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GROUNDS FOR THE APPLICATION OF INTERNATIONAL RULES OF INTERPRETATION IN NATIONAL COURTS

André Nollkaemper

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Grounds for the Application of International Rules of Interpretation in National Courts

André Nollkaemper*

I. Introduction

The more domestic courts consider and apply international law, the more these courts will have to engage in interpretation of international rights or obligations. Indeed, a large number of the cases that are included in the database *International Law in Domestic Courts*¹ involve interpretation of the rules of international law that were relied on by the parties or, in rare cases, were applied ex officio by the courts.

It seems a fair assumption that interpretation of international law by domestic courts may lead to a divergent interpretation between courts of different states. Interpretative practices between legal systems and domestic courts vary widely.² This inevitably will affect the interpretation of rules of international law by domestic courts. The divergence of interpretative practices may be exacerbated by the fact that courts may find that their leeway to interpret or apply international norms is limited by their relationship with the political branches of their state.³ As a consequence, national judicial practice may diffuse seemingly clear international standards into a multitude of meanings that may differ between courts of different states.⁴ In other words: when subjected to differing interpretative systems, the original international rule and the national variants of that rule may start to lead different lives.

While it may be thought that this phenomenon is problematic and will contribute to an undesirable fragmentation of international law,⁵ two points that allow us to put this development into perspective should be emphasized.

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¹ Oxford University Press, 'Oxford Reports on International Law' <<http://opil.ouplaw.com/home/oril>> accessed 1 July 2014.

² See generally D Shelton, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011).

³ See for a classic statement W Friedmann, *The Changing Structure of International Law* (Stevens & Sons 1964) 146–147; E Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts' (1993) 4 EJIL 159..

⁴ See the overview in HP Aust, A Rodiles and P Staubach, 'Unity or Uniformity? Domestic Courts and Treaty Interpretation' (2014) 27 LJIL 75; RA Müllerson, *Ordering Anarchy: International Law in International Society* (Martinus Nijhoff Publishers 2000) 199 (noting that in the application of international law by domestic courts, there is inevitably a process of domestication in the process of application and interpretation of international law).

⁵ See eg A Reinisch, 'Should Judges Second-Guess the UN Security Council?' (2009) 6 IOLR 257, 284 (noting that review of Security Council resolutions by different courts may lead to 'fragmentation of the single obligatory character of such instruments').

First, in some respects, this phenomenon is just a manifestation of the fact that states may interpret international law in different ways. International law has always relied on a process of auto-appreciation in the interpretation and application of international law. The authorities that have to establish the facts and assess them in the light of international law are the legal subjects themselves.⁶ When no central organs are empowered to interpret the law and apply it to the facts, the institutions that determine whether a particular act is or is not in conformity with international law are national organs and, in the course of so doing, they interpret the law.⁷ This phenomenon has always led to national colour and interpretative distortions between states.⁸ It could be said that there is no difference if the law-interpreting authorities are domestic courts rather than executive bodies – the divergence of national judicial practices would thus simply fit within this traditional practice.

However, on this point it should be noted that while the process of auto-interpretation is as enduring as international law itself, the role of national courts in the interpretation and application of law leads to a special situation. There may be a significant difference between auto-interpretation by the political organs and the situation in which national courts engage in interpretation and application of international law. Because the courts are expected to be independent from the political branches, the decisions of national courts are endowed with a greater authority than interpretations of the political organs of states. Decisions of national courts are, under certain conditions, relatively more final and likely to be accepted by other states (or their courts) or by international institutions.

The second point that should prevent us from jumping too quickly to a conclusion that national judicial interpretation of international law may lead to undesirable fragmentation is that a multiplicity of meanings in a domestic context is not necessarily a negative phenomenon. It simply reflects that domestic courts are better positioned to interpret an international obligation in a specific context. The meaning given to that obligation may then differ from the meaning given in a different context. If such variations are considered in terms of fragmentation at all, their positive effects outweigh the potential negative effects in terms of the cohesiveness of interpretation. A tension exists between the universalist aspirations of much of international law, on the one hand, and, on the other, the need to ground interpretation and application of

⁶ H Kelsen, *Law and Peace in International Relations. The Oliver Wendell Holmes Lectures, 1940-41* (Harvard UP 1942) 108.

⁷ L Gross, 'States as Organs of International Law and the Problem of Autointerpretation' in GA Lipsky (ed), *Law and Politics in the World Community* (University of California Press 1953) 59, 76-77; P Weil, 'Le droit international en quête de son identité: cours général de droit international public' (1992) 237 *Rec des Cours* 9, 220; G Abi-Saab, "'Interprétation et 'auto-interprétation' – quelques réflexions sur leur rôle dans la formation et la résolution du différend international' in U Beyerlin (ed), *Recht zwischen Umbruch und Bewahrung. Festschrift für Rudolf Bernhardt* (Springer-Verlag 1995) 11.

