

INTERNATIONAL LAW ASSOCIATION
JOHANNESBURG CONFERENCE (2016)

(STUDY GROUP ON) PRINCIPLES ON THE ENGAGEMENT OF DOMESTIC
COURTS WITH INTERNATIONAL LAW

Members of the Study Group

Professor André Nollkaemper (Netherlands): *Chair*

Professor Yuval Shany (Israel): *Co-Rapporteur*

Professor Antonios Tzanakopoulos (UK): *Co-Rapporteur*

Professor Curtis A Bradley (US)

Professor BS Chimni (HQ)

Dr Frédéric Dopagne (Belgium)

Ms Shaheed Fatima QC (UK)

Professor James T Gathii (US)

Professor Yuji Iwasawa (Japan)

Professor Bing Bing Jia (HQ)

Professor Karen Knop (Canada)

Professor Ralf Michaels (US)

Justice Andreas Paulus (Germany)

Professor Anne Peters (Switzerland)

Justice Ariranga Pillay (HQ)

Professor Mónica Pinto (Argentina)

Professor August Reinisch (Austria)

Professor Anthea Roberts (Australia)

FINAL REPORT

Mapping the Engagement of Domestic Courts with International Law

by Antonios Tzanakopoulos*
Co-Rapporteur of the Study Group

Introduction

1. This Final Report is the outcome of the work of the Study Group on *Principles on the Engagement of Domestic Courts with International Law*. It draws on previously published work by the officers of the Study Group,¹ as well as from the Preliminary Report of the Study Group.² It mainly draws, however, on the discussions that took place during a number of both open and closed Study Group meetings since 2011, including in Amsterdam, London, Sofia,³ Washington

* Associate Professor of Public International Law, University of Oxford; and Fellow of St Anne's College, Oxford. Apart from thanking the Chair of the Study Group, André Nollkaemper, its Co-Rapporteur, Yuval Shany, and all the members and researchers who submitted work, views, comments, and participated in the open and closed meetings of the Study Group, the author would like to acknowledge the excellent research assistance of Eleni Methymaki and Anna Ventouratou. Responsibility for all errors and omissions in this Final Report, however, rests with the author.

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.

² See International Law Association, *Report of the Seventy-Fifth Conference held in Sofia* (ILA, London 2012) 971–83.

³ See *ibid*, 984–93.

DC,⁴ and Heidelberg, as well as from a number of thematic and national reports solicited from Study Group members and from scholars from around the world.⁵

2. After introducing the underlying reason for the work of the Study Group, namely the increased relevance of domestic⁶ courts for international law (Part A, section I), the Final Report sets out the challenges presented by the different constitutional settings, the different methods and techniques of domestic court engagement with international law, and its different outcomes (Part A, section II). Part B of the Final Report seeks to map the postures or strategies of domestic court engagement with international law by drawing on the work submitted to the Discussion Group by its members and other scholars. Part C then discusses the grounds or reasons that emerge as justifying different strategies or postures of engagement, with a view to laying the groundwork for the normative exercise of compiling a set of principles or guidelines for the engagement of domestic courts with international law. This latter work, however, is one properly mandated to a Committee of the International Law Association, rather than the Study Group, whose work prepared the ground for such a normative exercise.

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 categories of engagement from this diversity.

4. The courts of the European Union 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.⁷ This is not to question that EU courts do also operate in ‘normal international law mode’.

⁴ See International Law Association, *Report of the Seventy-Sixth Conference held in Washington, DC* (ILA, London 2014) 900–15.

⁵ These reports will be made available on the Study Group’s website at <<http://www.ila-hq.org/en/study-groups/index.cfm/cid/1039>> and a forthcoming publication. A list can be found at the end of this Final Report.

⁶ The term ‘domestic’ is considered as interchangeable with ‘national’ and ‘municipal’ in this Final Report.

⁷ See further paragraph 13 below.

PART A: THE CHALLENGES OF MAPPING DOMESTIC COURT ENGAGEMENT

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.⁸ As a fact, a domestic court decision construing international law may be seen either as being in harmony with the international obligations of the State or as being in breach of them.⁹ 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.¹⁰ Furthermore, 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. As such, they may contribute to the formation of customary international law or to the understanding of the scope and content of treaties. This is different from domestic court decisions potentially constituting ‘material sources’ of international law in the sense of Article 38(1)(d) of the ICJ Statute.

6. There is little 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.¹¹ 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.¹² Finally, given that domestic courts could be seen as included in the term ‘judicial deci-

⁸ *Certain German Interests in Polish Upper Silesia* (Merits) [1926] PCIJ Ser A No 7 at 19. CW Jenks, *The Prospects of International Adjudication* (Stevens, London 1964) 552, already noted however that the general proposition that national laws are to be treated before international tribunals only as facts is ‘at most, a debatable proposition the validity and wisdom of which are subject to, and call for, further discussion and review’.

⁹ International courts commonly treat domestic laws, and domestic court decisions, as evidence of the breach by a State of its obligations under an international treaty or under customary law. See J Crawford, *Brownlie’s Principles of Public International Law* (8th edn, OUP, Oxford 2012) 52; WTO, India: *Patent Protection for Pharmaceutical and Agricultural Chemical Products (India-Patents)*— Report of the Appellate Body (19 December 1997) WT/DS50/AB/R [65]. See however further Article 38(1)(d) ICJ Statute and paragraph 6 below.

¹⁰ See Article 4 of the Articles on the Responsibility of States for Internationally Wrongful Acts (2001), Annex to UN General Assembly resolution 56/83 (12 December 2001), UN Doc A/RES/56/83 and Commentary (2001) II(2) YBILC (‘ARSIWA’); and cf generally C Eustathiades, *La responsabilité internationale de l’État pour les actes des organes judiciaires et le problème du déni de justice en droit international* (vol 1, Pedone, Paris 1936).

¹¹ See the collection of essays in A Tzanakopoulos and CJ Tams (eds), *Symposium on Domestic Courts as Agents of Development of International Law* (2013) 26 Leiden Journal of International Law 531–665, with contributions by R O’Keefe, R van Alebeek, D Hovell, Y Ronen, S Olleson, and S Wittich. Another area of international law which has been shaped to some extent by the jurisprudence of domestic courts is that of international environmental law. Important cases include the *Minors Oposa* case (*Minors Oposa v Secretary of the Department of Environmental and Natural Resources*, Supreme Court of Philippines, Judgment of 30 July 1993, 33 ILM 173 [1994]) and the *Vellore Citizens Welfare Forum* case (*Vellore Citizens Welfare Forum v Union of India and Ors*, Supreme Court of India, Judgment of 28 August 1996, Air 1996 Sc 2715). See further D Bodansky and J Brunnée, ‘The Role of National Courts in the Field of International Environmental Law’ (1998) 7 Review of European Comparative and International Environmental Law 11; and M Anderson and P Galizzi (eds), *International Environmental Law in National Courts* (BIICL 2002).

¹² See *Prosecutor v Goran Jelisić*, ICTY Trial Chamber Judgment, Case No IT-95-10-T (14 December 1999) [61]; Second Report of Special Rapporteur Georg Nolte on ‘Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties’, UN Doc A/CN.4/671 (26 March 2014) [42].

sions' in Article 38(1)(d) of the ICJ Statute, they may constitute subsidiary means for the determination of rules of international law.¹³

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. In principle, it is only when decisions of domestic courts are *not* 'rejected' by the State's executive (in the sense of being considered and outwardly presented as *not* representing the State's practice on the relevant issue) that they are capable of contributing towards the formation or development of customary law.¹⁴ This is because the formation or development of custom arguably requires consistent practice of all branches of government.¹⁵ The requirement of consistency could be seen as a projection of the domestic constitutional principle of separation of powers at the international level. It guarantees that the executive or legislative branch can adopt different approaches than those taken by courts in the course of formation of international law, and thereby they may limit the impact of domestic courts on the formation of that law.¹⁶ Conflicting practice of different branches of government could not constitute the consistent practice required for the emergence of a customary norm. In any event, it also may be that a decision by the executive is annulled or declared to be incompatible with international law by a domestic court, in which case the executive action would not necessarily be considered to express the State's *opinio juris*. As such, the discussion above does not necessarily imply priority of one branch of government over another in the formation of customary law.¹⁷

8. Even if not contradicted by the State's executive or other State organs, a domestic court's decision may still be of little or even negligible 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*. Of course, this is in no way pecu-

¹³ But see M Mendelson, 'The International Court of Justice and the Sources of International Law' in V Lowe and M Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (CUP, Cambridge 1996) 63, 69 and 82; A Pellet, 'Article 38' in A Zimmerman et al (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, OUP, Oxford 2012) 862 [321]; cf A Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *International and Comparative Law Quarterly* 57.

¹⁴ See Sir R Jennings and Sir A Watts (eds), *Oppenheim's International Law: Volume I Peace* (9th edn, Longman, London 1996): '[C]ourts are not organs of the state for expressing in a binding manner its views on foreign affairs'; E Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 *American Journal of International Law* 241, 248; Roberts (n 13) 62.

¹⁵ See International Law Commission, 'Identification of Customary International Law', UN Doc A/CN.4/L.869 (2015), draft conclusions 6–8; B Simma and A Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 *American Journal of International Law* 306; see generally also I Wuerth, 'International Law in Domestic Courts and the *Jurisdictional Immunities of the State* Case' (2012) 13 *Melbourne Journal of International Law* 1, 5 citing this Study Group's Preliminary Report (n 2), as well as M Akehurst, 'Custom as a Source of International Law' (1975) 47 *British Year Book of International Law* 1, 21–22 and Roberts (n 13) 61.

¹⁶ See *North Sea Continental Shelf Cases (The Netherlands/Germany; Denmark/Germany)* [1969] ICJ Reports 3, 44 [74].

