INTERNATIONAL LAW ASSOCIATION

Study Group: Principles on the Engagement of Domestic Courts with International Law

# Preliminary Report[*]
# Principles on the Engagement of Domestic Courts with International Law

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## Introduction

1. This preliminary report aims to provide the background for the current discussions of the ILA Study Group on *Principles on the Engagement of Domestic Courts with International Law*, and to consolidate the progress made during earlier discussions. It draws on some previously published work,[1] as well as on the discussions that took place during the first two meetings of the Study Group in Amsterdam in March and in Sofia in August 2012. It is understood that the Study Group may not be able to address all the aspects surveyed in this preliminary report; it may have to decide which aspects are to be covered, and the preliminary report seeks to serve as a basis for discussion and to progressively illustrate the progress towards such a decision. The dimension of contestation of international law by domestic courts will in any event be central to the Study Group's work, also in light of its Mandate.

2. After introducing the underlying reason for the work of the Study Group, viz the increased relevance of domestic courts for international law (section I), the preliminary report proceeds to investigate the different methods of domestic court engagement with international law, and its different outcomes, whether alignment with or contestation of international law (section II). The great variety in methods and outcomes of engagement that section II reveals is then considered with a view to the distillation of principles 'governing' such engagement (section III). Section IV, concluding, offers possibilities for the outcome of the Study Group's work.

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[*] This preliminary report is based on the background papers prepared for and presented at the first two meetings of the Study Group in Amsterdam, 16–17 March 2012, and at the 75th ILA Conference in Sofia, Bulgaria, 28 August 2012, taking into consideration the relevant discussions. It is only lightly footnoted. Many thanks are due to André Nollkaemper and Yuval Shany, as well as to the members of the Study Group, for invaluable guidance. The usual disclaimer applies.

[1] See generally the work of A Nollkaemper, and especially his *National Courts and the International Rule of Law* (OUP, Oxford 2011); the work of Y Shany, and especially his *Regulating Jurisdictional Relations between National and International Courts* (OUP, Oxford 2007); and A Tzanakopoulos, mainly 'Domestic Courts as the "Natural Judge" of International Law: A Change in Physiognomy' in J Crawford and S Nouwen (eds), *Select Proceedings of the European Society of International Law* (vol 3, Hart, Oxford 2012) 155–68; and 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 Loyola of LA Int'l & Comp L Rev 133–68.

3. Before launching into the substantive discussion, the term 'engagement', chosen for the title of the Study Group's work, needs to be explained. The driving principle for the choice of the term was to avoid a binary approach (enforcement/application versus non-enforcement/breach) in favour of a functional approach: the term 'engagement' captures, in the Study Group's view, the richness of approaches of domestic courts to international law. The Study Group's aim is to try and extract some general principles from this diversity, without losing sight of the rule of law.

4. Finally, it should be noted that the European Union courts are included in the Study Group's understanding of 'domestic courts', at least to the extent that these, as functionally hybrid courts, engage in judicial/constitutional review that is akin to that normally undertaken by domestic courts.[2] This is not to question that EU courts do also operate in 'normal international law mode' when they render, for example, advisory opinions on the conclusion of an international treaty by the EU.

## I. The Increased Relevance of Domestic Courts for International Law

### a. The traditional position

5. International law traditionally treats domestic law, including domestic court decisions, as facts.[3] As a simple fact, when a domestic court decision construes international law, it may be seen either as being in harmony with the international obligations of the State or as being in breach of them. In the latter case the domestic court decision may create an international dispute (or allow a dispute to 'mature' so as to become internationally justiciable, as for example is the case when the rule of exhaustion of local remedies applies), or it may engage the international responsibility of the State. But in any event, the domestic court decision will not normally be considered as a normative act carrying significance for the construction of the relevant international obligation or rule of international law. At best, domestic court decisions are to be considered elements of the practice of States, or ways through which States may express their *opinio juris* or views on the proper interpretation of their international obligations, and thus they do not but indirectly constitute sources of international law.

6. Still, there is no doubt that significant areas of public international law have been shaped by domestic court jurisprudence, which provided the requisite state practice and *opinio juris* for the creation of custom—the law of immunity being but one such example. Furthermore, since domestic courts are organs of the State, their decisions may constitute subsequent practice affecting the content of international law norms, within the meaning of Article 31(3)(b) VCLT.

[2] See further paragraph 13 below.

[3] *Certain German Interests in Polish Upper Silesia* (Merits) [1926] PCIJ Ser A No 7 at 19.