⁸ M McDougal, 'The Impact of International Law Upon National Law: A Policy-oriented Perspective' (1959) 4 *South Dakota L Rev* 25, reprinted in MS McDougal and Associates, *Studies in World Public Order* (Yale UP 1960) 225.

the law in a localised expression.⁹ International law may lose some of its uniform meaning in this process, yet may gain domestic relevance.¹⁰ Moreover, the very indeterminacy that fosters processes of auto-interpretation and differences between states is ‘not a scandal or a structural deficiency’, but ‘an absolutely central aspect of International Law’s acceptability.’¹¹

Despite the fact that the process of auto-interpretation is deeply embedded in international law and moreover may serve useful purposes, the question may be asked whether there are nonetheless good grounds for national courts to limit their freedom of interpretation, and perhaps limit divergence of interpretations, by relying on a single set of international principles of interpretation. One particular reason for an analysis of this question is that in some cases national courts have relied on international rather than national rules of interpretation. In a particularly forceful statement, the House of Lords said in relation to the construction of the Refugee Convention:

It is necessary to determine the autonomous meaning of the relevant treaty provision ... It follows that, as in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 [of the Vienna Convention] and without taking colour from distinctive features of the legal system of any individual contracting state. In principle there can only be one true interpretation of a treaty ... In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous international meaning of the treaty. And there can only be one true meaning’, at pp. 515–17 (Lord Steyn).¹²

Although the practice is by no means uniform, and there are also many cases where national courts that are confronted with questions of interpretation resort to national rather than international principles of interpretation,¹³ the question does present itself as to whether there are good grounds for domestic courts to rely on international principles of interpretation.

⁹ ME Adjami, ‘African Courts, International Law, and Comparative Case-Law: Chimera or Emerging Human Rights Jurisprudence’ (2002) 24 Mich J Intl L 164.

¹⁰ K Knop, ‘Here and There: International Law in Domestic Courts’ (2000) 32 NYU J Intl L & Pol 501, 504.

¹¹ M Koskeniemi and P Leino, ‘Fragmentation of International Law? Postmodern Anxieties’ (2002) 15 LJIL 553, 591.

¹² Eg *R v Secretary of State for the Home Department, ex p Adan* [2001] 2 AC 477, ILDC 229 (UK 2000) (Lord Steyn). See also New Zealand, Supreme Court, *Attorney-General v Zaoui and Inspector-General of Intelligence and Security* (2005) NZSC 38, ILDC 81 (NZ 2005).

¹³ There is ample practice where domestic courts apply principles of domestic (statutory) interpretation without referring to international principles of interpretation; see eg Pakistan, Supreme Court, *Societe Generale de Surveillance SA v Pakistan*, 2002 SCMR 1694, ILDC 82 (PK 2002) [A5].

In this this chapter I will explore three possible grounds on the basis of which domestic courts can resort to an application of international rules of interpretation: the effective performance of treaty obligations (II.), the international quality of domesticated norms (III.), and the external authority of decisions of domestic courts (IV.). The paper concludes by arguing that, depending on the context, each of these grounds may offer a justification for relying on international rules of interpretation, but that competing considerations may pull in diverging directions, and that the international rules of treaty interpretation do not necessarily preclude this.

II. Effective performance of international obligations

A first ground which can provide a justification for the application of international rules of interpretation in domestic courts is that such application may be an intrinsic part of the performance of international obligations. This obligation to perform a treaty in good faith is then extended to the principles of interpretation of treaties.

There are two variations of this argument. A strong version would say that there is a freestanding obligation to apply international principles of interpretation (the *pacta sunt servanda* principle would then apply to the Vienna Convention on the Law of Treaties (VCLT)¹⁴ itself) and that this obligation would rest on national courts. Article 26 of the VCLT stipulates that ‘every treaty in force’ has to be performed in good faith – apparently not excluding the VCLT itself. Though the VCLT is not expressly drafted in terms of ‘obligations’, it would seem that the entire rationale of the treaty is that states are not at liberty to apply or refrain from applying the provisions of the treaty. In that sense, the principles of interpretation, as a matter of obligation, have to be applied by states.

However, one caveat is in order. The fact that states may not be at liberty to disregard the provisions of the VCLT does not mean that if they do neglect the Convention, this would be a breach of a treaty that would engage the international responsibility of that state. Clearly there is a wide variety of international obligations that do not belong to the category of obligations breached, which will lead to international responsibility.¹⁵

A parallel may be drawn here with a rare domestic case that considered the question of whether non-application of the VCLT in itself was a breach that, in the specific domestic context, would provide a

¹⁴ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

¹⁵ I Brownlie, *System of the Law of Nations: State Responsibility, Part I* (OUP 1983) 26–31.

