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**THE RECEPTION BY THE INTERNATIONAL COURT OF JUSTICE  
OF DECISIONS OF DOMESTIC COURTS**

di

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29 luglio 2009

## **1. Introduction**

The case-law of the International Court of Justice (ICJ, or ‘Court’) is full of references to decisions of domestic courts. Recent and ongoing cases in which the Court has been confronted with prior decisions of domestic courts include:

- *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), in which Belgium demands extradition of Mr. Hissène Habré, former President of the Republic of Chad, but the *Chambre d’accusation* of the Dakar Court of Appeal had held that it was without jurisdiction over the request for Mr. Habré’s extradition, on the grounds that he enjoyed immunity from jurisdiction by virtue of having been Head of State at the time the acts occurred.<sup>1</sup>

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<sup>□</sup>This is a revised and updated version of the article that earlier appeared in 5 Chinese Journal of International Law 301-322 (2006)

<sup>1</sup> *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Request for the indication of provisional measures, Order of 28 May 2009, par. 26

- *Jurisdictional Immunities of the State* (Germany v. Italy), in which Germany alleges that “[t]hrough its judicial practice . . . Italy has infringed and continues to infringe its obligations towards Germany under international law”.<sup>2</sup>
- *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* (Mexico v. United States of America), in which the Court discussed whether the *Avena* Judgment lays down or implies that the courts of the United States are required to give direct effect to that judgment.<sup>3</sup>

These cases may signal a trend. Domestic courts increasingly are asked to examine question of international law and/or questions that are relevant to subsequent proceedings in the ICJ. Conversely, the ICJ is more and more asked to review matters that also have been reviewed by domestic courts. That trend appears to be a consequence of the escalating degree in which international law deals with matters that are (also) regulated by domestic law,<sup>4</sup> as well as the allocation of international rights and duties to individuals, who naturally tend to bring their claims before domestic courts.<sup>5</sup> These developments have inspired a burgeoning literature that holds we have entered an era of judicial cooperation, communication and dialogue between courts of different states and between domestic and international courts.<sup>6</sup>

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<sup>2</sup> Press release, No. 2008/44.

<sup>3</sup> *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* (Mexico v. United States of America), Judgment of 19 January 2009, General List No 139; ICGJ 349 (ICJ 2009), par. 44.

<sup>4</sup> William L. Twining, *Globalisation and Legal Theory*, Butterworths (2000); J.H.H. Weiler, ‘The Geology of International Law: Governance, Democracy and Legitimacy’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 64 (2004), p. 547-562, at p. 559-661; D. Thürer, ‘Völkerrecht und Landesrecht: Thesen zu einer theoretischen Problemumschreibung’, *Schweizerische Zeitschrift für internationales und europäisches Recht*, vol. 9 (1999), p. 217-224; Armin von Bogdandy, ‘Globalization and Europe: How to Square Democracy, Globalization and International Law’, *European Journal of International Law*, vol. 15 (2004), p. 885, at p. 889; M. Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’, *European Journal of International Law*, vol. 15 (2004), p. 917.

<sup>5</sup> See for the relationship between the direct obligation and authorization of individuals, on the one hand, and the relationship between domestic and international law, on the other, H. Kelsen, *Law and Peace in International Relations: the Oliver Wendell Holmes Lectures, 1940-41*, Harvard University Press (1942), p. 96. See also P. Allott, ‘State Responsibility and the Unmaking of International Law’, *Harvard International Law Journal*, vol. 29 (1988), p. 14.

<sup>6</sup> A voluminous literature has argued that it is indeed fruitful to construe the relationship between international courts (including the ICJ) and domestic courts in terms of cooperation and communication; see e.g. A.M. Slaughter, *A New World Order*, Princeton University Press (2004); Robert B. Ahdieh, ‘Between Dialogue and Decree: International Review of National Courts’, *N.Y.U.L. Rev.*, vol. 79 (2004), p. 2029; Ernst A. Young, ‘Institutional Settlement In A Globalizing Judicial System’, *Duke L.J.*, vol. 54 (2005), p. 1143. See generally on the interactionist theory of international law: J. Brunnée en S. J. Toope, ‘International law and Constructivism: Elements of an International Theory of International Law’, *Columbia Journal of Transnational Law*, vol. 39 (2000), p. 19-74; E. Hey, ‘Sustainable Development, Normative Development and the Legitimacy of Decision-making’, *Netherlands Yearbook of International Law*, vol. 34 (2004), p. 3-53.

In this article I will in what ways the ICJ has received decisions of domestic courts. What weight has the Court given to such decisions and on what grounds? To what extent and in which circumstances does it defer to prior decisions of domestic courts? The approach of the article is an empirical one. It does not seek to engage in the policy debates on the wisdom, or lack thereof, of judicial dialogue across legal systems,<sup>7</sup> but rather to determine what the Court has done in practice.

The article demonstrates that while the Court continues to recognize the formal separation between international law and domestic law, the practice of the Court is not based on a rigid dichotomy between the international and the domestic spheres. In particular cases decisions of domestic courts play a role in Judgments of the Court, not only as fact but also as law. Indeed, the dominant ‘decisions of domestic courts as facts’ doctrine fails to capture the richness of the ways in which the Court treats such decisions.

I will first set forth two basis assumptions that traditionally have guided the practice of the Court vis-à-vis domestic courts: domestic decisions as facts and the unity of the state (section 2). I then will discuss two situations in which the Court examines decisions of domestic courts: the review of legal or legal/factual decisions by domestic courts (section 3) and the role of decisions of domestic courts in the determination and development of international law (section 4). Section 5 contains some conclusions.

## **2. Fundamental assumptions**

The practice of the Court in respect of decisions of domestic court has been guided by two fundamental principles of international law: the principle that domestic law, and decisions of domestic organs, are facts, and the unity of the state.

As to the first assumption, the PCIJ said that from the perspective of the international legal order, decisions of domestic courts are facts, not law.<sup>8</sup> The ICJ has never expressed the opinion that this fundamental maxim would no longer be valid. A Chamber of the Court said in the *Case concerning the frontier dispute* that the fact that the Chamber had to refer to domestic law, did not mean that there would exist a ‘continuum juris, a legal relay between

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<sup>7</sup> See e.g. J.E. Alvarez, ‘The New Dispute Settlers: (Half) Truths And Consequences’, *Texas International Law Journal*, vol. 38 (2003), p. 405, at p. 429; E. A. Posner en J. C. Yoo, ‘Judicial Independence in International Tribunals’, *California Law Review*, vol. 93 (2005), p. 1, at p. 3

<sup>8</sup> *Certain German Interests in Polish Upper Silesia (Germany v Poland)*, (Merits) [1926] PCIJ (ser. A) No. 7 , at 19.

such law and international law'.<sup>9</sup> The ICJ is a Court of the international legal order; established by a treaty and empowered to apply international law. Indeed, its role as an international court – ‘an organ of international law’ – is in part defined by the fact that it applies international rather than domestic law.<sup>10</sup> The factual nature of domestic decisions is key to much of the practice of the Court in the review of such decisions against international law (section 3) and the determination of questions of international law (section 4). One example is that the Court will reach a decision in regard to municipal law (including judgments of domestic courts) on the basis of evidence submitted to it in the proceedings. Judge Ad Hoc Guggenheim noted in the *Nottebohm case*:

[The Court] cannot freely examine the application and interpretation of municipal law but can merely enquire into the application of municipal law as a question of fact, alleged or disputed by the parties and, in the light of its own knowledge, in order to determine whether the facts are correct or incorrect.<sup>11</sup>

However, as we will see below, this dominant principle does not fully explain practice.

