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Inside or Out: Two Types of International Legal Pluralism

André Nollkaemper*

1. Introduction

In this article I explore the distinction and relationship between two types of international legal pluralism. Both types recognize a pluralistic relationship between autonomous international and national legal orders in which the final legal authority is contested.[1] However, they differ fundamentally in scope and nature.[2]

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[1] Compare the concept of legal pluralism in D. Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States', in: J. L. Dunoff & J. P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: Cambridge University Press 2009), 326-355, at p. 12; P. Schiff Berman, 'Global Legal Pluralism' (2007) 80 *Southern California Law Review*, 1155 ('we live in world of hybrid legal spaces *where a single act or actor is potentially regulated by multiple legal or quasi-legal regimes*'); B. Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sidney Law Review*, 375 ('What makes this pluralism noteworthy is not merely the fact that there are multiple uncoordinated, coexisting or overlapping bodies of law, but that there is diversity amongst them. They may make competing claims of authority; they may impose conflicting demands or norms; they may have different styles and orientations.').

[2] The scope of the article is narrow in that is limited to forms of pluralism that relate directly to the relationship between international and national law. I use the term 'international legal pluralism' to refer to this relationship. The complexity is far greater than this, as additional layers of normativity, each creating its own pluralist dynamics, take place outside of the legal orders of international and national law, even though they may well impinge on these legal orders; see for a concise discussion L. Catá Backer, 'Inter-Systemic Harmonisation and Its Challenges for the Legal State', in S. Muller, S. Zouridis, M. Frishman and L. Kistemaker (eds.), *The Law of the Future and the Future of Law* (Oslo: Torkel Opsahl Academic Epublisher, 2011), p. 427. See also G. Teubner, '"Global Bukowina": Legal Pluralism in the World Society', in G. Teubner (ed.), *Global Law without a State* (Dartmouth Publishing Group, 1997), p. 3.

I use the term ‘types’ of legal pluralism to refer to two distinct understandings and constructions of the pluralistic relationship between the international and national legal orders. The term ‘type’ functions as an equivalent of the term ‘paradigms’. The two types of pluralism do not so much represent factual descriptions of such relationships between legal orders, though both are supported by empirical data and conform to particular factual constellations. Rather, they represent ways to perceive, understand, and think about them. They represent alternative ways for making sense of a complex reality that – and this can be stipulated at the outset – cannot be captured fully by either of them.[3]

I refer to the first type of pluralism as ‘internal’ as it construes a pluralism that is internal to the international legal order. This type recognizes the divide between the international and national legal orders and the diversity between autonomous national legal orders. It reflects the political and social reality that any workable system of international law needs to allow for a wide diversity, exceptions, and even contradictions in the interpretation and application of norms between different actors. Yet, it postulates that in the final analysis this type of pluralism remains normatively confined by rules of international law. It has some similarity with what a number of authors refer to as ‘pluralism under international law’[4] or ‘constitutional pluralism’ – a pluralism that is accommodated by a common standard (though the term ‘constitutional’ in this particular international law context has connotations which go beyond the supremacy claim and which for purposes of this article can be left aside).[5] It may

[3] See for a useful and concise discussion of the term ´paradigm´ in legal scholarship R Michaels, ´Two Paradigms of Jurisdiction´ (2005-2006) 27 *Michigan J. Int´l Law 1022*, citing M. Van Hoecke and M. Warrington,, ´Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law´(1998) 47 Int´l & Comp. L. Q. 495.

[4] N. MacCormik, ‘Risking Constitutional Collision in Europe?’ (1998) 18 *Oxford Journal of Legal Studies* 517 at 527.

[5] See for the concept N. Walker 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317-359. It might be critiqued that this type is not really pluralist since it does accept a claim to hierarchy. However, as

be contended that this 'pluralism within international law' is not pluralism proper, as conflicts are ultimately settled by international law. However, this article takes the position that there can be many forms and facets of pluralism, and that much of modern literature may fail to appreciate the inherently pluralistic nature of the international legal order.[6]

The second type of pluralism construes a pluralism that is external to the international legal order. Empirically, it is based on the fact that much of the diversity between legal systems is not actually limited by rules of international law. As a matter of fact many legal systems contest international obligations and prioritize nationally defined values and rights over incompatible rules of international law. In its normative dimension, this position is based on the belief that subjecting pluralism to international law would not do justice to legitimate political and social differences between states and communities within states, and moreover would fail to address concerns over the quality and (il)legitimacy of international law. This pluralism is thus not contained by international law but is positioned outside, and is to some extent opposed to, international law. This external pluralism is hugely popular in recent legal scholarship, and has found an eloquent formulation in Nico Krisch's 'Beyond Constitutionalism'.[7]

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will be argued below (text to notes 85 – 86), the diversity within international law is such that the use of the term pluralism in this context is not improper. See also See also A Peters, ´Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse´(2010) 65 ZÖR 3 – 63.

[6] See further *infra* section 3.2.

[7] N. Krisch, *Beyond Constitutionalism* (Oxford: Oxford University Press, 2011). See also P. Schiff Berman, 'A Pluralist Approach to International Law' (2007) 32 *Yale Journal of International Law* 301; M. Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 *European Law Journal* 362; M. Rosenfeld, *The Identity of the Constitutional Subject, Selfhood, Citizenship, Culture, and Community* (Routledge, 2009); M Rosenfeld, 'The Challenges of Constitutional Ordering in a Multilevel Legally Pluralistic and Ideologically Divided Globalised Polity', in S. Muller, S. Zouridis, M. Frishman and L. Kistemaker (ed.): *The Law of the Future and the Future of Law* (Oslo: Torkel Opsahl Academic Epublisher, 2011), p. 109.

The distinction between internal and external pluralism is not sharp. The judgment of the European Court of Justice (ECJ) in *Kadi*[8] is often seen as an example of the external type of pluralism.[9] Had the ECJ used somewhat different wording and relied more on international human rights law binding on the United Nations, it could just as easily be seen as an example of internal pluralism. The thin line between the categories may make the use of particular cases as support for either type of pluralism, depending on rhetorical motives, reflecting different opinions on which conceptualization has more normative appeal, as well as the different political agendas of those who qualify a particular practice in terms that can be construed either inside or outside the international legal system.

Yet, in several respects the distinction between internal and external pluralism is a fundamental one. The two paradigms are each based on a different level of analysis.[10] They reflect a different reading of and appreciation for the position of national systems vis-à-vis the international legal system, particularly of the forms and degrees in which legal systems accept or contest the normative claims of international law. They also reflect a difference in the level of faith in the scope, power, and legitimacy of international law. And perhaps, above all, they reflect a different understanding of the relationship between law and politics. While the internal pluralist paradigm assumes that conflicts between legal orders can be solved by international legal principles, in the external paradigm the relationship is shaped by politics

[8] Joined Cases C-492/05 P and C-402/05, *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR *I*-06351; [2008] 3 CMLR 41.

[9] And indeed treated as such by Krisch, supra note 7 chap 5.

[10] The internal pluralistic model may be seen as first-order pluralism, whereas the external pluralism is a second-order pluralism; see N. Walker 'Rosenfeld's plural constitutionalism' (2010) 8 *International Journal of Constitutional Law* 677 at 678.

rather than by law.[11] That is, it is recognized that the question of which order prevails is a political, not a legal question. The internal paradigm thus postulates a modest and restricted form of pluralism, in contrast with the more 'radical' external pluralism that subjects legal claims to political dynamics.[12]

This article critically explores the foundations, ambitions, and weaknesses of the two types of international legal pluralism and their interactions. I will argue that while internal pluralism has merit, in that it emphasizes the interests of stability in interstate affairs, it may fail to recognize the interests of states, but notably also those of communities within states, that may seek change and may resist subjection to what they perceive as illegitimate or undemocratic laws. External pluralism articulates precisely the interests of such states and communities. But at the same time its normative project seems difficult to reconcile with the interests of legal certainty and stability of the international legal system, thereby endangering the protection of the rights and interests of the same states and communities in whose name the supporters of the external paradigm appear to speak.

My central argument is that the two types of pluralism, in a somewhat paradoxical way, depend on each other. While the international legal order needs its hierarchical claim to supremacy in order to provide the stability and legal certainty to serve the essential interests of states, communities, and individuals, the legitimacy of its claim to supremacy relies on the inspiration, legitimacy, and politics that are articulated in the paradigm of external pluralism.

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[11] Krisch, *supra* note 7 at 305-306. See on the connection between the law/politics and the international/national distinction A. Huneeus, 'Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights', in J. Couso, A. Huneeus, R. Sieder (eds.) , *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge: Cambridge University Press, 2010), p. 136.

[12] L. Zucca, 'Monism and Fundamental Rights in Europe and Beyond' (January 4, 2011). Available at SSRN: http://ssrn.com/abstract=1734602 (discussing constitutional and radical pluralism).

In turn, the paradigm of external pluralism seems difficult to reconcile with the interests of stability of the international legal system, and yet it relies at least in part on that system since its primarily political project cannot provide stability at the international level. In this sense the international and national legal orders both threaten and depend on each other.

I will first explore the dynamics that underlie international legal pluralism (section 2) and then examine the foundations, manifestations, and limitations of the internal and external pluralistic paradigms (sections 3 and 4). Next, I will analyse the interactions and feedback loops between them (section 5). Section 6 contains conclusions.

2. Dynamics of pluralism

I distinguish the dynamics that underlie international legal pluralism by using two categories: the dynamics of conventional pluralism that have always been part of international law (section 2.1), and the pluralism that is driven by new forms of international law-making (section 2.2). The distinction is obviously a fluid one, as old dynamics continue to exercise their power and new dynamics are not really as new as is often contended, but it serves to identify distinct factors that underlie both the internal and external pluralistic paradigms.

2.1 Conventional pluralism

International legal pluralism is as old as the international legal order itself. It reflects the failure of the monistic project to unite the international and national legal orders. The

unrelenting normative appeal of that project in terms of protection of individual rights has failed to persuade the states, which have resisted a full subjection of national legal orders to international law. Many states determine that in the case of a conflict between international law and domestic law, national law (constitutional or statutory law) by definition prevails, or, alternatively, that the latest expression of the will of parliament prevails – also if that is national law.[13] The formal relationship between the international and national legal orders could only reflect these political and legal realities and, thus, is essentially dualistic.

Inevitably reflecting uncoordinated but substantively largely identical political choices, international law allows for and indeed is, in its fundamental dimensions, determined by a duality between international and national spheres. That duality necessarily implies pluralism, both in a vertical sense (international law and national law can contest the ultimate claim to authority) and horizontally, between legal systems. Indeed, in view of the diversity of national constitutional approaches to the reception of international law, many authors have preferred the term pluralism over dualism to designate the relationship between international and national legal orders.[14] Tamanaha notes that '[i]f one envisions matters from the standpoint of a global or transnational legal system, that legal system is immediately pluralistic because it contains and interacts with a multitude of coexisting, competing, and overlapping legal systems at many levels and in many contexts.'[15]

[13] A. Peters, 'The Globalization of State Constitutions' in J. Nijman & A, Nollkaemper (eds.), *New Perspectives on the Divide between International and National Law* (Oxford: Oxford University Press, 2007), p. 251; J. Nijman & A. Nollkaemper, 'Beyond the Divide', ibid, 341. See also the overview in D. Carreau, *Droit International* (Pedone, 2004), pp. 58 – 68.

[14] See e.g. G. Gaja, 'Dualism – A Review', in J. Nijman & A. Nollkaemper (eds.), *New Perspectives on the Divide between International and National Law* (Oxford: Oxford University Press, 2007), pp. 52, 53.

[15] Tamanaha, *supra* note 1 at 389.

The political choices of virtually all states to preserve a duality with international law, thus dictating a pluralistic relationship between legal systems, have been propelled by intertwined considerations of control and legitimacy.

Control is relevant, in that states that were subjected to the power of 'the west' generally have not shown an interest in recognizing the hierarchical claims of a normative system that they did not control. This explains much of the dualism maintained in most, though not all, Asian states.[16] It also explains the weak position of customary law in most, if not all, states. Even though many states accord some legal effect to custom, they rarely allow it to trump domestic law, as the process of development of customary law remains too obscure to allow it *a priori*, without consideration of its substantive merits, to overrule national law.

Conversely, many (mostly European) states may be said to control the process of international law-making, at least through treaties (always with the availability of a safety valve, in the form of withholding consent, as an exit strategy) and feel relatively comfortable with allowing international law not only to be part of national law, but even to allow it to trump national law.[17]

[16] M. Sornarajah, 'The Asian Perspective to International Law in the Age of Globalization' (2001) 5 *Singapore Journal of International and Comparative Law* 284 (referring to the Asian position towards international law as 'the result of a shared experience of colonialism of the Asian people'); K.G. Lee, 'A Critical Perspective on the (Lack of) Interfaces Between International Human Rights Law and National Constitutions in East Asia' (2010) 5 *National Taiwan University Law Review* 155 (discussing the 'instrumental (ab)use of modern international law' by western states). There are exceptions to this pattern, see for an overview Lin Chun Hung, ´Asean Charter: Deeper Regional Integration under International Law? 9 Chinese J. Int'l L. 821.

