clarendon Press, Oxford, 1996) 287-319 at 287.

³⁵ See e.g. Art. 4 of the Draft Articles of the ILC on Diplomatic Protection, available at <untreaty.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf> (visited 1 July 2008) ('For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States, or in any other manner, not inconsistent with international law.') See also ASEAN Agreement for the Promotion and Protection of Investments (1987), Art. 1(1) (available at <www.aseansec.org/12812.htm> (visited 1 July 2008)). See also *ibid.*, Art. 1(2) ('The term "company" of a Contracting Party shall mean a corporation, partnership or other business association, incorporated or constituted under the laws in force in the territory of any Contracting Party wherein the place of effective management is situated.'). See also *Waguib Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007, at para. 143, (available at <ita.law.uvic.ca/documents/Siagv.Egypt.pdf> (last visited 17 April 2008)) (noting that '[i]t is well established that the domestic laws of each Contracting State determine nationality. This has been accepted in ICSID practice.')

³⁶ Many bilateral investment treaties protect the right of investors against expropriation. The existence of an investment may depend the definition of property rights under the national law of the host state and arbitrators may therefore need to apply national law in order to determine whether there was an investment to expropriate in the first place; see Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration', 74 *British Yearbook of International Law* (2003) 151-289 at 197-199; Cristoph Schreuer, *The Relevance of Public International Law in International Commercial Arbitration: Investment Disputes*, at 21, available at <www.univie.ac.at/intlaw/pdf/csunpubpaper_1.pdf> (visited 1 July 2008) (noting that '[t]he protection of property through an investment treaty or general international law is contingent upon the existence and extent of property rights as determined by the applicable domestic law').

³⁷ See also *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ Reports (1970) 3, at para. 38.

³⁸ Art. 4-5 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 in James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002).

³⁹ Carlo Santulli, *Le statut international de l'ordre juridique étatique. Étude du traitement du droit interne par le droit international* (Pédone, Paris, 2001), at 445-446.

then means that a court of one state accepts a judicial decision of another state so as to prevent the need to re-litigate the claim.⁴⁰ Although it usually requires a separate action to enforce the foreign judgments, the legal position determined by the foreign judgment is accepted as if it were given by a court of the forum state.

Recognition of Judgments of Domestic Courts in International Law

The effect of domestic judgments in the international legal order has elements of both definitions of recognition, but is closer to the second (conflict of laws) definition than to the former (sources of international law) definition.

In order to properly understand the possibility of characterizing judgments of domestic courts in terms of a rule of recognition, it is helpful to summarize the traditional legal status of decisions of domestic courts in the international legal order. Despite formidable changes in the transnational nature of the activities of domestic courts,⁴¹ international law remains based on the principle of unity of the state. International law addresses the state as a legal person. It leaves the designation of particular entities as state organs, and the allocation of tasks between these organs, to domestic law. Although international law has autonomous principles of attribution (it can qualify, for the purposes of international law, a particular entity as a state organ, even when domestic law does not do so), such principles have no effect on the status of that organ under domestic law.⁴²

When treaties or general international law charge domestic courts with the task of exercising adjudicative jurisdiction in matters of international law,⁴³ the famous *dédoublement fonctionnel*,⁴⁴ this involves a process of delegation.⁴⁵ International law

⁴⁰ See general discussion in Peter North & James Fawcett, *Cheshire & North's Private International Law* (13th edn, Butterworths, London, 1999) at 480 *et seq.* (noting at 488 with respect to recognition under the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (<curia.europa.eu/common/recdoc/convention/en/c-textes/lug-idx.htm>) that '[a] foreign judgment recognized by virtue of article 26 in principle has the same effects in the State in which enforcement is sought as it does in the State in which it was given').

⁴¹ Anne-Marie Slaughter, 'A Typology of Transjudicial Communication', 29 *University of Richmond Law Review* (1994) 99-137; *id.*, 'Judicial Globalization', 40 *Virginia Journal of International Law* (2000) 1103-1124.

⁴² Report of the International Law Commission on the Work of its 25th Session, UN Doc A/CN.4/SER.A/1973/Add.1, 190 (1973), para. 10

⁴³ As is implicit in the obligation to prosecute (*supra* note 7); the obligation to provide remedies for human rights violations (*supra* note 6) or the obligation to review and reconsider domestic judgments in cases where the individual rights under the Vienna Convention on Consular Relations were violated; see *Avena and Other Mexican Nationals (Mexico v. United States of America)*, ICJ Reports (2004) 40, at para. 143.

⁴⁴ Georges Scelle, 'Règles générales du droit de la paix', 46 *Recueil des Cours de l'Académie de La Haye* (1933) 331-703 at 356. See for a discussion of Scelle's theory: Antonio Cassese, 'Remarks on Scelle's

delegates the task of giving effect to international law to states.⁴⁶ The state can then delegate, through its domestic legal order, powers to its courts.⁴⁷ The power of domestic courts to fulfill a role in the adjudication of international claims, whether or not expressly provided for by international law, remains grounded in a power-conferring rule of domestic law.

The consequence of this dualistic relationship between international and national law is that domestic judgments, in principle, have the same status as municipal laws. They are, in the words of the Permanent Court of International Justice, ‘facts which express the will and constitute the activities of States’.⁴⁸ This has obvious consequences for the legal effects of such judgments, both in the processes of law-making⁴⁹ and law-determination.⁵⁰

However, the dualistic relationship between international and national law does not mean that decisions of domestic courts cannot acquire legal relevance in international law. International law does not have enough powerful options for the adjudication of all international claims at the international level. Similar to questions on nationality or corporate law, where international law does not contain sufficient rules and has to refer to domestic law, in particular areas of law and in particular

Theory of “Role Splitting” (dédoublément fonctionnel) in International Law’, 1 *European Journal of International Law* (1990) 210-231 at 210.

⁴⁵ The term ‘delegation’ is used to refer to the process of empowerment of states and domestic organs. This process is to be distinguished from the upward process of delegation by states to international institutions; see e.g. See Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, ‘The Emergence of Global Administrative Law’, 68 *Law and Contemporary Problems* (2005) 15-61.

⁴⁶ Hans Kelsen, *Pure Theory of Law* (2nd edn, tr. Max Night, University of California Press, Berkeley, 1989) at 323.

⁴⁷ Hans Kelsen, *Law and Peace in International Relations. The Oliver Wendell Holmes Lectures, 1940-41* (Harvard University Press, Cambridge, 1942) 96; Kelsen, *Pure Theory of Law*, *supra* note 46, at 327.

⁴⁸ *Case of Certain German Interests in Polish Upper Silesia (Minority Schools) (Germany v. Poland)*, PCIJ Series A, No. 15 (1928) 54 (stating that ‘[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures’); *Prosecutor v. Delalic et al.*, IT-96-21, Judgment, 20 February 2001, para. 76; *Monte Confurco (Seychelles v. France)*, ITLOS, Judgment, 18 December 2000, para. 72.

⁴⁹ Thus, in the sphere of formation of customary law, domestic decisions can be relevant to the formation of custom. Large parts of customary law, in particular in the field of jurisdiction and immunities, have been developed precisely in the practice of national courts, but their effect is determined by their status as practice of the state. Robert Jennings and Arthur Watts, *Oppenheim’s International Law* (9th edn, Longman, London, 1996) at 41; ILA, Statement of Principles Applicable to the Formation of General Customary International Law, principle 9, reproduced in ILA, *Report of the Sixty-Ninth Conference* (2000); Hersch Lauterpacht, ‘Decisions of National Courts as a Source of International Law’, 10 *British Yearbook of International Law* (1929) 65-95 at 84.

⁵⁰ See generally on the status of domestic law in the international legal order: Giorgio Gaja, ‘Dualism — A Review’ in Janne Nijman & Andre Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press, 2007) 52-62 at 58-5; Santulli, *Le statut*, *supra* note 39.

situations, the proper functioning of international law relies on domestic courts. International law can, for the settlement of a particular international dispute, defer to the authority of domestic courts.

However, in areas where international law defers to domestic judgments law, it cannot do so in a blanket manner. This is similar to the rule of recognition in its sources-of-law form. In regard to nationality, Draft Article 4 of the ILC Draft Articles on Diplomatic Protection defines the state of nationality for the purposes of diplomatic protection of natural persons. While this definition is premised on the principle that it is for the particular state to determine, in accordance with its municipal law, who is to qualify for its nationality; it also reflects that international law imposes limits on the grant of nationality.⁵¹ Also the rule of recognition in its conflict of laws manifestation generally makes recognition of foreign judgments dependent on certain conditions, including, for instance, due process.⁵² Likewise, international law would only accept judgments of domestic courts if certain criteria were satisfied. Independence is an obvious candidate for such a criterion. Though it certainly is not the only such principle, and is part of the wider set of principles now often referred to as 'able and willing' that serves to indicate when exactly international law can rely on domestic law,⁵³ there is little doubt that independence, either in itself or in combination with other principles is key to the persuasive power of domestic judgments.⁵⁴

Situations in which the Question of Recognition of Domestic Judgments May Arise

The question whether interested actors⁵⁵ may recognize decisions of domestic courts arises in two main situations: first, when they have to assess the weight of decisions of domestic courts in the determination of a rule of international law; second, in assessing whether they can defer to a domestic settlements of an

⁵¹ Commentary to the Draft Articles on Diplomatic Protection, *supra* note 35, at 31.

⁵² See e.g. Art. 5 of the Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, at <hcch.e-vision.nl/index_en.php?act=conventions.text&cid=78> (visited 1 July 2008).

⁵³ This is most obvious in the ICC Statute, but the concept similarly underlies the doctrine of the responsibility to protect; See S. M. H. Nouwen, 'The Responsibility to Protect and Efforts to Promote Human Rights in Darfur', 24(65) *Merkourios: Utrecht Journal of International and European Law* (2007) 58-70 at 65. See *infra* text to note 157 on the connection between independence and 'shielding' and 'consistency of bringing to justice'.

⁵⁴ See *infra*, text accompanying notes 81*et seq.*

⁵⁵ In the majority of domestic cases, there will be no subsequent decision of an international institution. For all practical purposes, it is only when other actors actually have to assess the status and effect of a domestic judgment that the construction of a rule of recognition acquires practical relevance.

individual dispute. These two uses correspond to the two forms of recognition identified earlier: recognition as an indicator of the validity of law and recognition as an acceptance of foreign judgments.

As to the first situation, Article 38(1)(d) of the Statute of the ICJ provides for a rule of recognition in the first meaning identified in the previous section: as a criterion to identify the valid law. This also extends to decisions of domestic courts. Judicial decisions are subsidiary means for the determination of rules of law.⁵⁶ It is generally accepted that 'judicial decisions' include decisions of national courts.⁵⁷ As the distinctions between the application, interpretation and development of the law are thin, and application will often involve interpretation and in that respect development,⁵⁸ the qualification of 'subsidiary' is somewhat of an understatement.⁵⁹ Traditionally it has been doubted whether this would hold for domestic courts, in view of the fact that such courts will generally be tied to the national legal system,⁶⁰ and may have a national rather than international outlook.⁶¹ However, there is a widespread practice of national and international courts referring to decisions of national courts⁶² and apparently considering such decisions as impartial expressions of what these courts believe to be the state of the law.⁶³ In particular, when there is a certain convergence between decisions of domestic courts,⁶⁴ decisions may obtain a certain authority as to the determination or the interpretation of the law that may

⁵⁶ That judicial are only subsidiary means, reflects the fact that formally no system of precedents, let alone *stare decisis* exists. Cf. ICJ Statute, Art. 59. As an additional reason for the qualification 'subsidiary', it has been said that courts do not in principle make law but apply existing law that has an antecedent source. Jennings and Watts, *Oppenheim's International Law*, *supra* note 49, at 41; George Schwarzenberger, *A Manual of International Law* (6th edn, Professional Books Ltd., Milton, 1976) 27-28, referring to 'law-determining agencies', in contrast to law-creating processes; Menzel & Ipsen, *Völkerrecht: ein Studienbuch* (2e Auflage, Beck, München, 1979) at 87.

⁵⁷ Rosalyn Higgins, *Problems and Process* (Clarendon Press, Oxford, 1994) at 218, Jennings and Watts, *Oppenheim's International Law*, *supra* note 49, at 41-42, Robert Y. Jennings, 'What is International Law and How Do We Tell It When We See It?', 38 *Schweizerisches Jahrbuch für internationales Recht* (1981) 59 at 77. Menzel & Ipsen, *Völkerrecht*, *supra* note 56 at 87-88.