¹⁷ But see the position of the ILA Committee on Formation of Customary (General) International Law, 'Final Report: Statement of Principles Applicable to the Formation of General Customary International Law' in International Law Association, *Report of the Sixty-Ninth Conference held in London* (ILA, London 2000) 712, 729. In discussing principle 9, the Committee notes in paragraph (e) of its commentary that 'since it is the executive which has primary responsibility for the conduct of foreign relations, that organ's formal position ought usually to be accorded more weight than conflicting positions of the legislature or the national courts'. The Committee does however go on to note the point on consistency made just above: 'But it should also be noted that, in such a case, the internal uniformity or consistency which is needed for a State's practice to count towards the formation of a customary rule may anyway be prejudiced'.

liar for domestic courts and simply reflects the normal process of the formation of customary international law.

9. The historically 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.¹⁸

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.¹⁹ 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 the bilateralist structure breaking down and being replaced by a multilateral framework of protection (*traité-loi*). International environmental law, aspects of the law of the sea, and other areas of international law, including international investment law, international economic law, international criminal law, international humanitarian law, and so forth, 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,²⁰ and make it more difficult to demonstrate any specific or quantifiable damage—on which all forms of reparation for internationally wrongful acts are predicated under the law of State responsibility.²¹

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 individual rights, to abstain from taking

¹⁸ See further Part A, section II, below.

¹⁹ See generally B Simma, ‘From Bilateralism to Community Interest in International Law’ (1994) 250 *Recueil des cours de l’Académie de droit international de La Haye* 217.

²⁰ Cf Article 48 ARSIWA.

²¹ See Article 31 ARSIWA and commentary.

specific actions, etc. International human rights law (protection of specific rights) or international environmental law (eg curbing of emissions,²² or obligations to grant access to information, justice, or obligations to allow participation in decision-making²³) 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, and so forth),²⁴ 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, and so forth), international criminal law (obligations to criminalise within the domestic legal order certain behaviour defined in international treaties),²⁵ 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.²⁶

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 constraints on State power: executive or legislative action needs to take place within the limits set by the State’s obligations. It is domestic law that in some way enables the ‘reception’ of international law in the domestic legal system (and it does so in virtually all domestic legal systems, even if with significant differences²⁷). Individuals (and legal entities) within the State’s jurisdiction will thus regularly challenge executive action for compliance with the limits imposed on such action (challenges against legislative action are, however, more unusual) without necessarily distinguishing whether these limits have their source in domestic or international law (especially in legal contexts where international law can be relied upon before domestic courts). 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 is mainly asserted rather than proven empirically, as is the increased engagement of domestic

²² For example under the Kyoto Protocol to the United Nations Framework Convention on Climate Change (11 December 1997, entered into force 16 February 2005) 2303 UNTS 1.

²³ For example under the Aarhus Convention (Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (25 June 1998, entered into force 30 October 2002) 2161 UNTS 447).

²⁴ cf E-U Petersman, ‘Multi-Level Judicial Trade Governance Without Justice? On the Role of Domestic Courts in the WTO Legal and Political Settlement System’ (2006) EUI Working Papers Law No2006/44.

²⁵ For example under the United Nations Convention against Corruption (31 October 2003, entered into force 14 December 2005) 2349 UNTS 41 and the United Nations Convention against Organized Crime (15 November 2002, entered into force 29 September 2003) 2225 UNTS 209.

²⁶ See eg the ICJ decisions in *LaGrand* [2001] ICJ Reports 466 and *Avena and other Mexican Nationals* [2004] ICJ Reports 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 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, available at <<http://www.ejiltalk.org>>.

²⁷ See further Part A, section II.a, below.

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.²⁸ While empirical research needs to be undertaken to prove in specific terms this increased engagement, to delineate its scope and impact, as well as to assess the increased significance for international law of domestic court decisions, this is not the mandate of this Study Group.²⁹

15. One final note of caution is necessary, however. Even if there is increased engagement of domestic courts with international law in recent years, this may be more the case in some States than in others. A recent study by a member of this Study Group demonstrates that citations to domestic case law in international law textbooks and in judgments of many international courts and tribunals come overwhelmingly from Western liberal democratic States in general and from a handful of those States in particular.³⁰ Focusing on domestic case law as evidence of the content, or even as a source, of international law may have the effect of rendering the practice of some significant States less visible to the extent that it rarely occurs in their domestic courts, or to the extent that the relevant decisions are rarely reported or not easily accessible (including because of linguistic barriers). It could also result in a disproportionate focus on accessible decisions in the domestic courts of influential, English-speaking, common law States, like the United States and the United Kingdom. A number of points could be made in this respect, drawing parallels to the relative weight to be accorded to practice coming from different States in the process of determining the emergence of customary law, noting the practice of some courts, notably the German and Israeli highest courts, of circulating (partial) translations of important judgments, and so forth. This Final Report is not the place to further discuss these issues, but they should be noted and it should also be highlighted that both the members of the Study Group and the author of the Final Report are acutely aware of such considerations.

II. The Infinite Variety of Engagement

16. The previous section aimed at laying the groundwork which potentially explains—if it does not 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 interna-

²⁸ Benvenisti (n 14) 241–242, argues that the increased engagement of domestic courts with international law ‘is part of a reaction to the forces of globalization, which are placing increasing pressure on the different branches of government to conform to global standards ... Stated differently, most national courts, seeking to maintain the vitality of their national political institutions and to safeguard their one domestic status vis-à-vis the political branches, cannot afford to ignore foreign and international law’; cf Y Shany, ‘National Courts as International Actors: Jurisdictional Implications’ (2008) Hebrew University International Law Research Paper No. 22-08, available at <<http://dx.doi.org/10.2139/ssrn.1292056>>.

²⁹ 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.

³⁰ A Roberts, *Is International Law International?* (forthcoming: OUP, Oxford 2017). References were overwhelmingly made to US and UK case law, followed by French, Canadian, Australian, German and Israeli case law, and to a lesser extent Italian, South African, Dutch, and Belgian case law.

tional 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 potential breach of) international law. These issues are taken up in turn.

a. Variations in the Reception of international law

17. 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 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.

18. This picture is already rather simplified.³¹ 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;³² by contrast, the UK arguably ‘incorporates’ customary law into the common law, or rather treats it as a source of the common law,³³ but requires transformation of treaties before there can be any domestic application.³⁴ The position is similar in Canadian law,³⁵ while a similar position has also been judicially developed in Israel.³⁶ The Greek constitution provides for the ‘incorporation’ of treaties ratified by Greece, which however takes place through the adoption of a formal law to that effect each and every time, while it makes little relevant provision for customary law, although it states in general terms that ‘generally accepted rules of international law’ constitute an ‘inalienable part’ of Greek law.³⁷ The South African Constitution determines that both treaties and custom are directly applicable in the South African legal order, but requires transformation of treaties unless they are self-executing, while custom is considered as automatically incorporated only if it is not in conflict with the Constitution or legislative acts.³⁸ In Germany, general international law is automatically incorporated with precedence over contrary legislation, whereas treaties of a political or legislative nature are incorporated by

³¹ See eg A Paulus, ‘The Emergence of the International Community and the Divide between International and Domestic Law’, in J Nijman and A Nollkaemper (ed), *New Perspectives on the Divide between National and International Law* (OUP, Oxford 2007) 228 – 234 for an argument that the juxtaposition between monism and dualism masks the pluralism of legal orders.

³² The position in Israel is similar: see the *Report on Israel* (2013) [1]–[2].

³³ See in detail for the complex position of customary international law under UK law R O’Keefe, ‘The Doctrine of Incorporation Revisited’ (2008) 79 *British Year Book of International Law* 7–85 and cf the *Report on England* (2015) [35]–[39].

³⁴ See also the *Report on England* (2015) [35]–[39]. See further the *Report on South Africa* (2013) (2)–(3) for the similar position that State.

³⁵ See the *Report on Canada* (2013) 3–4.

³⁶ See the *Report on Israel* (2013) [1]–[2].

³⁷ See Article 28(1) of the Constitution of Greece (2008), available at <<http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>>.

³⁸ See the *Report on South Africa* (2013) (2)–(3).

a law of parliament and share, in principle, their rank.³⁹ Constitutional orders may introduce distinctions even within the same source of international law: the German,⁴⁰ South African and Turkish constitutions distinguish between human rights treaties and other treaties as regards their legal effects in the domestic legal order; the legal position in the Argentinean legal order has nowadays evolved into prioritizing a ‘constitutional bloc’ consisting of the Constitution and human rights obligations, followed by international treaties and finally ordinary law;⁴¹ the Austrian constitution grants a specific treaty (the ECHR) constitutional rank; the Swiss constitution grants quasi supra-constitutional status to *jus cogens* norms.⁴² Notably, the Sri Lankan Constitution subjects all of international law to the Constitution and to ordinary law, but provides that investment treaties are only subject to the Constitution.⁴³

19. Within this great variety, many further variations are possible. These relate to the hierarchical standing of international law, or of particular sources of international law, in the domestic hierarchical pyramid, some of which have been incidentally mentioned in the preceding paragraph. International law (or particular sources, or particular elements within sources, such as 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 or more special 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, and as far as domestic courts are concerned, the reception of international law into the domestic legal order is regulated by domestic law itself, whether more or less stringently.

20. On the other hand, the position of international law on legal hierarchy and relevance is clear, and quite indifferent to any variations in its reception by domestic law. Domestic law (of any importance or hierarchical standing) may never constitute justification for the non-compliance by a State with its international obligations.⁴⁴

³⁹ Cf Articles 25 and 59 of the German Basic Law; and BVerfG, Beschluss des Zweiten Senats vom 15. Dezember 2015 - 2 BvL 1/12 [35]ff, available at <http://www.bverfg.de/e/ls20151215_2bvl000112.html> (partial transl in Press Release No 9/2016 of 12 February 2016, available at <www.bverfg.de>); cf A Paulus, ‘Germany’ in D Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement* (CUP, Cambridge 2009) 217–219.

