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**Domestic Judicial Non-Application of  
International Law  
in a Comparative Constitutional Law Perspective:  
Identitarian and Structural**

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## Abstract

This project is concerned with the non-application of international law by domestic courts. It aims to discuss, from a comparative legal perspective, the reasoning that domestic courts develop to justify the non-application of the international legal obligations binding on the state and whether and how such reasoning is influenced by the conception of statehood endorsed by the constitution. In so doing, an alternative between structural and identitarian conflicts between national and international law is introduced.

In cases of structural conflicts, the substance of the law is not considered and the conclusion that international law is inapplicable within the domestic sphere is determined by formal criteria only: grounds for such findings are, for example, that a treaty is unincorporated, that the Government is deemed to have acted *ultra vires* in ratifying it, or that its provisions are found not to be self-executing.

Conversely, in cases of identity-based non-application, the same conclusion is based on the finding of the axiological incompatibility of the international law norms at issue with the fundamental values of the national constitution, once their abstract applicability has been positively established by formal reasoning.

This alternative between structural and identitarian non-compliance is discussed in light of the conceptions of the state and its relationship with international law, and more specifically in the light of the alternative between modern and postmodern open statehood. In particular, it is asked whether the principle of open statehood has any bearing on how judicial non-compliance is framed and justified. Such an alternative between modern and postmodern open statehood is understood through the lens of the legal tradition, as an evolution of the idea of the state, which, in light of the current globalised state of affairs, can either reaffirm a modern conception of statehood in a conservative stance, or ‘adapt’ and reform it by incorporating an open conception of it.

The present research seeks to show that there is a correlation between modern statehood and structural conflicts, on the one hand, and post-modern, open statehood and identitarian conflicts, on the other. Indeed, modern statehood reaffirms the centrality of the state as the sole source of legal authority within the domestic legal system, and thus allows for the application of international law only insofar as it is authorised by the competent institutional actors through the relevant legal procedures: conflicts between national and international law are thus framed as structural conflicts, since the

incorporation of international law becomes strictly conditional on the respect of said procedures.

Conversely, openness to international law is characterised by a greater and more flexible, though not unlimited, penetration of international law within the domestic legal system, which is considered to be more permeable to non-state sources, at least in areas of law that show a marked cosmopolitan attitude (e.g., the protection of fundamental rights and the fight against climate change). As a result, the incorporation of international law goes beyond strict compliance with formal requirements and increasingly becomes a matter of axiological compatibility, if not continuity, with the domestic constitution. Thus, cases of judicial non-compliance with international law are mainly due to the axiological incompatibility between the two levels, rather than to the lack of formal requirements.

This research adopts a comparative method and looks specifically at the jurisdictions of the United Kingdom, Germany and Colombia, which are seen as prototypical representatives of modern (the United Kingdom) and post-modern, open statehood (Germany and Colombia).

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*La Bara v Minister for Immigration and Citizenship* [2008] FCA 785

### Brazil

Supreme Federal Tribunal, Judgement of 23.08.2021, ARE: 954858 RJ, *Changri-lá fishing boat*

### Canada

*R. v. Partak* [2001] CanLII 28411 (Ontario Superior Court of Justice)

*Bouzari v Islamic Republic of Iran* (2004), 220 O.A.C. 1

*Abdelrazik v. Canada (Minister of Foreign Affairs) (F.C.)* [2010] 1 F.C.R. 267

*Kazemi Estate v Islamic Republic of Iran* (2014) 3 S.C.R. 62

*R. v. Provo* [2015] ONCJ 311

*United States v. Sari* 2023 BCSC 1931

### Colombia

Constitutional Court of Colombia, Judgement of 5 June 1992, T-406/1992

Constitutional Court of Colombia, Judgement of 17 June 1992, T-411/1992

Constitutional Court of Colombia, Judgement of 24 June 1992, T-426/1992

Constitutional Court of Colombia, Judgement of 5 February 1993, C-027/1993

Constitutional Court of Colombia, Judgement of 11 March 1993, C-104/1993

Constitutional Court of Colombia, Judgement of 8 July 1993, C-267/1993

Constitutional Court of Colombia, Judgement of 18 May 1995, C-225/1995

Constitutional Court of Colombia, Judgement of 7 December 1995, C-587/1995

Constitutional Court of Colombia, Judgement of 15 May 1997, C-231/97

Constitutional Court of Colombia, Judgement of 5 August 1997, C-358/97

Constitutional Court of Colombia, Judgement of 25 September 1997, C-468 de 1997

Constitutional Court of Colombia, Judgement of 10 August 1998, C-400/1998

Constitutional Court of Colombia, Judgement of 6 May 1999, T-308/1999  
Constitutional Court of Colombia, Judgement of 4 August 1999, C-560/1999  
Constitutional Court of Colombia, Judgement of 11 August 1999, C-582/1999  
Constitutional Court of Colombia, Judgement of 23 October 2000, C-1433/2000  
Constitutional Court of Colombia, Judgement of 26 July 2001, C-774/2001  
Constitutional Court of Colombia, Judgement of 10 October 2001, C-1064/2001  
Constitutional Court of Colombia, Judgement of 7 May 2002, C-339/2002  
Constitutional Court of Colombia, Judgement of 30 July 2002, C-578/2002  
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Constitutional Court of Colombia, Judgement of 30 October 2003 C-1017/2003  
Constitutional Court of Colombia, Judgement of 22 January 2004, T-25/04  
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Constitutional Court of Colombia, Judgement of 14 April 2005, C-401/2005  
Constitutional Court of Colombia, Judgment of 1 February 2006, C-028/2006  
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Constitutional Court of Colombia, Judgement 25 April 2007, C-291/2007  
Constitutional Court of Colombia, Judgement of 24 July 2008, C-750/08  
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Constitutional Court of Colombia, Judgement of 30 March 2009, C-228/2009  
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Constitutional Court of Colombia, Judgement of 6 June 2012, C-415/12  
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Constitutional Court of Colombia, Judgement of 23 October 2014, C-332 de 2014

Constitutional Court of Colombia, Judgement of 16 July, C-500/2014  
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Constitutional Court of Colombia, Judgement of 29 May 2019, C-234/19  
Constitutional Court of Colombia, Judgment of 2 July 2019, C-252/19  
Constitutional Court of Colombia, Judgement of 24 July 2019 C-327/2019  
Constitutional Court of Colombia, Judgement of 19 February 2020, C-69/2020  
Constitutional Court of Colombia, Judgement of 21 May 2020, SU-146/2020  
Constitutional Court of Colombia, Judgement of 20 May 2021, C-146/2021  
Constitutional Court of Colombia, Judgement of 3 August 2022, C-110/2022  
Constitutional Court of Colombia, Judgement of 22 August 2022, C-212/2022

## **Germany**

Federal Finance Court, Order for reference of 10 January 2012, I R 66/09, BFHE 236, 304  
Federal Court of Justice, Judgement of 7 November 2001, 5 StR 116/01, NStZ 2002, 168  
Federal Court of Justice, Judgement of 29 January 2003, 5 StR 475/02, unreported  
Federal Court of Justice, Judgement of 11 April 2007, 5 StR 475/02, NStZ-RR 2010, 66  
Federal Court of Justice, Judgement of 25 September 2007, 5 StR 116/01, BGHSt 52, 48  
Federal Court of Justice, Judgement of 7 June 2011, 4 StR 643/10, StV 2011, 603  
Federal Constitutional Court, Judgement of the Second Senate of 26 March 1957, 2 BvG 1/55, BVerfGE 6, 309, *Reichskonkordat*

Federal Constitutional Court, Decision of the First Senate of 4 May 1971, 1 BvR 636/68, BVerfGE 31, 58, *Spanier*

Federal Constitutional Court, Decision of the Second Senate of 9 June 1971, 2 BvR 255/69, BVerfGE 31, 145, *Milchpulver*

Federal Constitutional Court, Judgement of 31 July 1973, 2 BvF 1/73, BVerfGE 36, 1, *Grundlagenvertrag*

Federal Constitutional Court, Judgement of 29 May 1974, 2 BvL 52/71, BVerfGE 37, 271, *Solange I*

Federal Constitutional Court, Decision of the First Senate of 13 January 1976, 1 BvR 631/69, BVerfGE 41, 126, *Reparationsschäden*

Federal Constitutional Court, Decision of the First Senate of 17 May 1983, 2 BvR 731/80, BVerfGE 64, 135

Federal Constitutional Court, Decision of the Second Senate of 13 January 1987, 2 BvR 209/84, BVerfGE 74, 102, *Erziehungsmaßregeln*

Federal Constitutional Court, Decision of the Second Senate of 26 March 1987, 2 BvR 589/79, BVerfGE 74, 358, *Presumption of innocence*

Federal Constitutional Court, Decision of the Second Senate of Order of 29 May 1990, 2 BvR 254/88, BVerfGE 82, 106

Federal Constitutional Court, Decision of the First Senate of 8 July 1997, 1 BvR 1243/95, BVerfGE 96, 152, *Parteilehrer*

Federal Constitutional Court, Judgement of 15 December 1999, 1 BvR 653/96, BVerfGE 101, 361, *Caroline of Monaco*

Federal Constitutional Court, Decision of 24 October 2000, 1 BvR 1643/95, NJW 2001, 670

Decision of the Second Senate of 5 November 2003, 2 BvR 1243/03, BVerfGE 109, 13, *Extradition list*

Federal Constitutional Court, Decision of the Second Senate of 26 October 2004, 2 BvR 955/00, 1038/01, BVerfGE 112, 1, *Bodenreform III*

Federal Constitutional Court, Decision of the Second Senate of 14 October 2004, 2 BvR 1481/04, BVerfGE 111, 307, *Görgülü*

Federal Constitutional Court, Decision of the First Chamber of the Second Senate of 19 September 2006, 2 BvR 2115/01, BVerfGK 9, 174

Order of the First Senate of 26 February 2008, 1 BvR 1602/07, BVerfGE 120, 180, *Caroline of Monaco III*

Federal Constitutional Court, Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08, BVerfGE 123, 267, *Libson Treaty*

Federal Constitutional Court, Order of the Second Senate of 6 July 2010, 2 BvR 2661/06, BVerfGE 126, 286, *Honeywell*

Federal Constitutional Court, Decision of the Second Senate of 8 July 2010, 2 BvR 2485/07, BVerfGK 17, 390

Federal Constitutional Court, Judgement of the First Senate of 4 May 2011, 2 BvR 2365/09, BVerfGE 128, 326, *Preventive Detention*

Federal Constitutional Court, Order the Second Senate of of 14 January 2014, 2 BvR 2728/13, BVerfGE 134, 366 *Gauweiler (OMT)*

Federal Constitutional Court, Decision of the First Chamber of the Second Senate of 5 November 2013, 2 BvR 1579/11, NJW 2014, 532

Federal Constitutional Court, Judgment of the Second Senate of 21 June 2016, 2 BvR 2728/13, BVerfGE 142, 123, *Gauweiler (OMT)*

Federal Constitutional Court, Order of the Second Senate of 13 October 2016, 2 BvE 2/15, BVerfGE 143, 101, *NSA Investigation Committee*

Federal Constitutional Court, Judgement of Second Senate of 12 June 2018, 2 BvR 1738/12, BVerfGE 148, 296, *Ban on strikes for civil servants*

Federal Constitutional Court, Decision of the Second Senate of 29 January 2019, 2 BvC 62/14, BVerfGE 151, 1, *Exclusion of the right to vote in Bundestag elections*

Federal Constitutional Court, Order of the First Senate of 6 November 2019, 1 BvR 276/17, BVerfGE 152, 216, *Right to be forgotten II*

Federal Constitutional Court, Order of the Second Senate of 29 April 2021, BVerfGE 159, 89, *Weiss (PSPP)*

Federal Constitutional Court, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, BVerfGE 154, 17, *Weiss (PSPP)*

Federal Constitutional Court, Decision of the First Senate of 24 March 2021, 1 BvR 2656/18, BVerfGE 157, 30, *Federal Climate Protection Act*

## **Ireland**

*State (Ryan) v Lennon* [1935] IR 170

*McGee v. Attorney General* [1973] IR 284

*Finn v. Attorney General* [1983] IR 154

*Roche v. Ireland & Ors* [1983] IEHC 90

*Attorney General (Society for the Protection of the Unborn Child SPUC) v. Open Door Counselling and Dublin Well Woman Centre* [1988] IR 593

*SPUC v. Coogan* [1989] IR 734

*A.G. v. X* [1992] 1 IR 1

*Re Article 26 and the Information (Services outside the State for the Termination of Pregnancy) Bill 1994* [1995] 1 IR 1

*Re Article 26 and the Information (Services outside the State for the Termination of Pregnancy) Bill 1994* [1995] 1 IR 1

*Riordan v An Taoiseach (No 2)* [1999] 4 IR 343; *Hanafin v The Minister for the Environment* [1996] 2 IR 321

*Costello v. Ireland* [2022] IESC 44

## **Italy**

Italian Supreme Court, (full court), civil division, Judgement of 11 March 2004, no. 5044

Italian Supreme Court, (full court), civil division, Judgement of 29 May 2008, Joined cases 14201- 14212

Italian Supreme Court, (full court), civil division, Judgement of 29 May 2008, no. 14199

Italian Supreme Court, (full court), civil division, Judgement of 20 May 2011, no. 11163

Italian Supreme Court, (full court), civil division, Judgement of 28 September 2020, no. 20442

Italian Supreme Court, (full court), civil division, Judgement of 13 January 2017, no. 762

Italian Supreme Court, civil division, Order of 10 December 2021, No. 39391

Judgement of 18 December 1973, no. 183

Italian Constitutional Court, Judgement of 8 June 1984, no. 170

Italian Constitutional Court, Judgement of 22 October 2014, no. 238

Italian Constitutional Court, Judgement of 4 July 2023, no. 159

## **South Korea**

Seoul Central District Court, Judgement of 8 January 2021, 2016 Ga-Hap 505092, *Comfort Women Case*

## **The Netherlands**

Hoge Raad [Supreme Court], Judgement of 20 December 2019, no. 18/3843, *Urgenda Foundation v. State of the Netherlands*

## **United Kingdom**

*Case of Proclamations* (1610) 12 Co Rep 74

*The Parlement Belge* (1879) 4 P.D. 129

*The Zamora* [1916] 2 AC 77

*Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508

*Attorney General (Canada) v Attorney General (Ontario)* [1937] A.C. 326

*R. v Chief Constable of the Royal Ulster Constabulary Ex p. Begley* [1971] 1 W.L.R. 1475

*R (Othman) v Secretary of State for Work and Pensions* [2001] EWHC Admin 1022

*Oppenheimer v Cattermole* [1976] A.C. 249

*Laker Airways Ltd. v. Department of Trade* [1977] Q.B. 643

*Alcom v Colombia* [1984] A.C. 580

*JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418

*R v Secretary of State, Ex p Factortame Ltd (No 2)* [1991] 1 AC 603

*R. v Secretary of State for the Home Department Ex p. Brind* [1991] 1 A.C. 696

*R. v Secretary of State for the Home Department Ex p. Fire Brigades Union* [1995] 2 A.C. 513

*Al-Adsani v. Kuwait* (1996) 107 I.L.R. 536

*R v Secretary of State for the Home Department, Ex parte Pierson* [1998] AC 539

*R. v Secretary of State for the Home Department Ex p. Venables* [1998] A.C. 407

*Kleinwort Benson v Lincoln City Council* [1999] 2 A.C. 349

*R v Secretary of State for the Home Department, Ex parte Simms* [2000] 2 AC 115

*R (Alconbury Developments Ltd) v Environment Secretary* [2001] UKHL 23, [2003] 2 AC 29

*R v A* [2001] UKHL 25, [2002] 1 AC 45

*R. (on the application of Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin), [2002] 12 WLUK 505

*Abbasi* [2002] EWCA Civ 1598, [2002] 11 WLUK 114

*Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] Q.B. 151

*Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 A.C. 883

*R v Lyons* [2002] UKHL 44; [2003] 1 AC 976

*Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 39, [2003] 1 W.L.R. 1763

*R v Home Secretary, ex parte Anderson* [2003] UKHL 46, [2003] 1 A.C. 837

*Wainwright v Home Office* [2003] UKHL 53, [2004] 2 A.C. 406

*Re McKerr* [2004] UKHL 12, [2004] 1 W.L.R. 807

*R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323

*A v Secretary of State for the Home Department (No.2)* [2004] EWCA Civ 1123, [2005] 1 W.L.R. 414

*Ghaidan v. Godin-Mendoza* [2004] UKHL 30, [2004] 2 A.C. 557

*R (Marper) v Chief Constable of South Yorkshire* [2004] UKHL 39, [2004] 1 WLR 2196

*A (and others) v SSHD* [2004] UKHL 56, [2005] 2 A.C. 68

*N v Secretary of State for the Home Department* [2005] UKHL 31, [2005] 2 A.C. 296

*Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262

*A v Secretary of State for the Home Department (No.2)* [2005] UKHL 71, [2006] 2 A.C. 221

*Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465

*Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 A.C. 395

*Jones v. Saudia Arabia* [2006] UKHL 26

*Smith v Secretary of State for Work and Pensions* [2006] UKHL 35, [2006] 1 W.L.R. 2024

*Occidental Exploration Production Co v Republic of Ecuador* [2005] EWCA Civ 1116, [2006] QB 432

*R v Margaret Jones* [2006] UKHL 16, [2007] 1 AC 136

*Smith v Scott* [2007] CSIH 9, 2007 S.C. 345

*R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 A.C. 332

*R (Animal Defenders International) v Secretary of State For Culture, Media and Sport* [2008] UKHL 15, [2008] AC 1312

*Re G (A Child) (Adoption: Unmarried Couples)* [2008] UKHL 38, [2009] 1 A.C. 173

*Doherty v Birmingham City Council* [2008] UKHL 57, [2009] 1 A.C. 367

*R. v Horncastle* [2009] UKSC 14, [2010] 2 A.C. 373

*Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28, [2010] 2 AC 269

*HM Treasury (Respondents) v Mohammed Jabar Ahmed (FC) (Appellants)* [2010] UKSC 2

*R (Thompson) v SSHD* [2010] UKSC 17, [2011] 1 A.C. 331

*Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 A.C. 104

*R. (on the application of Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29, [2011] 1 A.C. 1

*ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 A.C. 166

*Ambrose v Harris* [2011] UKSC 43 [2011], 1 W.L.R. 2435

*Assange v The Swedish Prosecutor* [2012] UKSC 22, [2012] 2 A.C. 471

*R. (on the application of Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] A.C. 271

*R. v McLoughlin* [2014] EWCA Crim 188, [2014] 1 W.L.R. 3964

*R. (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] A.C. 657

*R (on the application of SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 W.L.R. 1449

*Miller (on the application of) v Secretary of state for Exiting the European Union* [2017] UKSC 5, [2018] A.C. 61

*R. (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52, [2021] 2 All E.R. 967

*R. (on the application of Plan B Earth) v Prime Minister* [2021] EWHC 3469 (Admin), [2021] 12 WLUK 285

*General Dynamics United Kingdom Ltd v Libya* [2021] UKSC 22, [2022] A.C. 318

*R. (on the application of SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] A.C. 223

*R (on the application of AB) v Secretary of State for Justice* [2021] UKSC 28 [2022] A.C. 487

*Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48, [2022] 2 All E.R. 911

*Local Authority v JB* [2021] UKSC 52, [2022] A.C. 1322

*R (on the application of Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2023] A.C. 559

*R. (on the application of Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin), [2023] 1 W.L.R. 225

*R (on the application of Coughlan) v Minister for the Cabinet Office* [2022] UKSC 11 [2022] 1 W.L.R. 2389

*Basfar v Wong* [2022] UKSC 20, [2023] A.C. 33

*Re Scottish Independence Referendum Bill* [2022] UKSC 31, [2022] 1 W.L.R. 5435

*R. (Friends of the Earth Ltd.) v The Secretary of State for International Trade/UK Export Finance* [2023] EWCA Civ 14, [2023] 1 W.L.R. 2293

*R (on the application of AAA and others) v Secretary of State for the Home Department* [2023] UKSC 42, [2023] 1 W.L.R. 4433

*Dillon v Secretary of State for Northern Ireland* [2024] NIKB 11, [2024] 2 WLUK 450

*R. (on the application of Friends of the Earth) v Secretary of State for Environment, Food and Rural Affairs* [2024] EWHC 2707 (Admin), [2024] 10 WLUK 460

*R. (on the application of Friends of the Earth Ltd) v Secretary of State for Energy Security and Net Zero* [2024] EWHC 995 (Admin), [2024] P.T.S.R. 1293

## **United States Of America**

*United States v. Verdugo–Urquidez*, 494 U.S. 259 (1990)

*Princz v. Federal Republic of Germany* (1994) 307 U.S. App. D.C. 102

*Siderman de Blake*, 965 F.2d 699 (9th Cir. 1992)

*Flatow v. Islamic Republic of Iran* 999 F.Supp. 1, 15-16 (D.D.C. 1998)

*People's Mojahedin Organization of Iran v. United States Department of State* 182 F.3d 17, 22 (D.C. Cir. 1999)

*Global Relief Foundation, Inc. v. O'Neill*, 315 F.3d 748 (7<sup>th</sup> Cir. 2002)

*Garb v. Republic of Poland*, 207 F. Supp. 2d 16 (E.D.N.Y. 2002)

*Wyatt v. Syrian Arab Republic* 362 F.Supp.2d 103, 115-116 (D.D.C. 2005)

*Al-Aqueel v Paulson* 568 F Supp 2d 64, 70 (D.D.C. 2008)

*Humanitarian Law Project v. U.S. Treasury Dept.*, 578 F.3d 1133 (9<sup>th</sup> Cir. 2009)

*Weinstein et al. v. Islamic Republic of Iran et al.* 609 F.3d 43, 53 (2d Cir. 2010)

*Al Haramain Islamic Foundation, Inc. v. United States Department of the Treasury* 660 F.3d 1019 (9th Cir. 2011)

*Ibrahim v Dept of Homeland Security* 669 F 3d 983 (9th Cir 2012)

*Kadi v Geithner* 42 F.Supp.3d 1, (D.D.C. 2012)

*Bennett et al. v. The Islamic Republic of Iran et al.* 799 F.3d 1281, 1287 (9th Cir. 2015)

*The Schooner Exchange v. McFaddon* 11 U.S. (7 Cranch) 116 (1812)

*Griswold v. Connecticut* 381 US 479 (1965)

*Roe v Wade* 410 US 113 (1973)

*Verlinden BV v Central Bank of Nigeria* (1983) 461 U.S. 480

*Republic of Argentina v Amerada Hess* (1989) 488 US 428, 443

*Breard v Greene, Warden* (1998) 523 U.S. 371

*Republic of Austria v Altman* (2004) 541 U.S. 677

*Sanchez-Llamas v Oregon* (2006) 548 U.S. 331

*Medellin v. Texas* 552 U.S. 491 (2008)

*Leal Garcia v Texas* (2011) 564 U.S. 940

*Republic of Argentina v. NML Capital, Ltd.* (2014) 573 U.S. 134

*Bank Markazi v Peterson* (2016) 578 U.S. \_\_\_

*Opati v Republic of Sudan* (2020) 140 S. Ct. 1601

### **Court of Justice of the European Union**

Judgment of the Court of First Instance of 21 September 2005, T-315/01, *Kadi v Council and Commission*, ECR 2005 II-3649

Judgment of the Court of First Instance of 21 September 2005, T-306/01, *Yusuf and Al Barakaat International Foundation v Council and Commission*, ECR 2005 II-3533

Judgment of 5 February 1963, C-26/62, *Van Gend en Loos v Administratie der Belastingen*, ECR 1963, 3

Judgement of the Court of 15 July 1964, C-6/64, *Costa v E.N.E.L.*, ECR 1964 585

Judgment of the Court of 17 December 1970, C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECR 1970 1125

Judgment of 4 December 1974, C-41/74, *Van Duyn v Home Office*, ECR 1974, 1337

Judgment of the Court of 4 October 1991, C-159/90, *Society for the Protection of Unborn Children Ireland v Grogan and Others*

Judgment of the General Court of 30 September 2010, T-85/09, *Kadi v Commission*, ECR 2010 II-5177

Opinion of Mr Advocate General Poiares Maduro delivered on 16 January 2008, in Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, ECR I-6351

Judgment of the Court (Grand Chamber) of 3 September 2008, C-402/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*, ECR 2008 I-635 ('*Kadi I*')

Judgment of the Court (Grand Chamber) of 18 July 2013, C-584/10 P, *Commission and Others v Kadi*, ECLI:EU:C:2013:518 ('*Kadi II*')

Grand Chamber, Judgement of 14 December 2023, App. no 59433/18, *Humpert v. Germany*

### **European Court of Human Rights**

Judgment 29 October 1992, Joined App. No. 14234/88 and 14235/88, *Open Door and Dublin Well Woman v. Ireland*

Grand Chamber, Judgement of 21 November 2001, App. no. 35763/97, *Al-Adsani v. the United Kingdom*

Judgement of 26 February 2004, App. no. 74969/01, *Görgülü v. Germany*

ECtHR (Third Section), Judgement of 24 June 2004, App. no 59320/00, *von Hannover v. Germany*

Grand Chamber, Judgement of 12 November 2008, App. no. 34503/97, *Demir and Baykara v. Turkey*

Judgment of 21 April 2009, App. no. 68959/01, *Enerji Yapi-Yol Sen v. Turkey*

Grand Chamber, Judgement of 16 December 2010, App. No. 25579/05, *A. B. and C. v. Ireland*

Judgement of 2 June 2014, App. nos. 34356/06 and 40528/06, *Jones and Others v. the United Kingdom*

Grand Chamber, Judgement of 21 June 2016, App. no. 5809/08, *Al-Dulimi and Montana Management Inc. v. Switzerland*

Grand Chamber, Judgement of 9 April 2024, App. no. 39371/20, *Duarte Agostinho v Portugal*

Grand Chamber, Judgement of 9 April 2024, App. no 53600/20, *Verein Klimaseniorinnen Schweiz v Switzerland*

Grand Chamber, Judgement of 9 April 2024, App. no. 7189/21, *Carême v France*

### **Human Rights Committee**

Communication of 31 Mar 2016, No. 2324/2013, *Mellet v. Ireland*

Communication of 17 March 2017, No. 2425/2014, *Whelan v. Ireland*.

### **International Court of Justice**

Order of 10 November 1998, *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, I.C.J. Reports 1998, p. 426;

Judgement of 27 June 2001, *LaGrand (Germany v United States of America)* I.C.J. Reports 466;

Judgement of 31 March 2004, *Avena and Other Mexican Nationals (Mexico v United States of America)*, I.C.J. Reports 2004, 12;

Judgement of 3 February 2012, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, I.C.J. Reports 2012, 99

Judgement of 13 February 2019, Preliminary Objections, *Certain Iranian Assets (Islamic Republic of Iran v United States of America)*, I.C.J. Reports 2019, 7

Judgement of 17 July 2019, *Jadhav (India v Pakistan)*, I.C.J. Reports 418;

Application instituting proceedings and request for the indication of provisional measures filed in the Registry of the Court on 29 April 2022, *Questions of jurisdictional immunities of the State and measures of constraint against State-owned property (Germany v. Italy)*, 2022 General List No. 183

ICJ, Judgement of 30 March 2023, *Certain Iranian Assets (Islamic Republic of Iran v United States of America)*, I.C.J. Reports 2023, 51

## **Permanent Court of International Justice**

*German Interests in Polish Upper Silesia (Germ. v. Pol.)*, 1925 P.C.I.J. (ser. A) No. 6 (Aug. 25)

## **Special Tribunal for Lebanon**

Special Tribunal for Lebanon (Appeals Chamber), Interlocutory Decision of 16 February 2011 on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, stl-11-01/I

## **ICSID Tribunals**

*Eco Oro Minerals Corp. v. Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021

*Red Eagle Exploration v. Colombia*, ICSID Case No. ARB/18/12, Award of 28 February 2024

*Montauk Metals (formerly Galway Gold) v. Colombia*, ICSID Case No. ARB/18/13, Award of 7 June 2024.

## Introduction

In recent years, the relationship between national legal orders and international law has grown ever more conflicted: at the same time that the need to foster international cooperation has clearly been shown by events such as the global pandemic and natural catastrophes which are ever increasing in number, frequency, and gravity all around the globe and which are likely caused by the anthropogenic increase in global temperatures, the authority of international law is questioned, inter alia, by the rise of autocratic and nationalist governments, disregarding their international obligations, and by wars and conflicts breaking out in many areas of the world, carrying with them massive violations of international humanitarian law and human rights.

### *1. The research questions and their relevance*

At such a turn in history, this research, while being aware of the surrounding context, has more modest aims, being content of investigating, adopting a comparative constitutional law methodology, the reasoning domestic judges adopt when refusing to give domestic application to international law. In such cases, while the state is bound by international obligations, domestic judges render judgements that are incompatible with such obligations, on the grounds that they are so required by national constitutional law.

Particularly, this research asks two, interrelated, questions.

The first question that is posed is of whether a difference exists, across jurisdictions, as to how instances of non-application of international law are framed by domestic courts with specific regard to the constitutional interests protected.

Second, and more importantly, it is asked whether the constitutional principle of openness some legal orders embrace is in any way correlated with how instances of conflict are framed.

The thesis that will be defended throughout this research is, accordingly, twofold.

First, it is argued that a fundamental difference can be found in how courts argue cases of non-application of international law, i.e. that between structural and identitarian conflicts. Structural conflicts are those conflicts in which international law is denied domestic application because it lacks some formal requirement – e.g. it has not been incorporated, or it is not self-executing – or because it is incorporated at a lower rank in

the domestic hierarchy of source: in such cases, the axiological considerations underpinning the contrasting norms are not considered. Instead, this is exactly what happens in identitarian conflicts, where international norms, otherwise deemed applicable, are refused domestic authority because they conflict with fundamental constitutional values.

Secondly, it will be maintained that an open conception of statehood is linked with the framing of conflicts between national and international law in identitarian terms, whereas a modern conception of statehood is linked with the framing of such conflicts in structural terms. A constitution embracing the principle of openness seeks to be as consistent as possible with the international law obligations that bind the state and to integrate, most often by interpretive means, international law within the domestic legal order, thus relaxing the structural criteria for the reception of international law and shoring up eventual deficits that might have arisen in that regard. However, it will reassert its autonomy and, thus, “closes up” in cases in which an axiological incompatibility arises between the two levels.

Instead, in contexts of modern statehood, the focus is on preserving the state’s capacity for autonomous law-making and thus, at least in constitutional democratic contexts, collective self-determination, realised through democratically legitimised representative institutions. Accordingly, international law becomes domestically relevant only insofar as positively incorporated through acts of said institutions. Because of this, in such contexts, conflicts between national and international law are often framed in structural terms, the courts strictly enforcing the structural requirements for international law to become domestically relevant, regardless of the actual axiological content thereof.

While that of the contrast between national and international law is admittedly hardly an emerging field, and many important contributions have been written over the years, the scholarly interest on this topic has been rekindled in recent years.<sup>1</sup> It is nonetheless the ambition of this research to incrementally increase the knowledge in this area of the law, building upon previous contribution and attempting to fill some gaps that have emerged.

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<sup>1</sup> See e.g., Doreen Lustig and Joseph HH Weiler, ‘Judicial Review in the Contemporary World—Retrospective and Prospective’ (2018) 16 *International Journal of Constitutional Law* 315; André Nollkaemper, Yuval Shany and Antonios Tzanakopoulos (eds), *The Engagement of Domestic Courts with International Law: Comparative Perspectives* (Oxford University Press 2024).

A relevant strand of literature, for example, has discussed, reaching very different conclusions, the question of the “order of orders” – namely, that of the possibility of establishing legal hierarchies between the different legal orders and, especially, in the perspective here adopted, between national and international law, thus solving eventual conflicts.<sup>2</sup>

In this regard, some scholars maintain, given the impossibility of establishing hierarchies between legal orders, and actually stressing the heterarchical ordering among them, that the answer to the question of authority in the context of the relationship between domestic legal orders and the international one should remain open.<sup>3</sup>

Others accounts of the relation between the two planes, grouped around the notion of “international constitutionalism”,<sup>4</sup> instead, attempt to (re-)convey unity and coherence to the practice of law at the intersection between legal systems by elaborating a set of overriding constitutional principles guiding the solution of conflicts, though not founding them upon the formal authority of international law: were international law not to respect such principles, domestic courts would be authorised and even required to disregard it; conversely, were international law to better realise and protect them, it should prevail over contrasting national norms.<sup>5</sup>

Addressing more general question as to the role of domestic courts vis-à-vis international law, the interpretive function domestic courts perform with regard to

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<sup>2</sup> For an overview, see Neil Walker, ‘Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders’ (2008) 6 *International Journal of Constitutional Law* 373; Başak Çali, *The Authority of International Law: Obedience, Respect, and Rebuttal* (Oxford University Press 2015) 33–46.

<sup>3</sup> Legal pluralist and constitutional pluralist distinguish themselves as the former deny the possibility of elaborating legal (and, more precisely, constitutional) principles aimed at reconciling the conflicting legal orders. As to the former, see Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2010); Jean L Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism* (Cambridge University Press 2012). As to the latter, see Neil Walker’, ‘Constitutionalism and Pluralism in Global Context’ in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012).

<sup>4</sup> For a “mapping” of the many scholarly perspectives which can be traced back to “international constitutionalism”, see Jan Klabbers, ‘International Constitutionalism’ in Roger Masterman and Robert Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019).

<sup>5</sup> Mattias Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’ (2004) 15 *European Journal of International Law* 907; Samantha Besson, ‘The Authority of International Law - Lifting the State Veil’ (2009) 31 *Sidney Law Review* 343; Anne Peters, ‘Supremacy Lost: International Law Meets Domestic Constitutional Law’ (2009) 3 *ICL Journal* 170.

international law,<sup>6</sup> also in the context of the fragmentation of international law has been discussed;<sup>7</sup> so has the role of domestic courts in enforcing international law.<sup>8</sup> In this context, some have framed the issue of domestic non-application of international law in terms of civil international disobedience, arguing that such instances of non-application of international law by domestic courts have an evolutive function for (the good of) the international legal system.<sup>9</sup>

Just as the function of domestic courts in international law has increased, however, so has the importance of international law under domestic constitutional law.<sup>10</sup> Accordingly, the phenomenon of domestic courts refusing to enforce international law in the national legal order on constitutional grounds is not only relevant to international law

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<sup>6</sup> As to the role of domestic courts as to the interpretation of international law, see André Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press 2011) 10, 264–279; Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford University Press 2016); Odile Ammann, *Domestic Courts and the Interpretation of International Law. Methods and Reasoning Based on the Swiss Example* (Brill Nijhoff 2020) 142, ff.

On a related topic, Anthea Roberts and others (eds), *Comparative International Law* (Oxford University Press 2018) argue that the diffuse domestic interpretation of international law threatens the unity and uniformity thereof, instead favouring the creation of ‘international laws’.

<sup>7</sup> Ole Kristian Fauchald and André Nollkaemper, *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Bloomsbury Publishing 2014).

<sup>8</sup> See e.g. Yuval Shany, ‘National Courts as International Actors: Jurisdictional Implications’ [2009] *Federalismi.it*; Anne-Marie Slaughter and William Burke-White, ‘The Future of International Law Is Domestic (or, The European Way of Law)’ in Janne E Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007).

<sup>9</sup> Robert E Goodin, ‘Toward an International Rule of Law: Distinguishing International Law-Breakers from Would-Be Law-Makers’ (2005) 9 *The Journal of Ethics* 225; Frédéric Mégret, ‘Civil Disobedience and International Law: Sketch for a Theoretical Argument’ (2009) 46 *Canadian Yearbook of International Law* 143; Antonio Franceschet, ‘Theorizing State Civil Disobedience in International Politics’ (2015) 11 *Journal of International Political Theory* 239; Danny Michelsen, ‘State Civil Disobedience: A Republican Perspective’ (2018) 14 *Journal of International Political Theory* 331.

<sup>10</sup> Brun-Otto Bryde, ‘Konstitutionalisierung Des Völkerrechts Und Internationalisierung Des Verfassungsrechts’ (2003) 42 *Der Staat* 61; Juliane Kokott, ‘Die Staatsrechtslehre und die Veränderung ihres Gegenstandes: Konsequenzen von Europäisierung und Internationalisierung’, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (De Gruyter 2004); Gráinne de Búrca and Oliver Gerstenberg, ‘The Denationalization of Constitutional Law’ (2006) 47 *Harvard International Law Journal* 20; Anne Peters, ‘The Globalization of State Constitutions’ in Janne E Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007); Matthias Herdegen, ‘Internationalisierung der Verfassungsordnung’ in Otto Depenheuer and Christoph Grabenwarter (eds), *Verfassungstheorie* (Mohr Siebeck 2010).

and scholars thereof, but it represents also a genuine constitutional law issue, one which poses a number of ‘inward-looking’ questions, which are rarely asked when one approaches the matter from the perspective of international law. This is in line with a recently growing interest in the field of comparative foreign relations law.<sup>11</sup>

Accordingly, judicial instances of non-compliance with the state’s international law obligations are also an important object of study under a constitutional law perspective: in this regard, the topic at hand has been often discussed in constitutional law studies devoted to specific jurisdictions.<sup>12</sup> Studies that adopt a more comparative approach to the issue of conflicts between national and international law, however, are most often based on country reports:<sup>13</sup> furthermore, when organising the findings of such studies, forms of domestic judicial non-application of international law are often discussed and differentiated in light of their ‘outward’ consequences as to the effectiveness and authority of international law.<sup>14</sup>

For these reasons, it would appear that a comparative constitutional law study devoted to improving the understanding of how instances of non-application of international law by national judges are framed as a matter of national constitutional law might be of some use in progressing the state of studies in the field.

However, this research is – hopefully – more relevant in that it strives to reconnect two strands of scholarship that, in spite of their objects of study being clearly intertwined in the legal practice, hardly relate to one another. These two strands are, on the one hand, the literature addressing the conflictual between national and international law above discussed and, on the other, that discussing the opening of the post-modern

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<sup>11</sup> Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press 2019); Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law: Bridges and Boundaries* (Cambridge University Press 2021); Helmut Philipp Aust, Heike Krieger and Felix Lange (eds), *Research Handbook on International Law and Domestic Legal Systems* (Edward Elgar Publishing Limited 2024).

<sup>12</sup> See ch. 6, 7, 8 for a review of the literature regarding the UK, Germany and Colombia respectively.

<sup>13</sup> Dinah Shelton (ed), *International Law and Domestic Legal Systems. Incorporation, Transformation, and Persuasion* (Oxford University Press 2011); Fulvio Maria Palombino (ed), *Duelling for Supremacy: International Law vs. National Fundamental Principles* (Cambridge University Press 2019); Nollkaemper, Shany and Tzanakopoulos (n 1).

<sup>14</sup> See, e.g., Nollkaemper, Shany and Tzanakopoulos (n 1) 12–14.

constitutions.<sup>15</sup> The question of whether and how the opening of the constitution affects the way in which conflicts between national and international law are argued is hardly ever asked in comparative constitutional law studies: however, a comparative approach to this question appears of sure importance in that it proves fundamental in grasping the potential, as well as the limits, of the principle at issue. Indeed, it is only by comparing the approach to conflicts between national and international law in open constitutional orders with that undertaken in legal orders that do not encompass such a principle that it is possible to fully grasp its relevance.

The reason for focusing on open constitutionalism is well captured in the concluding words of Stephan Hobe's 1998 monograph on the open constitutional state. He argued:

“perhaps open statehood, which currently appears to be an interim solution, will prove to be the compromise that, on the one hand, ensures that tasks are adequately and appropriately fulfilled and, on the other hand, maintains the relationship between the individual and the community as mediated by historical development and by culture and tradition. It would not be the first time in history that solutions seen as transitional have proved to be much more lasting than initially thought.”<sup>16</sup>

Indeed, in the present context, the open constitutional state, structurally stuck in between the “no longer” of the past absolute state sovereignty and the “not yet” of some kind of world (or even regional) government,<sup>17</sup> is probably here to stay, considering how unlikely it is that some sort of world government, or even a full transfer of sovereignty to supranational regional organisation such as the EU, is realised in the foreseeable future. Particularly, in the context of the present and ongoing crisis of multilateralism in international relations and of the international rule of law, the “unilateral” constitutional

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<sup>15</sup> As to the international literature on the opening of state constitutions, see Paolo Carrozza, ‘Constitutionalism’s Post-Modern Opening’ in Martin Loughlin (ed), *The Paradox of Constitutionalism* (Oxford University Press 2008); Antonio Cassese, *L’apertura degli ordinamenti statali all’ordinamento della comunità internazionale* (Editoriale scientifica 2009); Giuseppe Martinico, ‘Constitutionalism, Resistance, and Openness: Comparative Law Reflections on Constitutionalism in Postnational Governance’ (2016) 35 *Yearbook of European Law* 318. The literature on this topic is particularly developed in Germany (generally addressing also the issue of the limits of the openness of the German Constitution) – see *infra* ch. 7.

<sup>16</sup> Stephan Hobe, *Der offene Verfassungsstaat zwischen Souveränität und Interdependenz. Eine Studie zur Wandlung des Staatsbegriffs der deutschsprachigen Staatslehre im Kontext internationaler institutionalisierter Kooperation* (Duncker & Humblot 1998) 449.

<sup>17</sup> Giorgio Repetto, ‘Between the “No Longer” and the “Not Yet”. Shifting Sovereignties at the Age of Supranational Constitutionalism’ (2016) 7 *Comparative Law Review* 1.

commitment to uphold and promote it can be seen as the main instrument of an internationalist normative agenda, aimed at reaffirming the authority of international law, promoting states' compliance with it, and advancing their integration into the international society, thus rebutting the globally growing nationalistic tendencies. Hence the interest for what might appear as a contradiction, namely the reconciliation of the openness towards international law with the supremacy of the constitution. Indeed, if the principle of openness is not to be considered a rhetorical device, one to pay lip service to,<sup>18</sup> and instead it has to be considered having its own normative effectiveness, then it is necessary to investigate what effect, if any, it has in shaping the reasoning courts develop in instances of conflict between national and international law.

## 2. *Some preliminary issues: scope and methodology of the research*

A few preliminary clarifications are in order at this point, the first one concerning the scope of this research: namely, what is included therein and what is instead excluded from it.

First, this research is limited to the “Westphalian duo,” namely state and international law.<sup>19</sup> Admittedly, this is a limited perspective, as many other normative sources interact with state law, both beneath and above it, some *de iure* and others *de facto*.<sup>20</sup> Apart from those concerning the feasibility of the research, there are a number of considerations supporting the choice to limit the scope of this research to the interaction between national and international law. The first one is the ongoing relevance, in its own right, of the relationship between national and international law: far from being supplanted by other forms of legalities, both international law and national law are to this very day still fundamental sources of normativity and their interaction is often at the core of fundamental legal issues in a number of cases. Furthermore, as argued by Walker, international law is “important not just as a transnational precedent but also as a platform for global law. [...] International law has also been a catalyst for the development of

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<sup>18</sup> Anne Peters, ‘Völkerrechtsfreundlichkeit – mehr als ein Lippenbekenntnis’ (2023) 83 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law* 587.

<sup>19</sup> William Twining, *Globalisation and Legal Scholarship* (Wolf Legal Publishers 2011) 39.

<sup>20</sup> Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press 2012).

transnational law more generally.”<sup>21</sup> Accordingly, legal doctrines developed in the context of the interaction between national and international law might be applied to the interaction and, eventually, the conflicts between other forms of legality.

The choice to focus on the relationship between national and international law also implies that supranational law is excluded from the scope of this research. Thus, for example, the relationship between national and EU law won't be addressed. This is so for a fundamental difference between international and supranational law, namely that supranational law has an autonomous, plausible, claim to directly regulate some domestic situations.<sup>22</sup> International law does not: it might very well be that international law is directly applicable within the domestic legal order; however, it is so not autonomously and in its own right, but by virtue of a constitutional authorisation.<sup>23</sup> Such a distinction makes international and supranational law too different to be considered together in this research. This doesn't take away the fact that some argumentative techniques developed by domestic courts when addressing the one are not transposed in the courts' treatment of the other. Accordingly, insofar as it will be relevant, some references will be made to EU law, especially when discussing the case of Germany and, to a minor degree, that of the UK.

Limiting the present research to the relationship between national and international law also implies the exclusion of the discussion of the interaction between domestic and foreign law. In this, the present research entirely shares with Groppi and Ponthoreau the consideration of the radical difference between the entirely facultative reference to foreign materials when compared to the consideration by domestic judges of binding international obligations.<sup>24</sup>

Moreover, this research only addresses the instances of judicial non-application of international law in the context of working constitutional democracies: as such, contexts

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<sup>21</sup> Neil Walker, *Intimations of Global Law*: (Cambridge University Press 2014) 51.

<sup>22</sup> Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *The Modern Law Review* 317, 341.

<sup>23</sup> André Nollkaemper, 'The Duality of Direct Effect of International Law' (2014) 25 *European Journal of International Law* 105.

<sup>24</sup> Professor Tania Groppi and Professor Marie-Claire Ponthoreau, *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing 2014) 5. Thus the approach undertaken here should be distinguished from that employed in other researches whereby the reference to foreign materials and international law by domestic courts are considered together: see, e.g., Giuseppe De Vergottini, *Oltre il dialogo tra le corti: giudici, diritto straniero, comparazione* (Il mulino 2010); Vicki Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press 2013).

of rule of law crisis were excluded. This was done relying on the consideration that, in such context, the courts, on which this research is focused, lose their function of autonomously declaring what the law is; to the contrary, they become enablers of the party in power, thus collapsing the law on the mere political will. Accordingly, in those contexts, legal doctrines limiting the domestic authority of international law are consistently abused with the aim of freeing the political authorities from any constraints deriving from international obligations binding the state.<sup>25</sup> As a consequence, such cases are simply not comparable, at least within this research as it was designed, with those here discussed.

Somewhat relatedly, in designing this research, a choice was made to focus on instances of non-application of international law by judicial authorities, and not, for example, by political ones. This was done, borrowing and reformulating the limiting idea of the judge as *bouche de la loi*, based on an understanding of the judge as the *bouche du droit* – that is, as the institutional subject tasked with the application of the law as it results from the complexity of the legal order. Instead, political authorities pursue – legitimately – political agendas, and their decisions are informed by policy consideration more than they are determined by the law. Instead, judicial decisions are, or, at least, should be, entirely and exclusively determined by the law: hence the decision to focus only on judicial instances of non-application of international law.

Finally, a few words are needed as to the justification of the selections of the cases to be reviewed, namely those of the UK, Germany, and Colombia. Here, the criterion which was adopted to guide the choice of the relevant jurisdictions was that of the “prototypical cases,”<sup>26</sup> namely of those jurisdictions that best embody the characteristics that are being investigated. Given the present focus on the relevance of the principle of openness, the choice was made to identify those jurisdictions that more clearly embody it, also paying attention to the desirability of picking jurisdictions from different legal areas, so to have the most representative examples possible. These are Germany and

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<sup>25</sup> Among many, see Giuseppe Martinico and Oreste Pollicino, ‘Use and Abuse of a Promising Concept: What Has Happened to National Constitutional Identity?’ (2020) 39 Yearbook of European Law 228; Gábor Halmai and Julian Scholtes, ‘Illiberal Constitutionalism and the Abuse of Constitutional Identity’ in Ran Hirschl and Yaniv Roznai (eds), *Deciphering the Genome of Constitutionalism: The Foundations and Future of Constitutional Identity* (Cambridge University Press 2024). For a brief discussion, see *infra* ch. 2, para. 4.B.i.

<sup>26</sup> Ran Hirschl, ‘Comparative Methodologies’ in Roger Masterman and Robert Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019) 27.

Colombia, as both these cases clearly show a very remarked constitutional openness, which is generally recognised both in the scholarship and in the jurisprudence. The UK, instead, is the prototypical case of a legal order not embodying the principle of openness and at the same time, not being hostile to international law.

### 3. *Structure*

This thesis is divided in three parts.

In Part 1, i.e., in chapter 1 and 2, an alternative between structural and identitarian conflicts is first introduced and then formalised. Chapter 1, particularly, operates a review of a set of cases – those arisen under Article 36 VCCR, those pertaining to the sovereign immunity of states, and those contesting the UN targeted sanctions regime. The approach adopted is that of reviewing approximately the same case as it was decided across different jurisdiction, so that differences in judicial reasoning might better be captured. From the review thus carried out, patterns of judicial reasoning are inductively derived, and the observation is made of an emergence of patterns of identitarian and structural non-application of international law. In Chapter 2, these notions are then formalised and given a more robust theoretical structure.

Part II – that is, chapters 3 to 5 – aims at explaining such alternative, putting forward the main thesis of this research, namely the qualitative correlation between modern statehood and structural conflicts and between open statehood and identity conflicts. This is done by framing, in chapter 3 and 4, the alternative between modern and open statehood through the looking glasses of the legal tradition, thus understanding such a shift as an incremental development, rather than a rupture. Accordingly, while the core idea of the state, namely its legal autonomy, is preserved and retained, the open state progressively departs from the idea of self-referential sovereignty, embracing a more internationalist approach, whereby the fulfilment of the fundamental constitutional goals of the state is pursued and realised also on the international plane. In this perspective, chapter 3 presents the theory, especially as developed by Patrick Glenn, of the legal tradition, while chapter 4 applies it to the alternative between modern and open statehood. Chapter 5 builds upon the previous chapters and presents the main thesis of this research, arguing that an open conception of statehood is linked to the framing of conflicts between national and international law in terms of identity, while a modern understanding thereof is correlated with structural conflicts.

Part III – chapters 6 to 8 – test, and actually confirms, the reconstructive hypothesis elaborated in Chapter 5 by examining the cases of the UK, Germany, and Colombia respectively. While some accommodation of the specificities of each jurisdiction proves necessary, the structure of these chapters is somewhat uniform: it first presents the general principles of the law governing the relationship between national and international law in that jurisdiction, it discusses the domestic status of international law in the domestic legal order in areas which are not particularly constitutionally sensitive, subsequently discussing, instead, the relationship between national and international law in the field of human and fundamental rights and climate protection, the chapter devoted to Colombia discussing instead the protection of the environment. This is done on the assumption, which was then confirmed, that the principle of openness is particularly relevant in areas of the law of high constitutional and cosmopolitan significance.

Chapter I  
Distinguishing instances of non-application of international law by  
domestic courts: structural and identitarian

This chapter aims at showing that a fundamental difference exists in how instances of conflict between national and international law are construed by domestic courts. Thus, it introduces a distinction as to the approach domestic courts adopt in such cases, namely that between identity and structural conflicts. Initially these two notions will be presented and described only very briefly; afterwards, some cases will be presented where these notions can be appreciated and grasped more concretely, leaving it to the next Chapter to provide a sounder theoretical framework aimed at defining these two notions. Thus, three sets of cases will be presented, with the view of offering some concrete references, whereto the proposed distinction between structural and identity conflicts can be applied.

The choice to first present some cases, from which to derive the theoretical categories that will be employed throughout this research is also testament to the approach here generally adopted, that of inductively drawing general categories from the review of the concrete judicial practice, rather than deductively forcing theoretical notions thereupon.<sup>1</sup> It is only for the purpose of carrying out a clearer exposition and of favouring an easier understanding of the argument here presented that the notions of identity and structural conflicts will be briefly presented in the first paragraph.

In considering which cases to present, the choice was made to select judicial decision arisen in different jurisdictions, pertaining to the same matter of international law, thus showing more clearly how the same issue could be framed in structural or identitarian terms. The cases that will be presented are very well known and have been thoroughly discussed in the literature: while it is inevitable to provide some background to the cases that will be discussed, this allows to focus the discussion only on the aspects that are of interest to this research, devoting less attention that would otherwise be acceptable to a general analysis thereof. It is the ambition of this Chapter that by

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<sup>1</sup> A similar approach was adopted also by André Nollkaemper, Yuval Shany and Antonios Tzanakopoulos (eds), *The Engagement of Domestic Courts with International Law: Comparative Perspectives* (Oxford University Press 2024) 6: ‘instead of focusing on deductive principles, emanating from traditional theoretical constructs of the relationship between the national and international legal orders, this volume seeks to identify and offer a typology of patterns of engagement on the basis of practical experience of engagement in the life of international law.’

organising those cases around two categories, those of structural and identitarian conflicts, and by presenting them side-by-side with identical cases arisen in other jurisdictions, the differences in how the relationship between national and international law is framed by courts will become apparent.

Thus, the cases hereafter presented will be those arisen, before national Courts, under art. 36 of the Vienna Convention on Consular Relations of 1963, those pertaining to the recognition of the immunity of States, and those related to the UN terrorist individual sanctioning regime under UNSEC Resolution 1267 (1999).

### **1. Identity v. structural conflicts: a provisional definition**

National courts sometimes question the authority, in the domestic legal order, of a given norm of international law binding upon the State.<sup>2</sup> When they do, they may do so by arguing that a given requirement set forth in domestic law in order to incorporate international law in the municipal legal order is lacking, or, somewhat similarly, that the international law at issue occupies a lower rank in the hierarchy of sources than a given domestic provision, with which it is inconsistent ('structural conflicts'). Alternatively, courts may argue that the international law norm in question, otherwise applicable to the case, is axiologically incompatible with fundamental principles of constitutional law ('identity conflicts').

The former approach is 'structural' in the sense that it focuses on the domestic legal 'structure' regulating the relation between national and international law, and, more specifically, on those rules pertaining to the incorporation international law into the national legal system, both with regard to procedures and to the level at which international law "fits" in the domestic system of sources. Structural reasoning raises constitutional issues pertaining, e.g., to the domestic division of power, to the constitutional procedures required for the incorporation of international law, to the status of international law within the system of sources of law, etc. It aims at protecting the decision-making capacity of state institution: in democratic contexts, to which this research is limited, this also means that the framing of instance of non-application of

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<sup>2</sup> See Başak Çali, *The Authority of International Law: Obedience, Respect, and Rebuttal* (Oxford University Press 2015) 11, defining 'the authority that a particular international law possesses in domestic orders as the capacity of a particular international law to impose duties or to confer powers on state officials'.

international law in structural terms aims at protecting the law-making prerogative of democratically legitimised institutions. In such cases, the substance of the two competing norms – the one stemming from national law and the one from international law – is not engaged. In this, the question of the relevance of a norm of international law in the domestic setting is framed as one of procedure, competence, and inter-institutional equilibrium. This approach can also lead to cases where domestic courts do not take into consideration the relevant international law obligations binding the State, irrespective of where this results in compliance or non-compliance with them. In such cases, as a result, domestic law (as enacted by Parliament, or Congress) is “all that matters” and judges will feel constrained (as a matter of law) from considering international law but as a ground for interpretation in cases where the domestic law remains unclear: this is what Vicki Jackson terms ‘silent resistance,’ and the International Law Association Study Group on Principles on the Engagement of Domestic Courts with International Law terms ‘evasive avoidance’.<sup>3</sup> This judicial attitude is furthered, in the context of the USA, by doctrines of US exceptionalism.<sup>4</sup>

Conversely, ‘identity’ reasoning is quite different, in that it focuses on the substance of the competing norms, and on the values underpinning them, once that their relevance to the case has been *prima facie* established according to the relevant constitutional framework, *per* structural reasoning. As it has been observed, “it is about understanding the relation between legal orders not only in formal and institutional terms, but also in relation to values and substantial choices at play. [...] It is the discussion on the values, which, in its extreme traits assumes the features of identarian objection, that ends up

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<sup>3</sup> Vicki Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press 2013) ch 1 ‘Resisting the Transnational’; as to the ILA Study Group, its Final Report is now also published in Nollkaemper, Shany and Tzanakopoulos (n 1) 371, see p. 387.

<sup>4</sup> As for the debate on an alleged US exceptionalism, see Sabrina Safrin, ‘The Un-Exceptionalism of U.S. Exceptionalism’ (2008) 41 *Vanderbilt Journal of Transnational Law* 1307; Anu Bradford and Eric Posner, ‘Universal Exceptionalism in International Law’ (2011) 52 *Harvard International Law Journal* 3; Georg Nolte and Helmut Philipp Aust, ‘European Exceptionalism?’ (2013) 2 *Global Constitutionalism* 407; Gráinne de Búrca, ‘Internalization of International Law by the CJEU and the US Supreme Court’ (2015) 13 *International Journal of Constitutional Law* 987. The question, at least in the perspective of this research, however, is not whether one jurisdiction’s approach towards international law is exceptional, rather in what the various domestic “exceptionalisms” differ from one another, to what these differences are due, and what are the consequences thereof for the relation between national and international law.

reverberating on the architecture of the relations [between legal orders] and not the reciprocal (i.e., it is not an architectural evolution reverberating on the spaces of life)”.<sup>5</sup>

## **2. Identity v. structural conflicts: some cases**

### **A. Cases arisen under art. 36 of the 1963 Vienna Convention on Consular Relations**

Starting with cases arisen under art. 36 Vienna Convention on Consular Relations of 1963 (‘VCCR’), it should be first recalled that art. 36.1(b) VCCR requires State authorities to inform without delay a foreign national who has been “arrested or committed to prison or to custody pending trial or is detained in any other manner” of their rights under that paragraph. These rights basically consist of the right of communicating with the consular post of their State of nationality.

#### *1. Art. 36 VCCR in the interpretation of the International Court of Justice*

As it is well known, the issue of the consequences of a violation of such obligation upon States in cases where the foreign national was eventually convicted was addressed by the International Court of Justice in two cases brought against the USA,<sup>6</sup> whose conclusions were recently confirmed in a case involving India and Pakistan.<sup>7</sup> In those decisions, the ICJ consistently held that “article 36, paragraph 1, creates individual rights” and that, if a conviction had been passed in case of violation of such rights, the State

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<sup>5</sup> Alberto di Martino and Gianluigi Palombella, ‘Oltre l’architettura ordinamentale: il nuovo diritto composito della «terza ondata»’ (2020) 40 Quaderni costituzionali 225, 227 (author’s translation).

<sup>6</sup> ICJ, Judgement of 27 June 2001, *LaGrand (Germany v United States of America)* I.C.J. Reports 466; Judgement of 31 March 2004, *Avena and Other Mexican Nationals (Mexico v United States of America)*, I.C.J. Reports 12. An earlier case was that of Mr. Breard, brought by Paraguay against the USA, which Paraguay later discontinued the proceedings, after U.S. authorities carried out Mr Breard’s sentence – see, as to US Supreme Court allowing the sentence to be executed, *Breard v Greene, Warden* (1998) 523 U.S. 371; as to the subsequent discontinuance of the proceedings, ICJ, Order of 10 November 1998, *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, I.C.J. Reports 1998, p. 426.

<sup>7</sup> ICJ, Judgement of 17 July 2019, *Jadhav (India v Pakistan)*, I.C.J. Reports 418.

should provide for “the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.”<sup>8</sup>

Now, ICJ decisions are binding upon the parties to the case in respect of that particular case,<sup>9</sup> but this binding effect, once again, is a matter of international law and operates on international law plane; a whole different issue is that of the domestic application of such decisions.<sup>10</sup> Indeed, the conformation of the domestic legal order to international courts’ – and, particularly, in this case ICJ’s – decisions often requires implementing activity by national authorities: either by the political power – thereby considering, in their respective roles, the legislative and the executive –, or by courts, who, thus, as already argued, exercise a function of “gatekeeping”, or review.<sup>11</sup>

2. *The non-self-executing nature of Art. 36 VCCR in the case law of U.S. Courts: an instance of structural conflict.*

In the wake of the ICJ decision, a number of foreign nationals, convicted by US authorities without having been informed of their rights under art. 36 VCCR, attempted to invoke their rights – as affirmed by the ICJ in the mentioned decisions – before US courts, asking for the review of their convictions.<sup>12</sup> Eventually, the Supreme Court was called to determine the domestic effect of the rulings by the ICJ and of Article 36 VCCR, as interpreted by the ICJ.<sup>13</sup>

In *Medellin*, the Supreme Court held that neither Article 36 VCC, nor the rulings by the ICJ are self-executing in the US domestic legal order, and that, thus, they cannot be

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<sup>8</sup> ICJ, *La Grand* (n 13) paras. 77 and 125.

<sup>9</sup> See Article. 94 UN Charter and Article 59 ICJ Charter.

<sup>10</sup> Hermann Mosler, ‘Supra-National Judicial Decisions and National Courts’ (1981) 4 *Hastings International and Comparative Law Review* 425.

<sup>11</sup> With specific reference to the role of domestic courts, see Christoph H Schreuer, ‘The Implementation of International Judicial Decisions by Domestic Courts’ (1975) 24 *International and Comparative Law Quarterly* 153; André Nollkaemper, ‘Conversations among Courts: Domestic and International Adjudicators’ in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013).

<sup>12</sup> Bruno Simma and Carsten Hoppe, ‘From LaGrand and Avena to Medellin - A Rocky Road toward Implementation’ (2005) 14 *Tulane Journal of International and Comparative Law* 7; Curtis A Bradley, ‘Enforcing the Avena Decision in U.S. Courts’ (2006) 30 *Public Policy* 119.

<sup>13</sup> The matter was addressed by the Supreme Court in three judgements: *Sanchez-Llamas v Oregon* (2006) 548 U.S. 331; *Medellin v. Texas* 552 U.S. 491 (2008); *Leal Garcia v Texas* (2011) 564 U.S. 940.

the ground for courts granting individuals any particular remedy in case of breach of art. 36 VCCR obligations, observing:

“No one disputes that the *Avena* decision [...] constitutes an *international* law obligation on the part of the United States. The question we confront here is whether the *Avena* judgment has automatic *domestic* legal effect such that the judgment of its own force applies in state and federal courts. [...]

[Article 94 of the UN Charter] is not a directive to domestic courts. It does not provide that the United States “shall” or “must” comply with an ICJ decision, nor indicate that the Senate that ratified the U.N. Charter intended to vest ICJ decisions with immediate legal effect in domestic courts. Instead, “[t]he words of Article 94 ... call upon governments to take certain action.”

The pertinent international agreements, therefore, do not provide for implementation of ICJ judgments through direct enforcement in domestic courts, and ‘where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own.’”<sup>14</sup>

In a similar fashion, the Court had already held that art. 36 VCCR was not self-executing and a domestic remedy for breaches of its provisions could not be automatically derived therefrom: consequently, it was not for the courts, but for the legislator, and, more precisely, for State legislators, to enact legislation to the effect of providing the remedies required by international law obligations binding upon the USA.<sup>15</sup>

The issue of the domestic effects of art. 36 VCCR as interpreted by the ICJ – but not that of ICJ decisions, which are binding only upon States party to the litigation – was considered in other jurisdictions, the UK, Canada and Australia.<sup>16</sup> Whereas in Canada art. 36 VCCR is incorporated into national law,<sup>17</sup> and thus domestic courts found that

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<sup>14</sup> *Medellin v. Texas* (n 12) 504, 513 (original emphasis).

<sup>15</sup> See *Sanchez-Llamas v. Oregon* (n 12) 346, f: “if we were to require suppression for Article 36 violations without some authority in the Convention, we would in effect be supplementing those terms by enlarging the obligations of the United States under the Convention. This is entirely inconsistent with the judicial function. [...] Of course, it is well established that a self-executing treaty binds the States pursuant to the Supremacy Clause, and that the States therefore must recognize the force of the treaty in the course of adjudicating the rights of litigants. [...] But where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own”. See also *Breard v. Greene* (n 6).

<sup>16</sup> Kristin K Beilke, ‘The U.S. Is Not Alone in Its Reluctance to Adhere to Supranational Decisions from the International Court of Justice’ (2009) 7 *Loyola University Chicago International Law Review* 213.

<sup>17</sup> *Foreign Missions and International Organizations Act* S.C. 1991, c. 41, sec. 3.

individuals could invoke it before them,<sup>18</sup> in the United Kingdom and in Australia it is not so.<sup>19</sup> In Australia, particularly, this led to similar results to those reached by US court, namely the exclusion of possibility to invoke art. 36 VCCR before domestic courts because it wasn't incorporated and it is not to be considered self-executive.<sup>20</sup>

3. *Art. 36 VCCR cases in Germany: Völkerrechtsfreundlichkeit and the (only envisioned) possibility of derogation only due to concerns for the protection of "fundamental rights or other constitutional provisions."*

Against this background, two decisions by the Federal Constitutional Court of Germany ('FCC') mark a stark difference, not only as to the final outcome, but also (and in the perspective of this research, more interestingly) as to the reasoning adopted to frame conflicts between the national legal system and the international one.<sup>21</sup>

Just as in the USA, while the VCCR had been duly ratified by the German legislator, it had not been incorporated and no domestic procedure for the review of convictions passed in breach of its provisions – and especially of art. 36 – had been enacted. In a very similar manner to the cases decided in the US cases, a number of foreign nationals, were convicted without having been informed of his rights under art. 36 VCCR.

In this regard, the Federal Court of Justice (*Bundesgerichtshof* – 'BGH'), having considered the ICJ decision in *Avena*, and having thus established that art. 36 VCCR confers upon individuals subjective rights (also in the domestic legal order),<sup>22</sup> found that such provision did not affect the position of the accused in the criminal proceedings, as it

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<sup>18</sup> *R. v. Partak* [2001] CanLII 28411 (Ontario Superior Court of Justice), para. 22-26; *R. v. Provo* [2015] ONCJ 311, para. 63; *United States v. Sari* 2023 BCSC 1931, para. 40.

<sup>19</sup> As to the UK, see Consular Relations Act 1968, sec. 1; as to Australia, see Consular Privileges and Immunities Act 1972, sec. 5. In both cases several provisions of the Convention are given effect within the national legal order, with the exception, among others, of art. 36.

<sup>20</sup> *La Bara v Minister for Immigration and Citizenship* [2008] FCA 785, para. 10: 'the applicant cited Article 36 of the Convention [...], but that article is not incorporated into the domestic law.'

<sup>21</sup> Jana Gogolin, 'Avena and Sanchez-Llamas Come to Germany – The German Constitutional Court Upholds Rights under the Vienna Convention on Consular Relations' (2007) 8 German Law Journal 261; Carsten Hoppe, 'Implementation of LaGrand and Avena in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights' (2007) 18 European Journal of International Law 317.

<sup>22</sup> In this regard, it should be noted that the current § 114 b, last paragraph StPO ("A foreign national shall be informed that he may request information from the consular representation of his home State and send them communications") was added only in 2009, by law of 29.07.2009 BGBl I 2009 2274.

aimed merely at ensuring that an arrested foreign national did not “disappear” from the public without anyone noticing.<sup>23</sup> Thus, the BGH concluded, no remedy was available under German law to the applicants.

Eventually, however, at the end of a long chain of decisions,<sup>24</sup> the FCC, found that the applicants were entitled, under the constitutional principle of the rule of law, whose content was to be determined by taking into account also Germany’s international obligations, to a review of their conviction, passed without having been informed of their rights under art. 36 VCCR. The Federal Constitutional Court held:

“in terms of content, the obligation to take into account the relevant decisions of the International Court of Justice means that the specialist courts must deal with its statements and, if necessary, disclose divergent opinions of their own.

Such a deviation from the case law of the International Court of Justice can trigger conflicts with the international obligations of the Federal Republic of Germany, which must be avoided [pursuant to] the constitutional principle of international law friendliness. Therefore, in such a different case, it must be explained why fundamental rights of third parties or other constitutional provisions require a derogation.

The Federal Court of Justice did not sufficiently fulfil its constitutional obligation to take into account the relevant case-law of the International Court of Justice on the question of the consequences resulting from a violation of article 36(1)(b), third sentence, of the VCCR.

The Federal Court of Justice has not guaranteed the individual case review required by international law”<sup>25</sup>

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<sup>23</sup> Federal Court of Justice, Judgement of 7 November 2001, 5 StR 116/01, NStZ 2002, 168, para. 5; see also Federal Court of Justice, Judgement of 29 January 2003, 5 StR 475/02.

<sup>24</sup> After the 2001 and 2003 decisions (*supra* fn. 22) by the Federal Court of Justice, the FCC addressed the matter, quashing those decisions and returning the case to the specialised Court, in FCC, Decision of the First Chamber of the Second Senate of 19 September 2006, 2 BvR 2115/01, BVerfGK 9, 174. The case was then decided in 2007 by the Federal Court of Justice, which only awarded monetary compensation to the individuals convicted in breach of art. 36 VCCR, denying them, instead, a procedural remedy aimed at reconsidering the convictions: see Federal Court of Justice, Judgement of 11 April 2007, 5 StR 475/02, NStZ-RR 2010, 66; Judgement of 25 September 2007, 5 StR 116/01, BGHSt 52, 48.

<sup>25</sup> FCC, Decision of the Second Senate of 8 July 2010, 2 BvR 2485/07, BVerfGK 17, 390, para. 26, 30, and 34 (author’s translation).

The matter then returned to the BGH, which, concluding this saga, established the possibility of (and the conditions for) a review of convictions passed in breach of art. 36 VCCR.<sup>26</sup>

The above-quoted FCC decision is relevant for two reasons.

First, it shows the role of the principle of international law friendliness in justifying the relevance of international law obligation in the domestic legal order. Indeed, the VCCR is incorporated in the law of the case beyond what would have been possible by strictly adhering to the formal rules on the incorporation of international law in the domestic sphere: without taking into account the principle of openness, the result should have been the same of that reached by the Supreme Court in the U.S., as, at least initially, the BGH had concluded. Here, instead, a remedy for art. 36 VCCR violations was elaborated by the Courts on the basis, as explicitly acknowledged by the FCC, of the principle of friendliness towards international law, a corollary of that of openness.<sup>27</sup>

Second, while the final outcome of the long chain of decisions by the FCC and the BGH was actually one of compliance with the relevant international law obligations binding upon Germany and stemming from art 36 VCCR, as interpreted by the ICJ, the FCC was quite clear in stating the possibility for non-compliance with such authorities. Indeed, it stated quite clearly that a “deviation” from international law obligations is possible under German constitutional law, but it must be justified as due to the need to respect fundamental rights of third parties or other constitutional provisions.

In this regard, by comparing the position held by the FCC with that of the US Supreme Court in framing the reasons for the divergence between national and international legal orders, it becomes apparent that the latter is concerned with verifying whether ICJ decisions and art. 36 VCCR are directly applicable in the domestic legal order, regardless of their axiological implications and compatibility with the national Constitution. Given that the Supreme Court concludes in the negative as to their self-executing nature, it refuses to comply with them and to grant claimants a remedy under national law. The FCC, instead, having overcome the ‘structural difficulty’ the US Supreme Court deemed insurmountable by virtue of the principle of openness, frames the

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<sup>26</sup> Federal Court of Justice, Judgement of 7 June 2011, 4 StR 643/10, StV 2011, 603. Such a conclusion by the BGH was later (and finally) confirmed by the FCC: see Decision of the First Chamber of the Second Senate of 5 November 2013, 2 BvR 1579/11, NJW 2014, 532.

<sup>27</sup> See, *infra*, Ch. 7, para. 1.

(only hypothetical) conflict in axiological terms. In this, these two (sets of) cases appear to be traceable back to the distinction between structural and identity conflicts advanced.

## **B. State immunity cases.**

Somewhat similarly, the distinction between structural and identity conflicts here advanced emerges also from a review of State immunity cases.

### *1. Foreign State immunity and crimes against humanity before Italian courts: review of international law in light of the fundamental principles of the constitutional order.*

In this regard, a clear instance of identity conflicts is the well-known “never-ending saga” of the law of State immunity in the Italian jurisdiction regarding war crimes enacted in Italy during World War II by Nazi German occupying forces.<sup>28</sup>

The first episode of this saga consists in a number of Judgements by Italian ordinary courts in which Germany was denied immunity for said acts: among these, the most important – as it could be considered the ‘leading case’ – is the decision of the Italian Court of Cassation, in which the Court held that the customary international law of State immunity had evolved, excluding the recognition of immunity from the jurisdiction to States deemed to have enacted war crimes, thus denying Germany its sovereign immunity.<sup>29</sup> Due to similar considerations, Italian courts also granted the exequatur to

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<sup>28</sup> Karin Oellers-Frahm, ‘A Never-Ending Story: The International Court of Justice – The Italian Constitutional Court – Italian Tribunals and the Question of Immunity’ (2016) 76 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 193. The literature on the topic is very extensive: for an overview, see Stefano Battini, Anne Peters and Valentina Volpe (eds), *Remedies against Immunity? Reconciling International and Domestic Law after the Italian Constitutional Court’s Sentenza 238/2014* (Springer 2021); Carlo Focarelli, ‘State Immunity and Serious Violations of Human Rights: Judgment No. 238 of 2014 of the Italian Constitutional Court Seven Years On’ (2021) 1 *The Italian Review of International and Comparative Law* 29.

<sup>29</sup> Italian Supreme Court, (full court), civil division, Judgement of 11 March 2004, no. 5044, para. 9. See also Italian Supreme Court, (full court), civil division, Judgement of 29 May 2008, Joined cases from 14201 to 14212. On the Supreme Court reasoning, and specifically, on its use of the normative hierarchical theory, understood in substantial, and not formal terms, see P De Sena, ‘State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case’ (2005) 16 *European Journal of International Law* 89, 100 ff.

some analogous Greek judgements rendered against Germany, permitting the execution thereof on German assets in Italy.<sup>30</sup>

As a consequence of these proceedings, Germany sued Italy before the ICJ. Eventually, the ICJ condemned Italy for violating the customary international law on State immunities, concluding that “a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law.”<sup>31</sup> In holding so, the Court observed:

“Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory [...] are rules of *jus cogens*, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters.

The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.”<sup>32</sup>

In subsequent proceedings, the matter was referred to the Italian Constitutional Court, which held that:

“art. 10, first paragraph, Const., [...] requires this Court to ascertain whether the generally recognized rule of international law on immunity from jurisdiction of foreign States, as interpreted in the international order, can enter the constitutional order, as it does not conflict with fundamental principles and inviolable rights. The occurrence of the latter hypothesis, in fact, ‘excludes the operation of the incorporation of the international norm’, with the inevitable consequence that the international norm, insofar as it conflicts with the inviolable principles and rights, does not enter into the Italian legal order and cannot therefore be applied.

And that is precisely what has happened in this case.”<sup>33</sup>

Thus, the Court accepted the interpretation provided by the ICJ of the customary international norm on State immunity, deeming the Court a “particularly qualified” interpreter of international law, thus pre-empting domestic authorities to advance a contrasting interpretation of the international law norm. However, the Court refused to

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<sup>30</sup>Italian Supreme Court, (full court), civil division, Judgement of 29 May 2008, no. 14199; Italian Supreme Court, (full court), civil division, Judgement of 20 May 2011, no. 11163.

<sup>31</sup> Judgement of 3 February 2012, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, I.C.J. Reports 2012 99, 139.

<sup>32</sup> *ibid* 140.

<sup>33</sup> Italian Constitutional Court, Judgement of 22 October 2014, no. 238, para. 3.4 (author’s translation).

allow the incorporation of such norm in the domestic legal order *via* art. 10 of the Italian Constitution, holding that doing otherwise would imply a total sacrifice of the constitutional principle of access to justice, one of the “supreme principles” of the Italian constitutional order.

Furthermore, the Italian Constitutional Court struck down law no. 5/2013,<sup>34</sup> authorising the ratification of and giving execution to the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, which had been adopted by the Italian Parliament in the aftermath of the ICJ decision, and in order to comply with it.<sup>35</sup>

In the aftermath of the judgement of the Constitutional Court, many proceedings were initiated before Italian courts, which, abiding by the precedent of the Constitutional Court, often awarded the claimants reparations, at times allowing post-judgement constraint measures on German assets in Italy.<sup>36</sup> This led to Germany bringing – once again – proceedings against Italy before the ICJ, pending to this date.<sup>37</sup>

The displacement of Italian political authorities as a result of the Constitutional Court’s judgement and of its need to protect the supreme principles of the Italian constitution is quite striking as the former were pre-empted from changing the domestic norm on State immunity in order to comply with the ICJ judgement and international law. They could only partially remedy the situation by operating on the plane of the enforceability of judgements in which Germany was condemned, prohibiting the execution of judgements rendered against Germany and, at the same time, creating an *ad hoc* fund, financed by the general budget, drawing from which victims can satisfy their

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<sup>34</sup> Law of 14 January 2013, no. 5, GU of 29 January 2013, no. 24, p. 1.

<sup>35</sup> To this conclusion, see the discussion of said Bill before the Senate, and, especially, the speech given by its *rapporteur*, Senator Bettamio: “I emphasize that it is very important for Italy to proceed with this ratification [...] because there is a judgement of the International Court of Justice, which dates February 3, 2012, on the controversy between Italy and Germany regarding reparations to Italian citizens for the crimes of war committed by the Armed Forces of the Third Reich in Italy” (my translation - see the minutes of the Senate sitting of 21 December 2012, p. 85, available at <https://www.senato.it/service/PDF/PDFServer/BGT/00697127.pdf>).

<sup>36</sup> See, e.g., Italian Supreme Court, (full court), civil division, Judgement of 13 January 2017, no. 762; Judgement of 28 September 2020, no. 20442. See also, for an overview, ICJ, Application instituting proceedings and request for the indication of provisional measures filed in the Registry of the Court on 29 April 2022, *Questions of jurisdictional immunities of the State and measures of constraint against State-owned property (Germany v. Italy)*, 2022 General List No. 183, Annexes 6-8.

<sup>37</sup> *Ibid.*

claims as they are prevented from seeking the enforcement of the judgements rendered by the Courts against Germany and its assets in Italy.<sup>38</sup> Eventually, the Constitutional Court accepted this compromise.<sup>39</sup>

Similarly, in recent decision the Seoul central District Court and the Supreme Federal Tribunal of Brazil denied immunity to Japan and Germany respectively for war crimes enacted during World War II, arguing that doing otherwise would be in axiological contrast with the fundamental principles of their respective constitutional orders.<sup>40</sup>

2. *State Immunity and violations of jus cogens in the UK and Canada. The law of Parliament is the governing law: a structural framing of inter-systemic relationships (albeit complying with international law).*

While the cases mentioned in the previous paragraph fall quite clearly under the category of ‘identity conflicts’ as here elaborated, a number of instances of structural reasoning can also be found in the field of State immunity.

A moderate case of structural framing of the relationship between national and international law in the field of State immunity, eventually resulting in compliance with international law, is the decisions of the Court of Appeal for Ontario in the case of *Bouzari v. Islamic Republic of Iran*. Mr. Bouzari brought action against Iran seeking compensation for his kidnapping, false imprisonment, torture, and death threats, and return of the paid ransom money.<sup>41</sup> In that case, though the court discussed at length the

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<sup>38</sup> Art. 43 law decree (*decreto legge*) of 30 April 2022, no. 36 OJ 30 April 2022, no. 100, converted in law by law of 29 June 2022, no. 79. OJ 29 June 2022, no. 150: see Raffaella Nigro, ‘Il fondo ristori italiano alla luce dei “rimedi alternativi” all’immunità degli Stati esteri dalla giurisdizione esecutiva’ (2023) 106 *Rivista di diritto internazionale* 629.

<sup>39</sup> Italian Constitutional Court, Judgement of 4 July 2023, no. 159: see Giorgia Berrino, ‘Quale effettività della tutela giurisdizionale nel caso Germania c. Italia? L’art. 43 del d.l. n. 36/2022 come “rimedio” costituzionalmente legittimo’ [2023] *Diritti umani e diritto internazionale* 201.

<sup>40</sup> Seoul Central District Court, Judgement of 8 January 2021, 2016 Ga-Hap 505092, *Comfort Women Case*: see Dimitris Liakopoulos, ‘State Immunity and Inter-State Negotiations on Korean Comfort Women’ (2021) 19 *Indonesian Journal of International Law* 599; Seunghyun Nam, ‘Court Decisions in the Republic of Korea on Japan’s Accountability for Sexual Slavery of the Comfort Women’ (2022) 20 *Journal of International Criminal Justice* 459. As to Brazil, see Supreme Federal Tribunal (Brazil), Judgement of 23.08.2021, ARE: 954858 RJ, *Changri-lá fishing boat*. See Aziz Tuffi Saliba and Lucas Carlos Lima, ‘The Law of State Immunity before the Brazilian Supreme Court: What Is at Stake with the “Changri-La” Case? Cronicas’ (2021) 18 *Brazilian Journal of International Law* 53.

<sup>41</sup> *Bouzari v Islamic Republic of Iran* (2004), 220 O.A.C. 1.

international law aspects of the case (and, more specifically, whether an exception to foreign States immunity existed in cases of torture),<sup>42</sup> the decision of granting immunity to the foreign State was based on domestic law, with international law references mainly aiming at supporting the decision.<sup>43</sup>

Similarly, in *Kazemi v. Iran*, a case concerning a Canadian citizen kidnapped, tortured, and eventually killed in Iran by Iranian state officials, whose son and heir sued Iran before Canadian courts seeking damages for himself and his mother, the Supreme Court of Canada held:

“State immunity is not solely a rule of international law, it also reflects domestic choices made for policy reasons, particularly in matters of international relations. Canada’s commitment to the universal prohibition of torture is strong. However, Parliament has made a choice to give priority to a foreign state’s immunity over civil redress for citizens who have been tortured abroad. That policy choice is not a comment about the evils of torture, but rather an indication of what principles Parliament has chosen to promote.

In Canada, state immunity from civil suits is codified in the SIA. That Act is a complete codification of Canadian law as it relates to state immunity from civil proceedings. It provides an exhaustive list of exceptions to state immunity and it does not contain an exception to immunity from civil suits alleging acts of torture committed abroad. For that reason, reliance need not, and indeed cannot, be placed on the common law, jus cogens norms or customary international law to carve out additional exceptions to the immunity granted to foreign states pursuant to the SIA. Although there is no doubt that the prohibition of torture has reached the level of a peremptory norm, the current state of customary international law regarding redress for victims of torture does not alter the SIA, nor does it render it ambiguous.”<sup>44</sup>

Analogous lines of reasoning can be found in cases decided in the UK, where the key consideration in the courts’ reasoning was that, in the national legal order, the matter of sovereign immunities is governed by the State Immunities Act of 1978 (SIA), regardless of any other consideration. Indeed, courts accepted that recourse to international law as an interpretive guidance may be had only insofar as the letter of the Act is unclear, under

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<sup>42</sup> Hazel Fox, ‘In Defence of State Immunity: Why the UN: Convention on State Immunity Is Important’ (2006) 55 *International and Comparative Law Quarterly* 399; A Bianchi, ‘Human Rights and the Magic of Jus Cogens’ (2008) 19 *European Journal of International Law* 491; Roger O’Keefe, ‘State Immunity and Human Rights: Heads and Walls, Hearts and Minds’ (2011) 44 *Vanderbilt Journal of Transnational Law* 999.

<sup>43</sup> *Bouzari v Islamic Republic of Iran*, (fn 39), para. 67.

<sup>44</sup> *Kazemi Estate v Islamic Republic of Iran* (2014) 3 S.C.R. 62, 179 *per* McLachlin C.J. and LeBel, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

the presumption, in such instances, that Parliament did not want to violate international law; however, the requirement of the ambiguity of the law is interpreted quite strictly.<sup>45</sup>

Accordingly, in *Jones v. Saudi Arabia* and *Al-Adsani v. Kuwait*, both cases concerning foreign States committing acts of torture against British nationals within their own territory, the House of Lord concluded that “jurisdiction of the English Court in respect of foreign States is governed by the State Immunity Act 1978. [...] The Act is a comprehensive code and is not subject to overriding considerations.”<sup>46</sup>

Now, in the case of Canada, as well as in that of the UK, the relevant domestic legislation is in line with the pertinent international law, both as far as customary international law and the relevant treaty instruments are concerned.<sup>47</sup> Consequently, in those jurisdictions no significant cases of conflict between national and international law in the matter of sovereign immunities came to the fore. However, the judicial decisions above reviewed are strong indicators of the general approach taken by domestic courts in dealing with the issue of the relationship between the levels of legality – national and international law – in the matter of sovereign immunities, that is that of deferring to the

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<sup>45</sup> See, generally, Rosalyn Higgins Dbe Qc, ‘5.13 The Role of Domestic Courts in the Enforcement of International Human Rights: The United Kingdom’ in Pat Rogers (ed), *Themes and Theories* (Oxford University Press 2009); Roger O’Keefe, ‘Public International Law and English Law’ in Michael Wood (ed), *Halsbury’s Laws of England: International law and foreign relations* (LexisNexis 2018) para 22.

<sup>46</sup> *Al-Adsani v. Kuwait* (1996) 107 I.L.R. 536 per Lord Justice Stuart-Smith; identical arguments are adopted by the Lord Justices in *Jones v. Saudia Arabia* [2006] UKHL 26. In *Jones v Saudi Arabia*, admittedly, both Lord Justice Bingham and Lord Justice Hoffman considered at length questions of international law: this was, however, not in order to determine the question of jurisdiction, which was deemed to be governed by the SIA, but rather to adjudicate on the claim brough under art. 6 ECHR and to evaluate whether a declaration of incompatibility was needed.

<sup>47</sup> As to treaty-law in the matter of sovereign immunity, see the European Convention on State Immunity of May, 16 1972 (entered into force on June, 11 1976, which has been ratified by the UK) and the 2004 UN Convention on Jurisdictional Immunities of States and their Property (not yet in force and ratified by neither the UK or Canada) – hereinafter respectively “ECSI” and “UNCSI”. Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, Oxford University Press 2015). The compliance with international law by domestic legislation was a key consideration when the cases of *Al-Adsani* and *Jones* came before the ECtHR: the UK was found not to have breached art. 6 of the Convention exactly because the Court deemed that the UK, in limiting the individual right to access to a court had pursued, in a proportionate manner, a legitimate aim, that of abiding by international law. See ECtHR (Grand Chamber), Judgement of 21 November 2001, App. no. 35763/97, *Al-Adsani v. the United Kingdom*, para. 54-67; ECtHR, Judgement of 2 June 2014, App. nos. 34356/06 and 40528/06, *Jones and Others v. the United Kingdom*, para. 186-215.

legislative power and, thus, of mainly relying on domestic legislation in domestic proceedings, with international law merely playing a subsidiary role.

3. *Foreign States' Immunity and the terrorism exception before U.S. Courts: the domestic irrelevance of international law as an instance of structural conflict.*

An analogous line of reasoning, if more pronounced, given that the recognition of sovereign immunity is deemed a matter of 'grace and comity', disregarding the role of international law, is typical of US courts. Coherently, it is generally held that the matter of the recognition of immunity of foreign States is entirely regulated by domestic law: the case-law of the Supreme Court is absolutely consistent in this.<sup>48</sup>

Indeed, in *Amerada Hess*, the Court held that:

“we think that the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts.”<sup>49</sup>

Such reasoning was upheld also in cases where the foreign State had allegedly breached peremptory norms of international law, leading to the recognition of immunity to the respondent State and, thus, to the dismissal of the case on jurisdictional grounds.<sup>50</sup>

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<sup>48</sup> *Verlinden BV v Central Bank of Nigeria* (1983) 461 U.S. 480, 489: 'foreign sovereign immunity is a matter of grace and comity on the part of the United States.' This view is often traced back to *The Schooner Exchange v. McFaddon* 11 U.S. (7 Cranch) 116 (1812); William S Dodge, 'International Comity in American Law' (2015) 115 Columbia Law Review 2071; Jasper Finke, 'Sovereign Immunity: Rule, Comity or Something Else?' (2010) 21 European Journal of International Law 853. Contrast this conception with a dictum in ICJ *Jurisdictional Immunities of the State* (fn 29), p. 122: 'both Parties agree that immunity is governed by international law and is not a mere matter of comity.' See also, similarly, *Jones v. Saudi Arabia* [2006] UKHL 26, per Lord Hoffmann, par. 64: 'State immunity is not, as Lord Millett said, a "self-imposed restriction on the jurisdiction of [the] court" but a "limitation imposed from without".' Specifically, the relevant legislation is the 1976 *Foreign Sovereign Immunity Act* ('FSIA') 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611. See, generally, The American Law Institute, *Restatement of the Law Fourth. The Foreign Relations Law of the United States* (The American Law Institute Publisher 2017) 325.

<sup>49</sup> *Republic of Argentina v Amerada Hess* (1989) 488 US 428, 443. See also *Republic of Austria v Altman* (2004) 541 U.S. 677; *Republic of Argentina v. NML Capital, Ltd.* (2014) 573 U.S. 134; *Bank Markazi v Peterson* (2016) 578 U.S. \_\_; *Opati v Republic of Sudan* (2020) 140 S. Ct. 1601.