⁵⁸ Robert Y. Jennings, 'The Judiciary, International and National, and the Development of International Law', 45 *International and Comparative Law Quarterly* (1996) 1-12 at 3; Hersch Lauterpacht, *The Development of International Law by the International Court* (reprint, Cambridge, Cambridge University Press, 1996., 1996) at 21.

⁵⁹ Gerald Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', *Symbolae Verzijl* (Martinus Nijhoff, The Hague, 1958) 175; Jennings, 'The Judiciary', *supra* note 58, at 4.

⁶⁰ Jennings and Watts, *Oppenheim's International Law*, *supra* note 49, at 42; Schwarzenberger, *A Manual*, *supra* note 56, at 30.

⁶¹ Cassese, 'Remarks', *supra* note 44, at 210.

⁶² Slaughter, 'A Typology', *supra* note 41, at 99-137.

⁶³ Jennings, 'What is International Law', *supra* note 57, at 77.

⁶⁴ Schwarzenberger, *A Manual*, *supra* note 56, at 31.

not be explained in terms of customary law or general principles of law.⁶⁵ In this respect, decisions of domestic courts are more than facts and help to determine the nature and contents of a rule of international law – provided that they are based on an independent and impartial assessment of the state of the law.

The second situation in which the question of recognition may arise concerns the effect of decisions of domestic courts in individual cases. Here it may be less obvious that a rule of recognition in the sources-of-law meaning would somehow make these part of the international legal order. When a domestic court finds that a foreign state has breached international law, which may occur when that court denies immunity, such a determination has no legal effect in the international legal order and will, as a matter of international law, not be opposable to that foreign state.⁶⁶ Likewise, in contrast to decisions of international courts, which are valid in international law because they stem from an international source, orders of domestic courts, such as orders to pay compensation or provide restitution, in principle lack effect in international law.

However, in some respects, decisions of domestic courts may acquire international legal relevance in a way that is comparable to recognition in the conflict of law sense: as acceptance of a judgment in a way that precludes further international litigation and that in some respects is comparable to a judgment given in the international legal order. This holds in particular when domestic courts adjudicate disputes arising out of an international legal relationship existing between the forum state and private persons who possess subjective rights against that state, for instance in international human rights law or refugee law. Their decisions are not only of interest to the domestic legal order in which they are rendered, but also to international law.⁶⁷ This is based on essentially two considerations. First, in such cases, courts may adjudicate a claim based at least in part on an international legal standard. Indeed, it may well be argued that they can settle international disputes.⁶⁸ Second, the main objection against granting legal effect in international law to a decision of a domestic court against another state is the sovereignty of that state. But this is no barrier to finding any legal effect in the international legal relationship

⁶⁵ André Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' in Gideon Boas and William A. Schabas (eds), *International Law Developments in the Case Law of the ICTY* (Martinus Nijhoff, Leiden, 2003) 277-296.

⁶⁶ Hazel Fox, *The Law of State Immunity* (Oxford University Press, 2002) at 52.

⁶⁷ Jennings, 'The Judiciary', *supra* note 58; Riccardo Pisillo Mazzeschi, 'International obligations to provide for reparation claims?' in Albrecht Randelzhofer and Christian Tomuschat (eds), *State Responsibility and the Individual* (Martinus Nijhoff, The Hague, 1999) 149- 172 at 157-.

⁶⁸ Anne Peters, 'International Dispute Settlement: A Network of Cooperational Duties', 14 *European Journal of International Law* (2003) 1-34 at 3 (arguing that what makes a dispute an international dispute, is the substance of the dispute; international disputes thus normally are disputes in which the rivaling claims are based on international law').

between a domestic court and a private individual. In that respect, it may be easier to accept a decision of a domestic court as an authoritative determination of an international law relationship.

Indeed, precisely in those areas where international law regulates rights and duties of individuals, rather than (only) interstate legal relationships, international courts are able to defer to decisions of domestic courts as authoritative settlements of a dispute. This holds true for two types of institution: international criminal courts and international human rights courts. The way in which these courts can recognize domestic decisions is quite different.

The ICC can accept decisions in matters involving crimes against humanity, war crimes, genocide and, once defined, aggression, as long as these have been rendered by an independent court and were part of a process intended to bring a person to justice. In principle, the Court will not exercise jurisdiction, and in that respect leave intact, the outcome of domestic criminal proceedings if a domestic court (or investigatory and prosecutorial authorities) is independent and not controlled by political interests that aim to shield the defendants.⁶⁹ With respect to domestic trials of suspects of international crimes in Sudan, it has been said that the notorious subservience of the Sudanese prosecutors and judiciary to the government and military would easily allow the Court to find Sudan unwilling or unable to genuinely investigate or prosecute suspects in the cases that are brought before the ICC.⁷⁰ However, if Sudan would make such courts effectively independent from the government, it could preclude the ICC from taking up the case. While other international institutions (e.g., a human rights court) might still review the matter, the ICC itself would not find such a case admissible and the outcome of a domestic court may in that respect be final. The primary right of a domestic court to achieve a final decision is reinforced by Article 20 of the Statute, which precludes the ICC from reopening conviction or acquittals rendered by independent domestic courts if the proceedings were conducted independently and impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was consistent with an intent to bring the person concerned to justice.⁷¹

The principle of independence has a similar function in the completion strategy of the ICTY and the ICTR. Both courts can refer cases to the domestic level when they determine that the domestic judiciary is sufficiently independent to

⁶⁹ Art. 17(2) of the ICC Statute.

⁷⁰ Kevin J. Heller, 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process', 17 *Criminal Law Forum* (2006) 255-280 at 275.

⁷¹ Art. 20 of the ICC Statute.

be trusted to do what they would have done.⁷² Once a case is referred and the domestic court indeed proves independent, the Tribunals cannot revoke the referral⁷³ and the domestic judgments in principle will be left intact.

The principle of independence may fulfil a somewhat different function in human rights courts. In contrast to criminal law, where independent domestic judgments may serve to declare a case inadmissible, in human rights law independent domestic judgments do not make a claim inadmissible but rather may lead to deference in the merits stage. When domestic remedies are exhausted and an international claim is brought in a international court, that international court could examine the case on the merits. If a claim has already been reviewed in substance by an independent domestic court, the international court is more likely to defer to such a judgment.⁷⁴

In both constructions (independence as basis of non-admissibility in criminal law and independence as basis for deference on the merits in human rights law), domestic judgments do not create a *res judicata*.⁷⁵ International courts will not be obliged to follow judgments of domestic courts. Such decisions, therefore, may be subject to (indirect) review by a competent international court,⁷⁶ notably in human rights and criminal courts, but in rare cases also in the ICJ. A decision of a domestic court holding that an international wrong has been caused, or that no such wrong has been caused, does not prevent an international court from making a contrary finding.⁷⁷

⁷² Article 11 *bis*(b) of the ICTY 's Rule of Procedure and Evidence provides that 'The Referral Bench may order such referral proprio motu or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard and after being satisfied that the accused will receive a fair trial'.

⁷³ Article 11 *bis*(f), ICTY Rules of Procedure and Evidence.

⁷⁴ Yuval Shany, 'Jurisdictional Competition between National and International Courts: could International Jurisdiction-Regulating Rules apply?', 37 *Netherlands Yearbook of International Law* (2006) 3-56 at 47-53; Shany, *Regulating Jurisdictional Relations*, *supra* note 19, at 183 (providing examples of such deference in international case-law). Note that the situation may also arise when an international claim has been reviewed by a domestic court and the decision of the court is subsequently considered in a separate, unrelated claim by an international court. This was for instance the case in the case of the Advisory Opinion of the ICJ on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004) 136, which was preceded by a decision of the Israeli Supreme Court, which discussed partly the same legal questions; *Beit Suorik Village Council v. Government of Israel*, HCJ 2056/04, ILDC 16 (IL 2004). In this case, though, the ICJ did not refer to the Israeli Supreme Court discussion; see Shany, *Regulating Jurisdictional Relations*, *supra* note 19, at 53

⁷⁵ Shany, *Regulating Jurisdictional Relations*, *supra* note 19, at 159-161

⁷⁶ Indirect, in the sense that the international case need not involve the same parties or exactly the same legal basis as the domestic case, but nonetheless may consider or review the relevance of the domestic case.

⁷⁷ Cf. Amerasinghe, *Local Remedies in International Law*, *supra* note 8, Shany, *Regulating Jurisdictional Relations*, *supra* note 19, at 159-161 (discussing the absence of *res judicate* of domestic judgments).

Nonetheless, in those situations where international courts do defer to domestic judgments, we can qualify the deference to domestic courts as a process of recognition that resembles the second, conflict-of-law sense that we identified earlier: acceptance of domestic judgments as authoritative settlement of international claims.

Recognizing a judgment of a domestic court as an authoritative settlement of a dispute does not mean that such a decision is legally binding in international law. If a domestic court nullifies an act of government, orders a government to take certain actions to remove a conflict with an international obligation, or provides for a criminal sanction, such decisions derive from domestic law and their legal effects are confined to the domestic legal order.⁷⁸ In this respect it cannot be said, as may be the situation in private international law, that a domestic judgment has the *same* effect in international law as it does in the state in which it was given.

However, the fact that a judgment of a domestic court is not binding in international law does not make it irrelevant. The legally binding nature of a rule is only one form of authority.⁷⁹ International institutions may accept the outcome as being in conformity with international law and dispositive for the dispute in question. In that case, the judgment is not binding, but it certainly is more than a 'fact' and becomes part of the larger system of settlement of international disputes.⁸⁰

Independence as a Basis of Effectiveness

Having discussed the general concept of independence as a rule of recognition and having indicated some of the uses of the concept as a rule of recognition, we now can examine the basis of the rule. Why is it that international institutions and states resort to independence as an indicator for the authority of domestic judgments?

⁷⁸ This is indeed the logical consequence of the 'domestic law as fact' doctrine; see *supra* note 81; see also *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, Oct. 12, 2005, available at <ita.law.uvic.ca/documents/Noble.pdf> (visited 1 July 2008), holding that the rule that a breach of a contract by a State does not generally give rise to direct international responsibility on the part of that State, 'derives from the clear distinction between municipal law on the one hand and international law on the other ... , two separate legal systems (or orders) the second of which treats the rules contained in the first as facts.'

⁷⁹ Frederick Schauer, 'Positivism as Pariah' in George (ed.), *The Autonomy of Law*, *supra* note 34, 31-55 at 53.

⁸⁰ See Pierre-Marie Dupuy, 'The Unity of Application of International Law at the Global Level and the Responsibility of Judges', 1-2 *European Journal of Legal Studies* (2007) 1-23 at 3 (noting that '[i]n a strict sense, international law could only be considered monist with primacy of national laws if it saw them as legal orders. The situation is however ambiguous, given that international law goes beyond the simple fact of national law, and recognises as internationally valid certain situations resulting from the application of national rules', referring to Santulli, *Le statut*, *supra* note 39).

A key reason why international institutions may find independence a relevant criterion in assessing the value of domestic judgments is that independence may enhance the prospects of effective application of international law. Independence would guarantee that a court settles a dispute fairly, based on, and in conformity with, (international) law, rather than on, for instance, political pressures.⁸¹ Thus, the principle of independence may be able to break with the tradition of nationalistic domestic courts, which have done much to undermine the effectiveness of international law, and may assure relevant actors that domestic courts can be trusted to adjudicate claims in accordance with international law.⁸²

Most discussions of the principle of independence concern its role in the human right to a fair trial. But that is only one dimension of the principle of independence⁸³ and indeed seems too narrow to explain the uses of independence as a basis for allocating authority between international and domestic courts. The two meanings of independence should be distinguished. This can be illustrated by the Security Council's internationalization of the Hariri tribunal by Resolution 1757 (2007). The Council primarily sought to ensure that suspects are effectively tried, unhampered by political influence.⁸⁴ The protection of the right to a fair trial in the tribunal's statute is normatively and legally separated from the ambition to insulate the tribunal from domestic political powers that may protect, for instance, interests of Syria.⁸⁵ The fact that the aim of effectiveness is not always the same as the aim of a fair trial is also reflected in the ICC Statute. The ICC may take over prosecution

⁸¹ Theodor Meron, 'Judicial Independence and Impartiality in International Criminal Tribunals', 99 *American Journal of International Law* (2005) 359-369 at 360 (noting that the most important aspect of judicial independence is that 'independent courts are the indispensable means of holding a government to its nation's laws'). See also Peter H. Russell, 'Towards a General Theory of Judicial Independence', in Peter H. Russell and David M. O'Brien, *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (University Press of Virginia, 2001) at 10 (noting that the fundamental rationale of the principle of independence is that we can submit disputes 'to judges whose autonomy or independence gives us reason to believe that they will resolve the issues fairly, according to their understanding of the law, and not out of fear of recrimination or hope or reward'); *Ringelsen v. Austria*, Application No. 2614/65, ECtHR, Judgment, 16 July 1971, para. 95.