⁴⁰ Article 1(2) of the German Basic Law provides for a special status of core human rights treaties: see Beschluss des Zweiten Senats vom 15. Dezember 2015 (n 39) [76] with further references.

⁴¹ See generally the *Report on Argentina* (2015).

⁴² 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*. See generally the *Report on Switzerland* (2013).

⁴³ See the *Report on Sri Lanka* (2013) 6.

⁴⁴ See Article 3 ARSIWA and cf Article 27 of the Vienna Convention on the Law of Treaties (23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

b. Variations in the Application of International Law

21. Depending on the relevant domestic constitutional ordering, to which 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. Domestic courts have devised⁴⁵ a wide range of **blunting rules** or **moderating techniques** that moderate the effects of both **monism/incorporation** and **dualism/transformation**. To start with incorporation, there is no guarantee that this will lead to direct application of international law by the domestic court. Domestic courts have devised a variety of avoidance techniques, which allow them to blunt the otherwise sharp edge of constitutional requirements to apply 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 **accord-immunity** (whether to a foreign State under international law or to the forum State under domestic law) may be seen as such a blunting technique, even though of course we have to recognize that respecting immunity itself may be a form of application of international obligations.

22. 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 blunting 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 sometimes 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*⁴⁶ in the EU courts and *Ahmed*⁴⁷ in the UK courts, form one such group; while cases like *Medellin*⁴⁸ in the US Supreme Court form another, to the extent that the latter court refuses to apply the binding decision of an international court. The constitutional acceptance of 'treaty override' by contrary domestic legislation provides another example of the 'reactive turn to domestic law'.⁴⁹ Whether these groups of cases do indeed form separate categories, or belong in the same category, is something that requires further study.⁵⁰ We may be dealing here with a type of constitutional review where fundamental values are invoked against (other) international law rules as part of a process of normative contestation. Such an approach 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 (which from the perspective of the interna-

⁴⁵ Though the position may be taken that the blunting or moderating techniques 'stem' from domestic law and its provision as to the position of international law in the domestic legal system, and thus domestic courts merely apply, rather than devise, these techniques.

⁴⁶ 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-5177; and Joined Cases C-584/10 P, 593/10 P and C-595/10 P *Kadi II* [2013] ECLI:EU:C:2013:518.

⁴⁷ [2010] UKSC 2.

⁴⁸ 552 US 491 (2008).

⁴⁹ BVerfG, Beschluss des Zweiten Senats vom 15. Dezember 2015 (n 39).

⁵⁰ Some views are set out in Part B below.

tional legal order would be a clear breach of international law as indicated in paragraph 20 above).

23. 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 through judicial practice,⁵¹ or even through constitutional entrenchment,⁵² in a significant number of domestic legal orders. 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 seek to 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, as discussed below.

24. Consistent interpretation typically requires at least some ambiguity in domestic law, which needs to be construed, in order to invite the application of international law. However, different domestic courts have taken a variety of positions on the degree of ambiguity required to initiate the interpretative process, some requiring none at all.⁵³ Further, consistent interpretation in some cases refers merely to treaties, or it excludes from application constitutional texts, and so forth. 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.

⁵¹ 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); *F Hoffmann-La Roche Ltd v Empagran SA* 542 US 155, 163 (2004). See further on this C Bradley, *International Law in the US Legal System* (2nd edn, OUP, New York 2015) 15–18. 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; see also 128 BVerfGE 326, 367–372. 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, 377–379. 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, 393–394; as it does in Canada, both with respect to treaty obligations and obligations under general international law: *R v Hape* [2007] 2 SCR 292; 2007 SCC 26 [53]; *BO10 v Canada (Citizenship and Immigration)* 2015 SCC 58 [47]–[48]; cf K Knop, 'Here and There: International Law in Domestic Courts' (1999-2000) 32 New York University Journal of International Law and Policy 501. South African courts also employ the principle of consistent interpretation: *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].

⁵² See the *Report on South Africa* (2013) (3)–(4).

⁵³ See for example the *Report on England* (2015) [27]–[31]; the *Report on South Africa* (2013) (5); and the *Report on Canada* (2013) 20.

25. Domestic courts have also 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.⁵⁴ It effectively construes treaty ratification (among others, possibly) as a promise on which it allows basing some doctrine of promissory 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, this principle may lead to an almost irrebuttable presumption of conformity with international law, though in practice the strength of the presumption again varies.⁵⁵

26. 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.⁵⁶ 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’ in domestic law⁵⁷ and to interpret a presidential authorization to use force.⁵⁸ Another such example is the use of the Alien Tort Claims Act, 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.⁵⁹

27. All of the techniques described in paragraphs 23–26 above (which can also be positioned on a spectrum ranging from more to less rigid techniques) we may still call **blunting techniques**, as we did with the techniques described in paragraphs 21–22 (which we also called ‘avoidance’ techniques). This is because both sets of techniques each blunt the sharp edges of incorporation and transformation respectively.

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

29. An observation is called for with respect to the paradoxical counter-move indicated in paragraph 28 above: it refers precisely to the seemingly paradoxical moderation of the opposing main positions of incorporation and transformation, so that irrespective of the local constitu-

⁵⁴ See for example *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. There have been contradictory decisions in English courts regarding the doctrine of legitimate expectations deriving from the signature and ratification of an unincorporated treaty, see *Report on England* (2015) [33.3].

⁵⁵ See the *Report on England* (2015) [27]ff, [33.3].

⁵⁶ See for example *ibid*, [33.2] citing *McIntosh v HM Advocate* [2003] 1 AC 1078, in which an unincorporated international treaty was used to ‘illuminate’ the object and purpose of the relevant domestic legislation.

⁵⁷ See *Roper v Simmons* 543 US 551 (2005).

⁵⁸ See *Hamdi v Rumsfeld* 542 US 507 (2004). See further Bradley (n 51) 309–311.

⁵⁹ See the litigation under the *Alien Tort Claims Act* 28 USC §1350 (1789); cf Roberts (n 13) 76–77.

tional set-up, blunting or moderating may lead to similar outcomes in differently internationally inclined domestic legal orders. This paradoxical counter-move is revealing, and perhaps points towards blunting or moderating 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. An attempt to discuss such factors is made in Part C, after the engagement of domestic courts with international law has been mapped in Part B.

30. To the operation of these main and moderating techniques 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 the domestic level, and provide for the same substantive regulation (ie, they have the same substance).⁶⁰ One example of such a norm could be the right to an effective remedy for violation of a vested right; or other fundamental human rights⁶¹ which are guaranteed at both the international and most domestic levels.⁶² In that sense ‘consubstantial norms’ could be likened to ‘multi-sourced equivalent norms’, which have been argued to exist at the international level.⁶³ The commitment of domestic constitutions to international law and human rights⁶⁴ as well as the references by domestic courts to their domestic and international counterparts⁶⁵ can be relevant to the concept of consubstantial norms. 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 to both align with and to contest international rules—as will be demonstrated in Part B, below. Before turning to this point, however, the variations in the outcome of domestic court engagement with international law must be briefly mentioned.

⁶⁰ The term ‘consubstantial’ is originally a theological term which seeks to describe the Holy Trinity as being ‘of the same substance’, ie ‘consubstantial’ (ὁμοούσιος). See further Tzanakopoulos, ‘Domestic Courts in International Law’, 142–4. 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 may not strike a *different balance* from the one struck by the international norm. International law thus serves as the minimum standard of protection.

⁶¹ 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 Multi-level 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.

⁶² Indeed there is a feedback loop in the protection of fundamental human rights, with the American and French declarations of the eighteenth century influencing both the Universal Declaration of Human Rights and the first international treaties for the protection of human rights. These international documents then influenced the adoption of human rights protections in constitutions of States emerging from colonial rule or dictatorships. See *ibid*, and for examples see the *Report on Anglophone Africa* (2015) 10: many Anglophone African constitutions contain human rights protections influenced by international human rights instruments. See also the *Report on Sri Lanka* (2013) 2–3.

⁶³ See generally for the concept T Broude and Y Shany, ‘The International Law and Policy of Multi-Sourced Equivalent Norms’ in *idem* (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart, Oxford 2011) 1–15.

⁶⁴ Cf Article 6(3) TEU; Article 1(2) German Basic Law; Preamble and Article 1(a) South African Constitution.

⁶⁵ Cf PM Huber and A Paulus, ‘Cooperation of Constitutional Courts in Europe’ in M Andenas and D Fairgrieve (eds), *Courts and Comparative Law* (OUP, Oxford 2015) 281.

c. Variations in Outcome

31. A crucial aspect of the engagement of domestic courts with international law is whether, in the final analysis, the domestic court's '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;⁶⁶ 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 to the modification of an existing one. In treaty law, a 'violation' could evolve into a 'subsequent practice' which establishes the agreement of the parties regarding the interpretation of the treaty (in the sense of Article 31(3)(b) VCLT respectively) or causes the treaty to fall into desuetude or obsolescence.⁶⁷ 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 its development, or 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, and may even have implications for their hierarchical standing.

32. There are examples of instances that can be cited as substantiating the feedback loop referred to in paragraph 31 above: 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.⁶⁸ 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).⁶⁹ 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.⁷⁰

33. It thus appears that in a number of cases 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 Justice (but also the European Court of Human Rights, or the WTO dispute settlement organs, or an ad hoc or ICSID arbitral tribunal, among other possibilities).

⁶⁶ On this see further paragraphs 50 and 73 below.

⁶⁷ MG Kohen, 'Desuetude and Obsolescence of Treaties' in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP, Oxford 2011) 350.

⁶⁸ *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* [2012] ICJ Reports 99.

⁶⁹ *Marine Env'l Services MC and anor v 1992 IOPC Fund* (6 July 2006) ILDC 856 (GR 2006); cf Record of Decisions of the October 2012 Sessions of the IOPC Funds' Governing Bodies Doc IOPC/OCT12/11/1 (2012) [4.6.3]–[4.6.6]; see further Record of Decisions of the October 2015 Sessions of the IOPC Funds' Governing Bodies Doc IOPC/OCT15/11/WP.1 (2015) [2.1.5].