ground of cassation.¹⁶ In *Cigna Insurance Company of Europe SA-NV v Transport Nijs BVBA*, the Belgian Court of Cassation had to consider the argument by the plaintiffs that the Court of Appeal had disregarded the rules on treaty interpretation as laid down in Articles 31 and 32 of the VCLT in interpreting the Convention on the Contract for the International Carriage of Goods by.¹⁷ The Court of Cassation rejected the argument, stating that the violation of the rules on the interpretation of treaties was only ground for cassation if it amounted to a violation of the interpreted treaty itself at the same time.¹⁸

Without needing to consider the grounds for cassation under Belgian law, it would seem that this judgment confirms the general point that the application of the rules on treaty interpretation is ‘not an aim in itself, but only a means to achieve another goal, ie the quest for the correct meaning of the terms of a treaty.’¹⁹ However, this does not detract from the possibility to ground the application of the rules of treaty interpretation in a sense of obligation—it simply means that this is not a type of obligation the breach of which will be sanctioned as a matter of responsibility.

A weaker version of the argument is that while states (and their courts, a matter to which I return below) may not be obliged to give effect to principles of interpretation as a freestanding obligation, but such principles inform the meaning and application of the primary norms. Application of such principles then may not be obligatory as such, but may be required to the extent that this would be necessary to ensure the effective application of the international norm subject to interpretation. A failure to give effect to an international obligation with the meaning and content it has at the international level may constitute a wrongful act, for giving effect to an international norm that is devoid of its international normative context may well be giving effect to a different norm.

This argument is also supported by the notion that the principle that states are not allowed to rely on domestic law to justify non-compliance with their international obligation can be extended to rules of interpretation. Thus states cannot rely on domestic rules of interpretation where that would lead to an outcome that would be in breach of their international obligation.²⁰ One can recall on this point Judge Lauterpacht’s observation that if a particular matter is governed by domestic law and would therefore be

¹⁶ *Cigna Insurance Company of Europe SA-NV v Transport Nijs BVBA*, Cassation appeal, No C.97.0176.N, ILDC 38 (BE 2000), 30th March 2000, Court of Cassation.

¹⁷ Convention on the Contract for the International Carriage of Goods by Road Road (adopted 19 May 1956, entered into force 2 July 1961) 399 UNTS 189.

¹⁸ *Cigna Insurance Company of Europe SA-NV v Transport Nijs BVBA*, Cassation appeal, No C.97.0176.N, ILDC 38 (BE 2000), 30th March 2000, Court of Cassation, para 12.

¹⁹ J Wouters and M Vidal, ‘Non-Tax Treaties: Domestic Courts and Treaty Interpretation’ in G Maisto (ed), *Courts and Tax Treaty Law* (IBFD 2007) 11.

²⁰ P Pescatore, ‘Conclusion’ in FG Jacobs and S Roberts (eds), *The Effects of Treaties in Domestic Law* (Sweet & Maxwell 1987) 275.

outside the sphere of international law it is, ‘if accepted, subversive of international law.’²¹ This argument could be transposed to rules of interpretation to the extent that application of such rules would lead to an outcome at variance with what would be required by international law.

While the argument that if, and to the extent that, reliance on international rules of interpretation underpins a proper performance of international obligations as such is unobjectionable, a few comments are in order. First, as already indicated above, the ‘obligation’ to apply international rules of treaty interpretation is an obligation of result. It is not an obligation to behave in a legally defined way (in which case it would be an obligation of conduct), but rather an obligation to achieve a particular outcome—the performance of an obligation in the meaning of that obligation under international law.²² In this respect, there is nothing necessarily wrong with application of national principles of interpretation as long as the outcome is the same.

Second, all of the above relates to the application of principles of interpretation by states. An additional step is needed to relate any sense of obligation to courts, as organs of the state. This is of course part of a familiar and much wider debate as to whether international law only addresses the state as a black box, or whether it extends to courts.²³ In part, the answer to this question depends on the status of international law in the national legal order. From the perspective of international law, two points are worth noting. One is that some international courts have had no trouble directing themselves to national courts. In its Advisory Opinion in *Cumuraswamy*, the International Court of Justice (ICJ) stated that ‘the Malaysian courts had the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided in *limine litis*.’²⁴ Also, the provisional measures ordered in *LaGrand* seem to go further than stopping at the outer edge of the state.²⁵ The European Court of Human Rights (ECtHR) said in *Drozd and Janousek v France and Spain* that a court in Andorra, in contra-distinction to the courts of France and Spain, was not a ‘court... bound by the Convention’, suggesting that the courts of member states, and not only member states as such, are bound by the Convention for the Protection of Human

²¹ *Case of Certain Norwegian Loans (France v Norway)* (Separate Opinion of Judge Lauterpacht) [1957] ICJ Rep 9, 37.

²² **Error! Hyperlink reference not valid.** See generally P-M Dupuy, ‘Reviewing the Difficulties of Codification: On Ago’s Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility’ (1999) 10 EJIL 371, 379.

²³ W Ferdinandusse, ‘Out of the Blackbox?’ (2003) 29 Brooklyn J Intl L 45; R Higgins, ‘The Concept of “the State”: Variable Geometry and Dualist Perceptions’ in V Gowlland-Debbas (ed), *The International Legal System In Quest Of Equity And Universality, Liber Amicorum Georges Abi-Saab* (Kluwer Law 2001).

