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Nollkaemper, A.

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I

General Aspects

ANDRÉ NOLLKAEMPER

I. Introduction

The domestic court decisions excerpted in this chapter address general aspects pertaining to decisions of domestic courts on matters of international law that are relevant to the subsequent chapters in the book. These general aspects comprise a rather heterogeneous set of issues that are grouped here into three main sections. The subsections further address certain key concepts—or 'keywords'—that will recur throughout the book.

Section II discusses three conditions for domestic judicial application of international law: the question of whether international law is part of the 'law of the land' (or: is part of the applicable law—section II.1); the question of whether private parties can invoke international law ('standing to invoke international law'—section II.2); and the question of whether, in case of a conflicting outcome in a case, international law can be said to prevail over national law (the question of 'supremacy'—section II.3).

Section III addresses the two techniques that domestic courts commonly use to ensure that a particular international right or obligation is performed at the national level, namely the principle of 'direct effect' (section III.1); and the principle of 'consistent interpretation' (section III.2).

Section IV reviews methods by which domestic courts, rather than giving effect to international law, may block its application (or 'avoid' it).

The topics in these sections are 'preliminary' in a procedural sense: they generally need to be addressed before a court can consider the merits of a claim that is based on international law. This is true in particular for the questions of applicability and private rights, but also for avoidance techniques such as non-justiciability. Note that the issues addressed in this chapter are not exhaustive; several other topics, discussed separately in this book, are also preliminary in nature, in particular the questions of jurisdiction[1] and immunities.[2]

II. Conditions for Domestic Judicial Application of International Law

1. International law as applicable law

The ability of national judges to adjudicate on the basis of international law depends in part on the question of whether international law has been made part of the national legal order in the country in question; in other words, whether it constitutes applicable law in the given jurisdiction. Whether or not it does depends on a political decision of the forum state. International law does not determine its own applicability within national law, nor does international law require domestic applicability.

Some countries have made the decision to make international law automatically part of the 'law of the land' in their national legal orders. Examples of such states, to which reference will be made later in this book, are Argentina, Belgium, Brazil, the Dominican Republic, France, and

1 See C Ryngaert, H van der Wilt, and J Santos Vara, 'Jurisdiction' Chapter 3 in this volume.

2 See R Pavoni, R van Alebeek, 'Immunities of States and their Officials' Chapter 4 in this volume.

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the Netherlands. If certain conditions (such as whether or not a rule of international law accords individuals private rights) are satisfied, courts in those countries are thereby able to adjudicate claims on the basis of international law, although the outcome of such adjudication will depend on other factors considered below, such as whether or not in case of inconsistency between an international rule and domestic legislation or precedent, international law has been given supremacy over national law.

(a) Direct applicability of international law

An illustration of a case where international law could be applied as part of law of the land can be taken from the Dominican Republic. In the excerpted judgment, the Supreme Court made clear that Article 3 of the constitution made international law part of the national legal order, rendering it binding on the Dominican Republic. The Court rejected the Superior Land Court's interpretation that the treaties in question were 'foreign legislation' (*legislación extranjera*). By holding that the Superior Land Court should have applied the treaties relied upon by the plaintiff, the Supreme Court clarified that treaties adopted by the Dominican Republic form part of 'Dominican law', and that such treaties are thus applicable in the national legal system without it being necessary to enact specific implementing legislation to that effect.

Casación, Sentencia del 18 de junio de 1997, Gallardo Montilla v Gallardo Concepción and ors, Appeal Judgment, BJ 1039.164, ILDC 1490 (DO 1997), 18th June 1997, Dominican Republic; Supreme Court of Justice [SCJ]

The petitioner, Mr Gallardo Montilla, sought to overturn a judgment by the Superior Land Court, which had confirmed a first instance decision apportioning a plot of land part of his father's estate under a domestic statute that took into account the fact that Mr Montilla had been born out of wedlock. On appeal, Mr Montilla argued that the Superior Land Court had failed to take into account international treaty provisions prohibiting discrimination against children born out of wedlock, including Article 17(5) of the American Convention on Human Rights and Article 26 of the International Covenant on Civil and Political Rights. The Dominican Republic was a party to those treaties at the relevant time. According to Article 3 of the Dominican Constitution (1994): '[t]he Dominican Republic recognises and applies General and American International Law norms insofar as its public powers adopt them'.[3]

> Considering, that international treaties, duly approved by Congress, have the authority of an internal law, insofar as they affect the rights or private interests [which form the] object of the agreement; that therefore, tribunals have not only the right, but […] the duty to interpret the treaties, insofar as the application of one of their clauses could influence the solution of a private interests [-related] controversy; that this interpretation, like those of laws, is submitted to control of the Supreme Court of Justice, as a Court of Cassation;[4] that as a matter of adjudication, it is also incumbent on tribunals to solve, under the control of cassation, whether an international treaty, like the other laws, are compatible with the Constitution or not;
>
> Considering, that despite the petitioner having argued, that the international treaties [he] adduced had the character of internal laws, by [reason of] having been approved by the National Congress […] [the Superior Land Court] decided, by contrast, that [these treaties were] foreign legal provisions inapplicable to the case at hand; that in so acting, the […] [Superior Land] Court disavowed the said treaties, instead of […] having established that those treaties had received the approval of the National Congress, interpreting their clauses in order to determine whether the

3 'La República Dominicana reconoce y aplica las normas del Derecho Internacional general y americano en la medida en que sus poderes públicos las hayan adoptado.'

4 I.e., a court that only examines points of law.

> said [clauses] could or could not influence […] the solution of the controversy; that therefore, the judgment […] [of the Superior Land Court] must be quashed, without it being necessary to examine any other ground of appeal.

(b) Applicability through implementing legislation

Constitutions use differing language to indicate that international law is applicable as law of the land of a given country. The variations in language are significant. In each case it will depend on the construction of the domestic constitution, or other relevant rules of national law, to determine whether or not a court should treat a particular international rule as part of the national legal order.

In states where international law has not been made part of national law, courts will be limited in their possibility to give effect to international law. Many ('dualistic') states require incorporation or implementation of international law in the national legal order.[5] As a general proposition, domestic courts cannot apply international law—notably, treaties[6]—until international law is transformed into domestic law (eg, through an act of parliament or congress).

If a 'dualistic state' adopts legislation to transform a particular treaty, the contents of the treaty becomes part of the law of the land, and courts in principle will be able to apply it—but then as domestic, not international law. This is illustrated by the following case from Nigeria. The African Charter on Human and Peoples' Rights had been incorporated in Nigeria's domestic law, and after that it had the status of domestic law. Mandates enacted by the state could set the inclusion aside.

Abacha and ors v Fawehinmi, Appeal to Supreme Court, Case No SC 45/1997, (2000) 6 NWLR 228, (2002) 3 LRC 296, (2001) 1 CHR 95, ILDC 21 (NG 2000), 28th April 2000, Nigeria; Supreme Court

Chief Gani Fawehinmi was arrested on 30 January 1996 by the state security service. He argued that the arrest and continued detention without charge violated his rights under the 1999 Constitution (Nigeria) and the African Charter on Human and Peoples' Rights, as incorporated in Nigerian legislation.

> 14 I have carefully considered all that has been said by learned counsel for the parties on the status of the Charter as an international treaty entered into by our country. I do not consider it necessary to set out *in extenso* in this judgment their submissions. Suffice it to say that an international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly. See section 12(1) of the 1979 Constitution which provides:
>
> > 12(1) No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly (AFRC). […]
>
> 17 Where, however, the treaty is enacted into law by the National Assembly, as was the case with the African Charter which is incorporated into our municipal (i.e. domestic) law by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. 10 Laws of the Federation of Nigeria 1990 (hereafter is referred to simply as Cap. 10), it becomes binding and our courts must give effect to it like all other laws falling within the judicial powers of the courts. By Cap. 10 the African Charter is now part of the laws of Nigeria and like all other laws the courts must uphold it. The Charter gives to citizens of member states of the Organisation of

5 G Gaja, 'Dualism: A Review' in J Nijman and A Nollkaemper (eds), *New Perspectives on the Divide between National & International* Law (OUP 2007) 52.

6 In some legal systems, the process of incorporation of customary law differs from the process of incorporation of treaties.

> African Unity rights and obligations, which rights and obligations are to be enforced by our courts, if they must have any meaning. It is interesting to note that the rights and obligations contained in the Charter are not new to Nigeria as most of these rights and obligations are already enshrined in our Constitution. See Chapter IV of the 1979 and 1999 Constitutions.
>
> 18 No doubt Cap. 10 is a statute with international flavour. Being so, therefore, I would think that if there is a conflict between it and another statute, its provision will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation. To this extent I agree with their Lordships of the Court below that the Charter possesses "a greater vigour and strength" than any other domestic statute. But that is not to say that the Charter is superior to the Constitution as erroneously, with respect, was submitted by Mr. Adegboruwa, learned counsel for the respondent. Nor can its international flavour prevent the National Assembly, or the Federal Military Government removing it from our body of municipal laws by simply repealing Cap. 10. Nor also is the validity of another Statute necessarily affected by the mere fact that it violates the African Charter or any other treaty. For that matter — see: *Chae Chin Ping v. United States* 130 US. 181 where it was held that treaties are of no higher dignity than acts of Congress, and may be modified or repealed by Congress in like manner, and whether such modification or repeal is wise or just is not a judicial question. [. . .]
>
> 26 It is thus enacted that *all* authorities and persons exercising *legislative, executive* or *judicial* powers in Nigeria are enjoined to give full recognition and effect to the African Charter. That is, the plenitude of the Government of Nigeria cannot do anything inconsistent with the Charter. Section 1 was never suspended or repealed by any of the Constitution (Suspension and Modification) Decrees enacted between 1983 and 1999; it remained in force throughout this period. The position then is that the courts' jurisdiction to give "full recognition and effect" to the African Charter remained unimpaired.

Several examples in other chapters illustrate the dualist position. In *Campaign for Nuclear Disarmament v Prime Minister of the United Kingdom*,[7] treaties and Security Council Resolutions were not considered part of British national law and British courts were therefore not allowed to rule on their meaning.[8]

The UK court in *R v Jones and ors*[9] reasoned that it could not decide matters which entail a crime of aggression, as a crime of aggression is not a crime in the domestic law of the country.[10]

In *Re Habré*[11] the Senegalese Court of Cassation said it could not prosecute a foreigner for acts of torture committed abroad when the provisions of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment had not been incorporated into Senegalese domestic law.

(c) Limitations of the monist and dualist labels

While domestic provisions that recognize international law as part of national law create a presumption that a court will be able to adjudicate a claim based on international law, their effect

7 *Campaign for Nuclear Disarmament v Prime Minister of the United Kingdom, Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Defence* [2002] EWHC 2777 (Admin).

8 ibid, para 22; see C Shucksmith and N White, 'Use of Force' Chapter 12 in this volume.

9 *R v Jones and ors*, England and Wales, House of Lords, 29 March 2006, ILDC 380 (UK 2006).