⁷⁰ 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) [146]–[147].

PART B: MAPPING ENGAGEMENT

34. 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 Part A above. The most crucial part of the Study Group's work was to map the practices and methods of engagement and their potential outcomes. The main part, Part B, of this Final Report is concerned with mapping the relevant variety in domestic court engagement with international law, rather than seeking to explain what might be made of that variety. Part C then proceeds to identify the possible grounds behind domestic courts opting for one or the other strategy of engagement described in this part. But before moving on the mapping exercise, some preliminary comments are in order.

35. In the first phase of the work, 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' deficits 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 emerging from a vague law-making process, such as that of customary international law, or decreed by non-elected international organs, such as the secondary law of international organizations; (b) **procedural legitimacy concerns**—such as those created by norms produced in some manner which is procedurally incompatible with national traditions or otherwise problematic; and (c) **outcome/content legitimacy concerns**—such as those created by the potential or perceived conflict of international norms with deeply rooted local constitutional sensitivities.

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 interpretation and application, and thus the Study Group sought to focus on instances of domestic court resistance to, contestation of, but also development of international law. However, it became clear, in view also of the work submitted to the Study Group in the course of its operation by its members and by other scholars, that an exclusive focus on problematic norms 'at the edge' might present a skewed picture of the engagement of domestic courts with international law, overemphasizing resistance and contestation as a form of engagement. As such, the following three sections of this Part B generally map the engagement of domestic courts with all possible norms of international law, viewed statically (section I), dynamically (section II), and finally from the perspective of monitoring (section III). The concept of norms 'at the edge', however, continues to play a role in this analysis, as indeed it does in the context of identifying reasons for particular strategies or postures of engagement discussed in Part C.

I. Engagement Viewed Statically: Postures or Strategies

37. Whatever the contents of any norm of international law may be, there are broadly three **ideal types** of **strategy** or **posture**⁷¹ 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); and the **posture** or **strategy of contestation** (where domestic law is ostensibly used as a method to contest the generally accepted content of existing international law, such as in cases like *Kadi* and possibly *Medellín*).

38. The three ideal types described above and elaborated on further below match Hirschmann's three categories of **exit** (avoidance), **voice** (contestation), **loyalty** (alignment).⁷² However, further differentiation is required within each ideal type, and this is the purpose of the subsections that follow.

a. Avoidance

39. **Avoidance** is the general posture or strategy of a domestic court avoiding the application of international law in circumstances where the latter may be applicable. Such avoidance can be **evasive** or **affirmative**. It should be noted at the outset that the legislature or executive may also adopt a practice of avoidance by delaying ratification of treaties which would require changes in domestic law, or by allowing ratification/ratifying only with broad reservations which aim to shield domestic law from change.⁷³ In any event, the term avoidance should not be considered as being necessarily negative. The court may be forced by its own domestic law to avoid or refuse the application of international law, as described below. And delays in ratification or the making of reservations may be designed to ensure full compliance with all applicable international obligations.

40. **Evasive avoidance** is where international law is not applied without any relevant argument being made and without any discussion by the court. The court simply remains silent where the application of international law is plainly called for (and may even have been pleaded by the parties),⁷⁴ in a sort of 'willful blindness'.⁷⁵ An instance where this might be the case is where the legislature has passed a relevant law which may not fully reflect or may diverge from applicable international law. The domestic court may be bound to apply the relevant domestic

⁷¹ The difference between 'strategy' and 'posture' is that the former term conveys a sense of genuineness in the approach, whatever the underlying purpose, while the latter term may convey a more rhetorical, rather than genuine, position. The two terms however are used interchangeably in this Final Report.

⁷² See generally AO Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press 1970).

⁷³ See the *Report on Switzerland* (2013) 6.

⁷⁴ For examples see the *Report on Israel* (2013) [31]–[32]; the *Report on Belgium* (2014) 9–10; the *Report on Canada* (2013) 19; the *Report on International Human Rights Law* (2015) 10; and the *Onondaga* litigation, reported in ILA Committee on the Implementation of the Rights of Indigenous Peoples, *Johannesburg Conference Draft Report* (2016) 18–19, available at <<http://www.ila-hq.org/download.cfm/docid/22EA2347-3AC2-41A0-849732487DA9A7C4>>.

⁷⁵ For the expression see the *Report on Canada* (2013) 19.

law and may thus choose to silently ignore relevant international norms. An example is where States have passed immunity legislation, such as for example the UK, the US, Argentina, Japan, India, and so forth, with the expected result of prompting reliance on the domestic rather than the relevant international norms.⁷⁶ A countervailing trend which has been noted in some jurisdictions is for the executive to (be allowed to) intervene in order to prompt the domestic court to comply with international obligations on immunity.⁷⁷

41. Avoidance can also be **affirmative** (or **professed**). This is the case when the court considers the application of international law but explicitly rejects it, as this is, in the court's view, the appropriate position under domestic law. Some of the blunting or moderating mechanisms described above, such as non-justiciability or non-self-execution, may well lead to affirmative avoidance.⁷⁸ For example, the finding by a domestic court that internationally binding norms protecting social rights are programmatic and non-executable norms will lead it to determine that it is not up to it to apply these norms and to ensure compliance with them.⁷⁹ Similarly, the adoption of a dualist position with respect to treaties will allow (or impose on) courts to disregard international law, as compliance with it is seen as the responsibility of other State organs.⁸⁰ This will essentially leave it to the executive to comply with these norms uncontrolled by the domestic court, or to the legislature to produce consubstantial obligations which will allow the domestic court to weigh in. This can also be the outcome of the application of the principle of consistent interpretation, another moderating or blunting mechanism, when the presumption that the principle establishes is relatively weak and can be readily resisted by an argument that the law being interpreted is not ambiguous (or, for common law jurisdictions dealing with customary international law, that the common law does not require development).⁸¹

42. Affirmative is also the avoidance that ostensibly relies on international law to argue, though clearly wrongly, that on its own terms the latter is not applicable. A historical example of such affirmative avoidance is apartheid South Africa, where the application of customary law was rejected through the denial of its customary status: domestic courts would require 'universal' acceptance for a rule to be considered customary international law.⁸² By setting the bar so high, it was virtually guaranteed that almost no norm would be granted customary international law status by a South African court.

b. Alignment

43. **Alignment** can come in a number of variations: **simple** or **'fair weather'** alignment; **overriding** alignment; **consubstantial** alignment; and **'hyper'**-alignment (or alignment 'on

⁷⁶ See the *Report on Belgium* (2014) 4–5; and the *Report on India* (2013) 23 [53] and 25ff [57]ff.

⁷⁷ See *ibid* and cf *Tachiona v US* 386 F.3d 2005 (2d Cir. 2004).

⁷⁸ See the *Report on South Africa* (2013) (14); the *Report on Israel* (2013) [26]–[30]; the *Report on Canada* (2013) 16ff; and the *Report on International Humanitarian Law* (2013) 3–5. See further ILA Committee on the Implementation of the Rights of Indigenous Peoples, *Johannesburg Conference Draft Report* (2016) 6, referring to instances where lawsuits by indigenous peoples in the domestic courts of Bolivia were found inadmissible even despite the fact that Bolivia has transformed relevant international law into domestic law.

⁷⁹ See the *Report on Switzerland* (2013) 7.

⁸⁰ See the *Report on Argentina* (2015) 2–3; the *Report on Anglophone Africa* (2015) 8; and the *Report on India* (2013) 5–6 [11]–[12] and 7ff [16]ff.

⁸¹ See the *Report on England* (2015) [27]; and the *Report on Canada* (2013) 20.

⁸² See the *Report on South Africa* (2013) (11)–(13).

steroids'). Alignment, and in particular hyper-alignment is a strategy or posture particularly favoured by newer or smaller States that may wish to not appear parochial.⁸³ It is instructive in this connection that the US in the eighteenth century could be considered as 'bending over backwards' to (be seen as) align(ing) with international law. But it is by no means exclusively so, and much will depend on the particular variation of alignment in each case. The variations outlined above are now examined in turn.

44. **Fair weather alignment** is basically alignment with international law in run-of-the-mill, politically unproblematic situations. It is difficult to report on such alignment as examples abound in day-to-day life but, having no 'special' characteristics, they do not necessarily constitute 'newsworthy' instances. These may include instances where international law is cited explicitly in support of relevant domestic law, as well as other cases where the perceived content of the international and domestic law converge. Fair weather alignment becomes meaningful only when seen against the background of other types of alignment, and most crucially against the light of avoidance or contestation in politically charged circumstances. This is much like an omission, which becomes evident and meaningful only against the light of an obligation to act.⁸⁴ By contrast, the need to engage with politically charged rules, such as for example the rules of international humanitarian law in the context of an armed conflict in which the State whose courts are called upon to apply it is engaged, may well lead to (affirmative) avoidance or contestation.⁸⁵

45. **Overriding alignment** consists in the application of international law by the domestic court over conflicting domestic law. Determining the existence of normative conflict is in itself a very difficult matter, as 'apparent' conflicts may be resolved through interpretation, leading some to only consider irresolvable conflicts as 'genuine'.⁸⁶ However, interpretation being an art rather than a science, it is difficult to draw a bright line between 'apparent' and 'genuine' conflicts. A rather large area could be said to be gray between the two extremes.

46. Consistent interpretation can be seen as a technique for producing consubstantial alignment, when a domestic court interprets domestic law in conformity with international obligations of the State (generally if a statute or domestic law is at least somewhat ambiguous). But in some instances a very strong presumption of consistency of domestic law with international obligations, even in the face of little or no ambiguity in domestic law, may produce overriding alignment. This is for example the case in Belgium, where domestic courts have resorted in consistent interpretation in circumstances where the domestic norm being interpreted did not at all seem ambiguous,⁸⁷ as well as in South American States where international human rights law has been relied upon even to change a given Constitution (or its up to that point predominant interpretation).⁸⁸ It is also the case in South Africa where the Constitutional Court has

⁸³ See the *Report on Albania* (2013) 1. See further Part C below.