²⁴ *Difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62 [2(d)].

²⁵ *LaGrand Case (Germany v United States of America)* (Request for the Indication of Provisional Measures) [1999] ICJ Rep 9, 10.

Rights and Fundamental Freedoms and its Protocols.²⁶ And a North American Free Trade Agreement (NAFTA) tribunal declared in *Loewen* that it is the responsibility of the state and, consequently, of the courts of that state, to provide a fair trial for cases in which a foreign investor is a party.²⁷ Under this approach, it would seem unobjectionable to extend the requirement to interpret treaties in line with the VCLT to national courts.

The third point to note is that irrespective of whether one accepts that international law in general or the VCLT in particular applies to courts directly, it is beyond dispute that decisions of domestic courts may engage the international responsibility of their state by committing a wrong themselves, or condoning an international wrong by their state, by interpreting particular rights or obligations in a way that deviates from an interpretation that would be adopted at the international level.²⁸ Reasoning backwards, it seems a fair inference that domestic courts should prevent their states from acting in contravention of international obligations, and therefore that courts should apply those principles of interpretation that allow the state to perform its international obligations. The sanction of responsibility thus supports reliance on rules of interpretation to ensure that an act that would be internationally wrongful, were it to take place, does not occur.²⁹ In rare cases, courts have expressly justified their application of international law to prevent their state from committing an international wrong, and in so doing seem to have accepted a similar line of argument.³⁰ For instance, the Supreme Court of Uganda held that ‘we ought to interpret our law so as not to be in conflict with the international obligations that Uganda assumed when it acceded to the

²⁶ *Case of Drozd and Janousek v France and Spain* (1992) Series A no 240 [110]; also SK Martens, ‘Commentary’ in MK Bulterman and M Kuijer (eds), *Compliance with Judgments of International Courts* (Martinus Nijhoff Publishers 1996) 71–72 (noting that judgments of the ECtHR contain obligations for ‘all institutions of the respondent State: the legislature, the executive and the judiciary’).

²⁷ ICSID, *The Loewen Group, Inc and Haymond L Loewen v United States of America* (2003) ARB(AF)/98/3, 42 ILM 811 [123].

²⁸ In a 1955 decision, the Franco-Italian Conciliation Commission, established on the basis of Article 83 of the Italian Peace Treaty of 10 February 1947, held that ‘[a]lthough in some arbitral awards of the XIXth century the opinion is expressed that the independence of the courts, in accordance with the principle of the separation of powers generally recognized ... , excludes the international responsibility of the State for acts of the judiciary contrary to law, this theory now seems to be universally and rightly rejected’, Franco-Italian Conciliation Commission (1955) 13 RIAA 438.

²⁹ See also CM Vázquez, ‘Treaty-Based Rights and Remedies of Individuals’ (1992) 92 *Columb L Rev* 1084, 1143 (stating that ‘[i]f the treaty does not expressly entitle the individual to a remedy, a remedy should nevertheless be considered to be implicit in the treaty whenever failure to afford the individual the remedy would give rise to international responsibility of the United States ...’); FA Mann, ‘The Consequences of an International Wrong in International and National Law’ (1977) 1 *BYIL* 20, 24 (noting that it is the very rationale of the presumption that the courts are to apply rules of international law ‘to protect the nations against complaints by a foreign state’).

³⁰ *Görgülü Case*, 2 BvR 1481/04, 111 *BverfG* 307, (2004) *Neue Juristische Wochenschrift* (NJW) 3407, ILDC 65 (DE 2004) [61] (stating that ‘as part of its competence the Federal Constitutional Court is ... competent to prevent and remove, if possible, violations of public international law that consist in the incorrect application or non-observance by German courts of international-law obligations and may give rise to an international-law responsibility on the part of Germany In this, the Federal Constitutional Court is indirectly in the service of enforcing international law and in this way reduces the risk of failing to comply with international law’).

International Covenant on Civil and Political Rights.’³¹ The Canadian Supreme Court stated that, in deciding between different interpretations, courts ‘will avoid a construction that would place Canada in breach of those obligations.’³² Though such cases are rare, the normative point is of more general application.