<sup>50</sup> *Garb v. Republic of Poland* (2004) 207 F.Supp.2d 16, 38-40, regarding post-World War II antisemitic structural violence, forced displacement and expropriations in Poland; *Princz*

Similarly, in *Siderman de Blake v. Republic of Argentina*, where the Court of Appeal for the 9<sup>th</sup> Circuit accepted to have jurisdiction given that Argentina had implicitly waived its immunity by requiring the cooperation of U.S. Courts, District Judge Fletcher clearly reaffirmed the centrality and exclusivity of FSIA to determine questions of sovereign immunity and thus of jurisdiction, even in cases involving acts of torture:

“unfortunately we do not write on a clean slate. We do not deal only with customary International Law, but with an affirmative Act of Congress, (the Foreign States Immunities Act 1976). We must interpret the FSIA through the prism of *Amerada Hess*. [...]

In *Amerada Hess*, the Court had no occasion to consider acts of torture or other violations of the peremptory norms of international law, and such violations admittedly differ in kind from transgressions of *jus dispositivum*, the norms derived from international agreements or customary international law with which the *Amerada Hess* Court dealt. However, the Court was so emphatic in its pronouncement “that immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions,” that we conclude that if violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so. The fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FISA.”<sup>51</sup>

The US context stands out because, over time, Congress has elaborated, some exceptions to the law of State immunities in order to further foreign policy objectives, whose compatibility with international law is rather dubious: this is rather coherent with the premise that the law of immunity is a matter of grace and comity, rather than international obligation.<sup>52</sup>

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*v. Federal Republic of Germany* (1994) 307 U.S. App. D.C. 102, 110-111, regarding forced labor in Nazi concentration camps. See also Jennifer A Gergen, ‘Human Rights and the Foreign Sovereign Immunities Act’ (1995) 36 *Virginia Journal of International Law* 765; Mathias Reimann, ‘A Human Rights Exception to Sovereign Immunity: Some Thoughts on *Prinz v. Federal Republic of Germany*’ (1995) 16 *Michigan Journal of International Law* 403.

<sup>51</sup> *Siderman de Blake*, 965 F.2d 699 (9th Cir. 1992), 718-19.

<sup>52</sup> Chimène I Keitner, ‘Sovereignty, Humanity, and Justice: Reflections on U.S. Law of Foreign Sovereign Immunity’ in Régis Bismuth and others (eds), *Sovereign Immunity Under Pressure: Norms, Values and Interests* (Springer International Publishing 2022) 10. See also, in this regard, the proposed Holding the Chinese Communist Party Accountable for Infecting Americans Act, H.R.3984 — 117th Congress (2021-2022), meant to allow suits to be brought against China in the aftermath of the COVID-19 pandemic: Paul J Jr Larkin, ‘Suing China over COVID-19’ (2020) 100 *Boston University Law Review Online* 91, 113 ff. especially; Chimène I Keitner, ‘To Litigate a Pandemic: Cases in the United States Against China and the Chinese Communist Party and Foreign Sovereign Immunities’ (2020) 19 *Chinese Journal of International Law* 229.

In this regard, the so called ‘terrorist exception’, introduced by the US Congress in 1996 and subsequently modified in 2008 and 2016, is of particular interest.<sup>53</sup>

Under § 1605A (as resulting from the 2008 amendment)<sup>54</sup> and § 1605B, US nationals, members of the US armed forces and other US employees are granted a private action for damages for personal injury, patrimonial loss, or death against foreign States, whose official, employee or agent committed, within the scope of their offices, acts of terrorism resulting in patrimonial harm, personal injury or loss of life.

Two main differences between the two mentioned provisions arise. First, while in both cases it is irrelevant whether the action of the foreign State’s agent occurred abroad or within the territory of the USA, a difference arises as to the place in which the damages has occurred. Indeed, under § 1605A, claims can also be brought for damages occurred abroad (e.g., the bombing of an embassy), while this is not possible under § 1605B, which is limited to damages occurred in the territory of the USA. Furthermore, under the § 1605A provision, it is necessary that the respondent State is declared ‘a State sponsor of terrorism’ by the Department of State, while this is not required under § 1605B.<sup>55</sup>

Now, as anticipated, the legality of such norms under international law is more than questionable.<sup>56</sup>

First, both provisions appear to be in breach of customary international law, given, as it was stated by the ICJ in *Germany v. Italy*, that the norm on State immunity is procedural in nature, pre-empting States from exercising their jurisdiction against other States, irrespective of the legality under international law of the acts in relation to which

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<sup>53</sup> See 28 U.S.C. §§ 1605A and § 1605B – the latter being introduced in 2016 by JASTA (*An act to deter terrorism, provide justice for victims, and for other purposes* Pub.L. 114-222). For a more detailed analysis, see The American Law Institute (n 46) 395–402.

<sup>54</sup> See § 1083 of the *National Defense Authorization Act for Fiscal Year 2008 (NDAA)* Pub. L. No. 110-181, repealing § 1605(a)(7) and replacing it with a new ‘terrorist exception to the jurisdictional immunity of a foreign state’.

<sup>55</sup> *Flatow v. Islamic Republic of Iran* 999 F.Supp. 1, 15-16 (D.D.C. 1998); see also *Wyatt v. Syrian Arab Republic* 362 F.Supp.2d 103, 115-116 (D.D.C. 2005).The American Law Institute (n 46) 397.

<sup>56</sup> Iran tried to raise this issue before the International Court of Justice, but it failed on jurisdictional grounds: see ICJ, Judgement of 13 February 2019, Preliminary Objections, *Certain Iranian Assets (Islamic Republic of Iran v United States of America)*, I.C.J. Reports 2019, 7, 34, f. D Franchini, ‘State Immunity as a Tool of Foreign Policy : The Unanswered Question of Certain Iranian Assets’ 60 *Virginia Journal of International Law* 433.

proceedings were initiated.<sup>57</sup> Coherently, it is to be rejected the argument in favour of carving out a terrorism exception to the law of State immunity given the *jus cogens* nature of the ban of terrorism in international law;<sup>58</sup> this not of the fact that acts of terrorism are currently deemed not to constitute an international crime<sup>59</sup> or a breach of customary international law, let alone of *jus cogens* norms.<sup>60</sup>

Second, the ‘terrorism exception’ can hardly be traced back to the territorial tort exception, codified in art. 12 UNCSI and art. 11 ECSI, to neither of whom the US is party, and whose status under CIL is rather dubious after the ICJ decision in *Germany v. Italy*.<sup>61</sup> The key factor in this regard is that, while the territorial tort exception requires the agent of the foreign State to have committed the tortious act in the State *fori*, in most cases of terrorist acts (therefore falling under 28 USC § 1605A and B), their actions occur abroad, therefore falling outside – at least in most cases – of the scope of the territorial tort exception.<sup>62</sup>

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<sup>57</sup> *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment (2012) I.C.J. Reports 2012 99, 139. The Court also noted (in an obiter) that “this amendment has no counterpart in the legislation of other States” - *ibid* 138. This is no longer true after Canada enacted similar legislation in 2012: Jean-Gabriel Castel and Matthew E Castel, ‘Canadian State Immunity Act and the Absolute Immunity of Foreign States Committing or Supporting Acts of Terrorism or Violating International Humanitarian Law’ (2016) 45 *Advocates’ Quarterly* 81.

<sup>58</sup> For such an argument, see, e.g., Sofie G Syed, ‘Sovereign Immunity and Jus Cogens: Is There a Terrorism Exception for Conduct-Based Immunity’ (2015) 49 *Columbia Journal of Law and Social Problems* 251.

<sup>59</sup> See, holding the existence of the international crime of terrorism, Special Tribunal for Lebanon (Appeals Chamber), Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, stl-11-01/I, 16 February 2011, par. 83 ff; see also Antonio Cassese, ‘Terrorism as an International Crime’ in Andrea Bianchi (ed), *Enforcing international law norms against terrorism* (Hart Publishing 2004) - Professor Cassese was both President of the Tribunal and Judge Rapporteur in the above mentioned decision. For a critique, see Ben Saul, ‘Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism’ (2011) 24 *Leiden Journal of International Law* 677; Roger O’Keefe, *International Criminal Law* (Oxford University Press 2015) 160: ‘The claim is unconvincing, based as it is on an overdetermined reading of the evidence that takes liberties with the requirement for *opinio juris* in the formation of rules of customary international law’.

<sup>60</sup> Ben Saul, *Defining Terrorism in International Law* (Oxford University Press 2008) ch 4 ‘Terrorism in Customary International Law’; Magdalena Matusiak-Frańczak, ‘Terrorism Exception to State Immunity: An Emerging Customary Norm of International Law?’ in Régis Bismuth and others (eds), *Sovereign Immunity Under Pressure: Norms, Values and Interests* (Springer International Publishing 2022).

<sup>61</sup> Fox and Webb (n 45) ch 15 ‘Immunity from Adjudication: The Territorial Tort Exception’.

<sup>62</sup> Matusiak-Frańczak (n 58) para 3.1 ‘Territorial Tort Exception and Terrorism Exception’.

Despite the illegality of such provisions under international law, the issue of the conflict between national and international law was never considered by US courts,<sup>63</sup> something the ICJ acknowledged in *Iran v. the United States*.<sup>64</sup> Arguably, this is due to the structural premise that US immunity law is governed exclusively by FSIA and that, thus, courts are prevented to “look” beyond it.<sup>65</sup>

Conversely, in the Italian case, the Constitutional Court struck down, because of its axiological incompatibility with the supreme principles of the Constitution, the law authorising the ratification of UNCSI, passed by Parliament precisely in order to give effect to the ICJ decision, effectively displacing political bodies (Parliament and Government) from the management of inter-order relations.

Comparing the two sets of decisions, in conclusion, it becomes apparent the role that institutional concerns played in the reasoning of the US, English, and Canadian courts, as well as the relevance of substantial values in that of the Italian, Korean, and Brazilian ones, when addressing the issue of divergence or convergence with international law.

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<sup>63</sup> Such issue, instead, is more recently at the centre of a number of *exequatur* proceedings (pending or recently concluded) before European courts – see Stephanie Law and others, ‘The Aftermath of the 9/11 Litigation: Enforcing the US Havlish Judgments in Europe’ Max Planck Institute Luxembourg for Procedural Law Research Paper Series No. 1/2020. Particularly, the Italian Supreme Court, civil division, Order of 10 December 2021, No. 39391 maintained the legality of such exception even under customary international law: “the FSIA merely codifies a restrictive theory of immunity since it adopts criteria that are nowadays applied in international law and by the domestic courts of most Western States. [...] Foreign States’ immunity from the civil jurisdiction for *acta iure imperii* is an absolutely settled principle. It constitutes a prerogative, and not a right, recognised by customary international norms whose operation is precluded – also for the Italian legal system, following Judgment No. 238/2014 of the Italian Constitutional Court (fn 31) – as long as *delicta imperii* are concerned, i.e. crimes committed in breach of *ius cogens* norms and to the detriment of universal values that transcend the interests of individual State communities” (ibid., par. 7). For a critique of this decision, see Donato Greco, ‘Italy and the Enforcement of Foreign Judgments on Third States’ Tort Liability for Sponsoring Terrorism: The Conundrum of Jurisdictional Immunity of Foreign States in the Presence of Serious Violations of Human Rights’ (2022) 2 The Italian Review of International and Comparative Law 123.

<sup>64</sup> ICJ, Judgement of 30 March 2023, *Certain Iranian Assets (Islamic Republic of Iran v United States of America)*, I.C.J. Reports 2023, 51, para. 68-73, referring to *Weinstein et al. v. Islamic Republic of Iran et al.* 609 F.3d 43, 53 (2d Cir. 2010) and to *Bennett et al. v. The Islamic Republic of Iran et al.* 799 F.3d 1281, 1287 (9th Cir. 2015).

<sup>65</sup> Matusiak-Frańczak (n 101) 306: ‘What is typical for US jurisprudence is the analysis of the terrorism exception solely from the point of view of the domestic legal system.’

### C. The domestic contestation of the UN individual terrorist sanctioning regime.

Similarly, reference could be made to the domestic judicial decisions regarding the UN regime on individual sanctions targeting terrorists initially established under Security Council Resolution no. 1267 of 1999 (hereinafter ‘the 1267 regime’).<sup>66</sup>

#### 1. *United Nations Security Council Resolution no. 1267: a draconian regime.*

The core issue in such cases was that of the unavailability of effective review mechanisms to persons targeted by such sanctions, in spite of the severe effects that being targeted by these sanction carries (asset freeze, travel ban, and arms embargo). Shortcomings of the 1267 regime regarding the right to access to justice, especially given the serious effects of the sanctions (travel ban and freezing of assets), are quite well known:<sup>67</sup> in spite of the severity of the consequences of being the addressee of such sanctions, once an individual is included in the list of persons targeted – a proceeding in which they have no part whatsoever –, their removal from said list (‘delisting’) is extremely difficult, and, in any case, the result of political, rather than legal, considerations. Indeed, targeted individuals have the right to petition to be ‘delisted;’ however such petition has only the effect of putting in motion a procedure at the end of which it is up to the members of the Sanction Committee to decide whether or not to delist the requesting individual:<sup>68</sup> such a procedure, which ultimately makes the delisting decision entirely dependent on the will

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<sup>66</sup> See UNSC Resolution of 15 October 1999, no. 1267, S/RES/1267 (1999) and subsequent modifications thereof – an exhaustive list of Resolutions passed is available at: <https://www.un.org/securitycouncil/sanctions/1267/resolutions>.

<sup>67</sup> Bardo Fassbender, ‘Targeted Sanctions Imposed by the UN Security Council and Due Process Rights’ (2006) 3 *International Organizations Law Review* 437; Michael Bothe, ‘Security Council’s Targeted Sanctions against Presumed Terrorists: The Need to Comply with Human Rights Standards’ (2008) 6 *Journal of International Criminal Justice* 541; Johannes Reich, ‘Due Process and Sanctions Targeted against Individuals Pursuant to Resolution 1267 (1999)’ (2008) 33 *Yale Journal of International Law* 505; Ex multis Thomas J Biersteker, ‘Targeted Sanctions and Individual Human Rights’ (2009) 65 *International Journal* 99.

<sup>68</sup> The procedure for delisting, originally provided for in S/RES/1730(2006), is now described in S/RES/2610(2021), par. 63-83. Despite progressive amendments to the de-listing procedure made with the aim of making it easier for individuals to be de-listed – see especially the introduction of the Ombudsperson by S/RES/1904 (2009) and the adoption of the reverse-consensus decision rule with S/RES/1989 (2011), par. 23 –, the political nature of the decision by the Sanction Committee and by the Security Council remains.

of the States members of the sanction committee (rather than on the application of the law) can by no means be considered a legal remedy, let alone an effective one.<sup>69</sup>

The case of the 1267 regime (and – more generally – that of targeted sanctions regimes)<sup>70</sup> is peculiar, compared to the other cases discussed in this Chapter, because such regimes are adopted under art. 41 UN Charter and, therefore, binding on UN Member States.<sup>71</sup> As such, moreover, international obligations stemming from this regime prevail over their obligations under any other international agreement (art. 103 UN Charter).<sup>72</sup>

This is of relevance, as it had an impact on how courts considered the matter of the interplay between States' obligations to enact UN sanctions and the right to access to justice, protected under both domestic constitutions and international instruments. Indeed, when reviewing national implementing measures (both legislative and administrative in nature)<sup>73</sup> in areas in which domestic authorities were granted no room for discretion by the Security Council, courts were faced with an alternative. They could either consider the national implementing measure as entirely required by the UNSEC Resolution, and thus inextricably linked to it, so that a review of the national measure would implicitly consist in a review of the international law one, or disregard such fact, reviewing the national measure alone, irrespective of its connection to international law.<sup>74</sup>

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<sup>69</sup> Fassbender (n 65) 443: 'whether the respective committee, or the Security Council itself, grants a de-listing request is entirely within the committee's or the Council's discretion; no legal rules exist that would oblige the committee or the Council to grant a request if specific conditions are met.'; see also Annalisa Ciampi, 'Security Council Targeted Sanctions and Human Rights' in Bardo Fassbender (ed), *Securing Human Rights?: Achievements and Challenges of the UN Security Council* (Oxford University Press 2011) 110 ff.

<sup>70</sup> Though it is the most renowned, the 1267 regime is hardly the only targeted sanction regime established by the Security Council under art. 41 of the UN Charter – the list of such regimes is available at: <https://www.un.org/securitycouncil/sanctions/information>. For an introduction, Thomas J Biersteker, Sue E Eckert and Marcos Tourinho (eds), *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action* (Cambridge University Press 2016).

<sup>71</sup> See Article 25 UN Charter.

<sup>72</sup> For an introduction to art. 103 UN Charter - and the debate surrounding it -, see Rain Liivoja, 'The Scope of the Supremacy Clause of the United Nations Charter' (2008) 57 *International and Comparative Law Quarterly* 583; Andreas Paulus and Johann Ruben Leiæ, 'Ch. XVI Miscellaneous Provisions, Article 103' in Bruno Simma and others (eds), *The Charter of the United Nations: a commentary* (Third edition, Oxford University Press 2012).

<sup>73</sup> UNSEC Resolution do not generally enjoy direct effect in domestic systems and are thus in need of further implementation – see Vera Gowlland-Debbas (ed), *National Implementation of United Nations Sanctions: A Comparative Study* (Brill Nijhoff 2004).

<sup>74</sup> Antonios Tzanakopoulos, 'Domestic Court Reactions to UN Security Council Sanctions' in August Reinisch (ed), *Challenging Acts of International Organizations Before National Courts* (Oxford University Press 2010) 60.

Understandably, international courts took the first approach more often than national courts.

Where courts went down the former path, they usually considered that very thin standards are applicable to UNSEC Resolution adopted under art. 41 of the UN Charter – namely, only *ius cogens* norms – and therefore generally upheld the legality of the domestic legislation.<sup>75</sup> In a number of instances, however, courts, though considering that the measures under scrutiny were strictly implementing UNSEC Resolution, read the latter consistently with international human rights law, arguing that it was to be presumed that the Security Council, unless it did so expressly, had not meant to derogate from human rights when passing the relevant Resolutions.<sup>76</sup>

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<sup>75</sup> Most notably in CJEU, Court of First Instance (Second Chamber, extended composition), Judgment of the of 21 September 2005, T-315/01, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, ECR 2005 II-3649. See also *HM Treasury (Respondents) v Mohammed Jabar Ahmed (FC) (Appellants)* [2010] UKSC 2 (Lord Brown SCJ).

<sup>76</sup> ECtHR (Grand Chamber), Judgement of 21 June 2016, App. no. 5809/08, *Al-Dulimi and Montana Management Inc. v. Switzerland*: the applicant had been targeted by individual sanctions under UNSEC Resolution 1483(2003), superseding Resolution 661(1990) and sanctioning individuals related to the (dissolved) Government of Iraq; just like the regime of the sanctions related to terrorism, these Resolutions provided for the freezing of all assets pertaining to targeted individuals. Although Resolution 1483(2003) didn't provide any review mechanism, the Court held that "where a Security Council resolution does not contain any clear or explicit wording excluding or limiting respect for human rights [...], the Court must always presume that those measures are compatible with the Convention." Consequently, such a Resolution, "must always be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness can be avoided" (*ibid.*, para. 140, 146) See also ECtHR (Grand Chamber), Judgement of 12 September 2012, App. no. 10593/08, *Nada v. Switzerland*, concerning the situation of a sanctioned individual who, being prevented from traveling, could not leave Campione d'Italia, an Italian enclave in Switzerland, resulting in a prejudice to both his family life and his health. In this case the Court found that "Switzerland enjoyed some latitude, which was admittedly limited but nevertheless real, in implementing the relevant binding resolutions of the United Nations Security Council," and that, thus, it was required to exercise said latitude by undertaking "all possible measures to adapt the sanctions regime to the applicant's individual situation" (*ibid.*, para. 180, 196).

Apart from the ECtHR cases, see the judgement of the Supreme Court of Canada in *Abdelrazik v. Canada (Minister of Foreign Affairs) (F.C.)* [2010] 1 F.C.R. 267, concerning a Canadian citizen who had been targeted by individual sanctions after being included in the 1267 list: consequently, as he was subject to a travel ban, he could not leave Sudan, where he had been tortured, and return to Canada. The Court held that "properly interpreted the UN travel ban presents no impediment to Mr. Abdelrazik returning home to Canada" (*ibid.*, para. 129). Similarly, see, in the UK, the judgement rendered by the Queen's Bench Division (Administrative Court) in *R (Othman) v Secretary of State for Work and Pensions* [2001] EWHC Admin 1022, esp. par. 57: whereas, having been included within the 1267 list, the appellant was subject to an asset freeze, Collins J read the Regulation "subject only to the

Conversely, when courts adopted the latter perspective, focusing on the review of the domestic implementing measure, giving little, if any at all, consideration to the international law aspects of the case, they exerted a broader review of the domestic implementing measures, at times striking them down.

2. *The review of listing decisions by U.S. Courts: purely a matter of domestic law. The domestic irrelevance of international law as an instance of structural conflict.*

In the US, similarly to what has already been observed with regard to the matter of sovereign immunities, domestic courts disregarded the link between the domestic instrument giving effect to the UNSEC Resolution.

Few remarks are in order as to the U.S. legislative framework in the field of individual sanctions for activities of terrorism and support thereof. The key instrument in this regard is Executive Order no. 13224,<sup>77</sup> mirroring, in the domestic legal order, UNSEC Resolution 1267.<sup>78</sup> The Order was adopted pursuant to the International Emergency Economic Powers Act ‘IEEPA,’<sup>79</sup> empowering the President to do so in order to deal with ‘unusual and extraordinary threat’ to the national security, accordingly requiring that a state of national emergency has been declared.<sup>80</sup> Under this scheme, the Treasury, and,

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proviso that the Member State is entitled, and indeed perhaps bound, to ensure that the effect of applying the Regulation is not so as to mean that the individual in question, in this case the claimant, has because of having no means of support, reached a situation where his health and perhaps his very life are at risk.”

<sup>77</sup> Executive Order no. 13224 66 Fed. Reg. 49079 (2001), *Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism*; see also, amending Executive Order no. 13224, Executive Order no. 13268 67 Fed. Reg. 44751, (2002), *Termination of Emergency With Respect to the Taliban and Amendment of Executive Order 13224 of September 23, 2001*; Executive Order no. 13886 3 C.F.R. 48041 (2019), *Modernizing Sanctions To Combat Terrorism*.

<sup>78</sup> The link between Executive Order no. 13224 and the UNSEC Resolutions is absolutely clear from its preamble, as it is therein stated that the President has adopted the Order “by the authority vested in [him] as President by the Constitution and the laws of the United States of America, including [...] section 5 of the United Nations Participation Act of 1945 [...], and in view of United Nations Security Council Resolution (UNSCR) 1214 of December 8, 1998, UNSCR 1267 of October 15, 1999, UNSCR 1333 of December 19, 2000.”

<sup>79</sup> 50 U.S.C. 1701 et seq.

<sup>80</sup> States of national emergency are declared under 50 U.S.C. § 1601 seq., especially § 1621: President Bush first issued such declaration after the 2001 terrorist attacks (see Proclamation no. 7463 of Sep. 14, 2001, 67 F.R. 58317) and was ever since yearly continued – see Christopher A Casey, Dianne E Rennack and Jennifer K Elsea, ‘The International Emergency Economic Powers Act: Origins, Evolution, and Use’ (Congressional Research Service 2024) CRS Report R45618.

more specifically, Office of Foreign Assets Control ‘OFAC,’ a department thereof, is empowered to designate individuals as terrorist, which are then known as specially designed global terrorists ‘SDGT’. As a consequence, their assets are frozen and a travel ban is issued. Once designated, an individual can ask the designating administration to reconsider; eventually, if reconsideration is denied, a judicial review of such determination is available.

As anticipated, when individuals brought their claims before the courts, the latter did not consider the link between the national sanctioning scheme and the 1267 Regime, even if the domestic instrument was devised also to implement international law: in many cases individuals were listed under both the domestic and the U.N. regimes and, had their claims before U.S. courts been successful and had the courts thus ordered the sanctions targeting them to be lifted, this would have put the U.S. in breach of their international obligations. That this did not happen was a happenstance.<sup>81</sup> However, the link between the national framework and the international obligations stemming from the relevant UNSEC Resolutions was never entertained by U.S. Courts, which did never consider whether they could order the lifting of the sanction on individuals the U.S. were bound to sanctions under UNSEC Resolutions. Indeed, as it was observed,

“while judiciaries outside of the United States have demonstrated a willingness to engage, or at least acknowledge root international obligations associated with the Resolution 1267 Regime, the United States has [... omitted] even an acknowledgment of the United Nations or the Security Council in its jurisprudence.

In reviewing challenges of those simultaneously listed under Resolution 1267 and Executive Order 13224, federal courts have not alluded to Resolution 1267, *ius cogens*, nor acknowledged obligations under UNC Article 25. Instead, courts have favored review on solely domestic constitutional grounds.”<sup>82</sup>

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<sup>81</sup> Arguably, such outcome was made more likely by some procedural hurdles claimants faced. First, the standard of review courts could exert on the decision made by the administration to sanction a specific individual is rather limited: under the Administrative Procedure Act ‘APA’, applicable to these controversies, a designation would be set aside if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law:” see 5 U.S.C. § 706(2)(A). Second, targeted individuals often had limited access to classified information relied upon in the decision to list them, which is submitted to the reviewing court *ex parte* and *in camera* (50 U.S.C. §1702(c)). As to both aspects, see generally Rachel Barnes, ‘United States Sanctions: Delisting Applications, Judicial Review and Secret Evidence’ in Paul Eden and Matthew Happold (eds), *Economic Sanctions and International Law* (Hart Publishing 2016); Elena Chachko, ‘Due Process Is in the Details: U.S. Targeted Economic Sanctions and International Human Rights Law’ (2019) 113 157, 160, f.

<sup>82</sup> William Diaz, ‘Dualist, But Not Divergent: Evaluating United States Implementation of the 1267 Sanctions Regime’ 5 Liberty University Law Review 333, 367, 356.

As a matter of facts, individuals targeted by sanctions under Executive Order no. 13224, who were at the same time listed under UNSEC Res. 1267, were able to challenge before federal courts, if unsuccessfully, both the abstract constitutionality of IEEPA (and thus the general normative framework for the imposition of individual sanctions) and their concrete designation. In passage, it is worth noting that most of these claims relied on U.S. constitutional grounds, as such unavailable, unless a substantial connection to the US could be proven, to aliens (the majority of those designated under Executive Order 13224).<sup>83</sup>

In the following, two cases, representative of the litigation under Executive Order 13224, will be discussed. The purpose of reviewing the arguments raised in the following cases is not that of discussing the domestic arguments employed (e.g. the question of whether the imposition of sanctions upon individuals is to be considered a seizure under the Fourth Amendment, or that of whether the due process clause requires OFAC to give prior notice to individuals targeted by sanctions), hence their very brief exposition. Rather, the purpose here pursued is that of showing that, before U.S. courts, the question of the legality of the designation decisions was addressed as a purely domestic matter, framed only with reference to U.S. norms and without regard for the obligation to sanction the listed persons the U.S. had under UNSEC Resolution no. 1267. The issue of the international responsibility of the U.S. had the courts decided to order the lifting of sanctions targeting individuals listed by the 1267 Committee was immaterial to them.

For example, in *Kadi v. Geithner*,<sup>84</sup> Mr. Kadi, the same individual at the centre of the *Kadi* cases before the Court of Justice which will be discussed in the next section, sanctioned for his ties to certain individuals designated as SDGTs and for some donations to a number of organisations deemed to further terrorist activities, challenged his

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<sup>83</sup> *People's Mojahedin Organization of Iran v. United States Department of State* 182 F.3d 17, 22 (D.C. Cir. 1999): “a foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.” See also *Ibrahim v Dept of Homeland Security* 669 F 3d 983 (9th Cir 2012), holding that a Malaysian national on a No-Fly list, who had previously been in the U.S. for four years on a student visa could challenge her designation under the Fourth and Fifth Amendment; *Al-Aqueel v Paulson* 568 F Supp 2d 64, 70 (D.D.C. 2008), where the Court held that the petitioner, having often visited the US and having worked for a US company that bought property there, had sufficient connections with the United States to have standing to raise claims under the due process clause of the Fifth Amendment but not under the Fourth Amendment in respect of the blocked assets which were overseas.. The “sufficient connection test” was originally developed in *United States v. Verdugo–Urquidez*, 494 U.S. 259 (1990), and has been later applied to ascertain standing of alien plaintiffs challenging their designation as SDGTs.

<sup>84</sup> *Kadi v Geithner* 42 F.Supp.3d 1, (D.D.C. 2012).

designation as SDGT before the District Court for the District of Columbia. He raised both administrative and constitutional complaints, respectively addressing his concrete designation as a terrorist and the constitutionality of the relevant normative framework.

Indeed, first he claimed that OFAC had been wrong in designing him as terrorist, in that he had no links with terrorist, the charities and organisations he financially contributed to were not only and not even primarily involved in terrorist activities and he did not intend to aid terrorism in financing them, and that his designation in any case lacked sufficient evidence and procedural safeguards.

He then raised constitutional complaints under the First, Fourth, and Fifth Amendments.

Specifically, he argued that his Fifth Amendment right to the due process of law had been breached by the defendant in that, among other reasons, he had not been given, prior to the application of the sanctions, adequate notice of the charges, a sufficient statement of reasons for the decision of listing him, time to respond, or an opportunity to cross-examine the witnesses and plead his case before an independent tribunal. The Court held that this was not the case because *ex post* remedies can provide sufficient guarantees in cases in which granting *ex ante* ones would frustrate aims pursued by the State, as it clearly is the case with the imposition of sanctions on individuals, who, if warned, might flee the country or conceal their assets. He then raised an argument under the takings clause of the Fifth Amendment, which failed because the Court held that the blocking of Mr. Kadi's assets could not be considered a taking under the Amendment.

Mr. Kadi also claimed that the imposition of sanctions, preventing him to make donations to certain charitable organisations, designated as SDGTs, breached his right to freedom of speech and assembly, protected under the First Amendment. The Court, applying the intermediate scrutiny test, deemed that the Government had the authority to prevent Mr. Kadi from making certain financial contributions in that "there is no constitutional right to fund terrorism and [...] government action to suspend that support are not unconstitutional."<sup>85</sup>

Similarly, the applicant's arguments under the Fourth Amendment failed too as the Court held that, regardless of whether the application of individual sanctions under Executive Order 13224 constituted a seizure, such action, considered in the merits, was

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<sup>85</sup> *Ibid*, para. 26.

neither unreasonable nor without probable cause, given that it was supported by adequate evidence.

Another relevant case, ultimately decided by the Court of Appeals for the Ninth Circuit, is that of the *Al Haramain Islamic Foundation*,<sup>86</sup> a non-profit organisation whose stated purpose was to promote greater understanding of Islam which was designated as SDGT and brought action against the US Treasury, OFAC and the Department of Justice challenging its designation.

Somewhat similarly to Mr. Kadi, apart from substantive challenges to its designation, the Foundation argued that its due process rights, as well as its rights under the First and Fourth Amendment had been breached by its designation as a SDGT, particularly because of the use by OFAC of secret information, which the administration had never disclosed.

As to the substantial challenges, the Court found that there was sufficient evidence to support the designation and thus dismissed the appeal in that regard. Conversely, it found that the Foundation's due process rights had been violated. Indeed, the Court held, insofar as possible – that is to say: insofar as it did not endanger national security and it did not prove unreasonably burdensome on the administration – OFAC was required to take measures (e.g. by drafting an unclassified summary thereof or allowing access by a lawyer with the proper security clearances) to provide the Foundation with the relevant classified information upon which it had relied in designating the Foundation as a SDGT, which it had not done. This to allow the Foundation to understand the grounds for which it had been designated as a terrorist and, thus, defend itself. Moreover, the Court found that the Foundation's due process rights had been breached also by the prolonged failure by OFAC to provide adequate notice and opportunity to respond to OFAC's designation decisions, even after it had been adopted. In spite of these violations, however, the Court dismissed the case, as it found, in light of the substantial evidence before it, that said violations were harmless, in that, even if the Foundation had had access to the relevant information and to adequate notice, the ultimate designation determination would not have changed.

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<sup>86</sup> *Al Haramain Islamic Foundation, Inc. v. United States Department of the Treasury* 660 F.3d 1019 (9th Cir. 2011).

Conversely, the Court found that OFAC, by failing to obtain a warrant allowing it to designate the Foundation as a SDGT and thus to freeze its assets, had violated the Foundation's right to be free of unreasonable seizures under the Fourth Amendment.

Other cases brought before U.S. courts show similar patterns, whereby designed individuals and organisations ask the courts for a review of the listing decision under domestic grounds only, and courts entertain their claims without ever considering the international law aspects of the cases, ignoring the fact that the U.S. are bound under international law to sanction those individuals and without considering the question of whether the 1267 was compliant with international human rights law.<sup>87</sup>

3. *The UK Supreme Court Judgement in Ahmed: the ultra vires implementation of the 1267 Regime as an instance of structural conflict.*

Another clear example of a conflict between national and international law, framed in structural terms, is the decision of the UK Supreme Court in the case of *Ahmed*.<sup>88</sup> In this case, however, the international law aspects of the case were carefully considered by the Lord Justices.

This case concerned the review of the Terrorist Order and the Al-Qaida and Taliban Order,<sup>89</sup> two Orders in Council adopted under Section 1 of the 1946 United Nations Act with which UNSEC Resolution 1373 of 2001 and 1276 of 1999 respectively were incorporated in the domestic legal order together with their subsequent amendments.<sup>90</sup> However, because the present analysis focuses on the 1267 regime, and not on the 1373

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<sup>87</sup> See e.g. *Humanitarian Law Project v. U.S. Treasury Dept.*, 578 F.3d 1133 (9<sup>th</sup> Cir. 2009): plaintiffs challenged, on First and Fifth Amendment grounds, the President's authority under IEEPA and UNPA to designate organizations as terrorists; the organisation, however, was found to lack standing in that it had never been designated by the President, and self-censorship due to the fear of being designated didn't amount to injury-in-fact because IEEPA on its face did not regulate speech, but conduct. The plaintiff's claims based on the vagueness of the provision failed too, in that Executive Order 13224 adequately defined the criteria for the designation. See also *Global Relief Foundation, Inc. v. O'Neill*, 315 F.3d 748 (7<sup>th</sup> Cir. 2002).

<sup>88</sup> *HM Treasury (Respondents) v Mohammed Jabar Ahmed* (fn 72).

<sup>89</sup> Respectively the Terrorism (United Nations Measures) Order 2006 (SI 2006/2657) and the Al-Qaida and Taliban (United Nations Measures) Order 2006 (SI 2006/2952).

<sup>90</sup> Respectively S/RES/1373 (2001) and S/RES/1267 (1999).

one, which allowed for more discretion on the side of States, the Terrorist Order and its consideration by the UK Supreme Court will not be discussed.<sup>91</sup>

As already mentioned, the Al-Qaida Order, incorporating the 1267 regime in the domestic legal order, was made under section 1 of the 1946 United Nations Act, empowering the Executive to enact, by Order in Council, “such provision [deemed] necessary or expedient for enabling [measures adopted under art. 41 UN Charter] to be effectively applied.” Orders enacted under that provision are merely to be laid before Parliament: they are not subject to debate and cannot be rejected.<sup>92</sup>

The core issue in this case was whether the Order was *ultra vires* and, more specifically, whether Section 1 of the UN Act could be interpreted as conferring “power on the executive, without any Parliamentary scrutiny, to give effect in this country to decisions of the Security Council which are targeted against individuals.”<sup>93</sup>

In this regard, a majority of seven Justices relied on the principle of legality, according to which fundamental rights of individuals cannot be encroached by means of general or ambiguous words, with the consequence that ambiguous legislation is to be

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<sup>91</sup> It will suffice to recall that the Order was deemed *ultra vires* because, being enacted by the Executive only, and without any parliamentary involvement, it broadened its personal scope of application beyond what was strictly necessary to comply with the UNSEC Resolution. Indeed, while the Resolution required States to sanction ‘persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts’ (ibid., art. 1(c)), the Terrorist Order, at art. 4, par. 2, stating the conditions for the Treasury to designate persons for the purposes of the Order, allowed for the inclusion of persons “the Treasury [has] reasonable grounds for suspecting” to fall within the requirements of the Resolution.

<sup>92</sup> See Section 4 UN Act 1946. The degree to which Parliament is involved in the enactment of Statutory Instruments is entirely dependent on the enabling legislation, in this case the UN Act of 1946. Over time, a number of ‘types’ of scrutiny procedures have been flashed out by parliamentarians and legal scholars: among these, the procedure under sec. 1 UN Act is one of those which provide the least involvement of Parliament. For an overview, see Ruth Fox and Joel Blackwell, *The Devil Is in the Detail: Parliament and Delegated Legislation* (Hansard Society 2014) 73 ff.; Michael Zander, *The Law-Making Process* (Bloomsbury Publishing 2015) 105 ff.; Jeff King, ‘The Province of Delegated Legislation’ in Elizabeth Fisher, Jeff King and Alison Young (eds), *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford University Press 2020).

<sup>93</sup> *HM Treasury (Respondents) v Mohammed Jabar Ahmed* (fn 72), para. 44 per Lord Hope SCJ. The claimants argued also for the illegality of the Al-Qaeda Order by virtue of sec. 6(1) of the Human Rights Act, as the Order was deemed to breach their rights under art. 6 and 8 ECHR. In this regard the decisive consideration, recalling *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, was that “the obligation under article 25 of the Charter was, by virtue of article 103, to prevail over any other international agreement, including the Convention” (ibid., para. 71 per Lord Hope SCJ; but see also ibid., para. 106 and 203 per Lord Phillips SCJ and Lord Brown SCJ).

construed in such a way as not to remove such rights.<sup>94</sup> Consequently, due to the severity of the limitation of individual rights the 1267 Regime imposes, the majority of the Lord Justices found that Section 1 of the 1946 UN Act could not be construed as allowing Government to restrict the rights of individuals in such a fashion. Instead, this was possible only through parliamentary legislation. It was for Parliament to publicly debate the merits of the case, balancing the need to implement UNSEC Resolution with that of ensuring the rights of individuals, and to bear the political cost of either position.

Thus, the argument developed by the Lord Justices concerned issues of division of powers and institutional balance, rather than the substance of the case and the issue of the domestic acceptability of a ‘draconian’ regime, whereby individual are deemed to be held ‘prisoner of the State.’

#### 4. *The Kadi litigation before the European Court of Justice: reaffirming the “constitutional principles of the EC Treaty”.*

The *Kadi* litigation before the European Court of Justice,<sup>95</sup> and most relevantly for the present purposes *Kadi I – Kadi II* is, insofar as this research is concerned, a confirmation of the previous decision – addressed the issue of the validity of the EC (and

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<sup>94</sup> See *R v Secretary of State for the Home Department, Ex parte Simms* [2000] 2 AC 115; *R v Secretary of State for the Home Department, Ex parte Pierson* [1998] AC 539.

<sup>95</sup> CJEU, Judgment of the Court (Grand Chamber) of 3 September 2008, C-402/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*, ECR 2008 I-635 (*‘Kadi I’*); Judgment of the Court (Grand Chamber) of 18 July 2013, C-584/10 P, *Commission and Others v Kadi*, ECLI:EU:C:2013:518 (*‘Kadi II’*). These were both judgements on appeal from the General Court: see respectively Judgment of the Court of First Instance of 21 September 2005, T-315/01, *Kadi v Council and Commission*, ECR 2005 II-3649 and Judgment of the Court of First Instance of 21 September 2005, T-306/01, *Yusuf and Al Barakaat International Foundation v Council and Commission*, ECR 2005 II-3533; Judgment of the General Court of 30 September 2010, T-85/09, *Kadi v Commission*, ECR 2010 II-5177. For a discussion of this litigation, in a very wide scholarship, see N Türkiüler Isiksel, ‘Fundamental Rights in the EU after Kadi and Al Barakaat’ (2010) 16 European Law Journal 551; Gráinne De Búrca, ‘The European Court of Justice and the International Legal Order After Kadi’ (2010) 51 Harvard International Law Journal 1; Erika de Wet, ‘Human Rights Considerations and the Enforcement of Targeted Sanctions in Europe: The Emergence of Core Standards of Judicial Protection’ in Bardo Fassbender (ed), *Securing Human Rights?: Achievements and Challenges of the UN Security Council* (Oxford University Press 2011); J Kokott and C Sobotta, ‘The Kadi Case - Constitutional Core Values and International Law - Finding the Balance?’ (2012) 23 European Journal of International Law 1015; Luis I Gordillo, *Interlocking Constitutions: Towards an Interordinal Theory of National, European and UN Law* (Bloomsbury Publishing 2012) 228, ff.; Matej Avbelj, Filippo Fontanelli and Giuseppe Martinico (eds), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* (Routledge 2014).

later EU) instruments incorporating and giving effect to 1267 Regime in the Community's legal order.<sup>96</sup>

Despite authoritative scholarly critique, deeming the Judgements in *Kadi I* and *II* too unilateral, if not “chauvinist and parochial,”<sup>97</sup> the Court of Justice, as well as all intervening parties and the AG in both *Kadi I* and *II*, carefully considered the international law aspects of the case, even if it ultimately decided based on constitutional EU grounds only. Such an “engagement” with international law by the CJEU becomes especially apparent when said decisions are confronted with those rendered by U.S. Courts discussed above.<sup>98</sup>

Particularly, a relevant issue was the bearing on the case of the fact that the contested Regulation incorporated into the EU legal order the 1267 Regime, that is to say to UNSEC Resolutions enacted under Chapter VII of the UN Charter. This was important for two reasons.

First, because the Court of First instance both in *Yusuf* and *Kadi* found that, under art. 307 EC Treaty,<sup>99</sup> the Regulation was to be deemed immune from judicial review by EC courts because it incorporated a Resolution of the Security Council adopted under

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<sup>96</sup> In *Kadi I* (fn 92), this was the Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan. In *Kadi II* (fn 92), the legal act under review, incorporating the 1267 in the EU legal order was Commission Regulation (EC) No. 1190/2008 of 28 November 2008 amending for the 101<sup>st</sup> time Council Regulation (EC) 881/2002, adopted in the aftermath of the CJEU Judgement in *Kadi I*.

<sup>97</sup> De Búrca (n 92).

<sup>98</sup> Jackson (n 3) 71: “engagement is founded on commitments to judicial deliberation and is open to the possibilities of either harmony or dissonance between national self-understanding and transnational norms.”

<sup>99</sup> Art. 307 EC Treaty (now Art. 351 TFEU) reads (para. 1 and 2):

“the rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty. To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established.”

Chapter VII.<sup>100</sup> The Court of Justice, agreeing with AG Maduro,<sup>101</sup> reversed, finding that art. 307 EC Treaty could not limit the review of any Community legal act by the Court of Justice, because said provision “may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order.”<sup>102</sup>

Furthermore, and more interestingly, AG Maduro, recalling that the 1267 Regime aimed at combating international terrorism, thus protecting international peace and security, a task specifically assigned to the Security Council, acknowledged that “in an increasingly interdependent world,” “courts should not be institutionally blind [and that the Court of Justice] should be mindful of the international context in which it operates.”<sup>103</sup> Accordingly, the Court should have “recognise[d] the authority of [...] the Security Council, [...] better placed to weigh those [competing] fundamental interests.” Such deference, however, could not extend all the way and the Court could not “turn its back on the fundamental values that lie at the basis of the Community legal order,”<sup>104</sup> also in light of the fact that the 1267 Regime did not offer adequate remedies.<sup>105</sup>

The engagement with international law by the CJEU is consistent with a general open attitude the EU has towards international law.<sup>106</sup> Such openness, however, is not taken to its utmost consequences, which would negate the autonomy of the EU legal order, and the CJEU retains the power to scrutinise the contested Regulation.

Presenting the *Kadi* judgements by the CJEU as instances of identity reasoning is not to say that in the context of the litigation under review structural arguments were irrelevant; on the contrary, they were consistently present in the arguments put forward by the claimant, by the responding and intervening parties, and by both the Court of First

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<sup>100</sup> CJEU, Court of First Instance *Kadi v Council and Commission* (fn 92), para. 190; *Yusuf and Al Barakaat International Foundation v Council and Commission* (fn 92), para. 240.

<sup>101</sup> CJEU, Opinion of Mr Advocate General Poiares Maduro delivered on 16 January 2008, in Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, ECR I-6351, para. 43-55.

<sup>102</sup> CJEU, *Kadi I* (fn 92), para. 304.

<sup>103</sup> CJEU, Opinion of Mr Advocate General Poiares Maduro in *Kadi I* (fn 98), para. 44.

<sup>104</sup> *Ibid.*

<sup>105</sup> Antonios Tzanakopoulos, ‘The Solange Argument as a Justification for Disobeying the Security Council in the Kadi Judgments’, *Kadi on Trial* (Routledge 2014).

<sup>106</sup> Enzo Cannizzaro, ‘The Neo-Monism of the European Legal Order’ in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Brill Nijhoff 2011). As to the relationship between openness and autonomy vis-à-vis international law in EU law see Enzo Cannizzaro, ‘Nine Theses on Autonomy: Making Sense of a Controversial Doctrine’ (2024) 8 European Papers 1317.

Instance and, on appeal, the Court of Justice. Particularly, in *Kadi I*, a relevant structural issue was that of competence: whether the Community had the competence under Art. 60, 301, and 308 EC Treaty to adopt the contested Regulation. In this regard, both the Court of First Instance and the Court of Justice found that the Community had the competence to adopt the Regulation.<sup>107</sup>

Another crucial structural issue, as already mentioned, was that of whether, under art. 307 EC Treaty, the Regulation was immune from judicial review by EC courts because it incorporated a Resolution of the Security Council adopted under Chapter VII: this is a structural argument insofar as it excludes the power of reviewing the EC Regulation on the basis of the formal statute of the legal acts it incorporates, regardless of its actual content and of the axiological implications thereof. As observed, the Court of First Instance did not consider the substance of the Regulation, but only “the principles governing the relationship between the international legal order under the United Nations and the Community legal order”,<sup>108</sup> deriving from the EC Treaty “a rule of primacy, according to which UNSEC Resolution adopted under Chapter VII of the UN Charter prevail over rules of Community law.”<sup>109</sup>

Conversely, the Court of Justice in *Kadi I* concluded for the negative, thus overturning the judgement of the Court of First Instance. The Court held:

“[Art. 297 and Art. 307 EC Treaty] cannot, however, be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union.

Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights, including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights.

It follows from the foregoing that the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law [...].”<sup>110</sup>

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<sup>107</sup> CJEU, *Kadi I* (fn 92), para. 158-236; Judgment of the Court of First Instance *Kadi v Council and Commission* (fn 92) para. 87-135; Judgment of the Court of First Instance, *Yusuf and Al Barakaat International Foundation v Council and Commission* (fn 92), para. 107-171.

<sup>108</sup> CJEU, *Kadi I* (fn 92), para. 327.

<sup>109</sup> CJEU, Opinion of Mr Advocate General Poiares Maduro in *Kadi I* (fn 98), para. 18.

<sup>110</sup> CJEU, *Kadi I* (fn 92), para. 303, 304, 326.

In holding so, the Court of Justice, acted as “the constitutional court of the municipal legal order that is the Community”<sup>111</sup> and rejected the structural argument advanced by the Court of First instance relying on the constitutional imperative to protect fundamental rights and the principle of legality, and thus on axiological, considerations.<sup>112</sup> Specifically, the Court singled out a set of principles (those set out in Art. 6 para. 1 TEU, now considered founding values of the Union under Art. 2 TEU) and, deeming them the “very foundations of the Community legal order,”<sup>113</sup> and thus endowing them with a supra-constitutional status, held that Art. 307 EC, although it could authorise some deviation from EU primary law, could not be read as allowing for a derogation to those core principles and values.<sup>114</sup>

Ultimately, as to the concrete evaluation of the Regulation and of its content, it deemed it incompatible with the fundamental principles of the Community’s legal order as it breached the targeted individuals’ fundamental right to access to justice.

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<sup>111</sup> CJEU, Opinion of Mr Advocate General Poiares Maduro in *Kadi I* (fn 98), para. 37.

<sup>112</sup> Giuseppe Martinico, ‘The Autonomy of EU Law: A Joint Celebration of *Kadi II* and *Van Gend En Loos*’, *Kadi on Trial* (Routledge 2014) 166: ‘the CJEU selects a group of principles which may not be jeopardized because their violation would imply the denial of the axiological bases on which the EU legal order is founded. At national level, constitutional law scholars call this set of principles in different ways – “Republican form” (“forma repubblicana”) in Italy, “eternity clause” (“Ewigkeitsklausel”) in Germany but in the concrete task of identifying the principles that may be traced back to such an untouchable core a primary role has always been played by constitutional judges.’; see also Id. ‘Building Supranational Identity: Legal Reasoning and Outcome in *Kadi I* and Opinion 2/13 of the Court of Justice’ (2016) 8 *Italian Journal of Public Law* 235, 242–252.

<sup>113</sup> Daniel Sarmiento, ‘The EU’s Constitutional Core’ in Alejandro Saiz Arnaiz and Carina Alcoberro Llivinia (eds), *National constitutional identity and European integration* (Intersentia 2013); Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (3rd edn, Hart Publishing 2018) 52, f.

<sup>114</sup> Nikos Lavranos, ‘Revisiting Article 307 EC: The Untouchable Core of Fundamental European Constitutional Law Values and Principles’ in Filippo Fontanelli, Giuseppe Martinico and Paolo Carrozza (eds), *Shaping Rule of Law Through Dialogue. International and Supranational Experiences* (Europa Law Publishing 2010) 124–129, finding that the CJEU introduced “a new supra-constitutional law level termed the ‘very foundations of the Community legal order,’ which stands at the apex of the hierarchy of norms of the Community legal order. This new supra-constitutional law level apparently enjoys an even higher status than primary EC law. [...] While derogations from primary EC law within the context of Article 307 EC and in the light of *Centro-Com* apparently still remain possible, the ECJ signalled to the EC Member States that such derogations can never affect the ‘very foundations of the Community legal order’” (p. 126); see also Id., ‘Protecting European Law from International Law’ (2010) 15 *European Foreign Affairs Review* 265, arguing that the development and use by the CJEU of the concept of the ‘very foundations of the Community legal order’ resembles very closely the approach of the Federal German Constitutional Court to European integration, based on the notion of constitutional identity.

### **3. Provisional conclusions**

The aims of this Chapter – as they were presented at the beginning – were twofold: showing that conflicts between national and international law are often framed in different terms by domestic courts and introducing, by pointing at several concrete cases adjudicated in different jurisdiction concerning the same matter, the alternative between identitarian and structural conflicts in order to capture said variety. While this Chapter aimed at providing sufficient evidence from judicial practice for the proposed notions, it is for the next one to expound them more in depth, by building upon legal categories already developed in the context of legal theory.

Insofar as this Chapter aimed at presenting evidence from the judicial practice supporting the finding of an alternative in how inter-systemic conflicts are framed, it would appear that the presented decisions actually support such finding.

Indeed, in the cases arisen under art. 36 VCCR, the German FCC clearly set out the duty, under the principle of openness to international law, for German courts to give full effect to said provision, envisioning the possibility of derogating from international law only in if they explain “why fundamental rights of third parties or other constitutional provisions require a derogation.”<sup>115</sup> In the USA, instead, the Supreme Court refused to give effect to art. 36 VCCR and to the judgements rendered by the ICJ on the basis that neither art. 36 VCCR, nor art. 94 UN Charter (whereby States undertake to comply with the decision of the ICJ in any case to which they are parties) could be considered self-executing: therefore, in the absence of incorporating legislation, it was not for the courts to apply said international norms in the domestic sphere.

The review of cases arisen in the context of the law of State immunity, and with specific reference to cases of gross violation of fundamental principles of international law, at times even of *jus cogens* principles, by foreign States lead to similar observation. In an instance of structural framing of the relationship between domestic and international law, UK and Canadian Courts found, in cases of State torture, that the governing and the only relevant law was the law of Parliament, which provided for the immunity of the respondent foreign States, thus rejecting the applicants’ claims on jurisdictional grounds: its consistency with international law, while welcomed, was not a determining factor in

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<sup>115</sup> FCC, Decision of the Second Senate of 8 July 2010, 2 BvR 2485/07, BVerfGK 17, 390, para. 34 (author’s translation).

their reasoning. In the U.S., in another, but more radical, instance of structural reasoning, no consideration is given to the international law of State immunity, and the only governing law is considered the Foreign Sovereign Immunity Act: its actual consistency with international law is not even considered. Particularly, over time the FSIA has been amended and certain exceptions to the rule of State immunity have been carved out, such as the so-called terrorist exception, whose discipline, as discussed, is incompatible with the international law on State immunity binding the USA: this circumstance, however, has no bearing on the validity of the FSIA and on the adjudication of cases governed by it. Conversely, Italian courts, as well as Brazilian and Korean ones, have adopted an axiological, or identitarian, approach. Indeed, their reasoning in those cases focused on the substance of domestic constitutional principles deemed at odds with the relevant, and perfectly incorporated, international law on State immunity, whereby foreign States are to be considered immune from jurisdiction even if their conduct consisted in serious breaches of international law and, as in most of those cases, of *jus cogens* principles. Finding an incompatibility of the international legal norms with fundamental constitutional principles, courts in those jurisdictions refused to comply with international law, either by deeming that the constitutional clauses automatically incorporating customary international law did not operate to the effect of allowing those international norms in the domestic system, or by striking down national legislation ratifying and incorporating the relevant international instrument.

Finally, a similar alternative was found in the domestic review of UNSEC targeting sanctions regime. U.S. courts, in a similar fashion to the other cases discussed, reviewing the domestic decisions to sanction individuals targeted by the Sanction Committee (and thus the Security Council) under the 1267 Regime, showed no concerns about the international legal implications of eventually de-listing someone the U.S. were bound, under international law, to sanction. The U.K. Supreme Court, reviewing the legality of the domestic instrument incorporating the 1267 Regime, framed the issue in terms of competence, concluding that the Government lacked the power to do so by means of a statutory instrument adopted under sec. 1 of the 1946 UN Act: parliamentary legislation was required. Conversely, the CJEU, in its *Kadi* decisions, clearly adopted an identitarian approach, identifying a core of EU constitutional principles which could not be derogated even in order to comply with UNSEC Resolutions adopted under Chapter VII of the UN Charter, and thus ultimately striking down the EU instruments incorporating the 1267

Regime insofar as they did not provide for an adequate system of judicial review of the listing decisions.

Therefore, the proposition that conflicts between national and international law are often framed very differently under national law appears tenable, as well as the proposition that the alternative, at this stage still theoretically underdeveloped, between structural and identitarian conflicts can aptly capture and organise this varied scenario.

Furthermore, albeit it was not the purpose of this Chapter, by reviewing the cases that were discussed and linking each case with the jurisdiction wherein it arose, it is possible to observe a certain degree of correlation between, on the one hand, identitarian conflicts and legal orders encompassing the principle of openness towards international law (e.g., Italy, Germany, the EU), and, on the other, between instances of structural conflict and jurisdiction clearly not encompassing said principle (the U.K. and the USA). At this stage this cannot but be merely noticed. However, this observation prompts the question of whether this correlation can be further qualified, by linking the presence, in one legal order, of the principle of openness towards international law with the framing of inter-systemic conflicts in terms of identity, and its absence with that in terms of structure. This line of questions is at the heart of the present research and will be picked up in Chapter III. The next Chapter, instead, provides a more developed theoretical frame for the notions of structural and identity conflicts.

## Chapter II

### Understanding the alternative between identitarian and structural judicial non-application of international law

In the previous chapter, a number of cases were discussed where domestic courts refused to apply international law on grounds of national constitutional law. Throughout the discussion, the reasoning employed by the courts has been pointed out, reconnecting it to the notions of structural or identity conflicts that had been previously introduced, if only in a very axiomatic and schematic fashion. It is now time for a deeper discussion of those notions, and for a more thorough theoretical elaboration thereof.

#### **1. Towards the notions of structural and identity conflicts: a taxonomy of normative hierarchies in the domestic setting.**

In order to reach a better understanding of the notions of identity and structural conflicts between national and international law, recourse will be made to a taxonomy of normative hierarchies developed by legal theorists:<sup>1</sup> this scholarly elaboration has been developed mainly with reference to hierarchies among legal norms within the domestic legal system; repurposing it to the different context of the relationship between the national legal system and the international one, and between the respective norms, will thus require some adaptation.

According to one taxonomy, within the domestic legal system, hierarchical relationships between norms can be of three kinds: formal, material, and axiological. These will be discussed in turn throughout the next paragraphs.

#### **A. Formal hierarchical relationships**

Formal hierarchies are relations among one norm – or one set of norms –, disciplining the production of legal acts, and one or more acts accordingly produced. Consequently,

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<sup>1</sup> Riccardo Guastini, 'Gerarchie normative' [1997] *Materiali per una storia della cultura giuridica* 463; *Interpretare e argomentare* (2011) 165–172; 'Gerarchie normative' [2013] *Revus* 5770; Giorgio Pino, 'Norme e Gerarchie Normative' [2008] *Analisi e Diritto* 263; 'La Gerarchia Delle Fonti Del Diritto. Costruzione, Decostruzione, Ricostruzione' [2011] *Ars interpretandi*; Orlando Scarcello, 'On the Role of Normative Hierarchies in Constitutional Reasoning: A Survey of Some Paradigmatic Cases' (2018) 31 *Ratio Juris* 346.

the latter are valid only insofar as they are enacted through the procedures set forth by the former, which is thus hierarchically superior, in a formal sense. In the context of formal hierarchies, the superior norm has no bearing as to the content of the legal act whose conditions of validity it sets. As to examples of formal hierarchies, one could think of the constitutional rules setting out the law-making process, as well as of the constitutional norms disciplining the procedures to be followed in case of constitutional amendment or revision: in both cases, if ordinary legislation or constitutional reforms are passed in violation of those norms, they will be invalid. Similarly, administrative procedures set in ordinary legislation are also hierarchically superior, in a formal sense, to the administrative acts.

### **B. Material hierarchical relationships**

Material hierarchies are relations among two norms ( $N_1$  and  $N_2$ ), whereby  $N_2$  is valid only insofar as it does not contrast with the content of  $N_1$ : thus,  $N_1$  is hierarchically superior, in a material sense, to  $N_2$ . Material hierarchies require the existence of a third norm ( $N_3$ ) establishing the prohibition for the content of  $N_2$  to contrast that of  $N_1$  and providing for the remedies in case of violation of such prohibition. Here too examples are abundant: one is the relation between the Constitution and ordinary legislation, insofar as the latter needs to be consistent with the principles set out in the former, another is that between delegating and delegated legislation, insofar the latter must be consistent with guiding principles set by the former; furthermore, another example is that of the relation between ordinary legislation and contract, by reason of the prohibition, for private parties, to derogate from mandatory rules of law, on penalty of nullity of the contract.

### **C. Axiological hierarchical relationships**

Finally, axiological hierarchies imply a comparative evaluation, generally carried out by the interpreter rather than the legislator, of the axiological importance of two norms ( $N_1$  and  $N_2$ ), whereby  $N_1$  is deemed to be more 'important' than  $N_2$ . Consequently, if  $N_1$  and  $N_2$  are incompatible,  $N_1$ , which is axiologically superior to  $N_2$ , will be applied, whereas  $N_2$  will not. Indeed, relations of axiological hierarchy have consequences as to the applicability of norms, rather than as to their validity. However, they can – though they need not – overlap with material hierarchies: if that is the case, a norm deemed

axiologically inferior to another will be invalid, as per material hierarchy. One case of axiological hierarchy is the elaboration of ‘supreme principles of the Constitution’ by the Italian Constitutional Court (but analogous cases can be found in other jurisdictions),<sup>2</sup> limiting the constitutional amendment powers:<sup>3</sup> in this case axiological and material hierarchy are combined, as the violation of the supreme principles of the constitution by constitutional amendments will result in the invalidity thereof. Another instance of axiological hierarchy occurs in the establishment of the degree of importance of competing principles or rights in the act of balancing.<sup>4</sup> In this case, differently from the former one, no material hierarchy is established between the two competing principles, only an axiological one: as a consequence, the principle deemed axiologically inferior will not be abrogated, nullified, or declared invalid.

*i. Axiological hierarchies vis-à-vis formal and material hierarchies.*

Admittedly, axiological considerations underlie the establishment of both formal and material hierarchies:

‘in a broad sense, all types of normative hierarchies, and in general the establishment of preference mechanisms between norms, are ultimately axiological: they represent the outcome of a value choice. Thus, material hierarchies are established as a result of an evaluation of preference in favour of the body producing the materially superordinate norms, dictated, as the case may be, by considerations of greater democratic representativeness or technical competence, etc. [...] The same can also be said, finally, for structural [here: formal] hierarchies: the choice of a procedure, and the way it is structured to produce formally valid regulatory acts, is far from value-free’<sup>5</sup>

In this regard, what distinguishes formal and material hierarchies from axiological ones is that axiological considerations are immediately and directly relevant to the solution of

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<sup>2</sup> Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017) 39–70.

<sup>3</sup> Pietro Faraguna, *Ai Confini Della Costituzione. Principi Supremi e Identità Costituzionale* (Franco Angeli 2015).

<sup>4</sup> Robert Alexy, ‘Constitutional Rights, Balancing, and Rationality’ (2003) 16 *Ratio Juris* 131, 136.

<sup>5</sup> Pino, ‘La Gerarchia Delle Fonti Del Diritto. Costruzione, Decostruzione, Ricostruzione’ (n 1) 34, f. (author’s translation).

axiological antinomies; in the case of formal or material hierarchies, axiological considerations are only indirectly relevant, in that they explain why one procedure is established or why one source of law cannot derogate another. Still, it is important to acknowledge that both formal and material hierarchies imply (at times strong) value considerations and can represent constitutional problems of the highest significance.

Secondly, as to the relation between material and axiological hierarchies, the two might appear similar, or even overlapping. However, this is not the case: if it is true that axiological hierarchies do not necessarily imply material ones, the reciprocal is also true, namely that material hierarchies do not imply axiological ones.

Two examples will suffice. First, art. 38(2) of the German Basic Law establishes that ‘any person who has attained the age of eighteen shall be entitled to vote.’ One could imagine that ordinary legislation is enacted allowing seventeen-years-olds to vote, or, conversely, requiring citizens to be nineteen years old to vote: in both cases such electoral legislation would be in violation of a materially hierarchically superior norm. However, one could doubt that such a conflict between ordinary and constitutional legislation would necessarily imply strong axiological issues.<sup>6</sup> Similarly, the Italian legislation regulating the vehicle traffic was enacted through delegated legislation adopted by the Government.<sup>7</sup> In the delegating legislation, enacted by Parliament, it was provided that for the first year after having obtained a driving license, individuals should suffer certain limitations as to the power of the vehicles they could drive.<sup>8</sup> Had the delegated legislator provided for a two-year limit, it would have certainly constituted a material conflict, in that a materially superior norm (the delegating legislation) was breached by a lower norm (the delegated provision);<sup>9</sup> however, one could seriously doubt of the axiological relevance of this antinomy.

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<sup>6</sup> Similarly, with regard to the XXVI Amendment to the U.S. Constitution, Michel Rosenfeld, addressing the relation between constitutional amendment and constitutional identity, observed: “there are, of course, clear cases of amendments that do not threaten constitutional identity as well as of amendments that do. The Twenty Sixth Amendment to the U.S. Constitution adopted in 1971, which lowers the voting age to eighteen, is an example of the former. It would be absurd to claim that the U.S. Constitution’s identity in terms of selfhood could be even minimally threatened as a consequence of this amendment:” Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2009) 31.

<sup>7</sup> Legislative Decree of 30 April 1992, no. 285, GU 18 May 1992, no.114, Suppl. Ord. no. 74.

<sup>8</sup> *Ibid.*, art. 117 para. 2 (in the original version).

<sup>9</sup> The delegating legislation is Law of 13 June 1991, no. 190, GU 18 June 1991, no. 150, art. 2, para. 1, lett. s).

More synthetically, relations of material hierarchy merely require that the content of one norm ( $N_2$ ) respects that of another ( $N_1$ ), regardless of any consideration of values underpinning the two norms and irrespective of any comparison between the axiological importance of the two norms. Relations of material and axiological hierarchy might at times overlap (and often do), but this is merely an occurrence, and it is not in any way a theoretical necessity.

## **2. Adapting the taxonomy of intra-systemic hierarchies to inter-systemic relations: the inappropriateness of the notions of validity and hierarchy.**

As already mentioned, the taxonomy discussed above has been elaborated with the purpose of addressing relations among norms within the domestic legal system. As a consequence, it is not possible to simply extend it to the different issue of the relationship between norms pertaining to the national and international legal system; however, it is possible to adapt the ‘domestic’ taxonomy above discussed to the context of inter-system relationship.

In this regard, two main issues come to the fore, concerning the – related – notions of validity and hierarchy, which are, both, particularly linked to the context of intra-system relations and, thus, ill-suited for addressing inter-system ones.

First, systemic validity can grossly be defined as the belonging of one norm to one legal system (or as its membership thereof), due to the former respecting the criteria for validity established in the latter.<sup>10</sup> As such, it is a notion that can hardly be transposed to inter-system relations. Indeed, given that the national and international legal systems are reciprocally autonomous, violation of norms of international law by norms of national law cannot, *per se*,<sup>11</sup> be regarded as a reason for the latter’s invalidity, and vice versa.

Thus, a conflict between a national and an international law norm will result, within the domestic legal system, not in the invalidity of the international law norm at issue, but in its inexistence, thus ‘expelling’ it from the domestic legal system (or preventing it from

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<sup>10</sup> See art. 42, para. 1 VCLT: “the validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.”

<sup>11</sup> It is well possible, however, that one legal system incorporates within its own criteria of validity the observance of (certain, often human rights) norms of international law. The reverse is rarer; see however art. 46 of the 1969 Vienna Convention on the Law of the Treaties.

being introduced therein). Its validity remains a question of international law, to be addressed and solved according to international law criteria.

The ‘expulsion’ of international law norms found in irreparable conflict with national law is achieved through many different technical arrangements, depending on the type of source from which the international legal norm at issue stems (whether that is a treaty or a custom) and on the national legal order at issue (a relevant factor is whether it provides for the automatic incorporation of international law binding upon the State). For example, in case of treaty-based norms, it might be held that the wrong kind of source or the wrong procedure was employed for incorporating international law (e.g., normative acts of the executive instead of parliamentary statutes), with the consequence of the annulment of the incorporating instrument.<sup>12</sup> Moreover, the treaty at issue might be deemed not to produce any effect within the national legal order because of lack of incorporation, or, similarly, specific treaty provisions might be deemed not to be of self-executing nature:<sup>13</sup> the result, in both cases, is that the international law norm does not come into existence in the domestic sphere. The same goes for those cases in which the international law norm is found to be axiologically incompatible with the domestic legal order: in such cases, courts, pursuant to the relevant domestic rules, can strike down the domestic incorporating instrument, thus removing from the domestic legal order the international law norm at issue.<sup>14</sup>

As to customary international law, which is most often automatically incorporated in the national legal order,<sup>15</sup> when it is found to be incompatible with norms of national

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<sup>12</sup> E.g., in *HM Treasury (Respondents) v Mohammed Jabar Ahmed (FC) (Appellants)* [2010] UKSC 2.

<sup>13</sup> E.g., in *Sanchez-Llamas v Oregon* (2006) 548 U.S. 331 346.

<sup>14</sup> As the Italian Constitutional Court did with reference to Law of 14 January 2013, no. 5, GU of 29 January 2013, no. 24, p. 1, authorising the ratification of and incorporating in the Italian legal order the 2004 UN Convention on Jurisdictional Immunities of States and their Property – see Italian Constitutional Court, Judgement of 22 October 2014, no. 238.

<sup>15</sup> See Tom Ginsburg, ‘Locking in Democracy: Constitutions, Commitment, and International Law’ (2005) 38 *New York University Journal of International Law and Politics* 707; Tom Ginsburg, Svitlana Chernykh and Zachary Elkins, ‘Commitment and Diffusion: How and Why National Constitutions Incorporate International Law’ (2008) 2008 *University of Illinois Law Review* 38, 204–210; Pierre-Hugues Verdier and Mila Versteeg, ‘International Law in National Legal Systems: An Empirical Investigation’ (2015) 109 *American Journal of International Law* 514, 527–531.

law,<sup>16</sup> it will be held that the domestic *renvoi* to customary international law does not operate and thus the specific customary norm at issue will not be introduced in the legal system.<sup>17</sup> What all these cases have in common is that, by operating on the domestic incorporating tool, either by striking it down, or by limiting its effectiveness, they prevent the incorporation of the international law norm at issue in the domestic legal order, where, consequently, the latter is inexistent.

Somewhat similarly, it is not possible to hierarchically organise norms pertaining to different and reciprocally autonomous legal systems due to the lack of an overarching ordering criterion. Moreover, a norm is considered hierarchically superior to another if it sets the conditions of validity of the latter: thus, the inappropriateness of the notion of validity to address inter-order relations results in the inappropriateness thereto also of that of hierarchy.

Instead, what occurs in the context of the interactions between national and international law, which are different and autonomous legal orders, is that norms originating from the international legal system are incorporated in the domestic one by virtue of domestic rules, prescribing the necessary procedures and acts. As such, these domestic norms operate as grounds for the existence of international law norms in the domestic legal order and set the conditions for the successful incorporation of norms of international law: a violation of said norms thus determines the non-incorporation, and consequently the inexistence in the national legal order of the international law norms at issue. Accordingly, the relationship, also when it becomes a conflictual one, between the international and national legal order is one of co-ordination and can be analysed without

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<sup>16</sup> The position of customary international law in the hierarchy of sources varies a lot across jurisdictions (*ibid*). The rank in the domestic system that needs to be violated in order to prevent the incorporation of customary international law in the national order varies accordingly.

<sup>17</sup> With a very clear reasoning, see Italian Constitutional Court, Judgement of 22 October 2014, no. 238, par. 3.5 (emphasis added):

“This contrast [...] obliges this Court to declare that, to the extent that international law extends immunity to actions for damages caused by such serious violations, *the referral of Article 10, para. 1 of the Constitution does not operate.*

Consequently, insofar as the law of immunity from jurisdiction of States conflicts with the aforementioned fundamental principles [of the Constitution], *it has not entered the Italian legal order and, therefore, does not have any effect therein.*”

having recourse to the notion of hierarchy, thus respecting the fundamental premise of the mutual independence of the criteria of recognition of national and international law.

Having discussed these two points – that is, the inaptness of the notion of validity to describe the status of international legal norms in the domestic system and the related issue of the impossibility of framing relationship between the two levels in terms of hierarchy – as a way of premise, it is now possible to adapt the above-discussed taxonomy in the context of the conflictual relationship between national and international law.

### **3. Formal, material, and axiological conflicts between national and international law.**

Mirroring the above-discussed taxonomy, the domestic grounds for existence of international law norms in the national legal system can be of three different kinds: formal, material, and axiological. Accordingly, the violation of these grounds for existence of international law norms results in conflicts, which can be of formal, material, or axiological nature.

#### **A. Formal conflicts between national and international law**

A wide range of cases can be considered to fall within the category of formal conflicts between national and international law: what they have in common is that domestic formal conditions for the existence of international law norms in the national legal system were not satisfied. Here the question of the incorporation of international law is framed, under national constitutional law, in terms of procedure and competence.

This might occur because of the operation of ‘doctrines of direct effect.’<sup>18</sup> in such cases, ratified but unincorporated international law norms, though considered, are deemed not to be self-executing and thus domestic courts exclude that they have any bearing as to the solution of the case before them.<sup>19</sup>

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<sup>18</sup> André Nollkaemper, ‘The Duality of Direct Effect of International Law’ (2014) 25 *European Journal of International Law* 105, 115–117; Fulvio Maria Palombino, ‘Compliance with International Judgments: Between Supremacy of International Law and National Fundamental Principles’ (2015) 75 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 503, 208–210.

<sup>19</sup> *Sanchez-Llamas v Oregon* (2006) 548 U.S. 331; *Medellin v. Texas* (2008) 552 U.S. 491; *Leal Garcia v Texas* (2011) 564 U.S. 940.

Somewhat similarly, formal conflicts occur also when the incorporation of international law in the domestic legal order has occurred in violation of the relevant domestic procedures, or with the adoption of a legal act of the wrong nature.<sup>20</sup> In jurisdictions where the enactment of parliamentary legislation authorising the Government to ratify (certain kinds of) international agreements, a violation of this requirement might also come into consideration.<sup>21</sup> In passing, it should be noted that cases such as these, where the constitutional problem lies in the lack of respect for the relevant constitutionally mandated domestic procedures, are the only ones that, under certain and restrictive conditions, could be defended under international law.<sup>22</sup>

Formal conflicts occur also when international law is deemed not to have any bearing on the solution of the case, national law being the only applicable law to the controversy, notwithstanding any obligation the State has undertaken under international law. In such instances, courts hold that they are prevented to look beyond the law of Parliament, which is ‘all that matters:’ this is the case, for example, of the reasoning employed by English and Canadian courts in the cases pertaining to State immunity discussed in the previous chapter.<sup>23</sup> At times, as in the decisions just mentioned, this understanding of the relation between national and international norms is explicit in the reasoning of the courts as they do not even consider the international law aspects of the case. In other instances – and, among those reviewed, this is very often the cases decided

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<sup>20</sup> *HM Treasury v Ahmed* [2010] UKSC 2.

<sup>21</sup> Albeit with a certain variety of institutional solution, this is rather common. See Luzius Wildhaber, *Treaty-Making Power and Constitution: An International and Comparative Study* (Helbing & Lichtenhahn 1971); Antonio Cassese (ed), *Parliamentary Control over Foreign Policy* (Brill Nijhoff 1980); Stefan A Riesenfeld and Frederick M Abbott (eds), ‘Symposium on Parliamentary Participation in the Making and Operation of Treaties’ (1991) 67 *Chicago-Kent Law Review* 293; Pierre-Hugues Verdier and Mila Versteeg, ‘Separation of Powers, Treaty-Making, and Treaty Withdrawal: A Global Survey’ in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press 2019).

<sup>22</sup> See art. 46 VCLT. Such provision is generally interpreted quite restrictively, especially with regard to what constitute a *manifest* violation of a provision of internal law of *fundamental importance* regarding competence to conclude treaties: see Mark Eugen Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) art 46; Thilo Rensmann, ‘Article 46’ in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018).

<sup>23</sup> As to Canadian decisions, see *Bouzari v Islamic Republic of Iran* (2004), 220 O.A.C. 1; *Kazemi Estate v Islamic Republic of Iran* (2014) 3 S.C.R. 62, 179. In the UK, see *Al-Adsani v. Kuwait* (1996) 107 I.L.R. 536 and *Jones v. Saudia Arabia* [2006] UKHL 26.

by U.S. courts<sup>24</sup> – courts adopt this reasoning implicitly, failing to even mention the international law aspects of the case: this is what Vicki Jackson terms ‘silent resistance or indifference’ and that the International Law Association Study Group on Principles on the Engagement of Domestic Courts with International Law terms ‘evasive avoidance’.<sup>25</sup>

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Silent resistance is thus the most radical form of dualism among the case surveyed, in that it realises an absolute disconnection between the national and the international legal order, which can be coordinated only through the activity of the legislator. It is still a case of formal framing of the relationship between national and international law in that it is premised on an abstract conception of their relationship, one in which the substance of the norms at issue, or the values underpinning them, are never considered. Rather, what matters is the irrelevance of international legal sources within the domestic sphere, said irrelevance being so pronounced that international sources are not even mentioned in domestic proceedings. The fact that international sources are treated by domestic courts (and often even by the parties to the proceedings too) as if they did not exist is revealing of the structural conception adopted, whereby international law becomes relevant in the domestic sphere only through its incorporation by the legislator.

## **B. Material conflicts between national and international law**

Another category of conflict between national and international law is that of material conflicts, modelled upon the notion of material hierarchies above discussed; however, the notion of material conflicts adopted in the present research is more restrictive than the one above discussed. Indeed, beforehand, when discussing the taxonomy developed by legal theorists to address legal conflicts within the domestic legal system, it was observed that axiological and material conflicts might often overlap. Particularly, an axiological

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<sup>24</sup> This is the case of decisions rendered by U.S. courts both in the matter of State immunity and in that of UNSEC targeted sanctions. As to the former see *Verlinden BV v Central Bank of Nigeria* (1983) 461 U.S. 480; *Republic of Argentina v Amerada Hess* (1989) 488 US 428; *Republic of Austria v Altman* (2004) 541 U.S. 677; *Republic of Argentina v. NML Capital, Ltd.* (2014) 573 U.S. 134; *Bank Markazi v Peterson* (2016) 578 U.S. \_\_; *Opati v Republic of Sudan* (2020) 140 S. Ct. 1601. For a discussion thereof, see Ch. 1.

<sup>25</sup> Vicki Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press 2013) 34; André Nollkaemper, Yuval Shany and Antonios Tzanakopoulos (eds), *The Engagement of Domestic Courts with International Law: Comparative Perspectives* (Oxford University Press 2024) 387.

<sup>26</sup> Jackson (n 25) 34.

hierarchy, which does not have any consequences as to the validity of either of the competing norms, is often transformed into a material hierarchy, so that respect of the axiological superior norm becomes a condition of validity of the axiologically inferior one.

In this context, instead, the two notions are rigorously distinguished, not only for the sake of specificity, but also because material and axiological conflicts address two radically different concerns under domestic law, as it will be discussed in greater detail in the next paragraph. Indeed, material conflicts generally address the incompatibility of international norms with the product of the democratic process, that is, parliamentary legislation; axiological conflicts, instead, consist of instances of incompatibility between international norms and constitutional principles.

Specifically, material conflicts will be defined as those conflicts that entail only a material relationship between the contrasting norms, without entailing an axiological one. As such, a material conflict exists between national and international law, when a norm of national constitutional law prevents international law norms to be incorporated in the domestic legal order if they conflict, as to their substance, with domestic norms stemming from certain legal sources, regardless of any consideration as to the values underpinning the conflicting norms. This kind of conflict is related to the question of where does international law “fit” within the domestic hierarchy of sources.<sup>27</sup>

The case above discussed do not offer good examples of material conflicts thus understood. With the purpose of providing some examples of material conflicts, two cases – one dealing with treaty-based international law and one with customary international law – will be mentioned here.

The first example of material conflict is the judgement by the FCC in *Treaty Override*.<sup>28</sup> In that decision, the Court upheld the constitutionality of ‘treaty overrides,’ whereby national legislative provisions specifically provided that for a derogation to previously ratified and incorporated international treaties – in that case, a double taxation agreement with Turkey. The case arose from a dispute involving the German Income Tax

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<sup>27</sup> Verdier and Versteeg (n 15); Ginsburg, Chernykh and Elkins (n 15); Ginsburg (n 15).

<sup>28</sup> FCC, Order of the Second Senate of 15 December 2015, 2 BvL 1/12, BVerfGE 141, 1, *Treaty Override*. For a more detailed discussion of this case, see Chapter 7.

Act and a double taxation agreement Germany had concluded with Turkey.<sup>29</sup> Under § 50d of the Income Tax Act, as resulting from an amendment of 2003,<sup>30</sup> exemption from German tax for income from employment is contingent on the proof by the taxpayer that the state entitled under the double taxation treaty to exercise the right of taxation has waived such right or that the taxes assessed by that state on the income in question have been paid.<sup>31</sup> This was in blatant contrast with the relevant provision of the double taxation agreement concluded with Turkey.<sup>32</sup> Eventually, the case reached the Federal Finance Court which referred the matter to the FCC, deeming the Income Tax Act unconstitutional under art. 25 of the Basic Law in that it breached upon a treaty ratified by Germany.<sup>33</sup> The FCC, instead, reaffirming its case-law, held that treaties do not have a higher rank than federal laws within the German hierarchy of sources: accordingly, subsequent national legislation can override earlier treaty obligations, reflecting the principle of parliamentary sovereignty and democracy.<sup>34</sup>

Another example of material conflicts between national and international law is the 1906 landmark case of *Mortensen v Peters*.<sup>35</sup> This case involved a Danish fisherman, Mortensen, who was convicted under the Herring Fishery (Scotland) Act 1889 for fishing within the Moray Firth, an area declared off-limits to foreign fishermen by UK law. Mortensen argued that the national legislation conflicted with international customary law, which permitted fishing in such waters. Thus, the Scottish High Court of Justiciary had to determine whether UK domestic law or international customary law should prevail. It held that the domestic statute (the Herring Fishery Act) took precedence over conflicting international norms. The court emphasized that it was bound to apply the law as enacted by Parliament, irrespective of any contrary international customary law.

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<sup>29</sup> Respectively Income Tax Act (*Einkommensteuergesetz*), BGBl. I S. 823 (29 April 1997); Agreement between the Federal Republic of Germany and the Republic of Turkey for the Avoidance of Double Taxation with respect to Taxes on Income and Capital done at Bonn (Germany) on 16 April 1985, BGBl. II S. 865 (29 November 1989).

<sup>30</sup> See Second Act on the Amendment of Tax Laws - 2003 Tax Amendment of 15 December 2003, BGBl. I S. 2645 (19 December 2003).

<sup>31</sup> Income Tax Act, n. 29, § 50d(8).

<sup>32</sup> Art. 15, para. 1 of the Double Taxation Agreement between Germany and Turkey, n. 29.

<sup>33</sup> Federal Finance Court, Order of 10 January 2012, I R 66/09, BFHE 236, 304.

<sup>34</sup> FCC, *Treaty Override* (fn 27).

<sup>35</sup> *Mortensen v Peters* (1906) 8 F (J) 93.

In both these cases courts were confronted with an antinomy between national and international law. Indeed, the applicable national legislation was in unreconcilable conflict with the relevant international obligations of Germany and the UK respectively.

In both cases, national legislation had no direct axiological implications: in one case it consisted in a ban on fishing in certain areas, in the other in the provision that exemptions from German tax for income from employment is contingent on proof that the taxes assessed by the contracting state have been paid. Thus, national legislation did not prevail over the relevant international obligations because it gave effect to important constitutional principles, whose safeguard by the courts was deemed of paramount importance. Rather, in both cases, national legislation prevailed because it was the product of the legislative authority of Parliament, and, as such, the concretisation of the democratic principle.

### **C. Axiological conflicts between national and international law**

As discussed above, in the domestic legal order axiological hierarchies imply that courts undertake a comparative evaluation of the axiological importance of two norms, whereby either one is deemed to be more ‘important’ than the other. Similarly, in the context of inter-systemic conflicts, international law norms which otherwise would be applicable to domestic proceedings are instead refused application on the ground that they conflict with constitutional principles and values of such importance that they cannot be derogated by international law norms.

In the first chapter a number of such cases were discussed.

This is clearly the case of the Italian (as well as that of the Brazilian and South Korean) judgements in the case of State immunity. Indeed, the Italian Constitutional Court found that in that case the generally recognized rule of international law on immunity from jurisdiction of foreign States, as interpreted in the international order, could not enter the Italian constitutional order, not because of some defects in their incorporation, but because it conflicted with fundamental principles and inviolable rights of the Italian constitutional order.<sup>36</sup>

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<sup>36</sup> Italian Constitutional Court, Judgement of 22 October 2014, no. 238, especially para. 3.4.

Similarly, the Court of Justice in *Kadi I* found that art. 307 EC Treaty could not be interpreted – as the Court of First Instance had done<sup>37</sup> – to shield from judicial review the EU Regulation incorporating in the EU legal order the UN regime of targeted individual sanctions under Resolution no. 1267 as amended over time. Indeed, the Court held, “Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order.”<sup>38</sup>

Finally, the judgement by the FCC concerning convictions passed in violations of art. 36 of the Vienna Convention on Consular Relations overturned the decision of the Federal Court of Justice by holding that German courts were required to give effect to the decisions of the International Court of Justice: in holding so, it foresaw the hypothesis of disregarding such a duty and explained that, in such a case, “it must be explained why fundamental rights of third parties or other constitutional provisions require a derogation.”

As already mentioned in chapter 1, in the case of axiological conflicts, “it is the discussion on the values, which, in its extreme traits assumes the features of identarian objection, that ends up reverberating on the architecture of the relations [between legal orders] and not the reciprocal (i.e., it is not an architectural evolution reverberating on the spaces of life)”.<sup>39</sup>

#### **4. The notions of structural and identity conflicts between national and international law**

Having clarified the notions of formal, material, and axiological conflicts in the context of inter-systemic legal relationships in the previous paragraph, the present one aims at reconnecting those notions with those, employed in this research, of structural and identity conflicts. Thus, the first section will deal with the reduction of the notions of

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<sup>37</sup> Judgment of the Court of First Instance of 21 September 2005, T-315/01, *Kadi v Council and Commission*, ECR 2005 II-3649; Judgment of the Court of First Instance of 21 September 2005, T-306/01, *Yusuf and Al Barakaat International Foundation v Council and Commission*, ECR 2005 II-3533.

<sup>38</sup> Judgment of the Court (Grand Chamber) of 3 September 2008, C-402/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*, ECR 2008 I-635 (‘Kadi I’), para. 304.

<sup>39</sup> Alberto di Martino and Gianluigi Palombella, ‘Oltre l’architettura ordinamentale: il nuovo diritto composito della «terza ondata»’ (2020) 40 Quaderni costituzionali 225, 227 (author’s translation).

formal and material conflicts to that of structural conflicts; the second section, instead, will address the notion of identity conflicts, distinguishing constitutional identity and eternity and clarifying why the notion of identity is preferred to that of axiological conflicts so far used in this chapter following the scholarly elaboration discussed above.

**A. The unification of formal and material conflicts under the notion of structural conflicts.**

This section justifies the unification of formal and material conflicts under one single common category, that of structural conflicts.

The main argument supporting such unification is that structural conflicts (i.e. both formal and material ones) aim at protecting the law-making prerogatives of the competent public bodies, generally Parliaments, either vis-à-vis other public bodies such as the Government, or vis-à-vis international legal obligations binding the State. Instead, identity conflicts aim at protecting fundamental constitutional principles and values. Thus, structural conflicts could be understood as guarantees of the dynamic prerogative of a legal community to self-determination through the democratic process and the parliamentary representation. Identity conflicts, instead, can be understood as static safeguards of the core constitutional values and principles making up the identity of a specific national legal order.

The convergence of formal and material conflicts towards the unitary notion of structural conflicts, premised on them both aiming to protect the law-making prerogatives of national bodies, is substantiated by reading together some cases of formal and material conflicts.

In 1991 (thus prior to the enactment of the 1998 Human Rights Act incorporating the ECHR in the domestic legal system), in *R v Secretary of State for the Home Department, Ex p. Brind*, a case concerning the prohibition by directives of the Secretary of State of the broadcasting of direct speech from representatives of terrorist organisations, the House of Lord considered the domestic effect of the ECHR in the English legal order.<sup>40</sup> Given that the ECHR was an unincorporated treaty, the House of Lords resolved the case by formal reasoning, by holding that the Convention had no

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<sup>40</sup> [1991] 1 A.C. 696.

domestic authority. In doing so, the Lord Justices clarified that it was for Parliament to conform the domestic legal order to the Convention, and not for the courts:

“[The United Kingdom Government] could, for example, ‘domesticate’ or ‘patriate’ the Convention itself [...]. If it had done so, the Convention would have been part of English domestic law. Alternatively, it can review English common and statute law with a view to amending it, if and in so far as it is inconsistent with the Convention, at the same time seeking to ensure that all new statute law is consistent with it. This is the course which has in fact been adopted. [...] By contrast, the duty of the English courts is to decide disputes in accordance with English domestic law as it is, and not as it would be if full effect were given to this country’s obligations under the Treaty, assuming that there is any difference between the two.

It follows from this that in most cases the English courts will be wholly unconcerned with the terms of the Convention.”<sup>41</sup>

A few years later, in 2002, after the ECHR had been incorporated by the 1998 Human Rights Act, the House of Lord decided *R. v Secretary of State for the Home Department Ex p. Anderson*.<sup>42</sup> This case concerned the power, under section 29 of the Crime (Sentences) Act of 1997, of the Secretary of State for the Home Department, having received non-binding advice by the judiciary, to set the minimum time (“tariff”) prisoners sentenced to life imprisonment were required to serve before consideration would be given to any question of their release. In 2002, the ECtHR, reconsidering its previous case-law on the matter, held that the tariff was to be considered an element of punishment, and its setting an exercise in the sentencing function.<sup>43</sup> As such, setting the tariff fell under art. 6 para. 1 of the Convention, requiring a tribunal established by law to adopt such a determination, and thus being incompatible with such a determination being made by a member of the Executive such as the Secretary of State.

Consequently, in *Anderson*, the House of Lord made a declaration of incompatibility under section 4 of the Human Rights Act, given the incompatibility between the national legislation and the Convention as interpreted by the Strasbourg Court, which could not be remedied by means of consistent interpretation.