⁸² Benedetto Conforti (rapporteur), *The Activities of National Judges and the International Relations of their State* (Institute of International Law, Milan, 1993) at 1: 'The IDI noted that 'in order to attain within each State a correct application of international law through its own methods of interpretation within each State, it is appropriate to strengthen the independence of national courts in relation to the Executive.'

⁸³ See for a typology, distinguishing fair trial from effective application of the law, Meron, 'Judicial Independence', *supra* note 81 at 360

⁸⁴ Beyond this, independence (and the concept of the rule of law of which it is part) may also contribute to peace and security; see Simon Chesterman, 'An International Rule of Law?', 56 *American Journal of Comparative Law* (2008), available at SSRN: <ssrn.com/abstract=1081738> at 14.

⁸⁵ Statute of the Special Tribunal for Lebanon, Annex to UNSC S/Res 1757 (2007), Art. 2(3) and (4), 5(2), 9(1), 16(2), 17, 18(2).

when domestic courts are not independent and shield defendants, but the Statute is neutral in regard to the fair trial of defendants.⁸⁶ Thus, if specialised courts of Sudan prosecute persons responsible for atrocities in Darfur and would sentence unrepresented defendants to death after secret trials involving confessions obtained through torture, such trials may be effective in terms of prosecution, and the outcome of such a case will then be left intact by the ICC (though not necessarily by other international (human rights) courts).⁸⁷

Though these two bases of independence are to be distinguished, they may, of course, overlap in the sense that effectiveness of international law generally will extend to the application of human rights standards, including the obligation to provide for a fair trial. In this sense, the *Munyakaazi* decision⁸⁸ is at the same time an example of an international court seeking effectiveness of international standards and of an international court seeking to ensure a fair trial. The point is that the former meaning is broader and need not always overlap with the right to a fair trial.

If international institutions are interested in effectiveness as a basis for furthering effectiveness, this generally will mean effectiveness of international law. However, the example of the Lebanon tribunal indicates that this by no means is necessary. The interest may be confined to effective prosecution under domestic law, even though that conforms to an international expectation.

Due to its potential contribution to effective application of the law, the principle of independence is key to the rule of law. In its minimal form, as government limited by law,⁸⁹ the rule of law requires that the law is applied and effective – in particular against the state. Judicial independence is part and parcel of this definition of the rule of law.⁹⁰ This holds true in any case for the domestic level. Arguably, the distinct nature of the international legal order implies that the rule of law at the international level does not depend to the same extent on the presence of an international judiciary.⁹¹ However, even if one accepts that an independent judiciary is not a necessary condition for an international rule of law, it is a sound premise that independent courts help to further the international rule of law.⁹²

⁸⁶ Art. 17(2)(c) of the ICC Statute. Note that while the requirement of independence is separated here from the shielding of a suspect, the distinction between these concepts is thin. In cases of shielding by a judicial proceedings, that proceedings will not be independent also; see *infra* text to note 157.

⁸⁷ Heller, 'The Shadow Side', *supra* note 70, at 255.

⁸⁸ *Supra* note 1.

⁸⁹ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2005) at 114-119.

⁹⁰ *Ibid.*, at 124.

⁹¹ Chesterman, 'An International Rule of Law?', *supra* note 84, at 25-26.

⁹² Arthur Watts, 'The International Rule of Law', 36 *German Yearbook of International Law* (1993) 15-45 at 36; Bernhard Zangl, 'Is there an Emerging Rule of Law?', 13 *European Review* (2005) 73-91; Stéphane Beaulac, *An Inquiry into the International Rule of Law* (EUI Max Weber Programme Series Working Paper

Moreover, because independent courts remain relatively scarce at international level, independent domestic courts that can enforce international law against 'its' government could contribute to the rule of law at the international level.⁹³

The assumption that judicial independence furthers effectiveness is subject to one major caveat. The effective application of international law to the facts by domestic courts does not necessarily lead to effectiveness 'on the ground'. It is commonly thought that independence leads to effectiveness because effectiveness makes judicial judgments more acceptable for the parties, who may therefore be more willing to act in accordance with the judgment.⁹⁴ However, in the type of cases with which we are concerned here, often implicating the government, the assumption that effectiveness vis-à-vis the government would induce compliance may be open to doubt. The large number of cases in which the European Court of Human Rights (ECtHR) found Russia to be in breach of the Convention because of the failure of the executive to comply with domestic judgments illustrates that independence of courts only leads to effectiveness in practice if the government is willing to comply with the judgments.⁹⁵ Overzealous exercise of independent powers may not necessarily result in decisions that are effective. Indeed, courts that care about the effect of their rulings may prefer to exercise their independent powers moderately because that is the (implicit condition) upon which they have been granted those powers.⁹⁶ An independent judiciary may be less effective in terms of its ability to compel the executive to act when it adopts a doctrine that is too restrictive.⁹⁷

No. 2007/14, 2007) <ssrn.com/abstract=1074562> (visited 1 July 2008) at 23; Rosalyn Higgins, *The ICJ, the United Nations System, and the Rule of Law* (speech held at the London School of Economics 2006).

⁹³ Eyal Benvenisti, 'Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on "The Activities of National Courts and the International Relations of their State"', 5 *European Journal of International Law* (1994) 423-439 at 424.

⁹⁴ Shetreet, *Judicial Independence*, *supra* note 26, at 590-591.

⁹⁵ *Non-enforcement of domestic judicial decisions in Russia: general measures to comply with the European Court's judgments*, Memorandum prepared by the Department for the execution of the European Court's judgments (Application of Article 46 of the ECHR), CM/Inf/DH(2006)19 rev3 of 4 June 2007, available at <wcd.coe.int/ViewDoc.jsp?Ref=CM/Inf/DH(2006)19&Language=lanEnglish&Ver=rev3> (visited 1 July 2008).

⁹⁶ See Benvenisti, 'Judges and Foreign Affairs', *supra* note 93, at 3 (noting that 'Judicial independence in general and the power of judicial review in particular are thus two components of a "deal" between the court and the other branches of government.')

⁹⁷ Benvenisti, 'Judges and Foreign Affairs', *supra* note 93, at 4. Posner and Yoo make a similar argument in relation to international tribunals; see Eric Posner and John Yoo, 'Judicial Independence in International Tribunals', 93 *California Law Review* 1 (2005) 1-74 at 12.

The fact that international institutions may be more willing to accept domestic judgments as authoritative if they have been rendered by independent courts helps to explain why states are actually providing for such independence. The rule of recognition may exert a compliance pull on states by inducing them to provide, and rewarding them for providing, for independence.⁹⁸ From the perspective of states, granting a court independence displays commitment and can persuade international institutions to accept judgments of that court as authoritative.⁹⁹

This persuasive power of independence has commonly been applied in horizontal relations between states, and in relation to other actors, such as corporations. It is then thought that respecting judicial independence (even though it may require a state to sacrifice some policy freedom that is brought by unfettered discretion in foreign affairs) makes the state a more attractive and reliable partner. In particular in those cases where no effective international mechanisms are in place to hold states to their promises, judicial independence may allow governments to make credible commitments towards other states and expect to receive commitment in turn.¹⁰⁰ If a state can demonstrate that their policies and laws are scrutinized by independent courts, interested actors would have more reason to find the promises of that state credible and may be more willing to enter into treaties, contracts for

⁹⁸ Jann K. Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law', 1 *Journal of International Criminal Justice* (2003) 86-113 at 88; Jann K. Kleffner, 'Complementarity as a Catalyst for Compliance' in Jann K. Kleffner and Gerben Kor (eds), *Complementary Views on Complementarity* (TMC Asser Press, The Hague/Cambridge University Press, 2006) 79-104. See also *Prosecutor v. Ademi and Norac*, Case IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11bis, 14 September 2005, para. 57 (noting that the monitoring mechanism was primarily created to ensure that a case 'would be diligently prosecuted once it had been referred').

⁹⁹ Alternative explanatory factors may exist. A cynical explanation may be that independent judicial review may allow governments to deflect blame for unpopular policies onto the courts; see Matthew C. Stephenson, 'Court of Public Opinion: Government Accountability and Judicial Independence', 20 *Journal of Law, Economics and Organization* (2004) 379-399. For instance, a state allowing its courts to prosecute a domestically popular rebel leader could say it were the courts that pursued prosecution. This may have been the strategy of the Sierra Leone government to support the Sierra Leone Tribunal with a view to deflection of blame to the UN and the SCSL. However, while this factor may in particular cases play a role, it is unlikely to provide a primary explanation. It rests on assumptions on public awareness and knowledge on the role of courts in matters of international law that seem speculative (*ibid.* at 394). Alternatively, the population may accept that international law is different and that full independence in the application of international law is beyond what is possible. Compare Jessica Conser, 'Achievement of Judicial Effectiveness through Limits on Judicial Independence: A Comparative Approach', 31 *North Carolina Journal of International and Commercial Regulation* (2005) 255-335 (discussing effects of lack of independence in Japan on citizens perceptions).

¹⁰⁰ Bernd Hayo and Stefan Voigt, 'Explaining de facto Judicial Independence', 27 *International Review of Law and Economics* (2007) 269-290.

foreign investments or treaties, or other arrangements,¹⁰¹ and they may be more inclined to make similar promises to that state.¹⁰²

In the horizontal setting this argument suffers from certain problems. The powers of domestic courts to apply international law are highly uneven throughout the world. Limitations by doctrines such as transformation, direct effect or political questions make the lack of independence a relatively marginal problem and make any reliance on an assumption that independent courts of the other states would guarantee compliance uncertain. They place states in a prisoner's dilemma and it is not obvious that unilaterally granting the courts independence leads to an optimal outcome for the forum state.¹⁰³ Indeed, the reverse may well be true: the fact that there is little certainty that partners allow independent judicial review makes it an unattractive option for states to do so. This explains the virtual absence of domestic judicial review of government policy in WTO matters.¹⁰⁴

The persuasive power of independence may have a distinct role, however, in the vertical relations between states and international institutions. This relationship is less governed by reciprocity¹⁰⁵ and states (and their courts) are less likely to find themselves in a prisoner's dilemma. Independence may persuade international institutions to defer to domestic decisions and accept them as authoritative settlements of disputes. In criminal law, a state that grants its courts independence gains some control over domestic criminal justice as it may prevent 'intervention' by international criminal courts. In human rights law and in cases involving foreign nationals, judicial independence protects states' control over adjudication by forcing claimants to exhaust local remedies, thereby minimizing the risk that the state will be

¹⁰¹ See for a critical discussion of the possible economic effects of the rule of law (including independence), see 'Economics and the Rule of Law. Order in the Jungle', *The Economist* (May 13, 2008), at <www.economist.com/displaystory.cfm?story_id=10849115> (visited 1 July 2008).

¹⁰² Lars P. Feld and Stefan Voigt, 'Economic Growth and Judicial Independence: Cross-Country Evidence using a New Set of Indicators', 19 *European Journal of Political Economy* (2003) 497-527 (arguing that by making governments stick to their promises, independent courts can make commitments to protect rights credible, leading to positive effects on investment).

¹⁰³ Benvenisti, 'Judicial Misgivings' *supra* note 18, at 175 (noting that if national courts could have been assured that courts in other jurisdictions would similarly enforce international law, they would have been more willing to cooperate, but that 'in the current status of international politics, such cooperation is difficult to achieve, and rational judges act like the prisoner who cannot be sure that his or her fellow prisoner will cooperate').

¹⁰⁴ See discussion in Gert Zonnekeyn, *Direct Effect of WTO Law* (Cameron May, London, 2008).