[17] See e.g. Constitution of the Czech Republic, 1992, Article 10; Constitution of the Kingdom of the Netherlands, 1983, Article 94; Bulgaria, Supreme Administrative Court, *Al-Nashif v National Police Directorate at the Ministry of the Interior*, Administrative Case No 11004/2002; ILDC 608 (BG 2003) [H11] (holding that '[t]he provision of Article 6(1) of the ECHR proclaiming the right to a fair trial was a directly applicable norm and took priority over the provision of Article 46(2) of the Law for Foreigners, which contradicted it.').

Lack of control may be complemented by a lack of legitimacy, and these factors may strengthen each other – a point well made by the ´Third World Approaches to International Law´ (TWAIL) critique on international law – and this both explains and justifies a deep and continuing divide by a largely suspect body of international law and national legal orders.[18]

But (lack of) legitimacy also functions as a freestanding factor. Even states that do exercise some control over the process of international law-making may refrain from accepting it as part of a monistic system, due to deficits in the democratic legitimacy of international law. That holds in particular for states where parliaments are not engaged in the process of ratification of treaties, such as the United Kingdom. Considerations of democratic legitimacy then induce a formal separation of legal orders that protects the process of democratic decision-making over the governing laws. On the same ground, states that in principle recognize supremacy of international law at the national level mostly preserve the ultimate priority of national constitutional law, so as to allow for domestically-induced contestation and change, even when that would override international law.[19]

Conversely, states or communities have on a variety of grounds expressed a belief and hope in an international legal system (that they apparently take to be legitimate, and probably more legitimate than the domestic legal order) that should provide protection against state law, and could even outbalance the absence of any meaningful control over the making of law.[20]

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[18] R. Buchanan, 'Writing Resistance Into International Law' (2008) 10 *International Community Law Review* 1-10.

[19] T. Ginsburg, S. Chernykh and Z. Elkins, 'Commitment and Diffusion: How and Why National Constitutions Incorporate International Law' (2008) *University of Illinois Law Review* 201 at 237 ('International policies are dynamic, and the policies protected at the time the constitution was adopted may change over time, particularly with regard to customary international law').

[20] V.S. Vereshchetin, 'Some Reflections on the Relationship Between International Law and National Law in the Light of New Constitutions' in R. Müllerson, M. Fitzmaurice, and M. Andenas (eds.), *Constitutional Reform and International Law in Central and Eastern Europe* (London – The Hague – Boston: Kluwer Law International,

These political and normative foundations of the pluralistic relationship with international law also underlie the doctrinally constructed separation between international and national spheres in terms of sources, subjects, and substance. From the traditional perspective, at least, international law derived from different sources and was concerned with different actors and different subject-matters – thereby removing any basis for a hierarchical nesting of national legal orders within a supreme international legal order.[21] That doctrinal separation could only be conceptually useful in light of the underlying dynamics of control and legitimacy.

The practical manifestation of all of this is that while international law proclaims supremacy over national law at the international level,[22] and requires effective performance of international obligations, it cannot proclaim, let alone enforce, its precedence at the national level. Making use of the liberty left by international law, states and their courts have chosen radically different solutions – resulting, inevitably, in pluralism.[23]

In the 21st century, this depiction of the differences between international and national legal orders has largely become something of a straw man. If ever it were true that international law does not concern itself with the same actors and subject-matter as domestic law, that is no longer the case. Much of international law is now regulatory in nature and governs domestic

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1998); T. Ginsburg, S. Chernykh and Z. Elkins, *supra* note 19 (discussing the functions of accepting international law at domestic level for new democracies).

[21] G. Fitzmaurice, 'The General Principles of International law Considered from the Standpoint of the Rule of Law' (1957) 92 *Recueil des Cours* at 68 ff.

[22] Gerald Fitzmaurice wrote that the principle of supremacy is 'one of the great principles of international law, informing the whole system and applying to every branch of it'; G. Fitzmaurice, supra note 21, at 85. See for an application by the ICJ *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, I.C.J. Reports 1988, p. 12, at 34.

[23] See for a good overview of such differences also D. Shelton, *International Law and Domestic Legal Systems. Incorporation, Transformation, and Persuasion* (Oxford: Oxford University Press 2011).

matters, including legal rights and obligations of private persons.[24] While the fundamental distinction in terms of sources has remained (even though the traditional sources doctrine has been transformed in a much more complex system of validation), in principle, substance and subjects have come to overlap with domestic legal systems. This might open the door for at least a limited acceptance of a less dualistic relationship between international and national law.

In some of the world, this is indeed what has happened. In parts of Europe, Latin America and, to a lesser extent, North America and Africa, we have seen some osmosis between the international and national spheres, reflecting the parallel in substance and subjects of these two spheres.[25] States in these regions do not generally accept domestic effects of the hierarchical claim of international law on the basis of the abstract normative claim of the supremacy of international law. Rather, they base such effects on a substantive choice that reflects and conforms to domestic fundamental values, and, moreover, that is by definition based on domestic law.[26] Moreover, a resort to international law also may legitimize policies dictated by (more or less legitimate rules of) international law which are unpopular to local constituencies (e.g., liberalization of trade, austerity measures, rights of aliens etc).

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[24] See generally J. Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy' (2004) 64 *Zeitschrift für Ausländisches Recht und Völkerrecht* 547; M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law* 907; V.C. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford: Oxford University Press, 2010), p. 261; J K Cogan, The Regulatory Turn in International Law, 52 Harv. Int'l L.J. 322 (2011); A. Tzanakopoulos, 'Domestic Courts as the 'Natural Judge' of International Law: A Change in Physiognomy', in J. Crawford and S. Nouwen (eds.) *Select Proceedings of the European Society of International Law* (Oxford: Hart Publishing, 2011) , vol. III, p. 155.

[25] See the review of practice in A. Nollkaemper, *National Courts and the International Rule of Law* (Oxford: Oxford University Press, 2011).

[26] T. Cottier and D. Wüger, ‚Auswirkungen der Globalisierung aus das Verfassungsrecht: Eine Diskussionsgrundlage', in B. Sitter-Liver, *Herausgeforderte Verfassung: Die Schweiz im globalen Konzert* (Freiburg, Schweiz: Universitäts Verlag, 1999) 263 f; cited in A. Peters, supra n 13, at 267.

In some states, however, the hierarchical claim of international law was not only justified as the result of a national (constitutional) political choice, but also as a consequence of international law's supremacy itself. Courts in Belgium,[27] and Latvia[28] expressly referred to article 27 of the Vienna Convention on the Law of Treaties (VCLT).[29]

While we thus see a not insignificant body of practice in which international law infiltrates domestic legal orders,[30] seen from a worldwide perspective the practice is very uneven. The inroads of the 'new', internally and individually focused international law on traditional pluralism have been uneven. Most states (also in Europe) that have accepted some legal effect of such international law have maintained the ultimate control of constitutional law. Many other states, notably in Asia, have not similarly accepted a hierarchically higher status of international law at all – neither in general, nor for human rights in particular. They may have acquired more power and control, and in that respect one of the conditions for some form of osmosis may be satisfied, but they have used such power to maintain the traditional principles of international law, such as sovereignty and its corollary separation between the international and the national. The doctrinal construction of international law as a body of interstate law being separated from national law has become a reality of its own, and has become rather insensitive to any change in control and legitimacy.

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[27] *ING België v. B.I.*, Appeal Judgment, No. C.05.0154.N; ILDC 1025 (BE2007), 2 March 2007.

[28] *Linija v. Latvia*, Judgment of the Constitutional Court, No. 2004-01-06; ILDC 189 (LV 2004), 7 July 2004.The court had to consider whether the Latvian Code of Administrative Penalties was compatible with the International Convention on Facilitation of International Maritime Traffic, which provides that states shall not impose any penalty upon ship owners if their passengers possess inadequate control documents. The Court derived from the obligations of Latvia under the Vienna Convention on the Law of Treaties (VCLT), in particular the obligation to perform treaties in good faith that in a case of contradiction between rules of international law and national legislation, the provisions of international law must be applied. Hence, the court set aside the domestic law.

[29] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331.

[30] See the review of practice in A. Nollkaemper, *supra* note 25.

A major explanation of the only very partial effect that the overlap in substance/subjects of international and national legal orders has had on the formal legal relationship between international and national law is the essentially localized nature of the meaning and application of much of the 'new' international law. While human rights law is the paradigmatic driving force of international law's claim to monism, and unrivalled in its success for securing, across the world, a modest degree of osmosis between international and national law (in that international human rights are accepted as part of national law), the content of the law itself is intrinsically localized, and will differ between states.[31] There is an inherent tension between the universal aspirations of international (human rights) law, on the one hand, and the local context in which rights and obligations have to be realized, on the other. While international law to some extent accommodates diversity,[32] the extent to which it does so is ambiguous, and states and international institutions with the agenda and power to seek to 'enforce' such laws may not always respect the interpretations adopted by target states. International institutions and states using human rights as a basis for normative critique of other political systems have more often than not sought to lessen room for localized differentiation and pursue particular political interpretations.[33] In that situation, resistance in parts of the world (notably Asia) to a full domestic legal status of international human rights law is understandable. The substance/subject parallel between international and domestic law

[31] D. Kinley, 'Bendable Rules: The Development Implications of Human Rights Pluralism (October 21, 2010), in C. Sage, B. Tamanaha and M. Woolcock (eds.), *Legal Pluralism and Development Policy* (Forthcoming), Sydney Law School Research Paper No. 10/104. Available at: http://ssrn.com/abstract=1695304, 13 (referring to the need to provide 'space and opportunity for the particular to influence the general'); S. Benhabib, 'Claiming Rights across Borders: International Human Rights and Democratic Sovereignty' (2009) 103 *American Political Science Review* 691.

[32] See section 3 below

[33] See also J. Tully, On Global Citizenship and Imperialism Today: Two Ways of Thinking About Global Citizenship, Presented at the Political Theory Workshop, Yale University, New Haven, CT, naming ´ the "Trojan horse" of a neoimperial order extending around the world.´ cited in S. Benhabib, *supra* note 31, at 694.

appears to be imperfect after all, and is unable to fundamentally transform the prevailing dualistic and pluralistic constellation.

2.2 Modern pluralism

The sustained duality between international and national law has been strengthened by a new, no less powerful set of dynamics that helps to support the political opposition against any such claims toward a more open relationship between the legal systems.

The now well-documented deficits of new processes of international law-making would make any major steps at the national level to remove the protections against international law rather irresponsible towards domestic constituencies, as they would both release control and complicate legitimacy. The overlap in substance and subjects, captured by the 'regulatory turn' in international law,[34] may force some form of osmosis between the international and national domains, but it may also enhance the demands on the qualities of international rule-making. Retaining the power to give supremacy to national rather than international law may serve useful societal purposes in an internationalized society where patterns of authority and control are sometimes difficult to grasp. The already weak legitimizing power of consent[35] is often sidelined by the emergence of new forms of law-making – notably by international institutions and indeed by the wider phenomenon of rule-making beyond the state – which, even if they do not match the traditional sources doctrine, have indisputable normative

[34] J K Cogan, *supra* note 24.

[35] A. Buchanan, 'The Legitimacy of International Law', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), p. 90.

effects.[36] Even where consent might formally be available, its role is reduced by the fact that it comes late in the process and for many states, non-participation in international regimes is not an option.

While, theoretically, the weak legitimating role of consent might be compensated by other features of the international law-making process (such as transparency, protection of fundamental rights, or accountability), [37] that potential remains largely unrealized. The problems of lack of rule of law quality and democratic legitimacy of international law are real and pressing.[38] It is a plausible hypothesis, supported by anecdotic empirical data, that states with a strong practice of democratic and rule of law-based governance will be reluctant to allow full domestic effect of international obligations that seek to control matters within the national jurisdiction when those obligations result from processes that do not conform to the standards of democratic legitimacy, protection of the rule of law, and in particular the protection of fundamental rights that apply at the domestic level. It is a compelling normative argument that they should do so.[39]

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[36] See e.g. V. Heyvaert, 'Leveling Up, and Governing Across: Three Responses to Hybridization in International Law' (2009) 20 *European Journal of International Law* 647-674; S.F. Hallabi, 'The World Health Organization's Framework Convention on Tobacco Control: An Analysis of Guidelines Adopted by the Conference of the Parties (2011) 39 *Georgia Journal of International and Comparative Law* 1; N. Hachez and J. Wouters, ´A Glimpse at the Democratic Legitimacy of Private Standards. Assessing the Public Accountability of Global G.A.P.´, 14 *Journal of International Economic Law* (2011) 677-710; J.K. Levit, A Bottom-up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments (2005) 30 Yale J. Int'l L. 125.

[37] The role of such factors as legitimacy enhancing qualities is examined in much of the studies on Global Administrative Law; see e.g. the special issue on global administrative law in (2009) 6 *International Organizations Law Review*, no. 2.