10 ibid, para 31 of the judgment.

11 *Re Habré*, Appeal Decision, Cassation No 14; (2002) AHRLR 183 (SeCC 2001), Court of Cassation, First Chamber ILDC 164 (SN 2001), 20 March 2001.

is not more than that. There may be several reasons why despite such provisions a court will not be able to adjudicate a claim on the merits, including lack of direct effect.[12]

Conversely, in dualist states courts have been known to give legal effect to a treaty even when the treaty has not been transformed into national law, as illustrated by examples from Iceland and Malawi.

In the Icelandic case, the court cited a treaty in determining the legality of restrictions of a fundamental right protected by the Constitution, ie the freedom of employment. The weight given to UNCLOS was noteworthy, as with respect to the relation between municipal law and international law, Iceland adheres to dualism, and UNCLOS had not been incorporated into Icelandic municipal law.

Vatneyri Case, Public Prosecutor v Kristjánsson (Björn) and ors, Appeal Judgment, Case No 12/2000, H (2000) 1534, ILDC 67 (IS 2000), 6th April 2000, Iceland; Supreme Court

The operator and the captain of a vessel had been indicted for a violation of the Fisheries Management Act, no 38/1990 (Iceland) (Fisheries Act), as the latter had gone fishing without any catch entitlements. The operator and the captain who were charged in this case based one of their defences on section 3(1) of the Fisheries Act as granting the Minister of Fisheries unlimited powers to determine, by administrative provisions, how much may be caught in total from the utilized stocks for which limitation of catch was deemed necessary. They maintained that this arrangement did not fulfil the requirements of Article 75(1) of the 1944 Constitution (Iceland) (Constitution), to the effect that freedom of employment can only be limited by statute. According to the provision, any person was free to pursue the occupation of his choice. This freedom may, however, be limited by law, provided this was required by the public good.

> 9 The provision of Article 75, the first paragraph, of the Constitution, concerning freedom of employment, can be traced to Article 51 of the Constitution on the Particular Affairs of Iceland, of 5 January 1874. According to the provision, any person is free to pursue the occupation of his choice. This freedom may however be limited by law, provided this is required by the public good. […]
>
> 11 It can be inferred from the wording of Section 3, the first paragraph, of Act No. 38/1990, that total allowable catch shall be determined with a view to the optimum yield of utilised stocks, by reference to the best information available on their current condition. This understanding is supported by the explanatory notes to the bill enacted as Act No. 38/1990, and also conforms to the objectives set forth in Section 1 of the Act and in Section 1 of Act No. 57/1996 on Practices Concerning Utilised Stocks of Ocean Life. Accordingly, Section 3, the first paragraph, of Act No. 38/1990, entails an adequately circumscribed standard governing how the Minister shall limit the total allowable catch within each fishing year. Act No. 38/1990 furthermore contains certain rules on how the total allowable catch is to be distributed, and this distribution does not come within the purview of the Minister. The view that the provision in question grants the Minister such unlimited power to limit total available catch as to conflict with the requirement of Article 75, the first paragraph, of the Constitution, to the effect that freedom of employment can only be limited by law, can not be sustained.
>
> 12 Protection and efficient utilisation of the fish stocks of the Icelandic fishing grounds is a matter of important and obvious public interest. Under international law, Iceland has undertaken the obligation of ensuring reasonable utilisation of this resource, as required by Articles 61 and 62 of the United Nations Convention on the Law of the Sea, cf. Announcement No. 7/1985 in Division C of the Law Gazette.

12 See section III.1 below.

> Measures to prevent overexploitation by means of catch limits form an indispensable part of the protection and reasonable utilisation of fish stocks. For this reason, the public interest demands that the freedom to fish by way of occupation be made subject to limitations. Article 75 of the Constitution does not prevent law from providing for necessary limitations to total allowable catch from the various utilised stocks […].

The example from Malawi illustrates that while treaty law is not directly applicable in Malawi unless a domesticating statute had been adopted by parliament, the courts could nevertheless have regard to applicable norms of international law, where appropriate, and as was done in this case, as a guide to interpreting the constitution and other laws. Although not incorporated into national law, the court did rely upon international law to determine the legality of national law.

Adoption of Children Act Chapter 26:01, Re, Ciccone, Decision on merits, Adoption Case No 1 of 2009, [2009] MWHC 3, ILDC 1280 (MW 2009), 3rd April 2009, Malawi; High Court

Madonna Louise Ciccone petitioned the High Court of Malawi, Lilongwe District Registry, for an order to adopt the infant Chifundo James. The High Court dismissed her petition on the basis that she was not resident in Malawi at the time she petitioned the court, as required by the Adoption of Children Act ('Act'), Chapter 26:01 of the Laws of Malawi (Malawi). Ms Ciccone claimed that the decision of the High Court failed to give due regard to the principle of the best interests of the child, which was reflected in the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, instruments to which Malawi was a party.

> 34 […]. In doing so the courts will try as much as possible to avoid a clash between what our laws say on the subject and what the international agreements or conventions are saying on the subject, but where this is not possible, the provisions of our Constitution and the laws made under it will carry the day. It should not come as a surprise that this is the state of the law in Malawi because, by their nature, international agreements are a product of compromise arising out of hard bargaining by high contracting parties. They involve a lot of give and take. They are also negotiated by the executive branch of the Government and not by parliament. […] It is also the executive branch of Government that enters into international conventions. If the executive branch of Government wishes any of the international conventions which it has freely acceded to, to have the force of law, then it should bring such convention before parliament which has the Constitutional mandate to make all laws of this land. In this regard, sections 7, 8 and 9 of the Constitution are not only in tandem with what is contained in section 211 of the Constitution, but are also conclusive on the matter. We do not therefore agree with counsel's submission that the intention of section 211(1) is to make any international convention which Malawi signs automatically part of the law of the country.
>
> 35 Coming to the actual provisions of the CRC we note that Article 3 provides that "the best interest of the child" shall be a primary consideration. Article 21 of the CRC charges the parties who recognize adoptions in their system to ensure that the best interest of the child shall be the paramount consideration and that the adoption is authorized by competent authorities in accordance with the applicable law in those countries. The best interest of the child is also emphasized in Article 24 of the African Charter on the Rights and Welfare of the Child 1990. […]
>
> 39 Article 24(a) and (b) of the African Charter on the Rights and Welfare of the Child 1999 is for all practical purposes similar to Article 21(a) and (b) of the CRC and the observations we have made in regard to Article 21(a) and (b) are applicable to Article 24(a). All these provisions compliment and amplify the Act. And courts may

> take judicial notice of them when they are considering an application under the Act. This is not to say, however, that our own Act is not adequate or comprehensive in dealing with adoption issues, far from it. All we are saying here is that when we look at our Constitution and the Act there is no clash or conflict whatsoever between what is provided for in our own laws and what is provided for in the various conventions that have been referred to us. We will therefore use our own Act and Constitution which are sufficient in deciding this Appeal.

2. Private rights of action

A domestic court that in principle has jurisdiction and will be allowed to apply international law, generally will only be able to adjudicate an international claim if it can, in specific cases, be accessed by persons who are entitled to rely on an international obligation as a basis for their claim. This can be referred to as the requirement of standing,[13] although the terminology differs between countries (other terms used to refer to this requirement are cause of action, invocability, private right of action, or direct effect).

This requirement of standing explains why courts in many jurisdictions allow individuals to bring a claim based on the International Covenant on Civil and Political Rights (ICCPR) or the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), but not claims based on Article 2(4) of the Charter of the United Nations (UN Charter),[14] or only rarely on rules of international environmental law.[15] Courts generally take the position that these latter provisions protect rights of states only.[16]

In the practice of national courts, we can identify a procedural and a substantive component of the requirement of a private right of action. On the one hand, the requirement of a private right of action can function as a procedural threshold, preceding consideration on the merits of whether a state acted in breach of a particular international obligation. In that respect, the concept is closely related to and may be an element of the admissibility of claims.

On the other hand, deciding the threshold question may require a determination of the existence of a substantive right.[17] Indeed, 'to bar a case on standing grounds is, realistically, to deny a plaintiff a legal right, so that resolving the jurisdictional question […] requires a close look at the merits'.[18] In *Mora v New York*, the US Court of Appeals for the 2nd Circuit held that Article 36 of the Vienna Convention on Consular Relations (VCCR) did not confer an individual right on the plaintiff and that the plaintiff therefore could not rely on Article 36.[19]

13 See in the context of US law C M Vázquez, 'Treaty-Based Rights and Remedies of Individuals' (1992) 92 *Columbia Law Review* 1084, 1133.

14 See, eg, the Netherlands, Supreme Court, *Association of Lawyers for Peace v Netherlands*, C02/217HR, LJN: AN8071; ILDC 152 (NL 2004) para 3.4 (discussing Article 2(4) of the Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 59 Stat 1031; TS 993; 3 Bevans 1153 (UN Charter) and holding that the prohibition of the use of force was intended to protect states and therefore could not be invoked by a citizen in the national court).

15 D Bodansky and J Brunnée, 'The Role of National Courts in the Field of International Environmental Law' (1998) 7 *Review of European Community & International Environmental Law* 11; M Anderson and P Galizzi (eds), *International Environmental Law in National Courts* (British Institute of International and Comparative Law 2002).

16 See generally L Brilmayer, 'International Law in American Courts: A Modest Proposal' (1991) 100 *Yale Law Journal* 2277, 2292.

17 See Vázquez (n 13) 1135, 1141 (noting that, at least in the US, standing is a function of whether an individual has a primary right under a treaty).

18 Brilmayer (n 16) 2304.

19 *Mora v New York* 524 F 3d 183 (2d Cir 2008); ILDC 1100 (US 2008) [7] (discussing Article 36 of the Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261 (VCCR) and holding that 'we conclude that Article 36's obligation to inform detained aliens of the prospect of consular notification and access cannot, when violated, be vindicated by a private action for damages filed in our courts').

An illustration of the application of the private right of action test as a preliminary threshold is the following case from the Netherlands. Even though the Netherlands is a monist jurisdiction, where all rules of international law are part of the law of the land, courts can decline to give effect to rules of international law which do not create private rights. However, judicial practice is far from consistent, and one can witness considerable differences between civil and administrative courts—in the latter the requirement of a private right of action appears to be applied less strictly.

Association of Lawyers for Peace (Vereniging van Juristen voor de Vrede) and ors v Netherlands, Judgment on Appeal in Cassation, C02/217HR, LJN: AN8071, NJ 2004/329, ILDC 152 (NL 2004), 6th February 2004, Netherlands; Supreme Court [HR]

In response to the terrorist attacks on 11 September 2001, the United States (US) and the United Kingdom (UK) began military actions against Taliban and Al-Qaida training camps on 7 October 2001 (Operation Enduring Freedom). Two days later, [the Government of] the Netherlands informed the Dutch Parliament that it supported these military actions on the basis of the principle that the US had the right to act in self-defence. The Association of Lawyers for Peace installed proceedings requesting to prohibit the state to cooperate or engage in the threat or actual use of military force by the US or its allies, so as long as the UN Security Council had not ordered such use of force pursuant Article 42 of the UN Charter. They argued, inter alia, that the use of military force against targets in Afghanistan was a violation of binding principles and rules of international law, and thus that Dutch support for this force constituted a violation of Article 90 of the Dutch constitution, which provides that 'the Government shall promote the development of the international legal order'. Furthermore, the applicants argued that the prohibition on the use of force—including Articles 2(4), 42, and 51 of the UN Charter—as well as the Constitutional obligation enshrined in Article 90, were envisaged to protect fundamental interests of individuals.