It has been suggested that the answer to the question of whether a treaty should be interpreted in line with international principles may differ between particular types of treaties, especially between reciprocal and non-reciprocal norms.³³ In the former case there would be more interest in, and arguably also more justification for, applying similar standards of interpretation. A separate, but somewhat related, argument is that if the purpose of an international convention is to harmonize the laws of contracting states on the particular topic dealt with by the convention, it is more ‘important that the interpretation of the convention should be the same, so far as possible, in all contracting states.’³⁴ In such cases, it has been said that it may be necessary for domestic courts to interpret an international norm, or even an implementing statute, ‘in a normal manner appropriate for the interpretation of the international convention, unconstrained by the technical rules of English law, or by English legal precedent, but on broad principles of general acceptance.’³⁵ However, while there may be good policy reasons relating to reciprocity and harmonization for this distinction and, moreover, there is of course a well-established argument that rules of interpretation may differ between particular types of treaties,³⁶ it is difficult to find a basis in international law for the requirement to apply international principles of interpretation only for some treaties, but not for others. Indeed, this approach is unhelpful for grounding the approach in *R v Secretary of State for the Home Department, ex parte Adan*, cited above, in which the House of Lords construed the Refugee Convention with reference to the law of treaties.³⁷

Fourth, while all of the above suggests that the requirement of treaty performance can indeed support application of international principles of interpretation by domestic courts, the reality might be that such courts may likewise be subjected to a requirement to interpret and apply international obligations in

³¹ *Attorney General v Susan Kigula*, Constitutional Appeal No 03 of 2006 (21 January 2009) (unreported), ILDC 1260 (UG 2009).

³² *R v Hape* [2007] 2 SCR 292, 2007 SCC 26, ILDC 758 (CA 2007) [53] (holding that in deciding between different interpretations, courts ‘will avoid a construction that would place Canada in breach of those obligations’).

³³ See further the contribution by E Bjorge in this volume.

³⁴ AV Dicey and JHC Morris, *The Conflict of Laws* (13th edn, Sweet and Maxwell 2000) 9–15. See *Sidhu v British Airways plc* [1997] AC 430, 444, 2 WLR 26.

³⁵ *Stag Line Ltd v Foscolo Mango & Co Ltd* [1932] AC 328, 350, [1931] 41 Lloyd’s Rep 165; *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141, 152, 160, 161; *Ulster-Swift Ltd v Taunton Meat Haulage Ltd* [1977] 1 Lloyd’s Rep 346, [1977] 1 WLR 625, CA, at 628; Dicey and Morris (n 34) 9–15.

³⁶ Eg A Orakhelashvili, ‘Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights’ (2003) 14 EJIL 529; M Killander, ‘Interpreting Regional Human Rights Treaties’ (2010) 7 Intl J HR 145.

³⁷ *ex parte Adan* (n 12).

conformity with interpretative practices grounded in domestic law. Either the distinction between international and national rules of interpretation matters, or it does not. In the latter case, national courts may just as well apply national principles of interpretation, since it does not matter for the outcome. In the former case, application of international principles of interpretation may lead to a different outcome than application of national law would require. Clearly in such a situation it is simplistic to say that the national courts should simply follow national law. As I have explained elsewhere, this will place national courts in a double bind.³⁸ National courts neither operate fully in the national nor in the international legal order, but rather in a mixed zone where they are subject to competing loyalties, commitments, and obligations.³⁹ Articulating a ground for international obligation in itself does not help in resolving this double bind.

III. The international quality of domesticated norms

A second ground that justifies relying on international rules of interpretation is that rules of international law that are applied by domestic courts retain their international law quality, and by virtue of that quality international rules of interpretation remain applicable. The main difference between this second construction and the first construction, discussed above, is that this does not necessarily rest on an international obligation, but rather on the international quality of obligations that have been made part of the national legal order. The argument that also after their entry into domestic legal systems, international rights or obligations are still to be applied as international law rather than domestic law, has a long pedigree in international legal scholarship.⁴⁰ Though recent scholarship on this point appears to be rare, the perspective remains relevant.

From one viewpoint, the argument rests on the position that if a norm of one legal system is applied in another legal system, its meaning and interpretation remain determined by the former legal system. This

³⁸ A Nollkaemper, *National Courts and the International Rule of Law* (OUP 2011) 13.

³⁹ A von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: on the Relationship between International and Domestic Constitutional Law' (2008) *Intl J Con L* 397, 398; A Mills and T Stephens, 'Challenging the Role of Judges in Slaughter's Liberal Theory of International Law' (2005) 18 *LJIL* 1, 20 (noting that a role of the judiciary 'as servants of transnational norms contradicts their role as servants of the domestic rule of law'); Y Shany, 'Dédoublément fonctionnel and the Mixed Loyalties of National and International Judges' in F Fontanelli, G Martinico and P Carrozaa (eds), *Shaping Rule of Law through Dialogue. International and Supranational Experiences* (Europa Law Publishing 2010) 27, 36–37.

⁴⁰ See also H Lauterpacht, 'Decisions of Municipal Courts as a Source of International Law' (1929) 10 *BYIL* 65, 76–77; FG Jacobs, 'Introduction' in FG Jacobs and S Roberts (eds), *The Effects of Treaties in Domestic Law* (Sweet & Maxwell 1987) xxix; MS McDougal, 'The Impact of International Law Upon National Law: A Policy-oriented Perspective' (1959) 4 *South Dakota L Rev* 25, reprinted in: McDougal and Associates, *Studies in World Public Order* (Yale UP 1960) 206; Müllerson (n 4) 200, 204.

position finds support in the statement of the Permanent Court of International Justice (PCIJ) that '[o]nce the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force.'⁴¹ It can be argued that the reverse should also apply. Once a domestic court determines that it is necessary to apply international law, it should apply that as it would be applied in the international legal order, for it would not be applying international law if it were to apply it in a different manner.