[38] J.L. Cohen, 'Sovereignty in the Context of Globalization; A Constitutional Pluralist Perspective', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford, Oxford University Press, 2010), p. 261, at 276-277.

[39] J. Crawford, 'International Law and the Rule of Law' (2004) 24 *Adelaide Law Review* 3-12. Compare D. Bodanksy, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental

This may apply to treaty obligations that, though duly ratified by a state, may collide with fundamental rights at the domestic level. An example is the Agreement between the European Union (EU) and the United States on the processing and transfer of passenger name records, which may conflict with the right to privacy.[40] It may also apply to the regulatory chill that is created by bilateral investment treaties.[41] The problem is most pervasive in respect of decisions of international organizations. Such decisions may go beyond the initial consent granted by the underlying treaty,[42] will generally not be subjected to domestic political debate before they acquire binding effect, and will not be embedded in institutional structures that can make up for this. States will accept the performance of international obligations as long as it is ensured that the pre-existing fundamental rights are secured – whether at the international or the domestic level. If that standard cannot be met, backlashes at the domestic level are likely to emerge, and indeed have emerged.

Increasing adjudication, which brings about more and more international judicial law-making, adds to these dynamics.[43] Whatever good may have been brought by the proliferation of

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Law?' (1999) 92 *American journal of International Law* 596, at 606 (noting that the more international law resembles domestic law, the more it should be subject to the same standards of legitimacy).

[40]Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS), OJ L 204/18, 4 August 2007.

[41] See e.g. D. Schneiderman, *Constitutionalizing Economic Globalization* (Cambridge: Cambridge University Press, 2008); S. E. Spears, 'The Quest for Policy Space in New-Generation International Investment Agreements' (2010) 13 *Journal of International Economic Law* 1037 at 1039.

[42] See e.g. T. Gehring, 'Treaty-Making and Treaty Evolution', in D. Bodansky et al, *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2007), 466. See for an example of domestic resistance to the domestic legal force of decisions of international institutions after the expression of the initial consent: *Natural Resources Defense Council v. Environmental Protection Agency*, 373 US 223 (2006) (holding that decisions by the parties to the 1987 Montreal Protocol were not judicially enforceable in the United States).

[43] See the individual contributions in A. von Bogdandy and I. Venzke (eds.), Beyond Dispute: International Judicial Institutions as Lawmakers (2011) 12 *German Law Journal*, available at

international courts and tribunals, their practice raises fundamental questions about procedural and substantive fits with the prevailing normative conceptions in a particular society. This holds for the International Court of Justice (ICJ),[44] the European Court of Human Rights (ECtHR),[45] the Inter-American Court on Human Rights,[46] and the World Trade Organization Dispute Settlement Understanding (WTO DSU).[47]

There may be a temptation to overstate the risk on this point. There are not so many instances where acts of international institutions have the power to adopt binding rules. And while the risk of international rules – whether binding or not – having preemptive effects on national policy-making is a real one, its scope has hardly been properly researched, giving the debate a somewhat speculative character.

Yet, the above trend makes it understandable why domestic institutions (and likewise the ECJ at the European level) may have reservations about the wisdom and desirability of accepting, domestically, precedence of international law over conflicting fundamental rules of domestic

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http://www.germanlawjournal.com/index.php?pageID=2&vol=12&no=5 (last visited 27 September 2011); P Schiff Berman, *supra* note 7, at 314.

[44] See the opinion of the US Supreme Court in *Medellín v. Texas*, 552 US 491 (2008).

[45] See e.g. A. Follesdael, 'The Legitimacy of International Human Rights Review: The Case of the European Court of Human Rights' (2009) 40 *Journal of Social Philosophy* 595-607*;* T. Barkhuysen and M. Van Emmerik, 'Legitimacy of European Court of Human Rights Judgments: Procedural Aspects', in N.J.H. Huls *et al* (eds.) *The Legitimacy of Highest Courts Rulings* (T.M.C. Asser Press, 2009), pp. 37-449.

[46] A. Huneeus, *supra* note 11 (discussing cases of rejection in Chili, Argentina and Venezuela).

[47] I. Venzke, 'Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy' (2011) 12 *German Law Journal* 1111, available at http://www.germanlawjournal.com/index.php?pageID=11&artID=1355. ; R. Rajesh Babu, 'Interpretation of the WTO Agreements, Democratic Legitimacy and Developing Nations' (2010) 50 *Indian Journal of International Law* 45-90 (noting that the discretionary power has been used to read into the WTO rules new obligations which were not foreseen or negotiated during the Uruguay Round of negotiations, and that the panels and the Appellate Body have consistently made improper use of the techniques of interpretation, and often made policy choices to the resentment and detriment of a large majority of the WTO membership).

law. *Kadi* fits this pattern, as the Court of Justice declined to give effect to a resolution of the Security Council that would be incompatible with the fundamental values of the European Union itself.[48] Several claims have been brought before domestic courts challenging the implementation of Security Council decisions (or, rather, national legislation that incorporated such decisions), based on an alleged conflict with fundamental rights.[49]

States thus justifiably continue to insist on control at the national level – necessarily implying some form of pluralism due to differing interpretations and patterns of application. Even the Netherlands, often heralded as a monist state that grants supremacy to international law over the Constitution, has initiated discussions on the need to protect constitutional values against the effect of international decisions that would fall short of rule of law standards.[50]

These dynamics allow us to appreciate Asian practices that preserve supremacy of national law not so much as an old-fashioned anti-internationalist policy, but as a process with acute relevance that recognizes the frailties and shortcomings of the international legal order. These practices also allow us to appreciate national decisions in other parts of the world that seek to keep international law out of national legal orders not so much as decisions that frustrate the morally impeachable goals of international law, but rather as decisions that function as necessary checks and balances on the institutions of the international legal order.

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[48] N13 above.

[49] An overview of claims is contained in the UNSC Eleventh report of the Analytical Support and Sanctions Implementation Monitoring Team established pursuant to Security Council resolution 1526 (2004) and extended by resolution 1904 (2009) concerning Al-Qaida and the Taliban and associated individuals and entities (13 April 2011), UN Doc S/2011/245, 28. See also A Tzanakopoulos, ´Domestic Court Reactions to UN Security Council Sanctions´, in A. Reinisch (ed.), *Challenging Acts of International Organizations before National Courts* (Oxford: Oxford University Press 2010), p. 54.

[50] See the Report of the State Commission on the revision of the Dutch Constitution (Rapport Staatscommissie Grondwet), 15-11-2010, Tweede Kamer (House of Representatives of the Netherlands), session 2010-2011, attachment to Kamerstuk (Parliamentary Paper) 31570 no. 17. Available at www.staatscommissie.nl.

Given the fact that a relatively large part of international law seeks to regulate domestic matters (and it is precisely that part that is problematic in terms of legitimacy), we may see a sustained or even widening gap between the international level – where the principle of supremacy continues to reject any reliance on domestic law to justify non-performance of an international obligation – and the domestic level – where defects in the procedure and substance of international law may enhance the resistance of the state to the application of international law in the domestic order – leading to a sustained pluralism that preserves legitimate space for political decision-making at the national level.

3. Internal pluralism

While the internal pluralistic paradigm cannot but reflect the above dynamics and the resulting separation between the international and domestic legal systems, it nonetheless construes a hierarchy that constrains such differences. It is essentially based on a combination of formal supremacy (section 3.1) and deference to the national level (section 3.2). However, the question is whether this combination is sufficient to address the challenges arising out of the separation between legal orders (section 3,3).

3.1 The premise of formal supremacy

The paradigm of internal pluralism is based on the fundamental premise of the supremacy of international law, which prioritizes international law over national law. Gerald Fitzmaurice wrote that the principle of supremacy is ‘one of the great principles of international law,

informing the whole system and applying to every branch of it'.[51] In general terms, the principle of supremacy of international law seeks to subordinate the power of states to international law.[52] One of its manifestations is that international law is supreme over national law, and in the international legal order takes precedence over it.[53] In the event of a conflict between international law and domestic law, international law will have to prevail in the international legal order, domestic law being considered a fact from the standpoint of international law.[54] This aspect is at the heart of the law of treaties[55] and the law of international responsibility.[56] The principle of supremacy of international law is central to the international rule of law, which, if anything, requires that states exercise their powers in

[51] G. Fitzmaurice, *supra* note 21, at 85.

[52] G. Fitzmaurice, *supra* note 21, at 6.

[53] See for a comprehensive treatment of this aspect of the principle of supremacy: D. Carreau, *Droit International* (Paris: Pedone, 2004) 43; G. Fitzmaurice, *supra* note 21, at 68. See also C. Santuli, 'Le Statut International de L'Ordre Juridique Étatique' (Paris: Pedone, 2001), p. 427.

[54] *Certain German Interests in Polish Upper Silesia* (*Germany v Poland*) (Merits), PCIJ Rep Series A, No. 7; See also J. d'Aspremont, 'The Permanent Court of International Justice and Domestic Courts: A Variation in Roles' in M. Fitzmaurice, C.J. Tams, P. Merkouris (eds.), *The Lasting Legacy of the Permanent Court of International Justice* (Amsterdam: Martinus Nijhoff Publishers 2012, forthcoming).

[55] Art. 27 and 46 of the Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331; (1969) 8 ILM 679; UKTS (1980) 58.

[56] Articles 3 and 32 of the Articles on the Responsibility of States for Internationally Wrongful Acts (hereafter Articles on State Responsibility) see UN Doc A/Res/56/83 (2002) and J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002). A comparable principle is contained in Art. 35 of the Draft Articles of the ILC on the Responsibility of International Organizations, UN Doc A/CN.4/L.270 (2007). The Draft Articles of the ILC on the Responsibility of International Organizations do not contain an article comparable to Art. 3 of the State Responsibility Articles, see International Law Commission Report on the work of its 55th Session (2003) UN Doc A/58/10, 48.

accordance with international law, not domestic law.[57] There cannot be an international rule of law without the precedence of rules stemming from recognized sources over rules stemming from sources outside the system.[58] Any other organizational principle would allow states to escape compliance with their obligations based on domestically-defined priorities, and would undermine the rule of international law.

3.2 Accommodating pluralism

The combination of its universalist ambitions and its claim to supremacy have made international law an easy victim of caricature. More than a few authors have depicted international law as a straw man, which would be totally insensitive to both the empirical realities underlying pluralism as well as its normative appeal. Thus, Berman writes that 'a universalist vision tends to respond to normative conflict by seeking to erase normative difference altogether. Indeed, international legal theory has long yearned for an overarching set of commitments that would establish a more peaceful and harmonious global community.'[59] One is hard pressed to find support for such a universalist vision that would seek to 'erase normative difference altogether.' Such arguments overstate the universal and hierarchical claims that international law, or even a significant number of international legal scholars, would make.

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[57] I. Brownlie, *The Rule of Law in International Affairs, International Law at the Fiftieth Anniversary of the United Nations* (Brill, 1998), p. 213. See also G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge: Grotius Publications, 1986), vol. II, 587 (noting that the principle is generally accepted as 'a *sine qua non* of the efficacy and reality of international obligation').

[58] Fitzmaurice, *supra* note 21, at 69 (equating the principle that the sovereignty of states is subordinated to the supremacy of international law with the rule of law in the international field). See also (more critically) A. Watts, 'The International Rule of Law' (1993) *German Yearbook of International Law,* at 15; 22.

[59] Berman, *supra* note 1, at 1189.

As international law is largely the product of political choices made by states, one cannot expect anything other than an international legal system that allows for, and indeed facilitates, the diversity of national political and legal systems. Indeed, states have recognized international law's claim to supremacy only because it allows for legitimate differences. International law is based on, and necessarily reflects, a co-existence of competing national legal orders. The same actors that make international law seek to preserve pluralistic ordering.

Apart from the obvious options to preclude the binding effect of international norms that may conflict with national law altogether, for instance through withholding consent, whether or not through constitutional review preceding ratification,[60] a variety of principles and processes allow states to ensure that (fundamental) national norms are immune to the effect of international obligations. These are not necessarily means to escape compliance, but instead preserve legitimate policy space, and are essential to further cooperation between states that seek to protect such policy space while pursuing common interests.[61]

The structure of international obligations in many areas of international law, often critiqued by those pursuing a human rights, environmental, or free trade agenda for being unduly open or textured and overly protective of sovereignty, is reflective of the need to protect policy space. The lack of direct effect of much of international law is not only a matter of constitutional law, but precisely an attribute of international obligations that reflects the intention of states to preserve policy space.[62]

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[60] See e.g. for the power of the Constitutional Court of Slovenia in this regard: *Case concerning the Constitutionality of the Agreement between the Republic of Slovenia and the Republic of Croatia on Border Traffic and Cooperation*, Constitutional Court, No. 43/2001; ILDC 402 (SI 2001), 19 April 2001.