> 3.4 Article 2(4) of the Charter of the United Nations includes a provision requiring all Members to refrain from the threat or use of force against the territorial integrity or political independence of any State. This prohibition on the use of force is therefore intended to protect States and a citizen cannot invoke this provision, or the closely related provisions in Articles 42 and 51 of the Charter, before his national courts. [. . .]
>
> Nor is this altered by the argument that the prohibition on the use of force, when viewed in connection with the principle of individual responsibility for crimes against peace, is a rule of international law binding on all persons. Although an individual citizen can be held responsible under this principle for acting in contravention of the prohibition on the use of force, this does not in itself mean that an individual citizen can invoke the prohibition.

The significance of private rights of action as a preliminary question can be illustrated by case law on international humanitarian law (IHL). Lacking a private right of action, individuals who are allegedly victims of IHL violations cannot file suit against states for compensation on the basis of IHL conventions, such as the 1907 Hague Convention or the 1949 Geneva Conventions. For instance, US courts have refused to give direct effect to IHL conventions.

Iraq and Afghanistan Detainees Litigation, Re, Mohammed Ali and ors v Colonel Pappas and ors, Trial court order, 479 F.Supp.2d 85 (D.D.C. 2007), ILDC 812 (US 2007), 27th March 2007, United States; District of Columbia; District Court for the District of Columbia [DDC]

In this litigation, nine plaintiffs alleged that they were innocent civilians who had been tortured and abused while detained by the US military at various locations in Iraq and Afghanistan. Each plaintiff ultimately was released from custody without ever being charged with a crime. The plaintiffs advanced six causes of action, amongst which was the Geneva Convention relative to

the Protection of Civilian Persons in Time of War.[20] Citing long-standing US court practice and engaging in a textual analysis of the relevant provisions of Geneva Convention IV, the District Court held that the Geneva Convention IV was not self-executing.

> 58 The Court is not convinced that Geneva Convention IV is self-executing and establishes individual rights that may be judicially enforced via private lawsuits in federal courts. "Absent authorizing legislation, an individual has access to courts for enforcement of a treaty's provisions only when the treaty is self-executing, that is, when it expressly or impliedly provides a private right of action." […] None of the provisions of Geneva Convention IV contain any such express or implied language indicating that persons have individual "rights" that may be enforced under the treaty. Instead, the provisions of Geneva Convention IV state general obligations with regard to the treatment of protected persons that are imposed on signatory States.
>
> 59 Second, the Court's position on this issue is bolstered by the language of the treaty itself. Judge Bork's concurrence in *Tel-Oren*, 726 F.2d at 809, explained that "[a] treaty that provides that party states will take measures through their own laws to enforce its proscriptions evidences its intent not to be self-executing." In this case, Article 146 of Geneva Convention IV, which is located in Part IV titled "Execution of the Convention" states:
>
> The High Contracting Parties *undertake to enact any legislation* necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.
>
> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.
>
> In addition, it is the law of this circuit that a treaty is not self-executing when the rights of individuals are intended to be vindicated through diplomatic recourse. *Holmes v. Laird*, 459 F.2d 1211, 1222 (D.C. Cir. 1972). Article 149 provides that any alleged violation of the treaty shall be subject to an "enquiry" at the request of a party to the conflict, which enquiry shall be undertaken according to procedures negotiated by the parties or determined by an agreed-upon umpire. *Id.* at art. 149. If a violation of the treaty is established, "the Parties to the conflict shall put an end to it and shall repress it with the least possible delay." *Id.* When considered as a whole, it is apparent from these provisions — which make clear that enforcement of Geneva Convention IV is to be left to the legislation and laws of the parties or to diplomatic enquiry — that the treaty is not intended to be self-executing, in which case the plaintiffs are not entitled to pursue private lawsuits against the defendants for alleged violations. This result is consonant with the recognized rule that "international agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." Restatement (Third) of the Foreign Relations Law of the United States § 907 cmt. a (1987); *Hamdan I*, 415 F.3d at 39.
>
> 60 Third, other courts that have passed on the question of whether provisions of Geneva Convention IV are self-executing also concluded otherwise. *See Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978) (stating that general language in Geneva Convention IV offered no evidence that the treaty "was intended to be self-executing

20 Geneva Convention relative to the Protection of Civilian Persons in Time of War (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV).

> or to create private rights or action in the domestic courts of the signatory countries, in the absence of further domestic legislative action"); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 439 n.16 (D.N.J. 1999) ("Had Iwanowa attempted to assert a claim under the Hague or Geneva Conventions, it would have been dismissed for lack of jurisdiction because only self-executing treaties, *i.e.*, those that do not require legislation to make them operative, confer rights enforceable by private parties."); *American Baptist Churches v. Meese*, 712 F. Supp. 756, 770 (N.D. Cal. 1989) (determining that Article I of Geneva Convention IV is not self-executing because it "does not impose any specific obligations on the signatory nations, nor does it provide any intelligible guidelines for judicial enforcement").
>
> 61 Fourth, the recently-enacted Military Commissions Act of 2006, 109 P.L. 366, 120 Stat. 2600, confirms the Court's view that Geneva Convention IV is not self-executing. Section 5 of the Act states that "[n]o person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories." However, given that the other stated grounds support the Court's conclusion that Geneva Convention IV is not self-executing, it is not necessary to address at this time whether the Military Commissions Act of 2006 has retroactive application to the plaintiffs' lawsuit.
>
> 62 Because Geneva Convention IV manifests an intent to be enforced through legislation or diplomacy, it is not a self-executing treaty that provides a private right for the plaintiffs to sue the defendants for money damages. The plaintiffs' cause of action for violations of Geneva Convention IV therefore fails to state a claim for relief and will be dismissed.

US courts also have held that conventions outlawing the use of certain weapons do not create private causes of action. *Stutts and ors* is illustrative in this respect.

Stutts and ors v De Dietrich Group and ors, Stutts and ors v Deutsche Bank AG and ors, District court decision, No 03-CV-4058 (EDNY 2006), ILDC 874 (US 2006), 30th June 2006, United States; New York; District Court for the Eastern District of New York [EDNY]

US military servicemen and civilian employees of contractors who were deployed in the Persian Gulf region during the 1991 Gulf War were allegedly exposed to toxic agents contained in chemical weapons developed or otherwise obtained by the Iraqi government and detonated by the United States and its allies during the Gulf War. The plaintiffs brought suit against foreign corporations that had allegedly sold chemical agents and manufacturing equipment to Iraq that were used to develop the chemical weapons, and had acted as correspondent banks. The servicemen and civilian employees sought compensatory and punitive damages against the bank defendants under, amongst other legal instruments, the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.[21] As in *Goldstar*,[22] the question arose whether there was a private right of action for individuals under the Geneva Protocol.

> 23 As an initial matter, the Court must determine whether the sources of international law cited in the complaint provide private rights of action. In order for an international treaty such as the Geneva Convention of 1925 to provide for a private

21 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (signed 17 June 1925, entered into force 8 February 1928) 26 UST 571; 94 LNTS 65 (Geneva Protocol).

22 *Goldstar (Panama) SA and ors v United States*, Appeal judgment, 967 F 2d 965 (1992), ILDC 1648 (US 1992), 16th June 1992, United States; Court of Appeals (4th Circuit) [4th Cir].

> right of action it must be "self-executing," meaning that a private right of action is explicitly provided for in the treaty or the treaty has been implemented by a U.S. federal statute. […]
>
> 25 […] courts hold that the Geneva Conventions are not self-executing treaties and routinely reject private claims brought under them. See, e.g., *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 442 (1989) (Geneva Convention on the High Seas, 13 U.S.T. 2312, does not create a private right of action, but sets forth substantive rules of conduct and states that compensation shall be paid for certain wrongs); *United States v. Fort,* 921 F. Supp. 523, 526 (N.D. Ill. 1996) ("The courts have consistently held that the Geneva Conventions ... are not self-executing and, thus, provide no basis for the enforcement of private rights in domestic courts."). Accordingly, since the Geneva Convention is not self-executing and Congress has not passed implementing legislation, plaintiffs have no private right of action under the Convention.

Similar cases have arisen in Japan, notably in the 1990s when several compensation claims were brought by private plaintiffs against the Japanese government relating to civilian suffering during the Second World War. Without exception, Japanese courts have held that such plaintiffs do not have the right to claim compensation under IHL, the Hague Convention in particular, for damages suffered during the Second World War. In the case below, the Tokyo District Court inquired whether, objectively speaking, the content of individual rights was sufficiently clearly defined in the Hague Convention, and whether state parties in fact intended to establish individual rights. Applying Articles 31 and 32 the 1969 Vienna Convention on the Law of Treaties in its customary version, it gave a negative answer to both questions.

Maria Ria Henson et al v State of Japan, Japan, Tokyo District Court Judgment, 9 October 1998, 42 Japanese Annual of International Law 170-183 (1999) (not in ILDC)

In this case, Philippine 'comfort women', who were abused by Japanese soldiers during the occupation of the Philippines by the Japanese Army in the Second World War, brought a suit against the Japanese government claiming compensation for the harm suffered. The claim was partly based on (customary) international humanitarian law, Article 3 of the 1907 Hague Convention respecting the Laws and Customs of War on Land in particular. This article provides: 'A belligerent party which violates the provisions of the said Regulations [the Hague Regulations] shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its forces'. The question arose whether individual plaintiffs, as opposed to states, could derive rights from the article.

> In case of a violation of rights and benefits of individuals, the general principle of international law intends to provide remedies for individual victims indirectly through the exercise of diplomatic protection by the national states of the victims. When individual persons seek to remedy the violation of their rights and benefits directly from foreign States, they need a special norm of international law that provides them rights to claim redress.
>
> […] The plaintiffs assert that Article 3 of the Hague Convention is a codification of a principle of customary international law which recognizes the right of individual persons to claim compensation for damages directly against other States.
>
> […] In view of the purpose of the clauses of the Hague Convention and Regulations, Article 3 of the Convention should be understood as imposing liability for reparations on a belligerent party as a sanction against the violation of the Hague Regulations committed by its army or persons forming part of its army in order to secure observance of the Convention. It does not provide any right for individuals to demand compensation for damages and injury caused by the violation of the Regulations directly against belligerent State parties.