¹⁰⁵ Although some element of reciprocity may be inherent in the notion of 'judicial dialogue' between domestic and international courts; see e.g. Claire L'Heureux Dube, 'The Importance of Dialogue: Globalization and the International Impact of the Rhenquist Court', 34 *Tulsa Law Journal* (1998-1999) 15-40.

engaged in international claims.¹⁰⁶ Where international claims are made, for instance before international human rights courts, independence may induce international courts to defer to — and, in the terminology explained earlier, accept and recognize — judgments of domestic courts.¹⁰⁷

While these considerations may be relevant primarily for states making strategic choices with regard to the independence of courts, they may also be employed by courts themselves.¹⁰⁸ Within the scope left by domestic law, a domestic court can choose to restrict independent review, for instance by resorting to the judicial doctrine of non-justiciability,¹⁰⁹ or to maximize it, for instance through the doctrine of legitimate expectations, effectively grabbing power from the political branches.¹¹⁰

An independent role of domestic courts vis-à-vis the political branches may be helped by the empowering effect of international law.¹¹¹ Domestic courts can use international law as ‘higher law’ to strengthen their power¹¹² and engage in judicial

¹⁰⁶ This also underlies the local remedies rule, see e.g. Amerasinghe, *Local Remedies in International Law*, *supra* note 8, at 63.

¹⁰⁷ See *supra*, text accompanying notes 32-40 and 55-80..

¹⁰⁸ It is noteworthy that the Bangalore Principles on Judicial Conduct focus on the conduct of the courts rather than the state, and postulate that ‘A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.’ The Bangalore Principles of Judicial Conduct, E/CN.4/2003/65 (25 November 2002) Annex at 18; Value I at 20.

¹⁰⁹ This holds for the doctrine of non-justiciability, for instance, as applied in the UK. On the basis of a judge-made doctrine, the courts have held that ‘in the context of a situation with serious implications for the conduct of international relations, the courts should act with a high degree of circumspection in the interests of all concerned. It can rarely, if ever, be for judges to intervene where diplomats fear to tread’, see House of Lords, *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Pirbhai*, 107 ILR 462 (1985) 479, per Sir John Donaldson MR. Arguably, the same holds for the doctrine of self-executing treaties in the United States; when ‘[treaty] stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect.’ *Whitney v. Robertson*, 124 U. S. 190, 194 (1888).

¹¹⁰ As in the decision of the Australian High Court in *Minister for Immigration and Ethnic Affairs v. Teoh*, (1995) 183 CLR 273. A narrower approach was taken in *Re Minister for Immigration and Multicultural and Indigenous Affairs, Ex parte Lam*, (2003) 214 CLR 1, ILDC 203 (AU 2003) (holding that “If a doctrine of “legitimate expectation” was to remain part of Australian law, it would be better if it were applied only in cases in which there is an actual expectation, or that at the very least a reasonable inference that the person concerned could reasonably have believed and expected that certain procedures would be followed’ (para. 145)).

¹¹¹ Joseph Weiler, ‘The Transformation of Europe’, 100 *Yale Law Journal* (1991) at 2410-2431; Amichai Cohen, ‘Domestic Courts and Sovereignty’ in Yuval Shany (ed.), *Sovereignty, Supremacy and Subsidiarity* (Hart Publishing, Oxford, 2008).

¹¹² Domestic decisions that expressly recognize the effect of the international principle of supremacy at domestic level are rare. See for an exception: *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 is compatible with the International Convention on Facilitation of International Maritime Traffic, which provides that states shall not impose any penalty upon ship-

review in cases where there used to be discretion.¹¹³ Thereby, they also may help convince international courts to defer to domestic courts.¹¹⁴

Conversely, domestic courts that lean too much to the side of the government may fail to convince an international court to defer to their judgments. For example, it has been said that the Dutch Council of State would, in a case concerning migration law, be too ‘governmental’.¹¹⁵ If a migration law case in which a Dutch court would have sided with the government in a way that raises suspicions of lack of independence would come before the ECtHR, the Court might decline to give any weight to the judgment of the domestic court. It may find the Netherlands in violation of Article 6 of the ECHR. If no Article 6 claims have been made, the

owners if their passengers possess inadequate control documents. The Court derived from Latvia’s obligations 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 and proceeded to set aside the domestic law. See also a Belgian case that relied on the general principle of the supremacy of international law: *ING België v B I*, Appeal Judgment, Nr C.05.0154.N; ILDC 1025 (BE2007),

¹¹³ It should be added that in particular cases it may be the executive rather than the courts that takes an interest in effective treaty application. Independence of a court vis-à-vis the executive may then curtail the power of the executive to implement the treaty and would thus limit, rather than further, effectiveness. This is what happened in the *Medellin* case, where the US Supreme Court took an independent stand against the executive branch, and held that it could not give effect to the order of President Bush who had directed state courts to implement the ICJ’s *Avena Judgment*. *Medellin v. Texas*, Appeal Judgment, No 06–984; 552 US ___ (2008); ILDC 947 (US 2008), 25 March 2008. In 2005, President Bush had issued a Memorandum to the US Attorney General, providing: ‘I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.’ (*ibid.* at para. 15). The Court found that The President lacked authority to order state courts to comply with the ICJ’s judgment; *ibid.* paras 77–78.

¹¹⁴ Anne-Marie Slaughter, ‘Judicial Globalization’, 40 *Virginia Journal of International Law* (2000) 1103–1124 at 1105–1108; Eyal Benvenisti, ‘Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts’, forthcoming in 102 *American Journal of International Law* (2008). On the interplay between a supreme court (as the principal) and lower courts (as its agents), see McNollgast, *Conditions for Judicial Independence* (Research Paper No. 07-43, Apr. 2006) (available at <ssrn.com/abstract=895723> (visited 1 July 2008); McNollgast, ‘Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law’, 68 *Southern California Law Review* (1995) 1631–1683. The dependence of an international tribunal on national courts that are not formally bound by its decisions is even greater; see Juliane Kokkot, ‘Report on Germany’ in Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds), *The European Court and National Courts – Doctrine and Jurisprudence* (Hart Publishing, Oxford, 1998) 77; Bruno de Witte, ‘Direct Effect, Supremacy, and the Nature of Legal Order’, in Paul Craig and Grainne de Burca (eds), *The Evolution of EU Law* (Oxford University Press, 1999) 177–213.

¹¹⁵ T. P. Spijkerboer, ‘De Afdeling en de rechtsstaat. Het hoger beroep in vreemdelingenzaken’, *Nederlands Juristenblad* (2002) 2982–3088. See also K. Groenendijk, *Een Venijnig Proces* (SDU Uitgevers, The Hague, 2008).

Court need not make a finding on the lack of independence of the domestic court, but simply on the merits find a breach of the Convention that domestic courts have not been able to correct.¹¹⁶ Also in this case, it can be said that the domestic court did not exploit the possibility to convince the ECtHR to defer to its judgments.

Independence as an Obligation

The degree to which states choose to grant independence to their courts is not only a function of strategic considerations to maintain control. It also will be influenced by the existence of international obligations to secure independent courts. This section examines the scope of such an obligation and its possible contribution to the allocation of power between international and domestic courts.

International law contains a variety of obligations aiming to secure independence of domestic courts,¹¹⁷ in particular in human rights law¹¹⁸ and in the principle of denial of justice.¹¹⁹ The status of the principle of independence beyond human rights law and the principle of denial of justice is somewhat uncertain. It may be said that independence of the judiciary is a general principle of law¹²⁰ or perhaps a principle of customary law, as all major legal systems, and perhaps all states, appear to formally embrace the principle. However, even accepting the independence of the judiciary as a principle of general international law, despite the very imperfect application of this principle in practice,¹²¹ it seems most doubtful that this applies in full to the domestic judicial application of international law. There is a

¹¹⁶ It was only when an asylum seeker lodged an application directly with the ECtHR, without exhausting remedies in the Council of State, that the Court could determine that the remedies in the Council of State could not be considered as effective and need not be exhausted. *Salah Sheekh v. the Netherlands*, Application No. 1984/04, Judgment, 11 January 2007, paras 123-126.

¹¹⁷ See for an overview Ben Olbourne, 'Independence and Impartiality: International Standards for National Judges and Courts', 2 *The Law and Practice of International Courts and Tribunals* (2003) 97-126.

¹¹⁸ Art. 14 of the ICCPR. See for discussion e.g. Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, Engel, Khel am Rhein, 2005) at 237; Nihal Jayawickrama, *The Judicial Application of Human Rights Law* (Cambridge University Press, 2002) at 516. In the European system independence is protected by Art. 6(1) of the ECHR. See for the interpretation of the requirement by the ECtHR e.g. *Campbell and Fell v. United Kingdom*, Application No. 7819/77 and 7878/77, Judgment, 28 June 1984, para. 78.

¹¹⁹ Paulsson, *Denial of Justice*, *supra* note 14, chap. 6.

¹²⁰ Constitutional Court of Serbia, Constitutional Review of certain amendments to the Serbian Law on Judges Official Gazette of the Republic of Serbia, ILDC 31 (YU 2003) (holding that provisions of a domestic statute that lowered the achieved level of autonomy and independence of the courts and judges 'is in violation of the generally accepted principle of international law proclaimed in the European Charter on the Statute for Judges adopted in Strasbourg between 8 and 10 July 1998')

¹²¹ Jan Paulsson, 'Enclaves of Justice', 4 *Transnational Dispute Management* (2007) 1-13.

widespread practice of limitations of judicial independence in regard of domestic law.¹²² International law cannot ignore this practice.

The *Institut de droit international* recommended that '[n]ational courts should be empowered by their domestic legal order to interpret and apply international law with full independence.'¹²³ However, practice appears too inconsistent to support such a principle as it applies to international law. It remains a cornerstone of international law that states have the right to determine their own internal organization. To be sure, the lack of an independent judiciary may have a variety of political and also legal consequences (in terms of their acceptance or non-acceptance by international courts), and several international institutions, including the UN,¹²⁴ notably through the UN Special Rapporteur on Judicial Independence, as well as regional organizations such as the Council of Europe,¹²⁵ seek to strengthen the independence of the judiciary. Yet, it does not seem that the absence of an independent judiciary in itself constitutes an internationally wrongful act. Thus, outside the sphere of human rights law or other international obligations covering the issue, the practice of so-called executive certificates, the reliance on interpretation by the executive and the political questions doctrine as such are not prohibited under international law.

Where obligations to provide for an independent judiciary do exist, notably thus in human rights law and as the principle of the denial of justice, they may provide a firmer basis for decisions on the (non-)recognition of domestic decisions or on the (non-)allocation of cases to the domestic level. They may create additional incentives for states to provide for independence and may convince international courts. They also may provide a stronger basis for international courts to use independence as a criterion for allocation and deference.

The relevance of such obligations for present purposes is limited, however, in three respects. First, the obligations to provide for independent courts by no means apply to all situations where domestic courts are called upon to apply international law. Human rights obligations are confined to civil and criminal cases or 'suits at law'. While the scope of this clause has been extended to cover also claims

¹²² See below the discussion on 'politics' in the chapter on the contents of the principle of interpretation.

¹²³ *Annuaire* vol. 65(II), 319 (1993). See also ILA, Report of the 68th Conference, p. 669.

¹²⁴ 'In Larger Freedom: Towards Security, Development and Human Rights for All', Report of the Secretary-General of the United Nations by Heads of State and Government, A/59/2005, September 2005, para. 133; Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, S/2004/616, 3 August 2004, para. 21.

¹²⁵ Ernst-Ulrich Petersmann, 'Multi-Level Judicial Governance of International Trade Requires a Common Conception of Rule of Law and Justice', 10 *Journal of International Economic Law* (2007) 529-551.

pertaining to public or administrative law,¹²⁶ and, moreover, applies to large parts of human rights law itself,¹²⁷ there will remain many situations where domestic courts are called upon to give effect to a rule of international law, and where questions of independence falling outside the scope of international human rights law may arise.

It is of interest to note, though, that although the principle of independence as a principle of human rights law does not expressly apply to international law, it does cover particular strategies to leave the application or interpretation of international law to the political branches. In *Beaumartin v. France*, the ECtHR held that the practice of French courts, when called upon to interpret a treaty, to refer a preliminary question on the interpretation of that treaty to the minister, violated Article 6 of the European Convention as the case was not heard by an 'independent tribunal with full jurisdiction.'¹²⁸ The *Conseil d'Etat* thereupon discontinued this practice and now interprets international agreements itself; while it still may seek the opinion of the executive, it does not regard itself as bound by it. When the French courts continued to refer cases where the reciprocity clause under Article 55 of the French Constitution was concerned, the ECtHR held in *Chevrol v. France* that this practice was in violation of Article 6 as well, as it deprived the courts of the power to examine and take into account factual evidence that could have been crucial for the resolution of the dispute before them.¹²⁹ These judgments show that the obligation to provide for independent courts as part of human rights law may support the independence of courts in regard to the application of rules of international law other than human rights treaties themselves.