7. The potential for conflict between the courts and the executive in the area of formation of customary international law should be highlighted at this juncture: it is only when decisions of domestic courts are *not* rejected by the State's executive that they constitute State practice or that they can be taken to express the State's *opinio juris*, so that they are capable of contributing towards the formation or development of customary law. This could be seen as a projection of the domestic constitutional principle of separation of powers at the international level; it guarantees that the (presumably democratically elected) government can overrule democratically unaccountable courts in the process of formation of international law, and thereby also limits the impact of domestic courts in the formation of that law.

8. Even if not contradicted by the State's executive, a domestic court's decision may still be devoid of impact in the formation of customary law. States other than the forum state may also challenge the decision of the domestic court, thereby leading to contradictory State practice or *opinio juris*.

9. The traditionally limited role of domestic courts in international law is further confirmed by the traditionally bilateralist performance structure of international obligations (*traité-contrat*). International obligations usually demand(ed) performance by one State towards another on the international plane—eg omission from intervention in its domestic affairs, abstention from the threat or use of force, default permission to innocently pass through the territorial sea, etc. Domestic courts would have little to say with respect to the performance of such obligations: the doctrine of immunity or "act of State" would preclude them from pronouncing on another State's (sovereign) acts, while they would also traditionally avoid pronouncing on the conduct of international relations or foreign affairs of their own State, having developed a number of relevant 'avoidance techniques' to that effect.[4]

b. The reasons for increased engagement

10. The traditionally bilateralist performance structure of international law has been put under constant and significant strain in the last decades. At the danger of stating the trite, more and more regulation is taking place today at the international plane, ie at a level beyond the State. The development of various areas of international law regulated by multilateral instruments, otherwise called 'sectoral regimes', do not fit within this bilateral scheme. The international law on the protection of human rights is the most obvious example of such clearly bilateralist structure breaking down and being replaced by a multilateral framework of protection (*traité-loi*). International environmental law or aspects of the law of the sea and other areas of international law also reflect this development. The attempts then to protect general interests through the assumption of international obligations lead, in the event of a violation, to a lack of any identifiable 'specifically' injured State,[5] and make it difficult

[4] See further section II, below.

[5] Cf Article 48 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (2001) UN Doc A/56/10 (hereinafter: ASR).

to demonstrate any specific or quantifiable damage—on which all forms of reparation for internationally wrongful conduct are predicated.[6]

11. But even in traditionally bilateralist areas of international law, the latter has developed so as to remove the clearly inter-state slant in the implementation of international obligations. Indeed, traditional international law was primarily concerned with the establishment of State-to-State obligations that were to be implemented through conduct on the international plane, that is *outward-looking* obligations. States were then by-and-large free to determine what measures were required within the domestic legal order to implement these obligations, if any were required at all.

12. Today, however, international obligations are increasingly *inward looking*: this means that they specifically enjoin States to undertake certain conduct *within their own domestic legal order*: to adopt a specific legal framework, to accord specific rights, to abstain from taking specific actions, etc. International human rights law (protection of specific rights) or international environmental law (eg curbing of emissions,[7] or obligations to grant access to information, justice, or obligations to allow participation in decision-making[8]) may be invoked as the obvious example. Still, one may also think of analogous examples from diverse fields, such as WTO law (obligations to regulate subsidies, curb dumping, adopt technical regulations within the domestic legal order in accordance with prescribed processes and on prescribed grounds, etc), international investment law (curbing State regulatory power, even in areas of human rights, or environmental protection, in order to grant 'fair and equitable treatment' to investors—or, more simply, being bound to follow particular internationally accepted procedures in order to exercise regulatory power affecting, if only incidentally, foreign investments/investors, etc), the international law of the sea, and even diplomatic and consular law, which traditionally required States to adopt certain conduct within their domestic legal order.[9]

13. Penetrating the façade of the unitary State, looking at these obligations from within it, ie from the perspective of the individuals within the jurisdiction of the State, these international obligations look merely as limitations on State power: executive or legislative action needs to take place within the limits set by the State's obligations. To the extent that domestic law in some way enables the 'reception' of international law in the domestic legal system,[10] individuals (and legal entities) with-

[6] See the relevant ASR provisions and commentary ibid.

[7] Eg under the Kyoto Protocol.

[8] Eg under the Aarhus Convention.

[9] See eg the ICJ decision in *Avena and other Mexican Nationals* [2004] ICJ Rep 12, where the US was required to bring its domestic law and process into compliance with its international obligations to allow consular assistance under the 1963 VCCR. See also the recent flare-up between the UK and Ecuador regarding the UK's ability to withdraw the qualification of Ecuador's Embassy in London as diplomatic premises under a relevant UK Statute of 1987: see the contributions of 16 and 17 August 2012 by R O'Keefe and D Akande at www.ejiltalk.org.