[61] See generally L. R. Helfer, 'Flexibility in International Agreements', in J. Dunoff & M.A. Pollack (eds.) *International Law and International Relations: Taking Stock* (Cambridge: Cambridge University Press, 2012, forthcoming), available at SSRN: http://ssrn.com/abstract=1930379.

[62] See on the international aspects of self-executing treaties (thus also explaining how international law can preclude or at least not require direct effect) T. Buergenthal, 'Self-Executing and Non-Self-Executing Treaties in

Policy space is further protected by the very heterogeneity of international rights and obligations that may come into conflict with each other. This allows and indeed requires states to curtail particular rights in order to protect others. This will inevitably lead to a divergence of interpretation and application, which can be qualified in terms of pluralism.[63] The phenomenon of regime complexity, which allows states choice in which regimes to follow and which institutions to use, points in the same direction.[64]

Limitation clauses in human rights law and international trade law allow states more room to accommodate local context. They are essentially a 'vehicle for protecting pluralistic sensibilities'.[65] International human rights law does not impose solely (nor, perhaps, even primarily) one set of standards for universal application, but also provides for a common standard that can be given meaning in different political, cultural, and legal contexts and cultures in a legitimate variety of ways.[66] Limitation clauses thus do not so much restrict rights, or provide exceptions to rights, but instead provide a basis for 'engagement and

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National and International Law' (1992) 235 *Recueil des Cours* 303 See on the political function of direct effect J. Klabbers, ''International Law in Community Law: The Law and Politics of Direct Effect'(2002), 21 Yearbook of European Law 263.

[63] See e.g. N. Petersen,' International Law, Cultural Diversity, and Democratic Rule: Beyond the Divide Between Universalism and Relativism' (2011) 1 *Asian Journal of International Law* 149 at 153

[64] K.J. Alter and S. Meunier, The Politics of International Regime Complexity, 7 Perspectives on Politics (2009) 13-24.

65 Kinley, supra 31 at 3.

66 This even holds for the European Convention on Human Rights, see A. Stone Sweet ´A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe (forthcoming, Journal of Global Constitutionalism, 2012)' The Selected Works of Alec Stone Sweet Available at: http://works.bepress.com/alec_stone_sweet/41 (arguing that the European Court has transcended rights minimalism while maintaining a meaningful commitment to principles of national diversity and regime subsidiarity.; Kinley, supra 31 at 3, citing Glendon, M., 2001. *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*. New York: Random House.; M. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House 2001), pp. xviii-xix.

inclusion by which states can interpret and apply rights in ways that reflect their inescapably varied histories, cultural mores, political circumstances and legal traditions.'[67]

References to domestic law essentially fulfill the same function.[68] The Vienna Convention on Consular Relations allows states to exercise the individual right to consular assistance in conformity with the laws and regulations of the receiving state.[69] In principle, a state that applies a domestic law in the performance of obligations to protect the individual right will not be in conflict with the international obligation, and no issue of supremacy arises. In *Avena*, the ICJ went to great lengths, though from the perspective of the United States perhaps not far enough, to accommodate concerns over the ability of the United States to rely on domestic law in moderating the domestic impact of the Convention and the Court's earlier judgment in *LaGrand*.[70] The room for such differentiation is dictated by the content and structure of the obligations in question. The reliance of the Court of Justice in *Kadi* on a *renvoi* to domestic law to justify its course was less persuasive, since the resolutions in question left less space.[71]

Reservations provide yet another level of accommodation that allows states to safeguard provisions of domestic law and thus prevent conflict at the international level. The compromise in the VCLT, which does not produce the automatic nullity of reservations even if they contravene the object and purpose of a treaty, and in any case does not affect the

[67] Kinley, supra 31 at 3-4.

[68] See generally also G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge: Grotius Publications, 1986), vol. II, at 591.

[69] Vienna Convention on Consular Relations, Vienna, 24 April 1963, in force 19 March 1967, 596 UNTS 261, TIAS 6820, 21 UST 77.

[70] *Avena and Other Mexican Nationals (Mexico v United States of America)*, Judgment, I.C.J. Reports 2004, p. 12, at para. 113; *Sanchez-Llamas v. Oregon and Bustillo v. Johnson*, 548 US 331 (2006).

[71] N13 above, par. 298 (It noted that the UN Charter requires that Security Council resolutions are given effect 'in accordance with the procedure applicable in that respect in the domestic legal order of each of the Member States of the United Nations.').

legality of reservations to which other states may object, is not so much an unintelligible arrangement that fails to provide legal certainty but a successful attempt to maintain legitimate diversity within treaty regimes.[72]

On this point, a further distinction that shapes pluralism in the international legal order needs to be introduced. In a sovereignty-based conception, which construes the international legal order in a private law model, space for reservations and, indeed, pluralism, is maximized. In contrast, in a public law model, the room for reservations is limited by the object and purpose of treaties.[73] The more the latter perspective is emphasized, as is commonly done with respect to human rights treaties, the more the room for diversity within a treaty regime is minimized.[74] The European Court of Human Rights has declared such reservations illegal and considered states bound without the benefit of incompatible reservations.[75] This trend, based on good grounds from the perspective of the substantive values underlying treaties, has uncertain implications for international legal pluralism. It cannot be excluded that once the

[72] Such diversity of course cannot be unlimited. See rule 3.1.5.5. of the Guide to Practice on Reservations to Treaties. UN Doc. A/66/10/Add.1 (A reservation by which a State or an international organization purports to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole in order to preserve the integrity of specific rules of the internal law of that State or of specific rules of that organization in force at the time of the formulation of the reservation may be formulated only insofar as it does not affect an essential element of the treaty nor its general tenour).

[73] Reservations to the Convention on Genocide, Advisory Opinion, (1951) ICJ Rep 15; ICGJ 227 (ICJ 1951), par. 33.

[74] International Law Commission, Report on the work of its fifty-ninth session (7 May to 5 June and 9 July to 10 August 2007), General Assembly, Official Records Sixty-second Session Supplement No. 10; UN Doc. A/62/10 (2007), 84-87.

[75] *Belilos v. Switzerland*, 29 April 1988, Series A no. 132, par. 55; *Loizidou v. Turkey* (preliminary objections), 23 March 1995, Series A no. 310, par. 95. . See also HRC, General comment no. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant: . 04-11-1994. CCPR/C/21/Rev.1/Add.6, General Comment No. 24. (General Comments), in particular paras. 17 and 18. See also the HRC's view in Rawle Kennedy v Trinidad and Tobago, Communication No 845, UN Doc CCPR/C/67/D/845/1999 (31 December 1999), para. 24 ('it is for the Committee, as the treaty body to the International Covenant on Civil and Political Rights and its Optional Protocols, to interpret and determine the validity of reservations made to these treaties').

safety valve of particular reservations is removed, this will either affect the acceptance of international obligations in the first place, or fuel rejectionist approaches at the national level.

Generally though (and thus apart from the practice of human rights institutions that challenge the power to make reservations), international institutions recognize and sustain the room for diversity. The margin of appreciation that the ECtHR allows in its review of domestic law and practice is the most discussed example of this.[76] The supervisory practice of human rights treaty bodies also bolsters the pluralistic ordering of legal systems:[77] the procedures that are often critiqued for their lack of bite are in fact construed to allow for, and indeed, promote 'assimilation of the human rights cause, rather than conversion to it.'[78]

More generally and fundamentally, it can be argued that the combination of the principle and practice of auto-interpretation[79] with weak enforcement powers within the international legal order is a precondition for states' willingness to recognize supremacy in the first place. While enforcement powers as such do not affect the status of an obligation as law – though that

[76] E. Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 *New York University Journal of International Law and Politics* 843; Y. Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2005) *European Journal of International Law* 907, at 912; Compare M. Kumm, *supra* note 24, at 927.

[77] Kinley supra 31 at 6 (´Pluralistic strains are perhaps most evident in the political and diplomatic interactions between states and the international human rights bodies. Such relations are often characterized as engaging rather than didactic, and suggestive rather than admonitory.

[78] id

[79] L. Gross, 'States as Organs of International Law and the Problem of Autointerpretation' in G. A. Lipsky (ed.), *Law and Politics in the World Community* (Berkeley and Los Angeles: University of California Press, 1953) 59, 76–77; P. Weil, 'Le droit international en quête de son identité: cours général de droit international public' (1992) 237 *Recueil des Cours* 9, 220; G. Abi-Saab, '"Interprétation" et "auto-interprétation" – quelques réflexions sur leur role dans la formation et la résolution du différend international' in U. Beyerlin (ed.), *Recht zwischen Umbruch und Bewährung. Festschrift für Rudolf Bernhardt* (Berlin/Heidelberg/New York: Springer-Verlag, 1995) 11.

argument has been made – they should be considered as an essential aspect that explains the normative ambitions and effect of international obligations.[80]

The combined effect of all of this is a contained form of pluralism. International law necessarily allows much deference towards, and to a large extent accommodates, the divergence of interpretations between different legal systems.[81] It implies a fragmentation that may endanger the very stability that the principle of supremacy seeks to protect.[82]

However, while all of this allows for a pluralistic variation across legal systems, in the final analysis such pluralism is limited by international law. The situation with respect to the Vienna Convention on Consular Relations is illustrative: while it preserves the right to

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[80] K. W. Abbott et al., 'The Concept Of Legalisation' (2000) 54 *International Organization*, 17-35; M. Reisman, 'A Hard Look at Soft Law' (1988) *Proceedings of the 82nd Annual Meeting of the American Society of International Law* 373, available at: http://digitalcommons.law.yale.edu/fss_papers/750; J.E. Alvarez. *International Organisations As Law-makers* (Oxford: Oxford University Press, 2006).

[81]Compare Halberstam, *supra* note 1, at 3 (referring to systems as 'constitutional heterarchical', which means that although the exact hierarchy is unsettled, constitutional claims are nevertheless mutually accommodated). Also Berman *supra* note 1, at 1192 (a pluralist framework recognizes that normative conflict is unavoidable and so, instead of trying to erase conflict, seeks to manage it through procedural mechanisms, institutions, and practices that might at least draw the participants to the conflict into a shared social space.)

[82] Most authors use the term 'fragmentation' to refer to horizontal fragmentation between institutions and functional regimes within the international legal order (see e.g. the conclusions of the work of the Study Group on the Fragmentation of International Law, International Law Commission Report on the work of its 58th session (2006) UN Doc A/61/10, 407; M. Koskenniemi, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553; A.L. Paulus, 'Subsidiarity, Fragmentation and Democracy: Towards the Demise of General International Law?' in T. Broude and Y. Shany (eds.), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity: Essays in Honour of Professor Ruth Lapidoth* (Oxford: Hart Publishing, 2008) 99; J. Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands' (2004) 25 *Michigan Journal of International Law* 903. However, the term is as relevant at the interface of domestic and international orders. The connection between the role of national courts and fragmentation is noted by: A. Kunzelmann, 'Australian International Law: The Impact of Australian Courts on the Fragmentation of International Law' (2008) 27 *Australian Yearbook of International Law* 225, 248. See also M McDougal, 'The Impact of International Law Upon National Law: A Policy-oriented Perspective' (1959) 4 *S.D. L. Rev.* 25; reprinted in McDougal & Associates, *Studies in World Public Order* (New Haven, Yale University Press, 1960) 225.

perform obligations in conformity with national law, article 36(2) provides that the deference to domestic law is 'subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended'. [83] The general point is that it is international law that determines what matters are governed by domestic law and the extent to which they are so governed.[84] The sensitivity of international law to fundamental rules of domestic law, through any of the above devices, thus does not result in a general exception to the principle of supremacy in the international legal order.

One might argue that in view of the ultimate claim to authority of international law, the differentiation within the international legal order is not really pluralistic, because in the end it is subject to a hierarchical system. However, that argument would understate the necessary connection between the premise of supremacy and the diversity of national legal systems that makes it possible, as well as the weakness of enforcement powers that allow the diversity to sustain itself. Indeed, the very fact that the international legal order recognizes and reconstitutes sovereignty as the basis of statehood implies that we have to acknowledge that normative claims of international law co-exist alongside those of states and their legal orders.[85] It is thus perfectly possible to speak of a 'pluralism under international law'.[86] It is

[83] The Court concluded in *LaGrand* that the application of the procedural default rule by the United States had the effect of preventing such 'full effect' and concluded on that basis that the United States was in breach of its international obligation; *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, p. 466, at paras. 90-91.

[84] Also G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge: Grotius Publications, 1986), vol. II, at 592.

[85] J.L. Cohen, supra note 38, at 274.

[86] N. MacCormik, *supra* note 4, at 527. See also A Stone Sweet, Constitutionalism, Legal Pluralism, and International Regimes, 16 Ind. J. Global Legal Stud. 632 (2009) ;W Burke-White, ´International Legal Pluralism´, (2004) 25 *Mich. J. Int'l L.* 977 (2004) 977 (referring to a pluralist system that accepts a range of different and equally legitimate policy choices by national governments and international institutions, but does

noteworthy that even the EU legal system, which proclaims a supremacy that is even more forceful than the claim of supremacy of international law, is often sketched in pluralistic terms. Halberstam notes that the unsettled nature of authority in the United States and the EU

> is not a defect, but an essential feature of the system. And in both, the lack of settlement does not result in anarchy within the system or destruction of the system, but in productive conflict. Constitutional heterarchy is therefore not a principle of disorder, but a principle of organization.[87]

If this holds for relatively strong hierarchical and (quasi) federal systems such as those of the United States and the EU, it certainly holds for the much looser and far more heterogeneous international legal order.