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<sup>41</sup> Ibid., p. 717, f. per Lord Donaldson.

<sup>42</sup> [2002] UKHL 46.

<sup>43</sup> ECtHR, Judgement of 28 May 2002, app. no 46295/99, *Stafford v United Kingdom*, especially para. 78-80.

As it will be argued at greater length in the chapter dealing with the UK legal order, declarations of incompatibility represent material conflicts, in that the Convention norm at issue, though incorporated in the national legal order, is therein refused full application due to its material inconsistency with parliamentary legislation. In stating the reasons for such a declaration, and, conversely, for not adopting a consistent interpretation of section 29 under section 3 of the Human Rights Act, the House of Lords held that

“to read section 29 as precluding participation by the Home Secretary, if it were possible to do so, would not be judicial interpretation but judicial vandalism: it would give the section an effect quite different from that which Parliament intended and would go well beyond any interpretative process sanctioned by section 3 of the 1998 Act.”<sup>44</sup>

The UK might be considered somewhat peculiar, in that its entire constitutional order is organised on the basis of the principle of parliamentary sovereignty: it might be appropriate, at this stage, to additionally consider cases of structural conflicts stemming from other, and different, jurisdictions.

Starting with a case of formal conflicts, *Sanchez-Llamas v Oregon* is a judgement rendered by the US Supreme Court regarding, as already discussed in chapter 1, the domestic effect of the 1963 Vienna Convention on Consular Relations.<sup>45</sup> The Court held that the art. 36 was devoid of any domestic authority in that it had not been incorporated by Congress and could not be deemed self-executory. In doing so, the Supreme Court stated that:

“if we were to require suppression for Article 36 violations without some authority in the Convention, we would in effect be supplementing those terms by enlarging the obligations of the United States under the Convention. This is entirely inconsistent with the judicial function. [...] Of course, it is well established that a self-executing treaty binds the States pursuant to the Supremacy Clause, and that the States therefore must recognize the force of the treaty in the course of adjudicating the rights of litigants. [...] But where a treaty does not provide a particular remedy,

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<sup>44</sup> Ibid, para. 30 per Lord Bingham.

<sup>45</sup> (2006) 548 U.S. 331.

either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own.”<sup>46</sup>

The *Treaty Override* decision of the FCC has already been discussed in this chapter.<sup>47</sup> It is a clear case of material conflicts, whereby the international norm at issue, stemming from an international treaty regularly ratified and incorporated in the German legal system, was disregarded on the ground of its incompatibility with subsequent parliamentary legislation. The link between material conflicts, democratic decision-making and the prerogatives of the legislature emerge clearly from the reasoning of the Court:

“Power in democracy is always temporary in nature. This implies that, in accordance with the will of the people as expressed through elections, subsequent legislatures must be able to revise, within the limits set by the Basic Law, legislative acts undertaken by earlier legislatures [...]. It would be incompatible with this concept if a parliament could bind subsequent legislatures during later parliamentary terms and limit their ability to rescind or correct past legislative decisions.”<sup>48</sup>

Thus, as the passages quoted above, taken from cases of both formal and material conflicts, make clear, what unites cases of formal and material conflicts within the category of structural conflicts advanced here is that they both aim at protecting the law-making prerogative of state bodies. This finality is fulfilled either by making the domestic authority of international law norms contingent on its positive incorporation by the competent domestic authorities through the appropriate domestic procedures (formal conflicts), or by strictly enforcing national doctrines on the hierarchy of sources of law regulating the place of international law therein, thus making the domestic authority of international law contingent on it respecting hierarchically superior national provisions, regardless of the values underpinning the competing norms (material conflicts).

Arguing that structural conflicts entail value-free consideration, where the solution of the antinomy between the national and international legal order does not depend on a comparative evaluation of the values underpinning the two norms is not to negate that such cases pose relevant constitutional issues. To the contrary, the protection of the

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<sup>46</sup> Ibid., p. 336.

<sup>47</sup> FCC, *Treaty Override* (fn 27). See *supra*, para. 3.B.

<sup>48</sup> Ibid., para. 53.

democratic principle and the degree to which it is realised, even at the expense of fulfilling the international obligations binding the State, is clearly a matter of the utmost constitutional salience.

However, what distinguishes structural from identitarian conflicts is the fact that in cases of structural conflicts, axiological considerations are second-order reasons for the solution of conflicts between national and international law and constituting the general (ideological) background thereto; however, they are not directly decisive of the case, which is instead determined, as argued at length, on structural grounds. Instead, in identity conflicts axiological considerations are first-order reasons for solving the conflict between the two levels.

### **B. Identity conflicts: a note of clarification.**

So far in this chapter, the notion of constitutional identity and that of identitarian conflicts has never been used, instead employing that of axiological ones. This is due to a certain ‘path-dependency’ from the scholarly works developing the taxonomy of hierarchies and thus of antinomies in the domestic legal order referred above, which employ the latter rather than the former notion. One might, however, inquire as to why one should not continue to employ the notion of axiological conflicts and instead adopt an alternative one, that of identity.

Beyond the difficulty of resisting the lure of a concept which, though harshly criticised for being prone to abuse in illiberal contexts, is still *à la mode*,<sup>49</sup> there are some good reasons for employing, in this context, this terminology instead of alternative ones. These reasons, which will be further developed in subparagraph v), concern the particular aptness of the notion of constitutional identity to convey the distinctively domestic, or ‘local,’ nature of the constitutional principles upon which the decision not to apply international law relies.<sup>50</sup>

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<sup>49</sup> JHH Weiler, ‘Federalism Without Constitutionalism: Europe’s Sonderweg’ in Kalypso Nicolaidis and Robert Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press 2001) 63.

<sup>50</sup> Somewhat similarly, according to Lustig and Weiler, the notion of constitutional identity “describe[s] a judicial sensibility which is concerned, while ensuring respect for fundamental rights and other similar constitutional norms or the basic habits and practices of accountable and representative democratic governance, with other additional

However, along with its merits and potentialities, the notion of constitutional identity brings along two main difficulties that, unless they are dispelled, would make its adoption in the context of this research problematic, albeit for different reasons: its abuse by illiberal regimes and its intertwinement with the notion of constitutional eternity. Hence, the following paragraphs discuss these two issues.

*i. Constitutional identity in illiberal regimes: throwing out the bathwater but keeping the baby.*

The first difficulty deriving from the adoption of the notion of constitutional identity consists in its abusive borrowing by illiberal regimes.<sup>51</sup> These regimes adopt an essentialist and ontological reading of the notion, grounding it in the supposed – and actually invented<sup>52</sup> – ethnocultural homogeneity of the people or the nation, thus reducing constitutional identity to a mere formalisation of pre-constitutional identities.<sup>53</sup> This is

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‘identitarian’ aspects of the polity, for which typically liberal theory which informs the substantive norms of judicial review has been far less sensitive:” Doreen Lustig and Joseph HH Weiler, ‘Judicial Review in the Contemporary World—Retrospective and Prospective’ (2018) 16 *International Journal of Constitutional Law* 315, 340.

<sup>51</sup> Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press 2021) 36: “abusive constitutional borrowing involves the use of designs, concepts, and principles taken from core aspects of liberal democratic constitutionalism, but which are turned into attacks on the minimum core of electoral democracy.”

<sup>52</sup> See at least, dispelling the notion of the existence of atavist national and ethnical communities, brought together by a common past, Eric Hobsbawm and Terence Ranger (eds), *The Invention of Tradition* (Cambridge University Press 2000); Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (3rd edn, Verso 2006).

<sup>53</sup> See, e.g., Hungarian Constitutional Court, Decision 22/2016 of 5 December 2016, para. 67, 110: “the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law [...] Since the values that make up the self-identity have come into existence on the basis of historical constitutional development, they are legal facts that cannot be waived neither by way of an international treaty nor with the amendment of the Fundamental Law, because legal facts cannot be changed through legislation.” See Kriszta Kovács, ‘The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts’ (2017) 18 *German Law Journal* 1703; Julian Scholtes, *The Abuse of Constitutional Identity in the European Union* (Oxford University Press 2023) 83–168. On the functions of pre-constitutional identities in the formation of constitutional identity, see Rosenfeld, *The Identity of the Constitutional Subject* (n 6), discussed *infra* in subparagraph iii.

often accompanied by official memory policies aimed at the appropriation and re-invention of the past.<sup>54</sup>

Moreover, when in power, the proponents of such understanding of constitutional identity bring forward illiberal transformations of the State while maintaining the façade of a constitutional government:<sup>55</sup> among other means, such transformation is pursued first and foremost by fundamentally harming the independence of justices and tribunals, which are turned into enablers of the new majorities in power.<sup>56</sup>

The combination of these two factors has turned the notion of constitutional identity into a powerful weapon in the hands of captured courts, which employ it to challenge any external authority deemed to interfere with the exercise of power by ruling populist (when not altogether authoritarian) regimes.<sup>57</sup>

On these grounds, especially in the context of the debate on constitutional pluralism in the EU, some scholars have called for altogether abandoning the concept, deemed inherently dangerous and prone to manipulation.<sup>58</sup>

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<sup>54</sup> Gavriel D Rosenfeld, ‘The Rise of Illiberal Memory’ (2023) 16 *Memory Studies* 819; Kornelia Kończal and A Dirk Moses (eds), *Patriotic History and the (Re)Nationalization of Memory* (Routledge 2023).

<sup>55</sup> On the mimetic and parasitic approach to constitutionalism by populists, whereby ‘populist leaders endeavour to present themselves as consistent and compatible with the language of constitutionalism,’ while subverting ‘the axiological hierarchies that characterise constitutional democracies,’ see Giuseppe Martinico, *Filtering Populist Claims to Fight Populism: The Italian Case in a Comparative Perspective* (Cambridge University Press 2021) 10–28.

<sup>56</sup> Wojciech Sadurski, ‘Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler’ (2019) 11 *Hague Journal on the Rule of Law* 63; Mirosław Wyrzykowski and Michał Ziólkowski, ‘Illiberal Constitutionalism and the Judiciary’, *Routledge Handbook of Illiberalism* (Routledge 2021).

<sup>57</sup> Constitutional identity is thus weaponised towards the creation of “an alternative legal space [...] under which the ruling majority can enact unconstitutional laws, unlawfully appoint members of the Constitutional Tribunal, the National Council of the Judiciary, the Supreme Court, or discipline and prosecute at will those who articulate positions that do not meet its expectations:” Written comments of the Commissioner for Human Rights of the Republic of Poland in the case of Jan Grzęda against Poland (Application no. 43572/18), Warsaw, 20-03-2021, available at the link: [https://bip.brpo.gov.pl/sites/default/files/Amicus\\_RPO\\_Grzeda\\_20.03.2021\\_\(jez.angielski\).pdf](https://bip.brpo.gov.pl/sites/default/files/Amicus_RPO_Grzeda_20.03.2021_(jez.angielski).pdf).

<sup>58</sup> Federico Fabbrini and András Sajó, ‘The Dangers of Constitutional Identity’ (2019) 25 *European Law Journal* 1; R Daniel Kelemen and Laurent Pech, ‘The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland’ (2019) 21 *Cambridge Yearbook of European Legal Studies* 59.

However, just as one does not throw out the baby together with the bathwater, some authors have quite agreeably insisted on the adjective “constitutional” in “constitutional identity,” thus limiting the reach of this notion only to genuine constitutional regimes:<sup>59</sup>

“we might understand constitutional identity as referring only to the identity of those constitutions that are perceived as higher regulatory norms and that establish legitimate authority tied to the protection of human rights, democracy, and the rule of law.”<sup>60</sup>

While it might be argued that the notion at issue retains analytical value also in authoritarian or quasi-authoritarian context,<sup>61</sup> it is generally agreed that the notion of constitutional identity takes on fundamentally different features and functions depending on whether it is employed in liberal constitutional or illiberal and authoritarian contexts. In the context of healthy constitutional regimes, constitutional identity strives for unity around constitutional principles and values through inclusion and the elaboration of the disharmony inherent in the constitutional subject. In illiberal contexts, conversely, any disharmony and inhomogeneity of the people is negated, and the constitutional identity is thereupon superimposed in an exclusionary manner, by arbitrarily picking certain defining features belonging to only a part of the community and considering them as defining of the identity of the entire community; in turn, those who do not share said

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<sup>59</sup> Michel Rosenfeld, ‘Deconstructing Constitutional Identity in Light of the Turn to Populism’ in Ran Hirschl and Yaniv Roznai (eds), *Deciphering the Genome of Constitutionalism: The Foundations and Future of Constitutional Identity* (Cambridge University Press 2024); Gábor Halmai and Julian Scholtes, ‘Illiberal Constitutionalism and the Abuse of Constitutional Identity’ in Ran Hirschl and Yaniv Roznai (eds), *Deciphering the Genome of Constitutionalism: The Foundations and Future of Constitutional Identity* (Cambridge University Press 2024). In the context of the EU, this approach has further relied on specific normative provisions – art. 2 and 4 TEU above all –, both insofar as they require the respect of common values such as fundamental rights and the rule of law, and insofar as they impose a duty of loyalty: Giuseppe Martinico and Oreste Pollicino, ‘Use and Abuse of a Promising Concept: What Has Happened to National Constitutional Identity?’ (2020) 39 *Yearbook of European Law* 228; Mattias Kumm, ‘Un-European Identity Claims: On the Relationship between Constituent Power, Constitutional Identity and Its Implications for Interpreting Article 4(2) TEU’ in Kriszta Kovács (ed), *The Jurisprudence of Particularism: National Identity Claims in Central Europe* (Hart Publishing 2023).

<sup>60</sup> Kriszta Kovács, ‘Introduction’ in Kriszta Kovács (ed), *The Jurisprudence of Particularism: National Identity Claims in Central Europe* (Hart Publishing 2023) 13.

<sup>61</sup> Gary Jeffrey Jacobsohn, ‘How to Think about the Reach of Constitutional Identity’ (2023) 1 *Comparative Constitutional Studies* 1.

features are expelled from the “People.”<sup>62</sup> In Rosenfeld’s words, “what is key is that both Jacobsohn’s dialogical approach and my dialectical one aim to allow for the greatest possible common unity and cohesion within the relevant constitutional unit. Populism, in contrast, is characterized by its commitment to subtract some long-established members of the constitutional unit within which it operates from its definition of “The People.””<sup>63</sup>

The considerations just made allow for the retention, in the context of this research, of the notion of constitutional identity, as they make it possible to distinguish between the notion as it was originally developed in liberal constitutional regimes, which maintains its autonomy and analytical value, and its abuse in illiberal and authoritarian ones. Ultimately, the scope of this research is limited to functioning constitutional regimes, to the exclusion therefrom of authoritarian regimes: it is thus possible to employ the notion of constitutional identity as developed and adopted in constitutional context, bearing in mind the fundamental differences that distinguish it from its abusive counterpart in authoritarian regimes, so not to confuse the two.

*ii. Constitutional identity and constitutional eternity: the need to distinguish the two notions.*

Another difficulty inherent in the adoption of the terminology of constitutional identity is its intertwinement with the notion of constitutional eternity. Indeed, especially within the European Union context, the notion of constitutional identity has been increasingly linked to that of eternity, thus being understood as the core, unamendable, principles of the

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<sup>62</sup> *ibid* 15: ‘failure to acknowledge the disharmonic reality that is endemic to the constitutional condition is at the core of the concept’s contemporary abuse. Or put differently, constitutional identity becomes concerning, and in some cases dangerous, when it is inspired by a felt need to eliminate contradiction or incongruity. Erasing dissonance from its core meaning enables guardians of constitutional identity to achieve their desired outcome while avoiding the obstacles that would otherwise make the attainment more elusive.’

<sup>63</sup> Rosenfeld, ‘Deconstructing Constitutional Identity in Light of the Turn to Populism’ (n 59) 287.

constitution.<sup>64</sup> This is particularly due to the elaboration of the doctrine of counterlimits to EU law by (originally) the Italian and the German Constitutional Courts.<sup>65</sup>

In the context of the EU, national (constitutional) courts have generally accepted the principle of the primacy elaborated by the European Court of Justice of EU law over national law, even of constitutional rank.<sup>66</sup> At the same time, however, said acceptance has never been unconditional, and national courts consistently maintained that EU law cannot take precedence over those constitutional norms that are not open to constitutional amendment and thus have a supra-constitutional status.<sup>67</sup>

Thus, in the EU context, framing of the notion of constitutional identity in formal term, by equating it with the core of unamendable constitutional principles, serves also the practical purpose of grounding and justifying resistance to the primacy of EU law.

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<sup>64</sup> As to the theoretical development of such association, see ‘Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law’ (2016) 14 *International Journal of Constitutional Law* 411; Monika Polzin, ‘Identity and Eternity: The German Concept of Constitutional Identity’ in Kriszta Kovács (ed), *The Jurisprudence of Particularism: National Identity Claims in Central Europe* (Hart Publishing 2023).

<sup>65</sup>As to Italy, as of recent, see, Faraguna (n 3). Simona Polimeni, *Controlimiti e identità costituzionale nazionale: contributo per una ricostruzione del dialogo tra le Corti* (Editoriale scientifica 2018); Daniele Pellegrini, *I controlimiti al primato del diritto dell’Unione europea nel dialogo tra le Corti* (Firenze University Press 2021); As to Germany, see Peter M Huber, *Recht der Europäischen Integration* (3rd edn, Nomos 2017); Monika Polzin, *Verfassungsidentität. Ein normatives Konzept des Grundgesetzes?* (Mohr Siebeck 2018).

Such elaboration rapidly spread through Europe and is now adopted by most EU Member States’ apex courts – see Christoph Grabenwarter, ‘National Constitutional Law Relating to the European Union’ in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart 2011); Monica Claes and Jan-Herman Reestman, ‘The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case’ (2015) 16 *German Law Journal* 917; Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2020); Luke Dimitrios Spieker, ‘Framing and Managing Constitutional Identity Conflicts: How to Stabilize the *Modus Vivendi* between the Court of Justice and National Constitutional Courts’ (2020) 57 *Common Market Law Review*. As to the mutual comparative references embedded in the reasoning of national Courts in the EU member States in this regard, see M Wendel, ‘Comparative Reasoning and the Making of a Common Constitutional Law: EU-Related Decisions of National Constitutional Courts in a Transnational Perspective’ (2013) 11 *International Journal of Constitutional Law* 981.

<sup>66</sup> Judgment of the Court of 15 July 1964, C-6/64, *Costa v E.N.E.L.*, ECR 1964 585; Judgment of the Court of 17 December 1970, C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECR 1970 1125.

<sup>67</sup> Grabenwarter (n 65).

Now, as far as the relation between national and international law is concerned, employing a formal notion of identity, whereby it is equated with eternity, would be quite problematic, and for a number of reasons.

First, it would be incongruous with the comparative framework of the place of international law within the domestic hierarchy of sources of law, which is almost always – with some differences between customary and treaty-based international law – at a sub-constitutional or even sub-legislative level.<sup>68</sup> As a consequence, there is little reason to invoke supra-constitutional sources, as provisions of constitutional and – at least very often – legislative rank already enjoy a higher rank than international law. The reason for the elaboration of the counterlimits doctrine within the EU context is no longer compelling.

It is of no surprise, then, that employing a formal notion of identity would result in severe under-selectiveness. For example, one could recall the decisions discussed in the first chapter in the matter of State immunity issued by the Italian Constitutional Court, the Seoul Central District Court, and the Brazilian Supreme Federal Tribunal. Among these, though they are almost identical in the reasoning developed and in the fact that the conflict between national and international law is framed in axiological terms, only the Italian decision would fall under the category of ‘identity,’ were a formal reading thereof adopted. Indeed, the Italian decision is the only one employing the notion of supreme (*i.e.*, enjoying a supra-constitutional status) principles of the Constitution in order to resist the incorporation of the customary international law on State immunity, the other two decision “merely” invoking the supremacy of the Constitution.<sup>69</sup>

*iii. Constitutional identity without constitutional eternity: doctrinal perspectives.*

However, employing a formal notion of constitutional identity, one equating it with that of eternity, in order to deal with inter-system conflicts, apart from appearing quite specific to the EU context, is not actually a theoretical necessity. Indeed, while it is true

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<sup>68</sup> Verdier and Versteeg (n 15).

<sup>69</sup> The case of the Italian decisions in the matter of State immunity and Nazi crimes is somewhat peculiar in this regard as customary international law (thereby including the law on State immunity providing for the immunity of Germany even for violations of *jus cogens*) is incorporated, in the Italian legal order, at constitutional level (Article 10 Italian Constitution). The recourse to supra-constitutional principles in the Italian Constitutional Court decision thus also served the purpose of justifying a derogation from a legal source enjoying constitutional rank.

that non-amendability clauses, where present, (concur to) express the identity of the Constitution,<sup>70</sup> the reverse, i.e. that constitutional identity is the expression of unamendability clauses only, does not hold true.

As a matter of facts, relevant doctrinal accounts of constitutional identity such as those provided by Michel Rosenfeld and Gary Jeffrey Jacobsohn understand said notion without making recourse to doctrine of unamendability.<sup>71</sup> Rather than framing identity as a constitutional pre-commitment to eternity, those accounts describe identity as the product of dynamics of change over time in the self-reflexive understanding of a constitution by its legal and political community.

For Rosenfeld, constitutional identity is the product of dynamics of interaction between sameness (i.e., the absence of change over time) and selfhood (i.e., the possibility to recognise oneself over time, despite the changes that have occurred). In his words:

“self-identity can either connote sameness or selfhood. I can recognize myself either because I look the same as I did yesterday or because in spite of all the changes which I have experienced since childhood – I no longer look the same, think the same, feel the same, etc. – I have endured as a single self that is distinct from all other selves. Or, in other words, I have remained myself as against all others. Analogously, constitutional identity can be constructed on the basis of sameness or of selfhood, or more precisely, based on dynamic interaction between projections of sameness and images of selfhood.”<sup>72</sup>

For the Author,

“inasmuch as constitutional identity transcends the mere fact of constitutionalism or content of a particular constitution, it emerges in the context of a dynamic process that must constantly weave together self-identity's two facets, sameness and selfhood.”<sup>73</sup>

Jacobsohn endorses a somewhat similar conception of constitutional identity:

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<sup>70</sup>Roznai (n 2); Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (Oxford University Press 2021) ch 3 especially.

<sup>71</sup> Rosenfeld, *The Identity of the Constitutional Subject* (n 6); Gary J Jacobsohn, *Constitutional Identity* (Harvard University Press 2010).

<sup>72</sup> Rosenfeld, *The Identity of the Constitutional Subject* (n 6) 31.

<sup>73</sup> Michel Rosenfeld, ‘Constitutional Identity’ in Michel Rosenfeld and András Sajó (eds), *The Oxford handbook of comparative constitutional law* (Oxford University Press 2012) 758.

“a constitution acquires an identity through experience, [and] this identity exists neither as a discrete object of invention nor as a heavily encrusted essence embedded in a society’s culture, requiring only to be discovered. Rather, identity emerges dialogically and represents a mix of political aspirations and commitments that are expressive of a nation’s past, as well as the determination of those within the society who seek in some ways to transcend that past. [...]

To this end, I argue for a more fluid concept of identity, in which constitutional assertions of self-definition are part of an ongoing process entailing adaptation and adjustment as circumstances dictate. It is not fluidity without boundaries, however, and textual commitments such as are embodied in preambles often set the topography upon which the mapping of constitutional identity occurs.”<sup>74</sup>

“It is the disharmony internal to a constitutional text or between the text and the social context in which it is situated that is the engine behind a nation’s evolving constitutional identity.”<sup>75</sup>

Under both accounts, the constitutional identity is thus the product of a complex dialectical (Rosenfeld) or dialogical (Jacobsohn) dynamic of mediation between pre-constitutional identities of a community (e.g., its national or religious identity) and constitutional aspirations, whereby pre-constitutional identities are partly negated and partly recovered and synthesised in the constitutional identity. However, such mediation is not carried out once and for all at the time of the enactment of the constitution, being thereafter consecrated in eternity clauses, making it legally unamendable; rather, it is the result of continuous processes taking place within a legal and political community, whose outcomes are not immutable over time.

*iv. Constitutional identity without constitutional eternity: the Irish case.*

It is useful to move momentarily away from theoretical accounts of constitutional identity and to consider, instead, the concrete practice in the field before returning, in the next paragraph, to the matter, providing for a more exhaustive conceptualisation of the notion of constitutional identity in the context of this research. Accordingly, if one looks at concrete constitutional experiences, they will easily find relevant examples of legal orders

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<sup>74</sup> Jacobsohn (n 71) 7, 13.

<sup>75</sup> Jacobsohn (n 61) 15.

where the elaboration of constitutional identity is decoupled from doctrines of constitutional unamendability.

Particularly, it is interesting to discuss the conceptualisation of constitutional identity in those states that adopt notions thereof that do not rely on unamendability doctrines and that are, at the same time, EU member states, given that, as already mentioned, in that context, the elaboration of counter-limits to the principle of primacy often relied on the notion of constitutional unamendability (or eternity). In this perspective, one could point, for example, to France, where no doctrine of constitutional unamendability is accepted and where, yet, the identity of the constitution is clearly discernible, being composed by those principles – e.g., that of *laïcité* – that lie “behind,” and not above the constitution, and can be enforced in court as a limit to the primacy of EU law.<sup>76</sup>

Another interesting case is that of Ireland, which is discussed in the following. In Ireland, no doctrine of constitutional unamendability exist and, provided that the relevant procedures dictated by the Irish Constitution are respected, each and every constitutional provision can be amended.<sup>77</sup> This has been consistently upheld by the Supreme Court over the entire constitutional history of Ireland, its first pronouncement in this regard predating the 1937 Constitution and its latest dating 2022.<sup>78</sup> Despite the absence of any doctrine of unamendability, the Irish Constitution clearly features a distinct identity, one

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<sup>76</sup> Michel Troper, ‘Behind the Constitution? The Principle of Constitutional Identity in France’ in András Sajó and Renáta Uitz (eds), *Constitutional Topography: Values and Constitutions* (Eleven International Publishing 2010) 198: “the principles [making up the French constitutional identity] cannot be called super-constitutional because the constituent power can always amend them [...], and because French law does not organize a formal hierarchy among constitutional rules, but only axiological hierarchies.” See also François-Xavier Millet, ‘Constitutional Identity in France: Vices and – Above All – Virtues’ in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019).

<sup>77</sup> A strong textual element supporting this conclusion is Art. 46 of the Irish Constitution, whereby it is stated that “any provision of this Constitution may be amended, whether by way of variation, addition, or repeal, in the manner provided by this Article.” Jacobsohn (n 71) 41–49; Aileen Kavanagh, ‘Unconstitutional Constitutional Amendments from Irish Free State to Irish Republic’ in Eoin Carolan (ed), *The Constitution of Ireland: perspectives and prospects* (Bloomsbury Professional 2012); Oran Doyle, ‘Constitutional Identity and Unamendability’ in Ran Hirschl and Yaniv Roznai (eds), *Deciphering the Genome of Constitutionalism: The Foundations and Future of Constitutional Identity* (Cambridge University Press 2024).

<sup>78</sup> *State (Ryan) v Lennon* [1935] IR 170, at 242; *Finn v. Attorney General* [1983] IR 154; *Roche v. Ireland & Ors* [1983] IEHC 90; *Re Article 26 and the Information (Services outside the State for the Termination of Pregnancy) Bill 1994* [1995] 1 IR 1; *Riordan v An Taoiseach (No 2)* [1999] 4 IR 343; *Hanafin v The Minister for the Environment* [1996] 2 IR 321.

that has undergone significant changes over time and that has been at the centre of vigorous interaction with both EU law, the ECHR, and other international institutions. The field of reproductive rights and, more specifically, the ban on abortion, only recently overcome, is perhaps the most salient instance of this.<sup>79</sup>

The preamble to the 1937 Irish Constitution clearly attributes a central role in the Irish Constitution to Christianity (more precisely, to Catholicism) and to natural law, understood as the product of God.<sup>80</sup> Although the importance of the reference to God and to natural law in the interpretation of Irish Constitution has waned over time, it is nonetheless a fundamental element in shaping the identity of the Irish Constitution and in reading some of its provisions, and, at least for the present purposes, especially those pertaining to the protection of the family and the ban of abortion (introduced in 1983 by way of the 8<sup>th</sup> Amendment and repealed in 2018 by the 36<sup>th</sup> Amendment).<sup>81</sup>

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<sup>79</sup> For a detailed account of the Irish legal and political vicissitudes in the matter of abortion rights, see Gráinne de Búrca, *Reframing Human Rights in a Turbulent Era* (Oxford University Press 2021) 157–179.

<sup>80</sup> The Preamble reads:

“In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,

We, the people of Éire,

Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,

And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,

Do hereby adopt, enact, and give to ourselves this Constitution”

On the preamble, on its Christian and Catholic underpinnings, and on its relevance in shaping Irish constitutional identity, see ‘How Do Constitutions Constitute Constitutional Identity?’ (2010) 8 *International Journal of Constitutional Law* 671; Mark Tushnet, ‘National Identity as a Constitutional Issue: The Case of the Preamble to the Irish Constitution of 1937’ in Eoin Carolan (ed), *The Constitution of Ireland: perspectives and prospects* (Bloomsbury Professional 2012); Angelo Rinella, ‘The Irish Constitutional Preamble in a Comparative Perspective’ in Giuseppe Franco Ferrari and John O’Dowd (eds), *75 years of the Constitution of Ireland: an Irish Italian dialogue* (Clarus Press 2014).

<sup>81</sup> On the role of Christianity and Catholicism in the Irish Constitution, and on the shift in their relevance, especially in light of the case-law of the Supreme Court in the period 1973-1999,

In this context, the Irish Supreme Court, in 1973 rendered its decision in *McGee v. Attorney General*,<sup>82</sup> allowing for the use of marital contraception, closely echoing that of the US Supreme Court in *Griswold v. Connecticut*.<sup>83</sup> As *McGee* was decided just a few months after the US Supreme Court's decision in *Roe v. Wade*,<sup>84</sup> which had provided for a federal right to voluntarily terminate one's pregnancy, some feared that the Irish Supreme Court might soon emulate once again its US counterpart, providing for a similar right also in Ireland, where abortion was still a crime and generally considered taboo.<sup>85</sup> Thus, a political movement, advocating for an amendment to the Constitution banning abortion (and pre-empting courts for allowing it), developed. This movement was successful, and, in 1983, the 8<sup>th</sup> Amendment to the Constitution was enacted.<sup>86</sup>

In subsequent years, anti-abortionist associations turned to the issue of the availability of pregnancy counselling and to that of the diffusion of information on the possibility to terminate one's pregnancy abroad, most often in the UK. Eventually, they managed to bring the issue before Irish Courts, which held that art. 40.3 prohibited the diffusion of information about abortion abroad.<sup>87</sup> Among these cases, two reached international institutions. The European Court of Human Rights held that the prohibition to diffuse information pertaining to termination of pregnancy violated the right to freedom

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see Oran Doyle, 'Legal Positivism, Natural Law and the Constitution' (2009) 31 *Dublin University Law Journal* 206; Aileen Kavanagh, 'The Irish Constitution at 75 Years: Natural Law, Christian Values and the Ideal of Justice' (2012) 48 *Irish Jurist* 71; Declan O'Keeffe, 'God, the Natural Law and the 1937 Constitution' in Eoin Carolan (ed), *The Constitution of Ireland: perspectives and prospects* (Bloomsbury Professional 2012); Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (Hart Publishing 2018) 157–171.

<sup>82</sup> [1973] IR 284.

<sup>83</sup> 381 US 479 (1965).

<sup>84</sup> 410 US 113 (1973).

<sup>85</sup> de Búrca (n 79) 157–8; 162–3.

<sup>86</sup> As a result, Art. 40.3.3 read:

“The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.”

<sup>87</sup> *Attorney General (Society for the Protection of the Unborn Child SPUC) v. Open Door Counselling and Dublin Well Woman Centre* [1988] IR 593. See also *SPUC v. Coogan* [1989] IR 734, holding that SPUC had standing to seek an injunction against University College Dublin's Students' Union, which had provided information on abortion services to its students; *SPUC v. Grogan* [1989] IR 753, where SPUC sought (successfully) an injunction against three student unions barring them from publishing the contact details of abortion providers in the United Kingdom in their student handbooks.

of expression, protected by Article 10 of the ECHR.<sup>88</sup> The European Court of Justice, in its *Grogan* decision, found that the student's union's activity of diffusing information did not amount to a service for the purposes of EU law, which, thus, did not pre-empt Irish authorities to ban it.<sup>89</sup> However, the Court appeared to suggest that, had the clinics in the UK directly diffused those information, that would have amounted to a cross-boundary service and the prohibition thereof by Irish authorities would have resulted in an illegitimate restriction of a fundamental freedom provided for by the Treaties. As the saying goes, 'better safe than sorry:' in the aftermath of the *Grogan* decision, the Irish Government negotiated a Protocol to the Maastricht Treaty, providing that EU law would not "affect the application in Ireland of Article 40.3.3. of the Constitution of Ireland."<sup>90</sup>

Subsequently, in 1992, in the wake of the highly controversial case of a 14-years-old girl who, having been raped by her neighbour, was prevented from aborting in Ireland and from travelling abroad for the same purpose,<sup>91</sup> and in order to address the legal uncertainty resulting from the cases decided after the enactment of the 8<sup>th</sup> Amendment, another referendum was held. The Irish people had to vote on three items: on the express recognition of the freedom to travel abroad to terminate one's pregnancy, on the right to access to the pertinent information (and to that of diffusing them), and on whether the mother's risk of suicide should be expressly ruled out as a circumstance making abortion legal. The first two items were approved, resulting in the 13<sup>th</sup> and 14<sup>th</sup> Amendments to the Constitution, amending art. 40.3.<sup>92</sup> After the referendum confirming the 14<sup>th</sup> Amendment, a Bill was passed by Parliament to give it effect, aimed at regulating the

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<sup>88</sup> ECtHR, Judgment 29 October 1992, Joined App. No. 14234/88 and 14235/88, *Open Door and Dublin Well Woman v. Ireland*.

<sup>89</sup> CJEU, Judgment of the Court of 4 October 1991, C-159/90, *Society for the Protection of Unborn Children Ireland v Grogan and Others*.

<sup>90</sup> Protocol (No. 17) annexed to the Treaty on European Union and to the Treaties establishing the European Communities, OJ C 191, 29 July 1992, p. 1, 94 ('Grogan Protocol'). In the literature, both Faraguna and Curtin, who worried about the fragmenting potential the enactment of the Protocol entailed, highlighted the function of the Protocol in accommodating Irish core constitutional principles within the framework of EU law: see Deirdre M Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 *Common Market Law Review* 17, 48–49; Pietro Faraguna, 'Taking Constitutional Identities Away from the Courts' (2015) 41 *Brooklyn Journal of International Law* 491, 554.

<sup>91</sup> *A.G. v. X* [1992] 1 IR 1.

<sup>92</sup> Respectively, the Amendments introduced new provisions in art. 40.3 reading: "this subsection shall not limit freedom to travel between the State and another state" and that "this subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state."

diffusion of information pertaining to the termination of pregnancies. Before signing the Bill, the President of the Republic referred it to the Supreme Court pursuant to Art. 26 of the Constitution, for an *ex ante* review thereof.<sup>93</sup> The argument was put before the Court that the Bill was unconstitutional in that the 14<sup>th</sup> Amendment itself was unconstitutional, as it was incompatible with the natural law and Art. 40.3, understood as a codification of the natural law. The Court rejected the argument, refusing to review the substantial validity of a constitutional amendment enacted through the required procedures, and upheld the contested legislation.<sup>94</sup>

In the following years, up to 2018, the Irish law remained substantially unchanged but for the enactment, in 2013, of the Protection of Life During Pregnancy Bill, which provided very narrow exceptions to the ban to abortion.<sup>95</sup> These years were marked by high profile cases brought before international institutions (among these those of *A., B., and C., Mellet*, and *Whelan*),<sup>96</sup> with whom Ireland complied with some difficulty and significant delay, in turn receiving widespread international critique by States and international institutions.<sup>97</sup>

Eventually, in 2016, the Citizen Assembly was established as an experiment in deliberative democracy.<sup>98</sup> Among the various topic, it also dealt with that of abortion, and in its final recommendations it included that of reforming Art. 40.3. A parliamentary committee was then convened and ultimately concluded for the need of replacing Art. 40.3.3 with a provision enabling Parliament to pass legislation regulating abortion. A referendum was then held in 2018 whose result confirmed the constitutional reform.<sup>99</sup>

Drawing some conclusion from this overview of Irish constitutional history, it is apparent that the general issue of the status of the relationship between law and religion,

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<sup>93</sup> Regulation of Information (Services Outside the State For Termination of Pregnancies) Act, 1995, <https://www.irishstatutebook.ie/eli/1995/act/5/enacted/en/print.html>.

<sup>94</sup> *Re Article 26 and the Information (Services outside the State for the Termination of Pregnancy) Bill 1994* [1995] 1 IR 1.

<sup>95</sup> Protection of Life During Pregnancy Bill, <https://www.irishstatutebook.ie/eli/2013/act/35/enacted/en/print.html>.

<sup>96</sup> Respectively ECtHR (Grand Chamber), Judgement of 16 December 2010, App. No. 25579/05, *A. B. and C. v. Ireland*; Human Rights Committee, Communication of 31 Mar 2016, No. 2324/2013, *Mellet v. Ireland*; Communication of 17 March 2017, No. 2425/2014, *Whelan v. Ireland*.

<sup>97</sup> de Búrca (n 79) 169–176.

<sup>98</sup> David M Farrell, Jane Suiter and Clodagh Harris, “‘Systematizing’ Constitutional Deliberation: The 2016–18 Citizens’ Assembly in Ireland” (2019) 34 *Irish Political Studies* 113.

<sup>99</sup> Luke Field, ‘The Abortion Referendum of 2018 and a Timeline of Abortion Politics in Ireland to Date’ (2018) 33 *Irish Political Studies* 608.

and, more precisely, between Catholicism and the Constitution, as well as the more specific issue of the regulation of abortion constitutes a cornerstone of the Irish constitutional identity, one that has been at the centre of a prolonged and vigorous interaction with international law and institutions and that has undergone radical change over time. This change has been brought about through a long and difficult constitutional process, to which national institutions, international bodies, political organisation, private associations, as well as the People itself (through numerous referendums) all partook. The fact that in Ireland, where no constitutional unamendability doctrine exists, a distinct constitutional identity is clearly discernible confirms the hypothesis that the notions of constitutional identity and constitutional eternity, although related, are reciprocally autonomous.

v. *Constitutional identity and conflicts between national and international law.*

As a result of the consideration just made, the notion of constitutional identity, as employed in this research, is to be found neither in pre-constitutional, historically fixed, and exclusionary identities, such as the national, or religious identity, as abusively claimed by illiberal regimes, nor by deriving it from eternity clauses embedded in the constitution, something that would render it a useless, if not problematic, analytical tool in the context of the present research.

Instead, an understanding of the notion of constitutional identity that includes material elements is here adopted.<sup>100</sup> Accordingly, rather than formal considerations pertaining to the (un-)amendability of constitutional provisions, when aiming to ascertain the identity of the constitution, one will need to consider the complex interactions between the constitutional text, other normative acts, even of sub-constitutional rank, and

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<sup>100</sup> On material approaches to constitutionalism, see Costantino Mortati, *La costituzione in senso materiale* (Giuffrè 1940). For a recent revisitation of the notion, see Marco Goldoni and Michael A Wilkinson (eds), *The Cambridge Handbook on the Material Constitution* (Cambridge University Press 2023); for an overview of Mortati's thought, see L Rubinelli, 'Costantino Mortati and the Idea of Material Constitution' (2019) 40 *History of Political Thought* 515; Lucia Rubinelli, 'The Constitution in the Material Sense According to Costantino Mortati' in Marco Goldoni and Michael A Wilkinson (eds), *The Cambridge Handbook on the Material Constitution* (Cambridge University Press 2023).

the values and finalities of the hegemonic political, social, and cultural forces.<sup>101</sup> It is only by analysing this interaction that one can make sense of the constitutional identity of one legal order and of the changes that it endures overtime.<sup>102</sup>

Thus, if, as Jacobsohn puts it, “a constitution acquires an identity through experience,”<sup>103</sup> this inevitably leads to the identity of a constitution having a remarkably context-specific content. Indeed, as the word suggests, the identity of a constitution both defines the core principles of a given legal order and distinguishes that specific legal order from other ones: the elaboration of a specific constitutional identity is also a function of the ongoing tension and even contradiction between “what is particular to the constitutional culture [and] what are widely viewed as common attributes of a universal culture of constitutionalism.”<sup>104</sup>

Thus, constitutional identity is inevitably local and particular, rather than universal and general. The underlying conception is that the law, in certain sensitive areas, is the product of a complex elaboration occurred within the public sphere, which has certain political, socio-historical, and cultural preconditions, which, at least for the time being, are not present in the international arena. As the FCC held in its judgement on the ratification of Lisbon Treaty, albeit in the context of EU integration,

“European unification on the basis of a treaty union of sovereign states may, however, not be achieved in such a way that not sufficient space is left to the Member States for the political formation of the economic, cultural and social living conditions. This applies in particular to areas which shape the citizens’ living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as to political decisions that rely especially on cultural, historical and linguistic perceptions and which

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<sup>101</sup> Augusto Barbera, ‘Ordinamento costituzionale e carte costituzionali’ [2010] Quaderni costituzionali 311, 311, 330, endorsing an intermediate thesis, whereby the core of the legal order (what he terms ‘*ordinamento costituzionale*,’ or constitutional order) is not determined neither solely by the legal text of the constitution (as in normative accounts), nor solely by the values of the political forces supporting and embracing the constitution (as in material ones); rather, it is the product of their interaction.

<sup>102</sup> On this topic, see Graziella Romeo, ‘A Material Understanding of Constitutional Changes: Revisiting “Constitutional Maintenance” Doctrines’ in Marco Goldoni and Michael A Wilkinson (eds), *The Cambridge Handbook on the Material Constitution* (Cambridge University Press 2023) 272, 273; see also Rubinelli, ‘The Constitution in the Material Sense According to Costantino Mortati’ (n 100) 95.

<sup>103</sup> Jacobsohn (n 71) 7.

<sup>104</sup> *ibid* 22, see also, for further discussion, *ibid.*, Chapter 4 ‘The Permeability of Constitutional Borders’.

develop in public discourse in the party political and parliamentary sphere of public politics.”<sup>105</sup>

The local and particular, rather than universal and general content of constitutional identity distinguishes the approach derived from employing the notion of constitutional identity from other approaches that rely on universal constitutional principles in order to solve conflicts between national and international law according to conflicts rules giving priority to that legal order – the national or the international – that best satisfies said principles.<sup>106</sup>

For similar reasons, also the notion of principled resistance (or non-compliance, or non-execution), indicating conflicts between international law and domestic

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<sup>105</sup>FCC, Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08, BVerfGE 123, 267, *Libson Treaty*, para. 249. Admittedly, this approach is a veritably state-centric one, whereby the nation-state is deemed to be the only possible site of deep political deliberation and the only forum for meaningful democratic participation and will formation given that only at state level the structural conditions for the existence of a genuine public sphere are deemed to exist. This reconstruction has not gone unchallenged: see, e.g., David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Polity 1999); Jürgen Habermas, *The Postnational Constellation: Political Essays* (MIT Press 2001) 61, 76, holding that although ‘the idea that societies are capable of democratic self-control and self-realization has until now been credibly realized only in the context of the nation-state,’ still ‘a democratic order does not inherently need to be mentally rooted in “the nation” as a pre-political community of shared destiny’. However, on the one hand, the international society itself is – to this day – organised by considering the state as its fundamental organisational unit and main subject; on the other hand, it is undisputable, if somewhat unfortunate, that many public law categories, including that of constitutional identity, informing the concrete legal practice, rely on a certain methodological nationalism (i.e., on the explicit and implicit assumptions that the nation state is the container of social processes, and that the national provides the core order for the analysis of social, economic and political processes: Ulrich Beck, ‘The Cosmopolitan State: Redefining Power in the Global Age’ (2005) 18 *International Journal of Politics, Culture, and Society* 143, 146.).

<sup>106</sup> Mattias Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’ (2004) 15 *European Journal of International Law* 907, 917–927, arguing that the duty to obey international law is a function of its legitimacy, to be assessed in light of four principles: international legality, establishing a presumption in favour of the authority of international law; jurisdictional legitimacy or subsidiarity, requiring any infringements of the autonomy of the local level by means of pre-emptive norms enacted on the higher level to be justified by good reasons; procedural legitimacy, focusing on the procedural quality of the jurisgenerative process in light of its transparency, participatory nature, and accountability; outcome legitimacy, barring, e.g., egregiously unjust or manifestly inefficient international norms from being applied. See also, Anne Peters, ‘Supremacy Lost: International Law Meets Domestic Constitutional Law’ (2009) 3 *ICL Journal* 170, 195, ff. albeit cautioning that “Admittedly, this new approach does not offer strict guidance, because it is debatable which norms are ‘important’ in terms of substance, and because it does not resolve clashes between a ‘domestic’ human right on the one side and an ‘international’ human right on the other” (p. 197).

constitutional law, whereby constitutional principles prevent the compliance with international law, is different from that of identity.<sup>107</sup> Indeed, first, ‘principled’ might refer to a whole range of constitutional issues, both concerning the procedures for the incorporation of international, substantial, and axiological issues. As such, employing it in the context of this research would result in overinclusion, as it could end up encapsulating also instances of structural non-compliance, proving to be a poor analytical tool.<sup>108</sup> Moreover, it fails to capture the distinctive local nature of the constitutional principles and values upon which non-compliance is justified in cases of identity conflicts.

## **5. Provisional conclusions**

This chapter aimed at providing a more in-depth account of the notions of structural and identitarian conflicts only briefly introduced in the previous chapter.

By making recourse to a taxonomy of hierarchies between norms developed by legal theorists with a view to addressing normative hierarchies within the domestic legal system, and by adapting it to inter-systemic relations, a taxonomy of relations between national and international law was presented, distinguishing formal, material, and axiological conflicts between national and international law.

Subsequently, formal and material conflicts were unified under the common category of structural conflicts, while axiological conflicts were subsumed under that of identitarian conflicts.

Particularly, the notion of constitutional identity was discussed at length: specifically, its notion and practice in illiberal regimes was distinguished from that of liberal constitutional ones, thus allowing for its retention in the present research. Furthermore, its aptness at addressing conflicts between national and international law

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<sup>107</sup> Andreas Føllesdal, ‘Accountability and Authority’, *Conference on the long-term future of the European Court of Human Rights* (Council of Europe - PluriCourts 2014); Fiona de Londras and Kanstantsin Dzehtsiarou, ‘Mission Impossible? Addressing Non-Execution through Infringement Proceedings in the European Court of Human Rights’ (2017) 66 *International & Comparative Law Quarterly* 467; Marten Breuer (ed), *Principled Resistance to ECtHR Judgments - A New Paradigm?* (Springer Berlin Heidelberg 2019) 18.

<sup>108</sup> It is, instead, a valuable analytical tool when, e.g., one is interested in distinguishing ‘principled’ resistance from ‘dilatatory’ resistance to ECtHR decisions, as in the case of Londras and Dzehtsiarou (n 107).

was discussed, in light of the frequent juxtaposition between constitutional identity and constitutional eternity.

What is to be remarked in conclusion is that this chapter, building upon the cases reviewed in the previous one, only attempted to make sense to the patterns that were then revealed by organising them around the notions of structural and identity conflicts. Thus, this chapter only aimed at clarifying the notions of structural and identitarian conflicts with a view to describe the legal argumentations used by courts in rebutting the domestic authority of international law, the first-order reasons immediately employed in judgements to exclude that the international law norms (generally) invoked by one of the parties to the dispute are determinative of the outcome of the case.

Conversely, this chapter did not address the second-order reasons of why courts might disregard international law.

In a way, one thing is to discuss and describe what arguments courts employ, another one is to address the question of why they pick one and not the other argument, or why, more generally, they refuse to comply (or, at times, even to consider) international law. This chapter was concerned only with the former issue, and not also with the latter ones.

The next chapters, conversely, presenting the core argument of this research, will attempt to explain the constitutional reasons behind this alternative, specifically correlating it with the alternative between modern and open statehood.

## Chapter III

### Thinking the relation between the law of the state and international law in terms of legal tradition

#### **1. A working concept of legal tradition**

Much is gained by framing the discussion pertaining to the relation between national and international law in terms of legal tradition. While this assumption is clearly in need of justification, it is perhaps useful to first address the question of what is meant by ‘legal tradition.’ This is particularly true considering the various accounts thereof that have been presented over time.<sup>1</sup>

Perhaps, the most renowned contribution to the study of legal tradition is the work of Patrick Glenn.<sup>2</sup> For him, a tradition is a set of normative information ‘captured’ in the past – i.e., preserved from obsolescence –, which is accessed and applied in the present; a legal tradition is thus a tradition made of legal information.

Traditions, for Glenn, are inherently normative, thereby distinguishing themselves from history, which, instead, is merely ‘past’:

“tradition is unquestionably normative. It tells us how we should act. Its normativity derives from the collective judgment, exercised over time, that the content of the tradition is of value and should be of contemporary application.”<sup>3</sup>

Indeed, capture and application imply acceptance and acceptance implies a value judgement; information no longer deemed right or useful is eventually expelled from the tradition, being no longer captured and thus forgotten (the phenomenon of ‘massaging’).

Therefore, a tradition is the result of a continuous process over time – truly a loop – of capture of information, its subsequent access and application in the present, its subsequent capture, access and application, potentially *ad infinitum*. Such a dialectical

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<sup>1</sup> For an overview, see Thomas Duve, ‘Legal Traditions: A Dialogue between Comparative Law and Comparative Legal History’ (2018) 6 *Comparative Legal History* 15.

<sup>2</sup> H Patrick Glenn, ‘A Concept of Legal Tradition’ (2008) 34 *Queen’s Law Journal* 427; H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (5th edn, Oxford University Press 2014) 1–32.

<sup>3</sup> H Patrick Glenn, ‘Legal Traditions and Legal Traditions’ (2007) 2 *Journal of Comparative Law* 69, 72.

process inevitably leads to change over time as previous information is discarded, some is acquired, and some, though preserved, is qualified and refined generation after generation.

Overall, the concept of tradition developed by Patrick Glenn appears quite tenable, and indeed his work is an invaluable contribution to the scholarship, being widely recognised as such. However, employing such a notion with the aim of constructing a general comparative law taxonomy is one thing;<sup>4</sup> applying it as an analytical tool, and with the purpose of carrying out a much narrower research, both in terms of the breath of the comparison, which here clearly does not extend to all *Legal Tradition of the World*,<sup>5</sup> and of scope of the research, limited to the domestic judicial non-compliance with and application of international law, is another. Thus, Glenn's elaboration requires, at least for the present purposes, some qualification: this is not to dispute the general validity of his conception, but an attempt to reach an understanding of legal tradition better fitting with and more useful to the purposes of the present research. The works of other scholars are particularly valuable in such an effort.

For John Merryman,

‘a legal tradition [...] is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective.’<sup>6</sup>

Conversely, for Harold Berman, to speak of a “tradition” of (Western) law is to call attention to two major historical facts:

‘first, that from the late eleventh and twelfth centuries on, except in certain periods of revolutionary change, legal institutions in the West developed continuously [...], with each generation consciously building on the work of previous generations; and second, that this

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<sup>4</sup> H Patrick Glenn, ‘Comparative Legal Families and Comparative Legal Traditions’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2019).

<sup>5</sup> Glenn, *Legal Traditions of the World* (n 2).

<sup>6</sup> John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3rd edn, Stanford University Press 2007) 2.

conscious process of continuous development is [...] conceived as a process not merely of change but of organic growth.

[It] is to postulate a concept of law, not as a body of rules, but as process, an enterprise, in which rules have meaning only in the context of institutions and procedure, values, and ways of thought. From this broader perspective the sources of law include not only the will of the lawmaker but also the reason and conscience of the community and its customs and usages.’<sup>7</sup>

Also by building upon these scholarly works, two qualifications can be made to Glenn’s conception of the legal tradition.

## **2. Two qualifications of Glenn’s conception of legal tradition.**

The first qualification to be made stresses the distinctiveness, among the many information passed down by tradition, of what Merryman calls ‘attitudes about nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, [...]’ and Berman addresses as ‘values and ways of thought.’ If one were to expound these notions, whose meaning is somewhat unclear, they would find that they consist in what is understood to be general doctrines of law. These are theoretical assumptions, affecting the interpretation of legal provisions and constituting the foundation for the constructing of further, and implicit, norms.

Legal doctrines are most often elaborated by scholars of law, though, more rarely, they can originate in the activity of courts and tribunals. They can be the product of a process of generalisation from other norms, but they often imply strong original normative assumptions.<sup>8</sup>

Legal doctrines, far from being merely exposition of the law, are law themselves insofar as they are determinative of the production of further norms and, ultimately, of the solution of concrete cases.<sup>9</sup>

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<sup>7</sup> Harold Joseph Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press 1983) 5, 11.

<sup>8</sup> Riccardo Guastini, *Saggi scettici sull’interpretazione* (Giappichelli 2017) 80.

<sup>9</sup> Rodolfo Sacco, ‘Dottrina (fonte del diritto)’, *Digesto delle discipline privatistiche* (UTET 1991) 214 215 ‘legal doctrine is everywhere a source of law, in the sense that it conditions the application of law everywhere’ (author’s translation); ‘Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)’ (1991) 39 *The American Journal of Comparative Law* 343, 345.

One example thereof is the *sui generis* nature of the European Union, derived by the European Court of Justice from the fact that member states had limited their own sovereignty, albeit in limited fields, thus justifying the principles of direct effect and primacy.<sup>10</sup> Another is dualism, originally elaborated by Heinrich Triepel and Dionisio Anzilotti,<sup>11</sup> whereby the national and international legal orders are to be conceived as separate, though connected, autonomous systems, which constitutes the foundation, for example, of the doctrine of counterlimits,<sup>12</sup> or of that of the non-applicability of unincorporated, though ratified, treaties.<sup>13</sup>

Now, for Glenn a legal tradition is made up of legal information, without further qualification, distinction, or organisation.<sup>14</sup> Legal traditions are thus made up of all kinds of norms – i.e., legal information carrying normative force: from those regulating the right of pursuing one’s bees in someone else’s field,<sup>15</sup> to normative concepts such as those of the state and its sovereignty.<sup>16</sup> For Glenn, these, and many more, information are all indifferently part of a tradition, they are all submerged and mixed in the ‘Bran Tub’ of the tradition.

However, at least in the Western legal tradition, legal doctrines are quite distinct, in that whereas most norms are of either legislative – of constitutional or ordinary rank – or judicial formant, doctrines of law usually are of scholarly formant, though they can

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<sup>10</sup> As for primacy, see ECJ, Judgment of 15 July 1964, C-6/64, *Costa v. ENEL*, ECR 1964, 1141; Judgment of 17 December 1970, C-11/70, *Internationale Handelsgesellschaft*, ECR 1970, 1125; as for direct effect, see ECJ, Judgment of 5 February 1963, C-26/62, *Van Gend en Loos v Administratie der Belastingen*, ECR 1963, 3; Judgment of 4 December 1974, C-41/74, *Van Duyn v Home Office*, ECR 1974, 1337.

<sup>11</sup> Heinrich Triepel, *Völkerrecht und Landesrecht* (CL Hirschfeld 1899); Dionisio Anzilotti, *Il Diritto Internazionale Nei Giudizi Interni* (Zanichelli 1905).

<sup>12</sup> See, e.g., Italian Constitutional Courts, Judgement of 22 October 2014, no. 238, para. 3; Judgement of 8 June 1984, no. 170, para. 4 and 7.

<sup>13</sup> See, e.g., the case law of the Supreme Court of the United States relating to the domestic effects of art. 36 VCCR already discussed in Chapter 1.

<sup>14</sup> This has attracted some critics: see, e.g., the contributions by William Twining (at p. 113) and John Bell (at p. 135) in Nicholas HD Foster, ‘A Fresh Start for Comparative Legal Studies? A Collective Review of Patrick Glenn’s Legal Traditions of the World, 2nd Edition’ (2006) 1 *Journal of Comparative Law* 1..

<sup>15</sup> See, e.g., art. 924 of the Italian civil code; § 962 BGB. The traditionality of this norm is quite remarkable and can be traced back – as in many other cases – to Roman law: Bruce W Frier, ‘Bees and Lawyers’ (1982) 78 *The Classical Journal* 105.

<sup>16</sup> H Patrick Glenn, *The Cosmopolitan State* (Oxford University Press 2013) ch 1; H Patrick Glenn, ‘The State as Legal Tradition Legal Tradition in a Diverse World: Keynote Contributions’ (2013) 2 *Cambridge Journal of International and Comparative Law* 704.

also be codified through the activity of Courts.<sup>17</sup> Admittedly, one could maintain that legal traditions consists of norms of all formants, especially if they consider legislation or judicial precedents as ‘institutionalised tradition;’<sup>18</sup> however, it would be more problematic to hold that the (Western) legal tradition operates in the same way irrespective of whether the normative information it passes down derive from legislative, judicial, or scholarly formant. This can be appreciated both regarding their change over time and their normativity.<sup>19</sup>

As to the aspect of change, as Martin Krygier puts it, “in law it is possible to decree or legislate important elements of novelty. But at the level of underlying assumptions and presuppositions, change within legal systems is a more complicated, supra-individual and usually supra-generational affair.”<sup>20</sup>

Indeed, at least since the Enlightenment and the French and American Revolution, and culminating with legal positivism, the Western legal tradition has come to embrace a voluntarist understanding of law as the will of the sovereign, shifting much of the balance between *ratio* and *voluntas* in favour of the latter,<sup>21</sup> though it is often observed that some late developments, both in terms of ‘over-constitutionalisation’ and of the excessive importance of Constitutional Courts in the legal order, go in the opposite

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<sup>17</sup> Rodolfo Sacco, ‘Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)’ (1991) 39 *The American Journal of Comparative Law* 1; ‘Legal Formants (Installment II of II)’ (n 9).

<sup>18</sup> Martin Krygier, ‘Law as Tradition’ (1986) 5 *Law and Philosophy* 237, 241, ff.; ‘The Traditionality of Statutes’ (1988) 1 *Ratio Juris* 20; ‘Too Much Information’ in Helge Dedek (ed), *A Cosmopolitan Jurisprudence* (Cambridge University Press 2021) 122. See instead Eugen Bucher, ‘Rechtsüberlieferung Und Heutiges Recht’ (2000) 75 *Zeitschrift für Europäisches Privatrecht* 394, 407: ‘The realms of extra-statutory legal content [aussergesetzlicher Rechtsinhalte] make up the remit of legal science: its task and responsibility is to search for answers to the legal questions arising there in the area of missing statutory rules.’

<sup>19</sup> Of course, this is not to say that legal doctrines cannot be incorporated in official sources of law – and, especially, in judicial decisions –, thus “borrowing” their formal status, together with their authoritative nature. See, e.g., *Miller (on the application of) v Secretary of state for Exiting the European Union* [2017] UKSC 5, para 43: ‘parliamentary sovereignty is a fundamental principle of the UK constitution [...]. It was famously summarised by Professor Dicey as meaning that Parliament has “the right to make or unmake any law whatsoever; and further, no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament.”’ See also *Costello v. Ireland* [2022] IESC 44 (O’ Donnell C.J.), para. 15: ‘This is particularly so in jurisdictions such as Ireland, which adhere to a dualist system.’

<sup>20</sup> Krygier, ‘Law as Tradition’ (n 18) 248.

<sup>21</sup> Kaarlo Tuori, *Ratio and Voluntas* (Routledge 2016); ‘Whose Voluntas, What Ratio? Law in the State Tradition’ (2018) 16 *International Journal of Constitutional Law* 1164: Tuori’s reading of Kelsen and Hart’s theories in voluntarist terms - or at least reconciling them with a voluntarist tradition in legal positivism - is of particular interest.

direction.<sup>22</sup> Accordingly, if law is to be understood as the will of the sovereign, most often mediated by Parliaments, it should be possible to the same sovereign to change the law previously enacted, provided the relevant formalities are respected: ‘the earth belongs to the living, and not to the dead.’<sup>23</sup> Insofar as, instead, the law is related more to *ratio* than *voluntas*, change cannot be brought about by decree, rather being the result of a progressive evolution. Therefore, while legislation and, though to a lesser degree, case-law are prone to abrupt changes, triggered by the passing of new legislation or by the overruling of previous decisions, legal doctrines feature a much more gradual and evolutionary dynamic of change. Indeed, to use Martin Krygier’s words, ‘Ronald Dworkin’s conceit, the chain novel, is apt here, though he does not, I believe, pursue his insights far enough, into the extent to which earlier chapters might constitute, rather than simply inform, later readers and writers.’<sup>24</sup>

Krygier’s just mentioned observation leads quite naturally to the second qualification to be made to Glenn’s notion of legal tradition, pertaining to the nature of its normativity.

In this regard, while the authority of norms enshrined in legislation, and, in common law systems, in case-law, is, at least *prima facie*, dependent on the authority of the source of law they are posited by, a whole other question is why such sources of law are to be regarded as authoritative sources – i.e., preemptive reasons for action.<sup>25</sup> According to Glenn, conceiving law as tradition provides normative justification to the

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<sup>22</sup> In a very wide and various debate, see Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press 1986); Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press 2000); Jeremy Waldron, ‘The Core of the Case against Judicial Review’ (2006) 115 *The Yale Law Journal* 1346; Martin Loughlin, *Against Constitutionalism* (Harvard University Press 2022). As to Germany, where this evolution of constitutional justice is particularly evident, see Matthias Jestaedt and others, *Das entgrenzte Gericht: Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Suhrkamp Verlag 2011); Florian Meinel, ‘Das Bundesverfassungsgericht in Der Ära Der Grossen Koalition: Zur Rechtsprechung Seit Dem Lissabon-Urteil’ (2021) 60 *Der Staat* 43; Andreas Kulick, *Das Konservative Gericht* (Mohr Siebeck 2021).

<sup>23</sup> As famously held by Thomas Jefferson in his letter to James Madison of September 6, 1789, published in Julian P Boyd (ed), *The Papers of Thomas Jefferson*, vol 15 (Princeton University Press 1958) 392–98 <<https://jeffersonpapers.princeton.edu/>>.

<sup>24</sup> Krygier, ‘Too Much Information’ (n 18) 124. The reference is to Dworkin’s doctrine of integrity and, particularly, to the principle of ‘fit’ – see Ronald Dworkin, *Law’s Empire* (Harvard University Press 1986).

<sup>25</sup> Joseph Raz, ‘Authority, Law and Morality’ (1985) 68 *The Monist* 295, 298: ‘the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should replace some of them’.

authority of official sources of law, and more generally, of the legal system itself, whereas legal positivism merely assumes its effectiveness as a matter of fact.<sup>26</sup>

The debate on how to justify the authority of law is a debate not to be taken up here. However, what is to be stressed is that legal traditions provide, in Glenn's opinion, indirect or secondary justifications of the normativity of official sources of law by providing justification for the authority of the legal system considered as a whole. Conversely, in the case of legal doctrines, which, at least at the domestic level,<sup>27</sup> are almost never included in the official sources of law,<sup>28</sup> legal tradition offers direct justification for their normativity. Indeed, as Sacco observes,

“the scholar has no other power than the one that comes from his capacity to persuade. He is, after all, a professor and an author, roles that multiply his chances of influencing the law by force of persuasion. A professor and author influences a student who learns the law from his book or his lectures. [...] Of course, [the student] has the capacity to criticize the professor's teaching but he will not exercise it until he has listened to a second professor who teaches doctrines different than the first. Once he has become a judge, yesterday's student will be keen to apply the law he has learned in the university.”<sup>29</sup>

Though clearly normative, legal traditions enjoy a different kind of normativity than norms posited by official sources of law: it is not by chance that Glenn expressly refused to adopt the notion of authority, preferring instead that of persuasiveness. Contrary to authoritative norms, which aim at guiding individuals' actions by displacing and excluding competing normative reasons, traditions, which can be described as ‘reasons for adherence,’<sup>30</sup> strive to guide human action by persuading individuals to keep a given conduct. In this, traditions are certainly normative reasons, however they do not displace competing reasons, and are open to contestation: indeed, whenever

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<sup>26</sup>H Patrick Glenn, ‘Doin’ the Transsystemic: Legal Systems and Legal Traditions’ (2005) 50 McGill Law Journal 863, 867, ff.

<sup>27</sup> The mention, by art. 38 of the ICJ Statute of ‘the teachings of the most highly qualified publicists of the various nations,’ though only ‘as subsidiary means for the determination of rules of law’ is quite noteworthy in this regard.

<sup>28</sup>Sacco, ‘Dottrina (fonte del diritto)’ (n 9) 215.

<sup>29</sup> Sacco, ‘Legal Formants (Installment II of II)’ (n 9) 349; analogously, Id. ‘Dottrina (fonte del diritto)’ (n 9) 167.

<sup>30</sup> H Patrick Glenn, ‘Persuasive Authority’ (1987) 32 McGill Law Journal 261; *Legal Traditions of the World* (n 2) 41.

normative information is deemed to no longer fit present circumstances, it is discarded and abandoned – the process of ‘massaging’ the tradition in Glenn’s terminology.

The second qualification to Glenn’s concept of the legal tradition, somewhat inherent in the remarks already made, is thus well summarised in the title Martin Krygier gives to a paragraph dealing with Glenn’s work: ‘Within the Bran-Tub; the Bran-Tub Within.’<sup>31</sup> Whereas Glenn appears to adopt an external point of view to legal traditions, coherently with the purpose of comparing legal traditions of the world, most legal operators – scholars, lawyers, judges, etc. – live and operate within a legal tradition and adopt an internal perspective to it. Legal doctrines are developed and taught by scholars and professors, they are invoked as justification for the solution of concrete cases by lawyers and judges, eventually gaining generalised acceptance in a given legal community. Thus, the legal tradition ends up shaping – most often without the awareness thereof by legal operators – legal doctrines, principles, and ways of thought. Thus understood, legal traditions offer a powerful explanation for the emergence and persistence of what Sacco calls ‘cryptotypes:’ these are ‘[normative] patterns which are implicit but have outward effects.’<sup>32</sup>

By way of summing up the introductory remarks just made, legal traditions consist in the passing down of normative information, in a dynamic of continuous appropriation, re-appropriation, and filtering-out. Particularly, they concern legal doctrines – in Merryman’s words: “deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society [...]”<sup>33</sup>–, which stand out, amongst other sources of “legal information” due to their nature, as well as their dynamics of change and normativity.

Despite their unofficial status, legal doctrines are to be considered sources of law insofar as ‘rules have meaning only in the context of [institutions and procedure,]

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<sup>31</sup> Krygier, ‘Too Much Information’ (n 18) 130–132.

<sup>32</sup> Sacco, ‘Legal Formants (Installment II of II)’ (n 9) 385. As Sacco observes, ‘some cryptotypes are more specific, others more general. The more general they are, the harder they are to identify. In extreme cases they may form the conceptual framework for the whole system. When verbalized, cryptotypes are perceived and passed on from one generation of jurists to mothers just as the legal rules of the society without a written alphabet are preserved and handed down. In the eyes of the people who do so, they soon become “obvious.” [...] This subjection to cryptotypes constitutes the “mentality” of the jurist of a given country’ (pp. 386-7)

<sup>33</sup> Merryman (n 6) 2.

values, and ways of thought,<sup>34</sup> thus conditioning the interpretation of positive law and the solution given to concrete cases.<sup>35</sup> Particularly, as it will be argued, in the context of this research, legal tradition has a crucial role in defining the law governing the relation between the national and international legal orders.

### **3. Appropriateness and relevance of thinking the relation between the law of the state and international law in terms of legal tradition**

At this point is probably necessary to clarify the reasons for employing the notion of legal tradition as an analytical tool in the context of the present research, which is focused on the relationship between the municipal and international legal orders, with particular reference to instances of domestic non-compliance with the latter. This means addressing both issues of appropriateness and usefulness of such notion in the present context.

#### **A. The appropriateness of legal tradition as an analytical tool**

As to the first aspect, that of appropriateness, the point of departure is to acknowledge that Constitutions expressly address many particular aspects of foreign relations law:<sup>36</sup> the place of international law in the municipal system of sources,<sup>37</sup> the

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<sup>34</sup>Berman (n 7) 11.

<sup>35</sup>Sacco, 'Dottrina (fonte del diritto)' (n 9) 215; Guastini (n 8) 80.

<sup>36</sup> Luzius Wildhaber, *Treaty-Making Power and Constitution. An International and Comparative Study* (Helbing & Lichtenhahn 1971); Armin von Bogdandy and Peter M Huber (eds), *Handbuch Ius Publicum Europaeum II: 'Offene Staatlichkeit - Wissenschaft vom Verfassungsrecht'* (CF Müller 2007); Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press 2019); Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law: Bridges and Boundaries* (Cambridge University Press 2021). A number of country reports studies have also been published: see Dinah Shelton (ed), *International Law and Domestic Legal Systems. Incorporation, Transformation, and Persuasion* (Oxford University Press 2011); Fulvio Maria Palombino (ed), *Duelling for Supremacy: International Law vs. National Fundamental Principles* (Cambridge University Press 2019); Shaheed Fatima, 'Engagement of English Courts with International Law' in André Nollkaemper and others (eds), *The Engagement of Domestic Courts with International Law: Comparative Perspectives* (Oxford University Press 2024).

<sup>37</sup> For an overview, see Tom Ginsburg, Svitlana Chernykh and Zachary Elkins, 'Commitment and Diffusion: How and Why National Constitutions Incorporate International Law' (2008) 2008 *University of Illinois Law Review* 38; Pierre-Hugues Verdier and Mila

national procedure for ratification and incorporation, especially addressing the role of Parliament vis-à-vis Government,<sup>38</sup> the role of international law in guiding the interpretation of national law,<sup>39</sup> particularly regarding international human rights instruments,<sup>40</sup> and so on.

Conversely, Constitutions are usually silent as to the general framework of (i.e. the general doctrines on) the relationship between the two legal orders: the latter remain on the background of the constitutional positive discipline in the field of foreign relations, constituting the implied and presupposed legal framework wherein the discrete constitutional norms operate. It is said framework that allows to make sense of the more particular norms as part of a coherent system and to interpret them accordingly.<sup>41</sup>

Furthermore, cases arise – and these are mainly cases where the issue of domestic judicial non-compliance with international law is brought to fore – whose solution depends on the clarification of the said general framework. Actually, if one adopts a comparative perspective – as already attempted in Chapter 1, and as it is the ambition of the present research to show –, they will note that, though there are some differences across jurisdictions as to the place of international law in the system of sources, the procedures for ratification and incorporation and so on, those differences are not marked enough to justify the differences in the solution of cases of conflicts between the national and international legal order highlighted in the previous chapter. Instead, such differences can only be explained by identifying diverging patterns in the fundamental doctrines pertaining to the status of international law in the domestic legal order and its relationship with the international one.

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Versteeg, ‘International Law in National Legal Systems: An Empirical Investigation’ (2015) 109 *American Journal of International Law* 514.

<sup>38</sup> Antonio Cassese (ed), *Parliamentary Control over Foreign Policy* (Brill Nijhoff 1980); Stefan A Riesenfeld and Frederick M Abbott (eds), ‘Symposium on Parliamentary Participation in the Making and Operation of Treaties’ (1991) 67 *Chicago-Kent Law Review* 293.

<sup>39</sup> André Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press 2011) 139, ff.; Pierfrancesco Rossi, ‘Using International Law for Construing Domestic Law: A Study of Consistent Interpretation’ (2020) 58 *Archiv des Völkerrechts* 279; Matthias Klatt (ed), *Constitutionally Conforming Interpretation - Comparative Perspectives: Volume 1: National Reports* (Hart Publishing 2023).

<sup>40</sup> Melissa A Waters, ‘Using Human Rights Treaties to Resolve Ambiguity: The Advent of a Rights-Conscious Charming Betsy Canon’ (2007) 38 *Victoria University of Wellington Law Review* 237.

<sup>41</sup> Andrej Lang, *Die Verfassungsgerichtsbarkeit in der vernetzten Weltordnung: Rechtsprechungskoordination in rechtsordnungsübergreifenden Richternetzwerken*, vol 293 (Springer 2020) 240, ff.

The dynamics of traditionality, as above discussed, are particularly apparent with regard to such doctrines, both from a subjective perspective – that is, one focusing on the scholarly positions in the debate, elaborated over time – and from an objective one, concerned with the evolution over time of the state and of international law.

Indeed, the doctrines of monism and dualism have long been at the centre of the debate relating to the relationship between the national and international legal orders. Though the passing of time, in itself, is no (good) reason for deeming a legal doctrine no longer adequate, it is worth noting that both doctrines were first expounded more than a century ago;<sup>42</sup> nowadays, there is broad consensus in deeming such alternative unsatisfying, and for a variety of reasons.<sup>43</sup> This conclusion – it is worth anticipating – appears somewhat fallacious insofar as dualism is concerned, due to the fact that such doctrine, not only allows for a plausible, though not always fully satisfactory,<sup>44</sup> explanation of a number of judicial decisions,<sup>45</sup> but also reflects the express self-

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<sup>42</sup> As to monism - in its internationalist version -, see Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu einer reinen Rechtslehre* (JCB Mohr (P Siebeck) 1920); Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Springer 1926). For dualism, see Triepel (n 11); Anzilotti (n 11).

<sup>43</sup> Janne E Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007); Luzius Wildhaber, 'The European Convention on Human Rights and International Law' (2007) 56 *International and Comparative Law Quarterly* 217, 217 'we need a new, more realistic and more comprehensive theory. A new theory should not only accept that reality is more complex and that [...] there are various shades of monism and dualism'; Armin von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6 *International Journal of Constitutional Law* 397, 400 'monism and dualism should cease to exist as doctrinal and theoretical notions for discussing the relationship between international law and internal law.'

<sup>44</sup> See, e.g., criticising such reading of the Italian Constitutional Court's decision 238 of 2014, Gianluigi Palombella, 'German War Crimes and the Rule of International Law' (2016) 14 *Journal of International Criminal Justice* 607.

<sup>45</sup> See, e.g. Italian Constitutional Court, Judgement of 22 October 2014, no. 238; CJEU Judgment of the Court (Grand Chamber) of 3 September 2008, C-402/05 P, *Kadi and Al Barakat International Foundation v Council and Commission*, ECR 2008 I-635. See, reading the three judgments in such terms, Massimo Lando, 'Intimations of Unconstitutionality: The Supremacy of International Law and Judgment 238/2014 of the Italian Constitutional Court' (2015) 78 *The Modern Law Review* 1028. As to the Italian Constitutional Court's case, Francesco Francioni, 'From Deference to Disobedience: The Uncertain Fate of Constitutional Court Decision No. 238/2014' (2015) 24 *The Italian Yearbook of International Law Online* 1. As to the Court of Justice's decision, see Gráinne De Búrca, 'The European Court of Justice and the International Legal Order After Kadi' (2010) 51 *Harvard International Law Journal* 1. As to the Supreme Court's decision, see Curtis A Bradley, 'Self-Execution and Treaty Duality' [2008] *The Supreme Court Review* 131.

understanding of a number of legal orders, at times even made official by the respective apex Courts.<sup>46</sup>

Regardless of the question of the ongoing relevance of the monism-dualism alternative, those elaborations remain relevant today insofar as they constitute the deep roots of many contemporary debates – such as the discussion on international constitutionalism,<sup>47</sup> or the persisting relevance of dualism.<sup>48</sup> Indeed, over time, they have been the object of an ongoing process of appropriation, re-elaboration and refinement by subsequent generations of scholars, in a dynamic closely recalling that typical of traditions, as above discussed.

Particularly, the fundamental ideas, respectively of searching for an ordering principle – a *clavis universalis*<sup>49</sup> –, capable of realising an overarching unity of national and international law, and of acknowledging the reciprocal autonomy of the national and international legal orders, with the possibility for conflicts it entails, are very much present in the contemporary debate.<sup>50</sup>

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<sup>46</sup> See, e.g. CJEU, Opinion of Mr Advocate General Poiares Maduro delivered on 16 January 2008, in Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, ECR I-6351 para. 24: “[t]he relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.”

<sup>47</sup> Thomas Kleinlein, ‘Alfred Verdross as a Founding Father of International Constitutionalism?’ (2012) 4 *Goettingen Journal of International Law* 385; Aoife O’Donoghue, ‘Alfred Verdross and the Contemporary Constitutionalization Debate’ (2012) 32 *Oxford Journal of Legal Studies* 799.

<sup>48</sup> Gaetano Arangio-Ruiz, ‘International Law and Interindividual Law’ in Janne E Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007); Giorgio Gaja, ‘Dualism—a Review’ in Janne E Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007). See also, most tellingly, a blog post commenting the Italian Constitutional Court decision no. 238 of 2014 by Anne Peters, ‘Let Not Triepel Triumph – How To Make the Best Out of Sentenza No. 238 of the Italian Constitutional Court for a Global Legal Order’ [2014] *Verfassungsblog* <<https://verfassungsblog.de/let-not-triepel-triumph-make-best-sentenza-no-238-italian-constitutional-court-global-legal-order-2/>> accessed 13 January 2025.

<sup>49</sup> Gianluigi Palombella, ‘“Formats” of Law and Their Intertwining’ in Jan Klabbers and Gianluigi Palombella (eds), *The Challenge of Inter-Legality* (1st edn, Cambridge University Press 2019) 33–35.

<sup>50</sup> For an overview, Neil Walker, ‘Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders’ (2008) 6 *International Journal of Constitutional Law* 373.

Furthermore, both sides of the debate are deeply embedded in long-standing traditions of thought, which are persistent, *mutatis mutandis*, to this day, informing and constituting the ethical and political background to more recent conceptions.

On the one hand, the monist-internationalist tradition is embedded – at times quite explicitly – in a normative cosmopolitanism:<sup>51</sup> particularly, it is well known that, for Kelsen, while the unity of national and international law was an epistemological postulate, the choice between the primacy of national law over international law, or that of international law over national law, is a matter of ethical and political preference; particularly, it is linked to an explicit cosmopolitan and pacifist political position, one diametrically opposed to the politics of power and to the celebration of the authority of the state which were quite diffuse at the time.<sup>52</sup> In Kelsen’s words:

“it is only temporarily, by no means forever, that contemporary humanity is divided into states, formed in any case in more or less arbitrary fashion. Its legal unity, that is the *civitas maxima* as organization of the world: this is the political core of the primacy of international law, which is at the same time the fundamental idea of that pacifism which in the sphere of international politics, constitutes the inverted image of imperialism.”<sup>53</sup>

On the other hand, dualism, though rebutting the conception of international law as the external law of the state, and the product of a mere – and precarious – self-limitation of state sovereignty, as theorised, following Hegel, by Georg Jellinek,<sup>54</sup> is originally embedded in the statist tradition. As Antonio Cassese observed regarding Italian positivist international lawyers operating in the early 20<sup>th</sup> century, among whom stood Dionisio Anzilotti,

“all these lawyers embrace an ideology, though they don’t admit it clearly, and perhaps they aren’t even conscious of this. This ideology, to put it briefly, consist in ‘respecting’ the modern state and its

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<sup>51</sup> B Simma, ‘The Contribution of Alfred Verdross to the Theory of International Law’ (1995) 6 *European Journal of International Law* 33; D Zolo, ‘Hans Kelsen: International Peace through International Law’ (1998) 9 *European Journal of International Law* 306.

<sup>52</sup> Hans Kelsen, *General Theory of Law and State* (Russell & Russell 1961) 388.

<sup>53</sup> Kelsen (n 43) 319, quoted from Zolo (n 52) 310.

<sup>54</sup> Georg Jellinek, *Die Rechtliche Natur Der Staatenverträge* (A Hölder 1880) 9: ‘the State as the subject of the general will can legally do everything, it can therefore free itself from the obligations it has taken on without committing an injustice, for it is the source of all law. The general will cannot be bound by any legal act!’ (author’s translation). On Anzilotti’s rebuttal of Jellinek’s positions, see Giorgio Gaja, ‘Positivism and Dualism in Dionisio Anzilotti’ (1992) 3 *European Journal of International Law* 123.

essential foundations, in postulating its incoercible sovereignty (their dualism meant that, ultimately, in case of contrast between international and national law, the latter was to prevail), and in affirming the importance of role of the great powers.”<sup>55</sup>

These conceptions – the cosmopolitan and statist one – have come to rely on very different justification; however, they still underlie the doctrines addressing the place of international law in the national legal system.

These subjective aspects of traditionality in the evolution of the doctrines concerning the place of international law in the national legal system would certainly constitute a first reason for framing the discussion here to be undertaken in terms of tradition.<sup>56</sup> However, beyond the evident elements of traditionality in the subjective aspects of said debate, it is equally, if not more, important to stress the traditionality thereof as to its object: that is, the state, international law, and their relationship.

In this regard, it is often observed – and quite tenably so – that, to paraphrase, the state and international law are joined at the hip, having been born at the same time: that moment is conventionally – though not without contestation<sup>57</sup> – deemed to be the Treaty of Westphalia of 1648.<sup>58</sup>

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<sup>55</sup> Antonio Cassese, *Il diritto internazionale in Italia* (Micaela Frulli ed, Il Mulino 2021) 29. See also, similarly, Laura Passero, *Dionisio Anzilotti e la dottrina internazionalistica tra Otto e Novecento* (Giuffrè 2010) 175–262.

<sup>56</sup> The influence Anzilotti had on the Permanent Court of International Justice - and on some of its most important decisions - further substantiates such observation. See, in this regard, José María Ruda, ‘The Opinions of Judge Dionisio Anzilotti at the Permanent Court of International Justice’ (1992) 3 *European Journal of International Law* 100.

<sup>57</sup> For an overview of the debate, see Stéphane Beaulac, ‘The Westphalian Legal Orthodoxy - Myth or Reality’ (2000) 2 *Journal of the History of International Law* 148; Sebastian Schmidt, ‘To Order the Minds of Scholars: The Discourse of the Peace of Westphalia in International Relations Literature’ (2011) 55 *International Studies Quarterly* 601; Jonathan Havercroft, ‘Was Westphalia “All That”? Hobbes, Bellarmine, and the Norm of Non-Intervention’ (2012) 1 *Global Constitutionalism* 120. In this regard, as Stephen Tierny observed, ‘any presentation of the Peace of Westphalia of 1648 as the defining moment in the birth of the modern nation-state is of course simplistic and largely inaccurate, but insofar as the term “Westphalia” has passed into common juridical parlance to encapsulate untrammelled state power, it continues to serve as a useful caricature’ (Id., ‘Reframing Sovereignty? Sub-State National Societies and Contemporary Challenges to the Nation-State’ (2005) 54 *International and Comparative Law Quarterly* 161, n 12.).

<sup>58</sup> *E pluribus*, Leo Gross, ‘The Peace of Westphalia, 1648-1948’ (1948) 42 *The American Journal of International Law* 20; Daniel Philpott, ‘Sovereignty: An Introduction and Brief History’ (1995) 48 *Journal of International Affairs* 353; Robert Jackson, *Sovereignty: The Evolution of an Idea* (Polity 2007) 49–56..

Indeed, for international law to exist, there was the need for sovereign states, *superiorem non recognoscens*, to do so: this was achieved at the time of the Peace of Westphalia, as the universal claims to political power and legal authorities of the Church and the Empire were rebutted in favour of those of the state, the political entity claiming the exclusive right to regulate, through law, a given community, identified with a people residing within a territory. Indeed, the internal and external dimensions of sovereignty are co-dependent and mutually implicating. As it has been observed,

‘for the monopolistic authority of a state within its territory to be achieved and maintained, recognition from other polities and their commitment to non-interference was necessary. Equally, for states to exercise their external sovereignty as actors capable of entering into international legal commitments, the indivisibility and finality of their internal authority was required.’<sup>59</sup>

Over the course of time, however, both the state and international law have undergone deep and structural transformation, as it will be briefly recalled in the next Chapter. The present state of affair is often described – at times building a prescriptive, rather than descriptive, argument – as a post-Westphalian one, where a plurality of law-producing *loci* exists beyond the state which enjoys a not-unplausible autonomous claim to legal authority,<sup>60</sup> and where the relevance of state sovereignty and consent, which is a corollary of the former, as organizing principles of the system of international law is seen by some as undergoing a process of relativisation.<sup>61</sup> It is quite natural to assume

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<sup>59</sup> Neil Walker, ‘Sovereignty Frames and Sovereignty Claims’ in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013) 20; similarly, Martin Loughlin, ‘Why Sovereignty?’ in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013) 34: ‘one set of relations concerns the position of the State in the international arena. A regime is recognized as a sovereign State when its governing authority is in no way legally dependent on any higher authority, whether that of pope or emperor. The sovereign State is an autonomous entity that acknowledges other similar entities in the sphere of international relations on the basis of formal equality. Correlating with this external aspect is the internal dimension. From the internal perspective, sovereignty expresses the conviction that the State is the ultimate source of law. There can be no fetter on the law-making authority of the State, whether deriving from divine law or natural law.’

<sup>60</sup> Neil Walker, *Intimations of Global Law*: (Cambridge University Press 2014).

<sup>61</sup> Andrew T Guzman, ‘Against Consent’ (2011) 52 *Virginia Journal of International Law* 747; Nico Krisch, ‘The Decay of Consent: International Law in an Age of Global Public Goods’ (2014) 108 *American Journal of International Law* 1; Matthias Kumm, ‘Sovereignty and the Right to Be Left Alone: Subsidiarity, Justice-Sensitive Externalities and the Proper Domain of the Consent Requirement in International Law’ (2016) 79 *Law*

that the legal doctrines concerned with the place of international law in the domestic legal system and its reception therein might have undergone a similar evolution.

## **B. What is gained from employing legal tradition as an analytical tool.**

If the previous remarks have attempted to show the relevance of legal tradition to the law of the relationship between national and international law, a few observations are in order as to what is expected to be gained from framing such issue in terms of legal tradition.

A first, quite obvious, set of remarks has a diachronic flavour to it. Indeed, one core aspect of the dynamics of traditionality is that of the passage of time. In this perspective, adopting the frame of the legal tradition has a number of consequences as to inter-temporal aspects.

“Knowing the past in order to understand the present” is something that is generally tenable and valuable maxim; in the present context, however, there are additional insights to be gained. Indeed, adopting the lens of tradition implies – and requires – a caution against a certain ‘laziness’ of the lawyer, that is ‘the choice – a culturally extremely risky choice – of transferring purely and simply principles born (and consolidated) in other and *toto coelo* historical context [...]; as if nothing had changed in the enormous leap from the state forged in the workshops of Enlightenment and Jacobinism to the social state [born out the World War II]:’<sup>62</sup> the same applies with regard to the ‘enormous leap’ from the state and the system of international relations emerged from the Peace of Westphalia to that of the present, globalised, setting.

Thus, thinking in terms of tradition calls for questioning long-standing assumption and ways of thought, in order to verify their appropriateness as analytical tools: that is to say, to check if they are still capable of capturing the reality of the practice of law, or

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and Contemporary Problems 239; Samantha Besson, ‘State Consent and Disagreement in International Law-Making. Dissolving the Paradox’ (2016) 29 *Leiden Journal of International Law* 289.

<sup>62</sup> Paolo Grossi, *L’invenzione del diritto* (Laterza 2017) 108 (author’s translation). Similarly, in the context of English law, see, questioning the ongoing relevance of traditional accounts of parliamentary sovereignty, Paul Craig, ‘Sovereignty of the United Kingdom Parliament after Factortame’ (1991) 11 *Yearbook of European Law* 221; Martin Loughlin and Stephen Tierney, ‘The Shibboleth of Sovereignty’ (2018) 81 *The Modern Law Review* 989.

whether their theoretical consolidation has outgrown it, losing much of its analytical value.

At the same time, however, adopting the lenses of the legal tradition also allows for the retainment of legal doctrines and categories previously developed, which can be adapted to the evolving scenario. This results, first, in a more descriptively accurate account of the development of legal practice and knowledge, which, instead of starting back from scratch once significant changes occur in the social, economic, and technological sphere, actually features an incremental and evolving dynamic, whereby later generations massively rely on the work of previous ones. Second, and from a methodological perspective, adopting the lenses of legal tradition also allows for the retainment of legal frames of thought, doctrines, notions, etc. previously elaborated, provided that their ongoing relevance and aptitude in capturing and applying to the real world is constantly questioned and that they are updated and adapted to the mutating social, political, and, especially, constitutional context as needed.<sup>63</sup>

Furthermore, apart from the diachronical insights, framing the issue in terms of legal tradition allows for a better understanding of the contemporary legal techniques used for regulating the place of international law in the domestic legal system, and, consequently, for grounding and justifying non-compliance with it. Indeed, not only this requires interpreting domestic judicial practice in light of its background, but it also allows for a more nuanced, and precise, understanding thereof by comparing and contrasting the judicial practice occurring in jurisdictions embracing different sub-traditions of the same macro-tradition. In other words, by comparing the judicial practice in jurisdictions featuring an open or modern understanding of statehood, commonalities and mutual differences should emerge and be more clearly identifiable, thus leading to a better description thereof.