¹²⁶ Clare Ovey & Robin White, *Jacobs and White's European Convention on Human Rights* (4th edn, Oxford University Press, 2006) 168-169.

¹²⁷ Article 13 of the ECHR provides for the right to an effective remedy against violations of the Convention, and the Court has held that violations of Article 13 are absorbed by Article 6. Ovey & White, *Jacobs and White's*, *supra* note 126, at 467-468. The same will apply under Article 2(3) of the ICCPR; see Human Rights Committee, General Comment 31, the Nature of the General Legal Obligation Imposed on State Parties to the Covenant, para. 15, available at <[www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.13.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument)>. Indeed, the Special Rapporteur of the UN on the independence of the judiciary has consistently maintained that the principle of independence underlies the application of human rights law as a whole.

¹²⁸ *Beaumartin v. France*, Application No. 15287/89, Judgment, 24 November 1994, para. 38;

¹²⁹ *Chevrol v. France*, Application No. 49636/99, Judgment, 13 February 2003, para. 83. The Court found in para. 82 that in a judgment of 9 April 1999, the Conseil d'Etat had held that it was not its task to assess whether Algeria had implemented the 1962 Government Declaration or to draw its own inferences in the event that the declaration had not been applied; it based its decision solely on the opinion of the Minister for Foreign Affairs and that, '[i]n so doing, the Conseil d'Etat considered itself to be bound by the opinion, thereby voluntarily depriving itself of the power to examine and take into account factual evidence that could have been crucial for the practical resolution of the dispute before it' ..

The human rights obligation to provide for judicial independence also may cover other judicial strategies to leave the determination or application of international obligations to political branches may be covered by. Where there exist unclear distinctions between the courts and the executive this may violate the principle of (objective) impartiality, and may be seen as a bias of the court *vis-à-vis* the government as a party to the dispute.¹³⁰ In *Rogerson v. Australia*, the Human Rights Committee (HRC) held that impartiality of the court implies that judges must not harbour preconceptions about the matter before them, and they must not act in ways that promote the interests of one of the parties.¹³¹ In particular cases, a decision of a court to leave remedies to the political branches may violate the right to a remedy.¹³² Application of treaty obligation *vis-à-vis* private individuals also may be subject to the principle of non-discrimination.¹³³

Second, even where international obligations to provide for an independent judiciary are applicable, at best they create a presumption that a domestic court can be relied upon. In the *Munyakazi* decision, the ICTR noted that Rwanda had accepted international obligations guaranteeing the right to be tried before an independent tribunal, but nonetheless found ‘sufficient guarantees against outside pressures’ to be lacking in Rwanda.¹³⁴

Third, as indicated above, the basis of the obligation to provide for a fair trial is different from the use of independence as a criterion to allocate power between international and domestic courts. The (non-)recognition of a domestic judgments is not based on the obligatory nature of independence, but rather on its potential

¹³⁰ The HRC held in *Babamonde v. Equatorial Guinea* that ‘a situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal within the meaning of article 14, paragraph 1, of the Covenant.’ (468/1991), ICCPR, A/49/40 vol. II (20 October 1993) 183 (CCPR/C/49/D/468/1991) at para. 9.4.

¹³¹ HRC, (802/1998), ICCPR, A/57/40 vol. II (3 April 2002) 150 (CCPR/C/74/805/1998) at para. 7.4.

¹³² But see *Auerbach v. Netherlands*, Application No. 45600/99, Admissibility Decision, 29 January 2002, in which the applicant argued that the Dutch Supreme Court finding a violation of Art. 14 of the ECHR but only referring to the legislator the task of laying down new rules did not constitute an effective remedy. The Court accepted that in the specific circumstances of the case, ‘and bearing in mind that the Court itself has held in various cases that a finding of a violation in itself constituted adequate just satisfaction under Article 41 of the Convention for any non-pecuniary damages suffered, ... the Supreme Court’s finding of a violation of the applicant’s rights under Article 14 of the Convention in conjunction with the cost orders issued in the applicant’s favour, and its instruction to the legislator to enact new legislation which has in fact occurred, may be regarded as adequate redress’.

¹³³ The HRC has suggested that if a treaty created individual entitlements, by virtue of Article 26 of the ICCPR such entitlements have to be applied without discrimination. *O’Neill and Quinn v. Ireland* (1314/04) (CCPR/C/87/D/1314/2004 (2006); 14 IHRR 55 (2007)) para. 8.4:

¹³⁴ *Supra* note 1.

contribution to effectiveness. Moreover, (non-)recognition does not involve a determination of the conformity of a particular judicial proceeding with an international obligation. If the ICC determines that a domestic court has not prosecuted a suspect in an independent manner that did not shield the suspect, this does not say anything about whether that trial was in conformity with the obligations of the forum state.

Balancing Independence with Other Interests

The hypothesis underlying this article that the principle of independence can function as a rule of recognition in international law, based on the contribution of independence to effectiveness of the law, is vulnerable in one major aspect. Effectiveness of international law obviously never has been an absolute value for states, but all too often has been traded for other interests. This is bound to affect the use of the principle of independence as a basis for allocating adjudicative power.

In particular cases, international institutions and other interested actors may balance the (instrumental) value of independence against other interests and find limitations of independence a price that is worth paying. A case in point is the trial of Saddam Hussein. Though the court that tried Hussein could not be qualified, according to many assessments, as an independent court,¹³⁵ his trial by an Iraqi court could have served an interest in itself,¹³⁶ which, for relevant actors, might have outweighed problems of independence.¹³⁷ Of course, relevant actors are unlikely to acknowledge such a trade off expressly — despite much evidence to the contrary, the United States maintained that the trial was conducted by an independent court.¹³⁸ A possible other example is the use of *gacaca* courts in Rwanda, where it

¹³⁵ See e.g. Miranda Sissons and Ari S. Bassin, 'Was the *Dujail* Trial Fair?', 5 *Journal of International Criminal Justice* (2007) 272-286 at 276 (noting that 'The Higher National De-Ba'athification Commission has repeatedly intervened in the Tribunal's judicial assignments and removals' and highlighting several incidents of political pressure).

¹³⁶ Foreign Secretary Margaret Beckett of the United Kingdom said that 'It is right that those accused of such crimes against the Iraqi people should face Iraqi justice', *Government hails Saddam verdict*, at <news.bbc.co.uk/2/hi/uk_news/6118134.stm> (visited 1 July 2008).

¹³⁷ It should of course be noted that criticism was widespread and it is impossible to say that the international community would have accepted the trial and the outcome as satisfying international standards; both the UN High Commissioner for Human Rights and the UN Special Rapporteur on extrajudicial, summary or arbitrary executions called for improvements of the Iraqi justice system; see 'UN human rights expert deplors Saddam's trial and execution; calls for legal overhaul' at <www.un.org/apps/news/story.asp?NewsID=21155&Cr=iraq&Cr1> (visited 1 July 2008).

¹³⁸ 'Verdict shows Iraq progress, says US' at <www.news.com.au/story/0,23599,20707850-1702,00.html> (visited on 1 July 2008) (citing White House spokesman Tony Snow as saying on NBC television 'You now have absolute proof that you've got an independent judiciary in Iraq').

may be doubted whether these give effective application to international legal standards, but that by and large seems acceptable to international community.¹³⁹

It also is to be considered that all too often there is no real alternative other than relying on the domestic level. If domestic proceedings are disqualified because of a lack of independence, an international court will have to do what it believes the domestic court should have done. But international courts will not have enough capacity and, moreover, are rarely able to produce the effects that will resonate in domestic society.¹⁴⁰ It may, for instance, be questioned whether the domestic courts to which the ICTY has referred cases as part of its completion strategy in all cases were fully independent and able to complete the trials in a similar manner as the ICTY would have done.¹⁴¹ But even if there would be shortcomings, these would have to be balanced against, first, the fact that the domestic courts could provide benefits that the ICTY could not and, second, that the ICTY for sheer reasons of capacity could not have conducted these trials. The value of domestic proceedings thus may outweigh the value of full independence.

Trading the interest of full effectiveness of the law against other interests can clash, of course, with the other dimension of independence: independence as a core element of the human right to a fair trial. The latter is sometimes seen as an absolute right.¹⁴² That probably means that to the extent that a particular pressure exerted against the courts is being qualified as being in conflict with the principle of independence, human rights treaties do not allow for the exceptions that may apply to some other human rights.¹⁴³ However, for the actors that make decisions or accept decisions in such cases of the Saddam Hussein trial or the *gacaca* court—and perhaps the same applies to the ECCC in Cambodia¹⁴⁴—independence is an interest that can be traded, and independence as a component of the right to a fair trial and

¹³⁹ See Jacques Fierens, 'Gacaca Courts: Between Fantasy and Reality', 3 *Journal of International Criminal Justice* (2006) 896-919.

¹⁴⁰ See for an excellent overview of the different impact of domestic and international trials, José E. Alvarez, 'Crimes of State/Crimes of Hate: Lessons from Rwanda', 24 *Yale Journal of International Law* (1999) 365-483 at 402-03, 466.

¹⁴¹ Sarah Williams, 'ICTY Referrals to National Jurisdictions: A Fair Trial or a Fair Price?', 17 *Criminal Law Forum* (2006) 177-222.

¹⁴² *González del Río v. Peru* (263/1987), ICCPR, A/48/40 vol. II (28 October 1992) 17 (CCPR/C/46/D/263/1987) para. 5.2 (holding that: 'the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception').

¹⁴³ But as a general proposition, it is doubtful whether this applies for Article 6 of the ECHR as a whole: see e.g. *Al Adsani v. United Kingdom*, Application No. 35763/97, ECtHR, Judgment, 21 November 2001 (holding that '[t]he right of access to a court is not, however, absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation...').

¹⁴⁴ Linton, 'Safeguarding the Independence', *supra* note 21.

need not always be a driving force behind a decision to allocate judicial power to a domestic court.

Contents of the Principle of Independence

Until now, we have talked about independence in a rather loose way, as a principle that protects courts from outside pressures. In order to identify the potential role of the principle of independence as a rule of recognition, and to make it subject to empirical research, we need to identify its contents more precisely. What exactly should courts be protected from in order to make their judgments acceptable from the perspective of international law? The question is not easily answered. International law has not defined independence in specific terms.¹⁴⁵ The UN Basic Principles state that ‘the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.’¹⁴⁶ The definition does not indicate from whom such influences might come, nor their nature. Also the ICCPR and the three regional human rights conventions do not define the concept in specific terms. While the hard core of the concept may be uncontroversial (it would for instance cover instructions by political branches,¹⁴⁷ or termination of terms of office on political grounds,¹⁴⁸ beyond this much is unclear and will depend on case-by-case determinations.

The open-textured nature of the principle of independence, in particular in relation to the application of international law, is in part due to the fact that the domestic political, legal and cultural limitations on the power of courts to apply international law will vary. International law cannot but take these variations into account. This does not mean that the principle of independence, in general or in its manifestation of a rule of recognition, does not exist, but it does mean that international actors making assessments of the degree of independence that

¹⁴⁵ It should also be noted that the definition of independence for the purposes of the rule of recognition need not correspond exactly with the definitions of the human rights instruments, even though these may provide a useful starting point. Also for the ICC’s decisions on complementarity human rights law may be a point of reference; see e.g. the frequent references to human rights case law in the ‘Informal expert paper: The principle of complementarity in practice’, available at <www.icc-cpi.int/library/organs/otp/complementarity.pdf> (visited 1 July 2008).

¹⁴⁶ UN Basic Principles, *supra* note 25, principle 2.

¹⁴⁷ On instructions from government, see *Bülül v. Turkey*, Application No. 47297/99, ECtHR, Judgment, 22 May 2007, para. 23.

¹⁴⁸ *Thaler v. Austria*, Application No. 58141/00, Judgment, 3 February 2005; *Findlay v. United Kingdom*, Application No. 22107/93, Judgment, 25 February 1997, para. 73.

international institutions expect of a domestic court need to take into account the legal and political context in which the court operates.¹⁴⁹ Thus, the flexibility of the principle of independence is also underscored by the decision of the ICTR in the *Munyakazi* decision—does the fact that the Government did not cooperate with the ICTR necessarily indicate that it would have interfered with a domestic trial?¹⁵⁰—and by the different view points on the independence of the Iraqi court that tried Saddam Hussein.¹⁵¹

As a result of its somewhat undefined nature, the principle of independence may overlap with a number of related, yet distinct concepts. For instance, the line between independence and impartiality (requiring that courts and judges be unbiased)¹⁵² is thin. A court systematically siding with the government in the denial of refugee claims may be said to be biased and therefore not impartial, but may also be said to be subject to direct or indirect pressures from the community from which it stems. The ECtHR often examines the principles of independence and objective impartiality together¹⁵³ and we can consider the latter as a subset of independence.