3.3 Unresolved challenges

The internal pluralistic perspective on the international legal order has, from both a descriptive and a normative perspective, a number of limitations. Despite its inherent flexibility, the internal paradigm cannot properly capture the diversity of legal systems and underlying political constellations. Two aspects should be distinguished.

First, there is much law-making and legally relevant rule-making beyond the state that is not subjected to international law and thus cannot be subjected to its hierarchical claims. Law-making outside the state (or, extending to the international legal system, outside the state-

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so ´within the context of a universal system´); B Kingsbury, ´Confronting Difference: The Puzzling Durability of Gentili's Combination of Pragmatic Pluralism and Normative Judgement´, 92 American Journal of International Law 713 (1998); D Held, ´Law of States, Law of Peoples: Three Models of Sovereignty´, 8 *Legal Theory* (2002) 1 at 38-39; A Peters, supra note 5.

[87] Halberstam, *supra* note 1, at 32.

centric system of sources) is even a defining feature of legal pluralism.[88] The supremacy of international law is powerless in regard to many national laws that aim at transnational regulation, to rules adopted by international standard-setting institutions, or to self-regulation by multinational corporations.[89] Such bodies of rules may make claims to the actors that they address that compete with normative claims made by international law, resulting in a situation of pluralism that cannot be accommodated or resolved by international law itself, simply because these systems are outside the purview of international law. Significantly, they will thus also neither profit from nor be controlled by the mechanism of domestic law that recognizes the legal effect of, and sometimes the partial supremacy of, international law, even though it is undeniable that they have significant effects on domestic law or policy.[90]

This proposition does not as such undermine the internal pluralistic paradigm – whose combination of supremacy and sensitivity by definition only extends to those areas actually covered by international law. International law is a limited system in terms of what it does and does not regulate, and it cannot possibly claim to accommodate all forms of pluralism constituted by normative systems, and also therefore cannot be critiqued on that basis. International law only represents part of the normative spectrum, and is necessarily part of a larger pluralistic system.[91]

Various attempts have been made to extend the scope of international law, or to redefine its basic premises – resulting necessarily in a deformalization of international law – with a view

[88] BZ Tamanaha, ´The Folly of the Social Scientific Concept of Legal Pluralism´, 20 *J.L. & Soc'y* 192 (1993) 192 at 193.

[89] P Schiff Berman, *supra* note 7, at 312.

[90] E.g., the Greek Conseil d'Etat held recently on 21 June 2011 that the Memorandum signed with IMF, EU and the ECB was not a treaty (on file with author). Similarly, the Supreme Court of the Philippines held in 2008 that a Peace Agreement that was in conflict with the Constitution was neither a treaty nor a unilateral act binding under international law in *The Province of North Cotabato v. The Government of the Republic of the Philippines et al.*, G.R. Nos. 183591, 183572, 183893 & 183591 [2008] PHSC 1111, 14 October 2008.

[91] Tamanaha, *supra* note 1.

to new forms of normativity within international law.[92] Such attempts aim to accommodate different forms of normativity within the system of international law. That holds both for older attempts to subject so-called soft law to the system of international law[93] and to newer arguments that informal rule-making by international institutions should be considered from the standpoint of a re-conceptualized international law. Such constructions may have their merits, to the extent that in several respects the lines between international law and soft law or informal law is a thin one, and that both from an empirical and normative aspect such bodies of normativity should be considered together.[94] Nonetheless, lumping them together may sacrifice the distinct nature of international law and,[95] with that, relinquish the foundational role of the principle of supremacy as a principle that can accommodate pluralism within the international legal system.

The second and, in certain respects, more serious challenge to the internal pluralist paradigm is that even in those areas that it does cover and where its claim to supremacy does extend, international law's accommodating principles and its sensitivity to diversity are ineffective in that it arguably cannot curtail competing normative claims by states. MacCormick argued that pluralism under international law provided a safe alternative to radical pluralism. Conflicts between legal systems would not occur in a legal vacuum, but in a space 'to which international law is not only relevant but indeed decisively so', given the continuing normative significance of *pacta sunt servanda*.[96] However, his argument seems to rest on a formal construction of international law that does not take into account the possibility that the

[92] See for a critical review of deformalization of international law J. d'Aspremont, 'The politics of Deformalization in International Law' (2011) 3 *Goetingen Journal of International Law* 503.

[93] J. Klabbers. 'The Redundancy of Soft Law' (1996) 65 *Nordic Journal of International Law* 167.

[94] Heyvaert, supra 36.

[95] Compare Tamanaha, *supra* note 88, at 193.

[96] N MacCormik *supra* note 4 at 527.

substance and procedure of international law itself may become problematic in the manner discussed in section 2.2 above.

Empirically, the weakness of the internal pluralist paradigm is that it cannot account for the many cases where states, or their courts, decline to give effect to international obligations because doing so would conflict with fundamental rights defined under national law. The very exceptional nature of the few cases that expressly base their conflict rules on the supremacy of international law[97] makes clear that otherwise, states and courts in their day-to-day practice reject such supremacy claims. The standard rejoinder to the gap between paradigm and reality is that all these cases in which states do not accept the supremacy of international law are simply cases of non-compliance, both with the obligations to conduct themselves in a given way and with the secondary obligation to terminate non-performance of international obligations and secure a return to legality. However, the number of cases where states principally and unconditionally accept the supremacy claim over conflicting national (constitutional) law is so limited that its premise itself must be called into question. It is thus forced to retreat to the narrow claim that its supremacy is only to guide action in the international legal order itself, without any effect for national legal orders.

Normatively, the weakness of the internal paradigm is its relative blindness to shortcomings in terms of substance and procedure. It is a compelling argument that international law should not be allowed to control matters within the national jurisdiction when international obligations result from processes that do not conform to the standards of democratic legitimacy, protection of the rule of law and, in particular, the protection of fundamental rights that apply at the domestic level.[98] It should also be recalled that blind obedience to the

[97] Supra n 27-28.

[98] See text to supra note 39.

supremacy of international law is not the same thing as the rule of law.[99] The drawbacks of the internal paradigm are thus clear: states would have to comply even if a decision of an international institution were of doubtful quality in terms of deliberative democracy, rule of law, or protection of human rights, unless such defects can be framed in terms of international law itself. Moreover, it would freeze the law precisely in an area where emerging practice at the national level can lead to, or change, hierarchies at the international level, notably in the area of human rights.[100]

At this point it should be noted that some of the recent work that has advanced this empirical and/or normative challenge to the internal paradigm may underestimate the ability of international law to accommodate competing claims. After all, there is a significant overlap between fundamental rights under domestic law and international human rights. Decisions to refrain from giving effect to international obligations that are formally based on a conflict with a domestic law may in fact conform to or give effect to a(nother) rule of international law. When a state denies the domestic effect of an international obligation because doing so would violate the right to a fair trial, the right to property or another human right, this may be consistent with internationally recognized human rights. Domestic constitutional, legislative, and judicial challenges to the full application of international law need not be regarded as nationalistic reflexes that seek to undermine the performance of international obligations – and that sustain an external pluralistic ordering – but may be seen as legitimate responses that are demanded of international law itself, based on a substantive overlap between international

[99] A. Watts, *supra* note 58, at 22. See also G. Palombella, 'The Rule of Law Beyond the State: Failures, Promises and Theory' (2009) 7 *International Journal of Constitutional Law* 442.

[100] See also A Peters, supra note 5, at 52 (´Jeder Konfliktfall ist ein Stimulus für Entwicklung neuer Ideen, für die Suche nach der bestmöglichen Reaktion. Damit wird die Problemlösung optimiert.´) Of course, change in practice of relevant actors can lead to a change in customary law, even where this practice involves a breach of existing law, see ICJ, Military and Paramilitary Activities in and Against Nicaragua, Nicaragua v United States, Merits, Judgment, (1986) ICJ Rep 14; ICGJ 112 (ICJ 1986), par. 186.

law and domestic law and a commonality of constitutional values at the international and the domestic level.[101]

One example of a case that may be explained and justified from this perspective is the *Görgülü* decision. The German *Bundesverfassungsgericht* held that, while it normally should give effect to a judgment of the European Court, this would not be so when that would *restrict or reduce the protection of the individual's fundamental rights under the Constitution.*[102] The Court noted that the commitment to international law takes effect only within the democratic and constitutional system of the Basic Law. Significantly, it referred in this context to a joint European development of fundamental rights.[103] As to the effects on third parties, it stated that it is the task of the domestic courts to integrate a decision of the ECtHR into the relevant partial legal area of the national legal system by balancing conflicting rights, and that the ECtHR could not aim to achieve such solutions itself.[104]

Likewise, challenges in domestic courts of decisions of the Security Council Sanctions Committee that impose restrictions on individual human rights, which would score low on most indicators of the international rule of law, may be seen as justifiable attempts to preserve individual rights and, indeed, the rule of law.[105] In some respects this also holds for the *Kadi* judgment. The Court protected fundamental rules of Community law which in substance overlapped and indeed were informed by international (European Convention of Human

[101] See further discussion in J. Nijman and A. Nollkaemper, *supra* note 13, at 341 – 360; A. Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts', Loyola of Los Angeles International and Comparative Law Review, Forthcoming.

[102] *Görgülü Case*, Individual constitutional complaint, BVerfG, 2 BvR 1481/04; ILDC 65 (2004), 14 October 2004, par. 32 (emphasis added); see also par. 62.

[103] *Id.* par. 62.

[104] *Id.* par. 58.

[105] E. De Wet and A. Nollkaemper, 'Review of Security Council Decisions by National Courts' (2002) 45 *German Yearbook of International Law* 166-202.

Rights (ECHR)) standards.[106] It may be noted in this context that the Court of Justice in *Kadi* understated its case, and perhaps limited its acceptability at the international level, by not putting more emphasis on the commonality between the European standards it sought to protect, on the one hand, and the human rights standards under the UN Conventions and customary law that were relevant to the exercise of powers by the Security Council, on the other.[107]

The conflict that emerges in such cases is of a different nature from a conflict between international law and domestic law. The fact that a state seeks to justify non-compliance with an international obligation by reference to another international obligation, rather than to a rule of domestic law, changes the parameters of the conflict. Rather than being analysed in a black and white manner (where either domestic law or international law has to trump the competing obligation), the conflict is now subjected to rules of international law pertaining to conflicts between two or more international norms.[108]

However, the scope of this argument, according to which challenges to international obligations can be resolved within the international legal order, and thus can be compatible with the internal pluralistic paradigm, is relatively limited. Many conflicts between international and national law cannot be translated or transformed into international law terms. While *Medellin* may in some readings of the case still be seen as a conflict between

[106] N 13 above. In par. 283 the Court recalled that 'according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance'.

[107] Article 24(2) of the UN Charter; see further discussion in E. De Wet and A. Nollkaemper, supra note 105; A. Tzanakopoulos, note 101.

[108] A Tzanakopoulos, 'Collective Security and Human Rights', in E. de Wet, J. Vidmar (eds.) Judicial Practice on Hierarchy in International Law: The Place for Human Rights. (Oxford: Oxford University Press, 2012, forthcoming).

two norms of international law, and as such can be subject to accommodating principles of international law, that is already much harder for challenges to international obligations based on the Sharia.[109]

Moreover, even if a conflict between domestic law and international law can be translated into a conflict between two international norms, the institutions tasked with balancing such norms may well come to different results, depending on whether they are part of the international or of a particular national legal order. The weighing of interests and obligations between human rights treaties and extradition treaties, applied for instance in Dutch and Czech extradition cases,[110] does not easily conform to international principles for the reconciliation of competing obligations and may well have led to a different result than that to which a hypothetical international court would have arrived.[111] Domestic courts may establish a hierarchy of norms (with fundamental rights on top), or come to a balance of interests, that international courts may reject, depending on their particular jurisdictional context. An international court is likely to reject the attempt of a state to justify non-performance by reference to a fundamental obligation that is not recognized as hierarchically superior.[112]

The substantive aspects of pluralism are thus sustained and, indeed, strengthened by the institutional context, in particular by the availability (or lack thereof) of international courts

[109] Though obviously not all such challenges would necessarily violate international law, see discussion by J. Rehman, 'The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq' (2007) 21 *International Journal of Law, Policy and the Family* 108-127.

[110] See respectively *C.D.S. v The Netherlands,* Surpreme Court of the Netherlands, 30 March 1990, (1991) NYIL 432 and *Recognition of a Sentence Imposed by a Thai Court,* Constitutional Complaint, I ÚS 601/04; ILDC 990 (CZ 2007), 21 February 2007.