Finally, such framing is a valuable analytical tool in understanding contrasting national practices. Indeed, as Glenn observes, traditions are never monolithic: rather,

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<sup>63</sup> This is inherent in the idea put forward by Patrick Glenn of the ‘adaptive state:’ see Id. *The Cosmopolitan State* (n 16) 184 ff. For a similar approach, see also Udo Di Fabio, *Das Recht offener Staaten: Grundlinien einer Staats- und Rechtstheorie* (Mohr Siebeck 1998) 132: ‘a transformation of the state, which would correspond to the course of development outlined here within the range of the dispersion discussed, requires a new theory of the state. However, its guiding principle would not be discontinuity with modernity, but the preservation of the humanistic image of man and society in a world that is visibly outgrowing simple modern constructions – a preserving transition.’ Similarly, *ibid.*, p. 135, f.

they are composed of contrasting information. Internal contrasts are often managed by traditions by allowing for a degree of internal pluralism; however, some information could be deemed to constitute the core of the tradition, and, thus, information contrasting with it will be expelled from the tradition.<sup>64</sup> This feature of legal traditions is indeed useful in understanding contrasts in national practices, and among legal formants within the same legal order.

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<sup>64</sup> Glenn, *Legal Traditions of the World* (n 2) 23: ‘in its most radical form, such opposition may take the form of heresy, treason or sedition. [...] The undefined or incomplete nature of all traditions thus rests ultimately on the difficulty of concluding as to the existence of absolute or irrefutable knowledge within a tradition.’

## Chapter IV

### The evolving state tradition:

#### the alternative between modern and post-modern, open statehood.

This chapter applies the dynamics of traditionality discussed in the previous one to the evolution of the idea of the state over time, specifically addressing the alternative between modern and open statehood as it resulted from the developments undergone in some postwar constitutional experiences.

#### **1. The making of the statist tradition: from medieval pluralism to the state's monopoly of law**

##### **A. The Medieval legal scenario: legal pluralism as the product of the 'uncomplete political power.'**

The point of departure in the present discussion cannot but be medieval legal pluralism: it is against this background that the rise of the state as the holder of exclusive political power within a territory and over a people and, therefore, as the monopolist of legal authority is best appreciated.<sup>1</sup>

The medieval political landscape is aptly defined – in Paolo Grossi's words – as one of 'uncomplete political power.'<sup>2</sup> By that Grossi means that the medieval political institutions – indifferently monarchies, seignories, or municipalities – differed from the modern state in that they feature a radically different 'psychology of power:'

'political power lacked any totalising ambition and was not capable of self-imposing as an all-encompassing fact, one absorbing all social phenomena. Instead, political power covered only certain areas of inter-subjective relations, allowing competing powers to regulate other, and very wide, areas.

The state has the ambition of making the object of power coincide with the totality of social relationships, of becoming, that is, a complete power. The political institutions of the Middle Age lacked exactly this, instead being characterised by an incomplete conception

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<sup>1</sup> On this development, see generally Luis Ignacio Gordillo Pérez, *Una teoría del Estado constitucional europeo* (4th edn, Athenaica 2023).

<sup>2</sup> Paolo Grossi, *L'ordine giuridico medievale* (Laterza 2006) 41.

of power, by the limitation of its tasks, and by the marked disregard for a large area of social interactions.’<sup>3</sup>

What follows from this political reality in terms of legal authority is a relative autonomy of law: autonomy, that is, from the political power, which, as already discussed, had little interest for it, being satisfied of regulating certain, limited, areas.

Beside the “law of the Prince,” therefore, a number of legal authorities coexisted: canon law, feudal law, municipal statutes, the *lex mercatoria*, regulations enacted by the corporations, ... In this perspective, the law, far from constituting the formalisation of the command of the sovereign, is the product of the self-regulation of the society: a society, furthermore, organised in a myriad of overlapping communities, some having a territorial nature – the city, the Kingdom, the Empire –, some an ethnic one, some based on the economic activity of its members – the corporation. In the background, constituting the unifying element, as well as a suppletive source of law, and a guide for interpretation, laid the common law – or, perhaps better, the common laws, plural: aside from the *ius commune* of Roman origin, centred around the *Corpus Iuris Civilis*, many regional common laws emerged whose relationship with the *ius commune* was quite variable: the *droit coutumier* in France, the *gemeines Recht* in Germany, the *derecho común* in Spain to name a few.<sup>4</sup>

Such a multitude of competing legal orders were then organised not by reducing them to unity through hierarchy; rather, they were harmonised in applying them to concrete cases through the work of interpreters. Interpretation here, however, is far from being the operation of clarifying the meaning of a text and then applying to the facts of the case as in the modern statist tradition; rather, the *interpretatio* consisted in a highly creative operation of the interpreters, the text of the law constituting an ever-feeblen limit to their activity.<sup>5</sup> Indeed, such interpretative activity has been recently defined as ‘invention,’ which, considered in its Latin roots (*inventio*), implies an active search for the law, to be found at the crossroads between the various legal orders coexisting in a given space, thus unifying it in its application to the case, without the need for a

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<sup>3</sup> *ibid* 41, 46.

<sup>4</sup> H Patrick Glenn, *On Common Laws* (Oxford University Press 2007) 43: ‘the common laws of Europe thus existed in great variety. *Ius commune* did not exist in singular but in multiple form, as *iura communia*, and there were vigorous relations not only between the common laws and the particular laws of each of them, but also between the common laws themselves.’

<sup>5</sup> Grossi, *L'ordine giuridico medievale* (n 2) 162–175; 223–235.

*reductio ad unum*, pursued, at a later moment by the modern state, through the unifying and excluding device of sovereignty and hierarchy.<sup>6</sup>

## **B. The rise of the state as the monopolist of legitimate power and the closure of the legal order.**

It is against this background that the state emerged as the political entity claiming – and progressively effectively obtaining – the monopoly of legitimate power.<sup>7</sup> This translated, on the side of legal authority, into the monopoly thereof, i.e., the claim by state of the prerogative to exclude competing legal authority, whose application in the territory of the state became conditional upon the authorisation of the state’s legal order.<sup>8</sup>

Thus, the law underwent a process of ‘reductionism,’ that is, of reducing the complexity of the sources of law to the unity of the law produced by the state and, therefore, to law in the formal sense.<sup>9</sup> This was a deliberate project, ideologically embedded in the culture of the Enlightenment, and its search for legal generality, abstraction, and stability.<sup>10</sup> State law was to be all-encompassing and exclusive, excluding all other sources of law, unless authorised by the state: it was to regulate, at least potentially, every aspect of life, and it was to do so to the exclusion of any other authority.

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<sup>6</sup> Paolo Grossi, *L’invenzione del diritto* (Laterza 2017) 114, ff.

<sup>7</sup> Of course, the attribution of sovereignty to the state was the product of a long process of abstraction: it began with the attribution of sovereignty to the Prince, then to the Crown, understood as an institution autonomous from the person of the ruler - on the ‘two bodies’ of the King, see the fundamental Ernst Kantorowicz, *The King’s Two Bodies: A Study in Medieval Political Theology* (Princeton University Press 2016) -, and, finally, to the state; on this, see Martin Loughlin, ‘Representation’ in Martin Loughlin (ed), *The Idea of Public Law* (Oxford University Press 2004).

<sup>8</sup> This was a process of ‘closing up,’ in the words of Partrick Glenn, the territorial State, thus overcoming the openness typical of medieval legal authorities: see Glenn, *The Cosmopolitan State* (n 1) ch 4.

<sup>9</sup> Paolo Grossi, *Oltre la legalità* (Laterza 2020) 9–12.

<sup>10</sup> Eugen Bucher, ‘Rechtsüberlieferung Und Heutiges Recht’ (2000) 75 *Zeitschrift für Europäisches Privatrecht* 394, 435: ‘the idea of codification is a child of the Enlightenment. The desire for legislation as such is old, but now the desire for all-encompassing laws that push aside all other laws is new. There is a belief in progress and in the power of human reason, a belief that is expressed in grand concepts and also in a tendency towards grandiosity. This is countered not only by contempt, but by programmatic rejection of the past’ (author’s translation).

This program was pursued mainly through two doctrines: that of hierarchy of sources and that of separation of powers, that is to say, through the realisation of the liberal, modern, and pre-constitutional *Rechtsstaat*.<sup>11</sup> It is indeed a system of legalistic absolutism.<sup>12</sup>

As mentioned, two doctrines are instrumental to it. As to that of the hierarchy of sources, such organisation of the sources of law, placing the law in formal sense (*lex*, statute, *Gesetz*, *loi*, *ley*, *legge*) at the apex of the sources, authorising and disciplining all other sources of law, thus granting unity, coherence, and organisation to the body of law, now unified in a system, allows the will of the sovereign – whose product and formalisation it is – to percolate throughout the entire legal order, thereby conforming the latter to itself.<sup>13</sup>

Conversely, the separation of powers, insofar as it is of interest here, had the effect of safeguarding the supremacy of the law of parliament in the system of sources, excluding the possibility for judges to interfere with it, either by abolishing existing legislation, or by creating new one. This was realised by both prohibiting judges to void the law passed by parliaments, and by excluding the possibility, for them, to integrate the applicable law by reference to extra-statutory sources, such as equity, custom, and natural law. The interpretation of Article 4 of the French *Code Civil* on the prohibition of denial of justice consolidated under the School of Exegesis in France is a testament to this.<sup>14</sup> Indeed, while Article 4 could be read as opening the system of the *Code* to its

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<sup>11</sup> Grossi, *Oltre la legalità* (n 9) spec. 9-12.

<sup>12</sup> Paolo Grossi, 'Epicedio per l'assolutismo giuridico: (dietro gli "Atti" di un Convegno milanese e alla ricerca di segni)' (1988) 17 Quaderni fiorentini per la storia del pensiero giuridico moderno 517. Indeed, the *Rechtsstaat* is essentially a legislative state, where the law in formal sense, eventually produced by Parliament, is met by no limits as to its content, and regulates and constraints every state power (thus differentiating itself from the *Polizeistaat*). This system of government, therefore, reflects and represents an actualisation of the idea of the rule of law in its formal understanding as "rule by law, not by men," as argued by Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 University of Chicago Law Review 1175. Though in passing, it should be noted that the *Rechtsstaat*, despite ensuring, by providing for stability of law, its non-retroactivity and generality, some degree of protection of individuals, insofar as it allows them to 'choose styles and forms of life, to fix long-term goals and to effectively direct one's life toward them,' it is perfectly compatible with manifest immoralities in the law, as history proved – see Joseph Raz, 'The Rule of Law and Its Virtue' in Id., *The authority of law: Essays on law and morality* (Oxford University Press 1979) 220, f.

<sup>13</sup> Franco Modugno, 'Fonti Del Diritto (Gerarchia Delle)', *Enciclopedia del Diritto* (Giuffrè 1997) 561 paras 1, 2.

<sup>14</sup> 'Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice.'

hetero-integration in cases of lacunas,<sup>15</sup> the interpretation that eventually prevailed was one stressing the need to consider the *Code* as exhaustive and self-sufficient, so that lacunas were to be filled by auto-integration and systemic interpretation, actually prohibiting recourse to other sources of law.<sup>16</sup> The judge thus notoriously became merely *la bouche de la loi*, in a (probably mis-)appropriation of the expression by Montesquieu.<sup>17</sup>

In England, the doctrine of parliamentary sovereignty sums in itself these various aspects: it both disciplines the status of the law of parliament, and the relationship between the judges and parliament, as to courts are prohibited to question the validity of the law enacted by parliament.<sup>18</sup>

Thus, if it is through the two doctrines above briefly reviewed that the closure of the state legal order came into effect, displacing competing sources of law, it is probably through an evolution – or, at least, a relativisation – thereof that the turn to an ‘open state,’ or an ‘adaptive’ one,<sup>19</sup> should come to be.

In this perspective, the passage from the liberal and administrative state to the constitutional state, a process that took significantly up after the Second World War and throughout the second half of the twentieth Century, could be understood as a preparatory stage, whereby the internal aspects of sovereignty underwent a deep reorganisation, that however arguably left the external sovereignty untouched.<sup>20</sup> It also

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<sup>15</sup>Norberto Bobbio, *Il Positivismo Giuridico* (Giappichelli 1979) 79–85.

<sup>16</sup> Giovanni Tarello, ‘La Scuola Dell’esegesi e La Sua Diffusione in Italia’, *Scritti per il XL della morte di P. E. Bensa* (Giuffrè 1969) 256. On this, see also Id. ‘Scuola Dell’Esegesi’, *Novissimo digesto italiano* (UTET 1969) 819; Gino Gorla, ‘I Precedenti Storici Dell’art. 12 Disposizioni Preliminari Del Codice Civile Del 1942 (Un Problema Di Diritto Costituzionale?)’ (1969) 92 *Il Foro Italiano* 112.

<sup>17</sup> KM Schönfeld, ‘Rex, Lex et Judex: Montesquieu and La Bouche de La Loi Revisited’ (2008) 4 *European Constitutional Law Review* 274.

<sup>18</sup> See, for a more detailed discussion, the chapter devoted to England.

<sup>19</sup> Glenn, *The Cosmopolitan State* (n 17) 184–186.

<sup>20</sup> Dieter Grimm, ‘Post-Sovereignty?’ in Bas Leijssenaar and Neil Walker (eds), *Sovereignty in Action* (Cambridge University Press 2019) 27: ‘when after 200 years the modern constitutional state replaced the absolute state, the highest degree of approximation to Bodin’s concept of sovereignty was reached, yet only by conceding that internal sovereignty largely exhausted itself in the act of constitution-making, and thereafter remained latent within the state. Here, in the constitutionally developed architecture of the state, only legally created and limited competencies existed, whose holders were not regarded as sovereign. [...] External sovereignty was left unaffected by this development. The states remained legally independent of other states or superior political entities and enjoyed self-determination with regard to their internal affairs. Sovereignty was therefore not questioned in international law.’ It should be noted, however, that, often times, the

laid the foundations for its opening to international law sources. Indeed, as to the two doctrines just discussed – the hierarchy of sources and the separation of powers – changes were substantial. In the perspective of this research, however, the introduction of Constitutions *per se* – that is, independently from their content and from the opening of the legal order they often determined – produced more relevant consequences as to the separation of powers than as to the hierarchy of sources.

Indeed, as to the hierarchy of sources, the closure this doctrine provides to the legal order has actually been furthered and strengthened, as the constitution has replaced parliamentary legislation as the formally highest source of the legal order, and its hierarchical superiority over other sources of law in the system is inherent to the relation of authorising-authorised authority. Furthermore, postwar, long constitutions evolved to supply not only a formal organisation to the legal system and to the public bodies, but also substantive criteria to adjudicate the validity of legislation. Question of legal validity, therefore, are to be resolved not only by referring to formal criteria, but also to material ones, expressive of the fundamental values of the legal community. In other words, long constitutions provide not only formal closure to the system by excluding non-authorised sources, but also axiological closure, requiring all applicable law to be consistent with the substantive constitutional provisions, and with the values they express.

As to the separation of powers, instead, consequences of the introduction of post-war constitutions are macroscopic, also in the perspective of the present research.

The first, striking, innovation is that of the introduction of the judicial review of legislation, empowering courts to review the validity of legislation passed by the parliament and, eventually, to strike it down.<sup>21</sup> Clearly, this displaced the omnipotence

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transition to the constitutional state was contextual to that to the open state, making the two interdependent and quite difficult to disentangle.

<sup>21</sup> The judicial review of legislation was not completely unknown to constitutional experiences before World War II even beyond the USA, as in the case of inter-war Austria and Germany: see, respectively Christoph Bezemek, ‘A Kelsenian Model of Constitutional Adjudication’ (2012) 67 *Zeitschrift für öffentliches Recht* 115; Theo Öhlinger, ‘The Genesis of the Austrian Model of Constitutional Review of Legislation’ (2003) 16 *Ratio Juris* 206; Michael Stolleis, ‘Judicial Review, Administrative Review, and Constitutional Review in the Weimar Republic’ (2003) 16 *Ratio Juris* 266. However, it is after the war, and, subsequently, with the process of decolonisation and, finally, after the fall of the communist bloc in Eastern Europe, that the judicial review of legislation has found its greatest diffusion: see Mauro Cappelletti, *Judicial Review in the Contemporary World* (Bobbs-Merrill 1971); Tom Ginsburg, ‘The Global Spread of Constitutional Review’ in Gregory A Caldeira, R Daniel Kelemen and Keith E Whittington (eds), *The Oxford*

of parliaments. Moreover, once accepted the idea that the law in formal sense could be hierarchically inferior to the constitution, this opened the door to an incredibly varied range of solution for the reception of international law in the domestic legal order and its relationship with national legislation, at times providing for the incorporation of international law at a higher hierarchical level than ordinary legislation.<sup>22</sup>

Secondly, the introduction of long constitutions implied the normative claim to conform thereto the entire legal order, which was achieved to a significant degree through judicial interventions. In this operation, judges – and not only constitutional judges – learnt how to “juggle” and interpretatively combine and integrate norms and principles pertaining to what were initially understood as two separate legalities, the ordinary and constitutional one.<sup>23</sup> This was done not only through the judicial review of legislation, often centralised in the hands of constitutional courts and tribunals, but also through a number of interpretative devices, available to all judges, including ordinary ones:<sup>24</sup> above all, the constitutionally oriented interpretation of norms<sup>25</sup> and the interpretation of general clauses, especially in civil law.<sup>26</sup> It is within this context that the interpretation of law progressively detached itself from being a syllogistic operation as theorised in the aftermath of the French Revolution, especially by the School of Exegesis, which was instrumental to the closure of the legal order around the legislation created by the sovereign, most often through Parliaments.<sup>27</sup>

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*Handbook of Law and Politics* (Oxford University Press 2008); Doreen Lustig and Joseph HH Weiler, ‘Judicial Review in the Contemporary World—Retrospective and Prospective’ (2018) 16 *International Journal of Constitutional Law* 315.

<sup>22</sup> Tom Ginsburg, Svitlana Chernykh and Zachary Elkins, ‘Commitment and Diffusion: How and Why National Constitutions Incorporate International Law’ (2008) 2008 *University of Illinois Law Review* 38; Pierre-Hugues Verdier and Mila Versteeg, ‘International Law in National Legal Systems: An Empirical Investigation’ (2015) 109 *American Journal of International Law* 514.

<sup>23</sup> Gustavo Zagrebelsky, *Il diritto mite: legge, diritti, giustizia* (Einaudi 1992) 147–213.

<sup>24</sup> Frank I Michelman, ‘The Interplay of Constitutional and Ordinary Jurisdiction’, *Comparative Constitutional Law* (Edward Elgar Publishing 2011).

<sup>25</sup> Massimo Luciani, ‘Interpretazione conforme a costituzione’, *Enciclopedia del diritto* (Giuffrè 2016) 391; Clemens Höpfner, *Die systemkonforme Auslegung* (Mohr Siebeck 2020); Matthias Klatt (ed), *Constitutionally Conforming Interpretation - Comparative Perspectives: Volume 1: National Reports* (Hart Publishing 2023).

<sup>26</sup> Stefano Rodotà, ‘Ideologie e Tecniche Della Riforma Del Diritto Civile’ (1967) 65 *Rivista del Diritto Commerciale* 83; Matthias Kumm, ‘Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law’ (2006) 7 *German Law Journal* 341.

<sup>27</sup> Gustavo Zagrebelsky, *Il diritto mite: legge, diritti, giustizia* (Einaudi 1992) 167-178 especially; Grossi, *L’invenzione del diritto* (n 6).

Such judicial attitude, together with a relativisation of the system of sources, whereby structural considerations are complimented by substantive ones in determining the domestic authority of international law, is key to understanding the place of international law in domestic legal orders characterised by an openness toward it.

## **2. A fork in the road of the legal tradition of statehood: modern v. post-modern, open statehood**

### **A. The evolution of international law from Westphalia to post-Westphalia**

If those above described are the mechanisms for the affirmation of the internal sovereignty of the state, the latter, as already noted,<sup>28</sup> is dependent on the external sovereignty. Indeed, the two are just the two sides of the same coin, which, ultimately, consists of the principle of self-determination:

‘sovereignty thus gained an internal and an external dimension, which met, however, in the right of self-determination. Self-determination regarding the internal affairs of the state could only exist if the state was free from heteronomy in its external affairs.’<sup>29</sup>

At Westphalia, the state emerged as a political entity *superiorem non recognoscens*: this implied the crisis of the claims to universal authority of the Church and the Empire.<sup>30</sup> In a system of states mutually recognising as equally sovereign, if sovereignty means first and foremost independence within a delimited territory, the necessary conclusion is the principle of non-interference: within the spatial remit of each state, no other state can interfere with the internal exercise of sovereignty.<sup>31</sup> The

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<sup>28</sup> Neil Walker, ‘Sovereignty Frames and Sovereignty Claims’ in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013); Martin Loughlin, ‘Why Sovereignty?’ in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013).

<sup>29</sup> Dieter Grimm, *Sovereignty: The Origin and Future of a Political Concept* (Columbia University Press 2015) 5.

<sup>30</sup> Grote Rainer, ‘Westphalian System’, *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2006).

<sup>31</sup> Permanent Court of Arbitration, *Island of Palmas case (Netherlands v USA)* (Award), April 4, 1928, Reports Of International Arbitral Awards, Vol. XI, 838: ‘sovereignty in the

state thus becomes a black box for international law, whose object is limited to the relation among states and does not encompass situations defined under internal law.<sup>32</sup> Limitations of state's sovereignty are strictly dependent on state's consent.<sup>33</sup>

The Westphalian system of international relations was thus characterized by 'self-contained and clearly demarcated [both horizontally – that is state/state – and vertically – that is state/international law] jurisdictions,'<sup>34</sup> whose fields of application, and whose objects, would rarely overlap.<sup>35</sup>

It is often observed that international law has undergone a movement from a law of coexistence to one of cooperation,<sup>36</sup> and more recently, toward regulation:<sup>37</sup> in a move from territoriality (the state, a political entity with general purpose but limited territorial remit) to functionalism (regulatory bodies, both public and private,<sup>38</sup> tasked with the pursuing of specific interests over a regional or global space), governing functions aimed at pursuing common goods – security, health, prosperity, protection of individuals' rights, etc. –, once the prerogative of the state, have been disaggregated and exercised at a global level in networks of governance.<sup>39</sup> At the same time, international

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relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state.'

<sup>32</sup> Exceptions to this were continuous and frequent in the international relations up to the League of Nations: see Stephen D Krasner, 'Compromising Westphalia' (1995) 20 *International Security* 115. Particularly, as to minority treaties, see Jennifer Jackson Preece, *National Minorities and the European Nation-States System* (Oxford University Press Oxford 1998) chs 3, 4 especially.

<sup>33</sup> Permanent Court of International Justice, *The Case of the SS Lotus (France v Turkey)* (Judgment), September 9, 1927, Rep Series A No 10, 18: 'international law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will [...]. Restrictions upon the independence of states cannot therefore be presumed.'

<sup>34</sup> Neil Walker, *Intimations of Global Law*: (Cambridge University Press 2014) 106.

<sup>35</sup> Gerald KCM Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92 *Collected Courses of the Hague Academy of International Law* 68–85.

<sup>36</sup> Wolfgang Friedmann, *The Changing Structure of International Law* (New York, Columbia University Press 1964).

<sup>37</sup> These - 'international law as transaction, community, and regulation' - are the three geological layers presented by Joseph HH Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 547.

<sup>38</sup> Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15.

<sup>39</sup> Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2009).

institutions and, more specifically, judicial and quasi-judicial institutions have proliferated,<sup>40</sup> leading to a greater ‘jurisdictionalisation’ of international law.<sup>41</sup>

The turn of international law from a law of coexistence to one of cooperation and regulation did not come out of the blue. Rather, “the conflagration of World War II made manifest the inescapable interdependence of the globe,”<sup>42</sup> triggering such an evolution. It became clear that international cooperation, particularly in institutionalised forms, was necessary for the achievement of most states’ objectives, beginning with keeping the peace and the protection of human rights – the purposes for which the United Nations were founded.<sup>43</sup> With time, and with the intensifying of globalisation, the need to pursue international collaboration extended to ever widening fields (trade, health, the environment, climate, cultural heritage, etc.),<sup>44</sup> so as to reduce externalities stemming from States autonomously and uncoordinatedly pursuing their own policies, as well as reducing the risk of ‘free riding’ among them.<sup>45</sup>

Accordingly, an international community has arguably emerged, one pursuing common interests, even at detriment of particular, and egoistical, interests of its components – the states.<sup>46</sup> The acknowledgement of the international community has

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<sup>40</sup> Pierre-Marie Dupuy and Jorge E Viñuales, ‘The Challenge of “Proliferation”: An Anatomy of the Debate’ in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013); Karen J Alter, ‘The Multiplication of International Courts and Tribunals After the End of the Cold War’ in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013). Particularly, Dupuy and Viñuales (ibid., p. 136, f.) describe such proliferation both in factual and perceptual (i.e., related to the perception by international legal scholars, often with a negative perspective, of the factual expansion of international bodies, with the risks of fragmentation it entails) terms. Particularly, as to the factual aspects, these consist in the development of a complex web of international judicial and quasi-judicial mechanisms, the expansion of their powers, the frequent resort thereto by states, and the increasing application of international law by domestic courts.

<sup>41</sup> Yuval Shany, ‘No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary’ (2009) 20 *European Journal of International Law* 73; Mikael Rask Madsen, *International Court Authority* (Oxford University Press 2018)..

<sup>42</sup> Robert Post, ‘Introduction’ in Seyla Benhabib, *Another cosmopolitanism* (Oxford University Press 2006) 1.

<sup>43</sup> See Art. 1 UN Charter.

<sup>44</sup> Norman Lewis (ed), *Global Governance and the Quest for Justice - Volume I: International and Regional Institutions* (Hart 2006); Roger Brownsword, *Global Governance and the Quest for Justice - Volume IV: Human Rights* (Hart 2004); David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Polity 1999).

<sup>45</sup> David Held, ‘Cosmopolitanism: Globalisation Tamed?’ (2003) 29 *Review of International Studies* 465.

<sup>46</sup> Bruno Simma, ‘From Bilateralism to Community Interest in International Law (Volume 250)’, *Collected Courses of the Hague Academy of International Law* (Brill 1994);

both an institutional aspect – the emergence of sites of law-making beyond the state – and one based on the primacy of a set of values and principles revolving around the protection of human rights.<sup>47</sup> The widening and deepening of the object of international law, which was no longer confined to regulating relations among states, but also penetrating the sphere inner sovereignty, and the consolidation of *ius cogens* and obligations *erga omnes*, among many others, are seen as symptoms of this evolution.

Whether the above-mentioned developments are real and actually imply a fundamental shift in the structure of international law, which would no longer be possible to organise around the principle of consent, or whether, and to what degree, descriptions thereof are aspirational in nature, when not betraying a reification of Western ideology,<sup>48</sup> is a debate not to be taken up here.

What is of interest, instead, is that, regardless of whether this determined a structural development, international law surely increased in quantity and deepened in quality. Not only international and national law have come to overlap as to the subject matter in a number of fields – e.g., human rights, the protection of the environment and the fight against climate change, criminal law, the protection of cultural heritage, etc. –, but “diagonal” interference by international law regulating specific sectors of the economy or the society with national law of constitutional significance are also often observed.<sup>49</sup>

Thus, although the fundamental difference between national and international law – the former being interindividual in nature, while the latter being inter-state<sup>50</sup> –, and

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Christian Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century General Course on Public International Law (Volume 281)’, *Collected Courses of the Hague Academy of International Law* (Brill 1999); Andreas L Paulus, ‘The Emergence of the International Community and the Divide Between International and Domestic Law’ in Janne E Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007).

<sup>47</sup> Anne Peters, ‘Humanity as the A and Ω of Sovereignty’ (2009) 20 *European Journal of International Law* 513.

<sup>48</sup> David Kennedy, ‘The Disciplines of International Law and Policy’ (1999) 12 *Leiden Journal of International Law* 9; Martti Koskenniemi, ‘The Subjective Dangers of Projects of World Community’ in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012)..

<sup>49</sup> See, for example, the debate on the right to regulate in the context of Investor-state Dispute Settlement mechanisms, Catharine Titi, ‘The Right to Regulate’ in Makane Moïse Mbengue and Stefanie Schacherer (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (Springer International Publishing 2019).

<sup>50</sup> Gaetano Arangio-Ruiz, ‘International Law and Interindividual Law’ in Janne E Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007).

with it the separation between the two legalities, has not vanished, the sharp distinction *ratione materiae* between them, typical of the ‘Westphalian system,’ appears to be faltering, as most of the fields of human action are regulated by both domestic and international law.<sup>51</sup>

The question, in the perspective of this research, thus becomes whether, and to what degree, reforms of constitutionalism have occurred on the domestic plane, mirroring and adapting to the developments undergone by the international legal order. In other words, while the state has not dissolved in favour of a world-state, nor has its claim to legal autonomy, it is to be discussed whether the idea of the state and conception of its relationship with international law has undergone an autonomous reconfiguration.

#### **B. The open constitutional state as an adaptation of the idea of the state.**

The above-discussed evolution of international law from a law of coexistence to one of cooperation and regulation, encompassing ever more subject matters, some of which closely interacting with core constitutionally sensitive areas, is quite obviously paralleled in developments in constitutional law. Particularly, while some constitutional orders continue to embrace a modern conception of statehood, making the pursuit of international cooperation purely a matter of political discretion, left to the free determination of the political bodies, others, instead, encompass a constitutional directive for political bodies to further international cooperation, the development of the international legal order, and the integration of the state therein, at the same time favouring the domestic reception of international law. The latter constitutional orders are usually described as ‘open’ legal orders.

Thus, the developments summarily described above constitute a fork in the road in the statist tradition: faced with the increasing need for international structured

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<sup>51</sup> Yuval Shany, *Regulating Jurisdictional Relations Between National and International Courts* (Oxford University Press 2007), who identifies in the blurring of the divide between national and international law and in the increasing overlap between the two, the need for a renewed discussion on the regulation of ‘jurisdictional overlaps between national and international courts—ie, jurisdictional interactions taking place between national and international courts with respect to disputes between the same parties (or, closely related sets of parties) over essentially identical issues, potentially or actually brought, simultaneously or consecutively, before national and international courts’ (ibid., p. 2).

cooperation and with the rapid and sustained development of the international legal order, constitutions could either conservatively reaffirm a modern conception of statehood, or they could reform it, embracing an open understanding thereof, one more ‘permeable’ to international law.<sup>52</sup>

Indeed, if one looks at domestic constitutionalism, they will be able to find many constitutions enacted (or radically modified) after World War II embracing a clear constitutional choice for an open conception of statehood.<sup>53</sup> This was the case, if to a varying degree, of the constitutions newly reformed or enacted in Italy and Germany immediately after the war,<sup>54</sup> in Spain, Portugal, and Greece in the 1970s after the fall of the dictatorships ruling those countries,<sup>55</sup> and in Latin America in the 1980s and 1990s, in countries coming out of dictatorship or immense internal struggles.<sup>56</sup> Furthermore, a favour towards international law was also shared by some of the constitutions adopted in the new states resulting from the process of decolonisation,<sup>57</sup> and in Eastern European constitutions enacted after the fall of communism.<sup>58</sup> In both of the last two cases, international law and institutions at times played a significant role in the constitution-making process.<sup>59</sup>

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<sup>52</sup> Mattias Wendel, *Permeabilität im europäischen Verfassungsrecht verfassungsrechtliche Integrationsnormen auf Staats- und Unionsebene im Vergleich* (Mohr Siebeck 2011).

<sup>53</sup> The terminology of ‘choice for international cooperation’ was initially devised by Klaus Vogel, *Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit: ein Diskussionsbeitrag zu einer Frage der Staatslehre sowie des geltenden deutschen Staatsrechts* (Mohr 1964). As to the relevance of the horrors of the 20<sup>th</sup> Century, see Tzvetan Todorov, *Hope and Memory: Lessons from the Twentieth Century* (Princeton University Press 2003).

<sup>54</sup> Constantino Mortati, *Lezioni sulle forme di governo* (Cedam 1973) 222, describing those constitutions as ‘borne out of the Resistance [to nazi-fascism]’.

<sup>55</sup> Carlos Espósito and Patrícia Galvão Teles, ‘International Law in Spain and Portugal: Internationalization by Democratization’ in Anne van Aaken and others (eds), *The Oxford Handbook of International Law in Europe* (Oxford University Press 2023); Iakovos V Iakovidis and Vassilis P Tzevelekos, ‘Greece’s Contribution to Public International Law’ in Anne van Aaken and others (eds), *The Oxford Handbook of International Law in Europe* (Oxford University Press 2023).

<sup>56</sup> Thomas Duve and Tamar Herzog (eds), *The Cambridge History of Latin American Law in Global Perspective* (Cambridge University Press 2024) ch 6.2, 6.3, and 7.

<sup>57</sup> The best renowned case in this regard is that of India, where art. 51, lett. c has been the basis for an internationally friendly case law of the Supreme Court: see Lavanya Rajamani, ‘International Law and the Constitutional Schema’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016).

<sup>58</sup> Eric Stein, ‘International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?’ (1994) 88 *American Journal of International Law* 427.

<sup>59</sup> Sergio Bartole, *The Internationalisation of Constitutional Law: A View from the Venice Commission* (Hart Publishing, an imprint of Bloomsbury Publishing 2020); Kevin L

Now, generalisations and abstractions from such a heterogeneous group of constitutional experiences are extremely difficult and dangerous; this research, instead, will discuss in greater detail the cases of Germany and Colombia as instances of open statehood, deemed to be good representatives of the wider group. However, some broad considerations, shedding light on some of the core tenets of open statehood, can be attempted.

First, most of these states were, at the time of the constitutional ‘decision’ in favour of international cooperation, in weak positions in the system of international relations: to make some examples, Germany (and Italy,<sup>60</sup> albeit its situation was marginally better than that of Germany) had just disastrously lost the Second World War and was under military occupation by allied powers; post-communist and post-colonial states had just obtained independence and sovereignty after long periods of foreign domination.<sup>61</sup> Finally, Latin American countries, just as post-colonial ones, though formally sovereign and independent, faced foreign interferences with their domestic political processes and neo-colonial and neo-imperial threats, especially with regard to the control over natural resources. To all of these countries international law

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Cope, ‘The Intermestic Constitution: Lessons from the World’s Newest Nation’ (2013) 53 *Virginia Journal of International Law* 667.

<sup>60</sup> On the link between the Italian Constitution’s openness towards international law and its founding in the Resistance to nazi-fascism, see Giuseppe Martinico, ‘Constitutionalism, Resistance, and Openness: Comparative Law Reflections on Constitutionalism in Postnational Governance’ (2016) 35 *Yearbook of European Law* 318, 328–331.

<sup>61</sup> Conversely, it is not by happenstance that prominent among the states that adopt a modern understanding of the relationship between national and international law are the winners of World War II, with France constituting the exception: see Antonio Cassese, *L’apertura degli ordinamenti statali all’ordinamento della comunità internazionale* (Editoriale scientifica 2009) 41. In the present research, Russia and China will not be considered, however, coherently with the premise that this study is limited to constitutional democracies.

promised the recognition and the protection of their sovereignty,<sup>62</sup> and, more precisely and more desirably, of their sovereign equality.<sup>63</sup>

This is particularly evident in the German case,<sup>64</sup> as Carlo Schmid, one of the strongest supporters of the opening of the German legal order to international law in the *parlamentarischer Rat* drafting the Basic Law observed, recognising the “very political” – one might say strategical, or even cynical – nature of his reasoning:

“The only effective weapon of those completely powerless is the law, international law. The juridification of a part of the realm of the political can be the only chance in the hands of the powerless to force the power of the superior within its limits. [...] The father of international law, Hugo Grotius, knew exactly what he was doing. He recognised that, after the English superior military power had succeeded in chasing the Dutch flag almost completely from the seas, the only mean to preserve Holland's possibility of life, was to legalise the living conditions on the high seas and to set the *mare liberum* against the English *mare clausum*.”

It is not for nothing that the so-called small powers were the great pioneers of international law; and there is also a - often unacknowledged and unrecognised -

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<sup>62</sup> S Prakash Sinha, ‘Perspective of the Newly Independent States on the Binding Quality of International Law’ (1965) 14 *The International and Comparative Law Quarterly* 121, 127: ‘sovereignty is the most treasured possession of the newly independent States. On the one hand, it makes them the master of their own house, and on the other hand, it provides them with a legal shield against foreign incursions or attempts thereat by stronger States.’ See also Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 196; George M Abi-Saab, ‘The Newly Independent States and the Scope of Domestic Jurisdiction’ (1960) 54 *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)* 84. This is not to diminish the vigour of the TWAIL critiques to international law and some of its doctrines.

<sup>63</sup> Bardo Fassbender, ‘Article 2 (1)’ in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press 2024) 230, observing: ‘At the San Francisco Conference, “sovereign equality” was deliberately adopted as a “new term”. Its purpose was clear: the idea of equality of States in law was given precedence over that of sovereignty by relegating the latter to the position of an attributive adjective merely modifying the noun “equality”. In this combination, sovereignty meant to exclude a legal superiority of any one (independent) State over another, but not to exclude a greater role of the international community played vis-à-vis all its members.’

<sup>64</sup> For example, the international law principle of self-determination, which obtained the status of constitutional principle, despite being only referred to in the Preamble to the Basic Law (see FCC, Judgement of 31 July 1973, 2 BvF 1/73, BVerfGE 36, 1, *Grundlagenvertrag*, § 80), was seen as a strong argument to bring about the reunification. See Andreas Paulus, ‘Völkerrechtsfreundlichkeit und Völkerrechtsskepsis in der politischen Praxis der deutschen Exekutive und Legislative’ in Thomas Giegerich (ed), *Der ‘offene Verfassungsstaat’ des Grundgesetzes nach 60 Jahren: Anspruch und Wirklichkeit einer großen Errungenschaft* (1st edn, Duncker & Humblot 2010); see also, generally, Rudolf Geiger, *Staatsrecht III* (7th edn, CH Beck 2018) 43–72.

political reason for this. That is why we Germans, precisely because we are so powerless today, should emphasise the primacy of international law with all the pathos we can muster.’<sup>65</sup>

While it cannot be denied that a modicum of political interest lies behind such reasoning, the aspirational choice and the idealistic push for a world order based on rules rather than power and might is quite clear in those constitutions, as is the constitutional directive to public powers to further the development of international law and cooperation: regional integration has a significant role in this regard.<sup>66</sup> Insofar as this is the case, the open constitutional state is not only characterised by the recourse to international cooperation for the pursuit of specific constitutional objectives; rather its defining feature of ‘openness’ becomes in and of itself an autonomous constitutional directive addressed at the various state’s organs, instructing them to operate on the international plane so to strengthen the international legal order and to further the state’s integration in the international community.<sup>67</sup>

Additionally, apart from the general idea of furthering the development and the strengthening of the international legal order as a stand-alone objective, the open legal state rests upon the realisation of the insufficiency to the achievement of states’ constitutional objectives of the internationally uncoordinated action of states.

Particularly, this concerns the pursuit of peace and security as the colonial domination of a large portion of the world and, finally, the two World Wars of the 20<sup>th</sup> Century have clearly shown the consequences of power politics and of the unrestrained exercise of external sovereignty.<sup>68</sup> Similar considerations are in order with regard to the

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<sup>65</sup> Deutschen Bundestag und Bundesarchiv (ed), *Der Parlamentarische Rat 1948-1949 - Akten und Protokollen*, vol V-Ausschuß für Grundsatzfragen (Harold Boldt 1993) 321, f. (12<sup>th</sup> sitting of the Committee on Fundamental Principles ‘*Ausschuß für Grundsatzfragen*’, 15 October 1948) (my translation).

<sup>66</sup> For a quantitative analysis of the presence of ‘regional integration clauses’ in national constitutions, see Philippe de Lombaerde and Liliana Lizarazo Rodriguez, ‘International Regionalism and National Constitutions: A Jurimetric Assessment’ (2014) 24 *Journal of Transnational Law & Policy* 23.

<sup>67</sup> Stephan Hobe, *Der offene Verfassungsstaat zwischen Souveränität und Interdependenz. Eine Studie zur Wandlung des Staatsbegriffs der deutschsprachigen Staatslehre im Kontext internationaler institutionalisierter Kooperation* (Duncker & Humblot 1998) 424.

<sup>68</sup> Thomas Giegerich, ‘Die Zähmung des Leviathan Deutschlands unvollendeter Weg vom nationalen Machtstaat zum offenen und europäischen Verfassungsstaat’ in Thomas Giegerich (ed), *Der ‘offene Verfassungsstaat’ des Grundgesetzes nach 60 Jahren: Anspruch und Wirklichkeit einer großen Errungenschaft* (Duncker & Humblot 2010) 13, s.: ‘a national power state [*Machtstaat*] archetypically refers to a state that attempts to

protection of human rights. In this context, the “disregard and contempt for human rights [which] resulted in barbarous acts which have outraged the conscience of mankind” constituted the foundation for both the post-war international human rights regime,<sup>69</sup> and the protection of fundamental rights in national constitutions, reinforcing and giving a strong institutional concretisation to the “potestative pessimism” – i.e., the idea of the danger inherent in the political power –, already a foundational idea of the European liberal tradition.<sup>70</sup>

Furthermore, apart from the protection of human rights and the pursuit of international peace and security, the opening of states’ legal orders is relevant with regard to other fields of law and areas of state action, in which international cooperation is necessary to achieve those constitutional goals the state is unable to fulfil acting exclusively on its own. These fields are indeed quite numerous and multiplying: for example, contrasting climate change and protecting the environment, regulating international migration, the protection of health, etc.

Upon these premises, the principle of openness, in requiring a greater integration of the state and its legal order in the international community, has three main effects.<sup>71</sup> First, it determines a directive for the political powers to further international and regional integration, at the same time authorising the state’s participation in international and regional organisations, as well as the limitation to its sovereignty this might imply. Furthermore, the principle of openness favours an enhanced reception of international law in the domestic legal order. Finally, it implies a centrality of the protection of human and fundamental rights, both as a precondition of the state’s

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ruthlessly assert autonomously defined national interests externally through the use of political, economic and military power at the expense of others. It avoids or denies international law restrictions on its means of power as far as possible or violates them as far as this is necessary and not too costly’ (my translation). See especially, in this regard, the constitutional provision banning offensive war in the constitutions of Italy (Art. 11), Germany (Art. 26), and Japan (Art. 9).

<sup>69</sup> The quote is from the Preamble to the Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December 1948 with Resolution A/RES/217 A (III). See Thomas Buergenthal, ‘The Evolving International Human Rights System’ (2006) 100 *American Journal of International Law* 783; Johannes Morsink, ‘World War Two and the Universal Declaration’ (1993) 15 *Human Rights Quarterly* 357.

<sup>70</sup> Danilo Zolo, ‘Teoria e critica dello Stato di diritto’ in Pietro Costa and Danilo Zolo (eds), *Lo stato di diritto: storia, teoria, critica* (Feltrinelli 2002) 35.

<sup>71</sup> Berenike Schriewer, *Zur Theorie der internationalen Offenheit und der Völkerrechtsfreundlichkeit einer Rechtsordnung und ihrer Erprobung am Beispiel der EU-Rechtsordnung*. (Duncker & Humblot 2017) 61–74.

participation in international organisations and as factor particularly favouring the reception of international human rights law in the domestic sphere.

Importantly, the open constitutional state does not radically depart from the statist tradition, of which it is only an incremental evolution and adaptation. More specifically, while moderating it, the open state does not renounce the claim to ultimate and exclusive legal authority typical of the idea of the state as it emerged by overcoming the legal pluralism typical of medieval law. Indeed, as it will be argued in more detail in the next section, under the principle of openness, and more precisely, under that of friendliness towards international law, while the structural requirements for the reception of international law are relaxed, the autonomy of the legal order and, thus, the controlling function of constitutional law are preserved.

### **3. Provisional conclusions.**

This chapter has discussed how the dynamics of traditionality discussed in the previous one imply that something of an idea – in this case that of the state – is retained, and something is progressively changed. Accordingly, in this chapter, the unchanging core of the idea of the state insofar as its relationship with international law is concerned has been traced back to the autonomy of the legal order and thus to the ultimate claim to exclusive law-making the state has always revindicated ever since its founding, in contrast with the legal pluralism typical of medieval law. Thus, in cases of conflict between national and international law, the state's organs – both in modern and open states – will argue that the solution to that conflict, which might well be the prevalence in the concrete case of international law, is to be solved by applying rules and principles found in national law. No state can be fully cosmopolitan, acknowledging, in a monist fashion, the existence of a unitary *Grundnorm* located in the international legal order, making the validity of national law conditional upon its respect.<sup>72</sup> That would amount to renouncing to sovereignty and, ultimately, to the state ceasing to exist as a state.

If the claim to legal autonomy inherent in the core of the idea of the state has remained unchanged, it has been pointed out that the general conception of the relationship between national and international law has instead undergone significant

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<sup>72</sup> As admitted by H Patrick Glenn, *The Cosmopolitan State* (Oxford University Press 2013) 185, fn. 129: 'a conceptual system can retain its integrity only if it engages in controlled measures of openness.'

changes in the passage from the modern to the open conception of statehood, the latter clearly favouring, as a matter of positive constitutional law, the participation of the state to the international community and its integration therein, allowing for a greater permeability of the national legal order, while the former leaves it entirely up to the political preferences of government and parliament.

## Chapter V

### The place and the limits of international law in the domestic system of sources of law: perspectives from the modern and open state.

This chapter puts forward the theoretical hypothesis for the main thesis of this research, namely that the principle of openness of the legal order is qualitatively correlated with the framing of conflicts between national and international law in terms of identity, rather than as structural conflicts; instead, a modern conception of statehood is qualitatively correlated with the framing of said conflicts in terms of structure.

This chapter aims at providing an outline of what the adoption of either a modern or an open conception of statehood entails as to the system of sources of law, and as to the place of international law therein. In order to do so, two notions developed in the Italian constitutional scholarship, namely those of '*fonte-atto*' and '*fonte-fatto*,' are employed as analytical categories.

#### **1. '*Fonti-fatto*' and '*fonti-atto*:' two analytical tools from the Italian constitutional law scholarship**

It is customary for Italian scholars addressing the subject of the sources of law to present, at the beginning of the discussion, the alternative between sources of law consisting in normative acts '*fonti-atto*' (normative acts) strictly understood and sources of law consisting in normative facts '*fonti-fatto*' (normative facts).<sup>1</sup>

In both cases, the sources of law are normative facts broadly understood: i.e., facts to which the legal order reconnects the effect of creating, modifying, or abolishing legal provisions or norms of that specific legal order. However, normative acts can be

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<sup>1</sup> Vezio Crisafulli, 'Fonti Del Diritto (Dir. Cost.)', *Enciclopedia del Diritto* (Giuffrè 1968) 925 933–935; *Lezioni di diritto costituzionale*, vol 2 (4. ed, CEDAM 1976) 32–37; Alessandro Pizzorusso, Silvia Ferreri and Guido Alpa, *Le fonti del diritto italiano* (UTET 1998) 69, ff.; Livio Paladin, *Le fonti de diritto italiano* (Ristampa, Il Mulino 2001) 436; Lorenza Carlassare, 'Fonti Del Diritto (Dir. Cost.)', *Enciclopedia del Diritto. Annali* (2008) 536 para 4; Alessandro Pizzorusso, *Delle fonti del diritto: art. 1-9* (2nd edn, Zanichelli - Soc ed del Foro italiano 2011) 166–173; Stefano Maria Cicconetti, *Le fonti del diritto italiano* (4th edn, Giappichelli 2019) 25–28; Andrea Morrone, *Fonti normative: concetti generali, problemi, casi* (Seconda edizione, Il Mulino 2022) 15, f.; Roberto Bin and Giovanni Pitruzzella, *Le fonti del diritto* (4. ed, Giappichelli 2023) 1–3. John Bell translates the Italian notions of *fonti-atto* and *fonti-fatto* as, respectively, act sources and fact sources: see Id., 'Sources of Law' (2018) 77 *The Cambridge Law Journal* 40, 43.

distinguished from normative facts in that they are the product of the will of a body endowed by the legal order of the power to enact those very acts, adopted through a specific procedure: they are sources of law created and enacted in observance of the relevant norms disciplining, in that specific legal order, the production of law. Examples of normative acts are abundant and consist of what most commonly comes to the mind when thinking about the sources of law: legislation in its various forms, governmental decrees and regulations, administrative acts, etc.

Conversely, normative facts strictly understood are not created pursuant to the norms regulating the production of law in that legal system; rather, they are created independently from them. Once they've come into existence, they are taken into consideration by the legal order merely as objects, without any reference to subjective or voluntary circumstances. As such, normative facts produce normative effects only because specific legal provisions accord them normative effect.

As Modugno put it,

“as with all sources, even for normative facts, the legal system tends to prescribe requirements and conditions for recognition and identification. When said requirements and conditions do not include as relevant the origin of a given subject or centre of imputation (to which the normative power is referred) or the ‘will’ of the normative production, but the fact is assumed in its simple objectivity insofar as it is endowed with certain characteristics considered to be significant, we have the predisposition of a type of normative facts distinguished from normative acts. When, on the contrary, the legal system, by identifying a subject or a centre of imputation, attributes to the latter the power (possibility) of enacting norms, there is the predisposition of a type of normative act distinguished from normative facts.”<sup>2</sup>

The most common normative facts are customs, that is domestic customs, not to be confused with customary international law. Customs are made of rules which are the result of consistent behaviour prolonged over time by individuals: as such they could not be considered official sources of law and their normativity would consist only of a sociological fact; however, in the silence of the Italian constitution, the preliminary provisions to the (predating) civil code include customs within the legal sources of the

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<sup>2</sup> Franco Modugno, ‘Fonti Del Diritto’, *Enciclopedia Giuridica* (Treccani 1989) 6, f.

legal order (art. 1), clarifying, however, at art. 8, par. 1, that ‘in matters regulated by laws and regulations, customs are effective only insofar as they are referred to by them.’ As it is apparent, the formation of customs is in no way disciplined by the relevant rules on the making of law in the Italian legal order: their formation is an autonomous matter, with whom the legal order is not concerned. Once they are formed, however, they’re taken into consideration by the legal order for the purposes, and within the limits, of art. 8 of the preliminary provisions to the civil code.

Thus, the legal authority of normative facts is strictly dependent on the provisions that incorporate them in the legal order.

## **2. The modern perspective: international law as a ‘fonte-fatto’**

The categories just mentioned have been applied to the question of the status of international law in the domestic legal system. Accordingly, although in the most recent discussions this conclusion is somewhat problematised in light of the opening of the domestic legal order,<sup>3</sup> it is commonly and traditionally held that international law, for the purposes of the domestic legal system is a normative fact:<sup>4</sup> the normative nature of international law in the domestic legal system is only the product of the *renvoi* the legal order operates to the international legal norms (regardless of whether this *renvoi* is general and automatic, as in the case of customary international law in most legal

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<sup>3</sup> Bin and Pitruzzella (n 1) 39, f.: ‘there is no doubt that the entire theory of sources has been affected in recent years by the “international” opening of our legal system. [...] Naturally, while on the one hand our legal culture draws strong stimuli and enrichments from it, on the other hand the old and stable framework that characterised our systematic theory of the sources of law until a few years ago has today lost much of its stability and has become much less capable of offering precise answers to the constant questions put to it;’ Morrone (n 1) 121: ‘because they belonged to different and separate legal orders, international and European sources were traditionally regarded as mere normative facts, which the domestic legal system recognised as producing rules that could be applied internally. This was an artifice (*fictio*), inspired by a closed conception of the national legal system, but contradicted by the very constitutional principles of openness to the outside world.’

<sup>4</sup> Vezio Crisafulli, ‘Fonti Del Diritto (Dir. Cost.)’, *Enciclopedia del Diritto* (Giuffrè 1968) 925–933–935; Vezio Crisafulli, *Lezioni di diritto costituzionale*, vol 2 (4. ed, CEDAM 1976) 32–37; Alessandro Pizzorusso, Silvia Ferreri and Guido Alpa, *Le fonti del diritto italiano* (UTET 1998) 69, ff.; Lorenza Carlassare, ‘Fonti Del Diritto (Dir. Cost.)’, *Enciclopedia del Diritto. Annali* (2008) 536 para 4; Alessandro Pizzorusso, *Delle fonti del diritto: art. 1-9* (2. ed, Zanichelli - Soc ed del Foro italiano 2011) 166–173; Stefano Maria Cicconetti, *Le fonti del diritto italiano* (4 ed.) Giappichelli 2019) 25–28.

systems, or it is realised through a specific incorporating instrument, as it is the case of international treaties in most jurisdictions).<sup>5</sup>

Accordingly, for the domestic legal system, the creation of international law is a mere fact, occurring, independently and autonomously, outside of its domain, and that its existence in the domestic legal order is a function of its reception therein according to national law and through the relevant domestic procedures.<sup>6</sup>

The notions of normative acts and normative facts, albeit elaborated in the specific Italian context, are apt to capture the dynamic between national law and international law more generally. Specifically, the framing of the relevance of international law in the domestic legal order through the category of normative facts is typical of a modern conception of statehood, whereby the state claims to be the sole law-making authority and whereby, as a consequence, all law which is not a direct product of the state, needs to be authorised by it to acquire effectiveness in the domestic legal order. This is a reformulation, employing different analytical categories, of the core tenet of dualism.<sup>7</sup>

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<sup>5</sup> This is not to say that international law is to be plead as a matter of fact before domestic courts, requiring parties to a dispute to prove the law (as it is sometimes the case with foreign law under private international law regimes): to the contrary, it is generally pleaded as a matter of law. This point will be substantiated in the following Chapters by reviewing the cases of the UK, the USA, Germany and Colombia. It should be noted that in the related, albeit different, matter of the pleading of foreign law in private international legal proceedings, while in some jurisdiction the foreign law is pleaded as a matter of fact, and thus needs to be proved by the party claiming its application to the case, in a growing number of jurisdiction it is (now) pleaded as a matter of law: see Trevor C Hartley, 'Pleading and Proof of Foreign Law: The Major European Systems Compared' (1996) 45 *International & Comparative Law Quarterly* 271; Rainer Hausmann, 'Pleading and Proof of Foreign Law – a Comparative Analysis' [2008] *The European Legal Forum* 1; Yuko Nishitani, 'Foreign Law in Domestic Courts: Challenges and Future Developments' in Franco Ferrari and Diego P Fernández Arroyo (eds), *Private International Law* (Edward Elgar Publishing 2019).

<sup>6</sup> This is not to ignore that domestic law, and constitutional law more specifically, plays a pivotal role in the creation of international law by singling out those subjects empowered to represent the state and act on its behalf on the international plane: among other issues, this becomes relevant, for example, in the process of treaty formation, as well as in order to identify state practice and *opinio iuris* for the purpose of ascertaining the formation of a rule of customary international law. Thomas Kleinlein, 'International Law-Making: Domestic Channels to Express Consent to Be Bound', *Research Handbook on International Law and Domestic Legal Systems* (Edward Elgar Publishing 2024).

<sup>7</sup> Giorgio Gaja, 'Dualism—a Review' in Janne E Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007) 52, f.: "the main feature of dualism appears to be that international law and municipal laws are viewed as separate legal systems, which may be defined as self-contained, because within each system the only existing rules are those that are part of the system. Rules which are not created within the system may nevertheless be relevant for the system if they are referred to by a rule included in the system."

Such understanding of the place of international law in the domestic legal order, one which makes its domestic authority strictly contingent upon its positive reception through the relevant domestic procedures and rigorously assigns international law a place in the domestic hierarchy of sources, has as a corollary the framing of conflicts between the two levels in structural terms: if the procedures for incorporation set out in domestic law are not met, or if the international norm at issue is inconsistent with a hierarchically superior domestic norm, then it will not be applicable in the domestic legal order.

### **3. The open state, the principle of friendliness towards international law, and the permeability of the system of sources: towards international law as '*fonte-atto*'?**

So far, the modern conception of statehood, and its implications as to the domestic status of international law, have been depicted as allowing international law in the domestic legal order only insofar as provided for by the relevant domestic procedures, which operate as controlling devices in the hands of legislatures, which authorise the ratification and subsequently provide for the incorporation of treaty-based international law and which can often, depending on its place in the hierarchy of sources, and which are capable of displacing customary international law by legislating inconsistently with it.

In light of this account, it is not unreasonable to expect a description of open statehood, whereby this emphasis on the strict respect on the domestic rules for the reception of international law, enforced by the courts via structural conflicts, is somewhat relaxed and international law is allowed to percolate in the domestic legal order more freely. Such an account of the place of international law domestic legal orders featuring the principle of openness would however be somewhat vague and thus unsatisfactory. Accordingly, this section aims at providing a more detailed account of the approach to international law undertaken by open constitutional orders.

As already discussed, the opening of the state is a general principle that (only) some legal orders feature and that has a number of declinations. When present, as far as

the reception of international law in the domestic legal order is concerned, it can be declined into the principle of friendliness toward international law.<sup>8</sup>

Quite obviously, and as it will become apparent by confronting Germany and Colombia, the content, and, especially, the intensity of the principle of friendliness towards international law is context-specific and each constitution featuring it realises it to a different degree, balancing it somewhat differently against other competing constitutional values and principles.

However, some general features can be identified. In this perspective, the principle of friendliness towards international law aims at conforming to the greatest extent possible the national to the international legal order and at avoiding conflicts between the two levels. This might be realised by providing for a higher position of international law in the hierarchy of sources, but also, and perhaps more significantly, by strengthening the consistent interpretation of domestic law, even of constitutional rank, in light of international law and by favouring the domestic reception of international law through open constitutional clauses, especially in the field of fundamental rights.<sup>9</sup>

#### **A. The principle of friendliness towards international law at work: two examples.**

Before addressing in more abstract terms the effect of the principle of friendliness towards international law as to the domestic systematisation of legal sources, and in order to provide some concrete reference for the discussion that will follow, two cases, showing the consequences of said principle, shall be considered. Both of these cases will be discussed at greater length and in further detail in the following chapters: here

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<sup>8</sup> Christian Tomuschat, ‘§226 Staatsrechtliche Entscheidung Für Die Internationale Offenheit’ in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol XI (CF Müller 2013); Berenike Schriewer, *Zur Theorie der internationalen Offenheit und der Völkerrechtsfreundlichkeit einer Rechtsordnung und ihrer Erprobung am Beispiel der EU-Rechtsordnung*. (Duncker & Humblot 2017) 61–75., distinguishing the ‘receptive aspect’ (the principle of friendliness towards international law), the ‘active aspect’ (the favour for international cooperation), and the ‘human-centred aspect’ (the promotion of human welfare).

<sup>9</sup>Schriewer (n 8) 76: ‘The international law-friendly legal system helps the norms of international law origin to achieve the greatest possible effectiveness through the correct interpretation of the norms, their widest possible direct application, the avoidance of conflicts with norms of purely national origin, a detailed catalogue of fundamental rights, a conflict resolution that conforms as far as possible to international law and the avoidance of elements that are unfriendly to international law’ (author’s translation).

only very brief – and somewhat apodictical – remarks will be made, while a longer discussion will be provided in the following chapters.

1. *The attribution of constitutional significance to the European Convention on Human Rights by the German Federal Constitutional Court.*

The first is represented by the status of the European Convention on Human Rights in the German legal order.<sup>10</sup>

In Germany, the Convention is incorporated through ordinary legislation,<sup>11</sup> deriving from it its formal status in the German legal order, namely that of ordinary federal legislation.<sup>12</sup> However, “the elaborate case law on the ECHR has given the Convention a status that goes far beyond its formal status as simple federal law.”<sup>13</sup> Indeed, the formal status of the Convention is insufficient to explain its normative impact, if not in contradiction with it.<sup>14</sup>

As a matter of facts, the FCC commonly invokes the Convention as an interpretive guidance for the fundamental rights enshrined in the Basic Law and, more precisely, to

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<sup>10</sup> For an overview, see Christian Tomuschat, ‘The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court’ (2010) 11 German Law Journal 513; Birgit Peters, ‘Germany’s Dialogue with Strasbourg: Extrapolating the Bundesverfassungsgericht’s Relationship with the European Court of Human Rights in the Preventive Detention Decision’ (2012) 13 German Law Journal 757; Eirik Bjorge, *Domestic Application of the ECHR: Courts As Faithful Trustees* (Oxford University Press USA - OSO 2015); Mehrdad Payandeh, ‘Normative Unscharfen Zwischen Offenheit Und Introvertiertheit: Die Gorgulu-Entscheidung in Retrospektive Rundfrage 70 Jahre BVerfG-Rechtsprechung’ (2022) 77 Zeitschrift für Öffentliches Recht (ZoR): Journal of Public Law 711.

<sup>11</sup> Act on the Convention for the Protection of Human Rights and Fundamental Freedoms (*Gesetz über die Konvention zum Schutze der Menschenrechte und Grundfreiheiten*) of 7 August 1952, Federal Law Gazette (Bundesgesetzblatt—BGBI) 1952 II 685.

<sup>12</sup> FCC, Decision of the Second Senate of 26 March 1987, 2 BvR 589/79, BVerfGE 74, 358, *Presumption of innocence*, para. 39; Decision of the Second Senate of 14 October 2004, 2 BvR 1481/04, BVerfGE 111, 307, *Görgülü*, para. 30; Judgement of the First Senate of 4 May 2011, 2 BvR 2365/09, BVerfGE 128, 326, *Preventive Detention*, para. 86; Judgement of Second Senate of 12 June 2018, 2 BvR 1738/12, BVerfGE 148, 296, *Ban on strikes for civil servants*, para. 126, f.; Decision of the Second Senate of 29 January 2019, 2 BvC 62/14, BVerfGE 151, 1, *Exclusion of the right to vote in Bundestag elections*, para. 61.

<sup>13</sup> Michael Lysander Fremuth, ‘Die Rezeption der Europäischen Menschenrechtskonvention in der deutschen Rechtsordnung’ in Michael Lysander Fremuth (ed), *70 Jahre Europäische Menschenrechtskonvention. Tagungsband zur Festveranstaltung* (Manz’sche Verlags- und Universitätsbuchhandlung 2022).

<sup>14</sup> Frank Hoffmeister, ‘Die Europäische Menschenrechtskonvention Als Grundrechtsverfassung Und Ihre Bedeutung in Deutschland’ (2001) 40 Der Staat 349, 372; Fremuth (n 13) 49..

determine “the content and scope of fundamental rights and constitutional principles of the Basic Law,”<sup>15</sup> something that is at odds with the formal status of the Convention vis-à-vis the Basic Law, the latter being hierarchically superior. In doing so, the FCC ends up shaping the content of the national fundamental rights not only so that they aren’t interpreted inconsistently with Convention rights, but also so that, ultimately, the latter are incorporated in the German constitutional framework.<sup>16</sup>

However, while relaxing the formal criteria for the reception of the Convention in the German legal order, the FCC has progressively consolidated axiological limits to such penetration.<sup>17</sup>

## 2. *The progressive constitutionalisation of international environmental law principle of precaution in the Colombian legal order*

Colombia is another open constitutional state:<sup>18</sup> the 1991 Political Constitution clearly expresses the desire for Colombia to partake and to further international and,

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<sup>15</sup> FCC, *Presumption of innocence* (fn 12), para. 39; *Görgülü* (fn 12) para. 32; Order of the First Senate of 26 February 2008, 1 BvR 1602/07, BVerfGE 120, 180, *Caroline of Monaco III*, para. 52; *Ban on strikes for civil servants*, (fn 12) para. 128.

<sup>16</sup> See, e.g., FCC, *Preventive detention* (fn 12), para. 90: “the substantive orientation of the Basic Law to human rights is expressed in particular in the German people’s profession of inviolable and inalienable human rights in Article 1.2 of the Basic Law. In Article 1.2 of the Basic Law, the Basic Law accords particular protection to the central stock of human rights. This protection, in conjunction with Article 59.2 of the Basic Law, is the basis for the constitutional duty to invoke the European Convention on Human Rights in its specific manifestation as an interpretation aid even when applying German fundamental rights. Article 1.2 of the Basic Law is therefore admittedly not a gateway to give the European Convention on Human Rights direct constitutional status, but the provision is more than a non-binding programmatic statement, in that it specifies a maxim for the interpretation of the Basic Law and makes it clear that the fundamental rights are also to be understood as a manifestation of human rights and have incorporated the latter as a minimum standard.”

<sup>17</sup> FCC, Judgment of the Second Senate of 12 June 2018 - 2 BvR 1738/12, BVerfGE 148, 296, para. 133-135; Judgment of the Second Senate of 4 May 2011, 2 BvR 2365/09, BVerfGE 128, 326, para. 93, 94; Order of the Second Senate of 14 October 2004, 2 BvR 1481/04, BVerfGE 111, 307, para. 62. For a more detailed discussion, see *infra* ch. 7, para. 3.B.1.

<sup>18</sup> See generally Laura Victoria García-Matamoros and Walter Arévalo Ramírez, ‘La Constitución y El Derecho Internacional’ in Tania Luna Blanco and Francisco Jose Chaux Donado (eds), *Tres décadas de constitución* (Ministerio de Justicia y del derecho 2022); Andrés Molano-Rojas, ‘La “Constitución Exterior” y La Constitucionalización de La Política Exterior Colombiana’ in Karen Nathalia Cerón Steevens, Walter Arévalo Ramírez and Ricardo Abello Galvis (eds), *De la Constitución de 1991 a la realidad: debates políticos, jurídicos, territoriales e internacionales* (Universidad del Rosario, Facultad de Ciencia Política y Gobierno, y de Relaciones Internacionales 2015); Leonardo García Jaramillo, ‘De la “constitucionalización” a la “convencionalización” del

especially, regional integration.<sup>19</sup> Here, the Constitution expressly provides that certain international law instruments, namely those recognising human rights and prohibiting their limitation in states of emergency, prevail over contrasting national legislation; other treaties on human rights ratified by Colombia, instead, are only to be considered as an interpretive guidance for constitutional provisions.<sup>20</sup> The Constitutional Court of Colombia, since its very early days, has thus elaborated the doctrine of the constitutionality bloc, subsequently refining it by distinguishing the constitutionality bloc *stricto sensu* and the constitutionality bloc *lato sensu*.<sup>21</sup> Accordingly, the former has an integrative function of the constitution and the sources the make it up form an integral part of the Constitution, while the latter consists of infra-constitutional but supra-legislative norms, to be used in interpreting and adjudicating the validity of ordinary legislation.

Thus, in Colombia, international law sources, mainly depending on their substantive content, might fall in the constitutionality bloc, *stricto* and *lato sensu* understood, or be considered only “ordinary” international legal sources. This categorisation has fundamental implications both as to the domestic status in the system of legal sources of international law, and as to eventual conflicts among international law norms and regimes. In spite of the importance of such a categorisation, the boundaries separating the three categories aren’t always clear beyond a few cases in which the Constitution provides sure guidance. Ultimately, reconnecting one international norm or regime to the constitutionality bloc (strictly or widely understood) or not rests upon the interpretative prerogative of the Constitutional Court.

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ordenamiento jurídico. La contribución del *ius constitutionale commune*’ [2016] Revista Derecho del Estado 131; Alejandro Ramelli, ‘Sistema de fuentes del derecho internacional público y “bloque de constitucionalidad” en Colombia’ (2004) 1 Cuestiones Constitucionales Revista Mexicana de Derecho Constitucional.

<sup>19</sup> See the Preamble: “In the exercise of their sovereign power, represented by their delegates to the National Constituent Assembly, invoking the protection of God, [...] and committed to promote the integration of the Latin American community, decree, authorize, and promulgate the following;” see also art. 9, para. 2: “in the same manner, the foreign policy of Colombia shall be oriented toward the integration of Latin America and the Caribbean.”

<sup>20</sup> See art. 93 para. 1 and 2 of the Colombian Constitution: “international treaties and agreements ratified by Congress that recognize human rights and prohibit their limitation in states of emergency have domestic priority. The rights and duties mentioned in this Charter shall be interpreted in accordance with international treaties on human rights ratified by Colombia.”

<sup>21</sup> Rodrigo Uprimny Yepes, *Bloque de Constitucionalidad, Derechos Humanos y Proceso Penal* (Consejo Superior de la Jurisprudencia 2008) 29–108.

In this regard, an interesting case is that of the domestic treatment of the principle of precaution,<sup>22</sup> a cornerstone principle of international environmental law, whereby “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”<sup>23</sup> Now, although the Colombian Constitution place a great importance on the protection of nature and the environment, it doesn’t mention the principle of precaution,<sup>24</sup> nor it specifically provides for the domestic reception of international environmental law, which is thus ordinarily incorporated.<sup>25</sup> However, art. 226, by providing that “the state shall promote the internationalization of [...] ecological relations on the basis of fairness, reciprocity, and the national interest,” normatively guides the foreign relations of Colombia, by instructing political authorities to pursue international cooperation in the field of environmental protection. This leaves unaffected, however, the issue of the domestic status of international environmental law.<sup>26</sup>

Over time, the Constitutional Court has dealt with the precautionary principle and its national statute on several occasions. Initially, in a set of cases ranging from 1993 to 2002, it deemed that it had only statutory rank.<sup>27</sup> Ever since 2004, instead, the Court has

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<sup>22</sup> Alejandro Gomez - Velasquez, ‘The “Constitutionalization” Process of the International Environmental Law in Colombia’ [2016] *Revista de Derecho* 1.

<sup>23</sup> *Report of the United Nations Conference on Environment and Development* (UN 1993) vol I, annex I, principle 15; it should be noted that the formulations of the principle are somewhat various across the international instrument that include it. See also Jacqueline Peel, ‘Precaution’ in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2021); Nicolas de Sadeleer, ‘The Precautionary Principle’ in Nicolas de Sadeleer (ed), *Environmental Principles: From Political Slogans to Legal Rules* (2nd edn, Oxford University Press 2020).

<sup>24</sup> However, art. 80 provides that “the state shall plan the handling and use of natural resources in order to guarantee their sustainable development, conservation, restoration, or replacement. Additionally, it shall caution and control the factors of environmental deterioration, impose legal sanctions, and demand the repair of any damage caused. In the same way, it shall cooperate with other nations in the protection of the ecosystems located in the border areas.”

<sup>25</sup> Treaty-based law through Treaty Passing Acts which have the rank of ordinary legislation (Constitutional Court, Decision C- 864 of 2006; Constitutional Court, Decision C- 252 of 2019); customary law is automatically incorporated in the domestic legal order, as per the case-law of the Constitutional Court (Decision C- 1189 of 2000, para. 2.3).

<sup>26</sup> In the classification provided by Schriewer, this provision constitutes an instance of the active aspect of openness, not one of its receptive aspect.

<sup>27</sup> Constitutional Court of Colombia, Judgement of 24 November 1994, C-528/94, para. VI.2: “in this case the principles to which the provision [article 1 of the Act 99 of 1993] refers are not constitutional, general or fundamental to the legal and political system, as might

steadily maintained that the principle at issue is part of the Colombian Constitution, holding that “the Precautionary Principle is constitutionalised because it emerges from the internationalisation of the ecological relations (art. 266 of the Constitution) and from the duties of protection and prevention contained in art. 80 of the Constitution.”<sup>28</sup>

In both cases, the constitutional courts read international law into the national constitution, by interpreting open constitutional clauses as well as specific constitutional provisions consistently with the international obligations of the state formally incorporated at a lower level in the system of sources: thus, the content of domestic provisions is shaped by reference to the international obligations of the state, an interpretive operation contingent upon the axiological continuity between the two levels.

#### **A. The principle of friendliness towards international law and the permeability of the legal order.**

Having reviewed to instances of the concrete operation of the principle of openness, it is now time for a more general and abstract discussion thereof.

First, the principle of openness is a constitutional principle, and not only a synthetical expression aiming at summarising a set of constitutional provisions dealing with the reception of international law in the domestic sphere.<sup>29</sup> Indeed, while many constitutions encompass, especially in the fields of fundamental rights protection, provisions which, by providing for the ‘enhanced’ reception of international law, meant to become integral part of the Constitution, or to be used as an interpretive guidance

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be initially understood and as the plaintiff wants to understand it, saying that they are equal to the preamble of the Constitution.” See also, similarly, Judgement of 23 April 2002, C-293/02, para. VI.3.4, VI.3.6.

<sup>28</sup> Constitutional Court of Colombia, Judgement of 27 July 2010, C-595/10, para. 4.5.1. See also Judgement of 3 April 2008, T-299, para. 3.2; Judgement of 12 October 2004, C-988/04, para. VII.15. See, generally, Alejandro Gómez-Velásquez, ‘El proceso de “constitucionalización” del derecho internacional ambiental en Colombia’ [2016] *Revista de Derecho* 1.

<sup>29</sup> See, as to Germany, Mehrdad Payandeh, ‘Völkerrechtsfreundlichkeit Als Verfassungsprinzip’ (2009) 57 *Jahrbuch des öffentlichen Rechts der Gegenwart. Neue Folge (JöR)* 465; Frank Schorkopf, ‘Völkerrechtsfreundlichkeit und Völkerrechtsskepsis in der Rechtsprechung des Bundesverfassungsgerichts’ in Thomas Giegerich (ed), *Der ‘offene Verfassungsstaat’ des Grundgesetzes nach 60 Jahren: Anspruch und Wirklichkeit einer großen Errungenschaft* (Duncker & Humblot 2010) 151 ff.; Alexander Kees, ‘Bricht Völkerrecht Landesrecht?’ (2015) 54 *Der Staat* 63, 83.

thereof, are expressive of the principle of friendliness towards international law,<sup>30</sup> the latter cannot be reduced to a mere synthesis of the former.

Instead, as a constitutional principle, that of friendliness towards international law has both a declaratory nature, as it synthesises distinct constitutional provisions dealing with the domestic status of international law, at the same time normatively underlining and justifying them, and a normative one, producing legal effects that go beyond those of said provisions. Indeed, while the principle of friendliness towards international law is interpretively derived from an encompassing consideration of the specific constitutional provisions, and (eventually) of the preamble, it acquires a normative effect that goes beyond that of these single provisions. Specifically, it constitutes the general theoretical and normative background to those single provisions, thus influencing their interpretation, and it fills the normative lacunas in the constitutional discipline of the reception of international law.

However, being interpretively derived from a number of discrete constitutional provisions, the principle of friendliness cannot determine interpretive outcomes that are inconsistent with them.<sup>31</sup>

As to the effect of the principle at issue, it is that of conforming the domestic legal order with the international one to the largest extent constitutionally possible, by both avoiding conflicts and by ensuring the domestic effectiveness of international law.<sup>32</sup>

Thus, the principle at issue makes the national legal order “permeable” to the international one, whereby permeability refers to the of receptive aptitude of a given legal system of legal principles and norms that originate from another one.<sup>33</sup>

More precisely, legal permeability has been described as

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<sup>30</sup> For example, such provisions might provide for the constitutional rank of international law, or require that national law, including the constitution, is interpreted in light of international law. For a comparative review, see Giuseppe Martinico, ‘Constituciones, Apertura y Derecho Comparado’ (2019) 67 *Estudios de Deusto* 111, 117, f.

<sup>31</sup> FCC, Judgement of the Second Senate of 26 March 1957, 2 BvG 1/55, BVerfGE 6, 309, *Reichskonkordat*, para. 243; and, in greater detail, Order of the Second Senate of 15 December 2015, 2 BvL 1/12, BVerfGE 141, 1, *Treaty Override*, para. 69. See Theresa Abend, *Grenzen der Völkerrechtsfreundlichkeit* (Göttingen University Press 2019) 82 ff.; Robert Frau, *Der Gesetzgeber zwischen Verfassungsrecht und völkerrechtlichem Vertrag* (Mohr Siebeck 2015) 71, f.

<sup>32</sup> Schriewer (n 8) 76 ff.; Knop, Daniel, *Volker- Und Europarechtsfreundlichkeit Als Verfassungsgrundsätze* (Mohr Siebeck 2014) 200 ff.

<sup>33</sup> Wendel (n 117). Klaus Vogel, *Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit: ein Diskussionsbeitrag zu einer Frage der Staatstheorie sowie des geltenden deutschen Staatsrechts* (Mohr 1964) 8 ff.

“the self-restraints, by a given legal system, of its claim to exclusive law-making power with the purpose of legally recognising normative fields, which would in principle fall within its own law-making scope, but which are nevertheless to be determined by legal principles or rules of law originating from a different legal order.”<sup>34</sup>

While this is a useful and insightful definition, it is quite evidently conceived with the phenomenon of the EU integration process, and the transfer of sovereign prerogatives it entails, authorised under art. 23 of the German Basic Law, in mind.<sup>35</sup> As such, the fundamental idea is that of the transfer of sovereign powers, which are taken from the state and conferred upon the supranational organisation: in the fields where such conferral has occurred, the law-making prerogative of the State withdraws and that of the EU expands.<sup>36</sup> The idea of the exclusiveness law-making thus fundamentally remains; what changes is the subject holding such prerogative: the Union and not the State.<sup>37</sup>

Obviously, no such transferral of sovereign powers occurs with regard to international law – indeed, this is the defining aspect that distinguishes supra- from inter- national integration.

Nonetheless, the notion of permeability is not to be discarded in addressing the effects of the principle of friendliness towards international law. Just as in the case of supranational integration, the state’s claim to exclusive law-making typical of modern statehood is withdrawn; however, no transfer of sovereign powers takes place, and no supranational organisation acquires the exclusive prerogative to regulate a given field. Rather, the claim of the municipal legal order to exclusive law-making is only partially withdrawn, allowing the international norms binding upon the state to concur to the

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<sup>34</sup> Ibid. (author’s translation).

<sup>35</sup> This is also suggested by the subtitle: ‘a comparison of constitutional integration norms at state and Union level’ (*‘verfassungsrechtliche Integrationsnormen auf Staats- und Unionsebene im Vergleich’*).

<sup>36</sup> See ECJ, Judgment of the Court of 5 February 1963, C-26/62, *Van Gend en Loos v Administratie der Belastingen*, E.C.R. 1963, 3, p. 12: “the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields.”

<sup>37</sup> Ultimately, this conception rests upon the theoretical premise of the indivisibility of sovereignty, as applied to European integration: for a convincing critique thereof, see Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press 2009) ch 1 especially.

definition of the domestically applicable law, even if this wouldn't have been possible by strictly applying structural criteria.

Thus, as Nicole Roughan argues, the authority of law, and especially of domestic law, ceases to be exclusive and becomes relative, relying upon both procedural and substantial (here: structural and axiological) justifications.<sup>38</sup> As a consequence, with specific regard to the domestic authority of international law, “a particularly strong substantive justification (favouring either level of authority) can make up for a procedural deficit and can establish authority.”<sup>39</sup>

This is to say, under the principle of friendliness towards international law, the national constitutional order acknowledges the claim to normativity of international law and strives to ensure its domestic effectiveness in light of its axiological content, at times even beyond what would be possible under strict structural considerations.<sup>40</sup>

In the terminology of the German FCC, the principle of international law friendliness determines the obligation to “take into account,” when determining the law applicable to the case, the relevant international obligations binding the state, at times

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<sup>38</sup> Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (Oxford University Press 2013). Accordingly, relative authority can be conceived in two senses: in the first one, it “suggests that there can be degrees of authority rather than treating authority as necessarily ultimate;” in the second one, it “means more than simply concurrent or co-existing or comparable authority; rather it is authority whose legitimacy is mutually constitutive and mutually constraining between two persons or bodies which prima facie have the standing of authority, but which cannot alone have independent legitimacy because of the existence of the other and the need for interaction” (ibid., p. 137, f.). The Author, while not refuting the former, adopts the latter understanding of relative authority, which implies a pluralist setting, i.e. the existence of overlapping and reciprocally independent authorities. This is different from the domestic status of international law under constitutional law and the principle of friendliness: here the domestic authority of international law is not original and independent, but rather a function of domestic constitutional law. This becomes quite apparent when the Author applies her conception of authority to the relation between national and international law, as she parts way with the “orthodox account” of international law’s authority, centred upon the role of consent (p. 180 ff.). Thus, the Author’s conception cannot be fully applied and some adjustments will be necessary. See also, for a similar conception of relative authority, Roger Cotterrell, ‘Transnational Communities and the Concept of Law’ (2008) 21 *Ratio Juris* 1, 15, advancing a ‘conception of relative legal authority linked to a notion of degrees of legality. This will not solve jurisdictional disputes or conflicts over authority and legitimacy claims but it may offer a slowly emerging template in terms of which these can be judged. Consistently with the idea of an emerging “cosmopolitan outlook,” the emphasis in determining the authority, scope and meaning of regulation will fall increasingly on negotiation and mutual recognition from diverse perspectives and standpoints, rather than on hierarchical juristic determination and observation from some fixed jurisdictional point (which, in fact, for many purposes no longer exists).’

<sup>39</sup> Roughan (n 38) 184.

<sup>40</sup> Vogel (n 33) 8 ff.

even if, were they to merely apply structural considerations, this would be uncalled for.<sup>41</sup> Thus, the international obligations of the state become, in their own capacity, legal authorities under national law, albeit not to the exclusion of domestic sources of law, instead concurring to the determination of the law applicable to the case.<sup>42</sup>

Thus, under the principle of friendliness towards international law, the reductionism typical of modern statehood, centred upon the unity of legal authority, a corollary of the unity of internal state sovereignty, is diminished and the law is the complex result of a convergence of domestic and international authorities. The solution to this complexity is to be found in the revaluation of the interpretative role of the judge, who has the task of ‘inventing the law’ (from the Latin *invenio*, to find), that is, of identifying the law applicable to the case by an operation of synthesis of the norms claiming to regulate the concrete case under review, stemming from the concurring legalities.<sup>43</sup>

However, and crucially, the principle of friendliness, due to its nature as an autonomous principle of constitutional law, does not result in an unconditional and absolute reception of international law, as even the open state retains, from the tradition of statehood, the claim to ultimate and exclusionary authority.<sup>44</sup> While in this context such a claim goes dormant, and international law is allowed to permeate the municipal

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<sup>41</sup> On the difference between such a duty and that of paying ‘respectful consideration’ to international law and international courts decisions established under the case-law of the US Supreme Court (especially after *Medellin*), see Alexander Proelß, ‘Die verfassungsrechtliche Berücksichtigungspflicht im Lichte des respectful consideration-Erfordernisses des U.S. Supreme Court’ in Thomas Giegerich (ed), *Der ‘offene Verfassungsstaat’ des Grundgesetzes nach 60 Jahren: Anspruch und Wirklichkeit einer großen Errungenschaft* (Duncker & Humblot 2010) 191: ‘In comparison with the constitutional duty of consideration, which the German state bodies must fulfil in the opinion of the FCC, the requirements to be observed by the US courts in relation to the decisions of international jurisdiction are less strict. In particular, the respectful consideration requirement does not require an insistence on the constitutional status of the legal interests that may justify a deviating interpretation.’

<sup>42</sup> The idea that international law sources (and more generally non-state law) concurs to the determination of the law applicable to the case is central in the recent scholarship on interlegality: see Edoardo Chiti, Alberto Di Martino and Gianluigi Palombella, *L’era Dell’interlegalità* (Il Mulino 2021); Jan Klabbers and Gianluigi Palombella (eds), *The Challenge of Inter-Legality* (Cambridge University Press 2019). See, particularly, in this sense, Alberto di Martino, ‘Dalla Regola per Il Caso al Caso Della Regola’ in Edoardo Chiti, Alberto di Martino and Gianluigi Palombella (eds), *L’era dell’interlegalità* (il Mulino 2021).

<sup>43</sup> Grossi, *L’invenzione del diritto* (n 63).

<sup>44</sup> Mattias Wendel, *Permeabilität im europäischen Verfassungsrecht verfassungsrechtliche Integrationsnormen auf Staats- und Unionsebene im Vergleich* (Mohr Siebeck 2011) 8, f.

legal order, it is always possible for the claim to exclusive law-making inherent in the sovereignty of the State to be reaffirmed, resulting in the exclusion of the domestic authority of international law.<sup>45</sup> As it is here argued, however, under the principle of international law friendliness, this occurs residually and due to axiological conflicts between national and international law.<sup>46</sup>

Accordingly, under the principle of friendliness towards international law, the domestic status of international law norms is not only a function of structural considerations, but also of axiological ones, whereby the axiological continuity with the domestic constitution is the key factor in shoring up structural deficiencies that might otherwise limit international law's domestic effectiveness. Conversely, in instances of axiological conflicts, the state's claim to exclusive law-making resurfaces, determining the closure of the legal order and the expulsion therefrom of axiologically inconsistent international norms.<sup>47</sup>

So, ultimately, are international law sources to be considered, under the principle of friendliness towards international law, '*fonti-fatto*' (normative facts) or '*fonti-atto*' (normative acts)?

It is clear that they cannot be considered normative acts, as that would imply the transferral of the prerogative to make domestically applicable law to international institutions, something which is the clear sign of a supra-constitutional legal order, as is the case with the European Union.

However, neither the classic understanding of international law sources as normative facts, whose domestic authority is strictly dependent on their authorisation and incorporation under national law, is a good fit, as it is hardly compatible with the domestic relevance of international law under the principle of international law friendliness discussed above. However, this conception, typical of modern statehood, is not to be completely discarded in the context of post-modern, open statehood, provided

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<sup>45</sup> Neil Walker, 'When Sovereigns Stir' in Bas Leijssenaar and Neil Walker (eds), *Sovereignty in Action* (Cambridge University Press 2019).

<sup>46</sup> For a similar argument, see also Alberto di Martino and Gianluigi Palombella, 'Oltre l'architettura ordinamentale: il nuovo diritto composito della «terza ondata»' (2020) 40 *Quaderni costituzionali* 225, 227.

<sup>47</sup> This conclusion differs from Roughan's, as, according to the Author, in case of substantial conflict, the solution to the case is the product of a negotiation between the two competing authorities. The perspective of constitutional law, and of domestic (and, especially, constitutional) courts in such cases, instead, is the negation of any domestic authority on the part of international law and the reassertion of the exclusive law-making prerogative of the State.

that some adjustments are made. Indeed, as it is a central feature of the dynamics of traditionality, the core of the conception of normative facts as applied to the domestic status of international law can be retained, even in light of the relaxation of the structural limits to the reception of international law typical of open statehood.

Accordingly, the domestic authority of international law continues to be due to a domestic authorisation. As such, constitutional law continues to exert a controlling function over the reception of international law: this remains unchanged.<sup>48</sup> What is specific of the control-function under the principle of friendliness towards international law is what is protected: rather than structural concerns pertaining to the reception of international law in the domestic legal system, the focus is on preventing international law to negatively affect the values and principles enshrined in the national constitution. As argued by Hobe,

“the relativisation of statehood brought about by the connection between [the national and international] levels in the fulfilment of constitutional tasks and the increasing openness of the state to the international community, typical of the state objective of openness, requires in a special way the identification of the individual with the political community surrounding them, which is one of the functions of the state.

And Art. F.1 TEU [now art. 4.2 TEU] indicates that identification via the nation-state – its language, culture and history – within the framework of institutionalised integration processes is proving to be an increasingly important task of the state. Although identification does not (or no longer) take place solely via the state, it is nevertheless a defining task of the state as long as the (European) Community and, even more so, international organisations are not (yet) in a position to convey such an identity or are only growing into this task.”<sup>49</sup>

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<sup>48</sup> Andrej Lang, *Die Verfassungsgerichtsbarkeit in der vernetzten Weltordnung: Rechtsprechungskoordination in rechtsordnungsübergreifenden Richternetzwerken*, vol 293 (Springer 2020) 247 ff.

<sup>49</sup>Stephan Hobe, *Der offene Verfassungsstaat zwischen Souveränität und Interdependenz. Eine Studie zur Wandlung des Staatsbegriffs der deutschsprachigen Staatslehre im Kontext internationaler institutionalisierter Kooperation* (Duncker & Humblot 1998) 419. Beyond elements typical of the national identity, the Author also acknowledges the relevance to the identity-providing function of the state of constitutional values and fundamental rights: “the orientation of the constitutional state towards the values of the constitution and the protection of minorities will undoubtedly fulfil the concept of the opening towards integration of the open constitutional state” (ibid., p. 424). (my translations).