> The following facts will support the interpretation of the Court. First, the general principle of international law provides that international law is a law governing relations between States. Secondly, Article 3 of the Hague Convention prescribes that the provisions of the Regulations and the Convention "do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention". Thirdly, there is no statement in Article 3 of the Convention referring to individuals as the subject to whom wrongdoing States are liable and obliged to pay compensation.
>
> […] the Regulations, as examined above, are nothing more than rules of conduct for the military and its members, and Article 3 of the Convention provides nothing more than State responsibility as a sanction against the State of a wrongdoer. Therefore, it is not possible to recognize that the article provides the right to individuals to claim directly against an occupying State. […] even if the article imposes payment of compensation on the belligerent parties, it does not lead directly to the recognition of the right of individuals to file claims.
>
> To summarize, according to the ordinary meaning to be given to the terms in their context, Article 3 of the Hague Convention cannot be understood as a clause that entitles individual victims to bring a claim for compensation directly against a wrongdoing State. Accordingly, it is impossible to recognize that the article is a codification of a rule of customary international law.

A reasoning similar to that made by US and Japanese courts was made in the following German court case, brought by Serb victims of the NATO military operation in Serbia (1999), notably the bombardment of a bridge, in which Germany had participated. The legal question was again whether the Hague and Geneva Conventions conferred rights on individuals to claim compensation from an allegedly responsible state (Germany in this case) for IHL violations of which those individuals were victims.

Varvarin Bridge Case, 36 citizens of the Former Federal Republic of Yugoslavia v Germany, Appeal judgment, III ZR 190/05, BGHZ 166, 384, JZ 2007, 532, BeckRS 2006, 14043, LSK 2007, 100071, RIW 2007, 137, VersR 2007, 1368, DÖV 2007, 429, ILDC 887 (DE 2006), 2nd November 2006, Germany; Federal Court of Justice [BGH]

> 6 1. a) The traditional concept of international law as law between States does not classify the individual as a subject of international law, but grants only indirect international protection to the individual. With regard to violations of international law based on actions against foreign citizens, the person affected was not entitled to bring a claim, but rather his or her native country was. In the area of diplomatic protection, the State obtained vindication of its own rights through respect for international law vis-à-vis its citizen (senate decision BGHZ (Bundesgerichtshof (Federal High Court) 155, 279, 291). The State acted as an intermediary for the person in question, i.e. all relations under international law were exclusively a matter for States, which in this respect also included the interests of the individuals. Consequently the individuals could not request the establishment of the wrong or the remedy of the wrong (Senate, aaO). […]
>
> 8 b) [Not] every rule originating from treaty-protected human rights also confers actual individual rights. Some conventions merely contain protective duties in the sphere of human rights without granting individual rights at the same time (Hobe/Kimminich, aaO p. 161). In particular, the rule still applies that, irrespective of a primary claim by the affected people for the observance of international law, the country of nationality is still basically only entitled to a secondary claim for compensation for the unlawful acts of a foreign State against its citizens (cf. Article 3 of the Hague Convention

(Haager Landkriegsordnung) BVerfGE (Bundesverfassungsgericht-German Federal Constitutional Court) 112, 1, 32 and following; Federal Constitutional Court NJW (Neue Juristische Wochenschrift) 2004, 3257, 3258; Federal Constitutional Court NJW 2006, 2542, 2543). Thus, it is for every international treaty which confers benefits on individuals to determine through interpretation whether and to what extent it should confer individual rights, i.e. whether it confers an independent right (a subjective right) — including, if applicable, a right to damages — or whether it only confers a general right (Dörr JZ (Juristische Zeitung-Law Journal) 2004, 574, 575; Herdegen aaO §22 note. 5). [. . .]

9 2. According to these principles, the plaintiffs are neither able to bring claims for compensation at the international level on the basis of Article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Hague Convention), or on the basis of Article 91 of the first Additional Protocol of 8 June 1977 to the Geneva Convention relative to the Protection of Civilian Persons in Time of War (AP I) of 12 August 1949 (BGBl. (Bundesgesetzblatt-Federal Law Gazette), 1990 II p. 1551; in the following: AP (Additional Protocol I). Other primary grounds for their claim — under international law — are not evident. [. . .]

10 a) Article 3 of the Hague Convention, which originally, undoubtedly, only had an intergovernmental character due to the earlier legal position of lack of rights and obligations for individuals (cf. Senate BGHZ 155, 279, 291), supports no direct individual claim for compensation for a war crime under international law, taking into account that the view of rights for individuals in the international law changed in the meantime (BVerfGE 112, 1, 32 and following; Federal Constitutional Court NJW 2006, 2542, 2543). While the origin of the provision illustrates that it concerns the protection of individuals and, consequently and indirectly, protects human rights, it does not follow that the regulation can be a basis for a direct claim under international law against a State for damages for the affected individual. According to the jurisprudence of the Federal Constitutional Court, to this day only the State of nationality is liable for secondary claims for compensation based on unlawful acts of a foreign State against its citizens, in spite of the development of the level of protection of human rights which resulted in the recognition that individuals could partly be subjects of international law and to the establishment of individual claim cases based on treaties (Federal Constitutional Court NJW 2004, 3257, 3258; 2006, 2542, 2543). [. . .]

11 b) The legal status of Article 91 of AP I cannot, ultimately, be considered to be different. It could be that the regulations of the law of armed conflict in the Additional Protocols of 1977 for the protection of the civilian population which are considered here — particularly Article 51 of AP I — justify the subjective rights of the affected individuals (civilians) for the purposes of a (primary) claim for observance of the provisions of international humanitarian law (cf. Article 3 Federal Constitutional Court HLKO NJW 2004, 3257, 3258; Dörr JZ 2004, 574, 575; id JZ 2005, 905, 908). An individual (secondary) restitution claim in the case of a violation of these provisions arises from this text, but in no case from practice under the international law, or from its history or the prior interpretation of Article 91 of AP I. [. . .]

12 aa) (1) According to Article 91 of AP I "A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming

part of its armed forces." This provision corresponds almost literally to Article 3 of the Hague Convention. It corresponds accordingly to the general view that Article 91 of AP I (merely) confirms pre-existing regulations in accordance with Article 3 of the Hague Convention, and extends them to four (Red Cross) Geneva Conventions and the Additional Protocol. Article 91 of AP I has the same meaning as Article 3 of the Hague Convention (Heintschel v. Heinegg, in: Heintschel v. Heinegg, among others, Entschädigung nach bewaffneten Konflikten (Restitution after armed conflicts) [2001], 1, 38; Wolfrum, in: Fleck, Handbuch des humanitären Völkerrechts in bewaffneten Konflikten (Handbook of Humanitarian Law in Armed Conflicts), additional note 1214). The reports on the conference in which the Additional Protocols were drafted do not support the assumption that the contracting parties sought to add meaning to Article 91 of AP I beyond the meaning of the Article 3 of the Hague Convention (cf. Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva in 1974–1977, Vol. III, p. 347; Vol. IX, p. 355ff., 397; Kalshoven, in: International and Comparative Law Quarterly Vol. 40 [1991], 827, 844ff.). If, at the time, the contracting parties had wanted to provide a basis for individual claims for damages in the area concerned, they could have turned to Article 5(5) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights (ECHR)) dated 4 November 1950, which was in effect at the time of the negotiations of the Additional Protocols and which explicitly foresees a claim for compensation for the person whose human rights have been violated; nothing suggests that a similar regulation was intended for the responsibility of the State for violations of international humanitarian law in armed conflicts. […]

13 (2) The fact that the Geneva Additional Protocols only supported intergovernmental rather than direct individual restitution claims, according to the principles of State responsibility, is confirmed, *inter alia*, by the fact that the draft Articles of the International Law Commission of the United Nations (ILC) on State responsibility of 2001 (cf. attached to resolution 56/83 of the General Assembly of the United Nations on 12 December 2001; printed in Sartorius II No. 6) only foresee in Article 42 the entitlement of an injured State to invoke the responsibility of another State and no individual claims of injured individuals. That is to say, these Articles constitute binding international law only to the extent that they codify customary international law (Schröder, in: Graf Vitzthum, aaO, paragraph 7, note 7). In any case, they are an indication of the fact that the contrary position has not yet developed. In the future, claims of violations of international law are to be considered as a basis for (substitute) proceedings between States (Heintschel v. Heinegg, aaO p. 25). In particular, also because of the specialist nature of international humanitarian law in relation to general human rights (cf. Heintze HuV-I 2003, 172, 174 and following), an individual right cannot be derived from the interpretation of Article 91 of AP I merely on the basis that in certain cases people whose human rights were violated can be granted the right to file a complaint against the violating State (for examples, see Article 34 of the ECHR) […]

14 bb) Furthermore, the commentary on the Additional Protocols to the Geneva Conventions (de Preux, in: Sandoz/Swinarski/Zimmermann, Commentary on the Additional Protocols [1987] Ln. 3657) arrives at the conclusion that under Article 91 of AP I, with the exception of special cases, foreign nationals who were harmed by unlawful acts of a warring party would have to turn to their own government to take up their complaints on their behalf and present it to the responsible party. As far

as de Preux (aaO) simultaneously points to a "trend" that has been developing since 1945, i.e., to recognition of the exercise of rights by individual people, this trend represents — as with similar interpretations or analysis in international law literature (cf. Kleffner, in: 15 LJIL [2002], 235, 244 and following, 250; Zegveld, in: 85 IRRC [2003], 497, 505 and following; Dörr JZ 2005, 905, 909) — no more than the statement of an ideal in the area of international humanitarian law, to be achieved in the future but not yet incorporated in the practice of international law. In this area the general criminal law principle that the violation of a primary obligation normally leads to a secondary claim for the holder of the injured right (Dörr aaO p. 909), receives only limited actual recognition. […]

17 3. Regarding the above-mentioned question, denied by the Senate, of whether a directly applicable individual right can be derived from Article 3 of the Hague Convention or from Article 91 of AP I, or from another rule of the international law, no consideration is necessary for the Federal Constitutional Court according to Article 100(2) of the Basic Law. The obligation for consideration applies only when the concerning question is "dubious", i.e. the court finds serious doubts in jurisprudence and the literature (Federal Constitutional Court NJW 2006, 2542, 2544). The above interpretation suggests that, according to the general understanding of international law, the individual concerned claim restitution in cases like this, as desirable as this is for some individual voices in the literature of international law. In particular, there are no (international or national) court orders which unambiguously affirm the right to bring proceedings for damages through such an individual (international law) claim for compensation and which can be used as the basis for a decision. Furthermore, there are no suggestions that such individual claims for compensation would have been recognised against the responsible State under current international law.

3. Supremacy

If a court is permitted to apply international law, it might occur that the rule conflicts with national legislation. The question here is to determine whether international law prevails over national law, or to put differently, whether international law has supremacy above national law.

From the perspective of international law, states cannot plead provisions of their municipal legal systems to evade an obligation laid down by international law. That is, the lawfulness of conduct under municipal law does not excuse a breach of international law by states. If an international obligation is to be honoured, all state organs (eg parliaments, courts, municipalities, etc) must act in conformity with what that obligation requires of the state.