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

[112] This is indeed suggested by the Judgment of the ECtHR in *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI.

with jurisdiction in regard to the claims decided by national courts. International law can only partly accommodate the dynamics in, and differences between, national political choices. Theoretically, the capacity to accommodate differences might be increased by a widening of the principle contained in article 27 of the VCLT, to allow a party to rely on provisions of its internal law as justification for its failure to perform a treaty, perhaps limited by the qualification that it should concern a rule of its internal law of fundamental importance. However, doing so would collapse the international legal order as such and thus also the internal pluralistic paradigm.

4. External pluralism

The paradigm of external international legal pluralism builds on the weaknesses of the paradigm of internal pluralism. It is precisely the inability of the internal paradigm to accommodate practices that contest international legal prescriptions and, more importantly, to provide normative justifications for such practices, that has fueled an articulation of a perspective that finds such justifications outside the international legal order.

4.1 The resistance against supremacy of international law

Empirically, the case for external pluralism is a compelling one. Cases such as *Ahmed and Others* (where the UK Supreme Court declined to give effect to international obligations and urged the parliament to decide on the implementation of the counter-terrorism resolution – a

retreat to national democracy)[113] and *Kadi* (defended by a reference to the autonomous European legal order)[114] are but the more well-known examples of a much wider phenomenon. According to Krisch, the practice of national courts reviewing decisions of international organizations proves that legal pluralism is taking root.[115]

The claim of external pluralism rests in particular on three related premises. First, 'plural, divided identities, loyalties, and allegiances that characterize postnational society are better reflected in a multiplicity of orders than in an overarching framework that implies ultimate authority'.[116] It thus reflects the reality of states (in their dual manifestation as international and national legal persons), communities, and individuals who operate in separate legal orders, and who are bound to be subject to competing loyalties, commitments, and obligations stemming from these respective legal orders.[117]

Second, it is premised on the legitimacy concerns that largely outstrip the legitimating power of formal legality, and that may justify non-compliance with international obligations where international law cannot accommodate such concerns.[118]

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[113] *Her Majesty's Treasury v Mohammed Jabar Ahmed and others* [2010] UKSC 2.

[114] Joined Cases C-492/05 P and C-402/05, *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR *I*-06351; [2008] 3 CMLR 41.

[115] Krisch, *supra* note 7, part Two. See for instance his chapter on the decisions regarding the UN Security Council Resolutions, at 153-188.

[116] Krisch, *supra* note 7, at 103.

[117] Compare A. von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: on the Relationship between International and Domestic Constitutional Law' (2008) 6 *International Journal of Constitutional Law* 397, 398; A. Mills and T. Stephens, 'Challenging the Role of Judges in Slaughter's Liberal Theory of International Law' (2005) 18 *Leiden Journal of International Law* 1, 20 (noting that a role of the judiciary 'as servants of transnational norms contradicts their role as servants of the domestic rule of law').

[118] M. Kumm, 'Democratic Constitutionalism encounters International law: Terms of Engagement, in S. Choudhry (ed.), *Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2007) 263.

Third, the external pluralist paradigm allows for change. Where the hierarchy-based internal paradigm fixes values, rights, and obligations, thus confirming the underlying power constellations, external pluralism provides for change, development, and contestation.[119] The necessarily conservative nature of international law means that it fails to keep up with changing policies and priorities. Whether change is assessed positively or negatively depends, of course, on the eye of the beholder, but it would seem that change is a value in itself that needs to be facilitated by legal systems. It may well be that some of the external pluralistic literature understates the capacity of international law, and international institutions in particular, for change without depending on cumbersome processes of negotiation and ratification – as evidenced especially in human rights areas such as the death penalty and rights of homosexuals. But on the whole, international law is rather static, particularly in areas where powerful institutions are lacking.[120] And, of course, the question is whether change propelled by international institutions is the change that is sought by domestic constituencies.

National constitutional arrangements that oppose international law's claim to supremacy should be seen not so much as a threat to legal certainty and stability, but as providing checks and balances that are lacking at the international level,[121] and thus promoting legitimate change and adjustment. Control and even rejection at national level can be seen as a ex post facto form of an accountability mechanism that is missing at international level. [122] Indeed,

[119] Krisch supra note 7, at 79, 81; Berman *supra* note 1, at 1155 ('we need to realize that normative conflict among multiple, overlapping legal systems is unavoidable and might even sometimes be desirable, both as a source of alternative ideas and as a site for discourse among multiple community affiliations').

[120] Krisch, supra note 7 at 240.

[121] Krisch, supra note 7 at 78-89.

[122] See for a discussion of the modes of ex post facto accountability N Hachez and J Wouters, *supra* note 36.

such external pluralism should not be seen in terms of conflicts between competing claims, but in terms of accommodation and adjustment.[123]

It may especially be said in this latter respect that the external pluralist paradigm may overstate its case in view of the long tradition of national challenges to supremacy of the rule of law. Indeed, there is something odd in the statement that pluralism is taking root, in view of the fact that resistance and rejection is as old as the international legal order itself. For centuries, national courts have decided conflicts between international and national law in favour of national law, and indeed had no other option under domestic law. It might even be said that any refusal of a state (or court) to decline to give effect to an international obligation based on domestic priorities implicitly makes a claim that international law should allow that particular exception, and to that extent seeks accommodation.

What may be new in the recent string of cases, then, is that these may be construed as part of a dynamic pattern of adjustment and accommodation at the interface between international law and national law. It is thus not so much the pluralism that is new, but the articulation of principles and processes that justify rejection and that rise beyond the particular national context.[124] This opens up possible dialogue between states / courts on their justification for contestation[125] as well as exchanges between states / courts on the one hand and international institutions on the other.[126] Indeed, key to the external pluralist paradigm as defined in this article is that it is not internal to the national legal order in a way that the internal pluralist

[123] Krisch, supra note 7 at 100.

[124] Krisch, supra note 7 at 240.

[125] A. Tzanakopoulos, 'Judicial Dialogue in Multi-level Governance: The Impact of the Solange Argument', in O. K. Fauchald and A. Nollkaemper (eds.), *The Practice of International and National Courts And The (De-) Fragmentation Of International Law* (Oxford: Hart Publishing, 2012, forthcoming).

[126] Section 5 below

paradigm is internal to the international legal order, but that by definition it pertains to the interface between legal systems. I will return to this aspect in section 5 below.

Thus the external paradigm can better normatively justify a wide range of practices which have to be deemed problematical from the perspective of the internal pluralistic paradigm. Appreciating the pluralist structure of law in the postnational constellation will provide better mechanisms for accommodating and stabilizing competing claims than any overarching blueprint.[127] While according to both the internal and the external paradigm there is no fixed rule of priority, the internal perspective would still take the position that general principles, namely those of international law, can accommodate the competing positions by ultimately requiring conformity with international law. The external paradigm releases that single point of normative control – inevitably meaning that states and courts deal only with those conflicts by engaging in politics.[128]

4.2 Accommodation of international rules

The proposition that international and national legal orders contest normative claims without a common point of reference of course does not mean that international law will lack effect in national legal orders. Both in the EU and the United Kingdom, whose judicial decisions have often been cited as an example of modern external pluralism, there is ample evidence that international norms are generally accepted as guiding and constraining the exercise of public power.

[127] Krisch, supra note 7 at 299.

[128] N. Krisch, 'The Open Architecture of European Human Rights Law' (2008) 71 *Modern Law Review* 183. See also A. Torres Perez, *Conflicts of Rights in the European Union, (*Oxford: Oxford University Press, 2009).

This practice does not rebut the external pluralists' perspective as such, since the recognition of any legal effect is ultimately still based on national law. However, surely there is a difference between the fairly limited normative appeal of domestic law in the international legal order – except the influence on general principles[129] and the not unproblematic possibility of domestic analogies[130] – on the one hand, and the normative appeal that international law has in most, if not all, states, even if its formal recognition remains based on national law, on the other. Even states that retain a rigid formal duality with the international legal order in several respects recognize and allow for domestic effects of international law that mitigate and to some extent control pluralism. Indeed, the dynamics that fuel and sustain both conventional and modern pluralism are complemented by a countervailing normative appeal that pushes the legal orders towards each other, and without which the phenomenon of pluralism, and the respective merits of the paradigms of internal and external pluralism, cannot be properly understood.

In part, these contrasting dynamics reflect the unity of substance and subjects that, as noted above, has resulted in a significant, be it partial, osmosis between the international and the internal national levels, particularly in Europe but also in Latin America. For another part, this also reflects acceptance of a value-based hierarchy – resulting in a domestic recognition of supremacy of international law for international human rights. In this respect it is significant that many states allow for, but also restrict, the precedence of international law in the domestic legal order to international human rights treaties.[131] Contrasting dynamics also result

[129] B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 2006).

[130] see e.g. H. Lauterpacht, *Private Law Sources and Analogies of International Law* (London: Longmans, Green and Co. Ltd., 1927), see also L.R. Helfer, 'Constitutional Analogies in the International Legal System' (2004) 37 *Loyola of Los Angeles Law Review* 193.

[131] A. Peters, supra note 13.

from more pragmatic and interest-serving considerations – the interests of states in having a regime in the first place will generally extend to making that regime function.[132]

Even though particularly the first two sets of factors may be a largely western European construction, courts in non-European states have also engaged in the practice of maintaining an interpretative connection between domestic law and international obligations.[133] While Asian states generally resist accepting a legal effect of international law that would overcome pluralism, the fact is that many Asian states now have a constitutional or statutory human rights practice that in substance is intimately connected to international law, even though the role of such norms is thus quite different.[134] Moreover, courts across such dualistic states engage in interpretative practice that accords legal weight to international law. For instance in Bangladesh, in *Ershad v Bangladesh and ors* it was observed that Bangladesh's national courts should not immediately ignore the international obligations undertaken by the state. If domestic laws were not clear enough or there was nothing therein, the national courts should draw upon the principles incorporated in the international instruments.[135]

All of this leads to processes of interpretation, communication, and dialogue between international and national spheres that in part off-set the formal duality between the international and the national legal spheres, even though in the final analysis the latter maintains its essential trumping power.

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[132] A.T. Guzman, *How International Law Works: A Rational Choice Theory* (Oxford: Oxford University Press, 2008).

[133] See the review of practice in A. Nollkaemper, *supra* note 25.

[134] X. Hanqin and J. Qian, 'International Treaties in the Chinese Domestic Legal System', (2009) 8 *Chinese Journal of International Law* 299; K.G. Lee, *supra* note 16.

[135] *Ershad v. Bangladesh and ors*, Appeal Judgment (2001) 21BLD (AD) 69 ILDC 476 (BD 2000), 16 August 2000. See also *Chaudhury and Kendra v. Bangladesh and ors*, Written petition, No. 7977 of 2008, 29 BLD (HCD) 2009; ILDC 1515 (BD 2009), 19 January 2009 (human rights treaties could be used as an aid to the interpretation of the provisions on fundamental rights guaranteed in the Constitution).

To maintain its distinct identity, the external pluralist claim needs to be that despite all this infiltration of international norms, states do and should maintain the normative space to define their own political priorities that may contest international legal obligations.

4.3 Unresolved challenges

The main problem faced by the external pluralist paradigm is where to draw the line and how to reconcile it with the interests of a stable international legal order. While in the internal paradigm fragmentation is still constrained by a common, even though open-textured, point of reference, that is given up in the external perspective. Once we accept that a claim based on domestic values or principles can override a claim for performance of international obligations, the question is whether there are any limits to the values or principles that can be invoked.

Is there a distinction to be made between, say, *Kadi* and *Medellin*, or, even if there is not, between a rejection based on *Kadi* and *Medellin*, on the one hand, and a rejection based on the Sharia, on the other? For instance, the Egyptian Administrative Court had to review a claim by a person who was organically Muslim and had converted to Christianity in 1973. In 2009, his request to change the personal information on his identification card in accordance with his changed religion was denied. While Egypt is a party to the International Covenant on Civil and Political Rights (ICCPR), and by virtue of article 56 of the Constitution of Egypt, treaties, once ratified by that country, become part of the law of the land, the Administrative Court refused to apply article 18 of the ICCPR on the basis that it contradicts Islamic Sharia'a law. The Court held that according to article 2 of the Constitution, Islamic Sharia'a (Law) is reputed to be the supreme law of the land, and as such that preempts the implementation of

article 18 of the Convention.[136] Should such a case be considered on the same footing as the *Kadi* decision?

Rosenfeld notes that

> [w]hat is required … is some combination of formal and material points of convergence. The formal would reflect an acceptance of the function of the prevailing constitutional and legal order as a means to settle issues over which no material agreement among the plurality of competing views within the polity seems possible. The material points of convergence, on the other hand, would result from a normative commonality or overlap that spreads across a vast majority of competing normative outlooks within the polity.[137]

The key question is how far one shifts from the formal to the material, and how much convergence is needed in order to justify embarking on a disconnection from the formal convergence. Without limitation, we end up simply with a set of competing requirements – leaving it unclear how individuals, or states, should act, and what law will be applied and enforced.[138]

Some of the literature that advances the external pluralist paradigm is based on a substantive position that human rights justify national decisions that contravene international obligations.[139] A core, and a relatively safe common ground, of international human rights would seem to exist. Indeed, many cases cited in support of the external pluralist position

[136] *El Gohary v. the President of the Arab Republic of Egypt*, Egyptian Administrative Court, Case No. 53717, 13 June 2009. Note that on accession to the ICCPR, Egypt submitted the following declaration: "Taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratifiy it".