⁸⁴ Cf V Lowe, *International Law* (OUP, Oxford 2007) 41, 92, on *opinio juris* shedding light on the practice of 'not doing something' in the context of customary international law formation.

⁸⁵ See the *Report on International Humanitarian Law* (2013) 2–9. See further paragraphs 41 above and 58 below respectively.

⁸⁶ See generally E Roucouas, 'Engagements parallèles et contradictoires' (1987) 206 *Recueil des cours de l'Académie de droit international de La Haye* 9; and M Milanovic, 'Norm Conflict in International Law: Wither Human Rights?' (2009) 20 *Duke Journal of Comparative and International Law* 69.

⁸⁷ See the *Report on Belgium* (2014) 4–5.

⁸⁸ See the *Report on South America* (2015) 18ff.

taken the position that the only reasonable interpretation of domestic legislation is an interpretation that is consistent with international law.⁸⁹

47. Further, it can be argued that allowing challenge of domestic law or domestic normative acts on the basis of international law despite the availability of blunting rules which could lead to avoidance (and so would not avoid the challenge to domestic law) also produces overriding alignment. This is again the case in Belgium, where non-self-executing international law norms have been relied on in order to seek annulment of domestic normative acts, to seek compensation, and even to challenge criminal charges.⁹⁰ Similar examples can be found in the area of international investment law, where certain domestic courts have applied the provisions of an international investment agreement in order to reverse conversion of contracts from one currency to another (though there is practice on the part of domestic courts for either evasively avoiding these issues, or affirmatively avoiding them by reference to blunting techniques).⁹¹

48. Both consistent interpretation and the non-invocation of blunting techniques leading to avoidance have also shaped the position in Argentina, which may be seen as having transitioned from a period of affirmative avoidance to one of overriding alignment.⁹²

49. **Consubstantial alignment** is the application by the domestic court of domestic norms that are consubstantial with the international norms. As already mentioned above, the strategy or posture of consubstantial alignment can be independently adopted by a domestic court,⁹³ but it can also be forced upon it by the executive or legislature producing consubstantial obligations (ie ratifying a treaty only once they have changed domestic law to reflect the relevant international obligations, producing consubstantiality, in particular leading to *preemptive* consubstantial alignment).⁹⁴

50. The question that emerges is *when* the action of the legislature or executive in producing domestic norms leads to (evasive) avoidance (see paragraph 40 above) rather than consubstantial alignment. One could easily argue that the passing of domestic law is a method for applying international law in the domestic legal order rather than for avoiding it (or for contesting its content). No easy answer can be given to this question, ie the distinction between evasive avoidance and consubstantial alignment is not easy to draw in these circumstances. Much will depend on what we consider the *content* of the specific international norm to be, and on whether we consider that the relevant domestic norm is consistent with that content. This highlights the potential for all categories to collapse into another or to alternate depending on context and perhaps also on the particular reader's viewpoint. It is however no reason not to undertake the

⁸⁹ See the *Report on South Africa* (2013) (5)–(6).

⁹⁰ See the *Report on Belgium* (2014) 6ff.

⁹¹ See the *Report on International Investment Law* (2013) [Kjos].

⁹² See generally the *Report on Argentina* (2015), esp 5ff.

⁹³ See the *Report on India* (2013) 15–17 [34]–[37].

⁹⁴ See the *Report on Switzerland* (2013) 6 and consider the practice of Eastern European States in bringing their domestic law in conformity with the ECHR prior to joining the Council of Europe and having the obligation to do so. See also the practice of the UK where some statutes do not directly incorporate a treaty but are meant to give effect in whole or in part to the provisions of an unincorporated treaty. (Note that here the term 'incorporation' is meant to signify transformation into domestic law in the terminology used in Part A of this Report.) These statutes are meant to be interpreted with reference to the unincorporated treaty, producing consubstantial alignment. See the *Report on England* (2015) [21]–[23] and cf the *Report on Canada* (2013) where a similar approach of both full transformation and consubstantial transformation is used.

mapping exercise, and to argue whether a particular domestic court engagement falls within one or the other category. Any such argument is essentially an argument as to the content of the relevant norms or (which amounts to the same thing) their interpretation, and this will always be an issue on which views will occasionally diverge, sometimes widely.⁹⁵

51. Consubstantial alignment primarily takes place when the domestic court applies domestic law in a way that is aligned with what is required of the relevant State under relevant international law, even without any reference to such international law. The domestic law applied is consubstantial with the State's international obligations, and so the outcome is one of alignment with these international obligations. It should be noted that international law does not require that it be either incorporated or transformed into domestic law, and generally makes no provision on the way in which States will elect to comply. What is required is simply that compliance ensues, by whatever means. This is evident, for example, in the way the European Court of Human Rights has treated exhaustion of local remedies: the Court does not require that specific ECHR rights be explicitly pleaded before domestic courts. It only requires that the *substance* of these rights has been pleaded, even if solely under domestic law.⁹⁶

52. However, because of this peculiar characteristic of consubstantial alignment, ie that no explicit reference to international law is required for consubstantial alignment to take place, showcasing examples may be difficult at times. Much will depend on the analysis of the specific case, of its result, and of the requirements of international law, by each scholar or commentator.⁹⁷ An example, however, could be the *Tsilhqot'in* case in the Supreme Court of Canada: while the domestic court did not refer to international law, its analysis of the concept of indigenous rights over land was seen as being substantively in line with relevant international law.⁹⁸ Another example could be the approach of some Russian courts to indigenous peoples' rights.⁹⁹ Similarly, the US Supreme Court's approach in *Roper v Simmons* on the application of the death penalty to minors could be seen in this light.¹⁰⁰ Further examples can be seen essentially in many cases in which an international court, say the ECtHR, has reviewed the action of domestic courts and has found no violation of an international obligation, say the ECHR, even if these courts did not explicitly refer to international law in the context of the relevant case. In many cases the domestic law that was applied will be considered consubstantial with the international obligations of the State under the ECHR, or the domestic court will have interpreted that law in consubstantial alignment with the ECHR, so as for alignment to ensue.

53. The principle or technique of consistent interpretation may also produce consubstantiality and thus consubstantial alignment. This will be the case where the domestic courts see no reason to depart from the plain meaning of legislation if it is consistent with international law,

⁹⁵ See further paragraphs 31 above and 73 below.

⁹⁶ See *Castells v Spain* (App No 11798/85) Judgment of 23 April 1992 [32]; *Ahmet Sadik v Greece* (App No 18877/91) Judgment 15 November 1996 [33]; *Azinas v Cyprus* (App No 56679/00) Judgment of 28 April 2004 (Grand Chamber) [40]–[41]; *Gäfgen v Germany* (App No 22978/05) Judgment of 1 June 2010 (Grand Chamber) [142]–[146].

⁹⁷ See again paragraphs 31 and 50 above, and 73 below.

⁹⁸ See ILA Committee on the Implementation of the Rights of Indigenous Peoples, *Johannesburg Conference Draft Report* (2016) 17–18.

⁹⁹ See *ibid*, 26.

¹⁰⁰ See *Roper v Simmons* (n 57).

or where they engage in broad interpretation of domestic legislation by relying on relevant (not directly applicable or unincorporated) international law.¹⁰¹

54. Domestic courts have on occasion confirmed the ‘consubstantiality’ of domestic and international norms, in particular in the area of fundamental human rights: examples include the Swiss Federal Tribunal in *Nada*,¹⁰² as well as the Canadian Federal Court in *Abdelrazik*,¹⁰³ and the German Federal Constitutional Court in the ‘student fees’ and ‘forced treatment’ cases.¹⁰⁴ In other cases, domestic courts will often give preference to ‘consubstantial’ domestic law over applicable international law, but will clearly indicate that applicable international norms will be taken into consideration in the construction of the consubstantial domestic norms.¹⁰⁵ This is likely to produce consubstantial alignment; but when it deviates from or challenges the generally accepted content of an international norm it will constitute affirmative or consubstantial contestation, on which see further in the next subsection.

55. **Hyper-alignment** is a particular category of alignment where the domestic court may go beyond what international law actually requires (even though relying explicitly on international law), finding international obligations where none actually exist or are at least debatable.¹⁰⁶ An example of such alignment ‘on steroids’ can be seen in the case of Albania, where the domestic criminal law did not provide for a reopening of proceedings in the case that a violation of ECHR has been found by the ECtHR. This occasioned a split between the Albanian Constitutional Court and the Albanian Supreme Court (of Cassation), with the former ordering the latter to ‘legislate’ into existence such grounds for reopening proceedings, going beyond what was at the time the accepted interpretation of the ECHR.¹⁰⁷ In similar circumstances the Polish courts adopted the position that the lack of such grounds for reopening proceedings was regrettable, but also that it was not up to the domestic court to create such grounds.¹⁰⁸ Albanian courts have also relied on treaties not binding on Albania or on soft law in order to disregard

¹⁰¹ See for example the *Report on Sri Lanka* (2013) 6, 8; the *Report on Canada* (2013) 11–15; and the *Report on England* (2015) [24]ff with respect to fully unincorporated treaties. See also ILA Committee on the Implementation of the Rights of Indigenous Peoples, *Johannesburg Conference Draft Report* (2016) 7–8, for examples of Chilean courts ‘completing’ the understanding of indigenous peoples’ rights under domestic law by reference to international treaties, to some of which Chile had not even become a party; see further at 11–12 for the similar position adopted by the Supreme Court of Belize.

¹⁰² *Youssef Nada v State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, Administrative Appeal Judgment, Case No 1A 45/2007, Switzerland, Federal Tribunal (14 November 2007) 133 BGE II 450; ILDC 461 (CH 2007) [6.2].