Second, the practice of the Court is generally consistent with the well-established principle that international law does not identify the organs of a state, and defers to and respects the domestic internal organization of a state.<sup>12</sup> The Court thus generally addresses

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<sup>9</sup> *Case concerning the frontier dispute (Benin v. Niger)* (Judgment) [(2005) ICJ Rep 90; ICGJ 16 (ICJ 2005) (par. 28). This approach is shared by many other courts, including domestic ones. A few days earlier the *Superior Court of Justice* of Ontario said that ‘International law and domestic law are distinct entities that operate in different spheres’. Ontario Superior Court of Justice, *Council of Canadians v. Canada (Attorney General)*, Case 01-CV-208141, 8 July 2005, Carswell Ontario Cases 2005, p. 2973, par. 41 en 43.

<sup>10</sup> Alain Pellet, ‘Article 38’, in *The Statute of the International Court of Justice. A Commentary* (Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm, eds.), Oxford UP (2006), p. 677, at p. 734 (referring to Conseil D’État, 14 January 1916, *Camino*, *Recueil Leben*, p. 15 and Conseil D’État, Assemblée, 2 November 1973, *Société anonyme ‘Librairie Francois Mapero’*, *Recueil Leben*, p. 611.) 2, at p. 696; *Corfu Channel Case*, [1949] ICJ Rep 4, at 35 (where the Court said: ‘.. to ensure respect for international law, of which it is an organ...’).

<sup>11</sup> *Ibid.* See also *Brazilian Loans case*, [1929] PCIJ, Series A 20/21, p. 124 (noting that the rule or act under municipal law is to be regarded merely as a fact but such facts may be proved ‘by means of any researches which the Court may think fit to undertake or to cause to be undertaken’).

<sup>12</sup> *Prosecutor v Blaskic* (Appeals Chamber Judgment) ICTY Case no IT-95-14A (29 October 1997): customary international law protects the internal organization of each sovereign State: it leaves it to each sovereign State to determine its internal structure and in particular to designate the individuals acting as State agents or organs. Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of July 18, 1997, *Prosecutor v. Blaskic* (Appeals Chamber Judgment) ICTY Case no IT-95-14 (26 February 1998), par. 41. See also G. Fitzmaurice, ‘The General Principles of International Law – Considered from the Standpoint of the Rule of Law’ (1957) 92 RdC 1, 88. See also W.E. Beckett, ‘Les Questions d’Intérêt Général au Point de Vue Juridique dans la Jurisprudence de la Cour Permanente de Justice Internationale’ (1934) 39 RdC 131, 155

states as such, and not domestic courts. Nonetheless, this principle is not an inevitable one. Also in this respect, the boundaries between international law and national law are not hermetic, and in particular cases, the Court has been able to pierce this boundary.<sup>13</sup> In its Advisory Opinion in *Cumuraswamy*, the ICJ said 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*’.<sup>14</sup> The Court thus referred to an international obligation of the courts as such.

While admittedly such cases are rare, it does signify the power of the Court to address directly domestic courts. The proposition that international courts cannot directly address state organs thus is too imprecise. The point is rather that the Court generally prefers to respect the domestic regulatory power of states and to proceed in an indirect way. The occasional moments where necessity, opportunity and judicial courage meet, however, show that the boundary between international and domestic law is not hermetically closed.

Related to the notion of the unity of the state is that international law often formulates international obligations in terms of obligations of result, leaving it to states to determine how and through what organs such obligations are realised. The practice of the Court is consistent with this pattern. In *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* (Mexico v. United States of America), the Court recognized that the obligation imposed in par 153(9) of its *Avena* judgment was an obligation of result, leaving it to the United States to determine how the obligation to provide for review and reconsideration was to be achieved.<sup>15</sup> The Court did not pronounce on the question whether constituent organs of the United States were bound. It recognized that the *Avena* judgment does not imply or preclude that the courts of the USA would give direct effect to par. 153(g).<sup>16</sup> Although the Court was helped (as least in its own interpretation) by the fact that Mexico did not sufficiently press its disagreement with the US Supreme Court’s decision in *Medellin*, it is unlikely that it would have a different outcome if Mexico would have framed its decisions differently.

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<sup>13</sup> See generally: Rosalyn 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, London 2001).

<sup>14</sup> *Difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62, par. 2(d)

<sup>15</sup> *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals*, *supra* note 3, Par. 27.

<sup>16</sup> *Id.*, Par. 44.

### 3. Review of decisions of domestic courts against international law

A first situation in which the ICJ is confronted with the question how to treat a decision of a domestic court is when a dispute is brought before the Court, and domestic courts have been involved in the coming into existence and/or attempts to settle the dispute before it came before the Court. In this situation, several questions need to be distinguished.

#### 3.1. Decisions of domestic courts as elements of a dispute

The Court typically reviews acts of states against international law. Such acts may consist of physical acts (e.g. an armed attack), legislation and also decisions of domestic courts. Indeed, decisions of domestic courts can be (part of) the cause of a dispute.<sup>17</sup> In some cases it may be possible to single out domestic judgments as causes of disputes. In denial of justice cases, a judgment of a domestic court may be the decisive element of a denial of justice.<sup>18</sup> In the dispute underlying *Certain criminal proceedings in France*,<sup>19</sup> the act of the investigating judge was a direct cause of a dispute. Also in *Jurisdictional Immunities of the State* (Germany v. Italy), the decisions of the Italian courts will be the prime cause of the dispute. In such cases, the Court will have to rule directly on the compatibility of a particular domestic judicial decisions with an international obligation.

However, mostly judicial decisions are part of a complex of national acts, and cannot be singled out as the cause of a dispute. The real cause of the dispute often precedes domestic judicial decisions. In his separate opinion in the *Norwegian Loans* case, Judge Lauterpacht said that the international nature of a dispute was independent from any consideration of the matter by the Norwegian courts. The effects of Norwegian law for the French bondholders created a international dispute, irrespective of the effects of later attempts to exhaust local remedies:

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<sup>17</sup> According to the consistent jurisprudence of the Court and the Permanent Court of International Justice, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties (see *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No.2*, p.11; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, (Advisory Opinion) [1988] ICJ Rep 27, para. 35.