The line between independence and the ‘right to a court’ is thin as well. The ECtHR has examined situations where the executive blocks the implementation of a judgment of a court in terms of the principle of right to court.¹⁵⁴ In other cases, the Court brought this under the principle of legal certainty.¹⁵⁵ However, one could say that independence requires that a court may assume that its judgments will be given effect. In that respect problems of legality can be subsumed under independence.¹⁵⁶

¹⁴⁹ Compare, in comparable terms but not limited to the application of international law: John Bell, ‘Judicial Cultures and Judicial Independence’, 4 *Cambridge Yearbook of European Legal Studies* (2001) 47 at 60.

¹⁵⁰ *Supra* note 1.

¹⁵¹ *Supra* note 138.

¹⁵² *Çiraklar v. Turkey*, *supra* note 25, para. 38 (holding that as to the condition of impartiality, there are two conditions to be applied: ‘the first consists in seeking to determine the personal conviction of a particular judge in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect’; see also *Findlay v. United Kingdom*, *supra* note 148, para. 73.

¹⁵³ *Çiraklar v. Turkey*, *supra* note 25 (stating that ‘[i]n the instant case it is difficult to dissociate impartiality from independence and the Court will accordingly consider them together’). See also *Findlay v. United Kingdom*, *supra* note 148, para. 73.; *Thaler v. Austria*, Application No. 58141/00, Judgment, 3 February 2005, para. 30.

¹⁵⁴ E.g. in *Pridatchenko and Others v. Russia*, Application Nos 2191/03, 3104/03, 16094/03, 24486/03, Judgment, 21 June 2007, para. 49.

¹⁵⁵ *Asanidze v. Georgia*, Application No. 71503/01, Judgment, 8 April 2004, para. 130 (holding that ‘the principle of legal certainty – one of the fundamental aspects of the rule of law – precluded any attempt by a non-judicial authority to call that judgment into question or to prevent its execution’).

¹⁵⁶ *Van der Hurk v. Netherlands*, Application No. 16034/90, Judgment, 19 April 1994, para. 54

In international criminal law, the concept of independence is closely related to the notion of 'shielding'. Under the ICC Statute, the Court shall determine that a case is admissible when the national decision was made for the purpose of shielding the person concerned from criminal responsibility, the proceedings were not conducted independently and impartially, and they were, or are being, conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.¹⁵⁷ But the concept of independence and shielding can overlap. A political decision that seeks to influence the court by shielding a perpetrator also results in a lack of independence of that court.

Independence is therefore a flexible concept. In seeking to understand the role of independence in making decisions of domestic courts acceptable in, or relevant to, the international legal order, independence should be considered together with adjacent principles. However, the very fact that independence overlaps with each of these other concepts shows that independence indeed is a core concept in the explanation of the allocation between international and domestic courts.

This section will examine the contents of the principle by distinguishing three dimensions to the independence of domestic courts: independence from domestic politics, independence from limitations determined by domestic law and independence from domestic values.

Politics

The core of the concept of independence of the domestic judiciary is that courts should be free from pressures from the political branches of the state. This holds both for pressure from the executive branch,¹⁵⁸ from the legislative branch¹⁵⁹ and from the parties (in the type of cases that we are concerned, these often also will be

¹⁵⁷ Art. 17 of the ICC Statute.

¹⁵⁸ *Ringeisen v. Austria*, *supra* note 81, para. 95; see also *Van der Hurk v. Netherlands*, *supra* note 156, para. 54 (holding that the power of the Crown of the Netherlands (part of the government) to deprive the judgements of the Industrial Appeal Tribunal, an administrative tribunal, of its effect to the detriment of an individual party, was incompatible with the principle of independence). See also HRC, *Bahamonde v. Equatorial Guinea* (468/91) (considering that 'a situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal within the meaning of article 14, paragraph 1, of the Covenant').

¹⁵⁹ *Assanidze v. Georgia*, *supra* note 155, para. 129 (holding that 'the rule of law and the notion of fair trial enshrined in Article 6 of the Convention preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute').

the state or the executive).¹⁶⁰ As such, the principle is closely related to the principle of the separation of powers.¹⁶¹

The requirement of independence from domestic political branches as a condition for allocation of adjudicative power or deference sets a high threshold. Judicial independence from politics remains weak throughout the world.¹⁶² The already abundant political threats to independence in domestic situations are multiplied with regard to international law. The horizontal structure of the international legal system and the resulting political dimensions of international law¹⁶³ limit the possibility, and perhaps the desirability, of full independence. It has been said that international tribunals should not be separated entirely from the political interests underlying them as this would undermine effectiveness. Posner and Yoo argue that 'states will be reluctant to use international tribunals unless they have control over the judges' and that 'independence prevents international tribunals from being effective'.¹⁶⁴

Moving international law into the domestic arena can only partly neutralize the political nature of international law. The general principle that courts tend to exercise their powers subject to the general limit of mutual respect between branches of government¹⁶⁵ applies *a fortiori* to international law. Powers of judicial review that the judiciary normally may possess against the political branches often do not to a full extent cover international law.¹⁶⁶ Judicial powers may be limited by the doctrine that the state should speak with one voice (that is: the voice of

¹⁶⁰ *Ringeisen v. Austria*, *supra* note 81, para. 95.

¹⁶¹ ECtHR, *Stafford v. United Kingdom*, Application No. 46295/99, Judgment of 28 May 2000, para. 78.

¹⁶² Paulsson, 'Enclaves of Justice', *supra* note 121. See also various chapters in Russell and O'Brien, *Judicial Independence in the Age of Democracy*, *supra* note 26. In the United States, Supreme Court justice Sandra Day O'Connor said that judicial independence was under the most serious threat in her lifetime, cited in W. H. Pryor Jr., 'Not so serious Threats to Judicial Independence', 93 *Virginia Law Review* (2007) 1759-1783.

¹⁶³ Martti Koskenniemi, 'The Politics of International Law', 1 *European Journal of International Law* (1990) 77-153.

¹⁶⁴ Posner and Yoo, 'Judicial Independence', *supra* note 97.

¹⁶⁵ Shetreet, *Judicial Independence*, *supra* note 26, at 635; Conser, 'Achievement of Judicial Effectiveness', *supra* note 99, at 344 (noting that 'a lack of complete judicial independence is tolerable and even desirable in every judicial system').

¹⁶⁶ John Yoo, 'Treaty Interpretation and the False Sirens of Delegation', 90 *California Law Review* (2002) 1305-1343 at 1305; Roger P. Alford, 'Misusing International Sources to Interpret the Constitution', 98 *American Journal of International Law* (2004) 57-69 at 59 (referring to the 'international countermajoritarian difficulty' that results from 'the strategy to utilize international law to interpret the constitution'); Barry Friedman, 'The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five', 112 *Yale Law Journal* (2002) 153-259; Benvenisti, 'Reclaiming Democracy', *supra* note 114; Robert Chesney, 'Disaggregating Deference: The Judicial Power and Executive Treaty Interpretation', 92 *Iowa Law Review* (2007) 1769 at 1771; Derek Jinks and Neal Kumar Katyal, 'Disregarding Foreign Relations Law', 116 *Yale Law Journal* (2007) 1232.

government);¹⁶⁷ by the political questions doctrine, which may preclude the courts from examining whether the executive acts in accordance with international law;¹⁶⁸ by the principle that the interpretation of treaties is a matter for the executive rather than for the courts,¹⁶⁹ and by the doctrine of direct effect, which often curtails the judicial application of international law to protect the political branches.¹⁷⁰

The limitations of judicial independence in the application of international law have partly been undermined by the intertwining of international with domestic law. A major premise of the traditionally restrained role of domestic courts with respect to international law was the disconnection between domestic politics and world politics.¹⁷¹ This assumption has lost some of its force. Courts of many states will consider a routine criminal case involving the application of Article 6 of the ECHR not as a case touching on in the external affairs of a state (performance of a treaty obligation *vis-à-vis* other states).¹⁷² What applies for Article 6 may apply for other parts of international law, including, for instance, environmental law.¹⁷³ It is noteworthy that also with regard to counter-terrorism, courts of several states have been able to take an independent stand against the executive.¹⁷⁴ To the extent that the application of international law becomes intertwined with the application of domestic law, and judicial independence in the application of domestic law is accepted as the normal course of events, there may be no need for an additional justification for independence in the application of that particular rule of international law.¹⁷⁵

¹⁶⁷ Ralph Steinhardt, 'Human Rights Litigation and the "One Voice" Orthodoxy in Foreign Affairs' in Mark Gibney (ed.) *World Justice? U.S. Courts and International Human Rights* (Westview Press, Oxford, 1991) 23-57.

¹⁶⁸ IDI, *supra* note 27, at 331.

¹⁶⁹ *Ibid.*, at 336. The US Supreme Court held that '[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight'. *Kolovrat v. Oregon*, 366 US 187, 194 (1961), see also *Sanchez-Llamas v. Oregon*, 548 US ___ (2006).

¹⁷⁰ Jan Klabbers, 'International Law in Community Law: The Law and Politics of Direct Effect', 21 *Yearbook of European Law* (2002) 263-298.

¹⁷¹ Benvenisti, 'Reclaiming Democracy', *supra* note 114.

¹⁷² Jennings, 'The Judiciary', *supra* note 58; see generally on the regulatory nature of much of modern international law and its effects on domestic law: Joseph H. H. Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy', 64 *Heidelberg Journal of International Law* (2004) 545-562 at 547.

¹⁷³ Michael Anderson and Paolo Galizzi (eds), *International Environmental Law in National Courts* (British Institute of International and Comparative Law, London, 2002).

¹⁷⁴ Benvenisti, 'Reclaiming Democracy', *supra* note 114.

¹⁷⁵ See Slaughter, 'A Typology', *supra* note 41, at 103-6. As Karen Knop has noted, the transjudicial dialogue on human rights has blurred the distinction between comparative constitutional law and

Nonetheless, it is easy to overestimate the degree to which, on a worldwide scale, international law has indeed become intertwined with domestic law. In many areas, most notably the law of armed conflict, the application of international law retains its 'high politics' nature, and courts may be inclined to step back and leave the matter for the executive.¹⁷⁶ In regard to many areas of international law, courts continue to be faced by the barriers identified above. International law cannot neglect that practice and cannot (and does not) require independence from politics in absolute terms.¹⁷⁷

This has two main consequences. First, if domestic courts are to play a larger role in the settlement of international disputes, a role accepted by international institutions and other interested actors, their independence from domestic politics should be strengthened. It may be that the wide variety of rule-of-law programmes that seek to strengthen the independence of courts in domestic matters have been insufficiently focussed on these international aspects of judicial independence. Second, where independence from politics is not perfect, international institutions face difficult choices: should they hold domestic courts to strict (perhaps unrealistic) standards of independence, with the result that few cases will be left to the domestic level, or should they employ more flexible standards so that the role of domestic courts in settlement of international disputes may be enhanced?

Law

The possibility that, in some cases, international institutions will accept as authoritative a judgment of a domestic court in a matter over which also an

international law: Karen Knop, 'Here and There: International Law in Domestic Courts', 32 *New York University Journal of International Law and Politics* (2000) 501-536.

¹⁷⁶ Chesney, 'Disaggregating Deference', *supra* note 166; Onuma Yasuaki, 'International Law in and with International Politics: The Functions of International Law in International Society', 14 *European Journal of International Law* (2003) 105-139; Eyal Benvenisti, 'National Courts and the "War on Terrorism"', in Andrea Bianchi (ed.), *Enforcing International Law Norms against Terrorism* (Hart Publishing, Oxford, 2004) 307-329; Tim Koopmans, *Courts and Political Institutions: A Comparative View* (Cambridge University Press, 2003) at 104 (noting that problems like Vietnam are too large for the courts). Some authors have fully rejected the application of judicial independence to matters of international law and argued for a total judicial deference to executive. See e.g. John Yoo, *The Powers of War and Peace: the Constitution and Foreign Affairs after 9/11* (University of Chicago Press, 2005) 190-214; John Yoo and Julian Ku, 'Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch', 23 *Constitutional Commentary* (2006) 179, available at <ssrn.com/abstract=945454> (visited 1 July 2008); Cass R. Sunstein, 'Chevronizing Foreign Relations Law' 116 *Yale Law Journal* (2007) at 1170-1228.