Practice at domestic level is diverse. The following cases illustrate the position that international law is, also in the domestic sphere, supreme over national law. The first two cases are noteworthy, as they rely as support for that position on international rather than on domestic law. Even though many states considered international norms to prevail over national legislation, such hierarchy of norms was usually introduced by means of national constitutional law, rather than by recognizing supremacy of international law as an international obligation.

In the example from Chile, supremacy is given to international law on the basis of international law. The court noted that '[u]sing a domestic norm to justify not applying an international treaty breached Art 27 of the Vienna Convention on the Law of Treaties […]'.

Peru v Chile, Appeal decision, Rol No 2242-06, ILDC 1443 (CL 2007), 21st September 2007, Chile; Supreme Court

Alberto Fujimori served as President of Peru from 28 July 1990 to 14 November 2000. In November 2000 Fujimori fled to Japan, facing corruption and human rights violation charges in Peru relating to his mandate. On 6 November 2005, Fujimori arrived in Santiago, Chile,

apparently intending to return to Peru. During this visit, Fujimori was detained under Interpol's arrest warrant. Peru requested his extradition on thirteen charges, alleging that Fujimori had established criminal groups involving various members of his government with the purpose of carrying out crimes against Fujimori's opponents. The request for extradition was initially considered by a single judge of the Supreme Court of Chile, who ruled against extraditing Fujimori based on insufficient evidence to grant the request. Peru appealed the decision, presenting additional evidence supporting the former president's links to human rights abuses.

> H1 Under the Extradition Treaty (Chile/Peru) (5 November 1932), each party agreed to extradite to the other any person who was wanted in the requesting state for prosecution for an extraditable offence. The Procedural Criminal Code, 1997 (Chile) ('Procedural Code') required that for extradition to be sought a person had to be charged in a criminal proceeding. The extradition of former President Fujimori could not be rejected in application of the Procedural Code because that would have violated the Extradition Treaty. Also, using a domestic norm to justify not applying an international treaty breached Article 27 of the Vienna Convention on the Law of Treaties,[23] which provided that a state could not invoke municipal laws to justify non-compliance with the duties arising out of a treaty.

A similar approach was taken by the Constitutional Court of Latvia. The court applied the principle of supremacy within the domestic legal order and concluded that a national norm conflicting with an international treaty was invalid.

Linija v Latvia, Judgment of the Constitutional Court of the Republic of Latvia on a request for constitutional review, Case No 2004-01-06, Latvian Herald, No 108, 3056, ILDC 189 (LV 2004), 7th July 2004, Latvia; Constitutional Court

The Latvian Parliament adopted the law 'On the International Convention for the Facilitation of International Maritime Traffic' (the Convention) on 11 September 1997, thereby ratifying the said Convention. The Convention provides that 'public authorities shall not impose any penalty upon ship-owners in the event that any control document in possession of a passenger is found by public authorities to be inadequate, or if, for that reason, the passenger is found to be inadmissible to the State'. In 1998, the Parliament amended the Administrative Penalties Code. The amended Article 114 of this Code now imposed a fine on natural and legal persons who transported a person lacking the proper travel documents into Latvia through maritime and airport traffic. In 2003, such a fine was imposed on a shipping company that brought a Swedish national, whose passport was about to expire, to Latvia. The shipping company contested this fine in the district court, arguing that Article 114 of the Administrative Penalties Code constituted a violation of the FIMT Convention. The district court referred the case to the Constitutional Court, asking whether the Code of Administrative Penalties was compatible with Standard 3.15 of the FIMT Convention and whether the respective provision of the Code of Administrative Penalties was valid.

> 6 […] On April 6, 1993 the Supreme Council of the Republic of Latvia with a decision "On accession to Vienna Convention on the Law of Treaties of May 23, 1969" ratified the Vienna Convention on the Law of Treaties, of May 23, 1969 (further—the Vienna Convention). The Vienna Convention foresees that states parties recognize the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations, whatever their constitutional and social systems. Article 26 of the Vienna Convention provides that "every treaty in force is binding upon the parties to it and must be performed by them

23 (adopted on 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969) (Vienna Convention, VCLT).

in good faith". Consequently, every state must observe its obligations under international treaties and other sources of international law. Therefore, a State may not conflict national law with international law. State's national law may not contradict international obligations (law).

Article 68 of the Constitution of the Republic of Latvia provides inter alia that all international agreements which settle legislative matters need to be ratified by the Saeima. When the Constitutional Assembly included this norm into the Constitution, it did not envisage it to be possible that Latvia shall not perform its international obligations. The requirement to have the respective international agreements ratified by the Saeima was included into the Constitution with an objective to preclude such international obligations, which regulate legislative matters, without the approval of the Saeima. Thus, it is evident that the Constitutional Assembly has been guided by the presumption that international obligations "settle" issues and that they must be fulfilled.

The Law "The Procedure by which Laws and Other Acts, adopted by the Saeima, the President and the Cabinet of Ministers are Promulgated, Published and are Valid" does not specify what is the position of international agreements in the hierarchy of normative acts. However, this law has been adopted after the adoption of the law "On International Agreements of the Republic of Latvia". Article 13 of the law "On International Agreements of the Republic of Latvia" provides that "if an international agreement approved by the Saeima foresees provisions that conflict with legislative acts of the Republic of Latvia, the rules of the international agreement are to be applied". Also paragraph 6 of Article 16 of the Law on the Constitutional Court provides that the Constitutional Court hears cases on the compatibility of national legislation with international agreements, which are not breaching the Constitution.

Therefore, it is evident from the national legislation as well as from the international obligations of the Republic of Latvia under the Vienna Convention on the Law of Treaties, in particular, the obligation to perform treaties in good faith, that in case of a contradiction between rules of international law, which have been approved by the Parliament, and national legislation, provisions of international law must be applied. Moreover, international obligations, which Latvia has undertaken by international agreements approved by the Saeima are binding also on the Saeima. It may not adopt legislation that contradicts these obligations.

The applier of legal norms, also a court, when faced with a conflict between the international norm and national legislation of Latvia, must apply the international norm.

While international law claims, but cannot ensure, supremacy at the international level, many states have prioritized domestic law over conflicting rules of international law. The impact of domestic supremacy rules on the possibility that domestic courts apply particular rules of international law is evidenced in several chapters in this volume.

The District Court of The Hague addressed the question of whether treaty law prohibited the Netherlands from exercising universal jurisdiction over violations of Common Article 3 of the Geneva Conventions. In its answer, the District Court gave supremacy to Common Article 3 of the Geneva Conventions on the basis of Article 94 of the Dutch Constitution.[24]

In its decision in *WEU v Siedler*,[25] the Belgian Court of Cassation emphasized the primacy of directly applicable provisions of international law over provisions of domestic law.

24 *Public Prosecutor v F, First instance*, Criminal procedure, LJN: BA9575, 09/750001–06, District Court of The Hague, ILDC 797 (NL 2007), 25 June 2007.

25 *Western European Union v Siedler*, Court of Cassation of Belgium (3rd Chamber), 21 December 2009, Cass No S 04 0129 F; ILDC 1625 (BE 2009).

The Greek Supreme Court stated in *Germany v Prefecture of Voiotia*[26] that international custom forms an integral part of national law and prevails over any statutory provisions.[27]

The following cases illustrate the effect of a lack of domestic supremacy. In *Canada v Edelson*[28] the Israeli Supreme Court gave primacy to national law above international customary law on state immunity when qualifying the concerned state behaviour of Canada as sovereign or non-sovereign.

In *Bouzari and ors v Iran*[29] the Canadian Court expressly stated the superiority of its State Immunity Act (SIA) over international law: 'Canada has clearly legislated so as not to create this exception to state immunity whether it has an international law obligation to do so or not'.[30]

In *Fernandez v Fernandez*[31] the US Supreme Court gave primacy to the US constitution over conflicting international law obligations: 'As a general rule, a treaty provision that contravenes "any of the prohibitions or limitations of the Constitution applicable to the exercise of authority by the United States" is null and void. 1 Restatement (Third), the Foreign Relations Law of the United States (1987) § 302 (2) […]The United States Supreme Court has "regularly and uniformly recognized the supremacy of the Constitution over a treaty" '.[32]

The Italian Supreme Court in *Drago v International Plant Genetic Resources Institute (IPGRI)*[33] refrained from invoking international law while applying substantively equivalent principles of domestic law. In this case, the principle of constitutional supremacy was upheld:

> It is necessary to determine whether this measure, which unequivocally recognises the body's immunity from Italian jurisdiction and extends to employment relations with its employees, complies with the constitutional principle of judicial protection, as referred to under Article 24 of the Constitution, which constitutes a cardinal principle of the legal order (see Court of Cassation, All Civil Sections, no 12614, 17 December 1998, and no. 149/1999 cit.). This cardinal principle is overridden by the customary principle par in parem non habet iurisdictionem in relation to states, as the principle reflects the sovereign equality of state organisations that is a rule universally recognised by the international community to which our Constitution conforms (Article 10). But this prevalence is no longer justified when the sacrifice of the "cardinal principle" of the Constitution arises not from the international system but from a commitment freely entered into by our Republic through the ratification of a convention. In this case, the requirement that the commitment undertaken be translated into a ratifying law for it to become binding upon the courts brings to the fore the fundamental principles of the Constitution, with which the undertaking must be compatible for the ratifying law to be valid (see Constitutional Court judgement no 223 of 1996).[34]

In *Horgan v An Taoiseach and ors*[35] the Irish High Court ruled that 'one can only conclude therefore that principles of international law enter domestic law only to the extent that no

26 Greece, Supreme Court (Areios Pagos), *Germany v Prefecture of Voiotia*, No 11/2000, 4 May 2000, ILDC 287 (GR 2000).

27 ibid, para 8.

28 Israel, Supreme Court, *Canada v Edelson*, 3 June 1997, 131 ILR 279, ILDC 577 (IL 1997).

29 Canada, Ontario Court of Appeal, *Bouzari and ors v Iran*, 30 June 2004, ILDC 175 (CA 2004).

30 ibid, para 67.

31 US, Supreme Court of Connecticut, *Fernandez v Fernandez*, 19 July 1988, 545 A2d 1036 (Conn 1988), ILDC 1385 (US 1988).

32 ibid, para 25.

33 *Drago v International Plant Genetic Resources Institute (IPGRI)*, Final appeal judgment, no 3718; ILDC 827 (IT 2007) Italy, Court of Cassation, All Civil Sections, 19 February 2007.

34 ibid, para 6.5.

35 *Edward Horgan v An Taoiseach and ors*, Application for Declaratory Relief, (2003 No 3739P); (2003) 2 IR 468; (2003) IEHC 64.

constitutional, statutory or other judge made law is inconsistent with the principle in question. Where a conflict arises, the rule of international law must in every case yield to domestic law'.[36]

The Dutch Supreme Court judged in *Bouterse*[37] that customary international law could not supersede an Act of Parliament, hereby referring to Article 94 of the Constitution.

In *H v Prosecutor*[38] the Dutch Supreme Court ruled that Article 94 of the Dutch Constitution implicitly precluded courts from testing Acts of Parliament against rules of customary international law (ie unwritten international law).