[10] And it does so in virtually all domestic legal systems, even if with significant differences: see section II.a, below.

in the State's jurisdiction will regularly challenge executive action for compliance with the limits imposed on such action (challenges against legislative action are, however, more unusual) without necessarily considering whether these limits have their source in domestic or international law. It is also normal for domestic courts to be called upon to police executive compliance with the limits posed on State action—this, in the final analysis, is part of their mandate. As such, individuals will turn to domestic courts employing international legal arguments, and domestic courts will thus be forced to engage with these arguments.

14. The analysis above aims to account for the increased significance of domestic courts in the interpretation, application, but also development, of international law. This significance, to be fair, is asserted rather than proven empirically, as is the increased engagement of domestic courts with international law. It makes sense to assert that this is so, given the high visibility of domestic decisions in the last couple of decades, be it—among others—with respect to sovereign immunity, or with respect to compliance with or disobedience of Security Council sanctions, and given further the increasing interdependence of States and concurrent 'blurring of the dividing line' between international and domestic law due to the new 'directionality' of international obligations described above. While empirical research needs to be undertaken to prove in specific terms this increased engagement as well as the increased significance for international law of domestic decisions, this is not the mandate of this Study Group.[11]

## II. The Infinite Variety of Engagement

15. The previous section aimed at laying the groundwork which potentially explains—if it doesn't prove—the increased significance of domestic courts for international law. But how domestic courts actually engage with international law is a perennial question that has yet to be mapped out satisfactorily. One reason for this is the 'infinite variety' of constitutional set-ups regulating the reception of international law within the domestic legal order of any given State, and the subsequent infinite variety of domestic court engagement with these rules of international law. This in part explains, if it does not justify, the application of (and thus arguably also compliance with) international law by the domestic court, as well as the denial of application of (and thus breach of) international law. These issues are taken up in turn.

### a. Variations in the Reception of international law

16. The traditional distinction between monism and dualism leads to the two traditional methods of reception of international law into domestic law, thus corresponding roughly to **incorporation** and **transformation** respectively. If the domestic constitution adopts a monist approach, international law is (ideally) 'automatically' considered part of domestic law and thus incorporated in the legal order of the

[11] But see for a classic statement of the assertion JG Collier and V Lowe, *The Settlement of Disputes in International Law* (OUP, Oxford 1999) 5.

State. If, by contrast, the domestic constitution takes a dualist stance, then international law remains an external body of law that must be transformed into domestic law through the adoption of some domestic (usually legislative) act in order to lay claim to application in the domestic jurisdiction and before domestic courts.

17. This picture is already rather simplified. In reality domestic law, even if it adopts a 'monist' stance, sets a number of prerequisites before 'incorporating' international law, or distinguishes between different sources of international law—eg, treaties ratified by the US explicitly form part of the law of the land, while there is no specific provision for customary law; by contrast, the UK arguably 'incorporates' customary law into the common law, but requires transformation of treaties before there can be any domestic application. Similarly the Greek constitution provides for the 'incorporation' of treaties ratified by the Hellenic Republic, which however takes place through the adoption of a formal law to that effect each and every time, while it makes little provision for customary law. Other constitutional orders may introduce distinctions even within the same source of international law, viz the South African and Turkish constitutions which distinguish between human rights treaties and other treaties as regards their legal effects in the domestic legal order, the Austrian constitution which grants a specific treaty (the ECHR) constitutional rank, or the Swiss constitution which grants quasi supra-constitutional status to *jus cogens* norms.[12]

18. Within this great variety yet more variations are possible, as implied in the last sentence of the paragraph above: these relate to the hierarchical standing of international law, or of particular sources of international law, in the domestic hierarchical pyramid. International law (or particular sources, or particular elements within sources, viz human rights treaties) may be given a standing equal to that of ordinary law, superior to that of ordinary law, or even superior to that of the domestic constitution. Further, even 'automatic' incorporation does not guarantee the applicability of international law in the domestic legal order, as domestic law may allow 'direct effect' of certain sources of international law only, or of some elements within such sources only (eg self-executing treaties), or may permit the local constitution or even subsequent ordinary law to override international law. This brief sketch demonstrates that the distinction between monism and dualism is simplistic and often unhelpful: not only may both approaches be adopted within a given domestic legal order, but it can be further argued that there is no such thing as 'monism' properly so-called: in all circumstances, the reception of international law into the domestic legal order is regulated by domestic law itself, whether more or less stringently.

b. Variations in the Application of International Law

[12] It should be noted that the 'Swiss' notion of *jus cogens* is broader than that currently acceptable under international law, but Swiss courts will not consider a treaty void for conflicting with the broader notion of *jus cogens*.