A parallel may also be drawn with the interpretation of foreign law, where the leading principle is that foreign law should be interpreted in the way it is interpreted in the legal system that created it.⁴² Courts may deviate from this because they might find themselves ill at ease when applying foreign principles of interpretation. It is often tricky to determine precisely the meaning of a foreign law, written in an inaccessible language, in a foreign legal system. However, these considerations are much less limiting for the application of international law than for foreign law.

The argument that rules of international law should be interpreted in their international form because they stem from a different legal order ultimately rests on the idea that there is an essential connection between primary norms and secondary norms of a legal system. Rules of interpretation are one particular set of secondary norms.⁴³ The argument then is that because of the connection between primary and secondary norms, these rules remain applicable to the interpretation, modification, and termination of international obligations at the domestic level. The fundamental connection between primary and secondary norms should, so the argument goes, not be broken when a primary norm is transplanted into a domestic legal system. If a court were to give effect to an international obligation disconnected from its secondary context, it does not give effect to that obligation, but to another norm. It is the essential connection between primary and secondary norms that would justify domestic cases being guided by corresponding secondary norms of international law in regard to interpretation.⁴⁴

⁴¹ *Case Concerning the Payment in Gold of the Brazilian Federal Loans Contracted in France (France v Brazil)* [1929] PCIJ Rep Series A No 21, para 72. See also G Schwarzenberger, *International Law – Vol. I: International Law as Applied by Interdomestic courts and Tribunals* (Stevens & Sons 1945) 25.

⁴² *Case Concerning the Payment in Gold of the Brazilian Federal Loans Contracted in France* (n 41); J Dolinger, 'Application, Proof and Interpretation of Foreign law, a Comparative Study in Private International Law' (1995) 10 *Ariz J Intl & Comp L* 225, 265–266.

⁴³ See for a definition of secondary norms including such aspects: TM Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 184.

⁴⁴ R Gardiner, *Treaty Interpretation* (OUP 2008) 128; E Criddle, 'The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation' (2004) 44 *Virginia J Intl L* 431.

This argument that an international obligation retains its international character, and should thus be interpreted and applied in conformity with particular secondary rules, faces three obstacles.

A first critique is that as a general proposition it is overly broad, and does not reflect the wide variety of modalities through which international rules have become domesticated. The rules of international law that are to be interpreted by domestic courts can be distinguished by several categories, which differ in the degree to which such rules are embedded in the national legal order. At one extreme, courts may have to interpret rules of international law as such, without these rules being made part of the national legal order in any way other than that the courts have been granted the competence to apply such rules. For this category, the argument that a rule of international law retains its international character is relatively unproblematic. At the other extreme, international rules may be integrated, or translated, into domestic law in such a way that their international origins are hardly recognizable. For this latter category, despite the rule in question retaining its international law quality in the domestic legal order, the argument is, from both a conceptual and a practical perspective, much more difficult to make.

The second problem with the argument based on the connection between primary and secondary rules is that it presumes that secondary rules can easily migrate between legal orders. Secondary rules are constitutive of, and defining for, any particular legal system.⁴⁵ They inform and determine the connection between different primary rules, and it is precisely by virtue of such secondary rules that despite the wide variety of norms, adopted in different institutions by different actors, we can still speak of an international legal system. It is, thus, that the international and the national legal systems have, in principle, their own secondary rules and indeed constitute separate systems.⁴⁶ It may be said that international obligations are a part of the international system, being in a systemic relationship with other international norms,⁴⁷ and that the normative power of that system is limited to the international legal order itself. International

⁴⁵ HLA Hart, *The Concept of Law* (OUP 2012) 81.

⁴⁶ Of course, Hart did not consider that the secondary rules of international law had matured in a way that allowed international law to be qualified as a legal system; Hart (n 45) 208. See for the term 'system' in regard to international law eg G Abi-Saab, 'Cours Général de Droit International Public' (1987) 207 Rec des Cours 105. See also ILC, 'Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (n 47) 407 (stating that '[i]nternational law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hierarchical levels, their formulation may involve greater or lesser generality and specificity and their validity may date back to earlier or later moments in time').