III. Techniques

This section will discuss two techniques that national courts have resorted to in applying international law: direct effect (section 2.1) and consistent interpretation (section 2.2).

1. Direct effect

Courts can give effect to international obligations in two ways: indirect (that is, through national law), or direct. There is no doubt that indirect effect is the most common way to give effect to international obligations. Courts then secure the performance of an international obligation by applying domestic law that substantively incorporates or encompasses that obligation. This will be the situation when domestic law may pre-exist and substantively overlap with an international obligation. Unless international law provides more protection, the courts can in principle confine themselves to applying national law.

Courts may also give indirect effect to an international obligation by applying a law that has implemented (or: 'transformed') that obligation in national law. Such indirect effect is the normal situation in the many states that require transformation of international obligations into domestic law. But also states where international law in principle is the law of the land resort to such implementing legislation, because they may seek to make such obligations more coherent with national law, because these obligations are incomplete, or because legal certainty is enhanced if they are expressly made subject to legislation.

In contrast, a court gives '*direct* effect' to an obligation if it enforces that obligation as such, not in a domesticated form. The effect is 'direct' in the sense that it does not depend on an intervening legislative step. The defining feature of direct effect—enforcement of an international obligation without being dependent on implementing legislation—is caught by the term 'self-executing'. A treaty provision can execute itself, without requiring additional legislation. That is: without intervening legal step by the state, the international norm becomes operative for individual state organs and indeed for private individuals.[39]

The classic reference for direct effect is the US case *Foster v Nelson*. This case involved a treaty-based land-grant dispute between the United States and Spain. The US district court held that it could not give direct effect to the treaty in question and explained the criterion for self-executing international law. By making a distinction between self-executing and not self-executing treaties, it states that courts are empowered to rely on international law and thereby control executive power, when it is regarded as equivalent to a legislative act and operates as legislation.

36 ibid, para 135.

37 *Bouterse*, Judgment on Appeal, HR 00749/01 CW 2323; ILDC 80 (NL 2001) The Netherlands, Supreme Court, 18 September 2001.

38 *H v Public Prosecutor*, Appeal judgment, LJN: AZ7143; Judgment on merits, Case No 07/10063 (E); LJN BG1476, Court of Appeal and Supreme Court, ILDC 636 (NL 2007) 29 January 2007 and ILDC 1071 (NL 2008) 8 July 2008.

39 T Buergenthal, 'Self-Executing and Non-Self-Executing Treaties in National and International Law' (1992) IV *Recueil des Cours* 303, 317.

Foster and Elam v Neilson, Appellate judgment, 27 US (2 Pet) 253 (1829), ILDC 2021 (US 1829), 7 L Ed 415 (1829), 1st January 1829, United States; Supreme Court [US]

> 207 A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial, but is carried into execution by the sovereign power of the respective parties to the instrument.
>
> 208 In the United States, a different principle is established. Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the Legislature whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the Judicial, Department, and the Legislature must execute the contract before it can become a rule for the Court.
>
> 209 The article under consideration does not […] say that those grants are hereby confirmed. Had such been its language, it would have acted directly on the subject, and would have repealed those acts of Congress which were repugnant to it; but its language is that those grants shall be ratified and confirmed to the persons in possession, &c. By whom shall they be ratified and confirmed? This seems to be the language of contract; and if it is, the ratification and confirmation which are promised must be the act of the Legislature. Until such act shall be passed, the Court is not at liberty to disregard the existing laws on the subject. Congress appears to have understood this article as it is understood by the court. […]

The important role of direct effect can be seen in those cases where a court declines to give direct effect to an international obligation, as in the Swiss example below. Although the Federal Supreme Court expresses the monist tradition of the Swiss legal system, the Federal Supreme Court's decision that the ICESCR in general does not grant individuals any subjective or legally enforceable rights in effect ensures that in the case at hand the openness to international law did not help the plaintiffs. According to the Federal Supreme Court, the ICESCR Articles 13(2)(b) and (c), in particular, are not specific enough for granting direct effect in their national legal system.

A and B v Government of the Canton of Zurich, Appeal against a Regulation of 15 September 1999 adopted by the Canton of Zurich on the Tuition at Schools of Higher Education, Case No 2P.273/1999, BGE 126 I 242, ILDC 350 (CH 2000), 22nd September 2000, Switzerland; Federal Supreme Court [BGer]

On 15 September 1999 the Government of the Canton of Zurich adopted a new Regulation on Tuition for Students of the Schools of Higher Education (Regulation). Before the Regulation, these schools did not require any registration and tuition fees. A and B challenged this new Regulation before the Federal Supreme Court. They claimed that this new Regulation, by introducing new registration and tuition fees, violated Article 13(2)(b) and Article 13(2)(c) of the International Covenant on Economic, Social and Cultural Rights.[40]

> 2b Switzerland was a country with a monist tradition: an international treaty ratified by the Federal Council formed part of federal law from the time of its entry into force for Switzerland; it was immediately binding on the authorities without need for it to be incorporated in the internal legal system through the adoption of a special law. However, the provisions of an international treaty could only be invoked by

40 (ICESCR) (signed 16 December 1966, entered into force 3 January 1976, entered into force for Switzerland on 18 September 1992) 993 UNTS 3.

> individuals before the national courts if they were self-executing, that is: if they had a sufficiently clear and tangible content to form the basis of a decision. Treaty provisions of a programmatic character could not be considered as self-executing: they did not establish individual rights that could be invoked before national courts, but needed to be elaborated and given appropriate form by the legislator.
>
> 2c Subject to certain exceptions, the International Covenant on Economic, Social and Cultural Rights (ICESCR) is not regarded in the jurisprudence of the Federal Court of Justice as directly applicable […]. The international law obligations assumed by Switzerland under this Covenant are consequently of a programmatic nature; the provisions of the Treaty are directed — contrary to the directly applicable guarantees of the International Covenant of 16 December 1966 on Civil and Political Rights (ICCPR; SR 0.103.2), to which Switzerland also acceded at the same time — are not aimed at the individual but (primarily) at the Parliaments of the Contracting States, which must regard them as a guideline for their activities (according to the Statement from the Federal Council of 30 January 1991 concerning Switzerland's accession to the two international human rights treaties of 1966, BBl 1991 I 1193 and 1202). The Federal Council and Parliament have consequently assumed that the provisions of the ICESCR essentially grant the individual no subjective or legally enforceable rights, apart from a few exceptions, that the citizen could invoke before Swiss administrative and legal authorities (BBl 1991 I 1202; AB 1991 Note 1494, p. 930). […]
>
> 2g […]. The question at issue is therefore how obligations of treaty law undertaken must be executed and whether and to what extent the provisions of this Covenant can be invoked within a state as "self-executing" by an individual in connection with an individual objection procedure (see Yvo Hangartner, Principles of Swiss National Law, Vol. I: Organisation, Zurich 1980, pp. 42–43; Ulrich Häfelin/Walter Haller, Swiss Federal Law, 4th edition, Zurich, 1998, Note 1038; Jeanine de Vries Reilingh, L'application des Pactes des Nations Unies relatifs aux droits de l'homme de 1966, Dissertation Neuenburg, Basel and Geneva 1998, Notes 104 et seq.; Manfred Nowak, Contents, Significance and implementing mechanisms of the two UN Human Rights Treaties, in: Switzerland and the UN Human Rights Treaties, 2nd edition, Basle 1997, p. 19; Gebert, op. cit., pp. 122–123; Künzli, op. cit., p. 532).
>
> 3 Article 13(2)(b) and (c) of the ICESCR do not contain, as will be shown, any enforceable guarantees concerning rights of the individual, that might be invoked in the present case on the basis of Article 84(1)(c) Constitution by Constitutional Objection.

The significance of direct effect is illustrated by several cases in this volume. In relation to international criminal law, the following cases can be noted. In *Public Prosecutor v Arklöf*[41] the Swedish court granted criminal responsibility to Jackie Arklöf for war crimes in the Yugoslavia Wars on the basis of a reference in a domestic penal code to customary international law. Several rules in international humanitarian law were directly applied.

In *Military Prosecutor v Bongi Massaba*[42] the Military Tribunal of Ituri, Democratic Republic of Congo (DRC), applied self-executing norms of international criminal law directly. Blaise Massaba, captain in the Congolese army, was charged with the war crimes of wilful killing and pillaging, as provided for in Article 8(2)(b)(xvi) and 8(2)(a)(i), respectively, of the Rome Statute

41 *Public Prosecutor v Arklöf*, Judgment, Case No B 4084-04 District Court of Stockholm, 18 December 2006, ILDC 633 (SE 2006).

42 *Military Prosecutor v Bongi Massaba*, Criminal trial judgment and accompanying civil action for damages, RP No 018/2006; RMP No 242/PEN/06, 24 March 2006, ILDC 387 (CD 2006).

of the International Criminal Court and the Congolese military penal code. The DRC had ratified the Rome Statute in 2002. The Congolese court applied the Rome Statute in order to fill the gaps in domestic law (also supremacy of international law on the basis of Article 215 the DRC constitution).

In *US v Smith*[43] the US Supreme Court found provisions in international criminal law sufficiently precise to be self-executing.

Conversely, in *Movement Against Racism and for Peoples' Friendship v Aussaresses*[44] the French Court of Cassation ruled that customary international law as such could not palliate the lack of explicit domestic provisions, and could therefore never serve as an adequate basis for prosecution and conviction within the French legal order.

2. Consistent interpretation

Apart from direct application of international legal obligations, international law can also be made effective in the national legal order by ways of consistent interpretation of national law. Domestic courts ensure compliance with international law by interpreting or applying their national laws in conformity with the standards or conditions laid down in international law. This section exemplifies how the concept of consistent interpretation is applied by national judges.

Interpretation No 27, Re, Judicial interpretation, [2002] no 27, ILDC 263 (CN 2002), 27th August 2002, China; Supreme People's Court

On 27 August 2002, at the 1239th Meeting of the Judicial Committee of the Supreme People's Court, the Committee adopted Provisions of the Supreme People's Court on Several Issues Concerning the Hearing of International Trade Administrative Cases. The Provisions were promulgated on the same day as Interpretation No 27 (Supreme People's Court), 2002 (Interpretation 27), and entered into force on 1 October 2002.

The preamble of Interpretation 27 stated the purpose of the Provisions as follows: 'In order to hear international trade administrative cases justly and duly pursuant to law, these Provisions are formulated in accordance with the Administrative Procedure Law of the People's Republic of China ("Administrative Procedure Law")[. . .], the Legislation Law of the People's Republic of China [. . .], and other relevant laws'.

The Supreme People's Courts judged upon the question of whether China is required to choose an interpretation consistent with the relevant provisions of international treaty obligations of the People's Republic of China (PRC).