Thus, while the principle of friendliness towards international law allows for a greater permeation of the national legal order by international law, determining the domestically applicable law by weighing substantial considerations as to the together with structural ones relating to the forms and procedures mandated by constitutional law for the reception of international law, at times remedying structural shortcomings in light of axiological considerations, this opening is not absolute and unconditional. Instead, the reception of international law in the national order is barred if it results in axiological incompatibility between the two levels, thus protecting the identity of the national constitution.

#### **4. What lies behind: the contemporary constitutional justifications for the adoption of modern or post-modern, open paradigms of statehood.**

As above discussed, according to the modern conception of statehood, the incorporating instruments, through which international law is allowed to produce normative effects within the national legal order, acquire the function of controlling and regulating the penetration of international law in the domestic legal order.

In democratic contexts, such instruments are generally approved by Parliaments:<sup>50</sup> in this sense, strict requirements as to the reception of international law, and the ‘policing’ thereof by courts through structural reasoning as described in the previous chapter, can be understood as functional to the preservation of the democratic legitimation of the law, and of international law more specifically.<sup>51</sup> This is relevant in a twofold perspective.

First, it represents a “classic” safeguard vis-à-vis the overreach of the executive branch wishing to avoid parliamentary oversight in its conduct of foreign affairs, preventing them from producing domestic legislative changes without the involvement

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<sup>50</sup> Luzius Wildhaber, *Treaty-Making Power and Constitution. An International and Comparative Study* (Helbing & Lichtenhahn 1971); Antonio Cassese (ed), *Parliamentary Control over Foreign Policy* (Brill Nijhoff 1980); Pierre-Hugues Verdier and Mila Versteeg, ‘International Law in National Legal Systems: An Empirical Investigation’ (2015) 109 *American Journal of International Law* 514.

<sup>51</sup> *R. (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para. 55-59; see Mark Elliott, ‘The Supreme Court’s Judgment in Miller: In Search of Constitutional Principle’ (2017) 76 *The Cambridge Law Journal* 257, 25: ‘the crucial point being that the Miller judgment gave Parliament the chance to have democratic input and insist upon oversight.’.

of parliaments.<sup>52</sup> This is the case, e.g., of the abuse of agreements in simplified form, which generally have weaker requirements as to parliamentary oversight, and that of the avoidance of parliamentary oversight in withdrawal procedures.<sup>53</sup>

Second, it has a cautionary function against judicial excesses, whereby international law is attributed, at least *de facto*, a higher formal status than what expressly provided for by the constitution, or it is given domestic effect even if not perfectly incorporated, especially through strong consistent interpretation.<sup>54</sup> Under this perspective, stressing the role of the domestic incorporating procedures and acts is also functional to rebutting the criticisms sometimes addressed to international law,<sup>55</sup> whereby it is argued that recognising domestic authority to international law results in a loss in terms of democratic legitimacy.<sup>56</sup> One very well-known instance thereof can be

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<sup>52</sup> Wildhaber (n 50) 9–14.

<sup>53</sup> As to the abuse of international agreements in simplified form, this is especially the case in the field of migration: see Eva Kassoti and Narin Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum*, vol 1 (TMC Asser Press 2022); Andrea Spagnolo, 'The Conclusion of Bilateral Agreements and Technical Arrangements for the Management of Migration Flows: An Overview of the Italian Practice' (2019) 28 *The Italian Yearbook of International Law Online* 209; Chiara Favilli, 'Quali modalità di conclusione degli accordi internazionali in materia di immigrazione?' [2005] *Rivista di Diritto Internazionale* 156. As to the avoidance of parliamentary involvement in withdrawal procedures, see Edward T Swaine, 'International Foreign Relations Law Executive Authority in Entering and Exiting Treaties' in Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law: Bridges and Boundaries* (Cambridge University Press 2021); Campbell McLachlan, 'The Assault on International Adjudication and the Limits of Withdrawal' (2019) 68 *International & Comparative Law Quarterly* 499; Hannah Woolaver, 'From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal' (2019) 30 *European Journal of International Law* 73.

<sup>54</sup> Helmut Philipp Aust, 'The Democratic Challenge to Foreign Relations Law in Transatlantic Perspective' in David Dyzenhaus, Jacco Bomhoff and Thomas Poole (eds), *The Double-Facing Constitution* (Cambridge University Press 2020). On consistent interpretation, its relationship with direct effect and its effects on the hierarchy of sources, see André Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press 2011) 139, ff.

<sup>55</sup> Heike Krieger, 'Die Herrschaft Der Fremden — Zur Demokratietheoretischen Kritik Des Völkerrechts' (2008) 133 *Archiv des öffentlichen Rechts* 315, 315, defending the democratic legitimacy of international law by taking domestic (parliamentary) procedures for ratification and incorporation seriously.

<sup>56</sup> See, critically, Gráinne de Búrca and Oliver Gerstenberg, 'The Denationalization of Constitutional Law' (2006) 47 *Harvard International Law Journal* 20, 245: 'From the dualist perspective, the ultimate legitimate source of coercive legal norms within a democratic legal order is the democratic process itself. Accordingly, international norms – including even human rights norms – are enforceable domestically only when and to the extent that the democratic sovereign has explicitly given them effect by "incorporating" them through acts of statutory legislation. Dualists worry that allowing international norms to have an "immediate" effect on domestic constitutional choices – that is,

found in the U.S. context, especially at the occasion of the debate on the legitimacy of references to foreign and international authorities in U.S. judicial decisions, as it will be later discussed.<sup>57</sup> Similarly, it is a widespread critique among populists, holding that international law illegitimately constrains the power of the people.<sup>58</sup>

While both the U.S. and the populist discourse arguably go too far, the democratic legitimising function conveyed upon international law in the domestic sphere by the constitutional procedures for the domestic reception of international law is a cornerstone of the constitutional law of foreign relations across most jurisdictions.<sup>59</sup> For example, the doctrine of incorporation developed in the English legal order is fundamentally premised upon the constitutional imperative to preserve the sovereignty of Parliament and, thus, representative democracy. Somewhat similarly, the German FCC's arguments for upholding the *lex posterior derogat priori* rule in its *Treaty Override* decisions heavily relied on the democratic principle.<sup>60</sup>

Thus, the judicial elaboration of general constitutional principles – such as that of friendliness towards international law – allowing for a greater permeability of the domestic legal order to international law and resulting in the limitation of the law-making prerogative of the state through its political bodies, which are democratically

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unmediated by legislative acts of statutory incorporation – would open the proverbial floodgates, permitting a freewheeling and self-programming judiciary, accountable only to its own professional norms of judicial comity, to usurp domestic legal and political prerogatives. Ports of entry, for international and foreign proto-legal materials therefore are, as to both existence and scope, wholly contingent upon domestic statutory legislation under the domestic constitution.’

<sup>57</sup> See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 750 (2004) (Scalia J. dissenting): “We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect. For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law.” See also Curtis Bradley, ‘International Delegations, the Structural Constitution, and Non-Self-Execution’ (2003) 55 *Stanford Law Review* 1557; John C Yoo, ‘Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution’ (1999) 99 *Columbia Law Review* 2218.

<sup>58</sup> Tamar Hostovsky Brandes, ‘International Law in Domestic Courts in an Era of Populism’ (2019) 17 *International Journal of Constitutional Law* 576; Heike Krieger, ‘Populist Governments and International Law’ (2019) 30 *European Journal of International Law* 971; Janne E Nijman and Wouter G Werner (eds), *Netherlands Yearbook of International Law 2018: Populism and International Law*, vol 49 (TMC Asser Press 2019).

<sup>59</sup> Cassese (n 50).

<sup>60</sup> FCC, Order of the Second Senate of 15 December 2015, 2 BvL 1/12, BVerfGE 141, 1. For a discussion of the decision, see *supra*, ch. 2, par. 3.B and *infra*, ch. 7, para. 2.C.

legitimised (at least in constitutional democracies), must have strong constitutional foundations.

Apart from the general principle of openness, making the consistency between national and international law a constitutional objective in itself, said constitutional foundations are to be especially found in the consideration of the inadequacy of the state to achieve many of its own constitutional finalities, aims, and objectives, without relying on the structured cooperation of other states: among many, one might think of those of maintaining peace and security, ensure public health, achieving prosperity, protecting the climate and the environment. In the field of fundamental rights, this is premised also on the universalistic nature of human dignity, underpinning both national and international catalogues of rights generally considered the foundation of the various and more specific human and fundamental rights.<sup>61</sup>

Thus, on top of the general opening of the state, there are specific grounds, linked to the achievement of specific constitutional aims, justifying the permeability of the legal order.<sup>62</sup> Accordingly, the principle of friendliness towards international law – and that, thereto connected, of permeability of the legal order – operates selectively.<sup>63</sup> In light of these considerations, the constitutional duty to ensure the consistency of the national legal order with the state’s international obligations, imposed upon all public bodies within their respective attributions, thereby including the courts, operates to different degrees depending on the field of law under consideration. This is expressly maintained by the German FCC,<sup>64</sup> and is inherent in the Colombian doctrine of the block of constitutionality, with the differentiation it conveys between the block *stricto*

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<sup>61</sup> Mary Neal, ‘Respect for Human Dignity as “Substantive Basic Norm”’ (2014) 10 International Journal of Law in Context 26; C McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 European Journal of International Law 655. n the influence of the 1948 Universal Declaration of Human Rights on the drafting of art. 1 of the German Basic Law, see Thilo Rensmann, *Wertordnung und Verfassung* (Mohr Siebeck 2007) 25 ff.

<sup>62</sup> Hobe (n 49) 390 ff.

<sup>63</sup> Wendel (n 44) 9, f.

<sup>64</sup> See FCC 2 BvR 2115/01 of 7 November 2006, para. 43: “The Federal Constitutional Court has repeatedly dealt with the principle of international law-friendliness of the Basic Law and derived from it the duty of the specialized courts to take into account the decisions of an international court established by an international treaty. It has established that this constitutionally direct obligation to take into account, which also applies to the application of fundamental rights, cannot be assumed for every provision of international law, but only insofar as this is required by the concept of the Basic Law laid down in Articles 23 to 26 of the Basic Law and in Articles 1(2) and 16(2) sentence 2 of the Basic Law.”

*and lato sensu* understood, and the remaining international law binding on Colombia not included therein.

The picture is completed by the principle of subsidiarity, which, “as a rule for exercising competences, indicates the reduced capacity of the state to fulfil tasks in the international network of relations and at the same time confirms the abandonment of the state’s claim to exclusivity to solve such problems.”<sup>65</sup> Accordingly, insofar as a constitutional objective can be met by the state acting alone, without seeking international cooperation, the substantive argument in favour of maximising the domestic reception of international law are not particularly cogent; conversely, the constitutional reasons for strictly adhering to structural reasoning in the reception of international law are more pressing. Correspondingly, however, the more international cooperation is needed in order to achieve those goals, the more pressing the arguments in favour of a greater conformation of the national legal order to the international one under the principle of friendliness towards international law. As it will be discussed, this is particularly evident in climate cases, where the Paris Agreement, and the temperature target it sets in Article 4 is often invoked domestically as a parameter of the constitutional duty to take action, even if it doesn’t create an international obligation to that effect.<sup>66</sup>

In sum, under the principle of openness and that of friendliness towards international law, the reception of international law in the domestic legal system is not only a function of formalities and procedures prescribed by constitutional law; instead it is also determined by substantive considerations, taking into account the need to achieve constitutional goals: when particularly pressing, such considerations are capable of trumping defects or deficiencies as to the structural requirements for the reception of international law in the domestic legal order.

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<sup>65</sup> Hobe (n 49) 402.

<sup>66</sup> As to the domestic invocation of the Paris Agreement, see Anna-Julia Saiger, ‘Domestic Courts and the Paris Agreement’s Climate Goals: The Need for a Comparative Approach’ (2020) 9 *Transnational Environmental Law* 37; Lennart Wegener, ‘Can the Paris Agreement Help Climate Change Litigation and Vice Versa?’ (2020) 9 *Transnational Environmental Law* 17. As to the non-binding nature of the “Paris target temperature” set under art. 4 of the Agreement, see Daniel Bodansky, ‘The Legal Character of the Paris Agreement’ (2016) 25 *Review of European, Comparative & International Environmental Law* 142; Christina Voigt, ‘The Paris Agreement: What Is the Standard of Conduct for Parties?’ (2016) 26 *Questions of International Law* 17.

Just as it is the case with any other principles, that of friendliness towards international law doesn't operate in an all-or-nothing fashion (as, instead, rules, including those regulating the procedures for the domestic reception of international law, do). Rather, the principle of friendliness (as any other legal principle) "states a reason that argues in one direction, but does not necessitate a particular decision;"<sup>67</sup> a reason arguing in one direction, and requiring the maximum possible fulfilment of the objective pursued, that is to weighed against other, and contrasting, reasons.<sup>68</sup> Accordingly, as the question of the domestic applicability of international law becomes a matter of comparing contrasting substantive reasons, rather than one of verifying the correct enactment of the required acts through the mandated procedures, the role of the (judicial) interpreter is significantly increased, even to the detriment of that of other constitutional actors – first and foremost, parliaments –, and the legal certainty and foreseeability are adversely affected, in a move towards a more casuistic approach.

Whether this trade-off is acceptable, and at which conditions, is ultimately a question that each legal order addresses according to its own constitutional framework: legal orders that encompass modern understanding of statehood resist such approaches to the reception of international law; open states, at least in certain circumstances, do not.

## **5. Provisional conclusions.**

This chapter put forward the main thesis of this research, namely that the principle of openness of the legal order is qualitatively correlated with the framing of conflicts between national and international law in terms of identity, rather than as structural conflicts, which the presentation of conflicts which is more closely correlated with a modern conception of statehood.

It did so by framing the discussion in terms of legal tradition, whereby the alternative between modern and open statehood is not understood in radically alternative terms, whereby open statehood, with its institutions and rules for the reception of international law, would represent a radical departure from the modern state. Rather, the descriptive approach here favoured is one whereby change takes place

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<sup>67</sup> Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 26.

<sup>68</sup> Understanding principles as optimisation requirements, see Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2010) 47.

incrementally, and legal structures and doctrines typical of the modern state are adapted to a different constitutional and international context, one characterised by a constitutional decision for the opening of the state's legal order and by a strongly intensified and more structured international cooperation among states.

By looking at the question of how national non-application of international law through the looking glasses of legal tradition, it was then possible to put forward a working hypothesis capable of explaining the alternative, described in the previous chapter, between identity- and structure- resistance to international law; such hypothesis is still to be tested and verified through the analysis of a number of jurisdictions, which will be undertaken in the next chapters.

Such reconstructive hypothesis is structured in three layers: that of the values of the legal order, at the roots of the legal discipline concerning the relationship between national and international law, the doctrines concretely disciplining it, and, finally, the techniques for construing judicial non-application of international law. Thus, three, interconnected, dichotomies are presented.

Starting at the level of values, the alternative here is between a modern and an open conception of statehood. What is common to both approaches is a fundamental commitment to a statist understanding of the law: as already mentioned, no state organ can accept a monist organisation of the relationship between the two levels, whereby the conditions of validity of domestic law are determined by international law. Thus, the application of the international law norm in the domestic legal system is always due to the reception thereof by national law, and it is conditional upon the respect of the criteria of recognition set out in domestic (constitutional) law. However, while a number of states maintain a modern paradigm of statehood, after the Second World War, in post-dictatorial contexts, and increasingly during the decolonisation, Constitutions have "opened up" to international law.

Particularly, and thus coming to the issue of the doctrines regulating the place of international law in the domestic legal system, the main consequence of the opening up of states when it comes to the issue of the domestic reception of international law, is the acknowledgment, by the national constitutional order, of the normative claim of international law. Accordingly, legal authority, rather than exclusive becomes relative, and the domestically applicable law is determined also by recourse to axiological considerations and by mediating between the competing norms, stemming from different legalities, in light of their axiological implications. In this context, though

closure, premised upon the state's sovereignty and the autonomy of the legal order, is always possible, this becomes an *ultima ratio*, recourse to which is made when conflicts between legalities appear unsolvable and the two levels express axiologically incompatible normative claims.

## Chapter VI International law in the UK

This Chapter discusses the relationship between national and international law, as well as the instances of non-application by domestic courts of the latter, in the United Kingdom.

The United Kingdom is a somewhat peculiar jurisdiction in that, in light of the principle of parliamentary sovereignty it adopts as cornerstone of its uncodified and partially unwritten constitution, it does not feature a “strong” system of judicial review.

In spite of this “peculiarity,” the English legal order is a prototype of a constitutional legal order embracing a modern conception of statehood and of the relationship between national and international law. Particularly, as it will become clear throughout the following discussion, the application of international treaty-based law in the domestic legal order, upon which this chapter is mainly focused, is strictly predicated upon its positive incorporation by parliamentary legislation. In this regard, the choice to mainly focus the discussion undertaken in this chapter on the non-application of unincorporated international law (either in general, or in the particular fields of international human rights and climate change law), rather than on the possibility for Parliament to disregard previously enacted international law commitments, aims at substantiating the assumption that the immunity of legislation from judicial review accounts only marginally for the status of international law in the domestic legal order: instead, the main factor in this regard – it is submitted – is the principle of parliamentary sovereignty, understood as an expression of a conception of statehood centred upon the state-bound collective self-determination, institutionally realised through parliamentary democracy. This consideration is also useful in dispelling eventual concerns as to the non-comparability of the English constitutional experience due to the “oddity” of its weak system of judicial review, something particularly relevant when the other examined cases are those of Germany and Colombia, both jurisdictions featuring very strong constitutional courts. The immunity of legislation from judicial review is simply not the main determining factor of the domestic status of international law under English law.

As it will be shown, according to this premise, and instrumentally to it, instances of non-application of international law in the domestic legal order are generally framed in structural terms. It is particularly interesting to acknowledge the careful attention the courts, especially as of recent years, pay at making sure no backdoors are created,

allowing unincorporated treaties to receive domestic application either through consistent interpretation of statutes, by developing the common law, or by applying Convention rights.

The Chapter first presents the principle of parliamentary sovereignty, discussing the consequences that derive from it as to the domestic status of international law; subsequently, the doctrine of incorporation is discussed, together with some of its corollaries. Finally, the general English approach to the domestic status of international law is tested in two fields of particular “cosmopolitan significance:” that of the protection of human rights and that of the mitigation of climate change.

## **1. The English constitution and the sovereignty of Parliament**

When addressing the uncodified and largely unwritten English constitution, one must begin from the principle of parliamentary sovereignty, a principle generally considered the cornerstone of the English legal system.<sup>1</sup>

Two traditional definitions of the principle of parliamentary sovereignty are provided by William Blackstone and Albert Venn Dicey,<sup>2</sup> upon which the “old” view of

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<sup>1</sup> See, generally, Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015); Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013); ‘Symposium: The Changing Landscape of British Constitutionalism’ (2011) 9 *International Journal of Constitutional Law* 79; Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press 2010); Jeffrey Denys Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Clarendon 2001).

<sup>2</sup> William Blackstone, *Commentaries on the Laws of England*, vol 1 (Oxford University Press 2016) 107:

“the power and jurisdiction of parliament, says sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. [...] It can, in short, do every thing that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament. True it is, that what they do, no authority upon earth can undo.”

See also AV Dicey, *An Introduction to the Study of the Law of the Constitution* (10th ed, Palgrave Macmillan UK 1985) 40:

“the principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.”

the principle at issue was developed.<sup>3</sup> According to this view, the sovereignty of Parliament is understood as meaning that:

“no Act of the sovereign legislature (composed of the Queen, Lords and Commons) could be invalid in the eyes of the courts; that it was always open to the legislature, so constituted, to repeal any previous legislation whatever; that therefore no Parliament could bind its successors; and that the legislature had only one process for enacting sovereign legislation, whereby it was declared to be the joint Act of the Crown, Lords and Commons in Parliament assembled. [...] that in case of conflict between two Acts of Parliament, the later repeals the earlier.”<sup>4</sup>

Thus, at the core of parliamentary sovereignty lie two interrelated principles: the prohibition for all institution, and especially the courts, to declare the law of Parliament to be invalid, and the doctrine of implied repeal, according to which in cases of inconsistent legislation, later legislation is to prevail on previous one. Over time, both of these principles have come under stress.<sup>5</sup>

Particularly, under the “new” conception of parliamentary sovereignty, Parliament is deemed capable of binding its future selves as to “the manner and forms,” thus prescribing the procedures future Parliaments have to respect to enact new and valid legislation.<sup>6</sup> However, it is still generally accepted that Parliament cannot bind its future selves as to the content of future legislation.

Furthermore, the processes of supra- and inter- national integration and of sub-national devolution put a significant strain on the principle of parliamentary sovereignty, as in both cases, if to varying degrees, partaking in those processes implied a substantive limitation of parliamentary legislative prerogatives.

As to the UK membership of the EU, while this is not the place to fully recall the discussions on whether membership in the EU resulted in a revolution in the doctrine of

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<sup>3</sup> Alison L Young, ‘Hunting Sovereignty: Jackson v Her Majesty’s Attorney-General’ [2006] Public Law 187, distinguishing the ‘old’ and the ‘new’ view of parliamentary sovereignty.

<sup>4</sup> HWR Wade, ‘The Basis of Legal Sovereignty’ (1955) 13 The Cambridge Law Journal 172, 174.

<sup>5</sup> Martin Loughlin and Stephen Tierney, ‘The Shibboleth of Sovereignty’ (2018) 81 The Modern Law Review 989; Rawlings, Leyland and Young (n 1); ‘Symposium: The Changing Landscape of British Constitutionalism’ (n 1); Goldsworthy, *Parliamentary Sovereignty* (n 1).

<sup>6</sup> *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262. Alison L Young, ‘Parliamentary Sovereignty Re-Defined’ in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013); C Forsyth, ‘The Definition of Parliament after Jackson: Can the Life of Parliament Be Extended under the Parliament Acts 1911 and 1949?’ (2011) 9 International Journal of Constitutional Law 132.

parliamentary sovereignty or it was possible for said doctrine to it, it is undisputable that EU membership and the principle of primacy it postulated were the most significant strain on the doctrine of parliamentary sovereignty.<sup>7</sup> Indeed, with the enactment of the European Communities Act of 1972, and particularly Section 2(4) thereof, Parliament knowingly joined a supranational organisation endowed with the power to make law capable of displacing parliamentary legislation, thus arguably limiting the legislative prerogatives of future Parliaments.

Ultimately, the UK membership in the EU was accommodated within the doctrine of parliamentary sovereignty – albeit in a manner hardly compatible with its most orthodox and traditional view<sup>8</sup> – by considering the 1972 Act a Constitutional Statute and by thus holding that the doctrine of implied repeal did not operate with regard to EU law; accordingly, Parliament remained free to pass legislation inconsistent with EU law but had to do so deliberately and expressly.<sup>9</sup> Albeit Brexit was significantly driven by the declared political objective of regaining full political and legal sovereignty,<sup>10</sup> even after the UK’s withdrawal from the EU, some of the dynamics resulting from the entanglement of the EU and UK legal orders are still present.<sup>11</sup>

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<sup>7</sup> For an overview of the debate, see Mark Elliott, ‘Sovereignty, Primacy and the Common Law Constitution: What Has EU Membership Taught Us?’ in Mark Elliott, Jack Williams and Alison L Young (eds), *The UK constitution after Miller: Brexit and beyond* (Hart Publishing 2018); Gordon (n 1) 151–192; Paul Craig, ‘The United Kingdom, the European Union, and Sovereignty’ in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013).

<sup>8</sup> Paul Craig, ‘Britain in the European Union’ in Jeffrey L Jowell and Dawn Oliver (eds), *The changing constitution* (7th edn, Oxford University Press 2011) 119, f.

<sup>9</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] Q.B. 151, para. 60-67 (Lord Laws); *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] A.C. 61, para. 60-69 (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge). See also, albeit not employing the notion of constitutional statutes, *R v Secretary of State, Ex p Factortame Ltd (No 2)* [1991] 1 AC 603, 658-659 (LJ Bridge). On the notion of constitutional statutes, see Farrah Ahmed and Adam Perry, ‘Constitutional Statutes’ (2017) 37 *Oxford Journal of Legal Studies* 461; Mark Elliott, ‘Constitutional Legislation, European Union Law and the Nature of the United Kingdom’s Contemporary Constitution’ (2014) 10 *European Constitutional Law Review* 379.

<sup>10</sup> Sionaidh Douglas Scott, ‘Brexit and the Challenges of a “Post-Sovereign” Legal Landscape’ in Elizabeth Fisher, Jeff King and Alison Young (eds), *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford University Press 2020).

<sup>11</sup> This is particularly the case under the EU (Withdrawal) Act 2018, its Northern Ireland Protocol thereto, as subsequently amended by the Windsor Framework, Decision no 1/2023 of the Joint Committee Established by the Agreement on the Withdrawal of the United Kingdom

Relatively minor – that is, in comparison to the EU membership – encumberments on the parliamentary sovereignty are inherent in the process of devolution, insofar as it rests upon the constitutional convention, thus not judicially enforceable, that the Westminster Parliament will legislate in devolved matters only with the consent of the national legislatures in the devolved nations.<sup>12</sup>

Finally, as it will be argued more in detail in the following, the Human Rights Act 1998 is built around the need to reconcile the incorporation of the ECHR with the doctrine of parliamentary sovereignty.

In spite of the developments occurred both “above” and “beneath” the state, that put some pressure on the doctrine of parliamentary sovereignty, the latter, in its core components has remained standing, still constituting the cornerstone of the English constitution.<sup>13</sup>

For the specific purposes of this research, discussing the relationship between national and international law, and the judicial framing of the conflicts between the two, some implications of the doctrine of parliamentary sovereignty should be pointed out. First, as already discussed, Parliament cannot bind future Parliaments to the respect of any given content, later Parliament always being able to repeal previous legislation – if, when constitutional statutes are concerned, only expressly; furthermore, no institution can declare invalid and thus void Parliamentary legislation. From this, it follows quite

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of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 laying down arrangements relating to the Windsor Framework, OJ L 102, 17 April 2023, p. 61. See in this regard, respectively, Paul Craig, ‘Brexit and the UK Constitution’, *The Changing Constitution* (Oxford University Press); Mark Elliott and Stephen Tierney, ‘Political Pragmatism and Constitutional Principle: The European Union (Withdrawal) Act 2018’ [2019] Public Law 37; and Anurag Deb, Eleni Frantziou and Tobias Lock, ‘The EU Charter of Fundamental Rights in Northern Ireland under the Windsor Framework’ (2024) 75 Northern Ireland Legal Quarterly 488. See, as to the effects of the Windsor Framework, e.g., *Dillon v Secretary of State for Northern Ireland* [2024] NIKB 11, holding that some provisions of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 are to be disapplied.

<sup>12</sup> Brice Dickson, ‘Devolution in Northern Ireland’, *The Changing Constitution* (Oxford University Press); Aileen McHarg, ‘Devolution in Scotland’, *The Changing Constitution* (Oxford University Press); Richard Rawlings, ‘The Welsh Way/Y Ffordd Gymreig’, *The Changing Constitution* (Oxford University Press). See also, generally, John Morison, ‘“A Sort of Farewell”: Sovereignty, Transition, and Devolution in the United Kingdom’ in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013); Peter Leyland, ‘The Multifaceted Constitutional Dynamics of U.K. Devolution’ (2011) 9 *International Journal of Constitutional Law* 251.

<sup>13</sup> Jeffrey Denys Goldsworthy, ‘Is Parliamentary Sovereignty Alive, Dying or Dead?’ [2023] Public Law 126.

logically that subsequent legislation can derogate from previously enacted, and incorporated, international commitments.

Further, two corollaries of the doctrine of parliamentary sovereignty are of the highest relevance in this field: one is the *Proclamation* principle, the other the *De Keyser*.<sup>14</sup>

Under the first principle, first affirmed in the 1611 *Case of Proclamation*, and subsequently reaffirmed in the 1688 Bill of Rights, the Crown cannot exercise its prerogative to enact, modify, or abolish legislation.<sup>15</sup> Under the *De Keyser* principle, instead, a prerogative power might be limited, curtailed, or abrogated by statute, and, when that is the case, the Crown is prohibited from acting under the prerogative thus limited.<sup>16</sup> Accordingly, both principles protect parliamentary sovereignty vis-à-vis the Executive, the *Proclamation* principle directly, by preventing the Crown to change the law through the exercise of the prerogative; the *De Keyser* indirectly, by impeding situations where the law enacted by parliament would be left formally intact, but the executive would circumvent it through the prerogative.<sup>17</sup>

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<sup>14</sup> For a discussion thereof, see *R (on the application of Miller)* (n 9), para. 44-51 (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge).

<sup>15</sup> *Case of Proclamations* (1610) 12 Co Rep 74, 75: “the King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament.” See also, subsequently, *The Zamora* [1916] 2 AC 77, 90 (Lord Parker Of Waddington). See also Bill of Rights 1688, 1 Will and Mar Sess 2, ch. 2, art. 1, declaring that:

“the pretended Power of Suspending of Laws or the Execution of Laws by Regall Authority without Consent of Parlyament is illegall.

the pretended Power of Dispensing with Laws or the Execution of Laws by Regall Authoritie as it hath beene assumed and exercised of late is illegall.”

<sup>16</sup> *Attorney General v De Keyser’s Royal Hotel Ltd* [1920] AC 508, 526 (Lord Dunedin): “inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed.” See also *R. v Secretary of State for the Home Department Exp. Fire Brigades Union* [1995] 2 A.C. 513, 522, f. (Lord Keith of Kinkel); *Laker Airways Ltd. v. Department of Trade* [1977] Q.B. 643, 678 (Mocatta J).

<sup>17</sup> Paul Craig, ‘Engagement and Disengagement with International Institutions: The U.K. Perspective’ in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press 2019) 409.

## **2. International law in the English legal order: parliamentary sovereignty, dualism and the doctrine of incorporation**

### **A. Dualism and its relationship with the sovereignty of parliament**

When it comes to the relationship, under English law, between national and international treaties,<sup>18</sup> the core doctrine to be considered is that of dualism, which has “a proximate normative connection” with the principle of parliamentary sovereignty just discussed, in that it is designed to protect the latter.<sup>19</sup>

Indeed, the ratification of treaties is a prerogative of the Crown. From this, two consequences derive. First, the exercise, as well as the non-exercise, of the prerogative in entering and ratifying treaties cannot be reviewed by the courts. Secondly, given that the executive was originally allowed to ratify international treaties without any involvement of Parliament, allowing ratified treaties to produce domestic legal effect would empower the executive to legislate through the prerogative, thus breaching upon the principle of parliamentary sovereignty and specifically the *Proclamation* principle, as above discussed.<sup>20</sup>

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<sup>18</sup> See, generally, Shaheed Fatima, *Using International Law in Domestic Courts* (Hart Publishing 2005); Stephen C Neff, ‘United Kingdom’ in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2011); Campbell McLachlan, *Foreign Relations Law* (Cambridge University Press 2014); Jonathan Mance, ‘International Law in the UK Supreme Court’ (King’s College, London, 13 February 2017) <<https://ukscy.org.uk/doi/10.19152/ukscy.714>> accessed 30 November 2024; Roger O’Keefe, ‘Public International Law and English Law’ in Michael Wood (ed), *Halsbury’s Laws of England: International law and foreign relations* (LexisNexis 2018); Eirik Bjorge and Ewan Smith, ‘United Kingdom’ in Fulvio Maria Palombino (ed), *Duelling for Supremacy* (Cambridge University Press 2019); Craig, ‘Engagement and Disengagement with International Institutions’ (n 17); Shaheed Fatima, ‘Engagement of English Courts with International Law’ in André Nollkaemper and others (eds), *The Engagement of Domestic Courts with International Law: Comparative Perspectives* (Oxford University Press 2024).

<sup>19</sup> Craig, ‘Engagement and Disengagement with International Institutions’ (n 17) 394. See also McLachlan (n 18) para 5.2.

<sup>20</sup> Importantly, it is no longer the case that the Crown can conclude international agreements without any involvement of Parliament. Instead, although it is not required that Parliament positively authorises the Government to ratify treaties by passing an authorising legislative act, it is required that the Government presents before Parliament the agreements it wishes to conclude, and Parliament can oppose their ratification. As to the parliamentary scrutiny on the ratification of international treaties in the UK, a gradual strengthening of the role of Parliament has taken place. The prerogative of the Crown in this matter was first reduced

Hence, the doctrine of dualism, whereby international treaties, when ratified, produce legal effects only on the international plane. Accordingly, as Lord Oliver stated in the *International Tin Council* case,

“quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is *res inter alios acta*, from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.”<sup>21</sup>

From this principle, two main consequences can be derived. First, acts of the Crown undertaken on the international plane under the prerogative are non-justiciable, as domestic courts cannot interpret international law and cannot find the British Government to have violated international law.<sup>22</sup> Second, ratified but unincorporated treaties do not

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by the formation of the “Ponsonby rule,” a convention whereby a Minister would lay before Parliament, before their ratification and for 21 sitting days, the treaties they wished to ratify: if Parliament did not oppose the ratification of said treaties within the prescribed time, the Crown could go on and ratify them. Subsequently, with the Constitutional Reform and Governance Act 2010, Section 20-25 codified this convention. See generally Templeman, ‘Treaty-Making and the British Parliament Europe’ (1991) 67 *Chicago-Kent Law Review* 459; Ian Sinclair, Susan J Dickson and Graham Maciver, ‘National Treaty Law and Practice: United Kingdom’ in Hollis Duncan, Merritt Blakslee and Benjamin Ederington (eds), *National Treaty Law and Practice* (Brill 2005); Joanna Harrington, ‘Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making’ (2006) 55 *International and Comparative Law Quarterly* 121; Jill Barrett, ‘The United Kingdom and Parliamentary Scrutiny of Treaties: Recent Reforms’ (2011) 60 *International and Comparative Law Quarterly* 225.

<sup>21</sup> *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 500 (Lord Oliver of Aylmerton). See also *The Parlement Belge* (1879) 4 P.D. 129, 149–155; *Attorney General (Canada) v Attorney General (Ontario)* [1937] A.C. 326, PC, 347–348.

<sup>22</sup> See also *R. (on the application of Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin), [2002] 12 WLUK 505, para. 47 (Brown LJ), 50, 59 (Kay J), where the claimants addressed to the English courts the question of the interpretation of the UNSEC Resolution 1441 and, particularly, that of whether Resolution 1441 authorised states to take military action if Iraq did not comply with it: the High Court concluded that English courts cannot interpret international instruments operating only on the international plane. In *R v Margaret Jones* [2006] UKHL 16, [2007] 1 AC 136, para. 67 (Lord Bingham), the defendants, charged with trespass at military airbases, raised the defence that they were attempting to prevent the UK from committing the crime of aggression by invading Iraq: the court held that no such crime existed under domestic law and that the crime of aggression under international law could not be imported in domestic law without Parliamentary legislation. However, English courts are allowed, and actually required, to take cognisance and to interpret international agreements when they are relevant to the determination of rights and obligations under domestic law: see, e.g., *Oppenheimer v Cattermole* [1976] A.C. 249; *Abbasi* [2002] EWCA Civ 1598, [2002] 11 WLUK 114;

produce domestic effect and cannot create rights or obligations for individuals in the domestic legal order: for international treaties to be made part of domestic law and thus be invocable before national courts, it is necessary that Parliament enacts legislation to that effect.

## **B. The domestic status of unincorporated treaties.**

As just discussed, it is a rule deriving from the dualist architecture of the relationship between domestic and international law under English law that ratified but unincorporated treaties do not form part of English law, remaining binding on the United Kingdom only on the international plane.

As a consequence, it might very well be possible that English courts, presented with the request to give domestic effects to international obligations binding on the UK, will refuse to do so, on the ground that said obligations stem from unincorporated treaties. This is an example of structural conflicts, where concerns as to the separation of powers will prevent international law to be given full domestic effect. Lord Hoffman addressed very clearly this issue in the *Lyons* case, observing that:

“the argument that the courts are an organ of State and therefore obliged to give effect to the State's international obligations is in my opinion a fallacy. If the proposition were true, it would completely undermine the principle that the courts apply domestic law and not international treaties. [...] The truth of the matter is that, in the present context, to describe the courts as an organ of the State is significant only in international law. International law does not normally take account of the internal distribution of powers within a State. It is the duty of the State to comply with international law, whatever may be the organs which have the power to do so. And likewise, a treaty may be infringed by the actions of the Crown, Parliament or the courts. From the point of view of international law, it ordinarily does not matter. In domestic law, however, the position is very different. The domestic constitution is based upon the separation of powers. In domestic law, the courts are obliged to give effect to

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*Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 A.C. 883; *Occidental Exploration Production Co v Republic of Ecuador* [2005] EWCA Civ 1116, [2006] QB 432. One such case, of particular significance, was *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 A.C. 332, where the claimant argued that his detention in Iraq by the British military force constituted a violation of his rights under art. 5 ECHR: given that the claimant's detention was authorised under UNSEC Res. No. 1511 of 2003 and 1546 of 2004, and the defendant argued that the Resolution qualified the Convention rights of the applicant as per art. 103 UN Charter, the Court was required to address the question of the interaction between the two international law instruments, all for the purpose of solving a case under domestic law – specifically, the Human Rights Act 1998.

the law as enacted by Parliament. This obligation is entirely unaffected by international law.<sup>23</sup>

1. *The debate concerning the domestic applicability of unincorporated treaties in light of the constitutional rationale of dualism.*

As it was stated, unincorporated treaties have no effect in the domestic legal order. This is the orthodox – and to this day prevailing – view, one whereby this rule suffers no exceptions. However, this view, recently strongly defended by the Supreme Court in a number of decisions as it will be pointed out over the next paragraphs, over time has undergone serious criticism by those wishing to relativise the absolute nature thereof, by providing for the applicability of unincorporated human rights treaties.

The determining factor in this debate is to ascertain what is that the doctrine of dualism stands for: the protection of the prerogatives of Parliament as such, or the protection of individuals from governmental abuses, institutionally realised also through the exclusive attribution of legislative prerogatives to Parliament. Insofar as the latter option were to prevail, the rationale for excluding any domestic relevance of unincorporated human rights treaties, or, at least, provisions thereof, would be diminished.<sup>24</sup>

Ultimately, the discussion of this debate proves insightful as to the deep constitutional reasons for a structural limitation of the domestic authority of international law. At the same time, it will become apparent how, were the reformist proposal to be accepted by the courts, this would signify a shift towards a more open conception of the relationship between national and international law, one where structural hurdles to the full domestic effectiveness of international obligations are overcome in light of their axiological implications, namely the protection of the individual.

The orthodox position, resting on the principle of the sovereignty of Parliament in the making of laws and on that of the separation of powers, and prohibiting courts to give domestic effect to international treaties, with no exception, should be rather clear by now.<sup>25</sup> It is justified, in a way that is truly paradigmatic of a modern conception of

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<sup>23</sup> *R v. Lyons* [2002] UKHL 44; [2003] 1 AC 976, para. 40. Contrast this approach with that of the German and Colombian courts under the principle of openness: see ch. 7, para. 2 and 3.A; ch. 8, para. 2.

<sup>24</sup> Craig, 'Engagement and Disengagement with International Institutions' (n 17) 397.

<sup>25</sup> Philip Sales and Joanne Clement, 'International Law in Domestic Courts: The Developing Framework' (2008) 124 *Law Quarterly Review* 388.

statehood by reference to the democratic principle, whereby democratic decision making can take place only within the nation state:

“democratic decision-making presupposes a political community constituting a constituency to be governed by defined representative institutions, typically provided by the nation state. [...] Therefore, it seems inevitable that an analysis of the extent to which international law is incorporated into English domestic law will have to grapple with how to deal with norms which are binding in international law (generated by modes of production external to the democratic procedures which operate within the constitution) but which have not been endorsed under the principal mode of production of binding norms in domestic law (by enactment by Parliament), and which may not be consistent with or reflected in ordinary domestic law. [...]

Care should be taken, when articulating the rules which govern the acceptance of norms of international law into domestic law, not to undermine these fundamental domestic constitutional principles. Within our legal and political system, potential dissonance between domestic law and international law is the price which is paid for the benefits of self-governance via a democratic system within the nation state.”<sup>26</sup>

The other side of the debate rests on the consideration that the doctrine of dualism does not aim at the protection of Parliament’s legislative prerogatives as such, but as a guarantee for individuals against abuse.<sup>27</sup>

Lord Steyn, in *Re McKerr*

“the rationale of the dualist theory [...] is that any inroad on it would risk abuses by the executive to the detriment of citizens. It is, however, difficult to see what relevance this has to international human rights treaties which create fundamental rights for individuals against the state and its agencies. A critical re-examination of this branch of the law may become necessary in the future.”<sup>28</sup>

Lord Kerr in *R (on the application of SG and others) v Secretary of State for Work and Pensions* further elaborated on this idea, advocating for the recognition of an exception to the doctrine of dualism when human rights convention are concerned.<sup>29</sup> He argued that:

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<sup>26</sup> *ibid* 389, f.

<sup>27</sup> Eirik Bjorge, ‘Can Unincorporated Treaty Obligations Be Part of English Law?’ [2017] Public Law 571; Bjorge and Smith (n 18). See also Campbell McLachlan, ‘The Foreign Relations Power in the Supreme Court’ (2018) 134 Law Quarterly Review 380, 395, who held, commenting on *Miller* 1.,

“The consequence is a striking affirmation of the positive function of dualism in confirming the supreme law-making function of Parliament within the separation of powers and in doing so for the purpose of protecting the individual from executive power, which is its real justification.”

<sup>28</sup> [2004] UKHL 12, [2004] 1 W.L.R. 807, para. 52.

<sup>29</sup> [2015] UKSC 16; [2015] 1 W.L.R. 1449, para. 254.

“if Lord Steyn is right, as I believe he is, to characterise the rationale for the dualist theory as a form of protection of the citizen from abuses by the executive, the justification for refusing to recognise the rights enshrined in an international convention relating to human rights and to which the UK has subscribed as directly enforceable in domestic law is not easy to find. Why should a convention which expresses the UK’s commitment to the protection of a particular human right for its citizens not be given effect as an enforceable right in domestic law?”

Standards expressed in international treaties or conventions dealing with human rights to which the UK has subscribed must be presumed to be the product of extensive and enlightened consideration. There is no logical reason to deny to UK citizens domestic law's vindication of the rights that those conventions proclaim.”<sup>30</sup>

In a slightly different fashion than the dicta just reviewed, Erik Bjorge, relying on the very same premises, has argued for the applicability of specific human rights provisions embedded in unincorporated treaties.<sup>31</sup> Accordingly, the domestic authority of such norms would require a case-by-case evaluation of the circumstances of the case. Thus, the domestic authority of international law, were this proposal to succeed, would be a function not of the parliamentary will to change the domestic legislation by incorporating international obligations, but also, and actually, mainly, of their axiological content.

Admittedly, such arguments have never received majority support, and in recent years the Supreme Court has intervened to reassert the orthodox view in a number of judgements.<sup>32</sup>

Aside from their direct invocation in domestic disputes, which, as already stated, is barred, unincorporated treaties might become relevant in a number of other cases: in the construction of ambiguous statutory provisions, in the development of the common law, and in the interpretation of Convention Rights under art. 2 of the Human Rights Act 1998. In all of these cases, which will be discussed in turn, a recurring concern is that of preventing unincorporated treaties from being given domestic effect through the backdoor of statutory construction, the development of the common law, or the interpretation of Convention Rights.

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<sup>30</sup> Ibid., para. 255, f.

<sup>31</sup> Bjorge (n 27).

<sup>32</sup> Lewis Graham, ‘The Supreme Court’s Recent Approach to Unincorporated Human Rights Treaties’ [2024] *European Human Rights Law Review* 49.

## 2. *Unincorporated treaties and statutory construction*

Not only unincorporated treaties cannot be directly invoked as legal authorities before domestic courts, but caution is required of courts interpreting parliamentary legislation consistently with the international obligations of the UK, especially if such obligations stem from unincorporated treaties.<sup>33</sup>

Indeed, one thing is for courts to interpret unclear statutory provisions in light of unincorporated treaties, another, and impermissible one, is for them to give said provision domestic application, which would be the case if the court gave the interpreted legislative provision a meaning unsupported by its text for the purpose of making it compatible with international law. The possibility of invoking unincorporated treaties as interpretive guidance for the statutory construction is, in principle, well established, relying on the assumption that, when (and only when) the interpretation to be given to parliamentary legislation is unclear, court should presume that Parliament did not intend to legislate in such a way to breach the international obligations of the UK. In the case of *Brind*, for example, the House of Lords, addressed the possibility of invoking as an interpretive guidance the ECHR, at the time not yet incorporated, observing that:

“it is already well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it.”<sup>34</sup>

In this regard, it has been observed that, in recent years, the Supreme Court, while has abstractly upholding and reiterating this principle,<sup>35</sup> has significantly circumscribed and limited its concrete application.<sup>36</sup> On the one hand, the Court had recourse to international

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<sup>33</sup> Rosalyn Higgins, ‘The Role of Domestic Courts in the Enforcement of International Human Rights: The United Kingdom’ in Benedetto Conforti and Francesco Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (Brill 1997) 37.

<sup>34</sup> *R. v Secretary of State for the Home Department Ex p. Brind* [1991] 1 A.C. 696, 747, f. See also, e.g., *Alcom v Colombia* [1984] A.C. 580, 588 (Lord Diplock); *R. v Secretary of State for the Home Department Ex p. Venables* [1998] A.C. 407, 499; *R. v Lyons* (n 23), para. 27 (Lord Hoffmann); *Smith v Secretary of State for Work and Pensions* [2006] UKHL 35, par. 78 (Lady Hale); *Assange v The Swedish Prosecutor* [2012] UKSC 22, [2012] 2 A.C. 471, para. 122 (Lord Dyson).

<sup>35</sup> *Re Scottish Independence Referendum Bill* [2022] UKSC 31, [2022] 1 W.L.R. 5435, par. 87 (Lord Reed, Lord Lloyd-Jones, Lord Sales, Lord Stephens and Lady Rose).

<sup>36</sup> Graham, ‘The Supreme Court’s Recent Approach to Unincorporated Human Rights Treaties’ (n 31).

law only when construing domestic legislation passed for the specific purpose of incorporating international obligations;<sup>37</sup> on the other, in *JB*,<sup>38</sup> the Court refused to consider the relevance of the UN Convention on the Rights of Persons with Disabilities ‘UNCPRD’ as to the interpretation of Section 2 and 3 of the Mental Capacity Act 2005, relating to mental capacity and sexual consent. The applicant had argued that Section 2 of the Mental Capacity Act, pertaining to mental capacity was to be construed in light of Article 12(2) UNCRPD, providing that “State Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.” Lord Stephens, writing for a unanimous Court, however rejected “the contention that this court should examine whether the United Kingdom has violated provisions of an unincorporated international treaty (which is the effect of the appellant’s contention).”<sup>39</sup>

Accordingly, while the principle that unincorporated treaties are to be considered in statutory construction is uncontested, defining the material scope of application of this principle is a more complicated case-by-case issue, as it requires to distinguish cases where the international provision at issues is relied merely as an interpretive guidance from those in which claimants implicitly ask courts to apply it.

The discriminating circumstance in addressing this issue relies on courts verifying whether the interpretation of a domestic provision applicants put forward in light of the international obligations of the UK falls within the frame of possible meanings attributable to that provision: if that is the case, then reliance on the international instrument at issue will be permissible and even required; otherwise not. Quite clearly, defining the perimeter of plausible interpretation also relies on the exercise by the courts of their interpretive prerogatives, and depends on a more or less rigorous and restrictive approach they adopt to the construction of the domestic statutory provisions, the Supreme Court apparently having adopted a restrictive one in its recent jurisprudence.

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<sup>37</sup> *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48, [2022] 2 All E.R. 911; *Basfar v Wong* [2022] UKSC 20, [2023] A.C. 33. See also, analogously, *General Dynamics United Kingdom Ltd v Libya* [2021] UKSC 22, [2022] A.C. 318, concerning the enforcement of an international arbitration award.

<sup>38</sup> *Local Authority v JB* [2021] UKSC 52, [2022] A.C. 1322.

<sup>39</sup> *Ibid.*, para. 120.

3. *Unincorporated treaties and the development of the common law*

Analogously to what has already been discussed with regards to the role of unincorporated treaties in statutory construction, courts expounding and developing the common law in light of international obligations stemming also from unincorporated treaties are required to tread carefully.

There are indeed dicta to the effect that English court should consider international obligations in developing the common law, even if they stem from unincorporated treaties; similarly, developments in the common law should be in line with international law rather than antithetical to it.<sup>40</sup>

A number of safeguards have been developed over time to ensure that the common law is not used as a “backdoor incorporation” for unincorporated treaties.<sup>41</sup> Accordingly, reference to a treaty is only relevant to the development of the common law to the extent that it may provide guidance in relation to a capacity for development already inherent in the common law itself: particularly, this concerns the rule of the precedent and the method of the incremental development.<sup>42</sup> Furthermore, the usual restriction upon the judicial development of the common law apply: courts cannot develop the common law in a contrary to legislation,<sup>43</sup> or where Parliament has itself already stroked the relevant balance between competing interests,<sup>44</sup> or in cases in which Parliament has abstained from legislating in a particularly complex area where it is appropriate that development of the law be left for the legislature.<sup>45</sup>

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<sup>40</sup> O’Keefe (n 18) para 23. *R v Lyons* (n 23), para. 27 (Lord Hoffmann); *A v Secretary of State for the Home Department (No.2)* [2005] UKHL 71, [2006] 2 A.C. 221, para. 27 (Lord Bingham); *R (on the application of SG) v Secretary of State for Work and Pensions* (n 29), para. 137 (Lord Hughes), 241 (Lord Kerr dissenting).

<sup>41</sup> *A v Secretary of State for the Home Department (No.2)* [2004] EWCA Civ 1123, [2005] 1 W.L.R. 414, para 266, f. (Laws L.J.), para. 434 (Neuberger L.J.).

<sup>42</sup> *Kleinwort Benson v Lincoln City Council* [1999] 2 A.C. 349, 377, f.

<sup>43</sup> *R. v Chief Constable of the Royal Ulster Constabulary Ex p. Begley* [1971] 1 W.L.R. 1475, HL, 1480 (Lord Browne-Wilkinson).

<sup>44</sup> *Re McKerr* (n 28), para. 32 (Lord Nicholls Of Birkenhead), 51 (Lord Steyn), 71 (Lord Hoffmann), 91 (Lord Brown Of Eaton-Under-Heywood); *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 39, [2003] 1 W.L.R. 1763, para. 75, ff. (Lord Millett); *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 A.C. 395, para. 26, 32, 64.

<sup>45</sup> *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 A.C. 406, para. 34 (Lord Hoffmann).

### **3. International law in the English legal order: the case of the European Convention for Human Rights and the Human Rights Act**

Coming to the field of fundamental rights protection, the main point of reference is the Human Rights Act 1998 ‘HRA,’ incorporating the ECHR. The overall scheme of the Act pursues a compromise between ensuring the respect of the Convention Rights – i.e. the rights enshrined by the ECHR and so incorporated – and the need to accommodate the Convention within a legal system based on the principle of parliamentary sovereignty.<sup>46</sup>

#### **A. The fundamental lines of the Human Rights Act 1998**

The Act and its provisions are very well known and have been thoroughly discussed since its adoption in 1998: here it will be discussed selectively, with a view to understanding the state of the relationship between the ECHR and English law, thus shedding some light on the more general issue of the relationship between national and international law.

Specifically, Section 1 provides for the incorporation of the “Convention rights” – i.e. some of the rights and freedoms set out in the Convention and in its protocols. Section 2 requires British courts, when determining a question which has arisen in connection with a Convention right, to take into account the interpretation thereto given by the ECtHR and, when appropriate, by other organs of the Convention system.

Section 3 providing a “a strong interpretative obligation” for the courts to read and give effect, insofar as possible, to primary and subordinate legislation in a manner compatible with the Convention, thus limiting the doctrine of implied repeal.<sup>47</sup> Section 4

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<sup>46</sup> David Feldman, ‘The Human Rights Act 1998 and Constitutional Principles’ (1999) 19 *Legal Studies* 165; Lord Irvine of Lairg, *Human Rights, Constitutional Law and the Development of the English Legal System: Selected Essays* (Hart 2003) 98; Alison L. Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing 2009); Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009) 310–13; R. Bellamy, ‘Political Constitutionalism and the Human Rights Act’ (2011) 9 *International Journal of Constitutional Law* 86.

<sup>47</sup> *R v A* [2001] UKHL 25, [2002] 1 AC 45, 68 (Lord Steyn). For a discussion of how “strong” this duty actually is, see Aileen Kavanagh, ‘What’s so Weak about “Weak-Form Review”? The Case of the UK Human Rights Act 1998’ (2015) 13 *International Journal of Constitutional Law* 1008, 1015, ff. Under s. 3, courts adopt a two-stage test: first, they ascertain whether the domestic legislation, ordinarily construed, is compliant with the Convention. If that is not the case, only then the courts verify whether it is possible to reach

provides for the possibility, for courts, to make a declaration of incompatibility, when they find that parliamentary legislation is incompatible with Convention rights, and it has not been possible to interpret it consistently with it under Section 3: this declaration does not affect the validity or applicability of the legislation at issue.

As just observed, the impossibility to reach a consistent interpretation under Section 3 is the precondition for a declaration under Section 4: apart from cases in which it is impossible to reconcile the tenor of the text with the Convention, there are two further limits on the interpretative prerogative of courts under Section 3: the fundamental features limit” and the “legislative deliberation limit”.<sup>48</sup> Accordingly, courts are prevented from making recourse to consistent interpretation, respectively, when this would result in the adoption of “a meaning inconsistent with a fundamental feature of the legislation” and when solving the interpretive question before them would entail addressing matters “for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling the legislative deliberation.”<sup>49</sup>

Moreover, as per Section 6, apart from legislative acts of Parliament, all other acts of public authority are unlawful, and thus invalid, if they are incompatible with the Convention rights. Under Section 19, the Government, through one of its ministers, must, before the second reading of any Bill put before Parliament, either make a statement of compatibility, attesting that the Bill at issue is, in their view, compatible with the Convention, or make a statement to the effect that they wish the House to proceed with the Bill, even if they are not able to make a statement of compatibility.

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an interpretation thereof that is compatible with the Convention: Conor Gearty, ‘Reconciling Parliamentary Democracy and Human Rights’ (2002) 118 *Law Quarterly Review* 248; Kavanagh, *Constitutional Review under the UK Human Rights Act* (n 46) 23–26.

<sup>48</sup> Kavanagh, *Constitutional Review under the UK Human Rights Act* (n 46) 88.

<sup>49</sup> *Ghaidan v. Godin-Mendoza* [2004] UKHL 30, [2004] 2 A.C. 557, para. 33 (Lord Nicholls of Birkenhead).

**B. A weak model of judicial review: the declarations of incompatibility as instances of structural conflict**

The interplay between Section 3, 4, and 19 is often described as determining a system of ‘weak judicial review.’<sup>50</sup> On the one hand, under Section 4, courts are clearly prevented from striking down legislation found in breach of Convention rights – the main reason for characterising this model ‘weak’<sup>51</sup> –, on the other hand the overall system distributes the responsibility for protecting individuals’ rights between the courts and the political bodies: both Parliament and the Executive.<sup>52</sup>

The system put in place by the HRA when it comes to declarations of incompatibility relies on the assumption that Government and Parliament will generally collaborate to the protection of individuals’ rights and that it will remedy to the violations found in

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<sup>50</sup> Janet L Hiebert, ‘Parliamentary Bills of Rights: An Alternative Model?’ (2006) 69 *The Modern Law Review* 7; Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press 2013) 157, ff.; Kavanagh, ‘What’s so Weak about “Weak-Form Review”?’ (n 47). The expression derives from Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2009); ‘Weak-Form Review: An Introduction’ (2019) 17 *International Journal of Constitutional Law* 807. See also, somewhat similarly, employing the terminology of the ‘dialogue’, Richard Clayton, ‘Judicial Deference and “Democratic Dialogue”’: The Legitimacy of Judicial Intervention under the Human Rights Act 1998’ [2004] *Public Law* 33; ‘Principles for Judicial Deference’ (2006) 11 *Judicial Review* 109; Francesca Klug, ‘Judicial Deference under the Human Rights Act 1998’ [2003] *European Human Rights Law Review* 125; Danny Nicol, ‘The Human Rights Act and the Politicians’ (2004) 24 *Legal Studies* 451; Young, *Parliamentary Sovereignty and the Human Rights Act* (n 46); *Democratic Dialogue and the Constitution* (Oxford University Press 2017). On the notion of ‘constitutional dialogue’ in systems of weak judicial review, see Rosalind Dixon, ‘Constitutional “Dialogue” and Deference’ in Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon (eds), *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge University Press 2019).

<sup>51</sup> Mark Tushnet, ‘Alternative Forms of Judicial Review’ 101 *Michigan Law Review* 2781, 2786: “the mark of weak-form review is that ordinary legislative majorities can displace judicial interpretations of the constitution in the relatively short run.” Conversely, “strong-form review is a system in which judicial interpretations of the Constitution are final and unreviewable by ordinary legislative majorities:” Tushnet, *Weak Courts, Strong Rights* (n 50) 33.

<sup>52</sup> On the often-underplayed significance of the function of the Executive in protecting Convention rights, see Aileen Kavanagh, *The Collaborative Constitution* (Cambridge University Press 2023) 121–149. As to the role of the Joint Committee on Human Rights in the UK Parliament, see the contributions by David Feldman, Aileen Kavanagh, Paul Yowell, and Jeff King in Hayley Jayne Hooper, Murray Hunt and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015).

declarations of incompatibility.<sup>53</sup> It has even been authoritatively argued that a constitutional convention exists, at least in an incipient stage, requiring Government and Parliament to act to remedy the incompatibilities unless exceptional circumstances are met.<sup>54</sup> This has indeed happened most of the times, even in very controversial cases, such as those of *Anderson* on the Home Secretary's role in setting the 'tariffs' by for life sentences for murder, *Belmarsh* on the indefinite detention of foreign terrorists, *Thompson* on the rights of sex offenders, and, though with only minimal compliance and great delay and reluctance, *Smith v Scott* on prisoners' voting rights.<sup>55</sup>

It is undisputed, however, that parliamentary sovereignty is left untouched, given the possibility for Parliament to legislate contrastingly with the Convention, either by simply legislating contrarily to it in an unambiguous way, by expressly overriding it, or by refusing to modify legislation as a consequence of declaration of incompatibility made under Section 4.

It is to be noted in passing that the equilibrium of the system was seriously put to the test in recent times, with the enactment, in the wake of the Supreme Court's decision prohibiting the transferral of asylum seekers to Rwanda on art. 3 ECHR grounds,<sup>56</sup> of the Safety of Rwanda Act 2024, containing sweeping notwithstanding clauses, and for which the Government was not able to make a declaration of compatibility under Section 17

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<sup>53</sup> Lord Sumption, 'The Limits of Law' in Nicholas William Barber, Paul Yowell and Richard Ekins (eds), *Lord Sumption and the Limits of the law* (Hart Publishing Ltd 2016) 11: 'where statute does not permit, the courts may make a declaration of incompatibility. The understanding is that Parliament will then amend the law so as to remove the inconsistency.' See also Aruna Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford University Press 2013) 138, ff.; Chintan Chandrachud, 'Reconfiguring the Discourse on Political Responses to Declarations of Incompatibility' [2014] Public law 624; Jeff King, 'Dialogue, Finality and Legality' in Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon (eds), *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge University Press 2019).

<sup>54</sup> Aileen Kavanagh, 'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication' in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press 2008) 214; *The Collaborative Constitution* (n 52) 363, ff.

<sup>55</sup> Respectively *R v Home Secretary, ex parte Anderson* [2003] UKHL 46, [2003] 1 A.C. 837; *A (and others) v SSHD* [2004] UKHL 56, [2005] 2 A.C. 68; (*Belmarsh*); *R (Thompson) v SSHD* [2010] UKSC 17, [2011] 1 A.C. 331; *Smith v Scott* [2007] CSIH 9, 2007 S.C. 345.

<sup>56</sup> *R (on the application of AAA and others) v Secretary of State for the Home Department* [2023] UKSC 42, [2023] 1 W.L.R. 4433.

HRA.<sup>57</sup> In the same period, Parliament had enacted a number of contentious legislative instruments containing many notwithstanding and ouster clauses, limiting the judicial review of administrative decisions.<sup>58</sup> These events tested the system devised under the HRA so much so that, on the one hand, the idea of withdrawing from the ECHR, or more realistically, that of repealing the HRA, circulated with some insistence;<sup>59</sup> on the other hand, instead, the never extinguished debate on the possibility of introducing a stronger version of judicial review was soon rekindled.<sup>60</sup>

It appears that this crisis has been overcome, particularly after the formation of a Labour Government, strongly reaffirming its commitment to abide by human rights commitments and not to repeal or negatively affect the functioning of the HRA 1998.

Apart from the pathologies in the way in which the system is devised to operate, and coming back to its discussion in its physiological operation, a significant consequence of both the declaration of incompatibility and the statement of compatibility is that the

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<sup>57</sup> Safety of Rwanda Act 2024, s. 3. For an overview of the issue, see Patrick Birkinshaw, 'The Rwanda Bill, Boat People and International Law' (2024) 30 *European Public Law*; Peter Leyland, 'The UK's Rwanda Asylum Policy and the Courts: Reflections on the Constitutional Consequences? Il Piano Britannico Sull'asilo in Rwanda e Le Corti: Riflessioni Sulle Conseguenze Costituzionali?' (2024) 64 *DPCE Online*.

<sup>58</sup> See *Illegal Migration Act 2023*, s. 5; *Victims and Prisoners Act 2024*, s. 69. See also the *Northern Ireland Troubles (Legacy and Reconciliation) Act 2023*, heavily criticised with regard to its compatibility with the Convention for the amnesty it introduced – eventually, it was disapplied by the Courts under the Windsor Framework – see *Dillon v Secretary of State for Northern Ireland* (n 11).

<sup>59</sup> For a discussion, see Kanstantsin Dzehtsiarou, 'The United Kingdom and the European Convention on Human Rights: Together Until the End?' (2024) 5 *European Convention on Human Rights Law Review*, The 1; Frederick Cowell, 'Locking in Human Rights: An Exploration of the Barriers to ECHR Withdrawal' (2024) 5 *European Convention on Human Rights Law Review* 50; Ed Bates, 'UK Withdrawal From the ECHR ("BrECHRit"): From Taboo to Tenable?' (2024) 5 *European Convention on Human Rights Law Review* 24; Valsamis Mitsilegas and Elspeth Guild, 'The UK and the ECHR After Brexit: The Challenge of Immigration Control' (2024) 5 *European Convention on Human Rights Law Review*, The 116.

<sup>60</sup> Charles Hymas, 'Back the Rwanda Bill or Risk the Sovereignty of Parliament, Say KCs' *The Telegraph* (10 December 2023) <<https://www.telegraph.co.uk/politics/2023/12/10/back-rwanda-bill-or-risk-the-sovereignty-of-parliament/>> accessed 6 January 2025; Adam Tucker, 'The Rwanda Policy, Legal Fiction(s), and Parliament's Legislative Authority' (*UK Constitutional Law Association*, 22 November 2023); Mark Elliott, 'Is the UK Heading for a Constitutional Crisis Because of the Rwanda Bill?' (*Public Law for Everyone*, 12 December 2023) <<https://publiclawforeveryone.com/2023/12/12/could-the-rwanda-bill-provoke-a-constitutional-showdown/>> accessed 6 January 2025; Jeff King, 'The House of Lords, Constitutional Propriety, and the Safety of Rwanda Bill' (*UK Constitutional Law Association*, 26 January 2024); Conor Crummey, 'The Safety of Rwanda (Asylum and Immigration) Bill and the Judicial "Disapplication" of Statutes' (*UK Constitutional Law Association*, 26 March 2024). The UK Constitutional Law Association Blog is accessible at the link: <<https://ukconstitutionallaw.org>> .

effects of parliamentary legislation on the enjoyment of Convention rights is made publicly clear. Thus, political actors are more directly confronted with the political cost of their choices: just as traditionally held with regard to the principle of legality, Parliament must squarely confront the political cost of reducing the Convention rights of individuals. As Lord Hoffman stated,

“Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.”<sup>61</sup>

Thus, seen under the categories put forward in this research, declarations of incompatibility are to be understood as instances of structural conflicts. Indeed, regardless of its axiological implications of the conflicting norms, Convention rights cannot be fully applied and secured on the ground that they contrast with parliamentary legislation, which is protected from being displaced, not in light of its particular axiological significance, but merely because it is the product of representative and democratic law-making processes undergone in Parliament. Considerations as to the substance of the law, and as to its effects on human rights, are made in Parliament and will eventually become relevant once again in the ballot box, not before the courts.

Furthermore, at times, as already discussed, the very issuing of declarations of incompatibility, instead of courts having recourse to consistent interpretation, even if it were abstractly possible for them to reach a Convention-compatible interpretation without going beyond the perimeter of the meanings compatible with the letter of the provision being interpreted, is premised upon considerations pertaining to the division of powers and interinstitutional balance. This further reinforces the consideration that declaration of incompatibility are grounded on structural considerations.

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<sup>61</sup> *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131, f. See also *HM Treasury v Ahmed* [2010] UKSC 2 [2010] 2 A.C. 534, para. 61 (Lord Hope SCJ); *R (on the application of Coughlan) v Minister for the Cabinet Office* [2022] UKSC 11 [2022] 1 W.L.R. 2389, para. 15 (Lord Stephens SCJ).

### C. Interpreting the Convention Rights

Under Section 2 HRA, in vindicating Convention rights, domestic courts have a duty to “take into account” decisions of the ECtHR. This duty was interpreted by the House of Lords first in *Alconbury* and, subsequently, in *Ullah*, where the fundamental principles under Section 2 HRA were set.<sup>62</sup> In the latter case, Lord Bingham formulated the “no more, but certainly no less” rule, arguing that:

“a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention Right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.”<sup>63</sup>

This rule – which came to be known as the ‘mirror principle’<sup>64</sup> – was aptly captured by a dictum of Lord Roger in *AF (No. 3)*, as he held:

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<sup>62</sup> *R (Alconbury Developments Ltd) v Environment Secretary* [2001] UKHL 23, [2003] 2 AC 29, where Lord Slynn, giving the leading speech, argued that, while s. 2 does not require them to follow the case-law of the ECtHR, UK courts, absent special circumstances, ‘should follow any clear and constant jurisprudence of the European Court of Human Rights’ (ibid., at para. 26). In the same Judgement, Lord Hoffman clarified what could be considered to be ‘special circumstances,’ observing that in cases in which the case-law of the ECtHR were ‘fundamentally at odds with the distribution of powers under the British constitution, [he] would have considerable doubt as to whether [said case-law] should be followed’ (ibid., at para. 76). *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323; see also *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465, para. 28 (Lord Bingham).

<sup>63</sup> *R (on the application of Ullah) v Special Adjudicator* (n 62), para. 20 (Lord Bingham).

<sup>64</sup> Philip Sales, ‘Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine’ [2012] Public Law 253; Eirik Bjorge, ‘The Courts and the ECHR: A Principled Approach to the Strasbourg Jurisprudence’ (2013) 72 Cambridge Law Journal 289; Roger Masterman, ‘Deconstructing the Mirror Principle’ in Roger Masterman and Ian Leigh (eds), *The United Kingdom’s Statutory Bill of Rights: Constitutional and Comparative Perspectives* (British Academy 2013); ‘The United Kingdom: From Strasbourg Surrogacy Towards a British Bill of Rights?’ in Patricia Popelier, Sarah Lambrecht and Koen Lemmens (eds), *Criticism of the European Court of Human Rights* (Intersentia 2016) 468, ff.; Helen Fenwick and Roger Masterman, ‘The Conservative Project to “Break the Link between British Courts and Strasbourg”: Rhetoric or Reality?’ (2017) 80 The Modern Law Review 1111; Lewis Graham, ‘The Modern Mirror Principle’ [2021] Public Law 523.

“even though we are dealing with rights under a United Kingdom statute, in reality, we have no choice: *Argentoratum locutum, iudicium finitum* – Strasbourg has spoken, the case is closed.”<sup>65</sup>

So formulated, this principle was criticised for being too rigid in requiring too strict a correspondence between the interpretation of Convention Rights by British courts and the case-law of the ECHR, UK courts being required to “keep the pace” with the interpretation of the Convention by the Strasbourg Court and being, conversely, prohibited from “leaping ahead.”<sup>66</sup>

First, it was argued that it forced national courts in a too reticent position, given that, in many cases, the ECtHR stops short of adopting a given reading of a Convention provision for institutional reason: first and foremost because of the finding of the existence of a margin of appreciation and, relatedly, of the absence of a European consensus. In such cases, under the Convention, it is well possible for States Party to the Convention to “fill in” the margin. As the question, from the point of view of domestic courts, becomes one of interinstitutional division of labour, British courts – so the argument goes – are allowed to develop their own interpretation of Convention Rights, “filling in” the margin themselves and, if appropriate, develop an interpretation of said rights beyond the case-law of the ECtHR.<sup>67</sup> As Lord Hoffmann stated,

“the margin of appreciation is there for division between the three branches of government according to our principles of the separation of powers. There is no principle by which it is automatically appropriated by the legislative branch.”<sup>68</sup>

While in some cases, the Supreme Court appeared to indicate that, in some circumstances it might appropriate for UK Courts to develop their interpretation of

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<sup>65</sup> *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28, [2010] 2 AC 269, para. 98 (Lord Rodger of Earlsferry).

<sup>66</sup> See *R (Marper) v Chief Constable of South Yorkshire* [2004] UKHL 39, [2004] 1 WLR 2196, para. 70 (Lady Hale); *R (Animal Defenders International) v Secretary of State For Culture, Media and Sport* [2008] UKHL 15, [2008] AC 1312, para. 53 (Lady Hale). For an overview of the related discussion, see Masterman (n 64) 472, ff.; Ed Bates, ‘Principled Criticism and a Warning from the “UK” to the ECtHR?’ in Marten Breuer (ed), *Principled Resistance to ECtHR Judgments - A New Paradigm?* (Springer Berlin Heidelberg 2019) 202, ff.

<sup>67</sup> TH Bingham, *Lives of the Law: Selected Essays and Speeches 2000-2010* (Oxford University Press 2011) 185, ff.; Lord Irvine of Lairg, ‘A British Interpretation of Convention Rights’ (2012) 179 Public Law 237; Richard Clayton, ‘Smoke and Mirrors: The Human Rights Act and the Impact of Strasbourg Case Law’ [2012] Public Law 639; Kacper Majewski, ‘Mirroring the Margin’ [2022] Public Law 553.

<sup>68</sup> *Re G (A Child) (Adoption: Unmarried Couples)* [2008] UKHL 38, [2009] 1 A.C. 173, para. 37 (Lord Hoffmann).

Convention Rights beyond the case-law of the ECtHR,<sup>69</sup> in recent cases the Court has quite clearly taken the opposite approach, on the grounds that, in such cases, it would be for Parliament, and not for the courts, to develop the protection of individuals beyond what is provided for by the case-law of the Court.<sup>70</sup>

Specifically, in *Elan-Cane*, a case dealing with the compatibility with the Convention of the refusal of British authorities to issue gender-neutral passports, Lord Reed (giving the judgement for a unanimous Court), discussed at length the duty under Section 2 HRA.<sup>71</sup> The decisive factor, one already developed in the jurisprudence of the House of Lords and, subsequently, of the Supreme Court,<sup>72</sup> in reaching the conclusion that UK courts are effectively prevented from developing Convention rights beyond the interpretation of the ECtHR is that doing so is for Parliament and not for the Courts and that concluding otherwise would impermissibly encroach on the prerogatives of Parliament:

“where the European court decides that there has been no violation of the Convention, applying the margin of appreciation doctrine, it remains open to the contracting state to recognise the right in issue under its domestic law [...]. The European court evidently has no role in deciding which institution in the United Kingdom should determine whether there should be such a right. That question depends on the United Kingdom’s constitution, under which

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<sup>69</sup> See, particularly, *ibid.*, para. 30-38 (Lord Hoffmann), 50, 56 (Lord Hope), 126 (Lord Mance); *R. (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] A.C. 657, para. 115, 126-128 (Lord Neuberger SCJ), 175-177, 182, 187-190 (Lord Mance SCJ), 197-201 (Lord Wilson SCJ).

<sup>70</sup> Majewski (n 67); Philip Sales, ‘The Developing Jurisprudence of the Supreme Court on Convention Rights’ [2024] Public Law 444. For a similar argument see also Brenda Hale, ‘Argentorum Locutum: Is Strasbourg or the Supreme Court Supreme?’ (2012) 12 Human Rights Law Review 65, 72.

<sup>71</sup> *R (on the application of Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2023] A.C. 559. See also *R (on the application of AB) v Secretary of State for Justice* [2021] UKSC 28, [2022] A.C. 487, para. 57-59 (Lord Reed SCJ).

<sup>72</sup> See the above-quoted passage from the speech of Lord Bingham in *R (on the application of Ullah) v Special Adjudicator* (n 63), para. 20; see also *Ambrose v Harris* [2011] UKSC 43 [2011], 1 W.L.R. 2435, para. 19 (Lord Hope SCJ):

“Parliament never intended to give the courts of this country the power to give a more generous scope to those rights than that which was to be found in the jurisprudence of the Strasbourg court. To do so would have the effect of changing them from Convention rights, based on the treaty obligation, into free-standing rights of the court’s own creation.”

legislative power is the preserve of the legislature, and the courts' role in law-making is confined to the development of the common law."<sup>73</sup>

Another line of criticism, instead, regarded the eventuality that this approach would result in a too 'subservient' position of British courts vis-à-vis the ECtHR. Eventually, this culminated in some decisions where the Supreme Court delineated some circumstances in which it held it permissible, and even required, of domestic courts to disregard the interpretation of Convention rights thereto given by the ECtHR. Particularly, in *Horncastle* and in *Pinnock*, the Supreme Court codified three such situations in which national courts can disregard the ECtHR's interpretation:<sup>74</sup> when the case-law of the ECtHR is not clear or constant case-law,<sup>75</sup> in cases in which the latter misunderstood domestic law,<sup>76</sup> and when the interpretation of the Convention by the ECtHR is "inconsistent with some fundamental substantive or procedural aspect of [UK] law."<sup>77</sup> This reservation by the Supreme Court – as it has been noted<sup>78</sup> – recalls quite closely the one made by the Federal Constitutional Court of Germany in *Görgülü*, which, as it will be discussed in the next chapter, subordinates the duty, for German courts, to

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<sup>73</sup> *R (on the application of Elan-Cane) v Secretary of State for the Home Department* (n 71), para. 82 (Lord Reed SCJ). As observed by Majewski (n 67) 558: "Lord Reed's real target in *Elan-Cane* was not Lord Hoffmann's multi-level conception of Convention rights; I think it was [his statement that 'there is no principle by which it is automatically appropriated by the legislative branch.']".

<sup>74</sup> *R. v Horncastle* [2009] UKSC 14, [2010] 2 A.C. 373, para. 11 (Lord Phillips P); *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 A.C. 104, para. 45 (Lord Neuberger SCJ). V. Graham, 'The Modern Mirror Principle' (n 64) 526, ff.

<sup>75</sup> See also, previous dicta to this effect in *R. (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* (n 63), para. 26 (Lord Slynn of Hadley); *R (on the application of Ullah) v Special Adjudicator* (n 63), para. 20 (Lord Bingham of Cornhill); *N v Secretary of State for the Home Department* [2005] UKHL 31, [2005] 2 A.C. 296, para. 14 (Lord Nicholls of Birkenhead); *R. (on the application of Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29, [2011] 1 A.C. 1, para. 199 (Lord Mance SCJ).

<sup>76</sup> The two cases in which this hypothesis materialised are *R. v Horncastle* (n 75) and *R. v McLoughlin* [2014] EWCA Crim 188, [2014] 1 W.L.R. 3964. See also, previous dicta to this effect in *R. v Lyons* (n 23), para. 46; *Doherty v Birmingham City Council* [2008] UKHL 57, [2009] 1 A.C. 367, para. 88 (Lord Scott of Foscote).

<sup>77</sup> *Manchester City Council v Pinnock* (n 75), para. 48 (Lord Neuberger SCJ). See also *R. (on the application of Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] A.C. 271, para. 35 (Lord Mance), 137 (Lord Sumption).

<sup>78</sup> CJ Van De Heyning, 'The Natural "Home" of Fundamental Rights Adjudication: Constitutional Challenges to the European Court of Human Rights' (2012) 31 Yearbook of European Law 128, 70; Giuseppe Martinico, 'Is the European Convention Going to Be "Supreme"? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts' (2012) 23 European Journal of International Law 401, 421.

take into account the ECHR and the case-law of the ECtHR to the respect of the fundamental constitutional principles of the German legal order.<sup>79</sup>

An ulterior limit to the duty of English courts to follow the interpretation given by the ECtHR when dealing with Convention rights has a very close bearing to the discussion undertaken in this research. Particularly, English courts are prevented to follow the Strasbourg Court's interpretation when doing so would result in the indirect incorporation of international treaties the UK hasn't incorporated. This is due to the fact that the ECtHR often interprets the Convention in light of other international law instruments, with little regard as to whether all its States Party have ratified or incorporated them.

The Supreme Court, which had arguably allowed the "passporting" of unincorporated treaties in previous decisions,<sup>80</sup> in recent decisions has been very clear in closing this door: the duty to take into account the case-law of the ECtHR in interpreting Convention rights cannot result in a backdoor judicial incorporation of unincorporated international treaties.<sup>81</sup>

On a more general note, the general caution as to the permeation of the domestic legal order by international law and by the Convention – and even more so by the case-law of the ECtHR –, with a view to protect the state-bound democratic law-making process, has been coupled, in recent years, with an attempt aimed at progressively realising an autochthonous system for the protection of fundamental rights, one, rooted in the English constitutional culture and, according to the most critical voices, not subordinate to the "foreign judges" of Strasbourg. In the academia, this was presupposed upon a "re-discovery" of common law constitutionalism – that is, of the potential the common law has in protecting individuals' rights against their encroachments by the public powers.<sup>82</sup> In the political arena, instead, ever since their electoral win in 2015, the

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<sup>79</sup> FCC, Order of the Second Senate of 14 October 2004, 2 BvR 1481/04, BVerfGE 111, 307, *Görgülü*, para. 35.

<sup>80</sup> See, e.g. *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 A.C. 166.

<sup>81</sup> *R. (on the application of AB) v Secretary of State for Justice*, [2021] UKSC 28, [2022] A.C. 487, para. 61-67 (Lord Reed SCJ); *R. (on the application of SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] A.C. 223, para. 80-84 (Lord Reed SCJ). See Sales (n 70); Graham, 'The Supreme Court's Recent Approach to Unincorporated Human Rights Treaties' (n 31).

<sup>82</sup> TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford University Press 2013); John Laws, *The Common Law Constitution* (Cambridge University Press 2014); John Finnis, 'Judicial Power: Past, Present and Future' (Gray's Inn Hall, 20

Tories put forward a number of proposals aimed at repealing the HRA or, at least, at strongly reducing the interpretive authority of the ECtHR on the Convention Rights as domestically applied in the domestic legal order – ultimately, these proposals culminated in the (failed) British Bill of Rights Bill, which would have dramatically reduced the domestic authority of the case-law of the ECtHR as well as the powers of the courts to review, even if for the somewhat limited purposes of issuing a declaration of incompatibility, the legislative choices made by the Parliament.<sup>83</sup>

#### **4. International law in the English legal order: the domestic status of international climate change law**

##### **A. International climate change law: a brief overview.**

Before discussing the relevance of international climate change law in the English legal order, a few preliminary notations are due with regard to the international instruments dealing with climate change, which are often invoked in domestic proceedings.

Many international law instruments are relevant with regard to the contrast to climate change: among these, the most important ones are those grouped within the “UN framework.”<sup>84</sup> The UN framework revolves around the UN Framework Convention on

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October 2015) <<https://policyexchange.org.uk/blogs/john-finnis-judicial-power-past-present-and-future/>> accessed 6 January 2025. For an overview, see Roger Masterman and Se-shauna Wheatle, ‘A Common Law Resurgence in Rights Protection?’ [2015] *European Human Rights Law Review* 57; Mark Elliott and Kirsty Elizabeth Hughes, ‘The Nature and Role of Common Law Constitutional Rights’ in Mark Elliott and Kirsty Elizabeth Hughes (eds), *Common law constitutional rights* (Hart 2020). For a powerful rebuttal of such proposals, see Conor Gearty, *On Fantasy Island* (Oxford University Press 2016).

<sup>83</sup> Bill of Rights Bill (withdrawn), Bill 117 2022-23. See especially Sections 1, 3, and 8. See also ‘Strong Leadership, a Clear Economic Plan, A Brighter, More Secure Future. The Conservative Party Manifesto 2015’, <<https://www.theresavilliers.co.uk/files/conservativemanifesto2015.pdf>>, pp. 39, ff., 73.

<sup>84</sup> Cinnamon P Carlarne, Kevin R Gray and Richard Tarasofsky, ‘International Climate Change Law: Mapping The Field’ in Kevin R Gray, Richard Tarasofsky and Cinnamon P Carlarne (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016); Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press 2017) 35–71. For a discussion of the UN framework, see David Freestone, ‘The United Nations Framework Convention on Climate Change—The Basis for the Climate Change Regime’ in Kevin R Gray, Richard Tarasofsky and Cinnamon P Carlarne (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016). For a discussion of other relevant regimes and

Climate Change ('UNFCCC'), within whose framework subsequent instruments of various legal nature have been adopted over time: among these the most relevant are the Kyoto Protocol, which has now ceased to produce legal effects, and the Paris Agreement; a number of declarations and decisions adopted at yearly conferences of the Parties to the Convention are also relevant with regard to both the interpretation and the implementation of these agreements.<sup>85</sup>

As to the content of the UN Framework, four core areas of regulation can be distinguished: mitigation of climate change, adaptation to its effects, provision as to the financial flows from the global North to the global South supporting the ecological transition, and, finally, institutional provisions.

For the purposes of this research, two of these four regulatory areas are of interest: climate change mitigation and, to a lesser degree, the institutional provisions.

Beginning with the latter aspect, that of the institutional setup, the UNFCCC created the International Panel on Climate Change, a technical and independent body tasked with the review of the scientific knowledge and advances in the field, with the aim of identifying and constantly updating the best available scientific knowledge, upon which to base the collective as well as the individual states' action in tackling climate change.<sup>86</sup>

Coming to the mitigation provisions, they aim to contain the rise of global temperature within a limit preventing catastrophic consequences. This limit is that identified by article 2 of the Paris Agreement, affirming the aim of the Parties to the Agreement of "holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5

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instruments, see Alan Boyle and Navraj Singh Ghaleigh, 'Climate Change and International Law beyond the UNFCCC' in Kevin R Gray, Richard Tarasofsky and Cinnamon P Carlarne (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016).

<sup>85</sup> Respectively, United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994), UNTS vol. 1771, p. 107; Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) UNTS vol. 2303, p. 162; Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016), UNTS vol. 3156, p. 79.

<sup>86</sup> Navraj Singh Ghaleigh, 'Science and Climate Change Law—The Role of the IPCC in International Decision-Making' in Kevin R Gray, Richard Tarasofsky and Cinnamon P Carlarne (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016); Timothy Meyer, 'Institutions and Expertise: The Role of Science in Climate Change Lawmaking' in Kevin R Gray, Richard Tarasofsky and Cinnamon P Carlarne (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016); Medani P Bhandari, *Getting the Climate Science Facts Right: The Role of the IPCC* (River Publishers 2022).

°C above pre-industrial levels.” While this target is generally deemed to reflect the scientific consensus, made evident particularly through the work of the IPCC, on the measure of the maximum increase in temperature before catastrophic and substantially irreversible outcomes are produced, it is undisputed that art. 2 of the Paris Agreement does not create an international obligation binding on the Parties to the Agreement to reduce their respective emission to such a degree that this target is achieved.<sup>87</sup>

## **B. The ‘Paris Effect’ in domestic climate litigation.**

Regardless of the non-binding nature of the target set by art. 2 Paris Agreement, this provision is generally invoked in domestic climate litigation, most often as a measure of the constitutional duty of protection grounded in domestic fundamental rights provisions.<sup>88</sup>

Particularly, in the context of continental Europe, the argumentative structure adopted both by the plaintiffs and, at least when their requests are accepted, by the courts has progressively consolidated around certain essential arguments in a temporal development that ideally begins with the *Urgenda* judgment to reach, most recently and through numerous intermediate stops, the *Klimaseniorinnen*, *Duarte Agostinho* and *Carême* triptych of the ECtHR.<sup>89</sup> These essential elements – in extreme synthesis – are,

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<sup>87</sup> Christina Voigt, ‘The Paris Agreement: What Is the Standard of Conduct for Parties?’ (2016) 26 *Questions of International Law* 17; Daniel Bodansky, ‘The Legal Character of the Paris Agreement’ (2016) 25 *Review of European, Comparative & International Environmental Law* 142; Lavanya Rajamani and Daniel Bodansky, ‘The Paris Rulebook: Balancing International Prescriptiveness with National Discretion’ (2019) 68 *International & Comparative Law Quarterly* 1023.

<sup>88</sup> On this notion, see at least Jacqueline Peel and Hari M Osofsky, ‘Climate Change Litigation’ (2020) 16 *Annual Review of Law and Social Science* 21. For an overview of climate change litigation, see Ivano Alogna and Eleanor Clifford, *Climate Change Litigation: Comparative and International Perspectives* (2020); Wolfgang Kahl and Marc-Philippe Weller (eds), *Climate Change Litigation: A Handbook* (CHBeck; Hart; Nomos 2021); Francesco Sindico and Makane Moïse Mbengue (eds), *Comparative Climate Change Litigation: Beyond the Usual Suspects* (Springer International Publishing 2021); Francesco Sindico and others (eds), *Research Handbook on Climate Change Litigation* (Edward Elgar Publishing 2024); Maxim Bönnemann and Maria Tigre (eds), *The Transformation of European Climate Litigation* (Verfassungsblog 2024); Joana Setzer and Catherine Higham, ‘Global Trends in Climate Change Litigation: 2024 Snapshot’ (The Grantham Research Institute on Climate Change and the Environment 2024).

<sup>89</sup> Respectively, Hoge Raad [Supreme Court], Judgement of 20 December 2019, no. 18/3843, *Urgenda Foundation v. State of the Netherlands* (Neth.); ECtHR (Grand Chamber), Judgements of 9 April 2024, App. no 53600/20, *Verein Klimaseniorinnen Schweiz v*

first of all, the alleged violation of a human or fundamental right of the applicants, either under the Constitution or the ECHR, caused by the State's violation of its 'climate obligation,' that is to say, its positive obligation to act to mitigate climate change, an obligation inherent in the same fundamental rights invoked and which is sometimes also expressly provided for by the Constitution. The German Federal Constitutional Court, for example, is very clear on this point: "the state's duty of protection arising from Art. 2(2) first sentence GG also includes the duty to protect life and health against the risks posed by climate change."<sup>90</sup>

The content and extent of this duty, which "requires further specification",<sup>91</sup> are generally determined by invoking as a parameter the limit to the increase in the average global temperature indicated by art. 2 by the Paris Agreement, considered an expression of international scientific consensus.<sup>92</sup> This cap on national emissions is thus apportioned among states and imposed thereupon, not directly by the Paris Agreement, which does not give rise to such an obligation, but by the courts, which, as mentioned above, interpretatively link it to the state's duty to mitigate climate change. The argumentative process concludes with the request that the State adapt its policies in the field of combating climate change.

This argumentative structure has not succeeded before the English courts. Particularly, the distinctive tract of the English case-law is the persistent rejection of the "Paris effect," i.e. the reliance on the Paris Agreement – and the target temperature it sets under art. 2 – in domestic proceedings.

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*Switzerland*; App. no. 39371/20, *Duarte Agostinho v Portugal*; App. no. 7189/21, *Carême v France*.

<sup>90</sup> FCC, Decision of the First Senate of 24 March 2021, 1 BvR 2656/18, BVerfGE 157, 30, *Federal Climate Protection Act*, para. 148.

<sup>91</sup> *ibid.*, par. 205.

<sup>92</sup> Lennart Wegener, 'Can the Paris Agreement Help Climate Change Litigation and Vice Versa?' (2020) 9 *Transnational Environmental Law* 17; Anna-Julia Saiger, 'Domestic Courts and the Paris Agreement's Climate Goals: The Need for a Comparative Approach' (2020) 9 *Transnational Environmental Law* 37; Brian J Preston, 'The Influence of the Paris Agreement on Climate Litigation: Legal Obligations and Norms (Part I)' (2021) 33 *Journal of Environmental Law* 1; Christina Voigt, 'The Power of the Paris Agreement in International Climate Litigation' (2023) 32 *Review of European, Comparative & International Environmental Law* 237; Meinhard Doelle, with Sara Seck and Rose Klug, 'The Use of Elements of the Paris Agreement and IPCC Reports in Climate Litigation' in Alexander Zahar (ed), *Research Handbook on the Law of the Paris Agreement* (Edward Elgar 2024).