[137] M. Rosenfeld, *supra* note 7, at, 113-114.

[138] N. MacCormik, *supra* note 4, at 530.

[139] Eg M Kumm, *supra* note 24.

revolve around human rights. But this position is question-begging. On the one hand, as argued above, part of such claims can be based on international law itself, which recognizes room for differing interpretations and is built on contradictions.[140] We may not need the external perspective for this. On the other hand, beyond the core of internationally recognized rights, convergence will be quickly lost. This will not be helped greatly by limiting this power to an undefined category of 'fundamental constitutional norms'. While some agreement can be expected, that is precisely in areas covered by international law, and thus will not further the cause of the external paradigm. Beyond this, what is fundamental will differ from one state to another. This may be different in the EU context, where the proposition that supremacy of EC law should not be understood as blind precedence over fundamental constitutional rules of the Member States is compelling.[141] The relative homogeneity would arguably make it possible to accept an exception to the principle of supremacy.[142] At the international level, such an exception would be much more difficult to accept, as its risks for instability in treaty performance would be much greater.

Various authors have pointed to principles that would provide delineation. However, more often than not these are not neutral principles, nor principles that are universally accepted – they reflect particular choices that may be common to particular states or regions. Rosenfeld refers to the values of 'liberty, equality or dignity' that would induce convergence.[143] However, such indeterminate concepts do not seem to be capable of solving the problem. As

[140] Section 3.2.

[141] E.g. C. Joerges, 'Rethinking European Law's Supremacy' (2005) *EUI Working Paper LAW No. 2005/12*.

[142] L.F.M. Besselink, *A Composite European Constitution* (Groningen: Europa Law Publishing, 2007) 10, (arguing on the basis of Article 5 of the Treaty on the European Union that 'European acts which do no respect […] fundamental values do not take precedence over national rules and acts which express that national identify and the common values of the democratic rule of law.').

[143] M. Rosenfeld, *supra* note 7, at 277.

they would need to be interpreted by actors on different levels of governance, who are likely to disagree, they seem inherently incapable of leading to any convergence. As noted by Walker, 'even such a seemingly modest specification of its ethical core may take pluralism in a dangerously perfectionist direction, reinstating constitutionalism as the promoter of morally acceptable conceptions of the good life rather than as the ringmaster between any and all such conceptions whose contemplation is not entirely incompatible with the existence of a plurality of other such conceptions.'[144]

Likewise, Halberstam suggests that the fundamental judgment on authority is not decided by a *Grundnorm*, but on the basis of three fundamental values: voice, expertise, and rights.[145] No doubt, as a matter of political philosophy, good reasons can be given for one over the other, but is there any indication that these can and do function as norms reflecting some consensus at the international level? As Halberstam admits, these values are of a modern liberal colour and might not find universal appreciation.[146]

Using the label of legitimacy to capture these normative choices does not lead to a neutral standard.[147] As noted by Koskenniemi, the term 'legitimacy' is only rhetorically successful when it is not tied to any particular formal or moral set of principles – but that is precisely what is not done by those who, under the external pluralist model, contest the legitimacy of claims based on international obligations. The diversity of normative, value-based agendas of both actors as well as (external) pluralist scholars reflects a struggle to gain control over international law to further a particular political value-based agenda.

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[144] N. Walker, supra note 10, 682.

[145] D. Halberstam, 'Local, Global and Plural Constitutionalism: Europe Meets the World' in G. de Burca and J. Weiler (eds.), *Europe's Constitutionalism and Others* (Cambridge: Cambridge University Press, Forthcoming), 16.

[146] Ibidem, p. 16.

[147] M. Kumm, *supra* note 118, at 263.

In the external pluralist paradigm this is not problematic: indeed, this is its asset. Krisch recognizes that the core of his pluralist understanding is precisely when actors on different levels of governance do *not* share a common, overarching point of reference.[148] The external perspective would thus legitimize contestation precisely on the basis of norms that might not be as 'universal' as human rights, such as national interest or religious norms.[149] External pluralism is a normative (and political) project that, as such, is invulnerable to a critique based on its effects on another legal system from which it necessarily has to be autonomous.

Yet, the questions of what the implications of the external pluralistic position are for the supremacy of international law and the interests that that principle serves cannot be circumvented.[150] A fundamental consideration in this respect is that supremacy of international law (as it is key to the internal pluralist paradigm) cannot really be sustained if international law is not supported at the domestic level. This is a fundamental and perhaps controversial position, for it may be argued that the stability of the international legal order can be sustained *without* implementation at the domestic level. To some extent that indeed may the case. However, the better argument is that it is precisely the internal focus of much of modern international law[151] that makes international law, the performance of its obligations, and the stability that it seeks, necessarily contingent on a proper connection with and acceptance at the national level. If so, a pluralistic position that makes such acceptance at the

[148] Krisch, *supra* note 7 at 81.

[149] Take for instance the reservations made by Islamic countries to many human rights treaties. These reservations are in a way comparable to the *Solange*-approach taken by the German Bundesverfassungsgericht in the European context, that is seen by Krisch as a pluralist tendency. Both form an *ex ante* restraint on the basis of values. Legal pluralism favoured by Krisch would open the possibility of *ex post* reviewing on the basis of the same values; Examples of protection of national interests are the British *Horncastle* case (*R v. Horncastle and others* [2009] UKSC 14) and the *Medellin* decision of the US Supreme Court (*Medellín v. Texas*, 552 US 491 (2008)).

[150] Krisch, *supra* note 7 recognizes the problem of stability at 234-235, see also at 240.

[151] J. Weiler, *supra* note 24; J.K. Cogan, *supra* note 24.

national level subject to a normative critique and contestation cannot but undermine the power of the claim to supremacy. Of course, one could on normative grounds debate and critique the decision of the Egyptian administrative court that prioritized Sharia law over article 18 of the ICCPR.[152] But that contestation would not be based on hierarchy but on substantive arguments, and at the end of the day, one would have to respect the different political judgments in different societies.

The effects would go far beyond incidental cases of non-performance of international obligations. An organizational principle that supports a state's contestation of international obligations based on domestically-defined priorities would undermine the rule of international law. It would obliterate boundaries of legality, and 'might reinforce perceptions of international law as non-law (or quasi-law) – i.e., a loose system of non-enforceable principles, containing little, if any real constraints on state power.'[153] The external pluralist perspective could thus open up a Pandora's box.

Of course, saying that this external pluralism undermines article 27 of the VCLT is trite, since the countervailing arguments do not accept the normative power of article 27 beyond the international legal order in the first place. However, it would also seem that given the dependence of much modern international law on national law, one cannot have the cake and eat it too. Even though coherence might not be achievable politically, it seems difficult to maintain at the same time that the international legal order should, as a normative requirement, demand a particular conduct, whereas a particular state should be allowed to pursue a different conduct. Coherence then would demand that the customary principle, as

[152] supra n 136.

[153] Y. Shany, *supra* note 76, at, 912.; A Peters, supra note 5, at 53 (Das zweite Fundamentalproblem ist, dass der Pluralismus, konsequent zu Ende gedacht in dem Sinne, dass wirklich alle Auffassungen zu jedem Zeitpunkt gleichberechtigt sind, die Rechtsfolge der völkerrechtlichen Haftung eines vertragsbrüchigen Staates im Aussenverhältnis leugnen müsste.) .

contained in article 27 of the VCLT, would be read as saying that a party may invoke the provisions of its internal law as justification for its failure to perform a treaty, perhaps limited by the qualification does this should concern a rule of its internal law of fundamental importance. It is quite obvious that this would undermine the legal certainty and, indeed, the rule of international law.

5. Confronting the in- and the outside

Notwithstanding the fact that in many cases relevant actors can reconcile requirements stemming from the international and the national legal orders, in the final analysis the competing claims from the international and the national or local levels, relying respectively on the supremacy claims of the international or the national and the local, are largely irreconcilable. This is certainly a hallmark of a situation of pluralism.[154]

The internal and external paradigms take different approaches to that complexity, but the way in which they do so seems incompatible in itself. While they both have an empirical basis, and as such can be used to describe and explain certain practices of relevant actors, the empirical material that supports either paradigm is totally different. Also, their normative grounds seem largely contradictory, as one focuses on the interests of cooperation and stability that can serve the substantive interests, and the other on particularity and locality. Perhaps most fundamentally, the differing pluralist conceptions part ways in their answer to the question of

[154] D. Halberstam, *supra* note 1, at 2.

what is 'law' in the first place.[155] Rules recognized as law in the internal paradigm need not be recognized as law in the external paradigm, and vice versa.

Yet to some extent the weaknesses of either type are the strengths of the other. The internal paradigm, without concern for external dynamics, is on empirical and normative grounds a poor measure for describing the development and application of international law. The European ideal of hierarchy is a tempting model for lessening complexity, but it does not provide a basis for judging and incorporating countervailing practices. It cannot capture the normative complexity and the loss of legal stability and legitimacy that have emerged as a by-product of new processes of international rule-making. Relying on hierarchy to trump conflicting rules may have the virtue of resolving conflicts within the system of law, but it does not resolve the problem that the trumping rules themselves fall short on normative grounds and cannot resolve the complexity of rules stemming from outside the system.

Conversely, an apologetic embrace of diversity and locality – as that is part of the external pluralistic model – falls short on descriptive and normative grounds, because the practices that support it undermine the key interests of stability and predictability, without which much of the international cooperation aimed at the protection of transnational interests breaks down.

However, the differences may easily slip into stereotypes. Each paradigm may provide what the other considers to be its distinctive appeal. The need for change and dynamics, rightly noted by authors writing from the external pluralist perspective, often comes precisely from international institutions whose decisions are countered at the domestic level. Compare, for example, the 1982 decision of the Supreme Court of Cyprus refusing to follow the ECtHR

[155] Compare W Twining, Normative and Legal Pluralism: A Global Perspective;, 20 *Duke J. Comp. & Int'l L.* (2010) 476 (noting that the question what counts as legal is one of the main puzzles in the debate about pluralism); B. Tamanaha, *supra* note 1, at 376.

Dungeon decision[156] on decriminalizing homosexuality by invoking the perception of public morals in Cyprus,[157] with later change triggered by the case-law of the ECtHR.[158] Such examples illustrate that international (human rights) law is more prone to change than external pluralists contend. Conversely, history provides all too many examples in which local and particular interests, highlighted by the external pluralist paradigm, have proved immune to change, and have furthermore resisted the protection of communities that international law – now with modest success – protects.

The nature of strengths and weaknesses allows us to identify and conceptualize a complementary connection between the two paradigms. [159] While the international legal order needs its hierarchical claim to supremacy in order to provide the stability and legal certainty to serve the essential interests of states, communities, and individuals who need the protection of international law, the legitimacy of the claim to supremacy relies on the dynamics that underlie the paradigm of external pluralism that provide the necessary inspiration and politics, without which international law will be static and arid.[160] International law not only needs external acceptance for effectiveness, but also requires contestation for its legitimacy.[161]

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[156] *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45.

[157] *Yiannakis Panayiotou Costa v. The Republic of Cyprus*, Surpreme Court of Cyprus, 8 June 1982.

[158] *Modinos v. Cyprus*, 22 April 1993, Series A no. 259.

[159] A. von Bogdandy, 'Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6 *International Journal of Constitutional Law* 397. See for the notion of complementary between international and national legal orders; A. Nollkaemper, 'Multilevel Accountability in International Law: a Case Study of the Aftermath of Srebrenica', in T. Broude and Y. Shany, *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Oxford: Hart Publishing, 2008) 345.

[160] See on connection between supremacy and legitimacy J.L. Cohen, *supra* note 38, at 978 (noting that ´the pluralist conception of the international legal system recognizes - and possibly thrives on -the diversity of the system´).

[161] P. Schiff Berman *supra* note 7, at 323.

The external paradigm thus provides the political context for the international legal order. It is a trite observation that the development, interpretation, application, and change of international law depends on politics.[162] Political processes are not limited to negotiations of treaties or the framework of international institutions – the processes of acceptance and rejection of international obligations provide a necessary political context for the international legal order that otherwise lacks organized political structures. For instance, the lack of a proper political context of the European Court of Human Rights (given the rather limited role of the Committee of Ministers) is necessarily supplemented and corrected by the partly legal, but more often than not political, decisions of national organs (whether courts, legislatures, or executive branches) that may respond to earlier decisions of the court, whether by outright rejection or by more constructive means of engagement.[163]

This political context allows for checks and balances, and change, in a legal environment that prefers uncontrolled hierarchies and stability.[164] Acceptance, but also rejection that leads to change, is a necessary element of legitimacy of the international legal order. Rather than seeing domestic filters as an unwarranted barrier to the full effect of international law, such filters may be complementary to the ambitions of international law itself as a dynamic body of law that can cater to competing and diverse social interests. Rather than being faithful but

[162] M. Koskenniemi, 'The Politics of International Law' (1990) 1 *European Journal of International Law* 4.