> 13 Article 7 of Interpretation 27: According to Paragraph 1 of Article 52 of the Administrative Procedure Law and Paragraphs 1 and 2 of Article 63 of the Legislation Law, a people's court shall, in the hearing of international trade administrative cases, follow the laws and administrative regulations of the People's Republic of China, as well as the local regulations, which relate to or affect the international trade, enacted by the local legislatures within the statutory legislative authority. [. . .]
>
> 15 Article 9 of Interpretation 27: If there are two or more reasonable interpretations for a specific clause of the law or administrative regulation applied by a people's court in the hearing of an international trade administrative case, and among which one interpretation is consistent with the relevant provisions of the international treaty that the PRC concluded or entered into, such interpretation shall be chosen, with the exception of the clauses on which the PRC claims reservation.

43 *United States v Smith*, Appeal judgment, 18 US 5 Wheat 153 (1820) US Supreme Court, 2 February 1820, ILDC 1053 (US 1820).

44 *Movement Against Racism and for Peoples' Friendship v Aussaresses*, Appeal judgment, Appeal No 02-80719; Decision No 122 France, Court of Cassation, Criminal Chamber, 17 June 2003, ILDC 775 (FR 2003).

Teoh's case, Minister of State for Immigration and Ethnic Affairs v Teoh, Final appeal judgment, Case No FC 95/013, ILDC 779 (AU 1995), (1995) 183 CLR 273, (1995) 128 ALR 353, (1995) 69 ALJR 423, (1995) EOC 92-696 (extract), [1995] HCA 20, 7th April 1995, Australia; High Court [HCA]

In May 1988, Mr Ah Hin Teoh, a Malaysian citizen, came to Australia. He entered Australia on a temporary visa. He subsequently married Mrs Jean Lim, an Australian citizen, in July 1988. Mr Teoh and his wife had three children together. Prior to the expiry of his temporary visa, Mr Teoh applied for a permanent resident status. Whilst his application was being processed, Mr Teoh was convicted for the importation and possession of heroin. This conviction led to the refusal of Mr Teoh's permanent resident status. Teoh applied for a review of this decision, referring to the rights of his children not to be separated from their parents, but this application was rejected by the Immigration Review Panel in July 1991. The Australian immigration minister accepted the decision of the panel and ordered that Mr Teoh be deported. Teoh brought the case before the Federal Court. The court subsequently dismissed the case. On appeal, the full bench of the Federal Court found that the decisions of the immigration minister had been an improper exercise of power, because the minister had failed to investigate the effects of deportation on Mr Teoh's family. The immigration minister appealed this decision to the High Court of Australia.

> 23 The [United Nations] Convention [on the Rights of Children] was ratified by the Commonwealth Executive on 17 December 1990 and it entered into force for Australia on 16 January 1991. […]
>
> 24 Articles 3 and 9 of the Convention provide as follows: […]
>
> Article 9
>
> "1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence."
>
> 25 It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. […] In this case, it is common ground that the provisions of the Convention have not been incorporated in this way. […]
>
> 26 But the fact that the Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. […]
>
> 34 […] ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as "a primary consideration". It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it. […]

> 36 The existence of a legitimate expectation that a decision-maker will act in a particular way does not necessarily compel him or her to act in that way. That is the difference between a legitimate expectation and a binding rule of law. To regard a legitimate expectation as requiring the decision-maker to act in a particular way is tantamount to treating it as a rule of law. It incorporates the provisions of the unincorporated convention into our municipal law by the back door. […]
>
> 37 But, if a decision-maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course. So, here, if the delegate proposed to give a decision which did not accord with the principle that the best interests of the children were to be a primary consideration, procedural fairness called for the delegate to take the steps just indicated.

A, Amnesty International (intervening) and Commonwealth Lawyers Association (intervening) v Secretary of State for the Home Department, Appeal judgment, [2005] UKHL 71, [2006] 2 AC 221, [2005] 3 WLR 1249, [2006] 1 All ER 575, ILDC 363 (UK 2005), 8th December 2005, United Kingdom; House of Lords [HL]

After the terrorist attacks of 11 September 2001, the United Kingdom adopted the Anti-terrorism, Crime and Security Act ('the 2001 Act'). This 2001 Act allowed for the indefinite detention of persons who were not British citizens but who were suspected of being terrorists and whose presence in the UK the secretary of state for the Home Department reasonably believed to be a risk to the national security.

The secretary of state applied this rule to ten foreign nationals whom he suspected of being terrorists. These persons could leave the country or be detained for an indefinite period without a trial. Eight out of these ten people chose to stay and challenge their detention. Among other things, the detainees claimed that the evidence against them was obtained through torture, inflicted upon them by foreign officials. In 2003, the Special Immigration Appeals Committee (SIAC) held that the fact that some of the evidence might have been obtained through torture did not render it inadmissible. The detainees appealed this decision at the Court of Appeals claiming that the SIAC erred in its application of Article 15 of the Convention against Torture. The Court of Appeals held that it could not apply the Convention against Torture because it had not been incorporated in British law. The detainees subsequently appealed to the House of Lords. Counsel for the detainees argued that English common law prohibited the admission of evidence that was obtained under torture. It was also argued that, even if English law did not require the exclusion of such evidence, the European Convention on Human Rights did require it. Furthermore, the 2001 Act should be construed as intending to comply with the UK's treaty obligations.

> 30 The preamble to the United Nations Charter (1945) recorded the determination of member states to reaffirm their faith in fundamental human rights and the dignity and worth of the human person and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained. The Charter was succeeded by the Universal Declaration of Human Rights 1948, the European Convention 1950 and the International Covenant on Civil and Political Rights 1966, all of which (in articles 5, 3 and 7 respectively, in very similar language) provided that no one should be subjected to torture or inhuman or degrading treatment. […]
>
> 33 It is common ground in these proceedings that the international prohibition of the use of torture enjoys the enhanced status of a *jus cogens* or peremptory norm of general international law. For purposes of the Vienna Convention, a peremptory norm of general international law is defined in article 53 to mean "a norm accepted

and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". In *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, 197–199, the *jus cogens* nature of the international crime of torture, the subject of universal jurisdiction, was recognised. […]

There can be few issues on which international legal opinion is clearer than on the condemnation of torture. Offenders have been recognised as the "common enemies of mankind" […]

34 As appears from the passage just cited, the jus cogens erga omnes nature of the prohibition of torture requires member states to do more than eschew the practice of torture. […] There is reason to regard it as a duty of states, save perhaps in limited and exceptional circumstances, as where immediately necessary to protect a person from unlawful violence or property from destruction, to reject the fruits of torture inflicted in breach of international law. […]

52 I accept the broad thrust of the appellants' argument on the common law. The principles of the common law, standing alone, in my opinion compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice. But the principles of the common law do not stand alone. Effect must be given to the European Convention, which itself takes account of the all but universal consensus embodied in the Torture Convention. The answer to the central question posed at the outset of this opinion is to be found not in a governmental policy, which may change, but in law.

Baker v Canada, Canada, Supreme Court, 9 July 1999, 2 SCR 817 (not in ILDC)

The appellant, a woman with Canadian-born dependent children, was ordered to be deported. She then applied for an exemption, based on humanitarian and compassionate considerations under section 114(2) of the Immigration Act, from the requirement that an application for permanent residence be made from outside Canada. A senior immigration officer replied by letter stating that there were insufficient humanitarian and compassionate reasons to warrant processing the application in Canada.

The Federal Court (Trial Division), dismissed an application for judicial review but certified the following question pursuant to section 83(1) of the Act: 'Given that the Immigration Act does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under section 114(2) of the Immigration Act?' The Court of Appeal limited its consideration to the question and found that the best interests of the children did not need to be given primacy in assessing such an application. The order that the appellant be removed from Canada, which was made after the immigration officer's decision, was stayed pending the result of this appeal.

1 L'HEUREUX-DUBÉ J. — Regulations made pursuant to s. 114(2) of the Immigration Act, R.S.C., 1985, c. I-2, empower the respondent Minister to facilitate the admission to Canada of a person where the Minister is satisfied, owing to humanitarian and compassionate considerations, that admission should be facilitated or an exemption from the regulations made under the Act should be granted. […].

69 Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification by Canada of the Convention on the Rights of the Child, and the recognition of the importance of children's rights and the best interests of children in other international instruments

> ratified by Canada. International treaties and conventions are not part of Canadian law unless they have been implemented by statute: *Francis v. The Queen*, [1956] S.C.R. 618, at p. 621; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, at pp. 172-73. I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.
>
> 70 Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, Driedger on the Construction of Statutes (3rd ed. 1994), at p. 330: [T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. *In so far as possible, therefore, interpretations that reflect these values and principles are preferred*. [Emphasis added.] The important role of international human rights law as an aid in interpreting domestic law has also been emphasized in other common law countries: see, for example, *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (C.A.), at p. 266; *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361 (S.C. India), at p. 367. It is also a critical influence on the interpretation of the scope of the rights included in the *Charter: Slaight Communications, supra; R. v. Keegstra*, [1990] 3 S.C.R. 697.
>
> 71 The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the Universal Declaration of Human Rights, recognizes that "childhood is entitled to special care and assistance". A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations Declaration of the Rights of the Child (1959), in its preamble, states that the child "needs special safeguards and care". The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power. […]
>
> 76 Therefore, both because there was a violation of the principles of procedural fairness owing to a reasonable apprehension of bias, and because the exercise of the H & C discretion was unreasonable, I would allow this appeal.

Several other cases in this volume illustrate the technique of consistent interpretation. In the *Jorgic Case*[45] the German Criminal Code, §6 Number 1, is interpreted in light of the Genocide Convention and the Rome Statute. By doing so, the German Federal Constitutional Court has come to the decision that international law does not preclude states from exercising universal jurisdiction.

In *Menchu and ors v Two Guatemalan Government Officials and ors*[46] the Spanish Constitutional Court overturned the restrictive interpretation of the principle of universal jurisdiction as provided for in Article 23.4 of the Organic Law of the Judicial Power (LOPJ), which is consistent with international law. As stated in the judgment: '[…] The concept of universal jurisdiction

45 *Jorgic Case,* Individual constitutional complaint, BVerfG, 2 BvR 1290/99, Federal Constitutional Court, (Second Senate), 4th Chamber, ILDC 132 (DE 2000), 12 December 2000.

46 *Guatemala Genocide Case, Menchú Tumn (Rigoberta) and ors v Two Guatemalan Government Officials and Six members of the Guatemalan Military*, Constitutional Appeal, Case No 237/2005, ILDC 137 (ES 2005), 26 September 2005, Spain; Constitutional Court.

in current international law is not configured around links of connections founded on particular state interests, as shown by article 23.4 LOPJ […]'.[47]

The *Couso* case[48] deals with the exercise of universal jurisdiction by Spanish courts over crimes of war committed during the Iraq war. The Spanish Supreme Court declared that the Fourth Geneva Convention and Article 23.4 of the LOPJ granted universal jurisdiction to Spanish courts, meaning that under the terms of international law the crime is permitted to be prosecuted in Spain on the basis of Article 23.4 of the LOPJ. However, the Spanish Supreme Court denied absolute universal jurisdiction as it defended the need for connection with Spanish interests.