¹⁰³ *Abdelrazik v Canada (Minister of Foreign Affairs)* [2010] 1 FCR 267; 2009 FC 580 [50]–[52].

¹⁰⁴ 128 BVerfGE 306 – Forced Treatment I; 134 BVerfGE 1, 34 [16] – Student Fees.

¹⁰⁵ See the *Report on Belgium* (2014) 6; see also the decision of the German Federal Constitutional Court on remuneration for translators, 134 BVerfGE 229 [88]; see further the discussion of international human rights law being used as a guide for the interpretation of Canadian law in ILA Committee on International Human Rights Law, *Johannesburg Conference Draft Report* (2016) 17–18, available at <<http://www.ila-hq.org/download.cfm?docid/0375EBFB-FC78-4B52-8A9930EF64098049>>. Cf the practice of EU courts of relying on both the ECHR and the ICCPR (and relevant jurisprudence thereunder) in analyzing fundamental rights under primary EU law, as for example in *Kadi II*: Case T-85/09 *Kadi II* [2010] ECR II-5177 [176]–[177].

¹⁰⁶ See the *Report on Albania* (2013) 1; and the *Report on India* (2013) 18ff [41]ff.

¹⁰⁷ See the *Report on Albania* (2013) 4.

¹⁰⁸ *Ibid.*

domestic law in other instances of hyper-alignment,¹⁰⁹ while the Kosovo courts have also taken similar positions.¹¹⁰ Sri Lankan courts also refer to regional instruments that are not binding on Sri Lanka, such as the ECHR.¹¹¹ Sri Lankan courts also can be considered as engaging in hyper-alignment in those cases where they have determined that soft environmental principles establish binding obligations on governmental authorities and become part of the common law.¹¹² Chilean courts and the Supreme Court of Belize have relied on international instruments not binding on the relevant States in the construction of indigenous peoples' rights under domestic law.¹¹³ Other relevant examples of hyper-alignment are provided by African courts,¹¹⁴ in particular Kenyan courts since the adoption of the 2010 Constitution.

56. One final such instance, which goes clearly beyond even consubstantial alignment to alignment on steroids is provided by Albanian courts in the context of the question whether the Rome Statute of the International Criminal Court is compatible with the Albanian Constitution. In responding to the question, the Albanian courts not only found the Rome Statute to be so compatible, and protecting human rights as the Albanian Constitution does, but went so far as to consider the ICC as the highest criminal court in the *Albanian* legal order.¹¹⁵

c. Contestation

57. Contestation also comes in a fair number of variations: **affirmative**; **negatory**; and **consubstantial**. Notably, contestation can refer to applicability or to content (interpretation): as such, affirmative contestation refers clearly to content; negatory contestation refers clearly to applicability (but this may be so due to the perceived content of the norm); and consubstantial contestation requires going beyond the posture of the court to determine whether what may seem as negatory contestation is in reality partial consubstantial alignment, using the contestation of the rule as a means for affecting its content. These are dealt with in turn below.

58. **Affirmative contestation** consists primarily in the domestic court accepting the validity or applicability of the international law norm but giving it a meaning different from that which is generally accepted, indicating thus that it wishes to change the content of the norm or that it perceives it as different from what is generally accepted. An example of such practice could be that of Israeli and Indian courts formally accepting the applicability of international law in a number of instances, but effectively rejecting its full application by diverging from the perceived as generally accepted meaning.¹¹⁶ This may well be the result of the court explicitly or implicitly deferring to the position of the executive on the matter (of the interpretation of the international rule).¹¹⁷ A special type of such affirmative contestation can appear when a domes-

¹⁰⁹ See G Zyberi and S Sali, 'The Place and Application of International Law in the Albanian Legal System' in S Rodin and T Perišin (eds), *Judicial Application of International Law in Southeast Europe* (Springer, Berlin 2015) 86, 99–102.

¹¹⁰ See the *Report on Kosovo* (2015) 14–15.

¹¹¹ See the *Report on Sri Lanka* (2013) 6.

¹¹² *Ibid.*

¹¹³ See n 101 above.

¹¹⁴ See the *Report on Anglophone Africa* (2015) 8.

¹¹⁵ See the *Report on Albania* (2013) 10.

¹¹⁶ See the *Report on International Humanitarian Law* (2013) 2–4; the *Report on Israel* (2013) [21]ff; and the *Report on India* (2013) 26–27 [58]–[60].

¹¹⁷ See the *Report on International Humanitarian Law* (2013) 2–4.

tic court diverges from the interpretation of international law given by an international court in a judgment, even when that is binding on the State, as sometimes happens in UK¹¹⁸ and US practice.¹¹⁹ Finally, attempts at consistent or harmonious interpretation may result in affirmative contestation as described here, when the court can be seen as diverging from the generally accepted content of an international norm in order to avoid conflict with a domestic norm.¹²⁰ This could be seen as ‘reverse’ consistent interpretation in that domestic courts tend to interpret international law in a manner consistent with the provisions of domestic law (and even sometimes policy) rather than the other way around.

59. Another instance of affirmative contestation could be the one where a domestic court contests the content of an international rule by relying on another international rule. This is the case for example in the practice of Belgian courts that challenges the content of the rules of immunity of international organisations in cases where their application would result in breach of the international obligation to respect the right to a fair trial and / or to an effective remedy.¹²¹ Similar (though far more isolated) examples can be found in the practice of UK courts,¹²² which may have been influenced by the practice of the Belgian courts. The decision of South African courts to find a decision of the Tribunal of the Southern African Development Community directly applicable domestically, and to ignore the immunity of Zimbabwe in the process,¹²³ is also a potential example of affirmative contestation pitting one international rule against another, as are the South African cases regarding the arrest of Bashir on the basis of an arrest warrant issued by the International Criminal Court.¹²⁴ The debate between Human Rights Monitoring Bodies, such as the HRC or the CAT as to the proper interpretation of international human rights norms (and their relationship to rules of immunity) can also be seen in the light of affirmative contestation.¹²⁵ A rare example of affirmative contestation of this sort could be the decision of the Albanian Constitutional Court to review an international agreement for the delimitation of maritime zones between Albania and Greece not only against the Albanian Constitution (which would properly come under the preceding paragraph), but also against the general international law of the sea.¹²⁶

60. Finally, domestic courts called upon to recognize and enforce foreign arbitral awards may engage in such types of contestation when reviewing international law application in the award, in accordance with rules of international law such as those under the 1958 New York Convention.¹²⁷ Notably, when review takes place not on the basis of the New York Convention

¹¹⁸ See *R v Lyons* [2003] 1 AC 976 [27] (Lord Hofmann) and see further the *Report on England* (2015) [17].

¹¹⁹ See *Medellín v Texas* 552 US 491 (2008).

¹²⁰ What Judge Nussberger has called ‘fake harmonious interpretation’ in her dissent in *Al-Dulimi v Switzerland* (App No 5809/08) (ECtHR Grand Chamber 2016).

¹²¹ See the *Report on Belgium* (2014) 9.

¹²² See *Entico Corp Ltd v United Nations Educational Scientific and Cultural Association (UNESCO)* [2008] 531 EWHC (Comm).

¹²³ See the *Report on South Africa* (2013) (10)–(11). Cf the *Report on Anglophone Africa* (2015) 10, for the avoidance of enforcement of the same decision by the courts of Zimbabwe, which relied on relevant constitutional law.

¹²⁴ *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Ors* (27740/2015) [2015] ZAGPPHC 402 (High Court) (24 June 2015); and *Minister of Justice and Constitutional Development and Ors v Southern African Litigation Centre and Ors* (867/15) [2016] ZASCA 17 (Supreme Court of Appeal) (15 March 2016).

¹²⁵ See the *Report on International Human Rights Law* (2015) 9.

¹²⁶ See the *Report on Albania* (2013) 10.

¹²⁷ See the *Report on International Investment Law [Kulick]* (2015) 6–7; for an example see the decision of The Hague District Court in the *Yukos* case, where as the court of the seat of the arbitration it quashed a US\$ 50bn arbitral

but on the basis of domestic law which reflects, for example, the relevant UNCITRAL Model Law (which in turn reflects the New York Convention to a large extent), the type of contestation produced is consubstantial contestation,¹²⁸ on which see further below.

61. **Negatory contestation** consists in the denial of the validity or applicability of an international law norm, perhaps due to its (perceived) content. The principle of consistent interpretation may lead to negatory contestation of international law. As explained above, the strength of the interpretative presumption that the legislature did not mean to violate international law in making domestic law varies. For example in Switzerland, while consistent interpretation is used successfully in order to achieve alignment, occasionally it may be hard to apply in the context of federal acts (whether stemming from the legislature or the people through referenda) which clearly meant to disregard or violate applicable international obligations of the State.¹²⁹ In particular, if the legislator was aware of the conflict between international law and a proposed domestic law, and chose to legislate in breach, consistent interpretation will not be able to produce alignment, but the court will have to adopt a position of negatory contestation.¹³⁰ The position is similar in the UK, as well as other States.¹³¹

62. Further – and clearer – examples of negatory contestation can be seen in the practice of domestic courts ignoring clearly applicable international law norms, perhaps due to the fact that they find their application objectionable in the circumstances. An example is the *Yahoo* case in Belgian courts, where the bilateral US-Belgium treaty on mutual assistance in criminal matters is systematically ignored, despite being clearly applicable.¹³² An even clearer example can be seen in the area of international investment law where the application of an international investment agreement would result in the breach of state aid rules also applicable in the host state under EU law (which in this connection can be seen as domestic law).¹³³

63. **Consubstantial contestation:** What may look at first as negatory contestation may in reality involve partial consubstantial alignment with one rule of international law, thereby seeking to affect the content of another rule of international law, namely the rule whose application or content is contested. An example of such consubstantial contestation is provided in the reactions of some domestic courts and the EU courts to targeted anti-terrorist sanctions imposed by the UN Security Council under Chapter VII of the UN Charter. These sanctions obligate UN member States to, among others, freeze the assets and ban the travel of individuals and legal entities designated by the Security Council through the relevant Sanctions Committee.¹³⁴ How-

award for lack of jurisdiction: *The Russian Federation v Veteran Petroleum Ltd* (Case No C/09/477160 / HA ZA 15-1); *The Russian Federation v Yukos Universal Ltd* (Case No C/09/477162 / HA ZA 15-2); and *The Russian Federation v Hulley Enterprises Ltd* (Case No C/09/481619 / HA ZA 15-112), Hague District Court, Judgment of 20 April 2016, available at < <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2016:4230>>.