<sup>18</sup> Cf. *Barcelona Traction case*, where the Court linked the objection to admissibility based on denial of justice to the merits because it was interwoven with the denial of justice. *Case Concerning the Barcelona Traction, Light and Power Company (Belgium v Spain)* (Preliminary Objections) [1964] ICJ Rep 6, at 46.

<sup>19</sup> *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v France)*, [2002-...] ICJ, General List, No. 129.

The crucial point is that, assuming that Norwegian law operates in a manner injurious to French bondholders, there are various questions of international law involved. To introduce in this context the question of exhaustion of local remedies is to make the issue revolve in a circle. The exhaustion of local remedies cannot in itself bring within the province of international law a dispute which is otherwise outside its sphere. The failure to exhaust legal remedies may constitute a bar to the jurisdiction of the Court; it does not affect the intrinsically international character of a dispute.<sup>20</sup>

Moreover, if a domestic court is asked to judge on an alleged international wrong caused by a rule of domestic law, the court often can do little else than applying the rule of domestic law. It would then be odd to say that a decision of a domestic court caused the dispute.<sup>21</sup>

The role of a domestic court's judgment as cause of a dispute was also raised in the *Case concerning Certain Property*. The Court needed to define the cause of the dispute in order to determine its temporal jurisdiction. Liechtenstein contended that the decisions of the German courts in the *Pieter van Laer Painting* case were the cause of the dispute. Before these decisions, it was said to be understood between Germany and Liechtenstein that Liechtenstein property confiscated pursuant to the Beneš Decrees could not be deemed to have been covered by the Settlement Convention because of Liechtenstein's neutrality. German courts would therefore not be barred by that Convention from passing on the lawfulness of these confiscations. In Liechtenstein's view, the decisions of the German courts in the 1990s made clear that Germany no longer adhered to that shared view, thus amounted to a change of position, and it would thus be the decisions of the German courts that gave rise to the dispute.<sup>22</sup> In his separate opinion, Judge Kooijmans noted that the German court decisions in the *Pieter van Laer Painting case* applied the Settlement Convention to neutral assets for the very first time, and that this introduced a new element<sup>23</sup> and suggested that these decisions could be considered as the source or real cause of the dispute.<sup>24</sup>

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<sup>20</sup> *Case of Certain Norwegian Loans (France v Norway)* Separate Opinion of Judge Lauterpacht [1957] ICJ Rep 9, at 38.

<sup>21</sup> For this reason it has been said that no effective remedies are to be expected from a domestic court. This was position of French Government in Norwegian Loans case. As a general proposition, though, this cannot be maintained; see discussion of *Certain Norwegian Loans (France v Norway)* Separate Opinion of Judge Lauterpacht [1957] ICJ Rep 9, at 39.

<sup>22</sup> *Case Concerning Certain Property (Liechtenstein v Germany)*, [2005] ICJ Rep. 296, par. 33

<sup>23</sup> *Case Concerning certain Property (Liechtenstein v Germany)*, Dissenting Opinion of Judge Kooijmans, [2005] ICJ Rep. 296, Par. 18.

<sup>24</sup> *Ibid.* Par. 21.



The Court disagreed. While it accepted that dispute was triggered by the decisions of the German courts, it found that the dispute has its ‘source or real cause’ in the Beneš Decrees under which the painting was confiscated and the Settlement Convention which the German courts invoked as ground for declaring themselves without jurisdiction to hear that case.<sup>25</sup>

The question whether it was a decision of a domestic court or rather the underlying legislation that caused a dispute was also considered in in the *La Grand* and *Avena* cases. The Court noted that a distinction must be drawn between the procedural default rule as such and its specific application in the present case. It found that in itself, the procedural default rule did not violate Article 36 of the Vienna Convention on Consular Relations. The breach occurred at the moment the procedural default rule prevented counsel to effectively challenge before a domestic court the convictions and sentences other than on United States constitutional grounds.<sup>26</sup> This effect for the first time manifested itself in the judicial proceedings, but the decision of the courts could not be isolated from the underlying legislation that precluded the courts from allowing these challenges.<sup>27</sup>

In such cases the Court will not directly adjudicate the compatibility of a domestic decision with international law, but rather assess the international legality of an act or series of acts by the state, of which the decisions were only one dimension.

### 3.2. *Interpretation of domestic law*

While, if a decision of a domestic court is the cause of the dispute, the ICJ will assess that act against international law, there may a variety of situations in which the Court is asked to rule on or consider a question of domestic law that had been reviewed by a domestic court. The Court then typically will defer to that domestic decision. The ICJ is not well positioned to consider such matters of domestic law.<sup>28</sup> In *Certain Questions of Mutual Assistance in Criminal Matters* (which in fact concerned the allocation of competences under French law for the application of a treaty), the Court said:

<sup>25</sup> *Case Concerning certain Property (Liechtenstein v Germany)*, [2005] ICJ Rep. 296, par. 47-48. The Court also noted that under Article 27 (a) of the European Convention for the Peaceful Settlement of Disputes, the critical issue is not the date when the dispute arose, but the date of the facts or situations in relation to which the dispute arose.

<sup>26</sup> *LaGrand Case (Germany v United States)* [2001] ICJ Rep 466, par. 90-91.

<sup>27</sup> The Court said: ‘although United States courts could and did examine the professional competence of counsel assigned to the indigent LaGrands by reference to United States constitutional standards, the procedural default rule prevented them from attaching any legal significance to the fact, inter alia, that the violation of the rights set forth in Article 36, paragraph 1, prevented Germany, in a timely fashion, from retaining private counsel for them and otherwise assisting in their defence as provided for by the Convention. Under these circumstances, the procedural default rule had the effect of preventing "full effect [from being] given to the purposes for which the rights accorded under this article are intended", and thus violated paragraph 2 of Article 36.’ *Ibid.*, par. 91.