⁴⁷ ILC, 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' (2006) UN Doc A/61/10 [1].

obligations that have been domesticated have become part of a different normative universe.⁴⁸ They lead a separate life from domestic law, governed by separate secondary norms.⁴⁹

The third and related problem is that this argument based on the connection between primary and secondary rules is easily opposed by a similar argument from the perspective of national law. Once a rule of international law is domesticated, it becomes part of the national legal order. Surely the institutions that then apply the rule are governed by national rather than international law. The same holds for the procedural rules that accompany and guide the application of international norms. If this is so, it is not obvious why rules of interpretation should be excluded from the otherwise controlling power of the national legal order. While, from the perspective of international law, the claim that the international norm should be interpreted according to its secondary rules is powerful, it can be opposed by a claim from the perspective of national law. There does not seem to be an objective vantage point to prefer one of these constructions over the other. In that respect, the decision to use international rather than domestic rules of interpretation is as much a political choice in favour of the aspirations of international law, as a conclusion that it can be inferred from an intrinsic connection between international rules and their international legal context. The pull of different secondary rules is then just one other dimension of the double bind in which national courts find themselves.⁵⁰

IV. External effects

The third ground for application of international rules of interpretation is that such application can support the acceptance of (or an increase in the weight attached to) a decision of a national court by international or foreign courts.

This argument can be applied in two categories of situations. The first consists of those (admittedly rare) cases when a decision of a domestic court is followed by a later decision of an international court. When domestic remedies are exhausted, and a plaintiff proceeds with an application before, for instance, the ECtHR, the Inter-American Court of Human Rights (IACtHR), the African Court on Human Rights, or an international treaty body, that court or body may examine the case on the merits. As part of that examination, it may consider the decisions that domestic courts have made in the matter. Arguably, the chance that a national decision will be accepted is greater if it has at least interpreted the decision in a way

⁴⁸ M Hakimi, 'Secondary Human Rights Law' (2009) 34 Yale J Intl L 596.

⁴⁹ See eg with regard to treaty interpretation: A Mestre, 'Les Traités et de Droit Interne' (1931) 38 Rec des Cours 299 (arguing that domestic courts should interpret treaty law in the same way as domestic law).

⁵⁰ See Nollkaemper (n 38).

that conforms to international rules of interpretation.⁵¹ We can also refer to a NAFTA tribunal that said in *Gami v Mexico* that it was for the Mexican courts to rule on the lawfulness of the expropriation as a matter of Mexican law, and that it deferred to the *Sentencia* as an authoritative expression of national law. It added: '[t]he present Tribunal will moreover give respectful consideration to the *Sentencia* insofar as it applies norms congruent with those of NAFTA.'⁵² Whether or not a norm is congruent with an international norm depends also on how it is interpreted.

The second type of situation in which the argument could be applied is in relation to the process of 'transnational judicial dialogue'.⁵³ The argument is that if a court has to determine to which of the wide variety of available domestic cases it has to refer in construing or applying a norm, it may give priority to decisions based on similar rules of interpretation. This argument may be particularly relevant in cases where a court is faced with a question of treaty interpretation, and it may be assisted by foreign courts that were confronted with similar questions of interpretation.⁵⁴

Both constructions may be illustrated by the judgment of the ECtHR in *Jones v UK*. The Court reviewed the challenged findings of the House of Lords and found these to be 'neither manifestly erroneous nor arbitrary but ... based on extensive references to international law materials and consideration of the applicant's legal arguments and the judgment of the Court of Appeal, which had found in the applicants' favour.'⁵⁵ The Court also noted that other national courts had examined in detail the findings of the House of Lords and considered 'those findings to be highly persuasive.'⁵⁶ In the case at hand, international principles of interpretation did not play any role. This may have been due to the customary law nature of the rule in question, but the point is more general. It could well be argued that if consideration of international law materials matters in terms of persuasion, this may include consideration of international principles of interpretation. The persuasive effect of a decision of a national court cannot be presumed, but has to be earned. If, despite the dualistic starting point, an international institution, or a court of

⁵¹ The question is in some respects comparable to the recognition of foreign judgments; see R Michaels, 'Recognition and Enforcement of Foreign Judgments' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2009) vol 8, 672.

⁵² North American Free Trade Agreement Tribunal, *Gami Investments, Inc v The Government of the United Mexican States* (2005) 44 ILM 545, [41] (discussing the North American Free Trade Agreement (NAFTA) (adopted 17 December 1992, entered into force 1 January 1994, 32 ILM 289, 309 (1993))).

⁵³ See the contribution by A Tzanakopoulos to this volume.

⁵⁴ It is to be noted though, in Judge Scalia's oft-quoted plea to consider 'judgments of our sister signatories' in the interpretation of the Warsaw Convention'; see Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention) (adopted 12 October 1929, entered into force 13 February 1933) 137 UNTS 11. Scalia did not appear to be concerned with whether foreign courts applied the VCLT; see *Olympic Airways v Husain* (representative of the estate of Abid M Hanson, deceased), Appeal Judgment, App No 02-1348, 540 US 644 (2003), 316 F.3d 829 (Sup. Ct. 2003), 124 S Ct 1221 (2003), ILDC 703 (US 2003), 24 February 2004, Supreme Court [US], separate opinion Justice Scalia, para 24.

⁵⁵ *Jones and others v UK*, App nos 34356/06 and 40528/06 (ECtHR, 14 January 2014), para 214.