¹²⁸ Cf the *Report on India* (2013) 14–15 [33].

¹²⁹ See the *Report on Switzerland* (2013) 11ff.

¹³⁰ *Ibid.*

¹³¹ But see *Report on Canada* (2013) 11, noting the Supreme Court of Canada's requirement in *R v Hape* (n 51) [53] of 'unequivocal legislative intent to default on an international obligation' to support an argument that the presumption of conformity is rebutted.

¹³² See the *Report on Belgium* (2014) 10.

¹³³ See *Ioan Micula and ors v Romania*, ICSID Case No ARB/05/20, Award of 11 December 2013 and the *Report on International Investment Law [Kjos]* (2013) 12.

¹³⁴ See for example the regime imposed by Security Council Resolution 1267 (1999) and kept continuously in force ever since, with most significant updates coming in Security Council Resolutions 1333 (2000); 1730 (2006);

ever, there was at first, and for some significant period of time, no way for those subjected to the sanctions to challenge their designation. Attempts to challenge the sanctions in domestic courts were normally bound to fail for lack of jurisdiction of domestic courts over the UN, or because of UN immunity, and so forth. At some point, nonetheless, domestic courts started considering the challenges, directed as they were against the domestic acts implementing the sanctions rather than directly against the UN act. In cases like *Kadi* in the Court of Justice of the European Union¹³⁵ (as well as *Kadi II*)¹³⁶ and *Ahmed* in the UK Supreme Court,¹³⁷ these courts reviewed the impugned domestic acts for compliance with the courts' domestic law (EU primary law and UK law respectively), and annulled them for violating fundamental human rights guaranteed under that law. This effectively forced the relevant States into an impossible situation: deprived of the domestic legal basis for implementing the UN measures, they had to either disregard their own courts or disobey the Security Council. From the perspective of international law this is clearly a problematic result: domestic law cannot serve to justify the breach of an international obligation.¹³⁸ However, the domestic law relied on in these cases, the protection of the fundamental human right to a fair trial and to an effective remedy, also constitutes international law. The contestation mounted by the domestic courts thus can be seen as consubstantial contestation: contesting the content of one rule of international law (the obligation imposed by the Security Council) because of the application, even if indirect, of the substance of another rule of international law (the right to a fair trial and to an effective remedy).¹³⁹

64. A similar analysis can be made of the decision of the Italian Constitutional Court that found the ICJ Judgment in *Jurisdictional Immunities of the State* contrary to the Italian Constitution.¹⁴⁰ It is beyond question that the Italian Constitutional Court's decision constitutes a challenge to the ICJ's determination of the content of the international law of immunity on the basis of domestic constitutional law.¹⁴¹ The contestation was founded, however, on the substance of the universally protected right of access to a court, even if by reference to its protection under the Italian Constitution. Essentially the Italian court can be seen as attempting to reopen the debate regarding the relationship between the international rule of sovereign immunity and internationally protected human rights, offering an alternative reading based on consubstantial domestic law. By contrast, the decision of the US Supreme Court in *Medellín* cannot be likened to the examples above, and does not constitute consubstantial contestation, based as it

1904 (2009); 1988 (2011) and 1989 (2011), the latter two splitting the regime up for persons or entities associated with the Taliban and Al-Qaeda respectively; and 2252 (2015) extending the 1267/1989 regime to persons or entities associated with ISIS (or ISIL, or IS, or Da'esh).

¹³⁵ Joined Cases C-402/05 P and C-415/05 P [2008] ECR I-6351.

¹³⁶ Case T-85/09 *Kadi II* [2010] ECR II-5177; Joined Cases C-584/10 P, 593/10 P and C-595/10 P [2013] ECLI:EU:C:2013:518.

¹³⁷ [2010] UKSC 2.

¹³⁸ See paragraph 20 above.

¹³⁹ See generally 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, for the argument that in relying on the right to a fair trial 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.

¹⁴⁰ See Decision 238/2014 of the Italian Constitutional Court, available at <<http://www.diritticomparati.it/2014/10/sentenza-n-238-anno-2014-repubblica-italiana-in-nome-del-popolo-italiano-la-corte-constituzionale-composta-dai-signori.html>> [in Italian].

¹⁴¹ See M Lando, 'Intimations of Unconstitutionality: The Supremacy of International Law and Judgment 238/2014 of the Italian Constitutional Court' (2015) 78 *Modern Law Review* 1028, 1038–9.

is on the peculiarly American ‘procedural default’ rule, which finds no corresponding rule (in substance) in international law.¹⁴²

65. Following the discussion on consubstantial contestation above, it can be argued that all types of contestation here examined may be also distinguished on the basis of whether they constitute **local contestation** or **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 (thus ‘local’ contestation).¹⁴³ In the latter case the domestic court contests the content of an international rule by reliance on another international rule (affirmative contestation as described in paragraphs 59–60 above). Or it contests the content of an international norm by reliance on domestic law, but in cases where a parallel can be drawn between the domestic law relied on and international rules which are ‘consubstantial’ with that domestic law (consubstantial contestation).¹⁴⁴ Or, finally, 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.¹⁴⁵ This final example could also be deemed as constituting affirmative contestation as described in paragraphs 58–60 above.

II. Engagement Viewed Dynamically: Development

66. 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 harbingers of corrosion and decay) of international law norms. This is the dynamic aspect of their engagement with international law. All the strategies or postures discussed in section I above may also reflect a **strategy or posture of development** of international law, as they may either seek or achieve to set in motion the process of adjustment or change of the relevant international rules. Domestic courts do not single-handedly develop international law: they merely may set that process in motion, or continue it and consolidate change. But this they can do, and it is then up to other actors to weigh in (on which see paragraph 68 below).

67. One question that immediately comes up in the context of discussing domestic courts as agents of development of international law is whether the domestic court should be cognizant of its role as such an agent of development. This question cannot be answered with a high degree of certainty, however: it is difficult enough to determine what the domestic court is doing, and how it is engaging with international law, let alone to determine what it thinks it is doing (except on rare occasions where courts explicitly articulate their views on their role in developing international law¹⁴⁶). Further, it cannot be excluded that for a number of reasons domestic

¹⁴² *Medellin* (n 119) could be seen as an example of local contestation.

¹⁴³ Which could also be regarded as a form of avoidance, the difference being however that contestation indicates some discomfort with the content of the international rule while avoidance merely ignores the international law rule.

¹⁴⁴ Eg in *Kadi* and *Ahmed* discussed above (see text at nn 135–137) 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.

¹⁴⁵ 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).

¹⁴⁶ See for example the Israeli Supreme Court in *Ajuri* [40], available at <http://elyon1.court.gov.il/Files_ENG/02/150/070/A15/02070150.A15.pdf>.

courts may not wish to engage in brazen statements as to their role and purpose. And even if they make statements as to what they think they are doing, these may well be geared towards shielding them from criticism or appeasing the various direct and indirect addressees of the decision. Thus, when called upon to choose between **what domestic courts are saying they are doing** and between **what they are actually doing**, the approach of this Final Report has generally been to assess what the court was actually doing. For example, there are instances where the domestic court may be paying lip service to an international legal rule, but then proceed to merely apply domestic law, or to avoid 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, and even explicitly rejects its application, may be actually applying an international norm in deciding a case, even if only in its ‘consubstantial’ incarnation.

68. Even when domestic courts do not consciously engage in development as a strategy or posture, development of the law may still ensue. This is because domestic courts engaging with international law rules may set in motion a process which will call for and perhaps lead to the reaction of (a) **other domestic courts**, so as for practice to accumulate either for or against the position taken by the domestic court (also: *horizontal dialogue*, ie between courts in different domestic legal orders); (b) **international courts**, which may be seen as ‘monitoring’ the engagement of domestic courts with international norms (also: *vertical dialogue*, see further section III below); and finally (c) **States**, who are the principal lawmakers and the ultimate monitors of the engagement of both domestic and international courts with international norms that they (the States) have made (on which see also further section III below).

III. Informal ‘Monitoring’ of Engagement

69. 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 courts. An example is the *Jurisdictional Immunities of the State* case before the ICJ:¹⁴⁷ here the actions of Greek and Italian courts led to a dispute which was submitted to the ICJ. The ICJ reversed an attempt at the development—or erosion—of the international law of immunity that had been initiated by the domestic courts or by States (eg through reaction to and protest against the decision of a domestic court of another State).¹⁴⁸ But this may still not be the final word, as further reaction on the part of domestic courts has followed, with the Italian Constitutional Court engaging in (consubstantial) contestation.¹⁴⁹

70. 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

¹⁴⁷ *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* [2012] ICJ Reports 99.

¹⁴⁸ cf Roberts (n 13) 64ff.

¹⁴⁹ See paragraph 64 above.

regulation (which could be cast as a form of fragmentation).¹⁵⁰ In the final analysis, the ultimate guardians will be the actual law-makers, the States, which also ‘monitor’ the engagement of domestic courts with international law. The State can seek to influence (by intervening in a case) or finally reject the position of its own domestic courts (by legislating to overrule it) or of the domestic courts of other States (by making protests or presenting claims to their States for violation of international law).

PART C: PRINCIPLES OF ENGAGEMENT?