### **C. The UK legal framework on climate change: the 2008 Climate Change Act**

Before coming to the discussion of climate litigation in the UK, some brief notes on the regulatory framework for tackling climate change enacted in the UK are necessary as a preliminary point. In this regard, the lynchpin of the system is the Climate Change Act 2008 ‘CCA’, the first legislative framework in the world to introduce comprehensive, legally binding targets for reducing climate-changing emissions.<sup>93</sup>

Section 1 of the CCA, as amended in 2019, sets the overall goal of climate neutrality to 2050, imposing a duty on the relevant Secretary of State to ensure this outcome. Many of the remaining provisions - which will be briefly outlined here - are instrumental to this goal.

In particular, the competent Secretary of State is obliged to periodically identify, for each five-year period, the maximum climate-changing emissions that can be emitted in that period (the so-called carbon budget): the carbon budget for the period including 2020 must envisage a 34% reduction compared to 1990 levels; that including 2050 a 100% reduction. The Secretary of State determines both the percentage reduction in emissions compared to 1990 for each five-year period and the corresponding carbon budgets with an order of his, transmitted to Parliament, subject to the affirmative resolution procedure. In drawing up the five-year targets, the Secretary of State must take into account - and must do so explicitly and publicly - the reports of the Commission on Climate Change (a technical and independent body established by the CCA itself). Furthermore, Section 10.2 specifies some issues for the Secretary and the Commission to consider: scientific knowledge and available technologies; economic, fiscal and social circumstances; energy policy; territorial differences; the international and European situation; and emissions from aviation and international shipping.

Having set these objectives, and with the aim of achieving them, the Secretary must draw up the policies he deems necessary and appropriate (Section 13). These policies must be presented to Parliament, in particular by indicating their expected development over time and their estimated impact on the various sectors of the economy. The CCA also provides for a rather dense set of procedures aimed at ensuring publicity,

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<sup>93</sup> Thomas L Muinzer, *Climate and Energy Governance for the UK Low Carbon Transition: The Climate Change Act 2008* (Springer International Publishing 2019).

transparency and independent monitoring of public policies on climate change. In brief, the legislative framework laid down by the CCA determines a triangular structure, featuring the Secretary of State, politically responsible to Parliament, as the creator and promoter of these policies, whose claimed effectiveness is constantly verified, both *ex ante* and *ex post*, by the Commission on Climate Change, whose reports, besides being published, are periodically presented in Parliament.

#### **D. Litigating the Climate Change Act: the lack of any ‘Paris effect’**

In the light of the regulatory framework outlined above - as well as the constitutional peculiarity of the English system, centred, as previously discussed, on the sovereignty of Parliament and the immunity of legislation from judicial review that derives from it – it is not surprising that climate litigation has focused not so much on the CCA, but on the national strategies periodically adopted pursuant to Section 13 thereof. This is both because it is these strategies that concretely define the relevant public policies, whereas the CCA merely sets general objectives, and because, being statutory instruments, they are susceptible to full judicial review.<sup>94</sup>

Probably, the most important case of climate litigation in the UK to this date is *R. (on the application of Plan B Earth) v Prime Minister*.<sup>95</sup>

In this case, the claimants, adopting an argument modelled on that in *Urgenda*, challenged the *Net Zero Strategy* adopted under Section 13 CCA on the grounds that it was inadequate to achieve the objectives set out in the Paris Agreement in relation to (especially) climate change mitigation, adaptation and the provision of financial flows, and that this constituted a violation of their rights under Articles 2, 8 and 14 ECHR.

Judge Bourne dismissed the action, based primarily on two considerations.

The first was the consideration that a regulatory framework to reduce the UK climate change emissions, actually existed and the *Climate Change Council* had found it to be “credible:” in such circumstances, and in the presence of complex socio-economic assessments, the State enjoys a wide margin of appreciation, and the courts are called

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<sup>94</sup> Ruth Fox and Joel Blackwell, *The Devil Is in the Detail: Parliament and Delegated Legislation* (Hansard Society 2014) 79, f.; Michael Zander, *The Law-Making Process* (Bloomsbury Publishing 2015) 108, ff.120.

<sup>95</sup> [2021] EWHC 3469 (Admin), [2021] 12 WLUK 285.

upon to respect the judgment of Parliament or the Executive unless it is proven to be “manifestly without reasonable foundation.”<sup>96</sup>

The second consideration underlying the decision, which is of greater interest here, concerned the impossibility of invoking the Paris Agreement in domestic judgments, since the Agreement, although ratified by the United Kingdom, was not incorporated: therefore the Agreement – together with the objectives it sets out – couldn’t be invoked as a yardstick for assessing state’s conduct either directly or indirectly, as a measure of the alleged positive duty to curb climate change derived from the plaintiffs’ rights enshrined in the ECHR and incorporated via in the HRA. Specifically, as to the indirect invocation of the Paris Agreement, the Judge considered that “the problem [with such an argument] is that the Claimants are using compliance with the Paris Temperature Limit as a test for compliance with Article 2 (and Article 8). The effect is that the Court is being asked to enforce the Paris Agreement, [an unincorporated treaty,] contrary to the guidance in *SC*.”<sup>97</sup> The Supreme Court shared these conclusions as to the domestic status of the Paris Agreement in a decision rendered in the context of the Heathrow Airport expansion litigation.<sup>98</sup>

Admittedly, the decision just discussed predates the ECtHR’s judgment in *Klimaseniorinnen*, in which the Court held that Article 8 ECHR “requires that each Contracting State undertake measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades.”<sup>99</sup> This judgement raises the question of the domestic effect in the English legal order of the ECtHR’s rulings on climate change, which is linked to the duty of English courts, under Section 2 HRA, to interpret the Convention Rights taking into account the rulings of the Strasbourg Court. Recent judgements by the High Court of Justice suggest that English courts may soon be confronted again with arguments such as those dismissed in *Plan B Earth*.

Indeed, in a 2022 decision, when the cases that would have been decided in April 2024 by the ECtHR were still pending before it, the High Court seems to have left the

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<sup>96</sup> *Ibid.*, para. 48-52 (Bourne J).

<sup>97</sup> *Ibid.*, para. 25, 53 (Bourne J).

<sup>98</sup> *R. (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52, [2021] 2 All E.R. 967, para. 108 (Lord Hodge and Lord Sales). See Navraj Singh Ghaleigh, ‘Climate Constitutionalism of the UK Supreme Court’ (2021) 33 *Journal of Environmental Law* 441.

<sup>99</sup> ECtHR, *Verein Klimaseniorinnen Schweiz v Switzerland* (n 90), para. 548.

issue unresolved, pending the decisions of the ECtHR.<sup>100</sup> The Court, applying the “mirror approach” to the interpretation of Convention Rights, and adhering to the rule “no less, but certainly no more,” held that it could not autonomously derive from art. 8 ECHR the State’s duty to act in climate matters, given that doing so in the absence of a ruling to that effect by the Strasbourg Court would have constituted more than the incremental development of ECHR jurisprudence to which the English courts are limited.<sup>101</sup>

Secondly, in a decision of October 2024 on climate change adaptation, and not on mitigation, the Court, severely limiting the relevance of the ECtHR’s judgment in *Klimaseniorinnen* for the purposes of its decision on the grounds of the difference, also in the regulatory context, between mitigation and adaptation, appears to conclude that it will be generally necessary, for the English courts, in the future, to take due account of this judgment and to comply with it.<sup>102</sup>

An element of caution as to the prospects for the application of the Strasbourg Court’s climate jurisprudence in the United Kingdom, however, derives from the fact that, as already discussed, the Supreme Court, also in recent decisions, has shown a certain rigor in excluding the “passporting” of unincorporated treaties through the interpretation of Convention Rights under Section 2 HRA. Therefore, while it cannot be excluded that, in the future, confronted again with a complained violation of art. 8 ECHR as interpreted in *Klimaseniorinnen*, the English courts will comply with it, it arguably is not unlikely that English courts might reiterate that such an argument is vitiated by the problem that interpreting Convention Rights so would implicitly result in a passporting of the Paris Agreement, requiring domestic effect to be indirectly given to an unincorporate treaty.

By way of conclusion of this very brief discussion on the climate change litigation before the English courts, and apart from any further consideration as to the possible future developments thereof, it must be mentioned that, in light of the impossibility – at least for the time being – of invoking the Paris Agreement as an external yardstick for evaluating the UK climate policies, the applicants, as well as the courts, developed and

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<sup>100</sup> Catherine Higham and Joana Setzer, ‘Net Zero, Full Transparency’ (*Verfassungsblog*, 28 July 2022).

<sup>101</sup> *R. (on the application of Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin), [2023] 1 W.L.R. 225, para. 269-274 (Holgate J).

<sup>102</sup> *R. (on the application of Friends of the Earth) v Secretary of State for Environment, Food and Rural Affairs* [2024] EWHC 2707 (Admin), [2024] 10 WLUK 460.

gradually refined an alternative model of climate litigation.<sup>103</sup> Such a model of climate litigation, administrative in nature, focuses on the internal rationality of the policies developed by the Secretary of State under Section 13 CCA and on the adequacy and exhaustiveness of the information collected and review in elaborating them: in such cases, the argument, very briefly put, is that unless the Secretary of State had received and considered all the “obviously material” information, including scientific and empirical evidences, pertaining to the effectiveness of the policies they developed to address climate change, they could not rationally determine and publicly affirm that said policies were adequate to meet the objectives of GHG reduction that had been set.

While such an argumentative structure is arguably quite effective in addressing climate change and in ensuring that the Government puts forward policies aimed at tackling it that are scientifically and empirically founded, it must be remarked that international law plays no part in it. While the global dimension of the phenomenon of climate change is certainly acknowledged by the courts, the legal reasoning decisive of the cases just discussed addresses the review of the climate policies undertaken by the UK and developed by the Secretary of State as a domestic matter only.<sup>104</sup> Accordingly, the only joint between the national and global dimension of climate change mitigation, and thus between national and international law, consists in the parliamentary determination of the overall objective set out in Section 1 CCA and in the progressive definition of carbon budgets by the Secretary of State under Section 4 CCA. That both of these determinations are consistent with the international consensus on the necessary intensity of mitigation action is, in the perspective of the English courts, a happy, but legally irrelevant, coincidence. Accordingly, if there ever was any inconsistency between the international and national level, said inconsistencies could not be corrected by way of judicial review.

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<sup>103</sup> *Friends of the Earth v Secretary of State for Business, Energy and Industrial Strategy* (n 102); *R. (on the application of Friends of the Earth Ltd) v Secretary of State for Energy Security and Net Zero* [2024] EWHC 995 (Admin), [2024] P.T.S.R. 1293.

<sup>104</sup> Although addressing a project-specific case of climate litigation, *R. (Friends of the Earth Ltd.) v The Secretary of State for International Trade/UK Export Finance* [2023] EWCA Civ 14, [2023] 1 W.L.R. 2293, see Andrew Sanger and Alison L Young, ‘Deference and Dualism Are Not Friends of The Earth’ (2023) 82 *The Cambridge Law Journal* 195.

## **5. Conclusive remarks**

Throughout this Chapter, the approach of English courts to the question of the domestic status of international law has been discussed, particularly with regard to the status of unincorporated treaties under domestic law.

It has emerged that English courts are quite careful in enforcing the prohibition of giving domestic effects to unincorporated treaties, on the ground that this would encroach upon the legislative prerogatives of Parliament and diminish the democratic credentials of the law. Particularly, it has been discussed how backdoors to this prohibition are contrasted, and how suggestion favouring developments in the law in the sense of allowing for a greater permeability of the domestic legal order to international law are rebutted.

This holds true also in two fields of law that have a high “cosmopolitan significance,” namely those of human rights and the protection of climate. As the discussion on Germany and Colombia will show, in this fields, under the principle of openness of the legal order, the permeability of the domestic legal order is particularly heightened, and constitutional provisions are often given content by reference to international law and standards. In the UK, instead, as it has become apparent, no such interpretive phenomenon occurs; to the contrary, courts are careful in enforcing structural limits to the application of international law in the domestic legal order, invoking the need to protect the legislative prerogatives of Parliament.

Thus, ultimately, the review of the English case asseverates the hypothesis that a modern conception of statehood favours the structuring of conflicts between national and international law in terms of structural conflicts.

At the same time, as it is quite reasonable to expect, the discussion developed has shown that there are dissonating voices in the English legal debate, as well attempts at reform, both judicially and extrajudicially.

Indeed, on the one hand, it is very well possible that a modern conception of statehood is brought to its extreme consequences, towards a radical closure of the national legal order, “opting out” of international law. Brexit clearly was the forerunner of this trend, which has not, however, spilled over to public international law and the ECHR

more particularly, though the Supreme Court has progressively adopted a more restrictive approach to the issue of the domestic effect of international law in recent times.<sup>105</sup>

On the other hand, there are strong voices advocating, both judicially and academically, for a moderately greater opening of the legal order. Particularly, it is often argued for the need, at least when invoking unincorporated human rights international norms, to verify case-by-case whether it would be appropriate to give them domestic effect. Accordingly, the question of the domestic applicability of international law, at least in these limited areas, should not be a function of a hard rule, that barring the domestic application of unincorporated treaties, but the result of balancing operation, whereby the need to safeguard the prerogatives of Parliament is measured against that of protecting individuals' rights. Strikingly, the legal reasoning under the principle of openness, as it will be shown in later chapters, is intimately resembling this proposal. As it will be discussed in the next chapters, this is very close to the approach adopted under the principle of friendliness towards international law.

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<sup>105</sup> Lewis Graham, 'Has the UK Supreme Court Become More Restrained in Public Law Cases?' (2024) 87 *The Modern Law Review* 1073.

## Chapter VII Germany

It is generally understood that the German legal order is characterised by the principle of openness towards international law.<sup>1</sup> In the words of the Federal Constitutional Court,

“the Basic Law integrates the state it constitutes into an international legal order that preserves freedom and peace, because it seeks to harmonise its own liberal peace order with an international law that not only concerns the coexistence of states, but also seeks to be the basis of the legitimacy of every state order.”<sup>2</sup>

“This understanding of sovereignty is clearly reflected in the aims enshrined in the Preamble to the Basic Law. The Basic Law departs from a self-sufficient and high-handed notion of sovereign statehood, affirming a view of state authority that sees sovereignty as ‘freedom organised and bound by international law’. It breaks with all forms of political Machiavellianism and with a rigid notion of sovereignty, which until the beginning of the 20th century still considered the right to wage war – including wars of aggression – to be a self-evident right of sovereign states. [...]

By contrast, the Basic Law sets out the overarching political aims of safeguarding peace and overcoming the destructive antagonism of European states. According to this understanding, sovereign statehood represents a peaceful space and the order guaranteed therein is based on individual freedom and collective self-determination. The state is neither a myth nor an end in itself, but the historically evolved, globally recognised form of organisation of a political community with the capacity to act.”<sup>3</sup>

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<sup>1</sup> Klaus Vogel, *Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit: ein Diskussionsbeitrag zu einer Frage der Staatstheorie sowie des geltenden deutschen Staatsrechts* (Mohr 1964); Udo Di Fabio, *Das Recht offener Staaten: Grundlinien einer Staats- und Rechtstheorie* (Mohr Siebeck 1998); Stephan Hobe, *Der offene Verfassungsstaat zwischen Souveränität und Interdependenz. Eine Studie zur Wandlung des Staatsbegriffs der deutschsprachigen Staatslehre im Kontext internationaler institutionalisierter Kooperation* (Duncker & Humblot 1998); Wolfgang Wessels, *Die Öffnung des Staates* (Springer Fachmedien Wiesbaden 2000); Christian Seiler, *Der souveräne Verfassungsstaat zwischen demokratischer Rückbindung und überstaatlicher Einbindung* (Mohr Siebeck 2005); Knop, Daniel, *Volker- und Europarechtsfreundlichkeit als Verfassungsgrundsätze* (Mohr Siebeck 2014); Berenike Schriewer, *Zur Theorie der internationalen Offenheit und der Völkerrechtsfreundlichkeit einer Rechtsordnung und ihrer Erprobung am Beispiel der EU-Rechtsordnung*. (Duncker & Humblot 2017); Theresa Abend, *Grenzen der Völkerrechtsfreundlichkeit* (Göttingen University Press 2019).

<sup>2</sup> FCC, Decision of the Second Senate of 26 October 2004, 2 BvR 955/00, 1038/01, BVerfGE 112, 1, *Bodenreform III*, para. 91.

<sup>3</sup> FCC, Judgement of 30 June 2009, 2 BvE 2/08, BVerfGE 123, 267, *Lisbon Treaty*, para. 223, 224.

Such openness, however, is not unlimited, resulting in a “controlled openness,” and not in an absolute subordination of the German legal order to international law, thus preserving the sovereign nature of the German state and the autonomy of its legal order.<sup>4</sup>

This chapter aims at discussing how, in the German legal order, the principles of openness and friendliness towards international law interact with the autonomy of the legal order, thus influencing both the domestic reception of international law and the way in which conflicts between the two level are framed.

First, the constitutional principles of openness and friendliness towards international law will be discussed (para. 1). In the following paragraphs, it will be discussed how the principle of friendliness towards international law affects the way in which international law is received within the domestic legal order and how, in turn, instances of judicial non-application of international law are framed. This will be done first with regard to international law in general, especially discussing the interaction with the *lex posterior derogate priori* (para. 2), and, subsequently, addressing areas of the law which show particularly strong cosmopolitan features – i.e. fundamental rights (para. 3) and climate change (para. 4) – thus justifying an enhanced effectiveness of the principle of friendliness towards international law.

## **1. The openness of the German legal order and the principle of friendliness towards international law**

Looking at the roots of the choice for an open conception of statehood undertaken by the framers of the Basic Law, it is difficult to identify one single overriding reasons

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<sup>4</sup> FCC, *Bodenreform III* (n 2), para. 92; Decision of 15 December 2015, 2 BvL 1/12, BVerfGE 141, 1, *Treaty Override*, para. 69. Volker Röben, *Außenverfassungsrecht* (Mohr Siebeck 2007) 72; Frank Schorkopf, *Grundgesetz und Überstaatlichkeit: Konflikt und Harmonie in den auswärtigen Beziehungen Deutschlands* (Mohr Siebeck 2007) 226, f. See also Daniel Lovric, ‘A Constitution Friendly to International Law: Germany and Its *Volkerrechtsfreundlichkeit*’ (2006) 25 *Australian Year Book of International Law* 75, 84, observing: ‘German constitutional law encourages the mutual interaction of international and domestic rules. But *Völkerrechtsfreundlichkeit* does not mean an uncritical acceptance of international law rules. [...] The main difference between Australia and Germany seems to be who exercises control over the inflow of international law. In Australia, with its strongly dualist legal framework, this control is primarily exercised by the parliament [...]. In Germany, by contrast, far more of this control is exercised by the courts, particularly by the Federal Constitutional Court.’

for it.<sup>5</sup> In part, it was a reaction to the disasters brought about by an unchecked exercised of the state's sovereignty, both internally, with the structural and egregious violation of individuals' rights, culminating in the holocaust, but not limited to that, and externally, with the pursuit to the extremes of power politics on the international plane.<sup>6</sup>

In part, the choice for open statehood was also linked to an instrumental consideration of international law, and the principle of self-determination it entails, deemed the only instrument available to the "enemy state," as Germany was then considered: this held true as to rehabilitation of Germany on the international plane, the recovery from the extreme economic hardship resulting from the defeat in the war and from the destruction of German cities, the guarantee of Germany's security, and the future reunification. Significantly, however, even after Germany managed to achieve its reunification and had already recovered economically and politically, the principle of openness has been constantly upheld by the FCC, thus contributing to dispel the idea of the choice for open statehood being merely dictated by opportunistic reasons.<sup>7</sup>

This principle, rooted in the Basic Law, was initially expounded by the German scholarship and subsequently endorsed by the FCC. This interpretative elaboration rests on the comprehensive consideration of the Preamble to the Basic Law and of some constitutional provision, clarifying their common underlying rationale, namely that of characterising, both descriptively and normatively, the German legal order as integrated in the international community.

There is some inconsistency in the provisions invoked in this context.<sup>8</sup> The Preamble is always considered, where it is stated: "inspired by the determination to

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<sup>5</sup> Thilo Rensmann, 'Die Genese des „offenen Verfassungsstaats“ 1948/49' in Thomas Giegerich (ed), *Der 'offene Verfassungsstaat' des Grundgesetzes nach 60 Jahren: Anspruch und Wirklichkeit einer großen Errungenschaft* (Duncker & Humblot 2010).

<sup>6</sup> Schorkopf (n 4) 48; Andreas Paulus, 'Völkerrechtsfreundlichkeit in der Rechtsprechung des Bundesverfassungsgerichts' (2023) 83 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 869, 872.

<sup>7</sup> Thomas Giegerich, 'Die Zähmung des Leviathan Deutschlands unvollendeter Weg vom nationalen Machtstaat zum offenen und europäischen Verfassungsstaat' in Thomas Giegerich (ed), *Der 'offene Verfassungsstaat' des Grundgesetzes nach 60 Jahren: Anspruch und Wirklichkeit einer großen Errungenschaft* (Duncker & Humblot 2010) 17.

<sup>8</sup> Rainer Wahl, 'Der offene Staat und seine Rechtsgrundlagen' [2003] *Juristische Schulung* 1145; Mehrdad Payandeh, 'Völkerrechtsfreundlichkeit als Verfassungsprinzip' (2009) 57 *Jahrbuch des öffentlichen Rechts der Gegenwart. Neue Folge (JöR)* 465; Ulrich Fastenrath, 'Völkerrechtsfreundlich und international offen?: Die Rechtsprechung des Bundesverfassungsgerichts zum internationalen Recht' in Robert Chr Van Ooyen and

promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law.” Similarly, the provisions from Article 23 to Article 26, concerning, respectively, the participation in the project of European integration, the transfer of sovereign prerogatives for the purposes of joining the system of collective security, the status of general principles of international law, and the constitutional ban of aggression wars are regularly mentioned.<sup>9</sup> Only recently Article 1, para. 2 on the acknowledgement of inviolable human rights is being mentioned.<sup>10</sup> At times, other sector-specific constitutional provisions are taken into consideration.<sup>11</sup>

By reviewing the mentioned provisions, it is quite apparent that, while they, individually as well as comprehensively considered, clearly show the choice for an open conception of statehood undertaken by the Basic Law and its framers, none of them – with the exception of Article 25 – directly concerns the domestic status of international law in the domestic legal order. Article 23 and 24, which enable the transfer of sovereign rights to supranational organisation in the context of European integration and collective security respectively, signalling a significant shift in the conception of statehood endorsed by Germany, have no bearing as to the domestic status of international norms, with the exception of the law of the supra- and international organisations they address.<sup>12</sup> Somewhat similarly, Article 26, in outlawing aggression wars, clearly reveals a departure

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Martin HW Möllers (eds), *Handbuch Bundesverfassungsgericht im politischen System* (Springer Fachmedien Wiesbaden 2024) 3, f.; Dürig, Herzog and Scholz (eds), ‘GG Art. 25’, *Grundgesetz-Kommentar* (105th edn, 2024) paras 6–8. On the development of the case law of the FCC, see Frank Schorkopf, ‘Völkerrechtsfreundlichkeit und Völkerrechtsskepsis in der Rechtsprechung des Bundesverfassungsgerichts’ in Thomas Giegerich (ed), *Der ‘offene Verfassungsstaat’ des Grundgesetzes nach 60 Jahren: Anspruch und Wirklichkeit einer großen Errungenschaft* (Duncker & Humblot 2010); Paulus (n 6).

<sup>9</sup> Rensmann, ‘Die Genese des „offenen Verfassungsstaats“ 1948/49’ (n 5) 62; Volker Röben, ‘Die Genese des „offenen Verfassungsstaats“ – Rückblick auf 1919 und 1871 –’ in Thomas Giegerich (ed), *Der ‘offene Verfassungsstaat’ des Grundgesetzes nach 60 Jahren: Anspruch und Wirklichkeit einer großen Errungenschaft* (Duncker & Humblot 2010).

<sup>10</sup> For an early case, see FCC, Decision of the First Senate of 4 May 1971, 1 BvR 636/68, BVerfGE 31, 58, *Spanier*, para. 44; See also, if with specific reference to the ECHR, Decision of the Second Senate of 4 May 2011, 2 BvR 2365/09, BVerfGE 128, 326, *Preventive Detention*, para. 90; FCC, Judgment of the Second Senate of 12 June 2018, 2 BvR 1738/12, BVerfGE 148, 296, *Ban on strikes for civil servants*, para. 130. Daniel Wolff, *Der einzelne in der offenen Staatlichkeit: grundgesetzlicher Grundrechtsschutz in der zwischenstaatlichen Kooperation* (Mohr Siebeck 2020) 287, f.

<sup>11</sup> Andreas Zimmermann, ‘Rezeption völkerrechtlicher Begriffe durch das Grundgesetz’ (2007) 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 297.

<sup>12</sup> Christian Calliess, *Staatsrecht III: Bezüge zum Völker- und Europarecht* (3., neu bearbeitete Auflage, CHBeck 2020) para 60, ff.

from the *Machtstaat* and power politics in international relations; however, once again, it says very little as to the technical legal status of international law in Germany.

Finally, Article 25, addressing the domestic status of “general rules of international law,” is perhaps the most important provision among these in revealing the choice for open statehood operated by the Basic Law. Indeed, Article 25 recuperates Article 4 of the Weimer 1919 Constitution, also enshrining an explicit and deliberated choice for open statehood, largely abandoned in the subsequent practice due to the extremely reductive reading of “generally accepted rules of international law” as requiring them to be accepted by Germany.<sup>13</sup>

Also in light of these considerations, it is considered that, albeit interpretatively derived from a number of constitutional provisions concerning the integration of Germany in the international community, the principle of openness is not only a synthetical expression summing them up; rather, it is an autonomous legal principle, determinative of autonomous legal effects, that go beyond those of the various provision from which it is drawn.<sup>14</sup>

The general constitutional principle of openness thus elaborated can be declined in three more specific principle stemming from it.<sup>15</sup> These are, first, the constitutional directive to the political bodies to further the integration of Germany in the international community, which is closely linked to the constitutional favour for the pursuit of the project of European integration and to the related authorisation of the transfer of sovereign prerogatives to supranational bodies under Article 23 BL. Secondly, and most relevantly for the purposes of this research, the principle of openness determines also the more specific principle of friendliness towards international law, concerning the domestic of international law and aiming to further, to the greatest extent possible, the correspondence between national and international law.<sup>16</sup> Finally, inherent in the principle of openness is

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<sup>13</sup> On the legal practice under the Weimer Constitution, see also Lawrence Preuss, ‘International Law in the Constitutions of the Länder in the American Zone in Germany’ (1947) 41 *American Journal of International Law* 888; Röben (n 9); Laila Schestag, ‘Weimar International. Zur Entstehung und Bedeutung von Artikel 4 WRV’ (2022) 70 *Jahrbuch des öffentlichen Rechts der Gegenwart. Neue Folge* 373.

<sup>14</sup> Payandeh, ‘Völkerrechtsfreundlichkeit als Verfassungsprinzip’ (n 8); Schorkopf (n 8) 151 ff.; Alexander Kees, ‘Bricht Völkerrecht Landesrecht?’ (2015) 54 *Der Staat* 63, 83.

<sup>15</sup> Schriewer (n 1) 72.

<sup>16</sup> FCC, Decision of the Second Senate of 5 November 2003, 2 BvR 1243/03, BVerfGE 109, 13, *Extradition list*, para. 36; *Bodenreform III* (n 2), para. 93. On the distinction between this

also the centrality of the human being and of its dignity, protected both at national, supranational, and international level: quite obviously, this consideration is of particular relevance in the field of human and fundamental rights, directing the interaction of the various, and often overlapping, legal orders in this field.<sup>17</sup>

Coming more specifically to the principle of international law friendliness, whereas the FCC has consistently held that the principle at issue translates in the duty of all State organs – and, among them, particularly of the Courts – to take into account the international obligations of Germany in carrying out their duties, its exact content and implications are not perfectly clear, and actually remains an open, and contentious, issue.<sup>18</sup>

Indeed, some considerations are in order when discussing the principle at issue.

First, given that it is derived from a number of specific constitutional provisions, it cannot run counter to any of them.<sup>19</sup>

Furthermore, the principle of friendliness towards international law does not exist in a constitutional vacuum; to the contrary, it is embedded in the “democratic and constitutional system of the Basic Law,” and is only effective within such framework.<sup>20</sup> This means that, when the principle of openness is applied, other constitutional imperatives are to be considered too – namely, the respect that is due to the exercise of the legislative prerogatives by the Bundestag, pursuant to the democratic principle, as well as the constitutional principles other than those specifically concerning the

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principle and that of openness, see Albert Bleckmann, ‘Die Völkerrechtsfreundlichkeit der deutschen Rechtsordnung’ (1979) 32 *Die öffentliche Verwaltung* 309; Christian Tomuschat, ‘§226 staatsrechtliche Entscheidung für die internationale Offenheit’ in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol XI (CF Müller 2013) para 9; Mehrdad Payandeh, ‘Verfassungsrechtliche Grundlagen der Völkerrechtsfreundlichkeit in Deutschland’ (2023) 83 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 609, 610.

<sup>17</sup> Karl-Peter Sommermann, ‘Völkerrechtlich garantierte Menschenrechte als Maßstab der Verfassungskonkretisierung — die Menschenrechtsfreundlichkeit des Grundgesetzes —’; Jochen Frowein, ‘Kritische Bemerkungen zur Lage des Deutschen Staatsrechts aus rechtsvergleichender Sicht’ (1998) 51 *Die öffentliche Verwaltung* 806; Thilo Rensmann, *Wertordnung und Verfassung* (Mohr Siebeck 2007).

<sup>18</sup> Payandeh, ‘Verfassungsrechtliche Grundlagen der Völkerrechtsfreundlichkeit in Deutschland’ (n 16) 615.

<sup>19</sup> FCC, *Treaty Override* (n 4), para. 69.

<sup>20</sup> FCC, Order of the Second Senate of 14 October 2004, 2 BvR 1481/04, BVerfGE 111, 307, *Görgülü*, para. 34. Developing - and endorsing - the consequences as to the limits of the consistent interpretation of the Basic Law of this affirmation, see Monika Polzin, ‘Reichweite und Grenzen der völkerrechtskonformen Interpretation des Grundgesetzes’ (2023) 83 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 741.

integration of Germany in the international legal order which might be relevant according to the case.

As a consequence, as it has been argued, “the idea that it would be possible to derive clear-cut guidelines for the content and limits of international law-friendliness from this seems doubtful. What remains is a fundamental, strong commitment to international law and to the international integration and openness of the German legal system, the normative contours of which, however, still appear blurred.”<sup>21</sup> Accordingly, a better understanding of the principle at issue, also in its implications as to the instances of judicial non-compliance with international law, and thus of the domestic non-application thereof, is probably achieved by reviewing its concrete operation in various fields of the law.

For now, it should be mentioned that the duty to take into account international law under the Basic Law and the principle of openness is generally perceived to be more far-reaching than its counterparts in the UK (or in the USA), both by authorising courts to reach “bolder” interpretations of the relevant statute, less limited by the letter of the interpreted provisions, and by framing the matter in objective terms rather than in voluntaristic, subjective ones.<sup>22</sup> This is particularly the case also because the duty of national courts to take into account international law is not limited to the construction of the legislative provisions on the premise that, in cases of ambiguity, courts should presume that the legislator intended to comply with international law rather than derogating from it; rather, such a duty extends also to the interpretation of the Basic Law, and rests upon the constitutional requirement of ensuring the greatest consistency possible between the two legal orders.<sup>23</sup> Accordingly, in areas of constitutional significance, such

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<sup>21</sup> Payandeh, ‘Verfassungsrechtliche Grundlagen der Völkerrechtsfreundlichkeit in Deutschland’ (n 16) 615. See also, similarly, Martin Schäfer, *Treaty Overriding* (Mohr Siebeck 2020) 60.

<sup>22</sup> Alexander Proelß, ‘Die verfassungsrechtliche Berücksichtigungspflicht im Lichte des respectful consideration-Erfordernisses des U.S. Supreme Court’ in Thomas Giegerich (ed), *Der ‘offene Verfassungsstaat’ des Grundgesetzes nach 60 Jahren: Anspruch und Wirklichkeit einer großen Errungenschaft* (Duncker & Humblot 2010); André Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press 2011) 139, ff.; Pierfrancesco Rossi, ‘Using International Law for Construing Domestic Law: A Study of Consistent Interpretation’ (2020) 58 *Archiv des Völkerrechts* 279.

<sup>23</sup> With specific reference to the ECHR, see Andreas Voßkuhle, ‘Rechtspluralismus als Herausforderung’ (2019) 79 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 481, 485: “the fact that an international treaty with the status of law influences the national constitution is anything but a matter of course. For Germany, however, this follows precisely from the substantive orientation of the Basic Law towards human rights.”

as those pertaining to the protection of fundamental rights or to the protection of the climate, international standards are very often indirectly relied upon in the defining the law applicable to the case, even to the effect of displacing contrasting legislation.

## **2. The interaction between the *lex posterior derogate priori* rule and the principle of friendliness towards international law in the case-law of the Federal Constitutional Court**

Having introduced the principles of openness and that of friendliness towards international law that stems from it in the previous paragraph, the interactions it undergoes with instances of non-application of international law can now be discussed.

The point of departure in this discussion is that, under German constitutional law, international treaties, when incorporated, acquire the formal rank of the incorporating legislation: as such, they are considered federal ordinary legislation. Consequently, insofar as it is not possible to reach an international-consistent interpretation of national legislation, subsequent legislative acts are allowed to derogate to previously incorporated treaties, as per the *lex priori derogat posteriori* rule.<sup>24</sup>

This issue, together with the implications thereto of the principle of friendliness towards international law, was addressed by the FCC on several occasions.<sup>25</sup> Among these, the decisions rendered in three cases are perhaps the most relevant: the *Reichskonkordat* decision of 1957, the *Alteigentümer* decision in 2004, and, finally, the *Treaty Override* decision of 2015.<sup>26</sup>

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<sup>24</sup> Werner Heun, 'Art. 59' in Horst Dreier (ed), *Grundgesetz-Kommentar*, vol 2 (3rd edn, Mohr Siebeck 2015) para 47; Rudolf Geiger, *Staatsrecht III* (7th edn, CH Beck 2018) 162; Heiko Sauer, *Staatsrecht III: auswärtige Gewalt, Bezüge des Grundgesetzes zu Völker- und Europarecht, offene Verfassungsstaatlichkeit* (5th edn, CH Beck 2018) 89, f.; Hans-Georg Dederer and Michael Schweitzer, *Staatsrecht, Völkerrecht, Europarecht* (12th edn, CF Müller 2020) 233–238.

<sup>25</sup> Knop, Daniel (n 1) 206–209.

<sup>26</sup> Respectively FCC, Judgement of the Second Senate of 26 March 1957, 2 BvG 1/55, BVerfGE 6, 309, *Reichskonkordat*; *Bodenreform III* (n 2); *Treaty Override* (n 4). See generally Schorkopf (n 8).

### A. The 1957 *Reichskonkordat* decision

The first decision (*Reichskonkordat*) concerned the constitutionality of the 1954 School Act, enacted by the State of Lower Saxony:<sup>27</sup> particularly, the question arose whether State Parliaments were constitutionally bound to comply with international law and, specifically, with the Concordat between the Holy See and the German Reich of 20 July 1933.<sup>28</sup> It is to be noted that the Concordat was concluded, on the German side, by the National Socialist government, it was never submitted to the Bundestag for its consideration, and it was incorporated through legislation enacted by the Government alone.<sup>29</sup> Accordingly, while the Concordat was perfectly binding on the Federal Republic of Germany in its quality of successor of the German Reich, because it had been validly concluded and enacted according to the procedures in place at the time,<sup>30</sup> it had a problematic origin and very weak democratic credentials.<sup>31</sup> The case was further complicated by the federal organisation of the German Republic and by the attribution to the States of the exclusive legislative competence in matters of instruction.

Net of these complexities, the FCC, in the final paragraphs of the decision, confronted the question of the implications of the constitutional principle of friendliness towards international law: the Court adopted a restrictive approach, which it maintained ever since,<sup>32</sup> concluding that “the Basic Law does not go so far in its friendliness towards international law as to ensure compliance with existing international treaties by binding

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<sup>27</sup> Act on the Public School System in Lower Saxony of 14 September 1954, Nds. GVBl. 1954, 89.

<sup>28</sup> RGBl. 1933 II, 679.

<sup>29</sup> Law on the Implementation of the Reich Concordat of 12 September 1933, RGBl. 1933 I, 625.

<sup>30</sup> As the FCC notes (*Reichskonkordat*, n 26, at para. 125),

“measured against the provisions of the Weimar Constitution, the so-called Enabling Act was invalid. However, there is no need to elaborate on this, because its validity cannot be decided according to the provisions of this constitution. The Enabling Act must be regarded as a stage in the revolutionary establishment of National Socialist tyranny. It created a new order of competences in place of the previous one. At the time of the ratification of the Concordat (September 1933), this new order of competences had actually been established, both internally and externally.”

<sup>31</sup> As noted by Thomas Giegerich, ‘Der Blankoscheck des Bundesverfassungsgerichts für den gesetzgeberischen Treaty Override ist völkerrechtsunfreundlich’ in Hans-Peter Folz and Stefan Lorenzmeier (eds), *Recht und Realität* (Nomos 2017) 644.

<sup>32</sup> H Kaiser, ‘Die Erfüllung der völkerrechtlichen Verträge des Bundes durch die Länder’ 526, 553; Schriewer (n 1) 58; Giegerich, ‘Der Blankoscheck des Bundesverfassungsgerichts für den gesetzgeberischen Treaty Override ist völkerrechtsunfreundlich’ (n 31) 645; Paulus (n 6) 873.

the legislature to the law corresponding to them.”<sup>33</sup> In reaching this conclusion, the FCC relied on the consideration that, under the Basic Law, the fulfilment of the international obligations of Germany is a responsibility of the competent legislatures, the Basic Law granting the character of domestic law only to the general rules of international law, which accordingly, trump contrasting statutory – but not constitutional – provisions. International treaties, instead, do not enjoy supremacy over other statutory provisions and, therefore, “the legislator has the power of disposal over the body of law even where a contractual obligation exists, provided it does not relate to general principles of international law.”<sup>34</sup>

## **B. The 2004 *Alteigentümer* and *Görgülü* decisions**

The principles established in *Reichskonkordat*, and later reaffirmed in a 1971 decision, where it was held that “the general legal principle of ‘*pacta sunt servanda*’ does not in turn transform the individual norms of international treaties into general rules of international law with priority over domestic law,<sup>35</sup> were further elaborated and refined in the 2004 *Alteigentümer* decision, dealing with the compatibility of the land expropriations in the former Soviet occupation zone between 1945 and 1949 with international law and the consequences of a possible violation of international law under the Basic Law. In that decision, the FCC clarified that the duty to respect international law, arising from the Basic Law’s friendliness towards international law, has three elements:

Firstly, the German state organs are obliged to comply with the norms of international law that bind the Federal Republic of Germany and to refrain from violations wherever possible. The legal consequences of a breach of this obligation depend on the type of international law norm concerned. The Basic Law itself regulates certain groups of cases. For example, it can be inferred from the second sentence of Article 25 of the Basic Law that the general rules of international law take precedence over ordinary statutory law.

Secondly, the legislator must ensure for the German legal system that violations of international law committed by its own state organs can be corrected.

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<sup>33</sup> FCC, *Reichskonkordat* (n 26), para. 243.

<sup>34</sup> *Ibid.*

<sup>35</sup> FCC, Decision of the Second Senate of 9 June 1971, 2 BvR 255/69, BVerfGE 31, 145, *Milchpulver*, para. 108. See also FCC, Decision of 24 October 2000, 1 BvR 1643/95, NJW 2001, 670, para. 9. See Schäfer (n 21) 66–75.

Thirdly, the German state organs may also be [...] to enforce international law in their own area of responsibility if other states violate it.”<sup>36</sup>

In the *Görgülü* decision, rendered 12 days prior to the *Alteigentümer*, mainly addressing the domestic status of the ECHR, the FCC observed that:

“the Basic Law pursues the objective to integrate Germany with the legal community of peaceful and free states but does not cede its sovereignty, ensuring the Basic Law has the last say. In this respect, there is no contradiction with the aim of openness to international law if the legislator, exceptionally, does not comply with international treaty law, provided this is the only way to avert a violation of the Basic Law’s fundamental principles.”<sup>37</sup>

This passage in the *Görgülü* decision – just as the decision generally considered – is quite ambivalent and can be understood both as an affirmation of the openness of the German constitutional order, as well imposing strong limitations thereupon.<sup>38</sup>

Despite the unwavering affirmation of the sovereignty of Germany, manifestly present in the *Görgülü*, but also in the *Alteigentümer* one, if less clearly so, these two decisions were seen as possibly developing the approach initially adopted in *Reichskonkordat* towards one more friendly towards international law and more restrictive of the prerogative of Parliament to disregard previous international obligations. It was observed, for example, that, in light of these decisions, “the question arises as to whether the argumentation of the *Reich Concordat* decision has become obsolete.”<sup>39</sup>

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<sup>36</sup> FCC, *Bodenreform III* (n 2), para. 93. See, very critical of the majority’s decision, the Dissenting Opinion of Judge Lübke-Wolff, generally criticising the majority for its excessive activism (“the Senate responds to questions that the case does not raise with constitutional principles that the Basic Law does not contain” – *ibid.*, para. 151), and specifically voicing strong concerns as to the third aspect of the duty to respect international law derived from the principle of friendliness towards international law.

<sup>37</sup> FCC, *Görgülü* (n 20), para. 35.

<sup>38</sup> Vocally critical, Ingolf Pernice, ‘BVerfG, EGMR und die Rechtsgemeinschaft’ [2004] *Europäische Zeitschrift für Wirtschaftsrecht* 705; for a more nuanced criticism, see Rainer Hofmann, ‘The German Federal Constitutional Court and Public International Law: New Decisions, New Approaches Forum’ (2004) 47 *German Yearbook of International Law* 9, 37; and Frank Hoffmeister, ‘Germany: Status of European Convention on Human Rights in Domestic Law’ (2006) 4 *International Journal of Constitutional Law* 722, 729, ff.

<sup>39</sup> Robert Frau, *Der Gesetzgeber zwischen Verfassungsrecht und völkerrechtlichem Vertrag* (Mohr Siebeck 2015) 54; Mehrdad Payandeh, ‘Grenzen der Völkerrechtsfreundlichkeit’ [2016] *Neue juristische Wochenschrift* 1279, 1279: “even if the [*Görgülü*] decision was not about the legislator being bound by international treaties, it could be understood to mean that a deviation from international treaties should only be permissible on the basis of conflicting constitutional law or possibly even only insofar as it is necessary to avert a violation of fundamental constitutional principles”; Giegerich, ‘Der Blankoscheck des Bundesverfassungsgerichts für den gesetzgeberischen Treaty Override ist völkerrechtsunfreundlich’ (n 31) 647–651.

Indeed, these decisions qualified the approach to the issue of the validity of parliamentary legislation derogating from previously enacted international obligations, both by stating that this should be done in exceptional circumstances, for the purposes of protecting fundamental constitutional principles, and by requiring German state organ to comply with international law, the legislator especially being called upon to ensure that Germany complies with international obligations. Indeed, it is by relying on the above quoted passage in *Görgülü*, as well as on the Preventive Detention decision,<sup>40</sup> that the Federal Finance Court (*Bundesfinanzhof*) referred the question to the FCC under Article 100, par. 1 BL of whether treaty overrides were allowed under the Basic Law, adopting the view that they were not.

### C. The 2015 Treaty Override decision

Deciding the referral from the Federal Finance Court, the FCC, in its 2015 *Treaty Override* decision, answered in the negative to the question, posed by the Finance Court, of whether Parliament was prohibited, under the Basic Law, to derogate from previously entered into treaty obligations.<sup>41</sup> In so doing, the FCC reaffirmed the *Reichskonkordat* principles, even, according to some commentators, going beyond them.<sup>42</sup>

The case originated in an Act of Assent of the Bundestag (Federal Parliament) dating from the 1980s,<sup>43</sup> by which the legislature had assented to an international agreement

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<sup>40</sup> Federal Finance Court, Order for reference of 10 January 2012, I R 66/09, BFHE 236, 304, para. 17-19. Similar considerations had also been put forward in the scholarship: see e.g. Klaus Vogel, 'Völkerrechtliche Verträge und innerstaatliche Gesetzgebung. Eine neue Entscheidung des BVerfG hat Bedeutung auch für die Beurteilung des Treaty Override' [2005] *Internationales Steuerrecht* 29; Alexander Rust and Ekkehart Reimer, 'Treaty Override im Deutschen internationalen Steuerrecht' [2005] *Internationales Steuerrecht* 843; Florian Becker, 'Völkerrechtliche Verträge und parlamentarische Gesetzgebungskompetenz' [2005] *Neue Zeitschrift für Verwaltungsrecht* 289; Dietmar Gosch, 'Über das Treaty Overriding Bestandsaufnahme – Verfassungsrecht – Europarecht' [2008] *Internationales Steuerrecht* 413. For the opposing view, specifically addressing the position of the Federal Finance Court, see Marcel Krumm, 'Legislativer Völkervertragsbruch im demokratischen Rechtsstaat' (2013) 138 *Archiv des öffentlichen Rechts* 363; Andreas Musil, 'Treaty Override als Dauerproblem des internationalen Steuerrechts' [2014] *Internationales Steuerrecht* 192.

<sup>41</sup> The conclusion of the *Treaty Override* decision were subsequently confirmed in FCC, Order of the Second Senate of 13 October 2016, 2 BvE 2/15, BVerfGE 143, 101, *NSA Investigation Committee*, para. 111-115.

<sup>42</sup> Ulrich Fastenrath, 'BVerfG, 15.12.2015 - 2 BvL 1/12. Kein Vorrang des Völker(Vertrags)Rechts - zum sogenannten Treaty Override durch den Gesetzgeber' (2016) 71 *JuristenZeitung* 625.

<sup>43</sup> 3 BGBL II, 1989, Nr. 39, 8.

between Turkey and the Federal Republic of Germany, under which income and assets from Turkey from self-employment and which can be taxed in Turkey, are to be excluded from the basis of assessment for German tax and may only be taken into account for the remaining assessment of the income and assets to be taken into account.

In 2003, however, the federal legislature amended the Income Tax Act and created a provision according to which the exemption under a double taxation agreement is only granted if proof is provided that the tax has been paid in the other state or that taxation has been waived. Consequently, also in the case of Turkey, employees were only exempt from taxation on their income earned there if they were able to provide the relevant proof. This new regulation therefore contradicted the regulation of the approval law in all cases in which proof had not been provided.<sup>44</sup>

The Second Senate of the Federal Constitutional Court thus had to rule on the constitutionality of this amendment to the Income Tax Act and on the question of whether the legislator, in light of principle of international law friendliness, can validly derogate from international treaties.<sup>45</sup>

The Court found that it could. Particularly, the Court, abiding by its precedents, applied a rule, whereby subsequent legislation can always derogate from previous international legal obligations, provided that these are not expressive of general rules of international law, which, under Article 25 Basic Law enjoy a supra-legislative rank.

As it has been correctly observed, “the Federal Constitutional Court sees the central problem of the decision as being the assignment of the approval laws to one of the levels

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<sup>44</sup> On the possibility of reaching a consistent interpretation of the amendment to the Income Tax, see Wiss Christina Henrich, ‘Das Bundesverfassungsgericht und die Verteidigung der Demokratie’ [2016] *Neue Zeitschrift für Verwaltungsrecht* 668, 670.

<sup>45</sup> Klaus Ferdinand Garditz, ‘Treaty Override International Decisions’ (2016) 110 *American Journal of International Law* 339; Michael Heinke, ‘Höher oder schwerer? – Ist die Vorrangrelation zwischen Völkervertragsrecht und Bundesrecht eine Frage der Abwägung?’ (2016) 55 *Der Staat* 393; Payandeh, ‘Grenzen der Völkerrechtsfreundlichkeit’ (n 39); Hwan Shu-Perng, ‘Trägt die (begrenzte) Völkerrechtsfreundlichkeit als Verfassungsprinzip zum Ausgleich zwischen internationaler Zusammenarbeit und nationaler Souveränität bei? Zugleich Anmerkung zur Treaty Override-Entscheidung des BVerfG’ (2017) 55 *Archiv des Völkerrechts* 349; Schäfer (n 21); Klaus Herkenroth, ‘Treaty Override von DBA – Teil 1: – Bundesverfassungsgericht Revisited sowie Argumentationslinien vor und unterhalb der Schwelle des Verfassungsrechts –’ (2021) 14 *Ubg - Die Unternehmensbesteuerung* 137; ‘Treaty Override von DBA – Teil 2 – Bundesverfassungsgericht Revisited sowie Argumentationslinien vor und unterhalb der Schwelle des Verfassungsrechts’ (2021) 14 *Ubg - Die Unternehmensbesteuerung* 210.

of legal norms established or presupposed by the Basic Law.”<sup>46</sup> Subsumed under the categories developed in this research, this clearly constitutes a case of structural conflicts.

Indeed, the rule the Court applies is a hard rule, which does not consider the substance matter of the two competing norms and frames the conflict between the two legal orders in structural terms. The case is thus solved by merely relying on arguments pertaining to the hierarchy of sources and the formal interaction between the two sources of law abstractly considered. As already mentioned in the previous chapters, this does not mean that no axiological considerations are at play in similar cases, but only that such considerations (in this case the competing values and principles are, on one side of the argument, that of democracy, and on the other, those of the rule of law and of friendliness towards international law) are indirect reasons for the solution of the case, in that they justify the rule applied to it; the case, instead, is resolved without considering the axiological implications (if any at all) directly underlying the competing norms. This is apparent from the reasoning of the FCC:

It does not follow from the principle of the Constitution’s openness to international law that there is an unreserved constitutional duty to comply with all rules of international law. [...]

The Basic Law does not provide that the German legal order is subordinate in every case to international law or that international law takes absolute precedence even over constitutional law. Rather, it seeks to open the domestic legal system up to international law and international cooperation (only) in the form of a regulated binding effect, i.e. in the manner provided for in the varied provisions of the Basic Law on the relationship between the two legal systems. However, by no means do the relevant constitutional provisions establish an absolute duty to comply with provisions of international treaties.

In particular, it conflicts with the principle of democracy (Article 20(1) and (2) GG) and the principle of parliamentary discontinuity. Power in democracy is always temporary in nature. This implies that, in accordance with the will of the people as expressed through elections, subsequent legislatures must be able to revise, within the limits set by the Basic Law, legislative acts undertaken by earlier legislatures [...].<sup>47</sup>

The most relevant aspect of this decision – a treatise-judgement in the distinctive style of the Court – is the strong link it establishes between the legitimacy of treaty overrides and the principle of democracy, particularly in light of the Court taking back the qualification, made in *Görgülü*, that the legislator should disregard international

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<sup>46</sup> Heinke (n 45) 400.

<sup>47</sup> FCC, *Treaty Override* (n 4), para. 69, 53.

treaties exceptionally, and “provided this is the only way to avert a violation of the Basic Law’s fundamental principles,”<sup>48</sup> instead justifying such a prerogative in more general terms on the grounds of the democratic legitimacy of parliamentary decision-making.

In this regard, the FCC has been criticised observing that “this justification makes “democracy” the label of the emperor’s new clothes – the sovereign power state of the 19th century, which pursued sovereign interest politics even against international law. [...] In the future, the Basic Law will apparently reserve the sovereignty of the German state to disregard international treaty law at will. This is a sad step backwards to the ideas of sovereignty of the first half of the 20th century, which the Basic Law wanted to overcome because they had led Germany to ruin twice in the course of a generation.”<sup>49</sup>

The considerations put forth by the FCC very closely recall those underlying the English approach to the domestic authority of international law which were discussed in the previous chapter, also in that they appear to rely on a similar, modern, conception of statehood. Such modern conception of statehood, and the corresponding minimisation of the role of the principles of openness and friendliness towards international law, endorsed by the Second Senate of the FCC in the *Treaty Override* decision, represent an important point in the development of the German tradition of statehood, which, as already discussed, is neither univocal, nor fixated in time. Particularly, this judgement represents a step in the direction of a modern, statist conception of statehood, arguably even when compared with the Judgement on the Lisbon Treaty.<sup>50</sup> It is quite interesting to note that in the parallel case-law on EU integration, especially when it comes to fiscal and monetary integration, the Second Senate of the FCC has developed in recent years a progressively harsher criticism of EU integration under the *ultra vires* review, for the purpose of protecting the national democracy, understood in subjective terms as a fundamental right to democracy.<sup>51</sup>

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<sup>48</sup> FCC, *Görgülü* (n 20), para. 35.

<sup>49</sup> Giegerich, ‘Der Blankoscheck des Bundesverfassungsgerichts für den gesetzgeberischen Treaty Override ist völkerrechtsunfreundlich’ (n 31) 653, 662. Similarly, see also Fastenrath (n 42) 636, ff.; Fastenrath (n 8) 25.

<sup>50</sup> FCC, *Lisbon Treaty* (n 3), para. 223, 224.

<sup>51</sup> See especially FCC, Order the Second Senate of of 14 January 2014, 2 BvR 2728/13, BVerfGE 134, 366 *Gauweiler (OMT)*; Judgment of the Second Senate of 21 June 2016, 2 BvR 2728/13, BVerfGE 142, 123, *Gauweiler (OMT)*; Order of the Second Senate of 29 April 2021, BVerfGE 159, 89, *Weiss (PSPP)*; Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, BVerfGE 154, 17, *Weiss (PSPP)*. The harshness of this line of case-

The *Treaty Override* decision is of significant importance also for the dissenting opinion of Justice König. Specifically, she called for an approach whereby the principle of friendliness towards international law was given much greater effect than in the reasoning of the majority. Accordingly, the solution to the case should have relied, rather than on the application of a clear-cut rule, as in the majority's opinion, on a balancing, to be carried out in the concrete case, between the reasons for disregarding the international obligations previously given effect to through parliamentary legislation and those in favour of upholding it, thus declaring the derogating legislation invalid:

“The decision by the Senate majority gives absolute preference to the principle of democracy and neglects the rule of law principle as interpreted in accordance with the principle of openness to international law. As a result, subsequent legislatures are at liberty to intentionally deviate from the provisions of an international treaty, irrespective of the resulting breach of international law. Doing so does not need to satisfy any particular conditions or require a justification. By contrast, the approach advocated here requires that the conflict between the principles of democracy and the rule of law be resolved in a manner that allows both principles to take effect to the broadest possible extent.

In striking this balance, the following criteria, in particular, should be considered: the aim pursued by the later statute, as well as its importance to the common good; the effects on the legal position of individuals who benefit from the international provision; the divergent provision's urgency; the possibility of using reasonable means of ending the international obligation in accordance with international law, e.g. by issuing an interpretative statement or denouncing or modifying the treaty; as well as the legal consequences of a breach of international law.

Where the criteria in favour of a unilateral repudiation of the international treaty in question fail to outweigh the factors arguing against a treaty override, the rule of law principle as interpreted in accordance with the openness to

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law can be best appreciated when compared with the approach developed in FCC, Order of the Second Senate of 6 July 2010, 2 BvR 2661/06, BVerfGE 126, 286, *Honeywell*, para. 61. On the relevance of the democratic principle in the FCC's case-law on EU (especially economic) integration, see Christoph Schönberger, 'Lisbon in Karlsruhe: Maastricht's Epigones At Sea' (2009) 10 German Law Journal 1201; Christoph Schönberger, 'Der introvertierte Rechtsstaat als Krönung der Demokratie? — Zur Entgrenzung von Art. 38 GG im Europaverfassungsrecht: zu Dietrich Murswiek JZ 2010, 702' (2010) 65 JuristenZeitung 1160; Roman Lehner, 'Die "Integrationsverfassungsbeschwerde" nach Art. 38 Abs. 1 S. 1 GG: Prozessuale und materiell-rechtliche Folgefragen zu einer objektiven Verfassungswahrungsbeschwerde' (2013) 52 Der Staat 535; Klaus Ferdinand Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' (2014) 15 German Law Journal 183; Isabel Feichtner, 'The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe' (2020) 21 German Law Journal 1090; Jens Van't Klooster and Nik de Boer, 'The ECB, the Courts and the Issue of Democratic Legitimacy after *Weiss*' (2020) 57 Common Market Law Review 1689.

international law must then take precedence over the principle of democracy. In any event, such conflicts must be resolved on a case-by-case basis in order to strike an appropriate balance between the principles of democracy and the rule of law.”<sup>52</sup>

In Justice König’s opinion, thus, the applicable law, in cases of contrasts between national and international law is not a result of the application of a clear-cut rule, and a function of structural considerations, pertaining to the mutual position in the system of the sources of law, but is the outcome of the balancing of competing axiological considerations.<sup>53</sup>

Summarising the divergence of opinions between the majority and the dissenting Justice König under the categories developed in this research, the majority’s judgement, informed by a modern understanding of statehood and by a minimisation of the effectiveness of the principle of friendliness towards international law, frames the conflict between national and international law in structural terms, relying on the *lex posterior* rule. The dissenting Justice, instead, by relying to a greater extent on the principle of friendliness towards international law, reaches the conclusion that the conflict between the two legal orders should be framed in identitarian terms, by having recourse to a comparative evaluation of the competing axiological reasons for favouring the one or the other legal order.

### **3. International human rights law in the German legal order: the overcoming of structural limitations to the applicability of international law and the formulation of identity barriers thereto.**

The *Treaty Override* decision just discussed was decided in a case in which the immediate constitutional significance of the competing norms was not particularly elevated: all things considered, it was a case about a double taxation treaty. Its constitutional significance depended, instead, on the general question it posed, that of whether ordinary legislation can validly derogate to international law properly

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<sup>52</sup> FCC, *Treaty Override* (n 4), Separate Opinion of Justice König, para. 7-9.

<sup>53</sup> On this point, see, extensively, Heinke (n 45); Shu-Perng Hwang, ‘Trägt die (begrenzte) Völkerrechtsfreundlichkeit als Verfassungsprinzip zum Ausgleich zwischen internationaler Zusammenarbeit und nationaler Souveränität bei?’ (2017) 55 Archiv des Völkerrechts 349, 361.

incorporated in the domestic legal order.<sup>54</sup> However, the FCC, in the same decision, apparently hinted to the possibility of considering international human rights law differently than other international law commitments undertaken by Germany, distinguishing the case it was about to decide from its case-law on the domestic status of the ECHR:

“the Basic Law distinguishes not only between international treaty law and the general rules of international law, but also between imperative provisions that may not be modified even by the constitutional legislature – particularly inviolable and inalienable human rights (Article 1(2) GG) – and other international law.”<sup>55</sup>

Indeed, as previously argued, on top of the general objective of ensuring the consistency of national law with international law, there are specific constitutional grounds, linked to the achievement of specific constitutional aims – e.g., the protection of human and fundamental rights and the protection of climate –, which, due to their marked cosmopolitan connotation, reinforce and enhance the effectiveness of the principle of friendliness towards international law. Accordingly, the principle of openness operates selectively: the constitutional duty to ensure the consistency of the national legal order with the state’s international obligations, imposed upon all public bodies within their respective attributions, including the courts, operates to different degrees depending on the field of law under consideration.

Particularly, with regard to the field of fundamental rights protection, Thilo Rensmann aptly captures the embeddedness of the system of values established by the Basic Law, especially through its fundamental rights provisions, in the universalistic dimension of the international human rights law and of the international community – the “bridge” especially being the universal value of human dignity:

“whereas for Rudolf Smend and Carl Schmitt it was the fundamental rights ‘of the Germans in particular’ that became the *telos* of the entire legal system by virtue of the unbound decision of the *pouvoir constituant*, the Basic Law founds the polity that it has established on the supra-positive foundation of universal human rights. In the words of the Basic Law, human rights are ‘the basis of every community’, and thus also of the community of Germans. In

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<sup>54</sup> Krumm (n 40) 381: ‘the Convention was born out of the painful experiences up to 1945. The United Nations Universal Declaration of Human Rights of 10 December 1948 was to be transformed into a regional protection system with efficient control mechanisms. Double taxation treaties, on the other hand, are bilateral exchange agreements in which the contracting states impose restrictions on each other with regard to their tax sovereignty.’

<sup>55</sup> FCC, *Treaty Override* (n 4), para. 76.

this way, the German constitutional order embraces the community-related ‘programme’ of human dignity and the free development of the personality, as authoritatively formulated by the international community in the Universal Declaration of Human Rights.”<sup>56</sup>

Accordingly, this paragraph aims at assessing whether the principle of friendliness towards international law operates differently in the field of human and fundamental rights than in other areas of the law, and at whether this results in specific patterns of construing judicial instances of non-application of international law.

#### **A. The domestic indirect applicability of unincorporated treaties at the occasion of the *La Grand* and *Avena* litigation.**

The domestic litigation concerning the reception of the ICJ’s Judgements in *La Grand e Avena*, already discussed in Chapter 1, proves an excellent case whereby the FCC relied on the principle of friendliness towards international law in order to give full domestic application to international law obligations, in spite of some structural shortcomings, at the same time envisioning the possibility to deviate from international commitments on identitarian grounds.<sup>57</sup>

In deciding the complaints of some individuals who had been convicted without being informed of their right to contact the consular or diplomatic representatives of their state of nationality and who thus requested their convictions to be quashed, the FCC read the German Constitutional law principle of the rule of law in light of Article 36 of the 1969 Vienna Convention on Consular Relations and of the ICJ’s interpretation thereof:

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<sup>56</sup> Rensmann, *Wertordnung und Verfassung* (n 17) 113. See especially pp. 25-41 for a discussion of the reception of the UN Declaration in the *parlamentarische Rat* drafting the Basic Law; see also Rensmann, ‘Die Genese des „offenen Verfassungsstaats“ 1948/49’ (n 5).

<sup>57</sup> Bruno Simma and Carsten Hoppe, ‘From LaGrand and Avena to Medellin - A Rocky Road toward Implementation’ (2005) 14 *Tulane Journal of International and Comparative Law* 7; Hartmut H Kahl, ‘Respectful Consideration v. Uniformity - A Short Transatlantic Comparative Study How to Deal with Article 36 of the Vienna Convention on Consular Relations’ (2007) 32 *DAJV Newsletter* 193; Jana Gogolin, ‘*Avena* and *Sanchez-Llamas* Come to Germany – The German Constitutional Court Upholds Rights under the Vienna Convention on Consular Relations’ (2007) 8 *German Law Journal* 261; Andreas Paulus, ‘A Comparative Look at Domestic Enforcement of International Tribunal Judgments’ (2009) 103 *Proceedings of the ASIL Annual Meeting* 42; Carsten Hoppe, ‘Implementation of LaGrand and Avena in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights’ (2007) 18 *European Journal of International Law* 317.

The principle of a fair trial is a constitutional principle of an abstract nature that does not replace the use of specific provisions of ordinary law. The Federal Constitutional Court has consistently emphasised in its case law that the right to a fair trial does not contain any commandments and prohibitions that are determined in every detail. [...] Accordingly, it is initially the task of the legislator to organise the right to a fair trial. [...]

However, the fair trial is not only shaped by the provisions of the Code of Criminal Procedure, but also by international treaty provisions. [...]

Article 36 of the Convention, which in the German legal system thus has the status of a federal law, contains provisions that are directly relevant to German criminal proceedings [...].”<sup>58</sup>

As already discussed in the first Chapter, while the obligation to inform a foreign national put under arrest of their diplomatic or consular mission under Article 36, par. 1, lett. b of the 1969 Vienna Convention on Consular Relation might indeed plausibly be deemed self-executing, this is hardly the case with the duty of the State to provide “review and reconsideration” of convictions passed in breach of said obligation that the ICJ read into that provision, given that, under criminal procedural law, there is a wide range of possible alternative remedies that can be employed in such cases. Indeed, the FCC, while demanding the task of determining the procedural remedy to be applied to the specialised courts – and, thus, particularly to the Federal Court of Justice –, provided them with a certain latitude in this task, in light of the ambiguous nature of the decision of the ICJ.<sup>59</sup>

Eventually, through a lengthy interaction between the FCC and the Federal Court of Justice, a procedural remedy was elaborated: the legal basis for such a remedy, however, was not the Vienna Convention, or the ICJ’s decisions, but the right to a fair trial under the Basic Law, whose content was determined by taking into account said international authorities. Through this interpretive endeavour, international law was ultimately given effect in the domestic legal order, if indirectly and only by reading it into national constitutional provisions. Accordingly, the principle of friendliness towards international law and the axiological continuity between the national and the international legal orders found by the FCC allowed the structural deficiencies as to the incorporation of the international norm to be shored up.

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<sup>58</sup> FCC, Decision of the First Chamber of the Second Senate of 19 September 2006, 2 BvR 2115/01, BVerfGK 9, 174, para. 51-53.

<sup>59</sup> FCC, Decision of the Second Senate of 8 July 2010, 2 BvR 2485/07, BVerfGK 17, 390, para. 28.

In this context, the Court, qualifying the duty of German courts to take into account international law and the judgements of the ICJ – significantly, even if rendered against states other than Germany –, held that German courts are allowed to deviate from international law as interpreted by the ICJ; however, in order to do so, they should give adequate reasons, highlighting the specific constitutional principles or fundamental rights of third parties that required such a solution:

“a deviation from the case law of the International Court of Justice can trigger conflicts with the international obligations of the Federal Republic of Germany, which must be avoided [pursuant] the constitutional principle of international law friendliness. Therefore, in such a different case, it must be explained why fundamental rights of third parties or other constitutional provisions require a derogation.”<sup>60</sup>

## **B. The status of the European Convention on Human Rights in the German legal order.**

Analogous considerations as to the “greater effectiveness” of the principle of friendliness towards international law in human and fundamental rights cases are in order with regard to the relationship between the German legal order and the ECHR.<sup>61</sup>

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<sup>60</sup> Ibid., para. 30.

<sup>61</sup> For an overview of the debate, see Philipp Cede, ‘Report on Austria and Germany’ in Giuseppe Martinico and Oreste Pollicino (eds), *The national judicial treatment of the ECHR and EU laws: a comparative constitutional perspective* (Europa Law Publishing 2010); Alessandra Di Martino, ‘National Constitutions and the ECHR. Comparative Remarks in Light of Germany’s Experience’ in Giorgio Repetto (ed), *The constitutional relevance of the ECHR in domestic and European law: an Italian perspective* (Intersentia 2013); Katharina Pabel, ‘Germany: The Long Way of Integrating the Strasbourg Perspective into the Protection of Fundamental Rights’ in Patricia Popelier, Sarah Lambrecht and Lemmens, Koen (eds), *Criticism of the European Court of Human Rights* (Intersentia 2016); Heiko Sauer, ‘Principled Resistance to and Principled Compliance with ECtHR Judgments in Germany’ in Marten Breuer (ed), *Principled Resistance to ECtHR Judgments - A New Paradigm?* (Springer Berlin Heidelberg 2019); Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention: ein Studienbuch* (7. Auflage, CH Beck 2021) para 9, ff.; Nicola Wenzel, ‘Under the Watchful Eyes of the Federal Constitutional Court: Compliance in Germany’ in Rainer Grote, Mariela Morales Antoniazzi and Davide Paris (eds), *Research Handbook on Compliance in International Human Rights Law* (2021); Michael Lysander Fremuth, ‘Die Rezeption der europäischen Menschenrechtskonvention in der deutschen Rechtsordnung’ in Michael Lysander Fremuth (ed), *70 Jahre Europäische Menschenrechtskonvention. Tagungsband zur Festveranstaltung* (Manz’sche Verlags- und Universitätsbuchhandlung 2022); Thomas Giegerich, ‘Wirkung und Rang der EMRK in den Rechtsordnungen der Mitgliedstaaten’ in Oliver Dörr, Rainer Grote and Thilo Marauhn (eds), *EMRK/GG Konkordanz-kommentar*, vol I (3rd edn, Mohr Siebeck 2022) para 45, ff.; Nina Prötzel, ‘Die EMRK und die Rechtsprechung des europäischen Gerichtshofs für

1. *The “nobilitation” of the ECHR in the German legal order*

In Germany, the Convention is incorporated through ordinary legislation,<sup>62</sup> deriving from its formal status in the German legal order, namely that of ordinary federal legislation.

There have been various scholarly attempts to bestow constitutional status upon the ECHR. Some have argued that it should be subsumed under Article 23 and 24 Basic Law as an instance of supranational law;<sup>63</sup> however, it is undisputed that no transfer of sovereign powers in favour of the ECHR has ever occurred. Others have advanced an interpretation of Article 1, par. 2 Basic Law as directly incorporating the human rights protected by the ECHR, particularly since Convention rights ‘fulfil the function of fundamental rights in both substantive and procedural terms.’<sup>64</sup> It has also been submitted that the rights provided for by the Convention should be considered “general principles of international constitutional law,” constituting the international public order, and thus should be accorded the (supra-legislative) rank of general principles of international law under Article 25 Basic Law.<sup>65</sup>

In spite of these scholarly proposals, the FCC has consistently held that the ECHR enjoys only a legislative rank, due to it being incorporated through ordinary legislation.<sup>66</sup>

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Menschenrechte in der Rechtsprechung des Bundesverfassungsgerichts: Neuere Entwicklungen: Aspekte der Einbeziehung und Einbeziehbarkeit’ in Sandra Lukosek and Alix Schlüter (eds), *Band 7 Linien der Rechtsprechung des Bundesverfassungsgerichts: erörtert von den wissenschaftlichen Mitarbeiterinnen und Mitarbeitern* (De Gruyter 2024).

<sup>62</sup> Act on the Convention for the Protection of Human Rights and Fundamental Freedoms (*Gesetz über die Konvention zum Schutze der Menschenrechte und Grundfreiheiten*) of 7 August 1952, Federal Law Gazette (Bundesgesetzblatt—BGBI) 1952 II 685.

<sup>63</sup> Georg Ress, ‘Verfassungsrechtliche Auswirkungen der Fortentwicklung völkerrechtlicher Verträge: Überlegungen zum Verhältnis des Grundgesetzes zur europäischen Wirtschaftsgemeinschaft und zur europäischen Menschenrechtskonvention’ in Walther Fürst, Roman Herzog and Dieter C Umbach (eds), *Festschrift für Wolfgang Zeidler* (de Gruyter 1987); Christian Walter, ‘Die europäische Menschenrechtskonvention als Konstitutionalisierungsprozeß’ (1999) 59 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 961; Ulrich Everling, ‘Europäische Union, europäische Menschenrechtskonvention und Verfassungsstaat – Schlusswort auf dem Symposium am 11. Juni 2005 in Bonn –’ (2005) 40 *Europarecht* 411.

<sup>64</sup> Frank Hoffmeister, ‘Die europäische Menschenrechtskonvention als Grundrechtsverfassung und ihre Bedeutung in Deutschland’ (2001) 40 *Der Staat* 349, 370.

<sup>65</sup> Albert Bleckmann, ‘Verfassungsrang der europäische Menschenrechtskonvention?’ (1994) 21 *Europäische Grundrechte Zeitschrift* 149, 153, ff.

<sup>66</sup> FCC, Decision of the Second Senate of 26 March 1987, 2 BvR 589/79, BVerfGE 74, 358, *Presumption of innocence*, para. 39; *Görgülü* (n 20), para. 30; *Preventive Detention* (n 10), para. 86; *Ban on strikes for civil servants* (n 10), para. 126, f.; Decision of the Second Senate of 29 January 2019, 2 BvC 62/14, BVerfGE 151, 1, *Exclusion of the right to vote in Bundestag elections*, para. 61.

However, overcoming its limited formal status within the German system of sources, “the elaborate case law on the ECHR has given the Convention a status that goes far beyond its formal status as simple federal law.”<sup>67</sup> Indeed, the formal status of the Convention is insufficient to explain its normative impact, if not in contradiction with it. Particularly, it is at odds with the adoption, by the FCC, of the ECHR as an interpretive guidance not only of ordinary legislation but also of the provisions of the Basic Law, which is hierarchically superior to the ECHR as incorporated in the German legal order.<sup>68</sup>

As a matter of facts, the FCC consistently invokes the Convention, and the judgements of the ECtHR, as an interpretive guidance for the fundamental rights enshrined in the Basic Law and, more precisely, in order to determine “the content and scope of fundamental rights and constitutional principles of the Basic Law.”<sup>69</sup> Thus, the FCC ends up shaping the content of the national fundamental rights, with not only the result that fundamental rights under the Basic Law are interpreted consistently with Convention rights, but also that, ultimately, the latter are incorporated, if indirectly, in the German constitutional framework.<sup>70</sup>

Among other cases, this was made quite apparent in the one concerning the presumption of innocence. While the presumption of innocence principle is not expressly enshrined in the Basic Law, the FCC read it into the rule of law principle by relying on the Convention:

“the presumption of innocence is a special manifestation of the principle of the rule of law and thus has constitutional status. It is also part of the positive law of the Federal Republic of Germany by virtue of Article 6 para. 2 ECHR in the rank of a federal law. If the Federal Constitutional Court has referred to the wording of Article 6(2) ECHR to define the presumption of innocence, which does not enjoy the status of constitutional law in the Federal Republic of Germany, this is based on the legal effect that the entry into force of the Convention has on the relationship between the fundamental rights of the Basic Law and the related human rights of the Convention.”<sup>71</sup>

More recently, it is in the decision on preventive detention that the FCC provided for an in-depth theoretical discussion of the relationship between the Basic Law and the

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<sup>67</sup> Fremuth (n 61) 75.

<sup>68</sup> Hoffmeister (n 64) 372; Fremuth (n 61) 49.

<sup>69</sup> FCC, *Ban on strikes for civil servants* (n 10), para. 128.

<sup>70</sup> Grabenwarter and Pabel (n 61) para 10.

<sup>71</sup> FCC, *Presumption of innocence II* (n 66), para. 39; see also Order of the First Senate of 26 February 2008, 1 BvR 1602/07, BVerfGE 120, 180, *Caroline of Monaco III*, para. 52; *Görgülü* (n 20), para. 32.

Convention, centred on the “substantive orientation of the Basic Law to human rights,” requiring “fundamental rights [...] also to be understood as a manifestation of human rights:”

“the substantive orientation of the Basic Law to human rights is expressed in particular in the German people’s profession of inviolable and inalienable human rights in Article 1.2 of the Basic Law. In Article 1.2 of the Basic Law, the Basic Law accords particular protection to the central stock of human rights. This protection, in conjunction with Article 59.2 of the Basic Law, is the basis for the constitutional duty to invoke the European Convention on Human Rights in its specific manifestation as an interpretation aid even when applying German fundamental rights. Article 1.2 of the Basic Law is therefore admittedly not a gateway to give the European Convention on Human Rights direct constitutional status, but the provision is more than a non-binding programmatic statement, in that it specifies a maxim for the interpretation of the Basic Law and makes it clear that the fundamental rights are also to be understood as a manifestation of human rights and have incorporated the latter as a minimum standard.”<sup>72</sup>

Accordingly, while Convention rights cannot be understood as fundamental rights under national constitutional law (*Grundrechte*), and thus breaches of Convention rights cannot be vindicated through direct constitutional complaints (*Verfassungsbeschwerde*) to the Federal Constitutional Court,<sup>73</sup> still they must be taken into account by national courts when interpreting the fundamental rights enshrined in the Basic Law; failure to do so is ground for a direct constitutional complaint brought under the relevant corresponding fundamental right enshrined in the Basic Law in conjunction with the rule of law principle

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<sup>72</sup> FCC, *Preventive detention* (n 10), para. 90; see also, with the same words, *Ban on strikes for civil servants* (n 10), para. 130.

<sup>73</sup> See Article 93, par. 1, no. 4a Basic Law and Article 90, par. 1 of the Law on the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz – BVerfGG*) of 11 August 1993, BGBl. I, p. 1473. See FCC, Decision of the First Senate of 13 January 1976, 1 BvR 631/69, BVerfGE 41, 126, *Reparationsschäden* para. 85; Decision of the First Senate of 17 May 1983, 2 BvR 731/80, BVerfGE 64, 135, *JuristenZeitung*, 38, no. 17 (2 September 198), 659, 663; Decision of the Second Senate of 13 January 1987, 2 BvR 209/84, BVerfGE 74, 102, *Erziehungsmaßregeln*, para. 90; Decision of the First Senate of 8 July 1997, 1 BvR 1243/95, BVerfGE 96, 152, *Parteilehrer*, para. 56; *Görgülü* (n 20), para. 32; *Preventive detention* (n 10), para. 87. Compare this approach with the recent permission to bring, in cases of fully harmonising EU law, direct constitutional complaints alleging (autonomous) violation of fundamental rights enshrined in the EU Charter of Fundamental Rights: see FCC, Order of the First Senate of 6 November 2019, 1 BvR 276/17, BVerfGE 152, 216, *Right to be forgotten II*, para. 87-93. See in this regard Mattias Wendel, ‘The Two-Faced Guardian – or How One Half of the German Federal Constitutional Court Became a European Fundamental Rights Court’ (2020) 57 *Common Market Law Review* 1383.

under Article 20, para. 3 Basic Law, as the Court clearly affirmed in *Görgülü*.<sup>74</sup> As observed by the FCC, “in this respect, the Federal Constitutional Court indirectly serves to enforce of international law, minimising the risk of non-compliance with international law.”<sup>75</sup> However, as it will be immediately discussed, the FCC operates also as a gatekeeper, limiting, at certain conditions, the penetration of the ECHR in the German legal order.<sup>76</sup>

Ultimately, while the FCC consistently reiterates its position on the formal status of the Convention in the German system of sources of law, through its case-law, it has “nobilitated” the Convention. In doing so, while the Court has allowed for a greater penetration of the Convention in the German legal order than what otherwise allowed based solely on formal consideration as to its incorporation by means of ordinary legislation.

## 2. *Non-application of the ECHR in the German legal order on identitarian grounds.*

While relaxing the formal criteria for the incorporation of the ECHR in the German legal order, the FCC retains the prerogative to the “ultimate say” as to the application of the ECHR – and of judgements of the Strasbourg Court – within the national legal order. The FCC understands its retention of such prerogative as compatible with the openness of the German legal order:

“the Constitution’s openness to international law thus expresses an understanding of sovereignty that is not only in favour of an integration into international and supranational contexts and their further development, but requires and expects them. Against this background, even the “final say” of

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<sup>74</sup> FCC, *Görgülü* (n 20), para. 63. Heiko Sauer, ‘Die neue Schlagkraft der gemeineuropäischen Grundrechtsjudikatur’ (2005) 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 35, 46–50; Stefan Mückl, ‘Kooperation oder Konfrontation? — Das Verhältnis zwischen Bundesverfassungsgericht und europäischem Gerichtshof für Menschenrechte’ (2005) 44 *Der Staat* 403, 421.

<sup>75</sup> FCC, *Görgülü* (n 20), para. 61. Contrast this approach with that of English courts: see *R v. Lyons* [2002] UKHL 44; [2003] 1 AC 976, para. 40 (LJ Hoffman), holding that “the argument that the courts are an organ of State and therefore obliged to give effect to the State’s international obligations is in my opinion a fallacy.” See generally ch. 6, para. 2.

<sup>76</sup> On the dual role of national courts as both enforcer of the international rule of law and gatekeepers, see Nollkaemper (n 22); Raffaella Kunz, *Richter über internationale Gerichte?: Die Rolle innerstaatlicher Gerichte bei der Umsetzung der Entscheidungen von EGMR und IAGMR* (Springer Berlin Heidelberg 2020).

the German Constitution is not opposed to an international and European dialogue of courts, but provides its normative basis.”<sup>77</sup>

Once again, the openness and the friendliness towards international law of a given – and in this case of the German – legal order is not to be read as overcoming its autonomy, and ultimately, the sovereignty of the state.<sup>78</sup> Rather, as this subparagraph argues, it affects the way in which conflicts between the different levels of legality are framed and the grounds upon which national judges might refuse to apply international law. In this regard, the FCC has progressively developed identitarian constraints on the domestic penetration of the ECHR.<sup>79</sup> Three decisions are particularly relevant over time in this regard – *Görgülü*, *Preventive detention II*, and *Strike of Public Servants*.<sup>80</sup> In these decisions, the FCC set forth the conditions allowing for, and actually requiring, the non-application of the ECHR, as interpreted by the ECtHR, in the German legal order; somewhat paradoxically, however, in none of these cases a conflict between national constitutional law and the ECHR actually arose.<sup>81</sup>

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<sup>77</sup> With identical wording FCC, *Preventive detention* (n 10), para. 89; *Ban on strikes for civil servants* (n 10), para. 129. See also, similarly, FCC, *Görgülü* (n 20), para. 35.

<sup>78</sup> As noted by Tomuschat, the autonomy of the German legal order *vis-à-vis* the ECHR is inherent in the constitutional duty of national courts to “take into account,” rather than simply “comply with” or “abide by” ECtHR’s judgements, implying the possibility for German courts to deviate from the judgements of the ECHR, as expressly held in FCC, *Görgülü* (n 20), para. 50: see Christian Tomuschat, ‘The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court’ (2010) 11 German Law Journal 513, 523. See also, on the reduction from the binding effect of the ECtHR’s decisions under Article 46 ECHR to the duty to take them into consideration, critically, Hans-Joachim Cremer, ‘Zur Bindungswirkung von EGMR-Urteilen: Anmerkung zum Görgülü-Beschluss des BVerfG vom 14.10.2004’ (2004) 31 Europäische Grundrechte-Zeitschrift 683, 693–670.

<sup>79</sup> Eckart Klein, ‘Germany’ in Janneke Gerards and JWA Fleuren (eds), *Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case-law: a comparative analysis* (Intersentia 2014); Pabel (n 61); Sauer, ‘Principled Resistance to and Principled Compliance with ECtHR Judgments in Germany’ (n 61).

<sup>80</sup> FCC, *Görgülü* (n 20); *Preventive detention* (n 10); *Ban on strikes for civil servants* (n 10).

<sup>81</sup> Indeed, in *Görgülü* (n 20), the FCC effectively enforced the ECtHR’s judgement in favour of Mr. Görgülü – ECtHR (Third Section), Judgement of 26 February 2004, App. no. 74969/01, *Görgülü v. Germany* –, overcoming the resistances to do so of the specialised courts; in *Preventive Detention* (n 10), the FCC, also by relying on the ECHR, struck down the German legislation allowing for the retroactive extension of the maximum terms for preventive detention; in *Ban on strikes for civil servants* (n 10), finally, the FCC, claiming the “first word” in a dialogue with the Strasbourg Court, discussed at length the reasons, stemming from the national constitutional tradition, why it could not follow two judgements rendered by the ECtHR against Turkey, arguing that this shouldn’t be considered a violation of Article 11 ECHR – see ECtHR (Grand Chamber), Judgement of 12 November 2008, App. no. 34503/97, *Demir and Baykara v. Turkey*; (Third Section),

Here, the limits to the application of the ECHR and of judgements of the ECtHR will be presented synthetically, as they result for an encompassing reading of the mentioned decision of the FCC. While this is done for the purposes of a better exposition, the decision to do so is also grounded in the consideration of the development of this case-law. Indeed, while all the limits developed by the FCC were already present in *Görgülü*, it is a commonly held, and admittedly justified, opinion that this decision is particularly difficult to read, lacking a systematic exposition of the limits placed on the domestic authority of the ECHR.<sup>82</sup> These limits have been at least partially overcome in the two subsequent decisions, which, however, do not fundamentally depart from the substance of the *Görgülü* decision.

First, the application of the Convention can never lower the standard of protection provided by the Basic Law, something that is allowed by the ECHR itself under Article 53: the Convention operates as a floor, not as a ceiling.<sup>83</sup>

Secondly, the interpretation of national law – both of ordinary federal law and of the Basic Law – in light of the Convention must be possible under the ordinary interpretive canons.<sup>84</sup> Accordingly, the *lex posterior* principle allows the legislator to derogate from the ECHR – either expressly, or by enacting legislation clearly contrasting, and thus interpretively irreconcilable, with the ECHR. However, such legislation, while it cannot be directly struck down for breach of the Convention, can nonetheless be challenged for violating fundamental rights under the Basic Law, also interpreted in light of the Convention. In turn, it is difficult to imagine that fundamental rights provisions of the

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Judgment of 21 April 2009, App. no. 68959/01, *Enerji Yapi-Yol Sen v. Turkey*. Eventually, the ECtHR agreed with the FCC – see ECtHR (Grand Chamber), Judgement of 14 December 2023, App. no 59433/18, *Humpert v. Germany*. See, as to the “strike ban saga,” Laura Hering, ‘No Right to Strike for Teachers with Civil-Servant Status: “Humpert and Others v Germany” (App. Nos 59433/18 and Others)’ [2024] European Human Rights Law Review 345.

<sup>82</sup> Cremer (n 78) 693; Marten Breuer, ‘Karlsruhe und die Gretchenfrage: Wie hast du’s mit Straßburg?’ (2005) 24 *Neue Zeitschrift für Verwaltungsrecht* 412, 412; Sauer, ‘Principled Resistance to and Principled Compliance with ECtHR Judgments in Germany’ (n 61) 60; Mehrdad Payandeh, ‘Normative Unscharfen zwischen Offenheit und Introvertiertheit: Die Gorgulu-Entscheidung in retrospektive Rundfrage 70 Jahre BVerfG-Rechtsprechung’ (2022) 77 *Zeitschrift für öffentliches Recht (ZöR): Journal of Public Law* 711, 717.

<sup>83</sup> *Görgülü* (n 20), para. 32; *Preventive Detention* (n 10), para. 93; *Strike of Public Servants* (n 10), para. 128.

<sup>84</sup> *Görgülü* (n 20), para. 62; *Preventive Detention* (n 10), para.93; *Strike of Public Servants* (n 10), para. 133.

Basic Law, due to their nature and formalisation, could not be interpreted consistently with the Convention under the ordinary interpretive canons.

Furthermore, and more interestingly, the FCC seems to envision the possibility to depart from the guidance of the ECtHR in “multipolar” cases, where “the increase of liberty for one subject of a fundamental right at the same time means a decrease of liberty for the other” and which entail the balancing of competing interests, if the outcome of the balancing carried out by the Strasbourg Court is at odds with that realised under German constitutional law.<sup>85</sup> The formulation of this reservation, first emerged in *Görgülü*, is often considered to be due to the judgement of the ECHR in *von Hannover v Germany*<sup>86</sup> – a consideration reinforced by the express reference thereto in the FCC’s decision in *Görgülü*.<sup>87</sup> The case of *von Hannover*, as is well known, revolved around the injunction Caroline von Hannover sought from German courts, barring newspaper from publishing pictures of her private life. The case was eventually decided by the FCC, rejecting von Hannover’s complaints, deeming the freedom of the press prevailing over the rights of the personality.<sup>88</sup> As the case was brought before the ECtHR, the Court, in a decision published a few months before the FCC’s decision in *Görgülü*, condemned Germany for breach of the right to private and family life under Article 8 ECHR, substantially reaching the opposite outcome than the FCC in the same balancing test.

Cases such as that of *von Hannover* have been described, especially with reference to the relationship between national and EU law, as “conflicts of convergence:” transposing this terminology to the context of the relations between national law and the ECHR, these are “conflicts due to the existence of legal sources (the principles concerning the protection of fundamental rights) that are now shared by the [ECtHR] and the national constitutional Courts. This has produced dynamics of interpretive competition.”<sup>89</sup> Hence,

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<sup>85</sup> *Görgülü* (n 20), para. 57, 58; *Preventive Detention* (n 10), para. 93; *Strike of Public Servants* (n 10), para. 134.

<sup>86</sup> ECtHR (Third Section), Judgement of 24 June 2004, App. no 59320/00.

<sup>87</sup> FCC, *Görgülü* (n 20), para. 58.

<sup>88</sup> FCC, Judgement of 15 December 1999, 1 BvR 653/96, BVerfGE 101, 361, *Caroline of Monaco*.