19. Depending on the relevant domestic constitutional ordering, to which the domestic courts are of course bound, the latter may proceed to give effect to international law, relying on relevant constitutional principles, or they may be able to refuse its application for a variety of reasons. There is no guarantee that **incorporation** leads to direct applicability of international law by the domestic court, as domestic courts have devised a variety of **avoidance techniques**, which allow them to by-pass otherwise (ie under their own constitutional arrangements) applicable international legal provisions: these include the doctrine of **non-justiciability** wherein one might include the **political question** doctrine, the **act-of-State** doctrine, denials of **standing**, and the doctrine of **non-self-execution** of treaties, among others. Even the avoidance of substantive international law questions through **according immunity** (whether to a foreign State under international law or to the forum State under domestic law) may be seen as such an avoidance technique.

20. The increase in inward-looking norms of international law creates a larger contact area between domestic and international law, which in turn has the potential of leading to greater conflict between the two sets of rules. The importance of this development is illustrated in recent domestic cases which might be taken as signaling a '**reactive turn** (of domestic courts) **to domestic law**' in the face of 'inconvenient' international law. This 'reactive turn' might be considered another avoidance technique, similar in function to the ones described above. The difference here is that the domestic court does not refuse to pronounce on a matter involving international law (as for example in cases of non-justiciability or act-of-State), but rather may accept that international law is implicated but deliberately—if implicitly—reject its application. A number of recent cases can be seen as falling in this category: reactions to Security Council sanctions, such as *Kadi*[13] in the EU courts and *Ahmed*[14] in the UK courts, form one such group; while cases like *Medellín*[15] in the US Supreme Court form another, to the extent that the latter court refuses to apply the binding decision of an international court. Whether these groups of cases do indeed form separate categories, or belong in the same category, is something that requires further study.[16] We may be dealing here with a type of constitutional review where fundamental values are invoked against (other) international law rules. This would seem to conceive the legal order as unitary and attempt to hierarchically order various rules and principles within the unitary legal system. Or we may be dealing with a claim of hierarchical structuring of separate legal orders, whereby the international legal order is subjected to the court's domestic legal order.

21. Conversely, there are ways in which domestic courts may give indirect effect to international law even if the latter has not been **transformed** through a domestic act as required by the relevant constitutional framework. This is mainly done through the principle of **consistent interpretation**, which has been introduced

[13] Joined Cases C-402/05 P and C-415/05 P [2008] ECR I-6351; cf Case T-85/09 *Kadi II* [2010] ECR II-0000 (30 September 2010).

[14] [2010] UKSC 2.

[15] 552 US 491 (2008).

[16] Some views are set out in section III, below.

through judicial practice in a significant number of domestic legal orders.[17] Taking a fairly broad-brush approach to the principle, it effectively institutes a presumption in favour of harmony of domestic law with international law. The domestic court will presume that the domestic legislator did not mean to introduce legislation in breach of the State's international obligations, and will thus interpret domestic law 'in the light of' or 'in accordance with' the State's international obligations, ie with international law. The presumption is of course rebuttable, but the difficulty of rebutting it fluctuates between different legal orders, some making the presumption virtually irrebuttable, others allowing its rebuttal even by necessary implication.

22. There are of course a number of problems with consistent interpretation as a principle for the (indirect) application of international law in domestic courts: it requires some ambiguity in domestic law, which needs to be construed, in order to come to bear (though distinct courts have taken a variety of positions on the degree of ambiguity required to initiate the interpretative process); in some cases it refers merely to treaties; or it excludes from application constitutional texts; etc. A field of domestic law where the interpretative application of international law may be of particular interest is administrative law. If statutes authorizing administrative actions are subject to a presumption of consistency with international law, then so is the relevant administrative action, which may be challenged and brought under judicial scrutiny.