<sup>28</sup> *Nottebohm Case (Liechtenstein v. Guatemala)* Dissenting Opinion of Judge Ad Hoc M. Guggenheim [1955] ICJ Rep 4, at 52 (par. 4).

where ultimate authority lay in respect of the response to a letter rogatory was settled by the *Chambre de l'instruction* of the Paris Court of Appeal in its judgment of 19 October 2006. It held that the application in one way or another of Article 2 of the 1986 Convention to a request made by a State is a matter solely for the investigating judge (who will have available information from relevant government departments). The Court of Appeal further determined that such a decision by an investigating judge is a decision in law, and not an advice to the executive. It is not for this Court to do other than accept the findings of the Paris Court of Appeal on this point.<sup>29</sup>

### 3.3. Review against international law

However, in many other cases the Court indeed will have to review such decision of domestic courts (whether as cause of a dispute, or as an element in a larger chain of events) against the standard of international law..<sup>30</sup> In *Avena*, the Court said:

If and so far as the Court may find that the obligations accepted by the parties to the Vienna Convention included commitments as to the conduct of their municipal courts in relation to the nationals of other parties, then in order to ascertain whether there have been breaches of the Convention, the Court must be able to examine the actions of those courts in the light of international law.<sup>31</sup>

The Court will not examine whether a domestic court has acted properly under domestic law, but will confine itself to examining whether such application is in accordance with the obligations which international law imposes on the State in question.<sup>32</sup>

The position of the Court vis-à-vis domestic judgments thus differs fundamentally from the position of domestic courts of appeal or cassation vis-à-vis lower courts. The Court in *LaGrand* rightly rejected the notion that it would act as a court of appeal of national proceedings. The Court said:

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<sup>29</sup> *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v France), Judgment of 4 June 2008, par. 146.

<sup>30</sup> *LaGrand case*, *supra* note 26, par. 52.

<sup>31</sup> *Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America)* [2004] ICJ Rep 12, at 30 (par. 28).

<sup>32</sup> *Nottebohm Case*, *supra* n 28 at 52, par. 4.

Although Germany deals extensively with the practice of American courts as it bears on the application of the Convention, [its submissions] seek to require the Court to do no more than apply the relevant rules of international law to the issues in dispute between the Parties to this case. The exercise of this function, expressly mandated by Article 38 of its Statute, does not convert this Court into a court of appeal of national criminal proceedings.<sup>33</sup>

#### 3.4. *Overlap between a domestic court decision and a case before the Court*

Intriguing questions may arise when the Court is asked to adjudicate a legal question that in whole or in part has already been adjudicated by a domestic court. This may for instance occur in cases involving diplomatic protection and prior exhaustion of local remedies. If a right of a national of a foreign state has been disregarded in violation of international law, international law allows the State where the violation occurred an opportunity to redress that violation of international law. The claim eventually brought by the state of nationality will be the claim of the state, in contrast to the claim of the private person in the national court. However, this fiction cannot hide that the substance of the claim may, in the context of exhaustion of local remedies, already have been brought before the domestic courts.<sup>34</sup>

Neither the claim presented to a domestic court nor the remedy that it provides need to refer or be based on international law. As to the former aspect, the Court recalled in *Elsi* that the local remedies rules does not ‘require that a claim be presented to the municipal courts in a form, and with arguments, suited to an international tribunal, applying different law to different parties’.<sup>35</sup> It added that ‘for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.’<sup>36</sup> As to the latter, the Court said in the *Interhandel* case that the State should be allowed to provide a remedy, it by its own

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<sup>33</sup> *LaGrand*, *supra* note 26, at par. 52.

<sup>34</sup> In the *Elsi* case, the Court said: ‘the Chamber has no doubt that the matter which colours and pervades the United States claim as a whole, is the alleged damage to Raytheon and Machlett, said to have resulted from the actions of the Respondent. Accordingly, the Chamber rejects the argument that in the present case there is a part of the Applicant’s claim which can be severed so as to render the local remedies rule inapplicable to that part; *Case Concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, [1989] ICJ Rep 15, at 43 (par. 52).

<sup>35</sup> *Case Concerning Elettronica Sicula S.p.A.*, *supra* note 34, at 46 (par. 59).

<sup>36</sup> *Ibid.*

means, within the framework of its own domestic legal system.<sup>37</sup> However, in substance the claim may still overlap with the claim eventually brought before the Court.

This overlap is particularly clear when a claim is brought and/or decided on the basis of international law, that has been made valid within the domestic legal order. In a few cases, the Court indicated that the effectiveness of local remedies depended on the possibility that the claimant could invoke in the domestic court at least in substance the same rules of international law that later formed the core of the dispute before the ICJ. In the *Interhandel case*, where the Court found it relevant to consider the possibility to resolve the dispute in the domestic courts by applying international law to set aside conflicting domestic law. The Court said:

It has also been contended on behalf of the Swiss Government that in the proceedings based upon the Trading with the Enemy Act, the United States courts are not in a position to adjudicate in accordance with the rules of international law and that the Supreme Court, in its decision of June 16th, 1958, made no reference to the many questions of international law which, in the opinion of the Swiss Government, constitute the subject of the present dispute. But the decisions of the United States courts bear witness to the fact that United States courts are competent to apply international law in their decisions when necessary. In the present case, when the dispute was brought to this Court, the proceedings in the United States courts had not reached the merits, in which considerations of international law could have been profitably relied upon.<sup>38</sup>

Judge Lauterpacht observed in his separate opinion in the *Norwegian Loans case* that domestic courts may be able to correct wrongs by referring to international law by interpreting domestic law in the light of international law. He noted that:

There has been a tendency in the practice of courts of many States to regard international law, in some way, as forming part of national law or as entering legitimately into the national conception of *ordre public*. Although the Norwegian Government has admitted that in no case can a Norwegian court overrule Norwegian legislation on the ground that it is contrary to international law, it has asserted that it is possible that a Norwegian court may

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<sup>37</sup> *Interhandel (Switzerland v. United States of America)* (Preliminary Objections) [1959] ICJ 6, at 27.

<sup>38</sup> *Ibid.* at p. 28.

consider international law to form part of the law of the Kingdom to the extent that it ought, if possible, to interpret the Norwegian legislation in question so as not to impute to it the intention or the effect of violating international law.<sup>39</sup>

In the *Elsi* case the Court discussed whether the provisions of the treaties that were at issue in the case (the FCN Treaty and the Supplementary Agreement) could be invoked in protection of individual rights before the Italian courts. The Court found on the evidence presented to it that ‘In none of the cases cited was the FCN Treaty provision relied on to establish the wrongfulness of conduct of Italian public officials’<sup>40</sup> and that it was ‘impossible to deduce, from the recent jurisprudence cited, what the attitude of the Italian courts would have been had Raytheon and Machlett brought an action, some 20 years ago, in reliance on Article 2043 of the Civil Code in conjunction with the provisions of the FCN Treaty and the Supplementary Agreement.’ Italy thus had not discharged the burden of proving the existence of a remedy which was open to the United States stockholders and which they failed to employ.<sup>41</sup>

The possibility of overlapping claims is not limited to cases involving the exhaustion of local remedies. In the *Avena* case, the Court observed that ‘In these special circumstances of interdependence of the rights of the State and of individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals under Article 36, paragraph 1 (b). The duty to exhaust local remedies does not apply to such a request’.<sup>42</sup> Still, both claim of the Mexican nationals in the United States courts and the the Mexican claim, based on its own right, alleged that the United States failed to comply with the individuals rights of private persons, and in that respect there was an overlap in the claims adjudicated in the domestic courts and in the ICJ.