<sup>89</sup> Giuseppe Martinico, ‘The “Polemical” Spirit of European Constitutional Law: On the Importance of Conflicts in EU Law’ (2015) 16 German Law Journal 1343, 1355. As to the possibilities of interaction and contamination between the constitutional doctrines regulating the domestic status of EU law and the ECHR, see Giuseppe Martinico, ‘National Judges and Supranational Law: Goals and Structure of the Research’ in Giuseppe Martinico and Oreste Pollicino (eds), *The national judicial treatment of the ECHR and EU laws: a*

in these cases, the conflictual element does not lie in the absence of sufficient safeguards at the level of the ECHR, which would result in a lowering of the protection afforded to certain rights by the national constitution.<sup>90</sup> Rather, the problem lies in the different outcome of the balancing between principles and rights which are present at both level and which are given a very similar meaning, but a different importance or “weight” when balanced against one another. Thus, the crux of the issue becomes that of identifying the institutional subject – the FCC or the ECtHR – holding the ultimate say as to the correct weighting of the competing principles at issue.<sup>91</sup>

Finally, a reservation in favour of “fundamental constitutional principles” is formulated by the FCC, whereby the Court affirms the prerogative to depart from the ECHR and the case-law of the ECtHR for the sake of protecting fundamental constitutional principles, a notion which, in a rather unclear passage, appears to be equated with that of constitutional identity under Article 79, para. 3 of the Basic Law.<sup>92</sup>

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*comparative constitutional perspective* (Europa Law Publishing 2010); and, more broadly, Giuseppe Martinico and Oreste Pollicino, *The Interaction between Europe’s Legal Systems: Judicial Dialogue and the Creation of Supranational Laws* (Edward Elgar Publishing 2012).

<sup>90</sup> Such conflicts would be considered “conflicts of absence:” in the context of the relationship between national and EU law, classic example of these conflicts are those envisioned in ItCC, Judgement of 18 December 1973, no. 183; FCC, Judgement of 29 May 1974, 2 BvL 52/71, BVerfGE 37, 271, *Solange I*.

<sup>91</sup> Anne Peters, ‘Rechtsordnungen und Konstitutionalisierung: zur Neubestimmung der Verhältnisse’ (2010) 65 *Zeitschrift für öffentliches Recht* 3, 59, f.; Thilo Rensmann, ‘BVerfGE 111, 307 – Görgülü. Das „letzte Wort“ im Dialog zwischen Karlsruhe und Straßburg’ in Jörg Menzel and Ralf Müller-Terpitz (eds), *Verfassungsrechtsprechung: Ausgewählte Entscheidungen des Bundesverfassungsgerichts in Retrospektive* (3rd edn, Mohr Siebeck 2017).

<sup>92</sup> FCC, *Görgülü* (n 20) only refers to “fundamental constitutional principles” (para. 35); *Preventive Detention* (n 10), instead, only refers to constitutional identity (para. 93); *Strike of Public Servants* (n 10) refers to both, in two different passages of the same paragraph (para. 133). In both the cases in which the limitation of constitutional identity is invoked, this is a result of the limitation of the consistent interpretation of the Basic Law to what is permissible under accepted interpretive methodologies – see, with identical phrasing, *Preventive Detention*, para. 93; *Strike of Civil Servants*, para. 133:

“the possibilities of interpretation in a manner open to the Convention end where it no longer appears justifiable according to the recognised methods of interpretation of statutes and of the constitution ([...] on the absolute limit on the core content of the constitutional identity of the Basic Law under Article 79.3 of the Basic Law, see BVerfGE 123, 267 <344> [...]).”

On the perplexities arising from this passage of the FCC’s decision, see Birgit Peters, ‘Germany’s Dialogue with Strasbourg: Extrapolating the Bundesverfassungsgericht’s Relationship with the European Court of Human Rights in the Preventive Detention Decision’ (2012)

While the first and the second grounds for non-application of the ECHR and of the judgements of the ECtHR in the German legal order are not particularly relevant – either because allowed by the ECHR, or because they aren't really likely to occur –, the third and the fourth grounds, i.e. the one related to “conflicts of convergence” and the fundamental constitutional principles reservation respectively, are more interesting. Particularly, they show that, while the FCC considers it acceptable, and actually required by the constitutional principle of friendliness towards international law, that international law and the ECHR compliment and further shape the Basic Law and its fundamental rights provisions, this is conditional upon international law fitting into the system of values determined by the Basic Law: according to the FCC, in cases in which the axiological continuity between the national constitution and international law falters, German courts – and, ultimately, the FCC itself – have the prerogative and the duty to depart from international obligations of Germany, including those stemming from the ECHR and the judgements of the ECtHR. This also transpires by the conceptualisation of the duty to take into account the ECHR and the judgements of the ECtHR as an act of active reception by German courts, excluding any automatic parallelism between the two legal orders and instead requiring the case-law of the ECtHR to be “integrated as carefully as possible into the existing, dogmatically differentiated national legal system,” particularly in the context of the constitutional review of proportionality and in that of the comparative evaluation of the competing constitutionally relevant interests it entails.<sup>93</sup>

Ultimately, while the reception of the ECHR in the national legal order is enhanced by virtue of its axiological continuity with the Basic Law, in cases in which this premise is rebutted, and an identitarian conflict between the Basic Law and the ECHR takes place, the autonomy of the legal order, premised upon the sovereignty of the German state comes

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13 German Law Journal 757, 769, f. On the equivalence between the notion of “fundamental constitutional principles” and that of constitutional identity, see Thilo Rensmann, ‘Germany. Domestic Courts as International Human Rights Courts: A German Perspective’ in Stefan Kadelbach, Thilo Rensmann and Eva Rieter (eds), *Judging International Human Rights: Courts of General Jurisdiction as Human Rights Courts* (Springer International Publishing 2019) 488.

<sup>93</sup> FCC, *Preventive detention* (n 10), para. 94; similarly, see also *Görgülü* (n 20), para. 57, 58; *Strike of Public Servants* (n 20), para. 131, 132, 135. See, in this regard, Anna-Bettina Kaiser, ‘Streikrecht Für Beamte – Folge Einer Fehlrezeption?’ (2017) 142 *Archiv des öffentlichen Rechts* 417, 432, ff.; Laura Hering, ‘Beamtenstreik zwischen Karlsruhe und Straßburg: Art. 11 EMRK und die konventionskonforme Auslegung durch das BVerfG’ (2019) 79 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 241, 257, ff.

back to the fore, allowing the FCC to reject the applicability of the ECHR in the domestic legal order.

#### **4. International climate law before the Federal Constitutional Court**

It was posited that the principles of openness and of friendliness towards international law operate to various degrees of intensity according to the area of law at issue, proving particularly effective in strongly cosmopolitan fields, such as the protection of human and fundamental rights and the contrast to climate change. The review of the relationship between German and international law in the area of fundamental rights has substantiated this original hypothesis. This section tests the same hypothesis in the field of climate change law. Albeit this area of the law registered, in Germany, no conflict – not even the envisionment thereof by the FCC – between national and international law, it is particularly instructive as to the effects of the principles of openness and of friendliness towards international law: as this section aims to show, the domestic status of the international law instruments addressing climate change is strongly enhanced, due to the axiological complementarity between German constitutional law and the international climate regime.

##### **A. The German framework on climate change mitigation and the decision of the FCC on the Federal Climate Protection Act of 2021.**

A brief overview of the relevant international instruments was provided in the previous chapter, in the section dealing with climate litigation proceedings brought before English courts. It is now to be discussed the relevance within the German legal order of those very same materials, and, particularly, of the Paris Agreement, which have very little bearing as to the domestic proceedings initiated in the UK.

Now, Germany, having already amended in 1994 the Basic Law to include Article 20a, providing for the duty of the state to protect the natural foundations of life, also in the interest of the future generation,<sup>94</sup> has ratified the Paris Agreement but hasn't

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<sup>94</sup> Law amending the Basic Law of 27 October 1994, BGBl. I, p. 3146; the provision was subsequently amended in 2002 to provide for the protection of animals: Law amending the Basic Law of 26 July 2002, BGBl. I, p. 2862. See generally Astrid Epiney, 'Art. 20a' in

incorporated it. Instead, it has adopted the “parallel” Federal Climate Protection Act (*Bundes-Klimaschutzgesetz*).<sup>95</sup> Its Article 1 sets forth the purposes of the Act, which are

“to provide protection from the effects of worldwide climate change by ensuring achievement of the national climate targets and compliance with the European targets. [...] The basis of the Act is the obligation according to the Paris Agreement, under the United Nations Framework Convention on Climate Change, to limit the increase in the global average temperature to well below two degrees Celsius and, if possible, to 1.5 degrees Celsius, above the pre-industrial level so as to minimise the effects of worldwide climate change.”

From reading Article 1 two elements are already apparent, which are absent from the corresponding legislation in the UK, the Climate Change Act 2008. First, the German regulation is understood as part of global regulatory framework, especially constituted by the UNFCCC, the Paris Agreement and the relevant EU legislation, which it seeks to implement. Second, Article 2 of the Paris Agreement is understood as creating an obligation for the states Party thereto, while it does not.

Eventually, four proceedings were lodged before the FCC – which joined them for the decision – alleging the insufficiency of the German efforts to tackle climate change, also specifically addressing the inadequacy of the Federal Climate Protection Act.<sup>96</sup>

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Peter M Huber and Andreas Voßkuhle (eds), *Grundgesetz: Kommentar* (7th edn, CH Beck 2018) 173; Calliess, ‘GG Art. 20a’ in Dürig, Herzog and Scholz (eds), *Grundgesetz-Kommentar* (105th edn, 2024).

<sup>95</sup> See, respectively, *Act on the Paris Agreement of 12 December 2015 of 28 September 2016*, BGBl. II 2016, p. 1082; *Federal Climate Action Act of 12 December 2019* (BGBl. I S. 2513) as lastly modified by as last amended by Article 1 of the Act of 15 July 2024 (BGBl. I S. 235). For a general discussion of the Act, see Christian Flachsland and Sebastian Levi, ‘Germany’s Federal Climate Change Act’ (2021) 30 *Environmental Politics* 118. For an analysis of the multilevel governance of climate change in the German federal legal order, see Helmut Schulze-Fielitz, ‘Umweltschutz im Föderalismus - Europa, Bund und Länder’ [2007] *Neue Zeitschrift für Verwaltungsrecht* 249; Christina Agnetha Flaskühler, *Föderale Klimaschutzgesetzgebung in Deutschland im Lichte des wohlgeordneten Rechts* (Nomos 2018); Peter Eckersley and others, ‘Climate Governance and Federalism in Germany’ in Alan Fenna, Sébastien Jodoin and Joana Setzer (eds), *Climate Governance and Federalism* (Cambridge University Press 2023).

<sup>96</sup> FCC, Decision of the First Senate of 24 March 2021, 1 BvR 2656/18, BVerfGE 157, 30, *Federal Climate Protection Act*. See generally Gabriele Britz, ‘Klimaschutz in der Rechtsprechung des Bundesverfassungsgerichts’ [2022] *Neue Zeitschrift für Verwaltungsrecht* 825; Helmut Philipp Aust, ‘Climate Protection Act Case, Order of the First Senate’ (2022) 116 *American Journal of International Law* 150; Felix Ekardt, ‘Freedom, Human Rights, Paris Agreement, and Climate Change: The German Landmark Ruling on Climate Litigation’ (2022) 64 *Environment: Science and Policy for Sustainable Development* 4; Martin Eifert and Michael von Landenberg-Roberg, ‘Climate Change Challenges Constitutional Law: Contextualising the German Federal Constitutional Courts Climate Jurisprudence Within

The Court first interpreted the right to life and physical integrity under Article 2 Basic Law as providing for a duty of protection, requiring “the state to afford protection against the risks of climate change:”<sup>97</sup> such a duty of protection has also a subjective dimension and, thus, a violation by the state of its positive obligations constitutes also a violation of individuals’ fundamental rights, granting them standing to bring a direct constitutional complaint before the FCC.<sup>98</sup> The measure and the content of this duty, as will be discussed momentarily, consists in reducing German emissions by such a measure that it will be possible to meet the targets set by the Paris Agreement. Accordingly, the FCC eventually found that the Climate Protection Act was adequate in that it provided for a sufficient reduction of German emissions over time, but was disproportionate in that it shifted too significant burdens at a later stage in time – namely in the 2030-50 period – resulting in a disproportionate restriction on the generality of future generations’ freedoms.<sup>99</sup>

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Climate Constitutionalism’ in Jelena Bäumlner and others (eds), *European Yearbook of International Economic Law 2022* (Springer International Publishing 2023); Alessandra Di Martino, ‘Intertemporalità Dei Diritti e Dintorni: Le Scelte Argomentative Del Bundesverfassungsgericht Nella Sentenza Sul Clima e Le Interazioni Con i Processi Democratici’ [2023] *Diritti Comparati* 56. This was not the only case arisen in Germany, but is surely the most relevant; for an overview of other cases, see Lara van Leeuwen and Lara van Leeuwen, *Klimawandel und Grundgesetz – Umfang und Grenzen eines verfassungsrechtlichen Anspruchs auf Klimaschutz* (Nomos Verlagsgesellschaft mbH & Co KG 2023) 73, ff.

<sup>97</sup> FCC, *Federal Climate Protection Act* (n 96), para. 144 (as to admissibility, see para. 97-111). On the possibility to envision a positive obligation of the state to take climate action see, before the FCC’s decision, Christian Calliess, *Rechtsstaat und Umweltstaat: Zugleich ein Beitrag zur Grundrechtsdogmatik im Rahmen mehrpoliger Verfassung* (Mohr Siebeck 2001) 312, ff.; Andreas Voßkuhle, ‘Umweltschutz und Grundgesetz’ [2013] *Neue Zeitschrift für Verwaltungsrecht* 1, 6, ff.; Felix Ekardt, ‘Umweltverfassung und „Schutzpflichten“’ [2013] *Neue Zeitschrift für Verwaltungsrecht* 1105; Thomas Groß, ‘Die Ableitung von Klimaschutzmaßnahmen aus grundrechtlichen Schutzpflichten’ [2020] *Neue Zeitschrift für Verwaltungsrecht* 337.

<sup>98</sup> Christian Bickenbach, ‘Subjektiv-öffentliches Recht auf Klimaschutz? Die Erderwärmung vor den Gerichten’ (2020) 75 *JuristenZeitung* 168; Jörg Berkemann, ‘„Freiheitschancen über die Generationen“ (Art. 20a GG) – intertemporaler Klimaschutz im Paradigmenwechsel’ [2021] *Die öffentliche Verwaltung* 701, 708, f.; Christian Calliess, ‘Das „Klimaurteil“ des Bundesverfassungsgerichts: „Versubjektivierung“ des Art. 20a GG?’ [2021] *Zeitschrift für Umweltrecht* 355. Critically, see Marc Ruttloff and Lisa Freihoff, ‘Intertemporale Freiheitssicherung oder doch besser „intertemporale Systemgerechtigkeit“? – auf Konturensuche’ [2021] *Neue Zeitschrift für Verwaltungsrecht* 917, 921, f.; Bernhard W Wegener, ‘Menschenrecht auf Klimaschutz? Grenzen grundrechtsgestützter Klimaklagen gegen Staat und Private’ [2022] *Neue juristische Wochenschrift* 425.

<sup>99</sup> On the intergenerational – or intertemporal – aspects of the decision, see Andreas Buser, ‘Of Carbon Budgets, Factual Uncertainties, and Intergenerational Equity–The German

## **B. The intertwinement of the domestic and international legal planes in the decision of the FCC.**

In the perspective of the present research, however, the most salient aspects of the decision are those related to the intertwinement of German law addressing climate change with international, or better yet global, dimension.<sup>100</sup> Such aspects are evident under multiple perspectives.

First, the Court considers the global nature of climate change not only as a factual element, somewhat external to the legal dimension of the case, but also, and more importantly, as a factor calling for Germany to act on the international plane to collectively address climate change:

“The obligation to take climate action arising from Article 20a GG is not invalidated by the fact that the climate and global warming are worldwide phenomena and that the problems of climate change cannot therefore be resolved by the mitigation efforts of any one state on its own. The climate action mandate enshrined in Article 20a GG possesses – like global warming itself – a special international dimension from the outset. [...]

In requiring that the natural foundations of life also be protected for future generations, Article 20a GG makes it obligatory to pursue a goal that the national legislator is not capable of reaching on its own but can only achieve through international cooperation. This is due to the physical realities of climate change and climate action. [...] No state can stop global warming on its own. Resolving the global climate problem will only be possible if climate action is taken worldwide. [...]

As an obligation to take climate action, Article 20a GG thus contains a duty that necessarily looks beyond the domestic legal system under the sole responsibility of the individual state, and must be understood as also pointing towards the level of international activity. [...] This compels the state to engage in internationally oriented activities to tackle climate change at the global level and requires it – the Federal Government in particular – to promote climate action within the international framework.”<sup>101</sup>

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Constitutional Court’s Climate Decision’ (2021) 22 German Law Journal 1409; Berkemann (n 98); Ruttloff and Freihoff (n 98); Nils Grosche, ‘Recht und intertemporale Gerechtigkeit’ (2022) 61 Der Staat 113; Di Martino (n 96); Giovanni Tuzet, Damiano Canale and Alessio Sardo, ‘Scenario Analysis in Karlsruhe: Exploring New Argumentative Steps of the Federal Constitutional Court’ (2024) 25 German Law Journal 707.

<sup>100</sup> Louis J Kotzé, ‘Neubauer et al. versus Germany: Planetary Climate Litigation for the Anthropocene?’ (2021) 22 German Law Journal 1423; Susan Krohn, ‘Die internationale Dimension der Staatszielbestimmung des Art. 20a GG’ [2021] Zeitschrift für Umweltrecht 603; Jannika Jahn, ‘Domestic Courts as Guarantors of International Climate Cooperation: Insights from the German Constitutional Court’s Climate Decision’ (2023) 21 International Journal of Constitutional Law 859.

<sup>101</sup> FCC, *Federal Climate Protection Act* (n 96), para. 199-201.

Apart from this constitutional directive to the German state organ to act on the international plane, which is a clear manifestation of the first dimension of the principle of openness towards international law of the Basic Law – i.e. the constitutional directive to pursue the international integration of Germany –, the rebuttal by the FCC of the “drop in the ocean” argument is also of note. This argument attempts to rebut the constitutional duty to take climate action by relying on the consideration that national climate action autonomously considered is incapable of stopping climate change and that, even if Germany actually managed to meet its targets, the harmful consequences to the fundamental rights of individuals living in Germany would likely still manifest, due to the failure of other states to meet their own target.

The rejection of this argument by the FCC is a prime example of concretisation of the principle of openness of the German legal order, at least for two reasons. First, the FCC clearly requires Germany to ‘do its part’ in mitigating climate change, with the understanding that avoiding catastrophic outcomes is only possible if each and every state fulfil its own responsibilities. Second, the FCC considers the consequences of the German state’s actions not only as to Germany, but also to the robustness and effectiveness of the international legal order, upon which Germany itself relies to fulfil its constitutional obligations towards its own citizens: every state that fulfil its self-imposed targets under the Paris Agreement reinforces the common trust in its operation, while every state that fails to do so, hinders it. In the words of the FCC,

“it is true that Germany would not be capable of preventing climate change on its own. Its isolated activity is clearly not the only causal factor determining the progression of climate change and the effectiveness of climate action. [...] In view of the global reduction requirements, Germany’s 2% share of worldwide CO<sub>2</sub> emissions is only a small factor, but if Germany’s climate action measures are embedded within global efforts, they are capable of playing a part in the overall drive to bring climate change to a halt.

The state may not evade its responsibility here by pointing to greenhouse gas emissions in other states. On the contrary, [...] it is precisely because the state is dependent on international cooperation in order to effectively carry out its obligation to take climate action under Article 20a GG that it must avoid creating incentives for other states to undermine this cooperation. Its own activities should serve to strengthen international confidence in the fact that climate action – particularly the pursuit of treaty-based climate targets – can be successful while safeguarding decent living conditions, including in terms of fundamental freedoms. [...]

The Paris Agreement very much relies on mutual trust as a precondition for effectiveness. [...] Creating and fostering trust in the willingness of the Parties to achieve the target is therefore seen as a key to the effectiveness of the Paris

Agreement. [...] This is significant from the constitutional law perspective to the extent that the route signposted by Article 20a GG towards globally effective climate action is largely directed through this Agreement.”<sup>102</sup>

Another aspect of the decision of relevance in the present context, one clearly showing the effects of the principle of friendliness towards international law, is the attribution of constitutional significance to the Paris Agreement by the FCC, in a very similar fashion to what the FCC has done over time with regard to the ECHR, as already discussed. This is done by interpreting Article 20a Basic Law in light of the Paris Agreement, determining the measure of the constitutionally required mitigation action by reference to the Agreement.<sup>103</sup> The constitutional significance of the Agreement is particularly striking not only because, formally, it only has the rank of federal legislation, but also because Article 2 of the Paris Agreement creates no international obligation, merely declaring the common aim of the Parties thereto.<sup>104</sup> The entanglement of the national level with the international one is transparent from the argumentation of the Court:

“It is true that the content of Article 20a GG requires further specification. However, this does not mean that Article 20a GG is a non-binding proclamation. It is a legal provision and is binding on the legislator. [...]

This binding effect may not be abandoned by leaving the task of specifying the protection mandate arising from Article 20a GG to the legislator alone [...]. Even though Article 20a GG does give the legislator a role in specifying its

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<sup>102</sup> FCC, *Federal Climate Protection Act* (n 96), para. 202-204.

<sup>103</sup> This possibility was suggested, before the decision, by Clauio Franzius, ‘Das Paris-Abkommen zum Klimaschutz Auf dem Weg zum transnationalen Klimaschutzrecht?’ [2010] *Zeitschrift für Umweltrecht* 515; Wolfram Cremer, ‘Verfassungskräftiger Klimaschutz nach Maßgabe völkerrechtlich verbindlicher Verpflichtungen und Ziele’ [2019] *Zeitschrift für Umweltrecht* 278. This aspect of the decision is a recurring one in a comparative perspective: see Lennart Wegener, ‘Can the Paris Agreement Help Climate Change Litigation and Vice Versa?’ (2020) 9 *Transnational Environmental Law* 17; Anna-Julia Saiger, ‘Domestic Courts and the Paris Agreement’s Climate Goals: The Need for a Comparative Approach’ (2020) 9 *Transnational Environmental Law* 37; Brian J Preston, ‘The Influence of the Paris Agreement on Climate Litigation: Legal Obligations and Norms (Part I)’ (2021) 33 *Journal of Environmental Law* 1; Christina Voigt, ‘The Power of the Paris Agreement in International Climate Litigation’ (2023) 32 *Review of European, Comparative & International Environmental Law* 237; Meinhard Doelle, with Sara Seck and Rose Klug, ‘The Use of Elements of the Paris Agreement and IPCC Reports in Climate Litigation’ in Alexander Zahar (ed), *Research Handbook on the Law of the Paris Agreement* (Edward Elgar 2024).

<sup>104</sup> Christina Voigt, ‘The Paris Agreement: What is the Standard of Conduct for Parties?’ (2016) 26 *Questions of International Law* 17; Daniel Bodansky, ‘The Legal Character of the Paris Agreement’ (2016) 25 *Review of European, Comparative & International Environmental Law* 142; Lavanya Rajamani and Daniel Bodansky, ‘The Paris Rulebook: Balancing International Prescriptiveness with National Discretion’ (2019) 68 *International & Comparative Law Quarterly* 1023

material content, it does so partly in order to provide a counterweight to the political process. [...]

Rather than being purely an expression of political will, the chosen temperature limit must indeed also be understood as being a specification of the climate action required under constitutional law. This is primarily supported by the fact that the climate target specified in § 1 third sentence of the Climate Protection Act is the internationally agreed temperature limit of Article 2(1)(a) PA, which the legislator has deliberately and explicitly taken as a basis. Its constitutional law significance goes beyond the consent given by the German legislator to the Paris Agreement in passing the act of approval.”<sup>105</sup>

Finally, of sure significance is the granting of standing to individuals from Bangladesh and Nepal, even if the FCC did not conclusively rule on whether Germany had constitutional duties of protection of foreigners living abroad and showing no apparent connection with Germany, only observing that it “does appear conceivable in principle”, and that, in any case, such duties would be of a reduced intensity than those due to individuals living in Germany.<sup>106</sup> In any case, the FCC held, those duties were respected by Germany in that it had taken adequate action.

This is particularly of note, also in light of the fact that the ECtHR, faced with the very same issue, recently reached the opposite conclusion, rejecting the standing of applicants vis-à-vis states other than that in which they reside.<sup>107</sup>

## **5. Conclusive remarks**

The case of Germany, a paradigmatic case of open constitutional statehood, shows the effect the principle of openness has as to the domestic reception of international law and on the structuring of conflicts between national and international law.

Particularly, a difference has been noted between how the principle of international law friendliness operates in areas of strong constitutional and cosmopolitan significance

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<sup>105</sup> FCC, *Federal Climate Protection Act* (n 96), para. 205, 206, 210.

<sup>106</sup> FCC, *Federal Climate Protection Act* (n 96), para. 101; 173-181: see, in this regard, Lea Main-Klingst and Hermann E Ott, ‘Climate Litigation, Extraterritoriality of Human Rights and the German Constitution’ <[https://brill.com/view/journals/cjel/7/2/article-p273\\_9.xml](https://brill.com/view/journals/cjel/7/2/article-p273_9.xml)> accessed 2 January 2025; Chiara Gentile, ‘Climate Change and the Extraterritorial Reach of the State Duty to Protect’ in Walter Frenz and Axel Preuße (eds), *Yearbook of Sustainable Smart Mining and Energy 2022 : Technical, Economic and Legal Framework* (Springer Nature Switzerland 2024) 133, ff.

<sup>107</sup> ECtHR (Grand Chamber), Judgement of 9 April 2024, App. no. 39371/20, *Duarte Agostinho v Portugal*, para. 184-213.

– such as those of fundamental rights protection and action against climate change – and how it operates in areas of the law less constitutionally significant. In the former areas, the actual domestic role of international law is enhanced vis-à-vis its formal status due to the axiological continuity between national constitutional law and international law, to the effect of attributing to international law a constitutional significance, invoking it as an interpretive aid, with the purpose of determining the content and the scope of constitutional provisions.

However, this opening is not unlimited, being instead a “controlled opening,”<sup>108</sup> carried out under conditions set out in the Basic Law and enforced by the courts – among them, especially by the FCC. These controlling conditions are axiological in nature, or, in the terminology here adopted, identitarian. Indeed, while the value system established by the Basic Law is open to integration by having recourse to international law, some fundamental decisions cannot be made but at the level of the state.<sup>109</sup> When the alignment between the system of values of the Basic Law and the values expressed by international law falters, courts refuse to give application to the international legal norms at issue, reasserting the autonomy of the legal order.<sup>110</sup> Accordingly, in such areas of the law, conflicts between national and international law are framed in terms of identity, structural deficits as to the domestic reception of international law being otherwise shored-up by the principle of friendliness towards international law.

Instead, in cases in which substantive concerns as to the axiological underpinning of the interacting norms are not as pressing, consideration as to the separation of powers and the law-making prerogatives of the Bundestag are given greater weight, and the application of international, just as its non-application, are determined by structural rules as to the domestic reception of international law, its place in the system of sources and,

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<sup>108</sup> FCC, *Bodenreform III* (n 2), para. 92; *Treaty Override* (n 4), para. 69.

<sup>109</sup> Similarly, albeit in the context of EU integration, see FCC, *Lisbon Treaty* (n 4), para. 249:

“European integration on the basis of a Treaty-based union of sovereign states cannot be realised in such a way that the Member States are left without sufficient political latitude to address economic, cultural and social conditions. This applies in particular to matters that shape the citizens’ living conditions and, above all, their private area of autonomy and of personal and social security, which is protected by fundamental rights; it also applies to political decisions that are especially reliant on prior cultural, historical and linguistic concepts and unfold in the sphere of party politics and of parliamentary decision-making, in the context of political discussion.”

<sup>110</sup> Neil Walker, ‘When Sovereigns Stir’ in Bas Leijssenaar and Neil Walker (eds), *Sovereignty in Action* (Cambridge University Press 2019) 58, ff.

not lastly, the chronological relationship between contrasting norms, following *the lex posteriori derogate priori* rule. In this context, it is particularly relevant that the FCC, and the majority of commentators, refuse to give the principle of friendliness towards international law the effect of making international law resistant to subsequent legislative derogations: accordingly, the domestic applicability of international law is merely a function of rules pertaining to the forms, procedure for the incorporation of international law in the domestic legal order and of its status therein.

The separate opinion of Justice König in *Treaty Override* is quite instructive, insofar as the Justice, arguing for a the principle of friendliness to be given greater weight, concluded that the Court should have adopted a balancing approach to the solution of chronological conflicts between a prior treaty commitment and a subsequent derogating legislation, where the outcome of this conflict should have been based on a comparative evaluation of the substantive consideration underpinning the international law norm and the contravening domestic one.<sup>111</sup>

This separate opinion does not only shed light on the effects of the principles of openness and friendliness towards international law as to the framing of conflicts between the two levels, but is also a point of emergence of the yet unsettled and probably ever-evolving development of the statist tradition in Germany: while the passage to an open conception of statehood, implying a rupture with the past, is consolidated, the precise definition of the scope, effects, and degree of the opening of the state is still progressing, with some pronouncements, both in the scholarship and in the judiciary, favouring a more statist approach, centred upon the nationally-bound decision-making, made concrete through the institutions of the representative democracy, while other voices put greater emphasis in the embeddedness of Germany in the international community and on the need to ensure the consistency between the national legal order and the international one.

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<sup>111</sup> FCC, *Treaty Override* (n 4), Separate Opinion of Justice König.

## Chapter VIII Colombia

This chapter discusses the relationship between national and international law in Colombia, as well as the – rare, and mainly only abstractly configured – instances of conflict between the two levels.

It shows that that inaugurated with the enactment of the 1991 Political Constitution is a strongly open constitutional state, and that instances of conflicts between the two legalities are most often framed in terms of identity, being grounded on the need to preserve the value system determined by the Political Constitution vis-à-vis international law. In this perspective, the integration of international law in the domestic Constitution, which in many fields is mandated, if to different degrees, by the Constitution itself, is only possible insofar as international norms are integrated, and thus “fit,” into the constitutional order created by the Political Constitution.

The chapter is structured as follows. The first paragraph introduces the openness of the Political Constitution in the context of what has been defined the “transformative constitutionalism,” an approach the Colombian Constitutional Court (‘CCC’) shares with many other courts in Latin America and the Global South. For this purpose, the paragraph discusses the role of the CCC in the difficult socio-political context characterising Colombia: it concludes that, in spite of the many challenges structurally affecting Colombia, the CCC is sufficiently autonomous from political powers, thus ensuring the autonomy of constitutional law from political and particular interests, and that its pronouncements have an actual impact on the Colombian reality. In light of this, though being aware of the structural difficulties Colombia has to face, it is concluded that it is not an incomparable case when confronted with jurisdictions such as the UK and Germany.

The second paragraphs addresses, in general terms, the openness of the Colombian Constitution, especially in light of a decision in which the CCC defined the approach of the Constitution to international law as informed by the moderate monism thesis elaborated by Verdross.

The third paragraph analyses the operation, the functions, and the limits of the mechanisms ensuring the compatibility with the Constitution of Colombia’s treaty

commitments – i.e., the ex-ante review of their constitutionality under Article 241, para. 10 Political Constitution –, regardless of the content of the treaty at issue.

Finally, the fourth paragraph addresses the substantive interactions between national and international law under the Political Constitution, especially discussing the doctrine of the conventionality control, also as distinguished by the CCC from the conventionality control devised by the Interamerican Court of Human Rights ('IACtHR').

Some conclusions are finally presented.

## **1. Transformative constitutionalism under the 1991 Political Constitution in the Colombian socio-political context**

One can hardly abstract from the actual social and political conditions of one country when discussing the functioning and the fundamental features of its legal order. This is especially true in the case of countries with a complicated situation such as that of Colombia.

Indeed, Colombia has quite a long history of internal armed conflict between the Colombian government and its armed forces and paramilitary groups and guerrillas,<sup>1</sup> resulting, over the years, in hundreds of thousands of murdered and forcefully disappeared or kidnapped people.<sup>2</sup> This conflict – it was acutely observed – “has been both a symptom and a cause of Colombia’s situation, which includes inequality and poverty.”<sup>3</sup> These two factors combined – i.e., the state of protracted armed conflict, with the atrocities performed over time, and the difficult socio-economic living conditions – resulted in millions of internally displaced persons, placing Colombia among the

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<sup>1</sup> For some context, see Gustavo Duncan, *Los señores de la guerra : de paramilitares, mafiosos y autodefensas en Colombia* (Bogotá : Planeta 2006); Juan Carlos Chaparro Rodríguez, *El Ocaso de la Guerra: La Confrontación Armada y Los Procesos de Paz en Colombia* (Universidad Colegio Mayor de Nuestra Señora del Rosario 2017).

<sup>2</sup> Comisión de la Verdad, ‘Hay Futuro si Hay Verdad. Informe Final Hallazgos y Recomendaciones de la Comisión de la Verdad de Colombia’ (2022).

<sup>3</sup> Rodrigo Uprimny Yepes, Sergio Ruano and Gabriella Michele García, ‘The Impact of the United Nations Human Rights Treaties on the Domestic Level in Colombia’ in Christof Heyns, Frans Jacobus Viljoen and Rachel Murray (eds), *The Impact of the United Nations Human Rights Treaties on the Domestic Level: Twenty Years On* (2nd edn, Brill Nijhoff 2024) 228. For recent statistical data, see Departamento Nacional de Planeación. Dirección de Estudios Económicos, ‘Pobreza Monetaria y Desigualdad’ (2023), calculating, for 2023, a GINI index (measuring economic inequality) of 0,546 and placing 33% of the population below the threshold of poverty and 11,4% below that of absolute poverty.

countries in the world with the highest number of internally displaced persons.<sup>4</sup> This situation is complimented by Colombia being one pivotal centre of the illicit international drug trafficking, in turn fuelling illegality, violence, and corruption.

On the other hand, and somewhat paradoxically,<sup>5</sup> Colombia's institution have proven quite stable over time, Colombia being one of the few countries in the region fundamentally not having undergone a military coup or dictatorship ever since obtaining its independence from Spain in 1819.<sup>6</sup>

The enactment of the 1991 Political Constitution concretised the aspiration to radically reform and pacify the Colombian society.<sup>7</sup> Particularly, it was a strong reaction to the extreme violences of the 1980s in Colombia, culminated in the assassination of the candidate for president of the liberal party in 1989, that led to the enactment of the Political Constitution of 1991, which sought to realise a rupture with the past and deeply reform the Colombian institutions:<sup>8</sup> among other aspects, the new constitution enshrines a long list of fundamental rights, especially encompassing many social rights, to be protected by the judiciary and, ultimately, by the CCC; it provides for the opening of the political system beyond the bipartidism that characterized Colombia up to that point and that had effectively blocked the Colombian society and the attempts at its reform, also by setting up various mechanisms of participatory democracy; finally, it strongly embeds the new constitutional order in international law.<sup>9</sup>

More than 30 years after the enactment of the new Constitution, the Colombian democracy, though challenged by the social and political reality, and affected by serious

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<sup>4</sup> At the end of 2023, Colombia was the fourth country in the world with the most internally displaced persons, after Sudan, Syria, and the Democratic Republic of Congo: see '2024 Global Report on Internal Displacement' (Internal Displacement Monitoring Centre 2024).

<sup>5</sup> David Bushnell, *The Making of Modern Colombia: A Nation in Spite of Itself* (University of California Press 1993).

<sup>6</sup> The exception being the military junta governing from 1957 to 1958 and established under the Frente Nacional Agreement

<sup>7</sup> Gonzalo Ramírez Cleves and Gonzalo Ramírez Cleves, 'El Derecho a La Paz En Colombia Como Principio Básico e Irreformable de La Constitución' [2024] *Diritto pubblico comparato ed europeo* 727.

<sup>8</sup> Manuel José Cepeda-Espinosa, 'Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court' (2004) 3 *Washington University Global Studies Law Review* 529.

<sup>9</sup> For an overview of the general traits of the 1991 Political Constitution, see Diego Younes Moreno, *Derecho Constitucional Colombiano* (15th edn, Legis Informacion Profesional 2017) 47–83. For a balance of the impact of the 1991 Political Constitution over time, with a sector-by-sector analysis, see Tania Luna Blanco and Francisco Jose Chaux Donado (eds), *Tres décadas de constitución* (Ministerio de Justicia y del derecho 2022).

internal shortcomings, is nonetheless alive, functioning, and, seemingly, reforming.<sup>10</sup> Furthermore, the internal conflicts have progressively been addressed as many guerrilla formations have laid down arms: some of them already with the enactment of the 1991 Political Constitution, the FARC and the ELN being the only two groups refusing to do so. The FARC reached a peace agreement in 2016, and the ELN is currently negotiating one, having however provisionally agreed to a ceasefire.<sup>11</sup>

Additionally, and importantly, Colombia has a tradition of independent judiciary,<sup>12</sup> and, particularly, at least in the perspective of this research, since its creation by the 1991 Political Constitution, of a strong and authoritative Constitutional Court,<sup>13</sup> which managed to stand its ground when faced with political threats to its independence, authority, and functioning.<sup>14</sup> This is of importance in the present context in that the comparability of the case of Colombia with that of the United Kingdom and Germany is permitted, in spite of the relevant differences, by the retainment by the law, in Colombia, of its autonomy vis-à-vis the political power, as well as of its effectiveness and credibility in shaping the modalities of the exercise of public power and the living conditions of individuals.

It is undeniable, however, that the political, economic, and social challenges faced by Colombia are largely foreign to countries such as the United Kingdom or Germany, just as the general context in which judicial institutions – and the CCC particularly – operate is quite different from that of the other cases discussed in this research.

The combination of the difficult social and political Colombian context and the weakness of the political and representative system have however determined a situation in which the CCC has become a focal point of the Colombian constitutional system, many demands of societal transformation being framed as demands of constitutional protection by the Court (especially through actions of *tutela*) rather than being framed as political

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<sup>10</sup> Harvey F Kline, *Colombia: Democracy Under Assault* (2nd edn, Routledge 2019).

<sup>11</sup> Jorge Luis Fabra-Zamora, Andrés Molina-Ochoa and Nancy C Doubleday (eds), *The Colombian Peace Agreement: A Multidisciplinary Assessment* (Routledge 2021).

<sup>12</sup> With a focus on the Supreme Court, see Mario Alberto Cajas Sarria, *La historia de la Corte Suprema de Justicia de Colombia, 1886-1991* (Universidad de Los Andes 2015).

<sup>13</sup> David Landau, 'Beyond Judicial Independence: The Construction of Judicial Power in Colombia' (Doctoral Thesis, Harvard University 2014).

<sup>14</sup> David Landau, 'Constitutional Backsliding: Colombia' in David S Law (ed), *Constitutionalism in Context* (Cambridge University Press 2022). See also Rosalind Dixon and Samuel Issacharoff, 'Living to Fight Another Day: Judicial Deferral in Defense of Democracy' [2016] *Wisconsin Law Review* 683, 716–718.

projects of collective disenfranchisement, to be channelled through the representatives institutions.<sup>15</sup> The CCC itself, ever since the very beginning of its work, has apparently shared this idea, observing:

“the difficulties derived from the unchecked growth of the executive power in the interventionist state and of the loss of political leadership of the legislative organ, must be compensated, in constitutional democracy, by the strengthening of the judicial power. [...] Only in this manner can a true equilibrium and collaboration between the powers be achieved; otherwise, the executive power will predominate.”<sup>16</sup>

This judicial aptitude, which is common to many jurisdictions in Latin America and, more broadly to the Global South,<sup>17</sup> has been described – at the same time normatively endorsing and theorising it – as one of transformative constitutionalism,<sup>18</sup> understood as the “practice of interpreting and applying constitutional norms in a way that seeks to promote deep social change, [...] as an approach to legal interpretation that considers the effective transformation of deeply entrenched structures toward a more egalitarian or democratic society one of the paramount goals of interpretative practice.”<sup>19</sup>

The CCC and its jurisprudence fit quite well this model, particularly by allowing the social rights enshrined in the Political Constitution to be vindicated through tutela actions,

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<sup>15</sup> Manuel Iturralde, ‘Access to Constitutional Justice in Colombia: Opportunities and Challenges for Social and Political Change’ in Daniel Bonilla Maldonado (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press 2013); Leonardo García Jaramillo, ‘De la “constitucionalización” a la “convencionalización” del ordenamiento jurídico. La contribución del ius constitutionale commune’ [2016] *Revista Derecho del Estado* 131; Manuel José Cepeda Espinosa and David E Landau, *Colombian Constitutional Law: Leading Cases* (Oxford University Press 2017) 19: ‘the role conception of the Court is thus one perhaps typical across some other countries of the “global south”— it is based on a skepticism, and at times distrust, of the capacity and will of political and bureaucratic actors to carry out the constitutional project. The perceived need to further the resolution of deep conflicts and very divisive issues through institutional means in a violent context also helps to explain the sustainability of judicial activism in Colombia.’

<sup>16</sup> CCC, Judgement of 5 June 1992, T-406/1992.

<sup>17</sup> Javier Couso, Alexandra Huneus and Rachel Sieder (eds), *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge University Press 2010). As to the comparison across jurisdictions in the Global South, see Frans Viljoen, Oscar Vilhena, and Upendra Baxi (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press 2013); Daniel Bonilla Maldonado, *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press 2014).

<sup>18</sup> Armin von Bogdandy and others (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford university press 2017).

<sup>19</sup> Armin Von Bogdandy and René Urueña, ‘International Transformative Constitutionalism in Latin America’ (2020) 114 *American Journal of International Law* 403, 405.

turning and individualistic instrument into one for addressing collective and structural issues.<sup>20</sup> Among many decisions, the one rendered in the matter of the rights of internally displaced persons is particularly revealing in this perspective, showing not only the activism of the Court, but also its intention to address, within its powers, the deep structural inequalities of the Colombian society.<sup>21</sup> In that decision, the Court dealt expressly with the structural inadequacy of the policy put in place by the political authorities aiming to ensure the fundamental rights of displaced persons:

“the Third Review Chamber of the Court concludes that, given the conditions of extreme vulnerability of the displaced population, as well as the repeated omission by the different authorities in charge of their assistance to grant timely and effective protection, the rights of the plaintiffs in the present proceedings—and of the displaced population in general—to a dignified life, personal integrity, equality, petition, work, health, social security, education, minimum subsistence income and special protection for elderly persons, women providers and children, have all been violated. These violations have been taking place in a massive, protracted and reiterative manner, and they are

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<sup>20</sup> Pablo Rueda, ‘Legal Language and Social Change during Colombia’s Economic Crisis’ in Alexandra Huneus, Javier Couso and Rachel Sieder (eds), *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge University Press 2010). For an overview of the Colombian constitutional justice system, see Nestor I Osuna Patino and others, ‘El Sistema de Justicia Constitucional En Colombia’ in Jesús María Casal H. and others (eds), *La jurisdicción constitucional en América Latina: un enfoque desde el ius constitutionale commune* (Instituto Max Planck : Universidad Externado de Colombia 2019).

<sup>21</sup> CCC, Judgement of 22 January 2004, T-25/04: see This is certainly not an exceptional instance – see, e.g., in the field of socio-economic rights – on which, see Magdalena Correa Henao and Alejandra Osorio Alvis, ‘Socioeconomic Rights in the Colombian Constitutional Jurisprudence: Proportionality and the Prohibition of Regressive Measures’ in Francisca Pou-Giménez, Laura Clérico and Esteban Restrepo-Saldarriaga (eds), *Proportionality and Transformation* (1st edn, Cambridge University Press 2022).– CCC, Judgement of 24 June 1992, T-426/1992, on the minimum level of subsistence (where the structural effects of the decision are somewhat limited, the Court only warning the competent authorities to refrain to negate individuals’ rights in similar situations to that decided in the future); CCC, Judgement of 6 May 1999, T-308/1999, striking down – in the midst of an economic crisis – a law which would have allowed the Central Bank to determine the interest rates of mortgages and to raise them accordingly to the fluctuations of the general economy, finding that it breached the right to dignified housing; CCC, Judgement of 23 October 2000, C-1433/2000, requiring all public salaries to be adjusted to the inflation, subsequently refined in Judgement of 10 October 2001, C-1064/2001 and Judgement of 30 October 2003 C-1017/2003, the latter requiring that the real purchasing power of all public sector workers making less than two minimum salaries be preserved, and it held that all workers should receive increases at least equal to 50 percent of inflation (see David Landau, ‘The Promise of a Minimum Core Approach: The Colombian Model for Judicial Review of Austerity Measures’ in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014).); CCC, Judgement of 31 July 2008, T-760/2008 on the healthcare system, where the Court – apart from the deciding the case before it – issued a complex set of orders to the public authorities, effectively aimed at a structural and timely reform of the system.

not attributable to a single authority, but are rather derived from a structural problem that affects the entire assistance policy designed by the State, as well as its different components, on account of the insufficiency of the resources allocated to finance such policy, and the precarious institutional capacity to implement it. This situation gives rise to an unconstitutional state of affairs, which shall be formally declared in this judgment.

[... This declaration] has as a consequence that the national and territorial authorities responsible for attending to the displaced population must adjust their actions in such a way as to achieve concordance between their legal and constitutional mandate and the resources assigned to ensure the effective enjoyment of the rights of the displaced.”<sup>22</sup>

The Court, in identifying the substantive rights of the displaced persons, relied heavily on the UN Guiding Principles on Internal Displacement “as a tool that contributes to the interpretation of this population’s rights.” The value attached by the CCC to a soft law instrument as the Guiding Principles reveals a fundamental aspect of the Colombian constitutional law, as well as of the case-law of the Court, namely its openness to international law. Indeed, with regard to the transformative approach of Latin American constitutionalism – thereby including the Colombian experience –, it has been authoritatively observed that:

“such a transformative approach would have remained a matter of domestic constitutional law, unrelated to international adjudication, were it not for the fact that these new constitutions also “opened” domestic law to international law, in particular to human rights law, through clauses incorporating international law in domestic legal systems.”<sup>23</sup>

As it will be discussed throughout the next paragraphs, the internationalisation of the Colombian legal order is particularly strong, even when compared with the German legal order. This can also be explained by taking into account the transformative approach undertaken, in a context of weak political institutions and challenging social problems, by the CCC: strongly embedding its jurisprudence within international – and foreign – precedents is functional in both strengthening its legitimacy, and, at the same, in operationalising and giving concrete content to the various constitutional norms invoked.

On the other hand, the weakness of the Colombian representative institutions, and more generally, of the entire democratic structure in place in Colombia, would make it more difficult to mount a strategy of non-application of international law based on the

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<sup>22</sup> Ibid., para. 2.2 of the Judgement.

<sup>23</sup> Von Bogdandy and Urueña (n 19) 410.

need to preserve the democratic decision-making function of the Colombian Congress, as instead, it is in the UK.

## **2. The openness of the Colombian legal order to international law under the 1991 Political Constitution: reconciling the supremacy of the constitution with the *pacta sunt servanda* principle.**

Prior to the entry into force of the 1991 Constitution, Colombian governments used to strategically ratify most international treaties, especially in the field of human rights protection, in order to improve its international standing and reputation, however, the domestic effectiveness of the ratified was substantially negated.<sup>24</sup> This was due to a combination of the legislative branch systematically not incorporating the ratified instruments and the Supreme Court adopting a strictly dualist doctrine as to the domestic effect of international law, requiring, barring the domestic effect of unincorporated treaties, in a very similar way to that already discussed with regard to the United Kingdom.<sup>25</sup>

This radical disconnect between the international and national legal orders was remedied by the 1991 Constitution: here, the choice for the opening of the legal order, which goes hand in hand with that of reaffirming the supremacy of the Constitution (Article 4), is clear and deliberate, and there are a number of provisions in the Political Constitution attesting to this, beginning with the Preamble, committing Colombia to the pursuit of regional integration.

The most important constitutional provision in this regard is probably Article 9, para. 1, according to which:

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<sup>24</sup> On the notion of ‘strategic ratifiers,’ see Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009) 58.

<sup>25</sup> Gustavo Gallón Giraldo and Rodrigo Uprimny, ‘Estado de Sitio y Tratados Internacionales: Una Crítica a La Jurisprudencia Constitucional de La Corte’ in Gustavo Gallón Giraldo and Comisión Andina de Juristas (eds), *Guerra y constituyente* (Comisión Andina de Juristas Seccional Colombiana 1991); Rodrigo Uprimny Yepes, ‘La fuerza vinculante de las decisiones de los organismos internacionales de derechos humanos en Colombia: un examen de la evolución de la jurisprudencia constitucional’ in Viviana Krsticevic, Liliana Tojo, and Center for Justice and International Law (eds), *Implementación de las decisiones del Sistema Interamericano de Derechos Humanos: jurisprudencia, normativa y experiencias nacionales* (CEJIL 2007) para II, El DIDH como no derecho: la situación antes de la Constitución de 1991.

“the external relations of the state are based on national sovereignty, on respect for the self-determination of peoples, and on the recognition of the principles of international law approved by Colombia.”

In Judgement C-400/98, the CCC read Article 9 to mean that it directly incorporated in the Colombian legal order the *pacta sunt servanda* principle: accordingly, the Court affirmed that the general approach under Colombian law to the relationship between national and international law is one of moderate monism, as elaborated by Alfred Verdross.<sup>26</sup>

Now, throughout this entire research, a dogmatic and deductive approach, aimed at identifying a general unitary doctrine, capable of explaining and normatively guiding the entire legal practice as to the relationship between national and international law, has been constantly avoided; rather, having identified the relevant constitutional principles, an attempt has been made to understand their interaction in the practice, with a view to draw some generalisation from it. This was done also on the understanding that recourse to grand theories such as monism, dualism, and their respective variations, would probably hurt rather than favour the understanding of the concrete legal practice of domestic judges under the national constitution: the Colombian case seems to prove this point.<sup>27</sup>

However, one cannot simply ignore the express qualification made by the CCC in a lengthy and carefully considered decision, which became a leading case in the Colombian law on the relationship between national and international law, devoted to the specific issue of the compatibility with the Political Constitution of the Vienna Convention on the Law of the Treaties and, specifically, of its Articles 26 and 27.

It has been argued – not implausibly – that the CCC distorted the theory put forward by Verdross, specifically by underplaying the circumstance that his moderate monism, while acknowledging that conflicts might arise between national and international law,

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<sup>26</sup> CCC, C-400/1998 (n 30), para. 44.

<sup>27</sup> On the inconsistent characterisation of the Colombian approach as moderate monism with the case-law of the CCC, see Paola Andrea Acosta Alvarado, ‘Zombis vs. Frankenstein: Sobre Las Relaciones Entre El Derecho Internacional y El Derecho Interno’ (2016) 14 Estudios constitucionales 15; Paola Andrea Acosta Alvarado and others, ‘Diagnóstico sobre las relaciones entre el derecho internacional y el derecho interno. El caso colombiano’ (2018) 16 Estudios constitucionales 369.

postulates the unity of the legal order and that conflicts, which can only be temporary and provisional, are to be resolved under the primacy of international law.<sup>28</sup>

Apart from the discrepancies in the theoretical framework, the important point is that the Court characterises the Colombian legal order in one way, and actually acts in another. This is true as to both the subsequent case-law, but also with regard to the very same Judgement C-400/98.

Indeed, in that the decision, the Court affirmed:

“in accordance with the foregoing [i.e. the endorsement of moderate monism as the official doctrine as to the relationship between national and international law], the principle applies to the state judge and to the national authorities that constitutional law precedes the international order, so that treaties have the value assigned to them by the constitution.”<sup>29</sup>

It is somewhat telling that, in the same decision, the Court recalled the Permanent Court of International Justice case of *Certain German Interests in Upper Silesia* seeking to substantiate its finding that the ratification of the VCLT, with its Articles 26 and 27, codifying the *pacta sunt servanda* principle, did not violate the principle of the supremacy of the constitution:<sup>30</sup> the influence of the dualist thesis of Dionisio Anzilotti on the Court and on this decision is well known.<sup>31</sup>

Subsequently, in C-269/14, a treatise-judgement in which the Court, in more than 300 pages, summarised its previous case-law on the relationship between national and international law, the Court strongly reaffirmed the autonomy of the Colombian legal order and the supremacy of the Constitution:

“the Constitution, while providing for different links between the domestic legal order and the sources of international law – thus materialising the constituent purpose of internationalising political, economic, social and environmental relations – is also unequivocal in determining that sovereignty

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<sup>28</sup> Julián Huertas-Cárdenas, ‘Monismo Moderado Colombiano: Examen a la Teoría Oficial de la Corte Constitucional Desde la Obra de Alfred Verdross’ (2016) 65 *Vniversitas* 197, see particularly, at p. 218, the parallel text of two relevant passages, one by Verdross, the other by the Constitutional Court in Judgement of 10 August 1998, C-400/98; Carlos Arévalo and Julián Huertas, ‘Not so Moderate: The Relationship between the Colombian Legal System and International Law’ in Alejandro Linares Cantillo, Camilo Valdivieso-León and Santiago García-Jaramillo (eds), *Constitutionalism: Old Dilemmas, New Insights* (Oxford University Press 2021).

<sup>29</sup> CCC, Judgement of 10 August 1998, C-400/1998 Para. 45.

<sup>30</sup> *German Interests in Polish Upper Silesia (Germ. v. Pol.)*, 1925 P.C.I.J. (ser. A) No. 6 (Aug. 25). See CCC, C-400/1998 (n 29), para. 49.

<sup>31</sup> José María Ruda, ‘The Opinions of Judge Dionisio Anzilotti at the Permanent Court of International Justice’ (1992) 3 *European Journal of International Law* 100.

resides in the people; and, this being so, its primordial expression in the Political Constitution imposes an unrenounceable duty to protect its supremacy. [...]

In this sense, the rule of constitutional supremacy, insofar as it constitutes the parameter for recognising the norms that belong to the Colombian legal system, demands that the totality of norms respect the limits established therein and, at the same time, optimise the mandates it contains.<sup>32</sup>

How then to reconcile these dicta by the CCC with the endorsement of moderate monism as the doctrine regulating the relationship between national and international law under the Colombian Constitution? Here, following what has been argued in the scholarship,<sup>33</sup> and as it has been the approach of this research, it is submitted that it is probably best to look at how international law is actually dealt with in the Colombian legal order, rather than at the statements of principles made by the CCC in C-400/98. It is anticipated, however, that, if one substitutes the “moderate monism” terminology with one of “open constitutionalism,” they’ll obtain a clearer picture, one that is consistent with both the Colombian constitution and the case-law of the CCC, as already apparent from reading the passages just quoted. Furthermore, the internationalist stance behind Verdross’s thesis is also inherent in the idea of open constitutionalism, though the two are clearly differentiated as, in the latter, the autonomy of the constitution and, accordingly, the retention by the CCC of the prerogative to ultimately disregard international law are clearly safeguarded.<sup>34</sup>

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<sup>32</sup> CCC, Judgement of 27 July 2014, C-269/14, para. 4.2.3.2., 4.2.3.3. See also Judgement of 11 March 1993, C-104/93: “in accordance with Article 4 of the Charter, which defines the Constitution as a norm of norms, these constitutional values and principles have a hierarchically superior content to the rest of the legal system, just as the Constitution is also formally superior to other norms. Therefore, the Colombian legal system is a material and formally hierarchical system of norms, with the Constitution at the top;” CCC, Judgement of 4 August 1999, C-560/1999, para. 2: “the Constitution as a *lex superior* specifies and regulates the forms and methods of production of the norms that make up the legal system and is therefore the ‘source of sources’, *norma normarum*. These characteristics of supremacy and of the highest rule of recognition of the legal order proper to the Constitution are unequivocally expressed in the text of Article 4;” CCC, Judgement of 6 July 2011, C-539/2011, para. 5.2.7; Judgement of 6 June 2012, C-415/12, para. 3.1.2.; Judgement of 10 February 2016, C-054/2016, para. 6, ff.

<sup>33</sup> Huertas-Cárdenas (n 28); Acosta Alvarado (n 27); Acosta Alvarado and others (n 27).

<sup>34</sup> B Simma, ‘The Contribution of Alfred Verdross to the Theory of International Law’ (1995) 6 *European Journal of International Law* 33; Aoife O’Donoghue, ‘Alfred Verdross and the Contemporary Constitutionalization Debate’ (2012) 32 *Oxford Journal of Legal Studies* 799; Thomas Kleinlein, ‘Alfred Verdross as a Founding Father of International Constitutionalism?’ (2012) 4 *Goettingen Journal of International Law* 385.

Accordingly, coming to the legal effects of Article 9, the CCC reconnects with it a fourfold mandate, binding Colombian authorities: to base international relations on national sovereignty, self-determination and recognition of the principles of international law accepted by the Republic of Colombia; to promote the internationalisation of political, economic, social and ecological relations on the basis of equity, reciprocity, and pursuit of national interest (Article 226, 227 Constitution); to orient international policy towards Latin American and Caribbean integration; to promote said integration by creating, for this purpose, supranational organisations.<sup>35</sup> Importantly, said mandates are deemed binding not only onto political authorities, but also on the courts and, especially, the CCC.<sup>36</sup> This distinguishes the approach adopted by the CCC from that typical of English courts, being instead closer to what is required of German courts under the Basic Law and the principle of openness.<sup>37</sup>

Accordingly, with regard to the constitutional mandate to base the international relations of Colombia, inter alia, on the respect of general principles of international law – including the *pacta sunt servanda* one, directly incorporated under art. 9 – and on that to internationalise the political, economic, social and ecological relations, the CCC has held that, under the *pacta sunt servanda* principle, as received in the Colombian legal order, while international law is not given primacy over national law,

“[it] is inadmissible the maintenance of an incompatibility between a treaty and the Constitution, since [...] the authorities would otherwise be subjected to untenable situations because they must apply the Constitution, even when this implies ignoring our international obligations and compromising the international responsibility of our State.

[Moreover,] it is the duty of legal operators to apply internal norms other than the Constitution in such a way that they harmonize as much as possible with the international commitments signed by the country.”<sup>38</sup>

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<sup>35</sup> CCC, C-269/14 (n 32), para. 4.8.1.1. See generally Laura Victoria García-Matamoros and Walter Arévalo Ramírez, ‘La Constitución y El Derecho Internacional’ in Tania Luna Blanco and Francisco Jose Chau Donado (eds), *Tres décadas de constitución* (Ministerio de Justicia y del derecho 2022).

<sup>36</sup> CCC, C-269/14 (n 32), para. 4.8.1.1.

<sup>37</sup> See ch. 6, para. 2; ch., para. 2 and 3.A. Compare especially see *R v. Lyons* [2002] UKHL 44; [2003] 1 AC 976, para. 40 (LJ Hoffman), holding that “the argument that the courts are an organ of State and therefore obliged to give effect to the State's international obligations is in my opinion a fallacy” with FCC, Order of the Second Senate of 14 October 2004, 2 BvR 1481/04, BVerfGE 111, 307, *Görgülü*, para. 61: “the Federal Constitutional Court indirectly serves to enforce of international law, minimising the risk of non-compliance with international law.”

<sup>38</sup> CCC, C-400/1998 (n 30), para. 48.

It should be noted that, apart from the duty to react and possibly to remedy to violations of international law abroad, the other two duties are very similar to those derived by the German Federal Constitutional Court from the principle of openness in *Bodenreform III*.<sup>39</sup>

The openness of the Colombian constitution, as well as the reconciliation between the constitutional imperative to enforce the primacy of the Constitution and the mandate to internationalise the political, economic, social and ecological relations, can be further appreciated under two perspectives, addressed in turn in the next paragraphs. The first concerns the *ex ante* review of constitutionality of treaties; the second the selective attribution of a varied constitutional significance to international law norms, depending on their content.

### **3. The review of international treaties under the 1991 Constitution**

Under the Colombian Constitution, international treaties are made by the Government and ratified by the President of the Republic, however for them to be ratified it is necessary that Congress enacts a law to this effect (Article 224).<sup>40</sup>

After the approval of the law authorising the ratification, that is, after the political choice to ratify the international instrument at issue has already been made,<sup>41</sup> and before the ratification of the treaty by the President of the Republic, when no international obligation is yet binding on Colombia, the Constitution requires that the CCC carry out a review of constitutionality of the treaty to be ratify (Article 241, no. 10).<sup>42</sup>

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<sup>39</sup> FCC, Decision of the Second Senate of 26 October 2004, 2 BvR 955/00, 1038/01, BVerfGE 112, 1, *Bodenreform III*, para. 93. See ch. 7, par. 2.B, and generally also ch. 7, par. 1.

<sup>40</sup> Carlos García Orjuela, 'Competencias del Congreso de la República, en Materia de Tratados Internacionales: Procedimiento y Características de la Aprobación de Tratados Internacionales en el Ordenamiento Jurídico Colombiano' (2005) 61 *Colombia Internacional* 148.

<sup>41</sup> CCC, Judgement of 3 August 2022, C-110/2022, para. 48: "the constitutional control exercised by this Court consists of an eminently legal study that is not concerned with reviewing the advantages, benefits or practical opportunities of the treaty at the economic or social level, nor its political convenience." See also Hernán Alejandro Olano García, 'Control de Constitucionalidad de los Tratados Internacionales en Colombia' (2006) 4 *Estudios constitucionales* 555, 571.

<sup>42</sup> See generally García (n 41); Alejandro Ramelli, 'El Control de Constitucionalidad de Los Tratados Internacionales En Colombia' (2007) 20 *Revista Derecho del Estado* 19; Moreno (n 9) 410, ff.; Walter Arévalo Ramírez, *Manual de derecho internacional público: fundamentos, tribunales internacionales y casos de estudio* (2. edición, Tirant lo Blanch 2020) 147, ff.; Paola Andrea Acosta Alvarado and Daniel Rivas Ramírez, 'El Control de

This requirement for treaties to undergo such review is found in the need to ensure that no legal norm existing in the Colombian legal order is incompatible with the Constitution, at the same time preventing Colombia from being found in breach of its international obligations.<sup>43</sup> The fundamental features of the review performed under Article 241, para. 10 have been defined by the CCC as preventive, in that it takes place before the ratification and the coming into existence of an international obligation, automatic, in that it is mandated by the Constitution for each and every treaty to be ratified by Colombia, comprehensive, as it concern both procedural and substantive aspect of both the treaty and the ratification procedure, participatory, which is generally true of the constitutional justice in Colombia, as citizens are always allowed to present observation, and definitive.<sup>44</sup>

#### **A. The finality of the ex-ante review of constitutionality of international treaties**

This last element – its definitiveness – is of significant importance: the finding of constitutionality of the treaty is considered *res judicata* and cannot be revisited at a later time.<sup>45</sup> Accordingly, *ex post* review of international treaties, that is, when they have

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Constitucionalidad de Tratados Internacionales y Leyes Aprobatorias e Tratados Internacionales’ in Humberto A Sierra Porto and others (eds), *Garantías judiciales de la constitución* (Universidad Externado de Colombia, Departamento de Derecho Constitucional 2023).

<sup>43</sup> CCC, C-110/2022 (n 41); Judgement of 25 September 1997, C-468 de 1997, para. 6; Judgement of 25 July 2006, C-576/2006, para. V.1; Judgement of 23 October 2014, C-332/2014, para. 2.1; Judgement of 12 December 2018, C-048/2018, para. V.1.

<sup>44</sup> CCC, C-269/14 (n 32), para. 1.2.-1.2.5; Judgement of 30 July 2002, C-578/2002.

<sup>45</sup> Obviously, findings of unconstitutionality can be remedied, thus allowing for a new review by the CCC that might find the treaty and its ratification process to be compatible with the Constitution. See, e.g., the case of the Bilateral Investment Treaty between France and Colombia (Agreement for the reciprocal promotion and protection of investments between Colombia and France, made in Bogotá on 10 July 2014, entered into force on 14 October 2020, *Journal Officiel de la République Française*, 7 November 2020 no. 0271, text no. 3). The CCC declared the Treaty “conditionally constitutional,” its constitutionality being contingent upon a number of interpretive declaration being made; only after this condition had been satisfied, could the President of the Republic proceed with the ratification (Judgment of 2 July 2019, C-252/2019). See Gustavo Prieto, ‘The Colombian Constitutional Court Judgment C-252/19: A New Frontier for Reform in International Investment Law’ (*EJIL: Talk!*, 29 July 2019) <<https://www.ejiltalk.org/the-colombian-constitutional-court-judgment-c-252-19-a-new-frontier-for-reform-in-international-investment-law/>> accessed 9 January 2025; Rafael Tamayo-Álvarez, ‘Constitutionality of the Colombia-France Bilateral Investment Treaty’ (2020) 114 *American Journal of International Law* 471.

already been ratified and are binding onto the Colombian state, is generally excluded:<sup>46</sup> this is partly aimed at ensuring the certainty of the law, and partly to ensure the compliance of Colombia with its international obligations.<sup>47</sup>

The impossibility to carry out a review of constitutionality of the treaties once they are ratified clearly implies a limitation in the protection of the supremacy of the Constitution:<sup>48</sup> for all that this conclusion is problematic, it is also a clear testament to the openness of the Colombian legal order, which hardly tolerates inconsistencies between national and international law. The problematic nature of this limitation can be appreciated under two aspects, the case-law of the CCC only partially remedying them, as it will be shown.

First, the control carried out by the CCC is an abstract control of constitutionality, one confronting – it has been argued not too much in detail, at least insofar as international treaties with an economic content are concerned<sup>49</sup> – the text of the international instrument at issue with the Constitution. However, most constitutionally problematic aspects of international instruments might become apparent only when they are applied to concrete cases, the law of state immunity being applied to Nazi war crimes, to states torturing individuals, or to states supporting international terrorism being the extreme example of this (*supra*, ch. 1, para. B).<sup>50</sup> Indeed, while only *in concreto* review can fully secure the primacy of the Constitution – and thus protect individuals fundamental rights –, the Colombian Constitution generally excludes the availability of such actions, on the ground of the definitive nature of the findings of constitutionality in *ex ante* reviews.<sup>51</sup>

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<sup>46</sup> See Article 241 of the 1991 Political Constitution: “the safeguarding of the integrity and supremacy of the Constitution is entrusted to the Constitutional Court *in the strict and precise terms of this article*. For such a purpose, it shall fulfil the following functions.” (emphasis added). While Article 241, no. 10 envisions the ex-ante review of international treaties, it does not provide for their ex-post control.

<sup>47</sup> On the need to ensure the certainty of law, especially in light of the precedents under the previous Constitution, see Ramelli (n 42) 21, f.

<sup>48</sup> See Mario Mendez, ‘Constitutional Review of Treaties: Lessons for Comparative Constitutional Design and Practice’ (2017) 15 International Journal of Constitutional Law 84, who argues for a combination of ex-ante and ex-post review mechanisms, on the premise that envisioning ex-ante controls only is not sufficient in adequately safeguarding the Constitution..

<sup>49</sup> Acosta Alvarado and Rivas Ramírez (n 42) 67, ff.

<sup>50</sup> This is not to take a position on whether those cases were correctly resolved by domestic authorities; however, they surely showed a problematic application of international law norms to concrete cases.

<sup>51</sup> Vocally critical, see Ramelli (n 42) 22, f.

In this regard, however, if only with regard to international trade agreements, the Court has reserved its power to review violations of the Constitution that might arise out of the future application of said agreements. It is unclear whether these exceptions might be applicable outside of the limited field of international trade agreements;<sup>52</sup> however, it is quite reasonable to expect that, were a very problematic case to present itself, the Court could rely on this reservation and apply it to the case before it.

Second, international treaties and the obligations stemming from them are capable of evolving over time, either through their interpretation by international courts,<sup>53</sup> or because they provide for the possibility of enacting secondary legislation, binding on the states party thereto regardless of their consent. With regard to both of these cases, the CCC has expressly formulated reservations, securing the retention of its own jurisdiction on future developments. This is particularly clear with regard to the supranational integration of Colombia in the Andean Community.

In this context, the CCC has acknowledged the interpretive monopoly of the Andean Tribunal of Justice on both primary and secondary community law; however, the CCC, formulating a reservation of jurisdiction over both primary and secondary community law very closely recalling the counterlimits doctrine elaborate in the EU context,<sup>54</sup> maintained that:

“the denial of justice by the Court or the proven ineffectiveness of its judicial mechanisms to overturn decisions or acts of the community that violate human rights or any other superior legal principle, could eventually lead the Constitutional Jurisdiction, in an extreme situation, to order their internal non-application, provided that prior efforts have been made to obtain from the

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<sup>52</sup> CCC, Judgement of 24 July 2008, C-750/08, para. 4.2.4:

“controversies may arise in the development and execution of the trade agreement in question, arising from the alleged undermining of fundamental or collective rights, which, although they are matters that correspond to the application of the law and therefore escape the abstract control of constitutionality, should nevertheless be controlled through the internal mechanisms that have been respectively instituted by the legal system for this purpose [...], which may be used at any time in defence of the constitutional order.”

See also, analogously, Judgement of 19 October 2006, C-964/2006, para. 42.

<sup>53</sup> Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (Springer 2012).

<sup>54</sup> See especially, with a very similar wording, Constitutional Court of Italy, Judgement of 18 December 1973, no. 138, para. 9.

Andean Court the interpretation of the norm on whose application the controversy is focused.”<sup>55</sup>

## **B. The ex-post review of international treaties ratified before the entry into force of the 1991 Political Constitution**

The 1991 Constitution, as just discussed, envisions the ex-ante review of treaties as a mean to ensure the supremacy of the Constitution and, at the same time, that Colombia does not breach its international obligations.

The question soon arose concerning the treaties ratified before the entry into force of the 1991 Political Constitution that appeared at odds with its substantive provisions. With regard to such treaties, given that, for obvious reasons, no ex-ante control of their compatibility with the 1991 had ever been carried out, it wasn't possible to find a solution capable of accommodating the need to both ensure the supremacy of the Constitution and to abide by international obligations. Ultimately, the CCC deemed that the supremacy of the Constitution prevailed over the need to comply with international law; however, this was not an immediate solution, actually being the end result of a quite turbulent case-law.<sup>56</sup>

The first case to be decided in this regard concerned – in a curious parallelism with Germany – the Concordat between Colombia and the Holy See, concluded, under the previous Constitution, in 1973.<sup>57</sup> Paragraph III and IV of the considerations of the Court

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<sup>55</sup> CCC, Judgement of 15 May 1997, C-231/97, para. 9. See also Judgement of 23 April 2014, C-256/14, para. 2.5.4; C-269/14 (32), para. 4.6.4.1; Judgement of 29 May 2019, C-234/19, para. 39. See William Guillermo Jiménez, ‘Papel de la jurisprudencia del tribunal de justicia de la comunidad andina, en decisiones judiciales de los países miembros’ (2013) 11 *Revista Colombiana De Derecho Internacional* 87. On the Andean Community and its Tribunal, see Osvaldo Saldías, ‘Comparative Community Law: Latin American Scholarship on Regional Integration and the Peril of Legal Functionalism’ (2008) 26 *UCLA Pacific Basin Law Journal* 51; Karen J Alter and Laurence R Helfer, ‘Legal Integration in the Andes: Law-Making by the Andean Tribunal of Justice’ (2011) 17 *European Law Journal* 701; Karen Alter, Laurence Helfer and Osvaldo Saldías, ‘Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice’ (2012) 60 *American Journal of Comparative Law* 629; Wilder Alejandro Sanchez, ‘On (the Lack of) Latin American Supranationalism’ (2017) 29 *Global Change, Peace & Security* 179.

<sup>56</sup> García (n 41); Oscar Manuel Ariza Orozco, ‘Perspectiva del Control de Constitucionalidad de los Tratados Públicos en Colombia: Una Visión Latinoamericana’ (2010) 2 *Revista Jurídica Mario Alario D’Filippo*; García-Matamoros and Arévalo Ramírez (n 35); Acosta Alvarado and Rivas Ramírez (n 42) 48, ff.

<sup>57</sup> Law 20 of 1974, approving the Concordat and Final Protocol, signed in Bogotá on 12 July 1973.

are telling of the themes developed throughout the entire judgement: para. III is devoted to the opening of the Colombian Constitution;<sup>58</sup> para. IV to its supremacy.<sup>59</sup>

Of the two principles, the prevailing one, in the Judgement of the Court is the latter, from which the Court derives its duty to review the constitutionality of the law approving the Concordat. The Court found that many provisions of the Concordat were unconstitutional – e.g., those pertaining to the indissolubility under Colombian civil law of the marriage celebrated according to catholic rites, and to the mandatory teaching of catholic religion in schools –, with the effect of striking down its ratification law and declaring them non-applicable: in many instances, the Court found a violation of the principle of non-discrimination.

However, the Court did not resolve the case simply by affirming the supremacy of the Constitution, regardless of the international legal aspects of the case. Instead, the Court attempted to reconcile, both substantively and procedurally, the two levels to the greatest extent possible, and, actually, even beyond what would have been legally sound.

Substantively, in para. VII, the Court “accepted” the opinion of the Attorney General: accordingly, the Court observed first that *jus cogens* norms exist, whose violation by any international agreement, under art. 53 VCLT, determines the nullity thereof; that art. 103 UN Charter, “which some consider to be “superj*us cogens*”, establishes the prevalence of the provisions of the Charter over any other international agreement that contradicts it;” that, in the framework of the UN, the 1948 Universal Declaration of Human Rights was approved, enshrining the right to equality without discrimination, which is also protected under many other international instruments, such as the 1948 American Declaration of the Rights and Duties of Man, the 1966 International Covenant on Civil and Political Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, and the 1969 American Convention on Human Rights. This

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<sup>58</sup> See CCC, Judgement of 5 February 1993, C-027/1993, especially para. II: “the emphasis placed by the 1991 Constitution on international law, and especially on the acceptance of its principles, aims and values, is complemented by the principles, values and rights established in the text of the Constitution itself.”

<sup>59</sup> See *ibid.*, para. IV, first period “the Constitutional Court inaugurates the performance of its function as “guardian” of the integrity and supremacy of the Constitution by affirming the thesis that the control entrusted to it by the 1991 Charter is **comprehensive and, therefore, material.**” (emphasis in the original).

line of reasoning, which is egregiously flawed and untenable under international law,<sup>60</sup> led the Court to the conclusion that “a law approving treaties, such as Law 20 of 1974, if it cannot ignore international treaties on human rights that are on a higher level and take their place, all the more reason must be subordinated to the Constitution, which enshrines such human rights in a masterful, categorical and prolific manner.”<sup>61</sup> Regardless of the unsoundness of the reasoning, it is nonetheless telling of the seriousness with which the CCC attempted to reconcile the national and international legal order, as well as of the conceptualisation of the relationship between the constitutional and the international protection of human and fundamental rights.

Procedurally, and here the reasoning of the Court is much sounder, the Court held that, under the *pacta sunt servanda* principle, as received in the Colombian legal order, the Executive is bound to denounce the Concordat, once it has been declared unconstitutional.

In sum, for all that Judgement C-027/1993 might be, in some respects, ill-reasoned, it shows a clear attempt at reconciling, both substantively and procedurally, the supremacy of the Constitution with the internalisation thereof.

Five months after the Judgement in C-027/1993, the Court rendered its Judgement in C-267/1993, reversing its previous conclusions. The case concerned the constitutionality of the ratification law of the Treaty of International Civil Law and of the Treaty of International Trade Law, made in Montevideo on 12 February 1889. The Court, recalling the dissenting opinion of Judge Jose Gregorio Hernandez Galindo in C-027/1993, held that it absolutely lacked jurisdiction to hear claims of unconstitutionality of laws authorising the ratification of international agreements after the ratification thereof. The Court justified its lack of jurisdiction on two grounds.

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<sup>60</sup> Among various problematic aspects of the reasoning, Article 103 – nor the prohibition of discrimination, let alone the prohibition of discrimination insofar as it would arguably prohibit the teaching of one religion in schools – is not deemed to be expressive of a *jus cogens* principle – see Rain Liivoja, ‘The Scope of the Supremacy Clause of the United Nations Charter’ (2008) 57 *International and Comparative Law Quarterly* 583; A Bianchi, ‘Human Rights and the Magic of *Jus Cogens*’ (2008) 19 *European Journal of International Law* 491; Andreas Paulus and Johann Ruben Leixæ, ‘Ch.XVI Miscellaneous Provisions, Article 103’ in Bruno Simma and others (eds), *The Charter of the United Nations: a commentary* (Third edition, Oxford University Press 2012); Kirsten Schmalenbach, ‘Article 53’ in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018); the Universal Declaration of Human Rights is a non-binding instrument, thus not falling under Article 103.

<sup>61</sup> CCC, C-027/1993 (n 58), para. VII, last period.

First, it held that the Constitution, in envisioning only the possibility, for the Court, determined a system of separation of powers whereby it was left to the President of the Republic to consider the opportunity to retain or to denounce previous treaty commitments: for the Court to strike down the ratifying legislation would amount to an undue interference with the prerogatives of the Executive.<sup>62</sup>

Second, the Court argued that if it were to strike down the ratifying legislation, this would put Colombia in breach of its international obligations and of the *pacta sunt servanda* principle, something that would be impermissible:

“the rationality of law is what demands that the internal order does not violate the international order, as this would be the precedent for unilateralism to be proclaimed with arguments that could be of force and not of reason, that is, of "caprice" and not of consensus. That is why there are eminently rational – and to the extent, universal – duties and rights, whereby the various civil societies, each organised in the form of a state, are bound together by covenants which bind them in a common objective ideal. The basis of the whole international order, the foundation of its construction and progress, is none other than respect for consensus, i.e. the principle *pacta sunt servanda*, the manifestation of right reason.”<sup>63</sup>

Finally, in the already mentioned Judgement C-400/1998, the CCC reversed again its stance as to its jurisdiction to review the constitutionality of treaties ratified before the enactment of the 1991 Constitution, affirming its jurisdiction, even if, in the merits, found the law ratifying the Vienna Convention on the Law on the Treaty, to be constitutional.<sup>64</sup> In case of a finding of unconstitutionality – the Court held –, the President of the Republic is bound to act to remove the contrast, either by reaching an agreement on the necessary changes to the international agreement at issue with the other parties thereto, or by denouncing it.

Two conclusions can be drawn by an overall consideration of the cases discussed.

First, the CCC is quite clear in holding that the Political Constitution is formally and materially at the apex of the Colombian legal order, and that no norm can exist within it that is in contrast with the Constitution: for all that the Constitution might be open to its integration by international sources, the system of values it establishes cannot be negatively affected by it.

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<sup>62</sup> CCC, Judgement of 8 July 1993, C-267/1993, Para. 3.1.

<sup>63</sup> *Ibid.*, para. 3.3.

<sup>64</sup> CCC, C-400/1998 (n 30), para. 48-57, see especially 56, f.

Second, the need to comply with international law is taken very seriously into consideration by the CCC. This led the Court to hold – if in one, subsequently reversed, decision – that it had no jurisdiction to review the constitutionality of international treaties already binding on Colombia. More relevantly, in that it was not subsequently overruled, the need to ensure that Colombia abides by its obligations led the Court in the Judgement on the Concordat to frame what actually was a conflict between constitutional and international law, also as a conflict between the Concordat and international human rights law, whose content corresponded to the values and principles of the Colombian Constitution.

### **C. The finality of the ex-ante review of treaties and the adjudication of conflicts between international treaties and subsequent legislation**

One final set of cases is of interest here is that of the constitutionality review of legislation enacted after the ratification of an international agreement, which derogates from it: it was discussed how, in both the UK and even in Germany subsequent legislation can validly derogate from previous treaty commitment.<sup>65</sup> This section addresses the issue of whether the emphasis the Colombian CCC places on the *pacta sunt servanda* principle determines a different outcome, namely the invalidity of posterior legislation derogating from previous international commitments.<sup>66</sup>

The point of departure is that, under the Colombian Constitution, the general rule, which suffers many exceptions in light of the substance of the international provision at issue, is that international treaties enjoy the formal rank of the legislation authorising their ratification. In many cases, however, international law is subsumed in the block of constitutionality (*infra*, next paragraph) – *stricto* or *latu senso* understood – and can thus condition, directly or indirectly, the validity of contrasting legislation: when this is the case, the conflict between national legislation and international law is resolved hierarchically, as international law commitments become relevant to ascertain the constitutionality of national legislation. Here, only the cases in which the relevant international norms are not considered part of the block will be considered.

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<sup>65</sup> Ch. 6, para. 2; ch. 7, para. 2.

<sup>66</sup> Arévalo Ramírez (n 42) 152–154; García-Matamoros and Arévalo Ramírez (n 35) 279–281.

In C-358/97 the CCC had to decide, in the context of an abstract control of the Militar Criminal Code,<sup>67</sup> on the constitutionality of Article 577 thereof, requiring that for the search of the consular offices and residences notice be given to the consul or to a representative thereof: accordingly, no authorisation by the consul is required. This is evident contrast with Article 31 VCCR, signed and ratified by Colombia.<sup>68</sup> Once again, the point of departure, for the Court, was the *pacta sunt servanda* principle: as a consequence thereof,

“the Colombian authorities are obliged to ensure the observance of the treaties ratified by Colombia, because their violation can compromise the international responsibility of the country and because the Charter confers internal legal force to international law, even though, naturally, without affecting the supreme nature of the Constitution (Article 4 Political Constitution), since, as has already been reiterated by this Corporation, for treaties or international agreements to have internal legal force, it is an indispensable condition "that their rules do not contradict or violate the precepts enshrined in our Political Charter, because in the event that this were to occur, the transgressing clauses would be inapplicable.”<sup>69</sup>

However, the Court excluded that the principle at issue had the effects of attributing constitutional rank to international treaties as such; accordingly, they cannot be invoked as parameters of judgment for the examination of the constitutionality of a norm: the mere fact that a legal norm is contrary to what has been agreed in an international agreement does not constitute sufficient grounds for declaring it unconstitutional. This is however a consequence of the abstract nature of the review carried out, in that occasion, by the CCC: if a concrete case were to arise in which the normative effects of the domestic and international norm are in unreconcilable contrast, national judges would be bound to give application to adopt an interpretation of the domestic norm that complies with international law.<sup>70</sup>

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<sup>67</sup> Decree no. 2550 of 1988, Diario Oficial, CXXV, no. 38608, 12 December 1988, p.1.

<sup>68</sup> Law 17 of 1971, Diario Oficial, CVIII, no. 33462, 18 November 1971, p. 593.

<sup>69</sup> CCC, Judgement of 5 August 1997, C-358/97, Para. 15.5.

<sup>70</sup> Ibid., para. 15.8: “does this mean that the Colombian constitutional system erodes the domestic normative value of treaties? In no way, because the Court is simply stating that it is not feasible, by way of abstract constitutional control, and in general terms, to declare the unenforceability of a norm that contradicts a treaty. However, it is obvious that it is up to the ordinary judges, in concrete cases, to resolve possible conflicts that may arise between treaties and laws. As has been pointed out in this judgment, the Charter recognises the internal legal force of international law.”

These conclusions have been constantly upheld by the Court, which has found the solution to conflicts such as those here discussed in the elaboration of a “duty of harmonisation” binding national authorities:

Therefore, in the context of the Constitution, a principle of harmonization between domestic law and the State's international obligations is imposed.

Thus, by recognizing the internal legal force of international treaties ratified by Colombia, the Constitution protects the interpretation that best allows for harmonizing the internal and international normative order, so that the State is not unnecessarily exposed to breaching its international obligations, since as expressly established in article 27 of the Vienna Convention on the law of treaties, "a party may not invoke the provisions of its internal law as justification for non-compliance with a treaty." [...]

In the event of a conflict between domestic legislation and the international treaties or agreements [...], the authorities must opt for an interpretation aimed at their harmonization and respect for the international commitments signed by Colombia”<sup>71</sup>

While it is perhaps a bit optimistic of the CCC to conclude that conflicts such as those just discussed can be resolved by way of interpretative harmonisation, the insistence on the need to secure the effectiveness of both the national and international norm, coupled with the absence of any emphasis on “the principle of democracy and the principle of parliamentary discontinuity” that were at the core of the reasoning of the Federal Constitutional Court in *Treaty Override*,<sup>72</sup> is a proof on the constitutional importance attributed to the need to abide by international law, even if only for the mere sake of it, in cases in which there are no other axiological reasons favouring the domestic authority of international norms.

Furthermore, so conceived, the intensity of the duty to harmonise national and international law appears quite significant, especially when compared with the requirements of consistent interpretation binding the German and, even more so, British courts.

Finally, this conclusion should be complimented with a careful understanding of the flexibility of the constitutionality block, especially in its broader understanding, and, correspondingly, of the ease with which the CCC subsumes within its scope international law norms: whenever this is the case the antinomy between national legislation and

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<sup>71</sup> CCC, Judgement of 27 June 2007, C-155/2007, para. 4.3., f. See also CCC, Judgement of 11 August 1999, C-582/1999, para. 8; Judgement of 21 April 2016, C-157/2016, para. ii.A.1.

<sup>72</sup> FCC, *Treaty Override* (n 4), para. 53. See ch. 7, para. 2.C.

international law is resolved through the application of the hierarchical criterion, if mediated by the Political Constitution.

Overall, the discussion of the institutional mechanisms – and of the absence thereof – for reviewing the compatibility of international law with national law renders the image of a legal order which, while certainly not being absolutely open to international law, and actually strongly retaining its autonomy and protecting its fundamental values, is nonetheless seriously concerned with the need to abide by international law, deemed a constitutional imperative, even if said imperative does not reach the point of attributing constitutional status to the international treaties as such.

#### **4. The substantive openness of the Colombian constitution and the constitutionality block doctrine**

From a substantive point of view, the Colombian Constitution features many provisions opening it to its integration by international law. Accordingly, the Constitution adopts a strongly differentiated approach to the domestic status of international law, depending on the substantive content of the latter.<sup>73</sup>

A flyover review of the relevant provisions of the Constitution clearly substantiates the idea of a very sparse and sector-specific regulation of the interaction between the national and international legal order:

- Under Article 35, para. 1, “extradition may be requested, granted or offered in accordance with public international treaties and, in their absence, with the relevant statute;”
- Article 44, on the rights of children, provides that children “shall also enjoy other rights upheld in the Constitution, the laws, and international treaties ratified by Colombia;”
- Article 53, on labour rights, holds – at para. 4 – that “international labour agreements duly ratified are part of domestic legislation;”

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<sup>73</sup> Manuel José Cepeda, ‘The Internationalization of Constitutional Law: A Note on the Colombian Case’ (2008) 41 *Verfassung und Recht in Übersee* 61; Eric Tremolada Álvarez, ‘La internacionalización del derecho constitucional en Colombia: una garantía para los procesos de integración. Ejercicio comparado con los países andinos’ (2016) 10 *Revista IUS*; Juana Inés Acosta López, Paola Andrea Acosta Alvarado and Daniel Rivas Ramírez (eds), *De Anacronismos y Vaticinios: Diagnóstico Sobre Las Relaciones Entre El Derecho Internacional y El Derecho Interno En Latinoamérica* (Universidad del Externado 2017); Acosta Alvarado and others (n 27); García-Matamoros and Arévalo Ramírez (n 35).

- Article 93, a key provision in this context, at para. 1 provides that “international treaties and agreements ratified by Congress that recognize human rights and prohibit their limitation in states of emergency have domestic priority;” at para. 2 it is established that “the rights and duties mentioned in this Charter shall be interpreted in accordance with international treaties on human rights ratified by Colombia.”
- Under Article 94, “the enunciation of the rights and guarantees contained in the Constitution and in international agreements in effect should not be understood as a negation of others which, being inherent to the human being, are not expressly mentioned in them.”
- Article 101, the borders of Colombia are those established in international treaties approved by Congress, duly ratified by the President of the Republic, and those defined by arbitration awards in which Colombia takes part.
- Article 214, regulating the possibility for the President of the Republic to decree the state of exception, limits it by providing that “neither human rights nor fundamental freedoms may be suspended. In all cases, the rules of international humanitarian law shall be observed.”
- Finally, Article 221 provides that “for the investigation and judgment of punishable conducts committed by members of the public force, when related to an armed conflict or a confrontation that meets the objective conditions of international humanitarian law, the norms and principles of international humanitarian law will be applied.”

Additionally, the question arose of the status of *jus cogens* norms, as well as that of the systematisation of the law of the Andean Community, to which Article 227 refers.