⁵⁶ *Jones and others v UK* (n 55) para 214.

another state, is to attach weight to decisions of domestic courts in the sense indicated above, that has to follow from certain procedural or substantive qualities of such decisions. The choice of interpretative rules may be one such quality.

However, the ability of this line of argument to provide a foundation for the application of international principles of interpretation is limited in several respects. In particular, the suggestion that foreign courts (the point may be less relevant to international courts adjudicating sequential proceedings) would attach more weight to decisions that are based on international principles of interpretation is open to doubt.

While it seems plausible that courts will refer more to decisions of other courts with which they share a common ground, such common ground may be found in a variety of other respects, such as a common legal system, regional closeness, or political affinity, and so on. These types of criteria may outweigh the role of common interpretative ground.

Second, particularly in relation to foreign courts (the argument may apply less to international courts), it may be argued that national courts may not be so interested in decisions based on a common normative ground, but in decisions pointing to useful ways to solve a legal problem of the jurisdiction at issue.

Approaches by one court that do not expressly rely on international rules of interpretation may well be more fitting or useful than those that do.

Third, and related to the previous point, the impact of decisions of domestic courts on the development of international law (for instance, in terms of development of customary law or subsequent practice) does not seem dependent on the question of whether such decisions themselves are in conformity with or are based on international principles of interpretation.

The larger point then is that while, particularly from the perspective of international courts, application of proper principles of interpretation may support deference, the weight attached to decisions of domestic courts (whether by international courts or tribunals or by foreign domestic courts) in terms of review, dialogue, or law development will depend on a variety of features of such decisions. The interpretative practice of these domestic courts will be only one factor that, moreover, might easily be outbalanced by other considerations that are more determinative of weight.

V. Conclusion

Each of the above three arguments has some potential for grounding reliance on international rules of interpretation, based on the assumption that application of international rules of interpretation will lead to a different outcome than the application of national rules of interpretation.

The common feature of each of the grounds is that as a matter of international law, none of them rests on an affirmative obligation to interpret a decision, in national proceedings, on the basis of international rules of interpretation. In this respect it may be said that the secondary rules of interpretation do not function by obligation, but serve as a normative penumbra that may in a weaker manner inform the meaning of corresponding rules at the domestic level. Penumbra means, literally, ‘dim light’. It is the outer filamentary region of a sunspot. A penumbra may be any area of transition around an area of great light. The gray area in between light and shadow is the penumbra. US Supreme Court Justice Holmes used ‘penumbra’ to refer to the ‘outer bounds of authority emanating from a law.’⁵⁷ Later, the Supreme Court used the concept to find that privacy in the ‘marital bedroom’ is defined in the ‘penumbra’ of constitutional rights, which do not specifically define a privacy right, but imply it.⁵⁸ The term ‘normative penumbra’ is thus used to refer to the phenomenon whereby international norms imply effects, even if they are not expressly provided for. The international legal system may extend the meaning and effects of a particular rule in its periphery or penumbra. Domestic courts that have to interpret and apply a domestic norm in an area where corresponding international norms exist may be influenced by the penumbra of such norms. Likewise, the international rules of interpretation may go beyond the normative system in which they are embedded, yet without them necessarily being obligatory as a matter of international law or being accepted as obligatory in the domestic legal system.

However, it is also clear that from the perspective of national courts, each of these constructions can be counterbalanced by other considerations that point in different directions. On the one hand, national courts remain firmly placed in a double bind between two legal orders. This does not really matter if national and international rules of interpretation point in the same direction. But where they point in different directions, courts will have to make a choice. The weight of the arguments will depend largely on the context, including the nature of the treaty (reciprocal or non-reciprocal) and the question of whether supervisory bodies may review the interpretation by a national court.

⁵⁷ *Danforth v Groton Water Co* 178 Mass 472, 59 NE 1033 (Mass 1901) 477. Also see OW Holmes and M Lerner, ‘Tax Law and the Penumbra – Schlesinger v. Winsconsin’ in OW Holmes and M Lerner (eds), *The Mind and Faith of Justice Holmes: his Speeches, Essays, Letters, and Judicial Opinions* (Edison Transaction Publishers 1988) 257 and A Lief, *The Dissenting Opinions of Mr Justice Holmes* (Wm S Hein Publishing 1981) 156.

⁵⁸ *Griswold v Connecticut* 381 US 479, 85 S Ct 1678 (Conn 1965); see also *Roe v Wade* 410 US 113, 93 S Ct 1409 (US 1973).

On the other hand, the value of converging treaty performance based on international rules of interpretation has to be balanced against the virtues of attaching weight to context and diversity, as noted in the introduction to this chapter. It may well be that the international rules of interpretation can accommodate these particular interests—but in that case it is not obvious that reliance on international rules of interpretation will make a difference in practice.

In all cases, however, the choice that national courts make may be made more transparent by articulating the grounds on which a court bases a decision to apply, or decline to apply, international principles of interpretation.