Also in *Jurisdictional Immunities of the State* (Germany v. Italy)<sup>43</sup> the Court may have to rule on a question (scope and exceptions of state immunity) that directly was addressed by the domestic Italian courts.

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<sup>39</sup> *Case of Certain Norwegian Loans*, *supra* note 20, at 40-41.

<sup>40</sup> *Case Concerning Elettronica Sicula S.p.A.*, *supra* note 54, at 47 (par. 62).

<sup>41</sup> *Ibid.*

<sup>42</sup> *Avena*, *supra* note 31, par. 40.

<sup>43</sup> *Supra* n 2.

In such cases, the task of the Court remains limited to examining whether a domestic court properly applied international law. The role of the ICJ is a subsidiary one.<sup>44</sup> It acts if and to the extent that domestic courts have failed to apply (the substance of) international law properly.<sup>45</sup> The fact remains that the Court in no way is bound by the domestic decision. In the relationship between domestic courts and the ICJ the principle of *res judicata* is not applicable. However, it may be simplifying to reduce the role of the ICJ as examiner of facts against international law.

It can be argued that when the Court is asked to adjudicate a matter that in whole or in part has been considered in a domestic court, it should to a certain extent defer to prior assessments of domestic courts;<sup>46</sup> comparable to the margin of appreciation doctrine applied by the European Court of Human Rights vis-à-vis the national courts of state parties to the European Convention<sup>47</sup> This deference may be justified by the fact that national authorities are better positioned to assess the factual and legal context of a dispute. When the Court is to review an abstract question of international law, such as may be the case in *Jurisdictional Immunities of the State* (Germany v. Italy), that may not be relevant. But in many cases the application of a rule with international law may be closely related with the facts.

This is illustrated by the differences in the decisions of the Israeli Supreme Court<sup>48</sup> and the Advisory Opinion of the ICJ<sup>49</sup> concerning the Wall. Shany notes:

the quality of the HCJ's judgment seems to be superior to that of the ICJ in several respects. Arguably, this reflects some of the inherent advantages of national adjudication over international adjudication, whose acknowledgement should inspire international courts to improve their level of performance or to accord greater deference to national courts.<sup>50</sup>

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<sup>44</sup> Anne-Marie Slaughter and William Burke-White, 'The Future of International Law is Domestic (or, The European Way of Law)' in Janne Nijman and André Nollkaemper, *New Perspectives on the Divide Between International Law and National Law* (Cambridge UP 2007) 110.

<sup>45</sup> *LaGrand (Germany v. United States)*, *supra* note 26, par. 52.

<sup>46</sup> Robert B. Ahdieh, 'Between Dialogue and Decree: International Review of National Courts', *N.Y.U. L. Rev.* vol. 79 (2004), p. 2029, at p. 2052.

<sup>47</sup> *Handyside v. UK*, 22 Eur. Ct. H.R. (Ser. A), at p. 22 (1976); Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' *E.J.I.L.*, vol. 16 (2005), p. 907, at pp. 921-922.

<sup>48</sup> H.C.J. 2056/04 *Beit Sourik Village v. Government of Israel* 58(5) P.D. 807 (2005) 38 (1-2), *Israel Law Review* 83.

<sup>49</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion of 9 July 2004) [2004] ICJ Rep 136.

<sup>50</sup> Yuval Shany, 'Capacities and Inadequacies: A Look at the Two Separation Barrier Cases', in *Israel Law Review*, Vol. 38 (2005), p. 230-246.

However, the ICJ Advisory Opinion on the *Separation Wall* did not acknowledge any advantages in terms of fact-finding that the Israeli Supreme Court may have had and it did not assign any weight to its decision on the legality of the separation barrier.<sup>51</sup>

*LaGrand* and *Avena* presented a different scenario. The application of the holdings of the Court on individual rights, and in particular the question what the consequence of failure to protect individual rights was, were highly context dependant and the ICJ relied on domestic court to perform the review and reconsideration in individual cases.<sup>52</sup> In a at this moment hypothetical situation in which, after a US court would have considered the claims based on article 36 of the Vienna Convention but rejected them because of lack of prejudice, and the question would come back to the Court, the Court would have to allow much deference to that domestic determination, even though formally still within the limits of the international obligation that it had formulated. In such cases, domestic courts and the ICJ indeed to some extent play a complementary nature.

#### **4. The determination of international law**

A second and quite different situation presents itself when the Court has to determine the existence or contents of a particular rule of international law, and the question is whether and to what extent it can rely on decisions of domestic courts in that determination. Of course, such decisions can as subsidiary sources, they can be relevant in the determination of international law.<sup>53</sup> However, the practice of the Court is relatively scarce. There is a world of a difference between the Court and, for instance, the European Court on Human Rights, that widely makes use of a comparative method, including consultation of judgments of domestic courts, to settle particular legal questions.<sup>54</sup> We also see little evidence of the process of judicial communication that has been highlighted by Slaughter.<sup>55</sup> This does not necessarily mean that the court may not consult domestic cases; but it is difficult to find in the case-law of

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<sup>51</sup> *Beit Sourik Village Council v. Gov't of Israel*, *supra* note 91, 58 P.D. 806. (English version available at <[http://62.90.71.124/files\\_eng/04/560/020/a28/040205601.a28.htm](http://62.90.71.124/files_eng/04/560/020/a28/040205601.a28.htm)>)

<sup>52</sup> *Avena*, *supra* n 31 at par. 153(g).

<sup>53</sup> Rosalyn Higgins, *Problems and Process*, Oxford: Clarendon Press (1994), p. 218, Robert Y. Jennings, "What Is International Law and How Do We tell It When We See It?", *Schweizerisches Jahrbuch für Internationales Recht*, vol. 38 (1981), p. 59, at 77. Menzel, Ipsen, *Völkerrecht: ein Studienbuch*, 2e Auflage, München: Beck (1979), pp. 87-88.

<sup>54</sup> Paul Mahoney, 'The Comparative Method in Judgments of the European Court of Human Rights: Reference Back to National Law', in: Guy Canivet et al, (eds), *Comparative Law before the Courts*, BIICL (2004), p. 137.

<sup>55</sup> *Supra* note 4; *Ibid.*, 'A global community of courts', *Harvard International Law Journal*, vol. 44 (2003) pp. 191-219.

the Court evidence that domestic cases are a relevant force in the Court's approach to certain questions.