23. Domestic courts have thus sought to apply other interpretative principles which are similar to the principle of consistent interpretation. One such principle is that of **legitimate expectations**, which has been used by Australian and Scottish courts and by the Privy Council. It effectively construes treaty ratification (among others, possibly) as a promise on which it allows basing some doctrine of promissory

[17] For reasons of space, only a brief overview will be given here. The *locus classicus* is the US Supreme Court's *Charming Betsy* principle: *Murray v The Charming Betsy* 6 US 64, 118 (1804); see also *MacLeod v US* 229 US 416, 434 (1913). In Germany the rule of consistent interpretation is seen as flowing from the *Völkerrechtsfreundlichkeit* of the Basic Law, and has been reiterated by the Federal Constitutional Court in 74 BVerfGE 358, 370. In Switzerland the principle of consistent interpretation is called '*Schubert-Praxis*' and flows from the relevant practice of the Federal Supreme Court. A principle of consistent interpretation exists in Australia, as enunciated by the High Court in *Kruger and ors v Commonwealth of Australia* reported in 118 ILR 371, 374, 377–9. In New Zealand there exists a very strong presumption of conformity with international law: see P Sales and J Clement, 'International Law in Domestic Courts: the Developing Framework' (2008) 124 LQR 388, 393–4. Canada also has a principle of consistent interpretation both with respect to treaty obligations and obligations under international law: C38295 *Bouzari and ors v Islamic Republic of Iran* (3 June 2004) [64]–[66] (Ontario Court of Appeal), as does arguably South Africa: *AZAPO and ors v South Africa and ors* [1996] ZACC 16 [26]. Italian courts engage in a rather peculiar construction with results similar to those when adopting a principle of consistent interpretation: they consider international law rules as special norms who are not superseded by later (domestic) general norms. See B Conforti, 'National Courts and the International Law of Human Rights' in idem and F Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (Martinus Nijhoff, The Hague 1997) 3, 11–12. As to the United Kingdom, there is (a) a presumption of compatibility in the common law regarding unincorporated treaty obligations; and (b) a statutory provision in the Human Rights Act 1998, which transforms the ECHR, which imposes a similar presumption. Finally, the ECJ has adopted a principle of consistent interpretation of EU law with international obligations of the EU: see Cases C-286/90 *Poulsen* [1992] ECR I-6019 [9]; and C-308/06 *Intertanko* ECR I-4057 [51].

estoppel. Finally, what may be seen as a most potent principle of interpretation is that of **legality**. It holds that the domestic legislature may not be considered as derogating from or abrogating an international right or duty save when it does so explicitly (in effect a quasi-irrebuttable presumption of conformity with international law).

24. Finally, domestic courts may use international law as a way to '**understand**' the world, and thus domestic legislation, and not just as a method to interpret domestic law in order to avoid a breach of the State's international obligations. In this conception of interaction between international and domestic law, international law provides a set of definitions which help the domestic court *understand* domestic legislation rather than *override* it. Examples could include the (controversial) use of international materials to understand the content of 'cruel and unusual punishment'[18] or the use of a one-sentence long statute almost two centuries old as a vehicle for examining the human rights-related practice of other States in US courts.[19]

25. All of the techniques described in paragraphs 21–24 above (which can also be positioned on a spectrum ranging from more to less rigid techniques) we may call **harmonization techniques**, in contradistinction to the **avoidance techniques** described in paragraphs 19–20.

26. To summarize, the main scheme so far positions the two **main principles**, that of **incorporation** and that of **transformation**, at the opposite ends of a spectrum; but a number of **moderating principles** immediately come into play and position the various legal orders all along the spectrum: **avoidance techniques** mainly moderate the impact of **incorporation**, pushing towards the transformation end of the spectrum, while **harmonization techniques** moderate the impact of the requirement for **transformation**, and pull towards the incorporation end of the spectrum.

27. A number of observations are called for with respect to the paradoxical counter-move indicated in paragraph 26 above: the first refers to the use of the term 'avoidance' which may invoke negative or pejorative connotations. On the one hand it may be said that the use of the term is problematic, as sometimes it should be acceptable that certain decisions regarding application of international law be left to the discretion of the executive; on the other hand such a concession might be antithetical to the notion of the rule of law, in particular to its aspect referring to the separation of powers. Much will depend on the content of the rule at stake, however, as more technical rules may justify increased deferral to the executive, whereas more value-heavy rules may require heavier judicial scrutiny; conversely the content of a rule may be more strict (which would favour close judicial scrutiny) or more general (which would allow for some deference to the rule's addressee as to its construction). Much may thus also depend on the addressee of the rule, as determined

[18] See eg *Roper v Simmons* 543 US 551 (2005).

[19] See the litigation under the *Alien Tort Claims Act* 28 USC §1350 (1789).

by its content, as this may be the State in general, or specifically the executive, legislative, or judicial power.

28. Another observation refers precisely to the seemingly paradoxical moderation of the opposing main positions of incorporation and transformation, so that irrespective of the local constitutional set-up, avoidance or harmonization may lead to similar outcomes in differently internationally inclined domestic legal orders. This paradoxical counter-move is revealing, and perhaps points towards avoidance or harmonization as dependent not on the local constitutional set-up, but rather on the substance of the relevant domestic and international rules at stake in each instance of engagement. Once again then, the substance of the rules at stake seems to be decisive as regards the engagement of the domestic court with international law. This is not meant to ignore that, in some cases, other factors, such as the individual preferences of specific judges, may also explain some of the inclination or disinclination to apply international law.