In *Empagran*[49] the US Supreme Court referred to the customary international law principle of non-intervention when applying US antitrust laws to foreign anti-competitive conduct and gave a restrictive interpretation to its Sherman Antitrust Act.

Alcoa[50] introduced the 'effects doctrine' in antitrust matters: 'Pursuant to this doctrine, which is a variation on the objective territoriality principle, States have jurisdiction over anticompetitive conduct that produces adverse effects within their territory.'[51] By reaching this conclusion, the US court interpreted its statutory laws in line with international law.

In *Bouzari and ors v Iran*,[52] the Canadian court referred to consistent interpretation when stating that domestic law should be interpreted, as far as possible, consistently with conventional and customary international law.

IV. Avoidance

Domestic courts have devised a variety of avoidance techniques, which allow them to escape the implications of constitutional requirements to apply international legal provisions. These include the doctrine of non-justiciability (wherein one might include the political question doctrine) and the act-of-state doctrine. Also denials of standing, and the doctrine of non-self-execution of treaties (discussed above) can be seen as belonging to this category. The following case is the most famous act-of-state doctrine case, which provides that '[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory'.[53]

Banco Nacional de Cuba v Sabbatino and Farr, Whitlock & Company, Decision of Supreme Court on the Grant of Certiorari, No 16, 376 US 398 (1964), 11 L.Ed.2d 804 (1964), 84 S.Ct. 923 (1964), ILDC 391 (US 1964), 23rd March 1964, United States; Supreme Court [US]

> 23 The classic American statement of the act of state doctrine, which appears to have taken root in England as early as 1674, Blad v. Bamfield, 3 Swans. 604, 36 Eng. Rep. 992, and began to emerge in the jurisprudence of this country in the late eighteenth and early nineteenth centuries […] is found in Underhill v. Hernandez, 168 U.S. 250, where Chief Justice Fuller said for a unanimous Court (p. 252):
>
> > "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of

47 ibid, para 9.

48 *Jiménez Sánchez and ors v Gibson and ors*, Appeal judgment, Case No 1240/2006, ILDC 993 (ES 2006), 11 December 2006, Spain; Supreme Court.

49 *F Hoffmann-La Roche Ltd et al v Empagran SA et al*, 124 S Ct 2359 (2004).

50 *United States v Aluminium Corp of America*, 148 F 2d 416 (2d Cir 1945) (Alcoa).

51 See C Ryngaert, H van der Wilt, and J Santos Vara, 'Jurisdiction' Chapter 3 in this volume.

52 Canada, Ontario Court of Appeal, *Bouzari and ors v Iran*, 30 June 2004, ILDC 175 (CA 2004).

53 *Banco Nacional de Cuba v Sabbatino and Farr, Whitlock & Company*, Decision of Supreme Court on the Grant of Certiorari, No 16, 376 US 398 (1964), 11 L Ed 2d 804 (1964), 84 S Ct 923 (1964), ILDC 391 (US 1964), 23 March 1964, United States; Supreme Court [US], para 416.

> the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves." [. . .]

29 Preliminarily, we discuss the foundations on which we deem the act of state doctrine to rest, and more particularly the question of whether state or federal law governs its application in a federal diversity case.

30 We do not believe that this doctrine is compelled either by the inherent nature of sovereign authority, as some of the earlier decisions seem to imply, see Underhill, supra; American Banana, supra; Oetjen, supra, at 303, or by some principle of international law. If a transaction takes place in one jurisdiction and the forum is in another, the forum does not by dismissing an action or by applying its own law purport to divest the first jurisdiction of its territorial sovereignty; it merely declines to adjudicate or makes applicable its own law to parties or property before it. The refusal of one country to enforce the penal laws of another (supra, pp. 413–414) is a typical example of an instance when a court will not entertain a cause of action arising in another jurisdiction. While historic notions of sovereign authority do bear upon the wisdom of employing the act of state doctrine, they do not dictate its existence.

31 That international law does not require application of the doctrine is evidenced by the practice of nations. Most of the countries rendering decisions on the subject fail to follow the rule rigidly. No international arbitral or judicial decision discovered suggests that international law prescribes recognition of sovereign acts of foreign governments, see 1 Oppenheim's International Law, 115aa (Lauterpacht, 8th ed. 1955) and apparently no claim has ever been raised before an international tribunal that failure to apply the act of state doctrine constitutes a breach of international obligation. If international law does not prescribe use of the doctrine, neither does it forbid application of the rule even if it is claimed that the act of state in question violated international law. The traditional view of international law is that it establishes substantive principles for determining whether one country has wronged another. Because of its peculiar nation-to-nation character the usual method for an individual to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal. See United States v. Diekelman, 92 U.S. 520, 524. Although it is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances, Ware v. Hylton, 3 Dall. 199, 281; The Nereide, 9 Cranch 388, 423; The Paquete Habana, 175 U.S. 677, 700, the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders.

32 Despite the broad statement in Oetjen that "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative [. . .] Departments," 246 U.S., at 302, it cannot of course be thought that "every case or controversy which touches foreign relations lies beyond judicial cognizance." Baker v. Carr, 369 U.S. 186, 211. The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state.

33 The act of state doctrine does, however, have "constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial

> Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere. Many commentators disagree with this view; they have striven by means of distinguishing and limiting past decisions and by advancing various considerations of policy to stimulate a narrowing of the apparent scope of the rule. Whatever considerations are thought to predominate, it is plain that the problems involved are uniquely federal in nature. If federal authority, in this instance this Court, orders the filed of judicial competence in this area for the federal courts, and the state courts are left free to formulate their own rules, the purposes behind the doctrine could be as effectively undermined as if there had been no federal pronouncement on the subject. […]
>
> 38 If the act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs. It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence, as in the Bernstein case, for the political interest of this country may, as a result, be measurably altered. Therefore, rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

A different type of avoidance strategy is found in the example below from the Netherlands, based on considerations of separation of powers. The Supreme Court found that the claims of the Association of Lawyers for Peace and the other organizations were related to questions concerning the policy of the state in matters of foreign affairs and defence. This policy will strongly depend on political considerations connected to the context of the case. It was not up to the civil courts to weigh these political considerations and to prohibit the state at the request of a citizen from carrying out certain acts in performance of political decisions in matters of foreign affairs or defence or to order a particular conduct in such matters.[54]

Association of Lawyers for Peace (Vereniging van Juristen voor de Vrede) and ors v Netherlands, Judgment on Appeal in Cassation, C02/217HR, LJN: AN8071, NJ 2004/329, ILDC 152 (NL 2004), 6th February 2004, Netherlands; Supreme Court [HR]

The Association of Lawyers for Peace and four other organizations requested the Supreme Court to prohibit the state, by way of injunctive relief, to cooperate or engage in the threat or actual

54 J Fleuren, *Association of Lawyers for Peace (Vereniging van Juristen voor de Vrede) and ors v Netherlands*, Judgment on Appeal in Cassation, C02/217HR, LJN: AN8071, NJ 2004/329, ILDC 152 (NL 2004), 6 February 2004, Netherlands; Supreme Court [HR], H3.

use of military force by the US or its allies against persons the US associated with the attacks of 9/11, so long as the UN Security Council had not ordered the use of force.

> 3.4 Article 2(4) of the Charter of the United Nations includes a provision requiring all Members to refrain from the threat or use of force against the territorial integrity or political independence of any State. This prohibition on the use of force is therefore intended to protect States and a citizen cannot invoke this provision, or the closely related provisions in Articles 42 and 51 of the Charter, before his national courts.
>
> Article 90 of the Constitution does not lead to a different opinion. Although this article directs the government to promote the international legal order, neither this article nor any other article determines how this should be done. The Supreme Court observes in this connection that the present claims of the Association and Others relate to questions concerning the policy of the State in matters of foreign affairs and defence, and that such policy depends to a large extent on political considerations in connection with the circumstances of the case. It is not up to the civil courts to make these political decisions, even as regards the prohibition on the use of force, or to prohibit the State at the request of a citizen from carrying out certain acts in performance of political decisions in the field of foreign policy or defence or to order it to follow a particular course of action in this field.

In the Israeli case below, petitioners had requested the Israeli Defence Forces not to replace and bury the bodies of casualties of fighting in the occupied territories. Although only as a final remark, the Israeli High Court noted that '[c]learly this Court will take no position regarding the manner in which combat is being conducted. As long as soldiers' lives are in danger, these decisions will be made by the commanders'.[55]

Barake v Minister of Defence of Israel and ors, Original petition to the high court of justice, HCJ 3114/02, ILDC 369 (IL 2002), 14th April 2002, Israel; Supreme Court; Supreme Court as High Court of Justice

> 12. It is good that the parties to these petitions have reached an understanding. This understanding is desirable. It respects the living and the dead. It avoids rumors. Of course, the law applies always and immediately. Respondents informed us that, in all their activities, the military authorities are advised by the Chief Military Attorney. This is how it should be. Even in a time of combat, the laws of war must be followed. Even in a time of combat, all must be done in order to protect the civilian population. *See* HCJ 2901/02 [1]; HCJ 2936/02 [2]; HCJ 2977/02 [3]; and HCJ 3022/02 [4]. Clearly this Court will take no position regarding the manner in which combat is being conducted. As long as soldiers' lives are in danger, these decisions will be made by the commanders. In the case before us, it was not claimed that the arrangement at which we arrived endangered the lives of soldiers. Nor was it claimed that the temporary order endangered the lives of soldiers. On the contrary; the arrangement at which we arrived is an arrangement in which all are interested.

Presidency of the Council of Ministers v Markovic and ors, Application for preliminary order on jurisdiction, 8157, 85 Rivista di diritto internazionale 799 (2002), ILDC 293 (IT 2002), 8th February 2002, Italy; Supreme Court of Cassation

Relatives of victims of NATO bombardments in Belgrade brought a civil claim before the Tribunal of Rome seeking compensation from the Italian Government. The Court of Cassation found that the choice of methods of warfare was to be regarded as an 'act of government', which

55 *Barake v Minister of Defence of Israel and ors*, Original petition to the High Court of Justice, HCJ 3114/02, ILDC 369 (IL 2002), 14 April 2002, Israel; Supreme Court; Supreme Court as High Court of Justice, para 12.

in turn was the manifestation of a political function. Similar acts were, by their very nature, non-justiciable. With respect to 'acts of government', no judicial review was admissible.

2. — The application holds the Italian State responsible for an event resulting from an act of war, in particular the method of conducting hostilities of aerial combat.

The choice of a means of conducting hostilities is an act of Government.

These are acts that constitute the manifestation of a political function with regard to which the Constitution requires attribution to a constitutional body: an act which by its nature is not such that a situation of protected interests can arise in respect thereof, whereupon the actions in which it is manifested assume or do not assume a particular content — Joined Divisions 12 July 1968 No. 2452; 17 October 1980 No. 5583; 8 January 1993 No. 124.

With regard to actions of this type, no court has the power to sanction the method by which the action has been put into effect.