One major explanation seems that the status of domestic courts' judgments as facts that belong to a particular domestic legal order, explains that the Court does not lightly use them to consider legal issues in a dispute involving other states. Jessup notes that 'The Court, qua Court, naturally hesitates to cite individuals or national courts lest it appear to have some bias or predilection'.<sup>56</sup> Similarly, Charles De Visscher wrote that 'The rarity of such references is a matter of prudence; the Court is careful not to introduce into its decisions elements whose heterogeneous character might escape its vigilance'.<sup>57</sup>

Nonetheless, the practice of the Court indeed shows that in several ways decisions of domestic courts can be relevant.

#### *Customary international law*

The primary contribution of domestic courts to the development of international law is in their role as acts of states that are relevant in the formation of customary international law.<sup>58</sup> This is in line with the status of national judicial acts as 'facts which express the will and constitute the activities of States'.<sup>59</sup> Large parts of customary law, in particular in the field of jurisdiction and immunities, have precisely been developed in the practice of national courts. The PCIJ expressly considered national case law in terms of its contribution to customary law on jurisdiction in the *Lotus* case.<sup>60</sup> It made clear that, as other forms of evidence of customary law, domestic case-law will need to conform to the normal

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<sup>56</sup> Judge Philip C. Jessup, letter dated 16 August 1979, *Annuaire de l'Institut de Droit International*, Vol. 61, I (1985), p. 253; cited in *Applicability of Article VI, Section 22, of Convention on Privileges and Immunities of the United Nations*, Advisory Opinion, Separate Opinion of Judge Shahabuddeen, [1989] ICJ Rep 177, at 220.

<sup>57</sup> Charles De Visscher, *Theory and Reality in Public International Law*, rev. ed., 1968, p. 391.

<sup>58</sup> Jennings, Watts (eds.), *Oppenheim's International Law*, 9<sup>th</sup> ed., London: Longman (1992) p. 41; ILA, *Statement of Principles Applicable to the Formation of General Customary International Law*, principle 9, reproduced in ILA, *Report of the Sixty-Ninth Conference* (2000). Older ideas to the effect that state practice consists only of the practice of those organs capable of entering into binding relations on behalf of the state (related the view that that customary law was tacit treaty law) now are generally rejected. The same holds for the view that municipal court cases were only evidence of custom, not a force creating custom.

<sup>59</sup> *Certain German Interests in Polish Upper Silesia*, *supra* n 1, at p. 19 "From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures".

<sup>60</sup>, *SS "Lotus"*, [1927] PCIJ, Series A, No 10, pp. 23, 26, 28-29.



requirements for the formation of customary law.<sup>61</sup> Since judgments of municipal courts pertaining to the alleged rule of international law regarding the exclusive competence of flag State over its ships were conflicting, the Court could not find in the national case law an indication of the existence of a rule of international law contended for by the French government.<sup>62</sup>

More recently, the Court referred to domestic judgments as form of state practice in determining customary law on immunities in the *Arrest Warrant case*. The Court noted

The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.<sup>63</sup>

On the whole, however, such references are exceptional. There is little explicit discussion of decisions of domestic courts as evidence of customary international law. The Court rarely engages in an extensive analysis of state practice, let alone that it extends that to the practice of domestic courts.<sup>64</sup> There is no evidence that an increasing involvement of domestic courts with matters relevant to international law, leads to an increasing role of domestic decisions in the determination of customary law by the Court. This area appears rather static, perhaps more indicative on propositions of the declining role of customary international law or the changing role of determining customary law, than of a changing role of domestic courts.

### *General principles*

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<sup>61</sup> *Fisheries case (United Kingdom v Norway)* [1951] ICJ Rep 116, at 131; *Asylum Case (Columbia v Peru)*, [1950] ICJ Rep 266, at 277.

<sup>62</sup> *SS "Lotus" case*, *supra* note 60, p. 29; see also Georg Schwarzenberger, *International Law, I, International Law as Applied by International Courts and Tribunals*, London: Stevens (1945), p. 18.

<sup>63</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ 3, 24 (par. 58). See also the Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, par. 22-24 (considering case-law as part of state practice concerning universal jurisdiction).

<sup>64</sup> This is in contrast to the practice of the ICTY; see for an overview André Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY', in: Gideon Boas & William A. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, Martinus Nijhoff Publishers (2003), p. 277-296.

Decisions of domestic courts also can be elements in the formation and identification of general principles of law. In some cases, the Court considered the effects of domestic case-law in terms of general principles. In his separate opinion in *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Judge Shahabuddeen noted:

While properly acknowledging the need for caution in transposing legal concepts from domestic societies to the international community, both Parties presented municipal law materials and sought some support from them for their respective contentions.<sup>65</sup>

The fact that in international a right to contribution may be more difficult to achieve due to the lack of access the courts, does not mean that the principle as such cannot be transplanted from domestic case-law to the international level, illustrating the need and possibility of adaptation of principles to a different legal system:

The fact that recourse to the Court may not be open to a party seeking contribution is not decisive .... The claim to contribution may be pursued in other ways. .... In international law a right may well exist even in the absence of any juridical method of enforcing it .... Thus, whether there is a right to contribution does not necessarily depend on whether there exists a juridical method of enforcing contribution.<sup>66</sup>

#### *Domestic analogies*

In addition to their role in the formation of customary international law or as evidence of general principles, the ICJ also can refer to (decisions of) domestic courts as analogies, or other forms of legal reasoning, in their approach to particular legal issues.<sup>67</sup>

The traditional position here is that the possibilities for the Court to derive lessons from decisions of domestic court, are limited by structural differences in the context within

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<sup>65</sup> *Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) Separate Opinion of Judge Shahabuddeen [1992] ICJ 240, at 287. In the *Oil Platforms* case, Judge Simma similarly found it possible to transplant the domestic notion of joint and several liability to the international sphere; *Case Concerning Oil Platforms (Islamic Republic Of Iran V. United States Of America)*, Separate Opinion of Judge Simma, [2003] ICJ Rep 161, at 324.

<sup>66</sup> *Case Concerning Certain Phosphate Lands in Nauru*, *supra* note 65, at 289.