71. Elaborating a set of principles of engagement would require, in addition to several other considerations, a determination of the **reasons** behind the choices of domestic courts with regard to their techniques and strategies of engagement with international law. Establishing the reasons for domestic courts opting to avoid or to contest or to 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, would allow the elaboration of guidelines and practice directions for domestic courts. Significant work needs to be done in order for such guidelines, principles or practice directions to be elaborated, and this is beyond the remit or capacity of the Study Group.

72. As a contribution to the mapping exercise as to the engagement of domestic courts with international law, this Final Report presents some thoughts on the reasons for the adoption of the various strategies or postures of engagement, and the role of the various techniques developed by domestic courts in this respect. This is meant to assist further work in the direction of setting out a set of principles on the engagement of domestic courts with international law, possibly by a Committee to be established by the International Law Association.

73. Before giving some thoughts on the reasons, it should be mentioned (as it already has been in the other parts of the Final Report)¹⁵¹ that the mapping of strategies or postures in Part B is not open and shut, as it depends on consensus regarding the content of the various rules of international law. The various categories may even collapse into one another depending on the observer’s viewpoint and in particular her conception of the content of the international rule at stake. Just as it was highlighted in paragraph 50 above that the passing of domestic law could be seen as both a method for applying international law in the domestic legal order and as a method for avoiding it (or for contesting its content), it could equally be argued that deference by the domestic court to the executive’s interpretation of a particular treaty can be cast as avoidance (avoiding to engage with applicable international law) as easily as it can be cast as alignment (it is the executive that negotiated and concluded the treaty and thus has a better understanding of its content). Much will depend on one’s evaluation of the content of the relevant law and the decision of the domestic courts. Some of these considerations may be imposed by virtue of constitutional provisions or principles in the domestic legal order, but they also constitute reasons why the domestic court has opted for a particular strategy or posture. But it is difficult to determine whether a court is ‘hiding behind’ constitutional constraints in order to avoid engagement with international law, or whether it is convinced that this is the correct position under its domestic law. What remains clear, from the perspective of international law, is that domestic courts can take widely diverging positions on the same issue. In the context of the exercise of discretion given to the State under international law, for example, some domes-

¹⁵⁰ cf Knop (n 51) 506; and Shany (n 28) 27ff.

¹⁵¹ See paragraphs 31 and 50 above.

tic courts may refuse to exercise that discretion, as they do not see themselves as the appropriate organ for this;¹⁵² other courts may step up to the plate to obligate the State to exercise its discretion under international law in the particular manner decided by the court.¹⁵³ But this does not mean that the mapping exercise is pointless, nor does it mean that one should not attempt to set out the potential reasons for the adoption of the various strategies or postures adopted by domestic courts.

74. The strategy or posture adopted by domestic courts will depend to some degree a number of variables, partly identified in Part A of this Report as the challenges for mapping domestic court engagement with international law. The first such variable, as evident also from the preceding paragraph, is the domestic constitutional provision on the relationship of international and domestic law, and the various blunting mechanisms developed by and available to the courts for moderating the effects of these provisions. These can be used by domestic courts to shift the posture more towards avoidance or more towards alignment than a plain reading of the constitutional instrument or rules would suggest.

75. Another variable is the relative position of the State concerned in the international community or its strategic choice about approach to international law. Newer, smaller, or developing States (and their courts), as well as States that place a high premium on their reputation as supporters of the international ‘rule of law’ and international cooperation, may wish to promote or consolidate their position as well respected members of that community by adopting and encouraging their courts to adopt a strategy or posture of alignment, occasionally even going into hyper-alignment. The same goes for States emerging from the status of pariah States, such as South Africa post-Apartheid. By contrast, powerful States, who are long-standing members of the international community may engage in contestation in its various guises, whether mounting local (constitutional) resistance and turning away from international law, or seeking to influence its content and development (occasionally also through consubstantial alignment rather than open contestation). Further, domestic courts in States undergoing radical (if still constitutional) change may look to international law as a way to protect themselves against themselves—ie to resist or to calm down constitutional but radical change. This may occasion a strategy or posture of alignment, perhaps even hyper-alignment.

76. A further variable, also identified as a challenge in Part A, is the type of rules involved in the adjudication. It has become apparent in Part B of the Report that the domestic courts of particular State do not exclusively conform to one particular strategy or posture, but may shift between them. These shifts can be explained in various ways, including by determining how politically or otherwise problematic the international rule and compliance with it is. It may be relatively easy to adopt a strategy or posture of alignment to politically unproblematic rules (or in circumstances which make alignment with the rules unproblematic) (fair weather alignment). In more problematic cases of politically- or value-laden rules, such as human rights or international humanitarian law rules, domestic courts may be more inclined to engage in avoid-

¹⁵² See *R v Keyn* (The *Franconia* case) (1876) 2 Ex D 63.

¹⁵³ See the Korean ‘Comfort Women’ case, Korean Constitutional Court (Judgment of 30 August 2011) 2006Hun-Ma788: Korean courts force Korea to pursue dispute settlement with Japan on the matter: this is because the discretion given to the Korean State under international law has to be structured in accordance with the Korean constitutional provisions on human rights. Cf the decisions of the Canadian courts in *Canada (Prime Minister) v Khadr* [2010] 1 SCR 44; 2010 SCC 3; and *Abdelrazik* (n 103).

ance or contestation.¹⁵⁴ It should be noted however that there are examples of domestic courts engaging with politically problematic international rules, such as those on the rights of indigenous peoples, in a manner which produces consubstantial alignment.¹⁵⁵

77. Occasionally, strategies or postures of engagement may also roughly map on to the type of rule involved in terms of its ‘directionality’ (see Part A section I.b above). It is easy to surmise that avoidance will be the preferred strategy of engagement with outward-looking, horizontal rules of international law.¹⁵⁶ But within inward-looking norms things are less clear: whereas rules that obligate the state to regulate cross-border private relations¹⁵⁷ may occasion a larger degree of alignment (and development), vertical inward-looking norms which regulate the relationship between the State and those within its jurisdiction may occasion all types of engagement depending on their (perceived) specific content and the interests at stake. This is so in part because transnational rules are rather laxly supervised by either international courts or States. Domestic courts are in fact the main agents applying treaties including such rules, and indeed the treaties themselves envision domestic courts as the main agents of enforcement. As such, domestic courts are relatively comfortable interpreting the sometimes vague language of these rules (eg child ‘in intolerable situation’), which in a purely horizontal or vertical context they might have found simply too vague, and opted to defer to the executive.

78. A number of other variables may play a role in this respect, and they have been identified by the Study Group, but may be too difficult to study in any exhaustive manner. These include whether and to what extent counsel have pleaded international law before the domestic court, and the quality of these pleadings. Anecdotal evidence suggests that domestic courts rely heavily on good argument on the part of counsel, and this would make sense: domestic court judges are not international law scholars and good argument will assist them in properly dealing with the international law issues in the case (and vice versa). A related factor is the way that international law is employed by counsel before the court: it may be used by the claimant or applicant as a sword to attack a normative act or government position; but it may also be used by the government as a shield to defend against an attack by the claimant or applicant. The way that international law is used, against the background of the relative merits of the case, may affect the disposition of the domestic court towards it. A further factor is the general disposition of the domestic court or judge towards international law in general. A most important factor relates also to the independence of the judiciary in the relevant State. The problem with all these factors, however, is that they are all to some extent subjective. Hence the difficulty in studying them in an exhaustive manner.

¹⁵⁴ See generally the *Report on Israel* (2013) and cf the Swiss courts’ position that the ICESCR is not directly effective, in contrast to most other human rights instruments in the domestic legal order, in the *Report on Switzerland* (2013) 8.

¹⁵⁵ See n 101 above.

¹⁵⁶ Note however that some seemingly outward-looking, horizontal rules are actually also inward-looking, and indeed specifically addressed to domestic courts (at least in part). The rules of immunity are such an example, and they occasion both alignment and contestation in their various incarnations.

¹⁵⁷ Sometimes called ‘transnational rules’, these inward-looking rules are found in numerous international treaties such as the Convention on the International Sale of Goods, the Hague Convention on the Civil Aspects of International Child Abduction, the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, or the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, among others. Countless domestic court decisions refer to the rules in these treaties, while in dualist States they always get transformed into domestic law, even if simply by scheduling.

79. A final variable is the certainty and frequency of supervision or monitoring, in particular by international courts. While in general international law there is the possibility of supervision or monitoring being exercised very occasionally, in the context of regional human rights treaties, especially those establishing courts with quasi-compulsory jurisdiction as their monitoring organs, supervision is much more certain and frequent. This, in large part, will occasion more alignment (as avoidance will not be appreciated by the monitoring court), though it also has the potential of leading to contestation.

List of Reports by Study Group members and invited scholars referred to in the Final Report

1 Thematic Reports

- 1.1 M Kanetake, *Report on International Human Rights Law* (2015)
- 1.2 HE Kjos, *Report on International Investment Law* (2013)
- 1.3 A Kulick, *Report on International Investment Law* (2015)
- 1.4 S Weill, *Report on International Humanitarian Law* (2013)

2 National Reports

- 2.5 EM Belser and R Oleschak, *Report on Switzerland* (2013)
- 2.6 F Dopagne, *Report on Belgium* (2014)
- 2.7 G van Ert, *Report on Canada* (2013)
- 2.8 S Fatima, *Report on England* (2015)
- 2.9 M Freitas Mohallem, *Report on South America* (2015)
- 2.10 R Gunaratne, *Report on Sri Lanka* (2013)
- 2.11 M Killander, *Report on Anglophone Africa* (2015)
- 2.12 M Pinto and N Maisley, *Report on Argentina* (2015)
- 2.13 Z Ratniece, *Report on Kosovo* (2015)
- 2.14 OG Schwartz, *Report on Israel* (2013)
- 2.15 H Woolaver, *Report on South Africa* (2013)
- 2.16 R Yadava and SP Kumar, *Report on India* (2013)
- 2.17 G Zyberi and S Sali, *Report on Albania* (2013)