29. To the operation of these main and moderating principles we should add another interesting variation which also heavily depends on the substance of the rule at stake and is currently understudied: this is the use of '**consubstantial norms**'. Consubstantial norms are norms which happen to exist both at the international and at domestic level, and provide for the same substantive regulation (ie, they have the same substance).[20] One example of such a norm could be the right to an effective remedy for violation of a vested right; or other fundamental / basic human rights[21] which are guaranteed at both the international and most domestic levels. In that sense 'consubstantial norms' could be likened to 'multi-sourced equivalent norms', which have been argued to exist on the international level.[22] The reason for including the impact of such consubstantial norms in the Study Group's consideration of the various methods of engagement of domestic courts with international law is that they may serve as a justification for contestation of international legal rules by domestic courts—as will be provisionally demonstrated in section III, below. Before turning to this point, however, the variations in the outcome of domestic court engagement with international law must be briefly mentioned.

c. Variations in Outcome

[20] The reference to 'same' substantive regulation need not (and probably should not) be understood as implying identical regulation—sometimes the domestic norm may be more protective of a particular right or value, but in order to be considered 'consubstantial' with an international norm it may not be *less* protective or strike a *different balance* from the one struck by the international norm. International law thus serves as the minimum standard of protection.

[21] For a discussion of the term 'fundamental rights' and its relationship to 'human rights' from an international-domestic comparative law perspective, see A Tzanakopoulos, 'Judicial Dialogue in Multilevel Governance: The Impact of the *Solange* Argument' in OK Fouchald and A Nollkaemper (eds), *The Practice of International and National Courts and the (De-Fragmentation) of International Law* (Hart, Oxford 2012) 185, 210–15.

[22] See generally for the concept T Broude and Y Shany, 'The International Law and Policy of Multi-Sourced Equivalent Norms' in eidem (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart, Oxford 2011) 1–15.

30. A crucial aspect of the engagement of domestic courts with international law is whether, in the final analysis, the domestic court 'intervention', as it were, leads to alignment with, or rather to breach of, international law. This is also a most difficult field of study. Not only does such an enquiry assume that international law always has fixed and objectively ascertainable contents; it also ignores the fact that every purported violation of international law has within it the seeds of a potential change in the law. In customary law, a 'violation' by a domestic court may lead to the emergence of a new customary rule, or the modification of an existing one. In treaty law, a 'violation' could establish the basis for a new 'agreed interpretation' of the treaty by the parties or could lead to the emergence of a consistent 'subsequent practice' effectively modifying the terms of the treaty (in the sense of Article 31(3)(a) and (b) VCLT respectively). This creates an interesting feedback loop, where domestic court engagement may both violate and develop international law; one crucial question then is how to distinguish between breach of the law and the emergence of new law. In addition, to the extent that rules of international law are invoked to challenge other rules of international law, a breach of one set of norms may promote compliance with another set of norms, even having potential implications on their hierarchical standing.

31. There are examples of instances that can be cited as substantiating the feedback loop referred to in paragraph 30: the Greek and Italian courts' jurisprudence on sovereign immunity could (and perhaps sought) to effect a change in the customary law of immunity, and it may have been successful were it not for conflicting practice of other domestic courts and finally for the intervention of the International Court of Justice, which put an end to the discussion for the foreseeable future.[23] Similarly, Greek court jurisprudence on the definition of 'ship' under the 1992 CLC/FUND Conventions has caused the States parties to consider adopting the Greek courts' interpretation over the one they preferred earlier (and on the basis of which the Greek court decisions were in clear violation of the relevant instruments).[24] The jurisprudence of UK courts has led the European Court of Human Rights to change its interpretation of provisions in the ECHR in some instances.[25]

32. It thus appears that in a number of instances it will be very hard to determine with any certainty whether a particular domestic court decision is in alignment with or in breach of international law—much will depend on other States' reactions (or lack thereof) to the decision, as well as to the possibility of 'corrective intervention' or 'monitoring' by an international judicial organ, such as the International Court of

[23] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* [2012] ICJ Rep (3 Feb 2012).

[24] *Marine Env'l Services MC and anor v 1992 IOPC Fund* (6 July 2006) ILDC 856 (GR 2006); cf Doc IOPC/OCT10/4/3/1 (2010).