<sup>67</sup> See *Appeal Relating To The Jurisdiction Of The Icao Council (India v. Pakistan)*, Separate Opinion of Judge Dillard, [1972] ICJ Rep 46, at 109-110 (discussing municipal law analogy).

which the Court, respectively domestic courts, function. Using a decision of a domestic court in any of above ways, requires that it is isolated from the domestic context in which it was originally rendered and transplanted to the vastly different legal, institutional and political context of the Court. Though when the PCIJ was set up, at least some had in mind a model of domestic superior courts,<sup>68</sup> neither the Statute of the PCIJ, nor that of the ICJ provided for the full judicial powers normally associated with a court of superior jurisdiction. Beyond the straightforward fact that both the ICJ and domestic courts are courts and exercise judicial functions, thus lies a world of a difference. The elements of this difference are well known: the absence of compulsory dispute settlement by the ICJ, the overriding need in the international field for proof of consent to submit to the jurisdiction of any tribunal,<sup>69</sup> the lack of jurisdictional primacy among other settlement mechanisms<sup>70</sup> and the lack of enforcement powers in respect of judgments.<sup>71</sup>

For all these reasons, domestic analogies, or attempts to transplant principles of domestic case-law to international law, traditionally have been considered with suspicion.<sup>72</sup> Judge McNair said in the Advisory Opinion *International Status of South-West Africa* with respect to the application of general principles of law in Article 38(1)c) of the Statute that ‘The way in which international law borrows from this source is not by means of importing private law institutions ‘lock, stock and barrel’, ready-made and fully equipped with a set of rules’.<sup>73</sup> In his Separate opinion in *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Judge Shahabuddeen noted:

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<sup>68</sup> As the Court has recalled, ‘The Permanent Court, set up in the aftermath of the most devastating conflict the world had seen, embodied the aspirations of a war-torn generation anxious to put behind them the horrors of international lawlessness and to enthrone international law. They sought to achieve this through a Court operating internationally on the model of the superior courts which ensured the rule of law at a domestic level’, Second order for the indication of provisional measures in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [1993] ICJ Rep 325, at 387.

<sup>69</sup> *Appeal Relating To The Jurisdiction Of The Icao Council (India v. Pakistan)*, Separate Opinion of Judge Dillard [1972] ICJ 46, at 110.

<sup>70</sup> *Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) Separate Opinion of Judge Shahabuddeen [1992] ICJ 240, at 289.

<sup>71</sup> Kal Raustiala, ‘Form And Substance In International Agreements’, *Am. J. Int’l L.*, vol. 99 (2005), p. 581, at p. 606.

<sup>72</sup> Mohamed Shahabuddeen, ‘Municipal Law Reasoning in International Law’, in Lowe, V. and Fitzmaurice, M. (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, Cambridge, Cambridge University Press (1996), pp.99-100; Hersch Lauterpacht, *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)*, London, Longman, Green and Co. (1927), p. ix. *Prosecutor v. Erdemović*, *supra* note 8, par. 2.

<sup>73</sup> *International Status of South West Africa* [1950] ICJ Rep 128, at 148.

to overestimate the relevance of private law analogies is to overlook significant differences between the legal framework of national societies and that of the international community, as well as differences between the jurisdictional basis and powers of the Court and those of national courts; "lock, stock and barrel" borrowings would of course be wrong  
.....<sup>74</sup>

More often than not, these differences have induced the Court, or individual judges, to decline to follow approaches adopted by domestic courts.<sup>75</sup> In *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, the Court noted

National courts, for their part, have more often than not the necessary power to order proprio motu the joinder of third parties who may be affected by the decision to be rendered; that solution makes it possible to settle a dispute in the presence of all the parties concerned. But on the international plane the Court has no such power. Its jurisdiction depends on the consent of States and, consequently, the Court may not compel a State to appear before it, even by way of intervention.<sup>76</sup>

Judge Oda referred to the differences between domestic and international proceedings in his argument that the Court should decline to render an interlocutory judgment in the *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*:

It appears that the Court is now attempting to render an interlocutory judgment - which is not unusual in domestic legal systems - for the first time in the history of this Court and its predecessor. In my view, the application of this concept of domestic law to the jurisprudence of the International Court of Justice is most inappropriate. In a municipal legal system there is generally no problem of the court's jurisdiction and it is competent to hand down an interlocutory judgment since its jurisdiction has been established without question.

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<sup>74</sup> *Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) Separate Opinion of Judge Shahabuddeen, *supra* 70 at 289. See also: Mohamed Shahabuddeen, 'Municipal Law Reasoning in International Law', in Lowe, V. and Fitzmaurice, M.(eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, Cambridge, Cambridge University Press (1996), pp. 99-100; Erika de Wet, *The Chapter VII Powers of the United Nations Security Council*, Hart Publishing (2004), p. 85.

<sup>75</sup> See also *Right of Passage over Indian Territory* (Preliminary Objections) Dissenting Opinion of Judge Chagla [1957] ICJ Rep 49-50 (stating that 'it would be extremely unsafe to draw an analogy between the rights of an owner and the obligations of States under international law.')

<sup>76</sup> *Case Concerning Certain Phosphate Lands in Nauru*, *supra* note 65, at 260 (par. 53).

... On the other hand, the present Court is now confronted by a question as to whether or not it has the jurisdiction to entertain the Application of Qatar. Without having disposed of this jurisdictional issue, the Court cannot hand down an interlocutory judgment.<sup>77</sup>

In the Advisory Opinion *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the UN Charter)*, Judge Morelli contrasted the invalidity of domestic administrative acts with the invalidity of acts of the United Nations, and concluded that the Court should ‘put a very strict construction on the rules by which the conditions for the validity of acts of the Organization are determined.’

If, ignoring the difference between the nature of the invalidity of domestic administrative acts (voidability) and the nature of the invalidity of acts of the United Nations (absolute nullity), the same extension were given to the conditions for the validity of both these classes of act, very serious consequences would result for the certainty of the legal situations arising from the acts of the Organization. The effectiveness of such acts would be laid open to perpetual uncertainty, because of the lack in the case of acts of the Organization of the means by which the need for certainty is satisfied in connection with administrative acts under domestic law.<sup>78</sup>

Judge Weeramantry in his dissenting opinion in the *case concerning East Timor (Portugal v. Australia)* referred to the difference between domestic systems, where if a court declines jurisdiction commonly some other court will be found, and the international system, where a decline of jurisdiction normally is the end of the matter, to argue for a liberal approach of jurisdictional rules.<sup>79</sup>

In the *Barcelona Traction* case, Judge Fitzmaurice referred to the difference between domestic systems and the international system to explain the relative greater weight of obiter dicta in the ICJ:

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<sup>77</sup> *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* (Jurisdiction and Admissibility), Separate Opinion of Judge Oda [1994] ICJ Rep 112, at 134-135.

<sup>78</sup> *Certain Expenses of the United Nations* (Advisory Opinion), Separate Opinion of Judge Morelli [1962] ICJ 151, 223 (par 8).