[163] E.g.: In reaction to the 2004 judgment by the European Court of Human Rights, upheld in 2005 by the Grand Chamber (*Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, ECHR 2005-IX), where the Court ruled that the United Kingdom was in breach of the ECHR by not granting prisoners the right to vote, the Cabinet Office in December 2010 confirmed proposals which will grant certain categories of prisoners the right to vote but will prevent the most serious offenders from voting. See 'Government approach to prisoner voting rights' (17 December 2010), at: http://www.cabinetoffice.gov.uk/news/government-approach-prisoner-voting-rights (last visited 29 September 2011).

[164] Krisch, supra note 7 at 85-89; See also E Benvenisti ' Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts ' (2008) , 102 *American Journal of International Law* 241 (arguing that the practice of national courts has potential of both providing an effective check on executive power at the national and international levels alike and promoting the ideals of the rule of law in the global sphere.

blind enforcers of international law, domestic courts may have to fulfill a role as a safety valve, or 'gate keeper'.[165] In that way they also can put pressure on international decision-makers to get it right, much in the same manner as the *Solange* case-law in Germany put pressure on decision-makers in the EC to recognize and protect fundamental rights. Similarly, the *Kadi* decision may put pressure on the Security Council to adjust the procedures, as the Council could not but be concerned about the effects of its resolutions in the European Union and that the defects in terms of rule-setting cannot be resolved at the European level.

From this perspective, the external pluralist paradigm does not bring much news to the table – it is just a different label, be it a particularly articulate one – for the inevitable and necessary political context of international law. The claim to conceptual and theoretical innovation of modern (external) pluralism seems instead to lie elsewhere. It lies in its ambition to shape and justify the interfaces between the international and the national legal orders. External pluralism is not only about rejection, but also about defining the relationship – rejection is a means to an end that lies beyond the protection of national values and interests.[166]

Conversely, the external paradigm highlights the virtues of processes of contestation that address the shortcomings of international law, yet in itself does not provide a plausible alternative for bringing the stability that is needed for deep international cooperation. The dynamics of external pluralism, however, while allowing precisely for legitimacy and politics, may be difficult to reconcile with the interests of a stable international legal order and in particular, the interests of effective performance of international obligations.

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[165] F.V. Kratochwil, 'The Role of Domestic Courts as Agencies of the International Legal Order', in: R.A. Falk, F.V. Kratochwil, S.H. Mendlovitz (eds.), *International Law, A Contemporary Perspective*, (Westview Press, 1985) 236, 237; A. Peters, supra note 13, at 267. See also P. Capps 'The Court as Gatekeeper: Customary International Law in British Courts' (2007) 70 *Modern Law Review* 458.

[166] Compare on this point the concept of the ´jurisgenerative power of cosmopolitan norms´ in S. Benhabib, supra note 31, at 696.

To be sure, there is one essential difference between the internal and external paradigms that limits the degree to which they depend on each other. While the internal paradigm needs to recognize the 'outside' processes of contestation in order to compensate for its own shortcomings, the external type of pluralism, in principle, can stand on its own as a coherent descriptive and normative model. The need for a complementary role of international law is thus not intrinsic to the external pluralist paradigm in the way that the need for contestation is intrinsic to a viable internal pluralist paradigm.

Rather, the complementary role of the internal paradigm kicks in once the interests of stability of transnational cooperation and regulation are recognized. Those interests may not necessarily be accepted by supporters of the external paradigm. But it should be recalled that international law also protects the rights and interests of the very communities and individuals that the external paradigm looks to empower. In the absence of an alternative principle that can organize stability and prevent the international legal order from slipping into chaos, there seems to be no alternative than to rely on the normative pull of international law's supremacy. In short, for any stable system of international governance, there will be a need for convergence after all. This will have to be located outside the international legal order, but because of the vulnerability of common ground, it cannot discard supremacy altogether. In this sense, the internal and external paradigms do not necessarily cancel each other out, but support each other and are essentially interlocking.

The partly complementary roles of the internal and external paradigms naturally draw attention to the norms at the interface of the legal orders. Seen from the international legal order, these provide common ground that can eventually justify non-compliance and induce change. From the external perspective, they provide common ground that prevents a radical loss of stability. It is there that we can place, for instance, Kumm's reliance on principles of

subsidiarity, participation/accountability, and reasonable outcomes.[167] These are certainly not principles that on any reading of positive international law would justify non-performance of international obligations, yet they are also not merely interests serving the politics of individual states. They instead rest on constitutional principles that are not entirely alien to domestic (constitutional) law (at least in states with a tradition of democratic constitutionalism) or to international law – even though they may not have risen to the level of binding international law. They can be said to be part of a normative space in between, which mediates between these two spheres.[168]

Democracy and the rule of law are other possible candidates for this category. International law could not possibly accept as exculpatory reasons a prioritization of domestic law based on the argument that international decisions suffer democracy deficits.[169] The same may hold for the rule of law.[170] Although the General Assembly has repeatedly reaffirmed the value of the rule of law both at international and national levels,[171] the concept is too ill-defined to function as a workable limitation on the operation of the principle of supremacy. But both democracy and the rule of law have found their fair share of application across legal systems, and have come to function, though not without problems, as a perspective for governance at national and international levels.

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[167] M. Kumm, *supra* note 118, at 260-261.

[168] Id, at 293.

[169] T. Cottier and D. Wüger, supra note 26.

[170] In this regards it is perhaps significant that the Court of Justice in *Kadi* (n13 above) said in par. 281 that 'it is to be borne in mind that the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions'. The rule of law thus provided part of the review which led to eventual denial of effect of a Security Council.

[171] See e.g. UNGA Resolution 62/70 of 8 January 2008, UN Doc A/RES/62/70.

The standard for identifying such 'in between norms'[172] is thus a different one from the traditional sources doctrine. We are looking at a set of norms that are widely shared across national legal systems and that have found some recognition at the international level, without rising to the level of a binding obligation. Thus there is truth in the observation that while, outside the sphere of international law, there may not be full agreement in terms of traditional sources, the more two states share the same fundamental values, the more unlikely it becomes that 'a truly disruptive actual conflict will occur'.[173] Indeed, the practice of fundamental rights displays a considerable degree of harmony and convergence that cuts across these paradigms.[174]

However, the content and role of this 'in between' category remains uncertain. Take Kumm's argument that the presumption of compliance with international law can be overridden by reason of the weight of the criteria of subsidiarity, procedure, and outcomes.[175] These principles may well be considered as normative principles that shape political contestation of international obligations. But inevitably, and certainly at a global level, interpretations of these criteria will differ. And as to outcomes, can states be trusted to second-guess outcomes of international decision-making procedures without relatively clear methods of determining which standards can be accepted, and which not? If international law were to allow such challenges, the end of international law as an effective and stable set of norms, and indeed of

[172] A similar concept ('interstitial norms') is used by V. Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?', in M. Byers, *The Role of Law in International Politics* (Oxford: Oxford University Press, 2000). See also Krisch, note 7 at 294 (discussing ´interface rules´).

[173] M. Rosenfeld, *supra* note 7 at 113-114.

[174] N Krisch, op. cit.

[175] M Kumm, *supra* note 24, 920; M Kumm, supra note 118, at 260-261

the international rule of law, would be near.[176] Likewise, Krisch's argument that collectives and polities should find recognition and consideration by others only if they have a sufficient basis in the public autonomy of citizens – both in terms of links to citizens within the respective polity and of inclusiveness towards affected outsiders[177] – cannot hold us back from a slippery slope. Does this mean that we must decide if an international obligation finds recognition by the collective it represents, and if it does not, would that be a basis for rejection of the norm?

In view of the open and disputed nature of principles in the interface between legal orders, a key role at the interface is played by procedure rather than substance, based on willingness to avoid conflict by anticipating conflict and trying to resolve it.[178] The core of accommodation then lies in exchange and communication.[179] Exemplary in this respect is the statement of Lord Phillips in the *Horncastle* case:

> The requirement to "take into account" the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the

[176] M. Rosenfeld, *supra* note 7, at 113 ('Without a centripetal movement to counter the strong centrifugal tendencies associated with globalisation and particularisation, the world may be headed for a war among legal regimes that could culminate in an erosion of the rule of law itself.')

[177] Krisch, supra note 7 at 275, 295-296.

[178] J.L. Cohen, supra note 38, at 275. See also J Habermas, ´Paradigms of Law´, 17 Cardozo Law Review 771 (1995-1996).

[179] See also Krisch, *supra* note 7 at 104 (´polities and institutions gain respect from others only if ... they are grounded in social practices with deliberative pedrigree and can make a claim to bring inclusiveness and attention to particularity into a plausible balance´).

> opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court. This is such a case.[180]

The fact that in such cases international and national courts may arrive at different conclusions reflects the normative ambiguity of international law and uncertainty as to its desired development, and not a black and white resistance between international and domestic law.

It is to be recognized that the interpretative choices as to the meaning of obligations and their desired development necessarily reflect political choices. The term 'political' here is not used in opposition to the term 'law', but rather as an inherent and necessary elements of law's interpretation, application and development. It also is true, though, that the question which interpretation eventually prevails, also is a political one, and it in that respect that the construction and exploitation of ambiguity, and the backing out of international obligations under the guise of the merits of the external pluralist paradigm, may sit uneasily with the rule of law quality of the international legal order.[181]

6. Conclusion

[180] *R v. Horncastle and others* [2009] UKSC 14, at 11;

[181] Cf. Eyal Benvenisti & George W. Downs, The Empire's New Clothes: Political Economy and the Fragmentation of International Law', 60 *Stanford Law Review* (2007) 595.(arguing that fragmentation represents an ongoing effort on the part of powerful states to preserve their dominance in an era in which hierarchy is increasingly viewed as illegitimate, and to reduce their accountability both domestically and internationally). See also A Peters, supra note 5, at 53 (´die pluralistische Deutung der Verhältnisse zwischen den Rechtsordnungen überlässt alle damit zusammenhängenden Fragen der Politik´) .

The central propositions of this article can be summarized as follows. First, the internal pluralist paradigm is, despite its accommodation of diversity, based on the recognition of international law´s hierarchical claim to supremacy in order to provide the stability and legal certainty to serve the essential interests of states, groups, and individuals who need the protection of international law. In this respect it continues to rest on powerful normative grounds. Despite the emergence of other modes of regulation and normativity, international law remains central to the coordination of state interests and to the achievement of common aims. Downplaying the claim to supremacy would entitle states to prioritize national law over conflicting international obligations, and would be the end of the aspiration.

Second, international law remains weak for its lack of a political context around international institutions and the thin legitimizing role of consent. As international law more directly impinges on the interests of non-state actors, and as the processes of law-making more often bypass whatever legitimization may have been provided by consent, processes of acceptance, contestation and rejection become key to the legitimacy of international obligations as well as the claim to supremacy of the system. A deferential approach, recognizing different hierarchies and the possible formation of new hierarchies, is essential.[182]

While international law has difficulty in combining its aspirations of binding force and supremacy with deference, one should not underestimate the ability of the international legal order to cope with inconsistencies – accept legal order, but keep open an option to exit – through the intentionally less than powerful means to enforce. The weak enforcement power of international law is built into the entire system, and sustains liberty and reduces the full normative claim of supremacy.[183]

[182] Above, text to notes 117-120.

[183] Compare Brad R Roth, Sovereign Equality and Bounded Pluralism in the International Legal Order, 99 Am. Soc'y Int'l. L. Proc. 394 (2005)

Third, this ability to accomodate and in particular to change remains limited, and the legitimacy of the claim of international law to supremacy, and thereby the descriptive and normative viability of the internal paradigm, relies on the destabilizing dynamics that underlie the paradigm of external pluralism for necessary inspiration, legitimacy, and politics. The external paradigm highlights exactly what the internal paradigm lacks in terms of room for contestation and the possibility of processes of conversion from the national to the international level.

Fourth, pluralism as it is central to the external paradigm may lead to the end of international law and to unwanted instability between legal orders. Scholarship has not succeeded in identifying compelling alternative principles or processes that can bring the necessary stability of expectations. It would not be inconsistent with an external paradigm to relinquish that ambition altogether. But is we postulate the need for such stability of expectations as a given, here seems to be no alternative for reliance on the larger system of international law which rests on the principle of supremacy, even if it is contested when it conflicts with external norms.

Fifth, principles and processes at the interface of legal orders (that can either be substantive, notably circling around human rights, or procedural) can mitigate the tension between the paradigms and allow for communication accommodation. The contestations and exchanges between legal orders will primarily be political and ought to be political, but they are not completely devoid of a common framework of reference.