[25] Eg with respect to the admissibility of hearsay evidence under Article 6 ECHR: *R v Horncastle* [2009] UKSC 14 and cf *Al-Khawaja and Tahery v UK* App Nos 26766/05 and 22228/06 (ECtHR Grand Chamber 2011) paragraphs 146–7.

Justice (but also the European Court of Human Rights, or the WTO dispute settlement bodies, or an ad hoc or ICSID investment tribunal, among other possibilities).

## III. Principled Approaches to Engagement

33. The difficulty in discerning any single principled approach to the engagement of domestic courts with international law is obviously the result of the great variety of domestic constitutional treatment of international law as to its position within the domestic legal framework, and the subsequent variations in the engagement of domestic courts with international law and in the outcome of such engagement, as described in section II, above. The most crucial part of the Study Group's work is not (solely) to map the practices and methods of engagement and their potential outcomes, but rather also to seek to identify the grounds on which domestic courts apply or refuse to apply international law and to discern and analyze the relevant principles that may emerge from such practice.

34. Seeking to establish such principles at the outset of the work might be seen as prejudicial to the Study Group's work. This is why the main part of this Preliminary Report has been concerned with mapping the relevant variety in domestic court engagement with international law, rather than with trying to make any normative arguments as what might be made of that variety. Some options were explored in the fist meetings of the Study Group and are further explored in the following few paragraphs.

35. Members of the Study Group agreed that, in the interest of making the project manageable, the Study Group should focus on norms 'at the edge', that is to say on norms of international law that seem to suffer from 'legitimacy' issues and are thus likely to provoke and encounter the resistance of domestic courts. While the term 'legitimacy' is itself contested, what is meant here is norms of international law that may be seen as problematic in three aspects: (a) **source legitimacy concerns**—such as those created by norms of customary international law or of secondary law of international organizations; (b) **outcome/content legitimacy concerns**—such as those created by the potential or perceived conflict of international norms with deeply rooted local constitutional sensitivities; and (c) **procedural legitimacy concerns**—such as those created by norms produced in some manner which is procedurally incompatible with national traditions or otherwise problematic. Such problematic norms, and in general all 'less established' norms, leave domestic courts with more discretion as to how to engage with them, and thus provide the more valuable material for identifying principles of engagement of domestic courts with international law.

36. The focus on norms 'at the edge' pulls with it the focus of the elaboration of principles of engagement of domestic courts with international law: problematic rules make for problematic responses by the organs charged with their interpretational and application, and thus the Study Group will focus on instances of domestic court resistance to, contestation of, but also development of international law. In

this connection, the Study Group will elaborate three sets of principles of engagement of domestic courts with international law: the first is a set of 'strategies' or 'postures' of engagement, which sets out the impact of domestic court engagement on the content of international norms (a); the second is devoted to the mechanics ('techniques') of domestic court engagement for achieving impact on the content of the norms (b); and the third, the only set properly called 'principles of engagement', seeks to elaborate on the strategic choices involved in adopting a particular posture and employing particular methods in the engagement of a domestic court with international legal norms (c). These sets of principles are briefly described in the following sub-sections.

a. Strategies of Engagement: Impact on the Content of Norms

**(i) Dynamic Engagement**

37. Courts, as organs of the State, necessarily affect the content of norms of international law whenever they engage with them. They serve as agents of development (or corrosion and decay) of international law norms. This is the dynamic aspect of their engagement with international law. However, such engagement can also be seen statically, in terms of ideal types (or strategies, or postures) of engagement of domestic courts with international law. These are dealt with immediately below, as the posture or strategy adopted by a court will affect the impact of its decision on the content of the norm.

**(ii) Static Engagement**

38. Whatever the content of a norm of international law there are broadly three **ideal types** of **strategy** or **posture** of domestic court engagement with international law, qualified by the outcome of such engagement. These are: the **posture** or **strategy of avoidance** (where the question of international law is altogether dodged); the **posture** or **strategy of alignment** (where—irrespective of the prescription of the constitutional framework, or even on the basis of an interpretation of such prescription which, on its face, seems to point towards avoidance—an attempt is made to align with international law or at least to harmonize domestic law or practice with international regulation; it should be noted however that, in line with the focus on resistance, the focus will be in particular on the **posture** or **strategy of problematic** or **partial accommodation** rather than 'full' alignment[26]); and the **posture** or **strategy of contestation** (where domestic law is ostensibly used as a method to contest existing [and acknowledged] international law, such as in cases like *Kadi* and *Medellín*). Both the strategies or postures of partial or problematic accommodation and of contestation may also be termed as a **posture** or **strategy of development** of inter-

[26] The concept of problematic or partial accommodation will need to be fleshed out by the Study Group, but it might involve situations where the domestic court misinterprets or misapplies international law while pretending to align itself with it; or situations where the domestic court expresses caution as to the content of international law and seeks to accommodate such content through interpretative devices of domestic law. See further section III.b, below.

national law, as they both may either seek or achieve the adjustment of the relevant international rules as a result of the domestic court's engagement with them.