<sup>79</sup> [1995] ICJ Rep. 90, at 160, noting that ‘In the international judicial system, an applicant seeking relief from this Court has, in general, nowhere else to turn if the Court refuses to hear it, unlike in a domestic jurisdiction where, despite a refusal by one tribunal, there may well be other tribunals or authorities to whom the petitioner may resort.’ Judge Weeramantry referred to Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 1986, Vol. II, p. 438 (noting that in the international field issues of jurisdiction ‘assume a far greater, and usually a fundamental importance.’)

since specific legislative action with direct binding effect is not at present possible in the international legal field, judicial pronouncements of one kind or another constitute the principal method by which the law can find some concrete measure of clarification and development. I agree with the late Judge Sir Hersch Lauterpacht ... that it is incumbent on international tribunals to bear in mind this consideration, which places them in a different position from domestic tribunals as regards dealing with-or at least commenting on-points that lie outside the strict ratio decidendi of the case.<sup>80</sup>

Finally, in the *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judge Owada noted in his Separate Opinion that since in international law the procedures and rules on evidence seem to be much less developed, and the task of the Court for fact finding much more demanding, than in the case of the national courts, the Court should have engaged in a ‘much more in-depth examination of the problem of ascertaining the facts of the case, if necessary proprio motu.’<sup>81</sup>

Despite the many and obvious differences between the ICJ and domestic courts, in some respects a court is a court, and one court may draw lessons from what other courts can or cannot do. In the recent commentary on the ICJ Statute it is, for instance, observed that the question of whether the proper function of the judges of the Court is to try to do what they see as ‘justice’ between the parties or whether they should try to act as an umpire between the performance of each team of counsel,<sup>82</sup> arises similarly for the Court and for domestic courts. The same is true for the question of the limits to the discretionary powers of the Court.<sup>83</sup> Looking at how domestic courts deal with such issues is helpful for understanding the way the Court deals, or should deal, with them.

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<sup>80</sup> *Case Concerning The Barcelona Traction, Light and Power Company, Limited (New Application : 1962) (Belgium v Spain)* Separate Opinion of Judge Fitzmaurice [1970] ICJ 3, at 64.

<sup>81</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v US)* Separate Opinion of Judge Owada [2003] ICJ 161, at 323.

<sup>82</sup> E.g. Robert Jennings, ‘General Introduction’, in *The Statute of the International Court of Justice. A Commentary* (Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm, eds.), Oxford UP (2006), p. 3, at p. 10.

<sup>83</sup> Alain Pellet, ‘Article 38’, in *The Statute of the International Court of Justice. A Commentary* (Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm, eds.), Oxford UP (2006), p. 677, at p. 734 (referring to Conseil D’État, 14 January 1916, *Camino, Recueil Leben*, p. 15 and Conseil D’État, Assemblée, 2 November 1973, *Société anonyme ‘Librairie Francois Mapero’, Recueil Leben*, p. 611.)

The rigid opposition against reference to such domestic principles indeed does not fully explain the practice of the Court. It is to be recalled that while Judge McNair warned against importing principles from private law ‘lock, stock and barrel’ into international law, he did recognize that domestic principles may show a course to follow: ‘the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles’.<sup>84</sup> In the case at hand, he indeed went on to derive from the domestic concept of trust lessons for the mandate system.<sup>85</sup> While automatic transplantation is to be rejected, domestic principles can be made applicable in the international context through a process of abstraction, generalization, and more generally adjustment.<sup>86</sup>

The case-law of the Court shows several examples where the Court, or judges, followed examples of domestic case-law or referred to them as background arguments. In the *Effects of Awards* Advisory Opinion, the Court said:

the contention that the General Assembly is inherently incapable of creating a tribunal competent to make decisions binding on itself cannot be accepted. It cannot be justified by analogy to national laws, for it is common practice in national legislatures to create courts with the capacity to render decisions legally binding on the legislatures which brought them into being.<sup>87</sup>

Judge Alvarez noted in his dissenting opinion in the Advisory Opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations* that ‘Because of the progressive tendencies of international life’, it is necessary to-day to interpret treaties, as well as laws, in a different manner than was customary when international life showed few changes. One of the considerations that supported that assertion was that:

national courts, in their interpretation of private law, seek to adapt it to the exigencies of contemporary life, with the result that they have modified the law, sometimes swiftly and

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<sup>84</sup> *Supra* note 22, p. 148. See also Mohamed Shahabuddeen, ‘Municipal Law Reasoning in International Law’, in Lowe, V. and Fitzmaurice, M. (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, Cambridge, Cambridge University Press, 1996, pp.99-100.

<sup>85</sup> *Supra* note 73, p. 149.

<sup>86</sup> E.g.: Prosper Weil, ‘Le droit international en quête de son identité. Cours général de droit international public’, in *R des C.*, vol. 237 (1992-VI), pp.146-147.

<sup>87</sup> *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, [1954] ICJ Rep 4, at 61.

profoundly, even in countries where law is codified to such an extent that it is necessary today to take into consideration not only legal texts, but also case-law. It is the same, a fortiori, in the interpretation of international matter, because international life is much more dynamic than national life.<sup>88</sup>

## 5. Conclusion

The picture that one might derive from the above overview is that while formally the Court maintains the traditional separation between the international and the domestic legal spheres, in several ways we also see complementarity and dialogue, rather than opposition and hierarchy. It is a picture that, in investment law, was indicated in *Occidental EPC v Ecuador*, where the Tribunal noted that the domestic and international procedures ‘may interact reciprocally’.<sup>89</sup> One can also say that international and domestic courts play interlocking functions in dispute settlement and are part of a system of ‘multilevel governance’. In this account, the dualist dogma that domestic decisions are mere facts may be misleading.<sup>90</sup>

The developments that have spurred and that support the stream of scholarship revolving around judicial dialogue and cooperation are mostly found outside the ICJ: in communication between courts of different states, in human rights law, investment law etcetera. In many respects, the ICJ is an unlikely forum for strong interaction with domestic courts. Its role overwhelmingly remains confined to traditional interstate disputes that have little chance of being litigated in domestic courts. Its powers and efficacy depend strongly on consent and support by states; elevating judgments of any single state to a different status than ‘facts’ sits uneasily with this dominant paradigm.

However, in particular in recent cases as *LaGrand* and *Avana*, where private persons can invoke individual rights, protected by international law in domestic courts, and the same claims subsequently emerge in the ICJ, some form of interaction emerges. This may be due to the combination of allocation of rights to individuals, the likelihood that such claims are

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<sup>88</sup> [1950] ICJ Rep 4, 15-16.

<sup>89</sup> London Court of International Arbitration, Final Award in the Matter of an UNCITRAL Arbitration: Occidental Exploration and Production Company v. The Republic of Ecuador (Case No. UN 3467) (July 1, 2004), <http://www.asil.org/ilib/OEPC-Ecuador.pdf>, par. 58.

<sup>90</sup> Michel Virally, ‘The Sources of International Law’, in Max Sørensen (ed.), *Manual of Public International Law*, MacMillan & Co. (1968), p. 116, at pp. 170-171.



being adjudicated primarily in a domestic context, and the fact that the ICJ will not be ideally positioned to review all matters of fact and law colored by a domestic context.

If we also consider the variety of ways in which the Court can attribute legal weight to decisions of domestic courts in the determination and development of international law, it would seem that the traditional dualistic position of characterized by ‘domestic decisions as facts’ and ‘courts as parts of a unitary state’ (see section 2), while formally still valid, have lost part of its explanatory power.