¹⁷⁷ Peter H. Russell, 'Towards a General Theory of Judicial Independence', in Peter H. Russell and David M. O'Brien, *Judicial Independence in the Age of Democracy. Critical Perspectives from around the World* (University Press of Virginia, 2001) 1-24 at 12.

international court could exercise jurisdiction would seem to be greater if the domestic court would rule on the same or a comparable legal claim. In at least some cases, this will mean that the domestic court has to be competent to apply (and actually does) apply the rule of international law that was invoked by the plaintiff, if not in form, then in substance. Indeed, it is when domestic courts apply such law, directly or indirectly, that they could be said to be engaged in the settlement of international claims, and performing acts comparable to an international court.¹⁷⁸ This situation may be comparable in criminal law. The Referral Branch of the ICTY examines whether the national applicable law would permit the prosecution and trial of the accused for offences of the type for which he is charged before the ICTY.¹⁷⁹

The power of domestic courts to apply rules of international law, and thus to adjudicate a claim that is comparable to a claim that could be adjudicated by an international court, is limited in all states in the world. This certainly holds true for 'dualistic' states that do not legislate a particular treaty into domestic law. States may also limit the powers of courts, thus protecting the power of political branches, by denying direct effect,¹⁸⁰ either by negotiating a treaty in such terms that court will not grant direct effect or by a subsequent declaration or reservation.¹⁸¹ Alternatively, political branches can adopt legislation that does not allow a court to give effect to a treaty obligation, that grants immunities to individuals or to the state, or that does not allow individuals to invoke a rule of international law. An example of the latter is the US Military Commissions Act.¹⁸² Domestic law may further limit the power of

¹⁷⁸ Peters, 'International Dispute Settlement', *supra* note 68; *Regulating Jurisdictional Relations*, *supra* note 19, at 141 (noting that when national courts directly and explicitly apply international law to the disputes before them 'they become engaged in a dispute resolution or law application project of a comparable nature to the process of resolution or application that could have taken place before international courts').

¹⁷⁹ Williams, 'ICTY Referrals', *supra* note 141 at 207.

¹⁸⁰ Conforti, *The Activities of National Judges*, *supra* note 82, at 336 (noting that direct effect is simply one form of dependency, comparable to the dependence on the executive in matters of treaty interpretation).

¹⁸¹ *Medellin v. Texas*, *supra* note 113, paras 25-27 (explaining that because the parties did not provide for it in the text of the Optional Protocol, judgments of the ICJ in regard to the Vienna Convention on Consular Relations are not self-executing). An example of declarations by the political branches after signature of a treaty to remove the possibility of direct effect is the declaration by the US Senate to preclude direct effect of the ICCPR; see e.g. *Sosa v. Alvarez-Machain*, 542 US 692 (2004), ILDC 117 (US 2004) (where the US Supreme Court stated that 'the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing').

¹⁸² US Military Commissions Act, sec. 5(a) (providing that '[n]o person may invoke the Geneva Conventions or any protocols 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

courts to provide a remedy in conformity with international law.¹⁸³ These and other strategies may limit or prevent the possibility that a domestic court would hear a claim that is comparable to a claim that may be raised in an international court.

Generally, the limitations on domestic courts to apply international law are not seen in terms of the concept of independence. Legislative overrides that undo the effect of individual judicial decisions may constitute exceptions and be covered by the principle of independence,¹⁸⁴ but otherwise courts use different concepts to address this problem. The European Court does not employ a general requirement to adjust domestic law to the obligations of the Convention, certainly not in terms of the principle of independence.¹⁸⁵ In the ICC Statute, the criterion that a case is admissible if a domestic judicial system is 'unavailable'¹⁸⁶ may be construed in the sense that if domestic law does not allow for prosecution of the crimes within the jurisdiction of the Court, a case will be admissible. However, this criterion is distinct from the principle of independence in the ICC Statute.¹⁸⁷

or territories'), available at <frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s3930enr.txt.pdf> (visited 1 July 2008).

¹⁸³ The possibility that English courts have to provide a remedy in conformity with secondary obligations under the European Convention on Human Rights is severely limited by the Human Rights Act. English courts are not empowered to set aside an English Act of Parliament, where it conflicts with obligations under the European Convention. The only remedy in this situation is a declaration of incompatibility which does not affect the validity, continuing operation or enforcement of the provision in question; see S. 4(6) of the Human Rights Act 1998; see generally Geoffrey Lindell, 'Invalidity, Disapplication and the Construction of Acts of Parliament: Their Relationship with Parliamentary Sovereignty in the Light of the European Communities Act and the Human Rights Act', 2 *Cambridge Yearbook of European Legal Studies* (2000) 399-415 at 399.

¹⁸⁴ The African Commission on Human and Peoples' Rights found that measures taken against certain newspapers that nullified pending judicial proceedings violated of Article 7(1)(a) of the Banjul Charter on Human and Peoples' Rights, guaranteeing the right of access to the courts. Decision of 15 November 1999 on communication no 145/95 brought by the Constitutional Rights Project, the Civil Liberties Organisation and Media Rights Agenda against Nigeria (*Constitutional Rights Project and Others v. Nigeria*) (2000) AHRLR 227 (ACHPR 1999); also: ILDC 11 GM 2001.

¹⁸⁵ But see *Ireland v. the United Kingdom*, ECHR Series A, No. 25, at 239 (holding that incorporation of the European Convention in national law would be a faithful method of applying the Convention); UN Doc E/C.12/1998/24, CESCR General Comment 9, The Domestic Application of the Covenant, 3 December 1998, at 8, UN Committee on Economic, Social and Cultural Rights (noting that 'while the Covenant does not formally oblige States to incorporate its provisions in domestic law, such an approach is desirable. Direct incorporation avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation of the Covenant rights by individuals in national courts. For these reasons, the Committee strongly encourages formal adoption or incorporation of the Covenant in national law'.)

¹⁸⁶ Art. 17(3), ICC Statute.

¹⁸⁷ Art. 17(2)(c), ICC Statute.

Nonetheless, the power of a court to apply international law is closely related to the concept of independence.¹⁸⁸ There is not that much of a difference between a political decision in an individual criminal case that seeks to influence the court by shielding a perpetrator who is supported by the government, the adoption of a law (or constitutional scheme) that does not allow a court to apply an international criminalization, and the adoption of a law that grants immunity to individual suspects before a trial has started. The UN Special Rapporteur on Independence of the Judiciary recognized this link between domestic legal limitations and independence, when he found that national laws allowing impunity by granting amnesties would be incompatible with the independence of the judiciary, as they would not allow the courts to uphold international principles of accountability.¹⁸⁹ Likewise, there is not that much of a difference between political pressure on a court not to rule against a government that has been responsible for human rights abuses, and a political decision to adopt a law that makes the government immune from trial. The ECtHR noted that whether a person has an actionable domestic claim so as to engage Article 6 ‘may depend not only on the substantive content of the relevant civil right, as defined under national law, but also on the existence of procedural bars preventing or limiting the possibilities of bringing potential claims to court.’¹⁹⁰

Limiting the power of course to apply international law then also can be seen as a limitation of independence. Denying a court the power to apply international law to a dispute where that law is binding on the state, or on other actors involved in litigation, undermines the independence of courts to adjudicate claims in accordance with the law.

Consequently, the possibility that domestic courts play a larger role in the adjudication of international claims, and that international institutions allocate a larger role to domestic courts, to some extent depends on improving the reception of international law in domestic law. Even though courts may seek to expand their

¹⁸⁸ Justice O’Connor recognized the relation between competence and independence when she stated that a resolution tabled in US Congress to forbid the citation of foreign law in constitutional interpretation would in fact limit judicial independence. Cited in W. H. Pryor Jr., ‘Not so serious Threats to Judicial Independence’, 93 *Virginia Law Review* (2007) 1759-1783 at 1759.

¹⁸⁹ Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, UN Doc. E/CN.4/60 (2003), para. 37.

¹⁹⁰ The Court added: ‘it would not be consistent with the rule of law in a democratic society, or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons.’; *A v. United Kingdom*, Application No. 35373/97, Judgment, 17 December 2002, para. 63.

independence within the boundaries set by domestic law,¹⁹¹ this is primarily a task for the legislature rather than the courts. The room for international institutions to demand from domestic courts independence from limitations from domestic law is limited. The application of international law will have to make use of domestic rules and procedures that may, in particular instances, more often than not limit the effective application of international law. In large part, these will fall within the sovereignty and procedural discretion of the state.¹⁹² More fundamentally, if independence would require courts to neglect domestic constraints, it would generally collide with the principle of legality.¹⁹³ Requiring courts to set aside domestic limitation in order to give full effect to international law would replace dependency on domestic law by dependency on international law – a proposition that not only seems hardly realistic or desirable, but also is hardly compatible with the rule of law that according to international law itself should be protected at national level.

Values

Most of the traditional unease of states and other actors about the value of domestic judgments does not stem so much from political pressures or legal limitations, but from a court's national prejudice,¹⁹⁴ national passions¹⁹⁵ and identification with national interests.¹⁹⁶ When defence counsel at the ICTR objected to the transfer of cases to domestic courts, this was partly because they felt that domestic courts would be biased towards the defendants: 'The ICTR judges should not make themselves accomplices in this further distortion of the ICTR mandate by delivering UN detainees to the control of those who should themselves be defendants at the

¹⁹¹ See *supra* note 110.

¹⁹² The US Supreme Court correctly said with respect to the Vienna Convention on Consular Relations that 'absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.' *Breard v. Greene*, 523 U. S. 371 (1998) at 375. This already follows from Art. 36(2) of the Vienna Convention; see similarly the Judgment of the Court of Appeal of Singapore, *Nguyen Tuong Van v. Public Prosecutor*, [2004] SGCA 47, ILDC 88 (SG 2004), para. 33-35.

¹⁹³ Wendy Lacey, 'The Judicial Use of Unincorporated International Conventions in Administrative Law: Back-doors, Platitudes and Window-dressing' in Hilary Charlesworth *et al.* (eds), *The Fluid State: International Law and National Legal Systems* (Federation Press, Sydney, 2005) at 85.

¹⁹⁴ Friedmann, *The Changing Structure*, *supra* note 16, at 146-147.

¹⁹⁵ *Ibid.*, at 147.

¹⁹⁶ Benvenisti, 'Judicial Misgivings', *supra* note 18.

ICTR.¹⁹⁷ Accepting domestic judgments as authoritative requires that courts are somehow liberated from such influences and perhaps are open to international values.¹⁹⁸

Whereas the first two dimensions mainly concern institutional independence (the structural position of courts *vis-à-vis* other powers), this dimension concerns personal independence — the outlook of individual judges in reaching decisions in matters involving international law. In human rights law, this is seen in terms of impartiality rather than independence.¹⁹⁹ The line between these concepts is thin, however, and the ECtHR often examines the principles of independence and impartiality together.²⁰⁰ Koopmans indeed notes that the concept of judicial independence encompasses independence from popular feelings.²⁰¹

Like independence from domestic politics and law, this standard obviously cannot be maintained in absolute terms. All courts are naturally embedded in an environment with their own distinct values that will influence the outlook and approach of courts and that in particular cases may colour their decisions, and it is unrealistic and undesirable to separate courts from the society of which they are a part.²⁰² It is illustrative that the Rwandese *gacaca* courts, that supposedly consider crimes in line with community expectations, by and large seem acceptable to international community.²⁰³

The task in respect of this third dimension then is to distinguish between nationalistic prejudice that prevents an impartial assessment of an international claim, and legitimate and indeed critical connection between judges and courts and the values of their society.

International Responses to Lack of Independence: Some

¹⁹⁷ The ICTR Lawyers Denounce the Transfers of Accused to Rwandan Courts, *AllAfrica.com - Hirondelle News Agency* October 10, 2007, at <www.publicinternationallaw.org/warcrimewatch/archives/wcpw_vol03issue04.html#rw5> (visited 1 August 2008). Some of their critique is reflected in the *Munyakazi* decision, *supra* note 1.

¹⁹⁸ Frédéric Mégret, 'In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice', 38 *Cornell International Law Journal* (2005) 725-751 at 738-739.

¹⁹⁹ *Supra* note 153.

²⁰⁰ *Çiraklar v. Turkey*, *supra* note 25, para. 38 (noting that '[i]n the instant case it is difficult to dissociate impartiality from independence and the Court will accordingly consider them together').