39. Within **contestation**, there is a distinction to be drawn between what could be termed **local contestation** and **internationally-minded contestation**. In the former case the domestic court is contesting the international rule by reliance on a domestic law principle which finds no corresponding principle in international law, such as the 'procedural default' rule (thus 'local' contestation).[27] In the latter case a parallel can be drawn between the domestic law relied on in contestation of international law and international rules which are 'consubstantial' with the domestic law relied on.[28] Or the contestation may focus on the question of who is the authoritative interpreter of rules of international law, with the domestic court claiming—even if implicitly—a privileged role in this connection.[29]

40. Further, it is crucial to distinguish between **what domestic courts are saying they are doing** and between **what they are actually doing**. For example, there are instances where the domestic court may be paying lip service to an international legal rule, but then proceeding to merely apply domestic law, or avoiding the relevant question altogether, thereby resulting in a violation of international law. Conversely, there are arguably instances where the domestic court, even though it makes no reference to international law, may be actually applying an international norm in deciding a case, even if only in its 'consubstantial' incarnation. This may have further implications for the development of international law.[30]

**(iii) Informal 'Monitoring' of Engagement**

41. The engagement of domestic courts with international norms, and the consequent impact on the content of such norms, is subject to an informal process of '**monitoring**', ie to decentralised **control** and **corrective intervention**. Domestic courts are accustomed, when acting within the domestic legal order, to functioning under the corrective control of the legislature. This sort of corrective intervention is far less ubiquitous in the decentralised legal system that is international law. Informal processes of monitoring domestic court engagement with international law are varied and diffuse, but such informal monitoring may be undertaken by international

[27] *Medellín* could be seen as an example of local contestation.

[28] Eg in *Kadi* and *Ahmed* domestic courts relied on constitutional rules protecting the right of access to a court and to an effective remedy, ie recognized aspects of the internationally protected right to a fair trial.

[29] The example here could be *Sanchez Llamas v Oregon* 548 US 331 (2006), where the domestic court claimed that it was the ICJ that read a provision in an international treaty wrongly, whereas the domestic court was reading it correctly (in the instance reference was to Article 36 VCCR).

[30] Eg it has been argued that in relying on the rights of access to a court and to an effective remedy, cases like *Kadi* and *Ahmed* are effectively resolving a conflict between international norms (chapter VII UN Security Council decisions and fundamental [human] rights) or alternatively reinterpreting Article 103 of the UN Charter: see further A Tzanakopoulos, 'Collective Security and Human Rights' in E de Wet and J Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (OUP, Oxford 2012) 42–70.

courts (an example being the *Jurisdictional Immunities of the State* case before the ICJ: here the actions of Greek and Italian courts led to the eruption of a dispute which was submitted to the ICJ; the ICJ in turn reversed an attempt at the development—or erosion—of the international law of immunity that had been attempted by the domestic courts) or by States in a decentralised manner (eg through reaction to and protest against the decision of a domestic court of another State).

42. Given the paucity of international judicial settlement of disputes, judicial law-making by domestic courts that impacts on international law, while subject to informal and diffuse international monitoring, requires much more vigilance in order to be kept within acceptable limits, and in order to have a **developing** rather than a merely **corrosive effect** on international regulation (which could be cast as a sub-type of fragmentation).

d. Principles of Engagement: Strategic Choices

43. A set of **principles of engagement** relates to the **reasons** behind the choices of domestic courts with regard to their strategies and techniques of engagement with international law. Establishing the reasons for domestic courts choosing to avoid or contest or align with international law in given circumstances, evaluating them as positive or negative from an international law perspective, and considering the costs of each strategic choice, will allow the Study Group to come up with guidelines and practice directions for domestic courts.

## IV. The Potential Outcome of the Study-Group's Work

44. As to the potential outcome of the Study Group's work, at its first meetings in March and August 2012 the Study Group agreed to produce both scholarly / academic types of contribution, in the form of a report, or book or set of articles, coupled with a set of thematic and national studies written by members of the Study Group and others in their particular fields of interest, but also a more practical type of outcome, such the drafting of a set of guidelines or recommended / best practices for the engagement of domestic court with international law. The Study Group will also seek to secure funding in order to support research carried out by junior researchers working under Group members' supervision.