²⁰¹ Koopmans, *Courts and Political Institutions*, *supra* note 176, at 250.

²⁰² Indeed, it has been said that the US Supreme Court has been successful because it has mirrored prevailing norms in society, see Posner and Yoo, *supra* note 97, at 13

²⁰³ See Jacques Fierens, 'Gacaca Courts: Between Fantasy and Reality', 3 *Journal of International Criminal Justice* (2006) 896-919.

Dilemmas

When international institutions and other interested actors find that the judiciary of a particular state is not sufficiently independent in a case in which they take an interest, the question arises how that problem may be remedied at international level. Two options may be to pull a case to the international level, and have an international court adjudicate the claim in a way that the domestic court should have done, or to internationalize the court. In some cases this may indeed solve a problem of independence. Adjudication in the ECtHR of a claim that was denied by a non-independent domestic court generally will conform to international standards of independence. The same may be true for the ICC or the ICTY. However, neither of these options is necessarily a solution to problems of independence.

The first option, deciding a case at the international level, faces problems of independence at international level. Like domestic courts, international courts often may be in a vulnerable position *vis-à-vis* political interests.²⁰⁴ In arbitration, and to some extent also in the ICJ, it is difficult to entirely neglect the ties between the nominating states (with all their political interests) and the judges.²⁰⁵ The *ad hoc* nature of many international criminal tribunals, may lead to political influence on the allocation of resources for justice and may lead to concerns that allocation of such scarce resources may serve political agendas rather than the service of justice.²⁰⁶ Criminal tribunals are vulnerable against the attack that in most instances they followed a model of victor's justice.²⁰⁷ The SCSL was made dependent on funding by international actors, making the argument that the Court would be inclined to make judgments that would be favourably received by those actors not implausible.²⁰⁸ Short-term contracts subject to performance review make the position of international judges vulnerable to political influences.²⁰⁹ The ICC may

²⁰⁴ See generally Mads Andenas, 'A European Perspective on Judicial Independence and Accountability', 41 *The International Lawyer* (2007) 1-20.

²⁰⁵ *Ibid.*, at 13. Note in this context that dispute settlement in some respects is an extension of negotiation between the parties; more akin to commercial arbitration than to public law.

²⁰⁶ Compare Bell, *supra* note 149, at 50 (referring to independence in general, not confined to the international domain).

²⁰⁷ Danilo Zolo, 'Who is Afraid of Punishing Aggressors? On the Double Track Approach to International Criminal Justice', 5 *Journal of International Criminal Justice* (2007) 799-807 at 805.

²⁰⁸ The argument was rejected by the Appeals Chamber of the Special Court for Sierra Leone (SCSL) in *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence), 13 March 2004.

²⁰⁹ Linton, 'Safeguarding the Independence', *supra* note 21, and, more generally about independence and mixed courts: Sarah H. M. Nouwen, 'Combining Ownership and Neutrality in the Prosecution of International Crimes: Theory and Reality of Mixed Tribunals', 25 *Netherlands Quarterly of Human Rights* (2007) 255-287.

have been used by domestic actors to pursue their domestic agendas.²¹⁰ It has also been said that the ICTR would lack independence, for instance, in view of alleged interference from the American government in the work of the Office of the Prosecutor, so that it would only prosecute former Hutu officials.²¹¹ Moreover, while resorting to international courts may prevent nationalistic passions of domestic judges, international judges may have their own normative ambitions. These may be related to the position of the state by which they are nominated,²¹² or be driven by an internationalist outlook.²¹³ Illustrative of the latter were the challenges to international judges on the SCSL, in view of alleged biased positions of individual judges on crimes against humanity²¹⁴ and child soldiers.²¹⁵

Such criticism and the fear for the lack of independence will not always rest on solid grounds. However, it seems unreasonable to take for granted that an international court, upon finding a problem of independence at the domestic level, can solve that problem by moving the case to the international level. It may very

²¹⁰ It has been said that if the ICC would limit its adjudication of international crimes committed in the DRC to the prosecution of Lubanga, opponent of the government of the DRC. It may become a political vehicle for the leaders of that state. Stephanie Wolters, *Selective Prosecutions Could Undermine Justice* (Institute for War & Peace Reporting, London, 2007) (noting that 'In the DRC, the transitional government led by President Joseph Kabila chose to feed Lubanga — who really counts as small fry in Congo's complex ladder of power — to the highly visible ICC, not because it believes in justice but precisely because it does not want to see it done across the board' and that 'Lubanga is expendable: his initial arrest and incarceration in Kinshasa and now his trial have not cost Kabila or any of those sharing power with him in the transitional government a cent of their political currency, and never will.')

²¹¹ The International Criminal Tribunal for Rwanda / Military II — the Defence Requests an Investigation of the Prosecution, Oct 17, 2007 (Hirondelle News Agency/All Africa Global Media via COMTEX).

²¹² As appeared to be the case in the request by Israel to preclude Judge Nabil Elaraby from sitting in the proceedings that resulted in the *Wall Advisory* opinion. This request was based on the judge's prior involvement in the Israeli–Palestinian conflict as an Egyptian diplomat. The Court denied the request, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 30 January 2004, ICJ Reports (1994) 3 (hereinafter ICJ Order). See for critical discussion Yuval Shany and Sigall Horowitz, 'Judicial Independence in The Hague Freetown: A Tale of Two Cities', 21 *Leiden Journal of International Law* (2008) 113-129.

²¹³ Philip Bobitt, *The Shield of Achilles* (Anchor Books, New York, 2003) at 258 (noting that the internationalistic model has its own ambitions and can hardly be considered as neutral); Hilary Charlesworth *et al.*, 'International Law and National Law: Fluid States' in Hilary Charlesworth *et al.* (eds), *The Fluid State: International Law and National Legal Systems* (Federation Press, Sydney, 2005) at 12 (referring to normative ideals of international lawyers).

²¹⁴ *Prosecutor v. Sesay*, Case No. SCSL-2004-AR15-15, Decision on Defense Motion seeking the Disqualification of Judge Robertson from the Appeals Chamber, 13 March 2003 (in which judge Robertson was disqualified for all cases and motions involving the RUF).

²¹⁵ *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-PT, Decision on the Motion to Recuse Judge Winter from the deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, 28 May 2004 (the court found that a bias of Judge Winter's could not be demonstrated).

well simply replace one problem of independence by another – the latter one simply being more acceptable to international institutions and other interested actors.

This also holds true for the second response to domestic problems of lack of independence. States and international institutions have actively sought to promote the independence of courts by the establishment of hybrid or mixed criminal courts and tribunals in, amongst others, East Timor, Sierra Leone, Cambodia, Bosnia Herzegovina and Lebanon,²¹⁶ and, less frequently, also mixed human rights courts, such as the Human Rights Chamber established under the Dayton Peace Agreement.²¹⁷ Common to most projects of internationalizing courts is that states and international institutions seek to secure that the courts will be independent, with a view to making their decisions acceptable at international level.

Internationalization can address each of the three dimensions of independence as discussed earlier. Key to securing independence is appointing sufficient international judges, who presumably would be insensitive to local political forces.²¹⁸ Thus, by endowing the Extraordinary Chambers of Cambodia and the Hariri tribunal with international judges, the United Nations hoped to ensure that the proceedings would not be unduly influenced by domestic political considerations and would not only be satisfactory to Cambodia and Lebanon, but also to the international community. Internationalization of domestic courts pursues the separate aim of securing applicability of international law or at least conformity of the applicable law with international law. Hybrid or mixed courts then seek to secure that they are able to apply international law and that the outcomes are acceptable to the international legal order.²¹⁹ Likewise, in respect to independence from national values, internationalization may, by bringing in international judges and international rules of procedure, seek to prevent the influence of national prejudice and passions that otherwise might have threatened the independence or impartiality of the court.

However, the power of these approaches (international judges, securing application of international law and preventing dominance of national passions) to result in courts that indeed are independent, and whose judgments on that basis are acceptable to the international community, is subject to the same caveat as was noted with respect to international courts. Solving threats of independence at the domestic level by internationalization need not always solve the problems of

²¹⁶ See the overview in Cesare Romano, Andre Nollkaemper and Jann Kleffner, *Internationalized Criminal Courts — Sierra Leone, East Timor, Kosovo and Cambodia* (Oxford University Press, 2003).

²¹⁷ 35 *International Legal Materials* (1996) 89.

²¹⁸ Cesare P. Romano, 'The Judges and Prosecutors of Internationalized Criminal Tribunals', in Romano *et al.*, *Internationalized Criminal Courts*, *supra* note 216, at 240

²¹⁹ Bert Swart, 'Internationalized Courts and Substantive Criminal Law' in Romano *et al.*, *Internationalized Criminal Courts*, *supra* note 216, at 295-296.

independence, but simply transform them to problems of independence at the international level.

It is to be added that transferring cases to the international level or to internationalized courts may lead to a range of other problems and limitations. International courts may not be able to produce the effects that will resonate in domestic society.²²⁰ Moreover, solving independence by bringing in a majority of international judges and by applying international law does not solve problems of inefficiency, defective substantive and procedural law or lack of resources that seem common to several attempts to internationalize courts and that may undermine the quality and authority of the decisions.²²¹ Finding a problem of independence in the application of international law is easier than solving it at international level, and, even if it is solved, the transfer to the international level may bring a range of unforeseen consequences.

Concluding Observations

This article has explored the hypothesis that the principle of independence can function as a rule of recognition in international law that allows international institutions and other interested actors to determine whether, from the perspective of international law, a particular domestic judgment can be accepted. Though the concept of the rule of recognition is not commonly applied to decisions of domestic courts, it seems that the concept is flexible enough to be applied in this context, though more in its private international law manifestation than in its use as an indicator of validity. The hypothesis that independence can serve to identify which judgments transcend domestic law is based on the sound premise that independence is a signifier of commitment by states and their courts, and that international institutions therefore can easier rely on domestic courts if these are sufficiently independent.

Of course, acceptance of domestic judicial decisions at international level as an authoritative settlement of an international claim generally will not only depend on independence, but also on related concepts such as impartiality, legality, knowledge of judges, and quality of the judgment. Independence thus will have to be reviewed in context to understand the persuasive power of a domestic judgment.

Independence of domestic courts in the application of international law is vulnerable throughout the world, most notably by pressures from the political branches, but also by limitations set by domestic law and by national prejudice. If

²²⁰ Alvarez, 'Crimes of State', *supra* note 140.

²²¹ Williams, 'ICTY Referrals', *supra* note 141, at 207.

domestic courts are to play a larger role in the settlement of international disputes, one that is accepted by international institutions and other interested actors, their independence in all three respects should be strengthened. The worldwide efforts to enhance the independence of the domestic judiciary, including those by the UN Special Rapporteur on Judicial Independence, should therefore be extended to encompass the wider, international role of domestic courts. Improvement along these lines will then also enhance the possibility of international court to allocate tasks to domestic courts and to defer to their judgments.

However, the article also has displayed a number of ambiguities of the principle of independence as a rule of recognition. For one, the principle is not absolute. International institutions (and states) may trade independence against other interest, such as the symbolic value of a state taking care of its own justice system, as in the case of Saddam Hussein.

Moreover, the principle is very flexible. It has allowed for a wide diversity of limitations in state practice on the judicial application of international law. This very flexibility makes the concept an attractive one, as both domestic and international actors can use the concept to claim authority. The question should be considered whether international courts, as the ICTR in the *Munyakazi* decision with which this article opened, occasionally have not been too demanding in requiring full independence. In this context it should also be taken into account that if an international court finds a problem of independence at domestic level, it cannot be taken for granted that it can do a better job.

To the extent that the principle of independence indeed is used to allocate tasks to domestic courts and to defer to their judgments (a question on which separate empirical analysis would be required), the principle indeed would be able to solve the conundrum caused by the fact that, while international law needs to rely on domestic courts, such courts are part of the very state whose behaviour may be in question. At a doctrinal level, this does not undermine the legal unity of the state. Judicial independence necessarily entails the need for (judicial) accountability.²²² This may lead to the responsibility of the state of which the court is an organ, not of the court itself. Yet the article does indicate that unity and its implications only can cover a part of the legal spectrum, and that the explanatory power of the concept of the unity of the state in respect of the role of domestic courts is limited.

²²² Shetreet, *Judicial Independence*, *supra* note 26, at 654. See also the collection of essays in Guy Canivet, Mads Andenas and Duncan Fairgrieve (eds), *Independence, Accountability, and the Judiciary* (British Institute of International and Comparative Law, London, 2006).