Ultimately, that of organising this sparse discipline and devising a general normative framework capable of accommodating it is a task – and not a particularly easy one – that falls upon the CCC. The main tool the Court has devised for this purpose is the doctrine of the constitutionality block, drawing inspiration from the French experience.<sup>74</sup>

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<sup>74</sup> A study that had significant impact and that is often referred to in this context was that by Louis Favoreu, ‘El bloque de la constitucionalidad’ [1990] *Revista del Centro de Estudios Constitucionales* 45. As to the French doctrine, see Agnès Roblot-Troizier, ‘Le Conseil constitutionnel et les sources du droit constitutionnel’ (2018) 21 *Jus Politicum*. *Revue de droit politique* 129; Charlotte Denizeau-Lahaye, ‘La genèse du bloc de constitutionnalité’ (2022) 8 *Titre VII* 11; Jean-Sébastien Boda, ‘Bloc de constitutionnalité ou désordre

### **A. The differentiated approach and the selective opening of the Political Constitution to the domestic effect of international law: the doctrine of the constitutionality block**

The key constitutional provision in the context of the Colombian doctrine of the constitutionality block is Article 93: para. 1 mandates that ratified human rights treaties that prohibit their limitation in states of exception “have priority” in the domestic legal order; under para. 2, the rights enshrined by the Political Constitution are to be interpreted in light of all international human rights treaties ratified by Colombia.

The elaboration of the doctrine of the constitutionality block was prompted, once again, by the need to reconcile the “priority” of human rights treaty under Article 93, para. 1 with the supremacy of the Constitution under Article 4, the fundamental idea behind this doctrine being that of attributing constitutional significance to norms which are not formally part of the Constitution:<sup>75</sup>

“the Court considers that the notion of a "block of constitutionality", which comes from French law but has made its mark in comparative constitutional law, makes it possible to harmonize the apparently contradictory principles and mandates of Articles 4 and 93 of our Constitution. [...]

The constitutionality block is composed of those norms and principles that, without appearing formally in the articles of the constitutional text, are used as parameters for the control of the constitutionality of laws, since they have been normatively integrated into the Constitution, by various means and by mandate of the Constitution itself. They are therefore true principles and rules of constitutional value, that is, they are norms situated at the constitutional level, even though they may sometimes contain reform mechanisms other than those of the norms of the constitutional articles *stricto sensu*.

Indeed, in this way the principle of supremacy of the Constitution, as a norm of norms (Political Constitution Article 4), is fully harmonized with the prevalence of treaties ratified by Colombia, which recognize human rights and

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constitutionnel ?’ (2022) 130 *Revue française de droit constitutionnel* 393. This doctrine is diffused in the entire Latin America, with very similar features across jurisdiction: see Manuel Eduardo Góngora Mera, ‘La Difusión Del Bloque de Constitucionalidad En La Jurisprudencia Latinoamericana y Su Potencial En La Construcción Del Ius Constitutionale Commune Latinoamericano’ in Armin von Bogdandy, Héctor Fix Fierro and Mariela Morales Antoniazzi (eds), *IUS constitutionale commune en América Latina: rasgos, potencialidades y desafíos* (Instituto de Estudios Constitucionales del Estado de Querétaro; Max Planck Institute for Comparative Public Law and International Law 2017).

<sup>75</sup> Rodrigo Uprimny Yepes, *Bloque de Constitucionalidad, Derechos Humanos y Proceso Penal* (Consejo Superior de la Jurisprudencia 2008) 29, ff.

prohibit their limitation in states of exception (Political Constitution Article 93).”<sup>76</sup>

If international human rights treaties – just as international humanitarian law ones – which cannot be derogated in states of emergencies are considered part of the Constitution, the Court soon addressed the status of those treaties which, instead, provide for human rights that can be limited in states of exception. It did so by distinguishing the notion of the constitutionality block *stricto sensu* from that of the constitutionality block *lato sensu* understood, which is also made up by international human rights treaties whose rights can be limited during states of emergency.<sup>77</sup>

The block strictly understood and that broadly understood differ as to their function. The norms making up the block of constitutionality in the strict sense fulfil two functions: an integrative and an interpretative one.

The integrative function consists in the fact that these norms are received in the Colombian legal order “without presupposing any relationship of identity between them and provisions of the Constitution.”<sup>78</sup> Consequently, they are domestically incorporated with the rank of constitutional law even if no corresponding provision exists in the Constitution. The interpretative function implies that they serve as a criterion to clarify the content and scope of the rights and duties enshrined in the Constitution.

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<sup>76</sup> CCC, Judgement of 18 May 1995, C-225/1995, para. 12. See also CCC, Judgement of 7 December 1995, C-587/1995, para. 11; C-358/1997 (n 69), para. 6; Judgement of 1 April 2003, C-67/2003, para. 3

<sup>77</sup> Mónica Arango Olaya, ‘El bloque de constitucionalidad en la jurisprudencia de la Corte Constitucional colombiana’ [2004] Precedente 79; Luis Andrés Fajardo Arturo, ‘Contenido y alcance jurisprudencial del bloque de constitucionalidad en Colombia’ (2007) 7 *Civilizar* 15; Óscar M Reina García, ‘Las cláusulas de apertura o reenvío hacia fuentes externas previstas en la Constitución colombiana, como criterio para delimitar el contenido del bloque de constitucionalidad’ [2012] *Revista Derecho del Estado* 175; Rodrigo Uprimny Yepes, ‘El bloque de constitucionalidad en Colombia. Un análisis jurisprudencial y un ensayo de sistematización doctrinal’ (2014) 3 *Ius Inkarrí* 115; Jaramillo (n 15); Fernando Alberto Rey Cruz, ‘El derecho internacional de los derechos humanos en el sistema jurídico colombiano. Logros y dilemas en su aplicación’; Juana Acosta-López and Giovanni Vega-Barbosa, ‘Compliance with International Human Rights Obligations in Colombia: Assessing the Normative Evolution and Practical Challenges’ (2021).

<sup>78</sup> CCC, Judgement of 31 August 2016, C-469/2016, para. 46. See also CCC, Judgement of 22 February 2005, C-148/2005, para. 3.2; Judgement of 30 March 2009, C-228/2009, para. 9-12; Judgement of 8 February 2016, C-035/2016, para. 41; Judgement of 24 July 2019 C-327/2019; Judgement of 19 February 2020, C-69/2020, para. 66; Judgement of 20 May 2021, C-146/2021, para. 92-95.

The block broadly understood only fulfils the second function, i.e. that of constituting an interpretive aid.<sup>79</sup>

Based on these categories, the CCC progressively subsumed international law norms – treaty-based as well as customary – under one or the other notion, based on their specific content, configuring four possibilities:<sup>80</sup> international norms which have supra-constitutional status – a very rare, if significant, case as only jus cogens norms and international treaties defining the boundaries of Colombia are given this status;<sup>81</sup> international norms part of the constitutionality block strictly and broadly understood; international norms that are not part of the block at all and that have the status of ordinary legislation.

In this regard, international law in economic fields broadly understood – the law of the Andena Community, trade law, investment protection law, etc. – is not considered part of the constitutionality block and is only given the status of ordinary legislation. This exclusion is not particularly striking if it is considered the caution Colombia – as well as other countries in the region – adopt when approaching international economic integration, as they are particularly concern about the preservation of their sovereignty on the natural resources present within their territories: this is especially true when it comes to international investment law.<sup>82</sup> It is particularly striking, however, that supranational law – i.e. the law of the Andean Community -, while it is accorded direct applicability in the domestic legal order as well as priority of application over ordinary legislation, is exclude from the block. It has been noted that this aspect of the opening of the Constitution of Colombia – and of Latin American countries more generally – is

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<sup>79</sup> This – it is recalled – is the only function that the German case law attributes to the ECHR, and to international human rights law more generally, as it has consistently rejected the idea that Article 2, para. 1 Basic Law incorporates international human rights law: see ch. 7, para. 3.B.1.

<sup>80</sup> See, for a detailed overview, CCC, C-269/14 (n 32), para. 4. See also the various contributions, each discussing on subject matter, in Part II of Acosta López, Acosta Alvarado and Rivas Ramírez (n 73); Acosta Alvarado and others (n 27).

<sup>81</sup> CCC, C-269/14 (n 32), para. 4.3 and 5.3 respectively dealing with the status of jus cogens norms and of international treaties regulating the boundaries of Colombia.

<sup>82</sup> David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge University Press 2008); David Schneiderman, 'Disabling Constitutional Capacity: Global Economic Law and Democratic Decline' in Mark A Graber, Sanford Levinson and Mark V Tushnet (eds), *Constitutional democracy in crisis* (Oxford University Press 2018); David Schneiderman, *Constitutional Review and International Investment Law: Deference or Defiance?* (Oxford University Press 2024) ch V, "Conditionally Constitutional: Colombia".

remarkably different from the opening of the German constitution, as well as of other European constitutions:

“the opening of the state in Latin America has a different orientation than for example in Germany, where the traditional focus was on collective security and economic integration. Numerous Latin American states have chosen, in the course of democratization, to open themselves up to norms of international human rights protection in order to better protect the fundamental principles of their constitutions. One can therefore speak of open statehood in two senses, since international human rights conventions are treated differently than treaties of regional economic integration.”<sup>83</sup>

The attribution to one international law norm of one or the other rank as above mentioned, however, does not depend on its belonging to a specific international regime, or on it being included within a specific treaty; while such consideration are *prima facie* relevant, the ultimate definition of the domestic relevance of a given norm is due to its specific normative content. This is clearly illustrated by the Judgement C-1490/2000, in which the Court concluded that Decision 351 of 1993, issued by the Commission of the Cartagena Agreement, containing the Common Provisions on Copyright, insofar as it protected moral rights of copyright – the Decision providing also for patrimonial rights of copyrights, was to be considered part of the constitutionality block broadly understood.<sup>84</sup> The pitfalls of such a casuistic approach are quite evident, as it’s not always easy to foresee the domestic rank that is to be attributed to an international norm, with the consequences this has as to the certainty and stability of law: while constitutional precedents provide useful guidance, it is ultimately for the CCC to clarify the place of international law norms in the domestic system.

In conclusion of this review of the doctrine of the block of constitutionality as elaborated by the CCC, two interconnected consequences, that are relevant to the following discussion of instances of attrition between national and international law in Colombia can be drawn.

The first conclusion that can be drawn at this stage is that, under the doctrine of the constitutionality block and especially insofar as the block strictly understood is

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<sup>83</sup> Armin von Bogdandy, ‘Ius Constitutionale Commune En América Latina: Observations on Transformative Constitutionalism’ in Armin von Bogdandy and others (eds), *Transformative constitutionalism in Latin America: the emergence of a new ius commune* (Oxford University Press 2017) 40.

<sup>84</sup> Para. 3. Decision 351 of 17 December 1993, Régimen Común sobre Derecho de Autor y Derechos Conexos, Gaceta Oficial del Acuerdo de Cartagena, X, no. 145 of 21 December 1993, p. 5.

concerned, international law is never applied in the domestic order as such, because of its own authority; rather it is always the case that the Constitution, and specifically, the relevant constitutional provision (generally Article 93), is applied, requiring in turn its integration and interpretation through international norms: “whenever a block of constitutionality is mentioned, it is because a provision of the Constitution so orders and requires its integration, so that the violation of any provision that forms it ultimately results in a violation of the Constitution.”<sup>85</sup> This is of relevance not only because it excludes the absolute acceptance of international law’s authority, but also because every international norm that is so made part of the constitutionality block is never considered as a stand-alone norm, to be applied in isolation from the rest of the legal order. To the contrary, international norms taken into account under the doctrine of the constitutionality block and to its effects are always integrated into the system of the Colombian Political Constitution and are considered in their systemic interactions with the other norms therein enshrined.

The second point to be highlighted is that by devising this system of differentiated reception of international law in the domestic legal order, the Political Constitution and, especially, the CCC hierarchically organise international obligations binding Colombia not only vis-à-vis the domestic legal order and, specifically, the Constitution, but also vis-à-vis each other, something that, with the exception of jus cogens norms, is foreign to international law. Such organisation and systematisation according to normative hierarchies is clearly based on the system of values established under the Colombian Political Constitution.

## **B. The Colombian legal order and the Interamerican Convention on Human Rights: constitutionality block vs conventionality control**

The American Convention on Human Rights (‘ACHR’) was incorporated in the Colombian legal order by Law 16/1972.<sup>86</sup> Given that the Convention enshrines rights that

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<sup>85</sup> CCC, Judgement of 7 December 1995, C-587/1995, para. 3; Judgement of 29 November 2005, C-036/2005, para. 10; Judgement of 14 April 2005, C-401/2005, para. 9; Judgement of 22 August 2022, C-212/2022, para. 56.

<sup>86</sup> Law of 30 December 1972, no. 16, Approving the American Convention on Human Rights, Pact of San José, Costa Rica, signed in San José, Costa Rica, on 22 November 1969, Diario Oficial, CIX, no. 33780, 5 February 1973, p. 321.

cannot be restricted during states of emergencies,<sup>87</sup> the CCC has consistently held that the Convention forms part of the block of constitutionality strictly understood.<sup>88</sup> Accordingly, the human rights protected by the Convention are part of the Constitution and parameters, if only by virtue of their domestic reception through the opening clauses of the Constitution,<sup>89</sup> of validity of ordinary legislation.

The official interpretive authority of the Convention is the Interamerican Court of Human Rights, as acknowledged also by the CCC.<sup>90</sup> However, from the perspective of the CCC, one thing is to ascertain the interpretation of a Convention right, another is to apply it domestically. Accordingly, in the second case, while the case law of the IACtHR is a relevant factor, it is not exhaustive:

“the determination of what a Convention right means [...] implies taking into account what its authoritative interpreter has said on the matter; not – it is insisted – to accept it in an unreflective manner.”<sup>91</sup>

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<sup>87</sup> According to Article 27 IACHR, it is not possible to suspend the rights – and the respective guarantees – enshrined in the following Articles: 3 (Right to Recognition of Legal Personality); 4 (Right to Life); 5 (Right to Personal Integrity); 6 (Prohibition of Slavery and Servitude); 9 (Principle of Legality and Retroactivity); 12 (Freedom of Conscience and Religion); 17 (Protection of the Family); 18 (Right to a Name); 19 (Rights of the Child); 20 (Right to Nationality), and 23 (Political Rights).

<sup>88</sup> CCC, Judgement of 26 July 2001, C-774/2001; Judgement of 2 October 2002, C-802/2002; Judgment of 1 February 2006, C-028/2006; Judgment of 24 August 2016, C-452 of 2016.

<sup>89</sup> CCC, Judgement 25 April 2007, C-291/2007, para. C:

“the norms that form part of the block of constitutionality do not constitute autonomous references for the control of constitutionality, and the Constitutional Court is not a judge of conventionality - that is, it is not called upon to verify the abstract concordance of national legislation with the international treaties that bind the State. [...] As already specified, the normative basis of the international provisions that are integrated into the block is derived from express constitutional clauses in which direct references are made to said norms and principles, incorporating them into the internal order with constitutional rank for the purposes of specifying and complementing the meaning of the constitutional clauses.”

See also C-028/2006 (n 88).

<sup>90</sup> See Article 1 of the Statute of the Inter-American Court of Human Rights, Adopted by the General Assembly of the Organisation of the American States at its Ninth Regular Session, held in La Paz Bolivia, October 1979 (Resolution No.448). Among many, see C-442 de 2011, para. 7: “the jurisprudence of the IACHR contains the authentic interpretation of the rights contained in the ACHR, an international instrument that integrates the parameter of constitutional control.” See also CCC, C-269/14 (n 32), para. 4.4.3.8; Judgement of 16 July, C-500/2014, para. 8.3.2.2; Judgement of 27 July 2016, C-327/2016, para. 24; C-146/2021 (n 78), para. 97.

<sup>91</sup> CCC, Judgement of 21 May 2020, SU-146/2020, para. 169.

Further elaborating on the point, the Court, has stated that the consideration of the Judgements of the IACtHR “must be systematic, in accordance with constitutional rules, and that when precedents of international law are used as a hermeneutical criterion, the circumstances of each particular case must be analysed to establish their applicability.”<sup>92</sup>

This line of reasoning is very close to that developed by the German FCC, as the German Court, deeming it relevant to take into account the ECHR, in the interpretation thereto given by the ECtHR, for the purpose of interpreting fundamental rights under the Basic Law also excluded any automatic parallelism between the two legal orders, instead requiring the case-law of the ECtHR to be “integrated as carefully as possible into the existing, dogmatically differentiated national legal system.”<sup>93</sup>

For similar reasons, the CCC has rejected the applicability of the conventionality control doctrine elaborated by the IACtHR. According to the doctrine of conventionality control,<sup>94</sup> national judges must ensure “that all the effects of the provisions embodied in the [American] Convention are not adversely affected by the enforcement of laws which

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<sup>92</sup> CCC, C-327/2016 (n 90), para. 26. See also C-500/2014 (n 92), para. 8.3.2.3.; C-146/2021 (n 78), para. 97.

<sup>93</sup> FCC, Judgement of the First Senate of 4 May 2011, 2 BvR 2365/09, BVerfGE 128, 326, *Preventive Detention*, para. 94. See ch. 7, para. 3.B.2.

<sup>94</sup> Laurence Burgorgue-Larsen, ‘La Corte Interamericana de Derechos Humanos Como Tribunal Constitucional’ in Armin von Bogdandy and others (eds), *IUS constitutionale commune en América Latina: rasgos, potencialidades y desafíos* (Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas; Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht 2014); Ariel E Dulitzky, ‘An Inter-American Constitutional Court - The Invention of the Conventionality Control by the Inter-American Court of Human Rights’ (2015) 50 *Texas International Law Journal* 45; Eduardo Ferrer Mac-Gregor, ‘Conventionality Control the New Doctrine of the Inter-American Court of Human Rights’ (2015) 109-93; Luz Eliyer Cárdenas Contreras, *El control de convencionalidad (CCV): fundamentación e implementación desde el sistema interamericano de derechos humanos* (Jaime Cubides Cárdenas ed, Primera edición, Universidad Católica de Colombia 2016); Miriam Lorena Henríquez Viñas and Mariela Morales Antoniazzi (eds), *El Control de Convencionalidad: Un Balance Comparado a 10 Años de Almonacid Arellano vs. Chile* (Ediciones DER : Universidad Alberto Hurtado, Facultad de Derecho 2017); Jorge Contesse, ‘The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights’ (2017) 15 *International Journal of Constitutional Law* 414; Pablo González-Domínguez, *The Doctrine of Conventionality Control: Between Uniformity and Legal Pluralism in the Inter-American Human Rights System* (Intersentia 2018); Miriam Lorena Henríquez Viñas and José Ignacio Núñez Leiva, ‘Conventionality Control: An Expression of the Basic Elements of the Judicial Function’ in Armin von Bogdandy and others (eds), *The Impact of the Inter-American Human Rights System: Transformations on the Ground* (Oxford University Press 2024).

are contrary to its purpose and that have not had any legal effects since their inception.”<sup>95</sup> Accordingly, domestic judges are required to either interpret the applicable norms in a way that is compatible with the Convention as interpreted by the IACtHR, or, if such interpretation is impossible, void or decline to enforce the domestic law. As it has been put, “the interpretation of the Convention’s obligations allows the Court, much like a constitutional court, to “invite itself” into the member States’ legal systems in order to force them to conform with the Convention.”<sup>96</sup>

As anticipated, the CCC has consistently refused to apply the conventionality control.<sup>97</sup> It has done so for two interconnected reasons.

First, its acceptance would have meant the subordination, as a matter of constitutional law, of the Colombian legal order to the Convention – and, consequently, the subordination of the CCC to the IACtHR –, which is incompatible with the supremacy of the Political Constitution under Article 4 thereof.

Second, and more interestingly, this is due to the need to ensure that international law materials – and thus the ACHR – are not given absolute domestic application, as if they were isolated and self-standing norms, but, instead, that they are integrated into the domestic constitutional order and that they “fit” within the system of values it establishes.

Accordingly, the doctrine of the conventionality control and that of the constitutionality block, though generally concretely overlapping as to their outcomes, are fundamentally different as to their premise and structure. Indeed, as the CCC held in C-146/2021,

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<sup>95</sup> IACtHR, Judgement of 26 September 2006, *Almonacid-Arellano et al v. Chile*, para. 124. On the subsequent development of the case-law of the IACtHR with regard to the conventionality control, see González-Domínguez (n 94) 13–62; Miriam Henríquez Viñas, ‘El control de convencionalidad interno. Su conceptualización en la jurisprudencia de la Corte Interamericana de Derechos Humanos’ (2019) 19 *Anuario mexicano de derecho internacional* 327; Claudio Nash, *Cuadernillo de Jurisprudencia de La Corte Interamericana de Derechos Humanos No. 7: Control de Convencionalidad* (Corte Interamericana de Derechos Humanos 2021).

<sup>96</sup> Ludovic Hennebel, ‘The Inter-American Court of Human Rights: The Ambassador of Universalism’ [2011] *Quebec Journal of International Law* 57, 72.

<sup>97</sup> Manuel Fernando Quinche Ramírez, ‘El control de convencionalidad y el sistema colombiano’ (2009) 12 *Revista Iberoamericana de Derecho Procesal Constitucional* 163; Danilo Rojas Betancourth, ‘Control de convencionalidad en Colombia. Entre el control de la Convención y su aplicación’ [2015] *Anuario de Derecho Constitucional Latinoamericano* 113; Sergio Andrés Caballero Palomino, ‘Tendencia jurisprudencial y criterio de aplicabilidad del control difuso de convencionalidad: análisis del caso colombiano y su contravía a la corte IDH’ (2023) 15 *Revista Jurídica Mario Alario D’Filippo* 508.

conceptually, the block of constitutionality and the conventionality control are distinct figures. The starting point of the conventionality control is treaty supremacy, while the constitutionality bloc is constitutional supremacy. In effect, the conventionality control assumes that the entire national legal system must be in conformity with the ACHR and the jurisprudence of the IACtHR, as well as with other international treaties. For its part, the constitutionality block is used in the framework of the control of constitutionality, and therefore seeks to ensure that the national legal system is in accordance with the Political Constitution, to which international human rights instruments ratified by Colombia are understood to be integrated.

In short, the use of the ACHR or other international human rights treaties ratified by Colombia as a parameter for determining the validity of domestic legislation does not imply per se the realisation of the conventionality control. [...] On the contrary, when the aforementioned international instruments are used as a parameter of constitutionality, because they are understood to be integrated into the Political Constitution, and are interpreted in a systematic and harmonious manner with the Constitution, we are dealing with the application of the block of constitutionality, within the framework of the control of constitutionality.”<sup>98</sup>

The observations just made render the picture of a strong opening of the Political Constitution towards international human rights law. Such opening is not, however, absolute, and the system of values established under the Political Constitution cannot be negatively affected by the domestic consideration and application of international law. The retention of sovereignty by the Colombian state and of autonomy by its Constitution, coupled by the retention of the ‘ultimate say’ by the CCC is thus residual, being invoked only when it is not possible to integrate international law in the domestic legal order and within the system of values underpinning it, and is functional to its preservation.

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<sup>98</sup> CCC, C-146/2021 (n 78), para. 102, 105. See also CCC, Judgement of 28 November 2016, C-659/2016, para. 3.2.1.4

### C. The protection of the *páramos*: environmental law and the protection of foreign investments

The Colombian Political Constitution is also a “Green Constitution,” providing for a high level of protection of the environment.<sup>99</sup> Particularly, in recent years, the judicial developments, recognising the “rights of nature” has rightly received attention.<sup>100</sup>

Now, Colombia is a “megadiverse” country with the third highest biodiversity index, largely due to the presence, within its territory of *páramos*, an alpine wetland ecosystem typical of the Andean region.<sup>101</sup> On top of being particularly biodiverse environments, *páramos* also have a crucial function as water reservoir and are great carbon sinks.<sup>102</sup>

Apart from being environmentally valuable, *páramos* are also, however, very rich in natural resources to be extracted by way of mining.

Progressively, the Colombian Congress enacted legislation aimed at restricting mining activities in the *páramos*, with the purpose of safeguarding the environment. Particularly, Law 1382 of 2010 amended the Mining Code, providing for a ban on new mining activities in the *páramos*; subsequently, Law 1753 of 2015 provided for the

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<sup>99</sup> See generally CCC, Judgement of 17 June 1992, T-411/1992; Judgement of 30 September 2015, C-449/2015. See also Judgement of 24 August 2016, C-389/2016, para. 37: “this expression is not a rhetorical statement without specific normative content. First, it refers to the set of specific norms in which the Constituent Assembly expressed mandates for environmental protection; second, to a cross-cutting axis of the Charter and an implicit value in the axiological substratum of the normative order; and finally, to a fundamental right, both collective and autonomous.” See also Oscar Andrés López Cortés and Angélica María Medina Sánchez, ‘Desarrollo Sostenible y Constitución Ecológica ¿Simple Ambigüedad o Una Coartada Oportuna?’ in Tania Luna Blanco and Francisco Jose Chau Donado (eds), *Tres décadas de constitución* (Ministerio de Justicia y del derecho 2022); Karen Viviana Rendón Osorio, ‘La naturaleza en el ordenamiento jurídico colombiano: ¿del antropocentrismo al ecocentrismo?’ [2024] *Revista Derecho del Estado* 337.

<sup>100</sup> Ximena Sierra Camargo, ‘The Ecocentric Turn of Environmental Justice in Colombia’ (2019) 30 *King’s Law Journal* 224; Paola Villiavicencio Calzadilla, ‘A Paradigm Shift in Courts’ View on Nature: The Atrato River and Amazon Basin Cases in Colombia Case Note’ (2019) 15 *Law, Environment and Development Journal* 3; Elizabeth Macpherson, Julia Torres Ventura and Felipe Clavijo Ospina, ‘Constitutional Law, Ecosystems, and Indigenous Peoples in Colombia: Biocultural Rights and Legal Subjects’ (2020) 9 *Transnational Environmental Law* 521; Philipp Wesche, ‘Rights of Nature in Practice: A Case Study on the Impacts of the Colombian Atrato River Decision’ (2021) 33 *Journal of Environmental Law* 531.

<sup>101</sup> Irwin Aisling, ‘The Race to Understand Colombia’s Exceptional Biodiversity’ (2023) 619 *Nature* 450.

<sup>102</sup> For these reasons, already in CCC, Judgement of 7 May 2002, C-339/2002 and Judgement of 15 August 2002, T-666/2002, the CCC held that the State had a constitutional duty to protect the *páramos*.

procedures for the delimitation of *páramos* areas, in which mining would eventually be banned, and, at Article 173, para. 1, for the possibility to continue to carry out mining activities for those already holding a mining license and contract. This final provision was challenged before the CCC, which found it unconstitutional, also for violation of the precautionary principle, due to the invaluable importance of *páramos* for the preservation of water cycles, the mitigation of climate change and the absorption of carbon.<sup>103</sup>

This decision and its subsequent application opened Colombia to claims brought by international investors under free trade agreements, something the Court was well aware of, as testified by the dissenting opinion of Justices Linares and Guerrero.<sup>104</sup>

Indeed, three cases were brought by Canadian corporations under the Colombia-Canada free trade agreement: these claims were arguably unfounded under the Canada-Colombia FTA itself and were eventually dismissed by all but one of the Arbitral Tribunals, which, having concluded that Colombia frustrated the legitimate expectations of Eco Oro (the investor) by failing to regulate the mining activities in a consistent, stable, and foreseeable way, did not however award any damage to the investor, on the ground that it had failed to prove any.<sup>105</sup>

Regardless of the actual outcome of the proceedings, the mere perspective of potentially being found in breach of the investors' rights under an international investment agreement, with the financial repercussion it entails, is however often ground for pause and consideration, so much so that international investment agreements have come under strong scrutiny and criticism for unduly causing a regulatory chill in relevant areas of the law, above all environmental protection.<sup>106</sup>

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<sup>103</sup> CCC, C-035/2016 (n 78).

<sup>104</sup> *Ibid.*, Salvamento Parcial y Aclaración de Voto de Los Magistrados Luis Guillermo Guerrero Perez y Alejandro Linares Cantillo, para. 5.5.

<sup>105</sup> *Eco Oro Minerals Corp. v. Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021; *Red Eagle Exploration v. Colombia*, ICSID Case No. ARB/18/12, Award of 28 February 2024; *Montauk Metals (formerly Galway Gold) v. Colombia*, ICSID Case No. ARB/18/13, Award of 7 June 2024. Anna Sands, 'Regulatory Chill and Domestic Law: Mining in the Santurbán Páramo' (2023) 22 *World Trade Review* 55; Nicolò Andreotti, 'The Colombian Santurbán Páramo Saga and Its Contribution to the Development of International Investment Law and Arbitration' [2025] *Arbitration International*.

<sup>106</sup> Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7 *Transnational Environmental Law* 229; Eckhard Janeba, 'Regulatory Chill and the Effect of Investor State Dispute Settlements' (2019) 27 *Review of International Economics* 1172; Tim A Hagemann, 'The North-South

In Judgement 035/2016 – just as the ones that followed –, the CCC considered that the international environmental law principle of precaution, that of sustainable development, and the discipline for the protection of biodiversity enshrined in the Biological Diversity Convention<sup>107</sup> made part of the constitutionality block, if broadly understood: consequently, in the perspective of the CCC, the national and international law planes, formally distinct, are substantially enmeshed and entangled, in light of the axiological centrality of the protection of the environment. This led the Court to frame the conflict between the protection of the environment and international investment law, not only as a conflict between national and international law, but also as a conflict between two separate international regimes. In both cases, the solution was found in the axiological primacy, under the Political Constitution, of the protection of the environment:

“the protection of the environment prevails over the economic rights acquired by individuals through environmental licenses and concession contracts in circumstances in which it is proven that the activity causes damage, or when there is merit to apply the precautionary principle to avoid damage to non-renewable natural resources and human health.”<sup>108</sup>

Thus, the CCC solved the apparent conflict before it by relying on an axiological preference expressed by the Political Constitution for the protection of the environment: in doing so, however, it also organised hierarchically the relations among different international regimes, as received in the Colombian legal order, based on the national constitutional values. This substantive comparative evaluation, leading to a hierarchical organisation of competing international law regimes is absolutely foreign to international law, this being the precondition for its fragmentation.<sup>109</sup>

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Divide of Regulatory Chill: A Comparative Analysis of the Impact of Investor-State Dispute Settlement on Policy Makers in Developed and Developing Countries Notes' (2022) 35 New York International Law Review 27.

<sup>107</sup> Convention on Biological Diversity, made in Rio de Janeiro on 5 June 1992, entered into force on 29 December 1993, UNTS, vol. 1760, p. 79.

<sup>108</sup> CCC, C-035/2016 (n 78), para. 128.

<sup>109</sup> On this specific case, read in the perspective of the role of domestic courts with relation to a fragmented state of international law, see Marcelo Lozada Gómez, *La Corte Constitucional colombiana en el contexto de la fragmentación del derecho internacional: desafíos y posibles alternativas para la recomposición* (Universidad Externado de Colombia 2019). See, generally, Ole Kristian Fauchald and André Nollkaemper, *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Bloomsbury Publishing 2014).

## 5. Conclusive remarks

This chapter discussed the case of Colombia, thus completing the review of cases undertaken within this research.

Having very briefly described the context in which the CCC operates, it addressed the explicit characterisation by the CCC of the Colombian legal order as embracing a moderate monism. In this regard, it was shown that this characterisation is untenable and inconsistent with the case-law of the CCC itself. Rather, the CCC places a significant emphasis on the autonomy of the Colombian legal order and on the supremacy of the Political Constitution, preventing any contrasting norm from existing within the Colombian legal order. Such a protection of the sovereignty and autonomy of Colombia is however coupled with a remarkable opening of its Constitution. The implications of such openness were discussed both with regard to the review of constitutionality of treaties, carried out by the CCC under Article 241, no. 10 of the Constitution, and, from a substantive perspective, with regard to the constitutionality block doctrine.

As to the first aspect, the openness of the Constitution is shown in the exclusion, at least in principle, of ex-post review of the constitutionality of treaties generally considered: once, in ex-ante proceedings, the CCC has found the treaty to be ratified to be constitutional, this issue cannot be revisited in subsequent proceedings. This is also justified with reference to the need, under the *pacta sunt servanda* principle not to judicially determine situations of breaches of international law obligations. For the same reason, the CCC has been cautious in allowing for the ex-post review of treaties ratified before the enactment of the 1991 Political Constitution but eventually found that the supremacy of the Constitution prevails over the need not to breach international law. Similar considerations, attempting at reconciling the supremacy of the constitution with the abidance by international law can be seen with regard to the settling of conflicts between supervening ordinary legislation and international law: although subsequent derogating legislation is not found to be unconstitutional for the reason of breaching international obligations, nonetheless the CCC holds that ordinary courts must ensure that the international law norms are applied, an outcome much “friendlier” to international law than that of the German FCC, especially in light of the reasoning of the two courts.

From a substantive perspective, the doctrine of the constitutionality block has been discussed, showing how it aims at selectively – i.e. based on constitutional preferences – integrating international law binding upon Colombia within the Colombian constitution.

The rejection of the conventionality control devised by the IACtHR and, at the same time, the finding that the ACHR is part of the constitutionality block *stricto sensu* and, thus, of the Constitution, is a clear manifestation of open statehood, coupling the retention of legal autonomy and state sovereignty with the opening of the Constitution to its integration by international law norms. In this light, the need to avoid any automatic transposition of the case-law of the IACtHR in the domestic context, and, instead, the imperative to ensure that it is carefully integrated within the Colombian constitutional order – something very similar to the cautions put forward by the German FCC – further reinforces this observation.

Ultimately, in this context, conflicts between national and international law, rather than having occurred, have been envisioned, if not in as explicit terms as by the German FCC.

## Conclusive remarks

This research aimed to discuss, from a comparative legal perspective, the reasoning that domestic courts develop to justify non-compliance with international legal obligations binding on the state. Particularly, it aimed to reconnect the alternative between modern and open statehood with the question of how conflicts between national and international law are framed.

To this end, it introduced an alternative between structural and identitarian conflicts between national and international law, relying on a review of cases carried out in Chapter 1. A paradigmatic set cases discussed in chapter 1 pertained to the domestic application of Article 36 VCCR. In both Germany and the USA, the provision at issue, providing for the right of every third country national deprived of their personal freedom to contact their consular representatives, had not been correctly incorporated. However, the German FCC clearly set out the duty, under the principle of openness to international law, for German courts to give full effect to said provision, envisioning the possibility of derogating from international law only in if they explain “why fundamental rights of third parties or other constitutional provisions require a derogation.”<sup>1</sup> In the USA, instead, the Supreme Court refused to give effect to art. 36 VCCR and to the judgements rendered by the ICJ in that regard on the basis that neither art. 36 VCCR, nor art. 94 UN Charter (whereby States undertake to comply with the decision of the ICJ in any case to which they are parties) could be considered self-executing: therefore, in the absence of incorporating legislation, it was not for the courts to apply said international norms in the domestic sphere. Drawing from the alternative between these cases, as well as between cases decided with regard to sovereign immunities and the UN targeted sanctions regime, and alternative was put forward between structural and identitarian conflicts.

Chapter 2 provided a more precise description of said conflicts. By making recourse to a taxonomy of hierarchies between norms developed by legal theorists with a view to addressing normative hierarchies within the domestic legal system, and by adapting it to inter-systemic relations, a taxonomy of relations between national and international law was presented, distinguishing formal, material, and axiological conflicts between national

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<sup>1</sup> FCC, Decision of the Second Senate of 8 July 2010, 2 BvR 2485/07, BVerfGK 17, 390, para. 34 (author’s translation).

and international law. Subsequently, formal and material conflicts were unified under the common category of structural conflicts, while axiological conflicts were subsumed under that of identitarian conflicts.

The subsequent chapters aimed at explaining this alternative. Chapter 3 introduced the notion and the terminology of legal tradition, mainly by relying on the works of Patrick Glenn. Such “looking glasses” were then used in both Chapter 4, to explain the gradual and incremental development of a post-modern, open conception of statehood, and in Chapter 5, to formulate the reconstructive hypothesis at the core of this research, namely that a qualified correlation exists between, on the one hand, the modern statehood and structural conflicts, and, on the other, open statehood and identitarian conflicts.

Indeed, adopting the lenses of the legal tradition allows for the understanding of the incremental dynamics of change, whereby the retainment of legal doctrines and categories previously developed goes hand in hand with their adaptation to the new and evolving constitutional scenario. Accordingly, the alternative between modern and open statehood is not understood in radically alternative terms, whereby open statehood, with its institutions and rules for the reception of international law, would represent a radical departure from the modern state. Rather, the descriptive approach here favoured is one whereby change takes place incrementally, and legal structures and doctrines typical of the modern state are adapted to a different constitutional and international context, one characterised by a constitutional decision for the opening of the state’s legal order and by a strongly intensified and more structured international cooperation among states.

Thus, in chapter 5 the main thesis of this research was put forward, structured in three layers: that of the values of the legal order, at the roots of the legal discipline concerning the relationship between national and international law, the doctrines concretely disciplining it, and, finally, the techniques for construing judicial non-compliance with international law.

Starting at the level of values, the alternative that was presented was between a modern and an open conception of statehood. What is common to both approaches is a fundamental commitment to a statist understanding of the law: as already mentioned, no state organ can accept a monist organisation of the relationship between the two levels, whereby the conditions of validity of domestic law are determined by international law. Thus, the application of the international law norm in the domestic legal system is always due to the reception thereof by national law, and it is conditional upon the respect of the criteria of recognition set out in domestic (constitutional) law. However, while a number

of states maintain a modern paradigm of statehood, after the Second World War, in post-dictatorial contexts, and increasingly during the decolonisation, Constitutions have “opened up” to international law.

Particularly, and thus coming to the issue of the doctrines regulating the place of international law in the domestic legal system, the main consequence of the opening up of states when it comes to the issue of the domestic reception of international law, is the acknowledgment, by the national constitutional order, of the normative claim of international law. Accordingly, legal authority, rather than exclusive becomes relative, and the domestically applicable law is determined also by recourse to axiological considerations and by mediating between the competing norms, stemming from different legalities, in light of their axiological implications. In this context, though closure, premised upon the state’s sovereignty and the autonomy of the legal order, is always possible, this becomes an *ultima ratio*, recourse to which is made when conflicts between legalities appear unsolvable and the two levels express axiologically incompatible normative claims.

In part III, chapter 6 tested this theory with regards to the UK, chapter 7 did the same with regards to Germany, and chapter 8 addressed Colombia.

Accordingly, in chapter 6, the approach of English courts to the question of the domestic status of international law has been discussed, particularly with regard to the status of unincorporated treaties under domestic law. It emerged that English courts are quite careful in enforcing the prohibition of giving domestic effects to unincorporated treaties, on the ground that this would encroach upon the legislative prerogatives of Parliament diminish the democratic credentials of the law, also in the area of fundamental rights and climate protection. Particularly, it has been discussed how backdoors to this prohibition are contrasted, and how suggestion favouring developments in the law in the sense of allowing for a greater permeability of the domestic legal order to international law are rebutted. Thus, ultimately, the review of the English case asseverated the hypothesis that a modern conception of statehood favours the structuring of conflicts between national and international law in terms of structural conflicts, protecting the law-making prerogatives of Parliament, and thus, the self-determination of the state community though democratic procedures and institutions.

In chapter 7, the case of Germany, a paradigmatic case of open constitutional statehood, was discussed, showing the effect the principle of openness has as to the

domestic reception of international law and on the structuring of conflicts between national and international law.

Particularly, a difference was noted between how the principle of international law friendliness operates in areas of strong constitutional and cosmopolitan significance – those of fundamental rights protection and action against climate change – and how it operates in areas of the law less constitutionally significant. In the former areas, the actual domestic role of international law is enhanced vis-à-vis its formal status due to the axiological continuity between national constitutional law and international law, to the effect of attributing to international law a constitutional significance, invoking it as an interpretive aid, with the purpose of determining the content and the scope of constitutional provisions.

However, this opening of the German legal order is not unlimited, being instead a “controlled opening,” carried out under conditions set out in the Basic Law and enforced by the courts – among them, especially by the FCC. These controlling conditions are axiological in nature, or, in the terminology here adopted, identitarian.

Chapter 8 discussed the case of Colombia, thus completing the review of cases undertaken within this research. In this context, the Colombian Constitutional Court places a significant emphasis on the autonomy of the Colombian legal order and on the supremacy of the Political Constitution, preventing any contrasting norm from existing within the Colombian legal order. Such a protection of the sovereignty and autonomy of Colombia is however coupled with a remarkable opening of its Constitution. The implications of such openness were discussed both with regard to the review of constitutionality of treaties, carried out by the CCC under Article 241, no. 10 of the Constitution, and, from a substantive perspective, with regard to the constitutionality block doctrine. Particularly, the rejection of the conventionality control devised by the IACtHR and, at the same time, the finding that the ACHR is part of the constitutionality block *stricto sensu* and, thus, of the Constitution, was deemed a clear manifestation of open statehood, coupling the retention of legal autonomy and state sovereignty with the opening of the Constitution to its controlled integration by international law norms. In this light, the need to avoid any automatic transposition of the case-law of the IACtHR in the domestic context, and, instead, the imperative to ensure that it is carefully integrated within the Colombian constitutional order – something very similar to the cautions put forward by the German FCC – further reinforces this observation.

Ultimately, what this research has shown is that the principle of openness of the constitution truly has a bearing as to how conflicts between national and international law are structured, particularly in areas of strong constitutional and cosmopolitan significance. Indeed, by favouring the domestic reception of international law, it turns the question of its domestic authority from one determined by the application of a set of structural rules to one where the determining factor is the consideration of the actual content of the norms involved. This holds true both as to the reception of international law, whereby its domestic application is enhanced by virtue of the axiological continuity between national and international law, and as to the non-application thereof, where the determining factor is a comparative evaluation of the values expressed by the competing norms.

## Bibliographical references

‘2024 Global Report on Internal Displacement’ (Internal Displacement Monitoring Centre 2024)

Abend T, *Grenzen der Völkerrechtsfreundlichkeit* (Göttingen University Press 2019)

Abi-Saab GM, ‘The Newly Independent States and the Scope of Domestic Jurisdiction’ (1960) 54 *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)* 84

Acosta Alvarado PA, ‘Zombis vs. Frankenstein: Sobre Las Relaciones Entre El Derecho Internacional y El Derecho Interno’ (2016) 14 *Estudios constitucionales* 15

——, ‘Diagnóstico sobre las relaciones entre el derecho internacional y el derecho interno. El caso colombiano’ (2018) 16 *Estudios constitucionales* 369

Acosta Alvarado PA and Rivas Ramírez D, ‘El Control de Constitucionalidad de Tratados Internacionales y Leyes Aprobatorias e Tratados Internacionales’ in Humberto A Sierra Porto and others (eds), *Garantías judiciales de la constitución* (Universidad Externado de Colombia, Departamento de Derecho Constitucional 2023)

Acosta López JI, Acosta Alvarado PA and Rivas Ramírez D (eds), *De Anacronismos y Vaticinios: Diagnóstico Sobre Las Relaciones Entre El Derecho Internacional y El Derecho Interno En Latinoamérica* (Universidad del Externado 2017)

Acosta-López J and Vega-Barbosa G, ‘Compliance with International Human Rights Obligations in Colombia: Assessing the Normative Evolution and Practical Challenges’ (2021)

Ahmed F and Perry A, ‘Constitutional Statutes’ (2017) 37 *Oxford Journal of Legal Studies* 461

Aisling I, ‘The Race to Understand Colombia’s Exceptional Biodiversity’ (2023) 619 *Nature* 450

Alexy R, ‘Constitutional Rights, Balancing, and Rationality’ (2003) 16 *Ratio Juris* 131

——, *A Theory of Constitutional Rights* (Oxford University Press 2010)

Allan TRS, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford University Press 2013)

Alogna I and Clifford E, *Climate Change Litigation: Comparative and International Perspectives* (2020)

Alter K, Helfer L and Saldías O, ‘Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice’ (2012) 60 *American Journal of Comparative Law* 629

Alter KJ, 'The Multiplication of International Courts and Tribunals After the End of the Cold War' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013)

Alter KJ and Helfer LR, 'Legal Integration in the Andes: Law-Making by the Andean Tribunal of Justice' (2011) 17 *European Law Journal* 701

Álvarez ET, 'La internacionalización del derecho constitucional en Colombia: una garantía para los procesos de integración. Ejercicio comparado con los países andinos' (2016) 10 *Revista IUS*

Ammann O, *Domestic Courts and the Interpretation of International Law. Methods and Reasoning Based on the Swiss Example* (Brill Nijhoff 2020)

Anderson B, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (3rd edn, Verso 2006)

Andreotti N, 'The Colombian Santurbán Páramo Saga and Its Contribution to the Development of International Investment Law and Arbitration' [2025] *Arbitration International*

Anghie A, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005)

Anzilotti D, *Il Diritto Internazionale Nei Giudizi Interni* (Zanichelli 1905)

Arangio-Ruiz G, 'International Law and Interindividual Law' in Janne E Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007)

Arévalo C and Huertas J, 'Not so Moderate: The Relationship between the Colombian Legal System and International Law' in Alejandro Linares Cantillo, Camilo Valdivieso-León and Santiago García-Jaramillo (eds), *Constitutionalism: Old Dilemmas, New Insights* (Oxford University Press 2021)

Arévalo Ramírez W, *Manual de derecho internacional público: fundamentos, tribunales internacionales y casos de estudio* (2. edición, Tirant lo Blanch 2020)

Arturo LAF, 'Contenido y alcance jurisprudencial del bloque de constitucionalidad en Colombia' (2007) 7 *Civilizar* 15

Augusto Barbera, 'Ordinamento costituzionale e carte costituzionali' [2010] *Quaderni costituzionali* 311

Aust HP, 'The Democratic Challenge to Foreign Relations Law in Transatlantic Perspective' in David Dyzenhaus, Jacco Bomhoff and Thomas Poole (eds), *The Double-Facing Constitution* (Cambridge University Press 2020)

——, 'Climate Protection Act Case, Order of the First Senate' (2022) 116 *American Journal of International Law* 150

Aust HP and Kleinlein T (eds), *Encounters between Foreign Relations Law and International Law: Bridges and Boundaries* (Cambridge University Press 2021)

Aust HP, Krieger H and Lange F (eds), *Research Handbook on International Law and Domestic Legal Systems* (Edward Elgar Publishing Limited 2024)

Aust HP and Nolte G (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford University Press 2016)

Avbelj M, Fontanelli F and Martinico G (eds), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* (Routledge 2014)

Barnes R, 'United States Sanctions: Delisting Applications, Judicial Review and Secret Evidence' in Paul Eden and Matthew Happold (eds), *Economic Sanctions and International Law* (Hart Publishing 2016)

Barrett J, 'The United Kingdom and Parliamentary Scrutiny of Treaties: Recent Reforms' (2011) 60 *International and Comparative Law Quarterly* 225

Bartole S, *The Internationalisation of Constitutional Law: A View from the Venice Commission* (Hart Publishing, an imprint of Bloomsbury Publishing 2020)

Bates E, 'Principled Criticism and a Warning from the "UK" to the ECtHR?' in Marten Breuer (ed), *Principled Resistance to ECtHR Judgments - A New Paradigm?* (Springer Berlin Heidelberg 2019)

——, 'UK Withdrawal From the Echr ("BrECHRit"): From Taboo to Tenable?' (2024) 5 *European Convention on Human Rights Law Review* 24

Battini S, Peters A and Volpe V (eds), *Remedies against Immunity? Reconciling International and Domestic Law after the Italian Constitutional Court's Sentenza 238/2014* (Springer 2021)

Beaulac S, 'The Westphalian Legal Orthodoxy - Myth or Reality' (2000) 2 *Journal of the History of International Law* 148

Beck U, 'The Cosmopolitan State: Redefining Power in the Global Age' (2005) 18 *International Journal of Politics, Culture, and Society* 143

Becker F, 'Völkerrechtliche Verträge und parlamentarische Gesetzgebungskompetenz' [2005] *Neue Zeitschrift für Verwaltungsrecht* 289

Beilke KK, 'The U.S. Is Not Alone in Its Reluctance to Adhere to Supranational Decisions from the International Court of Justice' (2009) 7 *Loyola University Chicago International Law Review* 213

Bell J, 'Sources of Law' (2018) 77 *The Cambridge Law Journal* 40

Bellamy R, 'Political Constitutionalism and the Human Rights Act' (2011) 9 *International Journal of Constitutional Law* 86

- Berkemann J, ‘„Freiheitschancen über die Generationen“ (Art. 20a GG) – intertemporaler Klimaschutz im Paradigmenwechsel’ [2021] *Die öffentliche Verwaltung* 701
- Berman HJ, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press 1983)
- Berman PS, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press 2012)
- Berrino G, ‘Quale effettività della tutela giurisdizionale nel caso Germania c. Italia? L’art. 43 del d.l. n. 36/2022 come “rimedio” costituzionalmente legittimo’ [2023] *Diritti umani e diritto internazionale* 201
- Besson S, ‘The Authority of International Law - Lifting the State Veil’ (2009) 31 *Sidney Law Review* 343
- , ‘State Consent and Disagreement in International Law-Making. Dissolving the Paradox’ (2016) 29 *Leiden Journal of International Law* 289
- Betancourth DR, ‘Control de convencionalidad en Colombia. Entre el control de la Convención y su aplicación’ [2015] *nuario de Derecho Constitucional Latinoamericano* 113
- Bezemek C, ‘A Kelsenian Model of Constitutional Adjudication’ (2012) 67 *Zeitschrift für öffentliches Recht* 115
- Bhandari MP, *Getting the Climate Science Facts Right: The Role of the IPCC* (River Publishers 2022)
- Bianchi A, ‘Human Rights and the Magic of Jus Cogens’ (2008) 19 *European Journal of International Law* 491
- Bickel AM, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press 1986)
- Bickenbach C, ‘Subjektiv-öffentliches Recht auf Klimaschutz? Die Erderwärmung vor den Gerichten’ (2020) 75 *JuristenZeitung* 168
- Biersteker TJ, ‘Targeted Sanctions and Individual Human Rights’ (2009) 65 *International Journal* 99
- Biersteker TJ, Eckert SE and Tourinho M (eds), *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action* (Cambridge University Press 2016)
- Bin R and Pitruzzella G, *Le fonti del diritto* (4. ed, Giappichelli 2023)
- Bingham TH, *Lives of the Law: Selected Essays and Speeches 2000-2010* (Oxford University Press 2011)
- Birkinshaw P, ‘The Rwanda Bill, Boat People and International Law’ (2024) 30 *European Public Law*

Bjorge E, 'The Courts and the ECHR: A Principled Approach to the Strasbourg Jurisprudence' (2013) 72 Cambridge Law Journal 289

——, *Domestic Application of the ECHR: Courts As Faithful Trustees* (Oxford University Press USA - OSO 2015)

——, 'Can Unincorporated Treaty Obligations Be Part of English Law?' [2017] Public Law 571

Bjorge E and Smith E, 'United Kingdom' in Fulvio Maria Palombino (ed), *Duelling for Supremacy* (Cambridge University Press 2019)

Blackstone W, *Commentaries on the Laws of England*, vol 2 (Oxford University Press 2016)

Blanco TL and Chaux Donado FJ (eds), *Tres décadas de constitución* (Ministerio de Justicia y del derecho 2022)

Bleckmann A, 'Die Völkerrechtsfreundlichkeit der deutschen Rechtsordnung' (1979) 32 Die öffentliche Verwaltung 309

——, 'Verfassungsrang der europäische Menschenrechtskonvention?' (1994) 21 Europäische Grundrechte Zeitschrift 149

Bobbio N, *Il Positivismo Giuridico* (Giappichelli 1979)

Boda J-S, 'Bloc de constitutionnalité ou désordre constitutionnel?' (2022) 130 Revue française de droit constitutionnel 393

Bodansky D, 'The Legal Character of the Paris Agreement' (2016) 25 Review of European, Comparative & International Environmental Law 142

Bodansky D, Brunnée J and Rajamani L, *International Climate Change Law* (Oxford University Press 2017)

Bogdandy A von and Huber PM (eds), *Handbuch Ius Publicum Europaeum II: 'Offene Staatlichkeit - Wissenschaft vom Verfassungsrecht'* (CF Müller 2007)

Bonilla Maldonado D, *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press 2014)

Bönnemann M and Tigre M (eds), *The Transformation of European Climate Litigation* (Verfassungsblog 2024)

Bothe M, 'Security Council's Targeted Sanctions against Presumed Terrorists: The Need to Comply with Human Rights Standards' (2008) 6 Journal of International Criminal Justice 541

Boyd JP (ed), *The Papers of Thomas Jefferson*, vol 15 (Princeton University Press 1958) <<https://jeffersonpapers.princeton.edu/>>

Boyle A and Ghaleigh NS, 'Climate Change and International Law beyond the UNFCCC' in Kevin R Gray, Richard Tarasofsky and Cinnamon P Carlarne (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016)

Bradford A and Posner E, 'Universal Exceptionalism in International Law' (2011) 52 *Harvard International Law Journal* 3

Bradley C, 'International Delegations, the Structural Constitution, and Non-Self-Execution' (2003) 55 *Stanford Law Review* 1557

Bradley CA, 'Enforcing the Avena Decision in U.S. Courts' (2006) 30 *Public Policy* 119

Bradley CA, 'Self-Execution and Treaty Duality' [2008] *The Supreme Court Review* 131

Bradley CA (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press 2019)

Breuer M, 'Karlsruhe und die Gretchenfrage: Wie hast du's mit Straßburg?' (2005) 24 *Neue Zeitschrift für Verwaltungsrecht* 412

— (ed), *Principled Resistance to ECtHR Judgments - A New Paradigm?* (Springer Berlin Heidelberg 2019)

Britz G, 'Klimaschutz in der Rechtsprechung des Bundesverfassungsgerichts' [2022] *Neue Zeitschrift für Verwaltungsrecht* 825

Brownword R, *Global Governance and the Quest for Justice - Volume IV: Human Rights* (Hart 2004)

Bryde B-O, 'Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts' (2003) 42 *Der Staat* 61

Bucher E, 'Rechtsüberlieferung und heutiges Recht' (2000) 75 *Zeitschrift für europäisches Privatrecht* 394

Buergenthal T, 'The Evolving International Human Rights System' (2006) 100 *American Journal of International Law* 783

Burgogue-Larsen L, 'La Corte Interamericana de Derechos Humanos Como Tribunal Constitucional' in Armin von Bogdandy and others (eds), *IUS constitutionale commune en América Latina: rasgos, potencialidades y desafíos* (Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas; Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht 2014)

Buser A, 'Of Carbon Budgets, Factual Uncertainties, and Intergenerational Equity—The German Constitutional Court's Climate Decision' (2021) 22 *German Law Journal* 1409

Bushnell D, *The Making of Modern Colombia: A Nation in Spite of Itself* (University of California Press 1993)

- Cajas Sarria MA, *La historia de la Corte Suprema de Justicia de Colombia, 1886-1991* (Universidad de Los Andes 2015)
- Çali B, *The Authority of International Law: Obedience, Respect, and Rebuttal* (Oxford University Press 2015)
- Calliess, ‘GG Art. 20a’ in Dürig, Herzog and Scholz (eds), *Grundgesetz-Kommentar* (105th edn, 2024)
- Calliess C, *Rechtsstaat und Umweltstaat: Zugleich ein Beitrag zur Grundrechtsdogmatik im Rahmen mehrpoliger Verfassung* (Mohr Siebeck 2001)
- , *Staatsrecht III: Bezüge zum Völker- und Europarecht* (3. Auflage, CHBeck 2020)
- , ‘Das „Klimaurteil“ des Bundesverfassungsgerichts: „Versubjektivierung“ des Art. 20a GG?’ [2021] *Zeitschrift für Umweltrecht* 355
- Calliess C and Schyff G van der (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2020)
- Calzadilla PV, ‘A Paradigm Shift in Courts’ View on Nature: The Atrato River and Amazon Basin Cases in Colombia Case Note’ (2019) 15 *Law, Environment and Development Journal* 3
- Camargo XS, ‘The Ecocentric Turn of Environmental Justice in Colombia’ (2019) 30 *King’s Law Journal* 224
- Cannizzaro E, ‘The Neo-Monism of the European Legal Order’ in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Brill Nijhoff 2011)
- , ‘Nine Theses on Autonomy: Making Sense of a Controversial Doctrine’ (2024) 8 *European Papers* 1317
- Cappelletti M, *Judicial Review in the Contemporary World* (Bobbs-Merrill 1971)
- Cárdenas Contreras LE, *El control de convencionalidad (CCV): fundamentación e implementación desde el sistema interamericano de derechos humanos* (Jaime Cubides Cárdenas ed, Primera edición, Universidad Católica de Colombia 2016)
- Carlarne CP, Gray KR and Tarasofsky R, ‘International Climate Change Law: Mapping The Field’ in Kevin R Gray, Richard Tarasofsky and Cinnamon P Carlarne (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016)
- Carlassare L, ‘Fonti Del Diritto (Dir. Cost.)’, *Enciclopedia del Diritto. Annali* (2008) 536
- Carrozza P, ‘Constitutionalism’s Post-Modern Opening’ in Martin Loughlin (ed), *The Paradox of Constitutionalism* (Oxford University Press 2008)

Casey CA, Rennack DE and Elsea JK, 'The International Emergency Economic Powers Act: Origins, Evolution, and Use' (Congressional Research Service 2024) CRS Report R45618

Cassese A (ed), *Parliamentary Control over Foreign Policy* (Brill Nijhoff 1980)

——, 'Terrorism as an International Crime' in Andrea Bianchi (ed), *Enforcing international law norms against terrorism* (Hart Publishing 2004)

——, *L'apertura degli ordinamenti statali all'ordinamento della comunità internazionale* (Editoriale scientifica 2009)

——, *Il diritto internazionale in Italia* (Micaela Frulli ed, Il Mulino 2021)

Castel J-G and Castel ME, 'Canadian State Immunity Act and the Absolute Immunity of Foreign States Committing or Supporting Acts of Terrorism or Violating International Humanitarian Law' (2016) 45 *Advocates' Quarterly* 81

Cede P, 'Report on Austria and Germany' in Giuseppe Martinico and Oreste Pollicino (eds), *The national judicial treatment of the ECHR and EU laws: a comparative constitutional perspective* (Europa Law Publishing 2010)

Cepeda Espinosa MJ and Landau DE, *Colombian Constitutional Law: Leading Cases* (Oxford University Press 2017)

Cepeda MJ, 'The Internationalization of Constitutional Law: A Note on the Colombian Case' (2008) 41 *Verfassung und Recht in Übersee* 61

Cepeda-Espinosa MJ, 'Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court'

Chachko E, 'Due Process Is in the Details: U.S. Targeted Economic Sanctions and International Human Rights Law' (2019) 113 *157*

Chandrachud C, 'Reconfiguring the Discourse on Political Responses to Declarations of Incompatibility' [2014] *Public law* 624

Chaparro Rodríguez JC, *El Ocaso de la Guerra: La Confrontación Armada y Los Procesos de Paz en Colombia* (Universidad Colegio Mayor de Nuestra Señora del Rosario 2017)

Chiti E, Di Martino A and Palombella G, *L'era dell'interlegalità* (Il Mulino 2021)

Ciampi A, 'Security Council Targeted Sanctions and Human Rights' in Bardo Fassbender (ed), *Securing Human Rights?: Achievements and Challenges of the UN Security Council* (Oxford University Press 2011)

Cicconetti SM, *Le fonti del diritto italiano* (4th edn, Giappichelli 2019)

Claes M and Reestman J-H, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' (2015) 16 *German Law Journal* 917

Clayton R, 'Judicial Deference and "Democratic Dialogue": The Legitimacy of Judicial Intervention under the Human Rights Act 1998' [2004] Public Law 33

——, 'Principles for Judicial Deference' (2006) 11 *Judicial Review* 109

——, 'Smoke and Mirrors: The Human Rights Act and the Impact of Strasbourg Case Law' [2012] Public Law 639

Cleves GR and Ramírez Cleves G, 'El Derecho a La Paz En Colombia Como Principio Básico e Irreformable de La Constitución' [2024] *Diritto pubblico comparato ed europeo* 727

Cohen JL, *Globalization and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism* (Cambridge University Press 2012)

Comisión de la Verdad, 'Hay Futuro si Hay Verdad. Informe Final Hallazgos y Recomendaciones de la Comisión de la Verdad de Colombia' (2022)

Contesse J, 'The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights' (2017) 15 *International Journal of Constitutional Law* 414

Cope KL, 'The Intermestic Constitution: Lessons from the World's Newest Nation' (2013) 53 *Virginia Journal of International Law* 667

Cotterrell R, 'Transnational Communities and the Concept of Law' (2008) 21 *Ratio Juris* 1

Couso J, Huneeus A and Sieder R (eds), *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge University Press 2010)

Cowell F, 'Locking in Human Rights: An Exploration of the Barriers to ECHR Withdrawal' (2024) 5 *European Convention on Human Rights Law Review* 50

Craig P, 'Sovereignty of the United Kingdom Parliament after Factortame' (1991) 11 *Yearbook of European Law* 221

——, 'Britain in the European Union' in Jeffrey L Jowell and Dawn Oliver (eds), *The changing constitution* (7th edn, Oxford University Press 2011)

——, 'The United Kingdom, the European Union, and Sovereignty' in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013)

——, 'Engagement and Disengagement with International Institutions: The U.K. Perspective' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press 2019)

——, 'Brexit and the UK Constitution', *The Changing Constitution* (Oxford University Press)

Cremer H-J, ‘Zur Bindungswirkung von EGMR-Urteilen: Anmerkung zum Görgülü-Beschluss des BVerfG vom 14.10.2004’ (2004) 31 Europäische Grundrechte-Zeitschrift 683

Cremer W, ‘Verfassungskräftiger Klimaschutz nach Maßgabe völkerrechtlich verbindlicher Verpflichtungen und Ziele’ [2019] Zeitschrift für Umweltrecht 278

Crisafulli V, ‘Fonti Del Diritto (Dir. Cost.)’, *Enciclopedia del Diritto* (Giuffrè 1968) 925

——, *Lezioni di diritto costituzionale*, vol 2 (4. ed, CEDAM 1976)

Crummey C, ‘The Safety of Rwanda (Asylum and Immigration) Bill and the Judicial “Disapplication” of Statutes’ (*UK Constitutional Law Association*, 26 March 2024)

Cruz FAR, ‘El derecho internacional de los derechos humanos en el sistema jurídico colombiano. Logros y dilemas en su aplicación’

Curtin DM, ‘The Constitutional Structure of the Union: A Europe of Bits and Pieces’ (1993) 30 Common Market Law Review 17

De Búrca G, ‘The European Court of Justice and the International Legal Order After Kadi’ (2010) 51 Harvard International Law Journal 1

de Búrca G, ‘Internalization of International Law by the CJEU and the US Supreme Court’ (2015) 13 International Journal of Constitutional Law 987

——, *Reframing Human Rights in a Turbulent Era* (Oxford University Press 2021)

de Búrca G and Gerstenberg O, ‘The Denationalization of Constitutional Law’ (2006) 47 Harvard International Law Journal 20

de Sadeleer N, ‘The Precautionary Principle’ in Nicolas de Sadeleer (ed), *Environmental Principles: From Political Slogans to Legal Rules* (2nd edn, Oxford University Press 2020)

De Sena P, ‘State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case’ (2005) 16 European Journal of International Law 89

De Vergottini G, *Oltre il dialogo tra le corti: giudici, diritto straniero, comparazione* (Il mulino 2010)

Deb A, Frantziou E and Lock T, ‘The EU Charter of Fundamental Rights in Northern Ireland under the Windsor Framework’ (2024) 75 Northern Ireland Legal Quarterly 488

Dederer H-G and Schweitzer M, *Staatsrecht, Völkerrecht, Europarecht* (12th edn, CF Müller 2020)

Denizeau-Lahaye C, ‘La genèse du bloc de constitutionnalité’ (2022) 8 Titre VII 11

Departamento Nacional de Planeación. Dirección de Estudios Económicos, ‘Pobreza Monetaria y Desigualdad’ (2023)

Deutschen Bundestag und Bundesarchiv (ed), *Der parlamentarische Rat 1948-1949 - Akten und Protokollen*, vol V – Ausschuß für Grundsatzfragen (Harold Boldt 1993)

Di Fabio U, *Das Recht offener Staaten: Grundlinien einer Staats- und Rechtstheorie* (Mohr Siebeck 1998)

Di Martino A, ‘National Constitutions and the ECHR. Comparative Remarks in Light of Germany’s Experience’ in Giorgio Repetto (ed), *The constitutional relevance of the ECHR in domestic and European law: an Italian perspective* (Intersentia 2013)

di Martino A, ‘Dalla Regola per Il Caso al Caso Della Regola’ in Edoardo Chiti, Alberto di Martino and Gianluigi Palombella (eds), *L’era dell’interlegalità* (il Mulino 2021)

Di Martino A, ‘Intertemporalità Dei Diritti e Dintorni: Le Scelte Argomentative Del Bundesverfassungsgericht Nella Sentenza Sul Clima e Le Interazioni Con i Processi Democratici’ [2023] *Diritti Comparati* 56

di Martino A and Palombella G, ‘Oltre l’architettura ordinamentale: il nuovo diritto composito della «terza ondata»’ (2020) 40 *Quaderni costituzionali* 225

Diaz W, ‘Dualist, But Not Divergent: Evaluating United States Implementation of the 1267 Sanctions Regime’ 5 *Liberty University Law Review* 333

Dicey AV, *An Introduction to the Study of the Law of the Constitution* (10th ed, Palgrave Macmillan UK 1985)

Dickson B, ‘Devolution in Northern Ireland’, *The Changing Constitution* (Oxford University Press)

Dixon R, ‘Constitutional “Dialogue” and Deference’ in Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon (eds), *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge University Press 2019)

Dixon R and Issacharoff S, ‘Living to Fight Another Day: Judicial Deferral in Defense of Democracy’ [2016] *SSRN Electronic Journal* <<https://www.ssrn.com/abstract=2726045>> accessed 11 January 2025

Dixon R and Landau D, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press 2021)

Dodge WS, ‘International Comity in American Law’ (2015) 115 *Columbia Law Review* 2071

Doelle M, Seck with S and Klug R, ‘The Use of Elements of the Paris Agreement and IPCC Reports in Climate Litigation’ in Alexander Zahar (ed), *Research Handbook on the Law of the Paris Agreement* (Edward Elgar 2024)

Doyle O, ‘Legal Positivism, Natural Law and the Constitution’ (2009) 31 *Dublin University Law Journal* 206

——, *The Constitution of Ireland: A Contextual Analysis* (Hart Publishing 2018)

——, ‘Constitutional Identity and Unamendability’ in Ran Hirschl and Yaniv Roznai (eds), *Deciphering the Genome of Constitutionalism: The Foundations and Future of Constitutional Identity* (Cambridge University Press 2024)

Dulitzky AE, ‘An Inter-American Constitutional Court - The Invention of the Conventionality Control by the Inter-American Court of Human Rights’ (2015) 50 *Texas International Law Journal* 45

Duncan G, *Los señores de la guerra: de paramilitares, mafiosos y autodefensas en Colombia* (Bogotá: Planeta 2006)

Dupuy P-M and Viñuales JE, ‘The Challenge of “Proliferation”: An Anatomy of the Debate’ in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013)

Dürig, Herzog and Scholz (eds), ‘GG Art. 25’, *Grundgesetz-Kommentar* (105th edn, 2024)

Duve T, ‘Legal Traditions: A Dialogue between Comparative Law and Comparative Legal History’ (2018) 6 *Comparative Legal History* 15

Duve T and Herzog T (eds), *The Cambridge History of Latin American Law in Global Perspective* (Cambridge University Press 2024)

Dworkin R, *Taking Rights Seriously* (Harvard University Press 1977)

——, *Law’s Empire* (Harvard University Press 1986)

Dzehtsiarou K, ‘The United Kingdom and the European Convention on Human Rights: Together Until the End?’ (2024) 5 *European Convention on Human Rights Law Review*, The 1

Eckersley P and others, ‘Climate Governance and Federalism in Germany’ in Alan Fenna, Sébastien Jodoin and Joana Setzer (eds), *Climate Governance and Federalism* (Cambridge University Press 2023)

Eifert M and von Landenberg-Roberg M, ‘Climate Change Challenges Constitutional Law: Contextualising the German Federal Constitutional Courts Climate Jurisprudence Within Climate Constitutionalism’ in Jelena Bäuml and others (eds), *European Yearbook of International Economic Law 2022* (Springer International Publishing 2023)

Ekardt F, ‘Umweltverfassung und „Schutzpflichten“’ [2013] *Neue Zeitschrift für Verwaltungsrecht* 1105

——, ‘Freedom, Human Rights, Paris Agreement, and Climate Change: The German Landmark Ruling on Climate Litigation’ (2022) 64 *Environment: Science and Policy for Sustainable Development* 4

Elliott M, ‘Constitutional Legislation, European Union Law and the Nature of the United Kingdom’s Contemporary Constitution’ (2014) 10 *European Constitutional Law Review* 379

——, ‘The Supreme Court’s Judgment in Miller: In Search of Constitutional Principle’ (2017) 76 *The Cambridge Law Journal* 257

——, ‘Sovereignty, Primacy and the Common Law Constitution: What Has EU Membership Taught Us?’ in Mark Elliott, Jack Williams and Alison L Young (eds), *The UK constitution after Miller: Brexit and beyond* (Hart Publishing 2018)

——, ‘Is the UK Heading for a Constitutional Crisis Because of the Rwanda Bill?’ (*Public Law for Everyone*, 12 December 2023) <<https://publiclawforeveryone.com/2023/12/12/could-the-rwanda-bill-provoke-a-constitutional-showdown/>> accessed 6 January 2025

Elliott M and Hughes KE, ‘The Nature and Role of Common Law Constitutional Rights’ in Mark Elliott and Kirsty Elizabeth Hughes (eds), *Common law constitutional rights* (Hart 2020)

Elliott M and Tierney S, ‘Political Pragmatism and Constitutional Principle: The European Union (Withdrawal) Act 2018’ [2019] *Public Law* 37

Epiney A, ‘Art. 20a’ in Peter M Huber and Andreas Voßkuhle (eds), *Grundgesetz: Kommentar* (7th edn, CH Beck 2018) 173

Espósito C and Galvão Teles P, ‘International Law in Spain and Portugal: Internationalization by Democratization’ in Anne van Aaken and others (eds), *The Oxford Handbook of International Law in Europe* (Oxford University Press 2023)

Everling U, ‘Europäische Union, europäische Menschenrechtskonvention und Verfassungsstaat – Schlusswort auf dem Symposium am 11. Juni 2005 in Bonn –’ (2005) 40 *Europarecht* 411

Fabbrini F and Sajó A, ‘The Dangers of Constitutional Identity’ (2019) 25 *European Law Journal* 1

Fabra-Zamora JL, Molina-Ochoa A and Doubleday NC (eds), *The Colombian Peace Agreement: A Multidisciplinary Assessment* (Routledge 2021)

Faraguna P, *Ai Confini Della Costituzione. Principi Supremi e Identità Costituzionale* (Franco Angeli 2015)

——, ‘Taking Constitutional Identities Away from the Courts’ (2015) 41 *Brooklyn Journal of International Law* 491

Farrell DM, Suiter J and Harris C, ‘“Systematizing” Constitutional Deliberation: The 2016–18 Citizens’ Assembly in Ireland’ (2019) 34 *Irish Political Studies* 113

Fassbender B, ‘Targeted Sanctions Imposed by the UN Security Council and Due Process Rights’ (2006) 3 *International Organizations Law Review* 437

——, ‘Article 2 (1)’ in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press 2024)

Fastenrath U, 'BVerfG, 15.12.2015 - 2 BvL 1/12. Kein Vorrang des Völker(Vertrags)Rechts - zum sogenannten Treaty Override durch den Gesetzgeber' (2016) 71 *JuristenZeitung* 625

——, 'Völkerrechtsfreundlich und international offen?: Die Rechtsprechung des Bundesverfassungsgerichts zum internationalen Recht' in Robert Chr Van Ooyen and Martin HW Möllers (eds), *Handbuch Bundesverfassungsgericht im politischen System* (Springer Fachmedien Wiesbaden 2024)

Fatima S, *Using International Law in Domestic Courts* (Hart Publishing 2005)

——, 'Engagement of English Courts with International Law' in André Nollkaemper and others (eds), *The Engagement of Domestic Courts with International Law: Comparative Perspectives* (Oxford University Press 2024)

Fauchald OK and Nollkaemper A, *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Bloomsbury Publishing 2014)

Favilli C, 'Quali modalità di conclusione degli accordi internazionali in materia di immigrazione?' [2005] *Rivista di Diritto Internazionale* 156

Favoreu L, 'El bloque de la constitucionalidad' [1990] *Revista del Centro de Estudios Constitucionales* 45

Feichtner I, 'The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe' (2020) 21 *German Law Journal* 1090

Feldman D, 'The Human Rights Act 1998 and Constitutional Principles' (1999) 19 *Legal Studies* 165

Fenwick H and Masterman R, 'The Conservative Project to "Break the Link between British Courts and Strasbourg": Rhetoric or Reality?' (2017) 80 *The Modern Law Review* 1111

Field L, 'The Abortion Referendum of 2018 and a Timeline of Abortion Politics in Ireland to Date' (2018) 33 *Irish Political Studies* 608

Finke J, 'Sovereign Immunity: Rule, Comity or Something Else?' (2010) 21 *European Journal of International Law* 853

Finnis J, 'Judicial Power: Past, Present and Future' (Gray's Inn Hall, 20 October 2015) <<https://policyexchange.org.uk/blogs/john-finnis-judicial-power-past-present-and-future/>> accessed 6 January 2025

Fitzmaurice GKCM, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92 *Collected Courses of the Hague Academy of International Law*

Flachsland C and Levi S, 'Germany's Federal Climate Change Act' (2021) 30 *Environmental Politics* 118

Flaskühler CA, *Föderale Klimaschutzgesetzgebung in Deutschland im Lichte des wohlgeordneten Rechts* (Nomos 2018)

Focarelli C, 'State Immunity and Serious Violations of Human Rights: Judgment No. 238 of 2014 of the Italian Constitutional Court Seven Years On' (2021) 1 *The Italian Review of International and Comparative Law* 29

Føllesdal A, 'Accountability and Authority', *Conference on the long-term future of the European Court of Human Rights* (Council of Europe - PluriCourts 2014)

Forsyth C, 'The Definition of Parliament after Jackson: Can the Life of Parliament Be Extended under the Parliament Acts 1911 and 1949?' (2011) 9 *International Journal of Constitutional Law* 132

Foster NH, 'A Fresh Start for Comparative Legal Studies? A Collective Review of Patrick Glenn's *Legal Traditions of the World*, 2nd Edition' (2006) 1 *Journal of Comparative Law* 1

Fox H, 'In Defence of State Immunity: Why the UN: Convention on State Immunity Is Important' (2006) 55 *International and Comparative Law Quarterly* 399

Fox H and Webb P, *The Law of State Immunity* (3rd edn, Oxford University Press 2015)

Fox R and Blackwell J, *The Devil Is in the Detail: Parliament and Delegated Legislation* (Hansard Society 2014)

Franceschet A, 'Theorizing State Civil Disobedience in International Politics' (2015) 11 *Journal of International Political Theory* 239

Franchini D, 'State Immunity as a Tool of Foreign Policy : The Unanswered Question of Certain Iranian Assets' 60 *Virginia Journal of International Law* 433

Francioni F, 'From Deference to Disobedience: The Uncertain Fate of Constitutional Court Decision No. 238/2014' (2015) 24 *The Italian Yearbook of International Law Online* 1

Frans Viljoen, Oscar Vilhena, and Upendra Baxi (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press 2013)

Franzius C, 'Das Paris-Abkommen zum Klimaschutz auf dem Weg zum transnationalen Klimaschutzrecht?' [2010] *Zeitschrift für Umweltrecht* 515

Frau R, *Der Gesetzgeber zwischen Verfassungsrecht und völkerrechtlichem Vertrag* (Mohr Siebeck 2015)

Freestone D, 'The United Nations Framework Convention on Climate Change—The Basis for the Climate Change Regime' in Kevin R Gray, Richard Tarasofsky and Cinnamon P Carlarne (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016)

Fremuth ML, 'Die Rezeption der europäischen Menschenrechtskonvention in der deutschen Rechtsordnung' in Michael Lysander Fremuth (ed), *70 Jahre europäische Menschenrechtskonvention. Tagungsband zur Festveranstaltung* (Manz'sche Verlags- und Universitätsbuchhandlung 2022)

Friedmann W, *The Changing Structure of International Law* (New York, Columbia University Press 1964)

Frier BW, 'Bees and Lawyers' (1982) 78 *The Classical Journal* 105

Frowein J, 'Kritische Bemerkungen zur Lage des deutschen Staatsrechts aus rechtsvergleichender Sicht' (1998) 51 *Die öffentliche Verwaltung* 806

Gaja G, 'Positivism and Dualism in Dionisio Anzilotti' (1992) 3 *European Journal of International Law* 123

——, 'Dualism—a Review' in Janne E Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007)

Gallón Giraldo G and Uprimny R, 'Estado de Sitio y Tratados Internacionales: Una Crítica a La Jurisprudencia Constitucional de La Corte' in Gustavo Gallón Giraldo and Comisión Andina de Juristas (eds), *Guerra y constituyente* (Comisión Andina de Juristas Seccional Colombiana 1991)

García HAO, 'Control de Constitucionalidad de los Tratados Internacionales en Colombia' (2006) 4 *Estudios constitucionales* 555

García ÓMR, 'Las cláusulas de apertura o reenvío hacia fuentes externas previstas en la Constitución colombiana, como criterio para delimitar el contenido del bloque de constitucionalidad' [2012] *Revista Derecho del Estado* 175

García-Matamoros LV and Arévalo Ramírez W, 'La Constitución y El Derecho Internacional' in Tania Luna Blanco and Francisco Jose Chaux Donado (eds), *Tres décadas de constitución* (Ministerio de Justicia y del derecho 2022)

Gardbaum S, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press 2013)

Gärditz KF, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' (2014) 15 *German Law Journal* 183

Garditz KF, 'Treaty Override International Decisions' (2016) 110 *American Journal of International Law* 339

Gearty C, 'Reconciling Parliamentary Democracy and Human Rights' (2002) 118 *Law Quarterly Review* 248

——, *On Fantasy Island* (Oxford University Press 2016)

Geiger R, *Staatsrecht III* (7th edn, CH Beck 2018)

Gentile C, 'Climate Change and the Extraterritorial Reach of the State Duty to Protect' in Walter Frenz and Axel Preuß (eds), *Yearbook of Sustainable Smart Mining and Energy 2022: Technical, Economic and Legal Framework* (Springer Nature Switzerland 2024)

Gergen JA, 'Human Rights and the Foreign Sovereign Immunities Act' (1995) 36 *Virginia Journal of International Law* 765

Ghaleigh NS, 'Science and Climate Change Law—The Role of the IPCC in International Decision-Making' in Kevin R Gray, Richard Tarasofsky and Cinnamon P Carlane (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016)

—, 'Climate Constitutionalism of the UK Supreme Court' (2021) 33 *Journal of Environmental Law* 441

Giegerich T, 'Die Zählung des Leviathan. Deutschlands unvollendeter Weg vom nationalen Machtstaat zum offenen und europäischen Verfassungsstaat' in Thomas Giegerich (ed), *Der 'offene Verfassungsstaat' des Grundgesetzes nach 60 Jahren: Anspruch und Wirklichkeit einer großen Errungenschaft* (Duncker & Humblot 2010)

—, 'Der Blankoscheck des Bundesverfassungsgerichts für den gesetzgeberischen Treaty Override ist völkerrechtsunfreundlich' in Hans-Peter Folz and Stefan Lorenzmeier (eds), *Recht und Realität* (Nomos 2017)

—, 'Wirkung und Rang der EMRK in den Rechtsordnungen der Mitgliedstaaten' in Oliver Dörr, Rainer Grote and Thilo Marauhn (eds), *EMRK/GG Konkordanzkommentar*, vol I (3rd edn, Mohr Siebeck 2022)

Ginsburg T, 'Locking in Democracy: Constitutions, Commitment, and International Law' (2005) 38 *New York University Journal of International Law and Politics* 707

—, 'The Global Spread of Constitutional Review' in Gregory A Caldeira, R Daniel Kelemen and Keith E Whittington (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press 2008)

Ginsburg T, Chernykh S and Elkins Z, 'Commitment and Diffusion: How and Why National Constitutions Incorporate International Law' (2008) 2008 *University of Illinois Law Review* 38

Glenn HP, 'Persuasive Authority' (1987) 32 *McGill Law Journal* 261

—, 'Doin' the Transsystemic: Legal Systems and Legal Traditions' (2005) 50 *McGill Law Journal* 863

—, 'Legal Traditions and Legal Traditions' (2007) 2 *Journal of Comparative Law* 69

Glenn HP, *On Common Laws* (Oxford University Press 2007)

Glenn HP, 'A Concept of Legal Tradition' (2008) 34 *Queen's Law Journal* 427

——, ‘The State as Legal Tradition Legal Tradition in a Diverse World: Keynote Contributions’ (2013) 2 *Cambridge Journal of International and Comparative Law* 704

——, *The Cosmopolitan State* (Oxford University Press 2013)

——, *Legal Traditions of the World: Sustainable Diversity in Law* (5th edn, Oxford University Press 2014)

——, ‘Comparative Legal Families and Comparative Legal Traditions’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2019)

Gogolin J, ‘Avena and Sanchez-Llamas Come to Germany – The German Constitutional Court Upholds Rights under the Vienna Convention on Consular Relations’ (2007) 8 *German Law Journal* 261

Goldoni M and Wilkinson MA (eds), *The Cambridge Handbook on the Material Constitution* (Cambridge University Press 2023)

Goldsworthy J, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press 2010)

Goldsworthy JD, *The Sovereignty of Parliament: History and Philosophy* (Clarendon 2001)

——, ‘Is Parliamentary Sovereignty Alive, Dying or Dead?’ [2023] *Public Law* 126

Gomez - Velasquez A, ‘The “Constitutionalization” Process of the International Environmental Law in Colombia’ [2016] *Revista de Derecho* 1

Gómez-Velásquez A, ‘El proceso de “constitucionalización” del derecho internacional ambiental en Colombia’ [2016] *Revista de Derecho* 1

Góngora Mera ME, ‘La Difusión Del Bloque de Constitucionalidad En La Jurisprudencia Latinoamericana y Su Potencial En La Construcción Del Ius Constitutionale Commune Latinoamericano’ in Armin von Bogdandy, Héctor Fix Fierro and Mariela Morales Antoniazzi (eds), *IUS constitutionale commune en América Latina: rasgos, potencialidades y desafíos* (Instituto de Estudios Constitucionales del Estado de Querétaro; Max Planck Institute for Comparative Public Law and International Law 2017)

González-Domínguez P, *The Doctrine of Conventionality Control: Between Uniformity and Legal Pluralism in the Inter-American Human Rights System* (Intersentia 2018)

Goodin RE, ‘Toward an International Rule of Law: Distinguishing International Law-Breakers from Would-Be Law-Makers’ (2005) 9 *The Journal of Ethics* 225

Gordillo LI, *Interlocking Constitutions: Towards an Interordinal Theory of National, European and UN Law* (Bloomsbury Publishing 2012)

Gordillo Pérez LI, *Una teoría del Estado constitucional europeo* (4th edn, Athenaica 2023)

Gordon M, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart Publishing 2015)

Gorla G, 'I Precedenti Storici Dell'art. 12 Disposizioni Preliminari Del Codice Civile Del 1942 (Un Problema Di Diritto Costituzionale?)' (1969) 92 *Il Foro Italiano* 112

Gosch D, 'Über das Treaty Overriding Bestandsaufnahme – Verfassungsrecht – Europarecht' [2008] *Internationales Steuerrecht* 413

Gowlland-Debbas V (ed), *National Implementation of United Nations Sanctions: A Comparative Study* (Brill Nijhoff 2004)

Grabenwarter C, 'National Constitutional Law Relating to the European Union' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart 2011)

Grabenwarter C and Pabel K, *Europäische Menschenrechtskonvention: ein Studienbuch* (7. Auflage, CH Beck 2021)

Graham L, 'The Modern Mirror Principle' [2021] *Public Law* 523

——, 'Has the UK Supreme Court Become More Restrained in Public Law Cases?' (2024) 87 *The Modern Law Review* 1073

——, 'The Supreme Court's Recent Approach to Unincorporated Human Rights Treaties' [2024] *European Human Rights Law Review* 49

Grimm D, *Sovereignty: The Origin and Future of a Political Concept* (Columbia University Press 2015)

——, 'Post-Sovereignty?' in Bas Leijssenaar and Neil Walker (eds), *Sovereignty in Action* (Cambridge University Press 2019)

Groppi PT and Ponthoreau PM-C, *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing 2014)

Grosche N, 'Recht und intertemporale Gerechtigkeit' (2022) 61 *Der Staat* 113

Gross L, 'The Peace of Westphalia, 1648-1948' (1948) 42 *The American Journal of International Law* 20

Groß T, 'Die Ableitung von Klimaschutzmaßnahmen aus grundrechtlichen Schutzpflichten' [2020] *Neue Zeitschrift für Verwaltungsrecht* 337

Grossi P, 'Epicedio per l'assolutismo giuridico: (dietro gli "Atti" di un Convegno milanese e alla ricerca di segni)' (1988) 17 *Quaderni fiorentini per la storia del pensiero giuridico moderno* 517

——, *L'ordine giuridico medievale* (Laterza 2006)

——, *L'invenzione del diritto* (Laterza 2017)

- , *Oltre la legalità* (Laterza 2020)
- Guastini R, ‘Gerarchie normative’ [1997] *Materiali per una storia della cultura giuridica* 463
- , *Interpretare e argomentare* (2011)
- , ‘Gerarchie normative’ [2013] *Revus* 5770
- , *Saggi scettici sull’interpretazione* (Giappichelli 2017)
- Guzman AT, ‘Against Consent’ (2011) 52 *Virginia Journal of International Law* 747
- Habermas J, *The Postnational Constellation: Political Essays* (MIT Press 2001)
- Hagemann TA, ‘The North-South Divide of Regulatory Chill: A Comparative Analysis of the Impact of Investor-State Dispute Settlement on Policy Makers in Developed and Developing Countries Notes’ (2022) 35 *New York International Law Review* 27
- Hale B, ‘Argentorum Locutum: Is Strasbourg or the Supreme Court Supreme?’ (2012) 12 *Human Rights Law Review* 65
- Halmi G and Scholtes J, ‘Illiberal Constitutionalism and the Abuse of Constitutional Identity’ in Ran Hirschl and Yaniv Roznai (eds), *Deciphering the Genome of Constitutionalism: The Foundations and Future of Constitutional Identity* (Cambridge University Press 2024)
- Harrington J, ‘Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making’ (2006) 55 *International and Comparative Law Quarterly* 121
- Hartley TC, ‘Pleading and Proof of Foreign Law: The Major European Systems Compared’ (1996) 45 *International & Comparative Law Quarterly* 271
- Hausmann R, ‘Pleading and Proof of Foreign Law – a Comparative Analysis’ [2008] *The European Legal Forum* 1
- Havercroft J, ‘Was Westphalia “All That”? Hobbes, Bellarmine, and the Norm of Non-Intervention’ (2012) 1 *Global Constitutionalism* 120
- Heinke M, ‘Höher oder schwerer? – Ist die Vorrangrelation zwischen Völkervertragsrecht und Bundesrecht eine Frage der Abwägung?’ (2016) 55 *Der Staat* 393
- Held D, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Polity 1999)
- , ‘Cosmopolitanism: Globalisation Tamed?’ (2003) 29 *Review of International Studies* 465
- Henao MC and Alvis AO, ‘Socioeconomic Rights in the Colombian Constitutional Jurisprudence: Proportionality and the Prohibition of Regressive Measures’ in Francisca

Pou-Giménez, Laura Clérico and Esteban Restrepo-Saldarriaga (eds), *Proportionality and Transformation* (1st edn, Cambridge University Press 2022)

Hennebel L, 'The Inter-American Court of Human Rights: The Ambassador of Universalism' [2011] *Quebec Journal of International Law* 57

Henrich WC, 'Das Bundesverfassungsgericht und die Verteidigung der Demokratie' [2016] *Neue Zeitschrift für Verwaltungsrecht* 668

Henríquez Viñas M, 'El control de convencionalidad interno. Su conceptualización en la jurisprudencia de la Corte Interamericana de Derechos Humanos' (2019) 19 *Anuario mexicano de derecho internacional* 327

Henríquez Viñas ML and Morales Antoniazzi M (eds), *El Control de Convencionalidad: Un Balance Comparado a 10 Años de Almonacid Arellano vs. Chile* (Ediciones DER : Universidad Alberto Hurtado, Facultad de Derecho 2017)

Herdegen M, 'Internationalisierung der Verfassungsordnung' in Otto Depenheuer and Christoph Grabenwarter (eds), *Verfassungstheorie* (Mohr Siebeck 2010)

Hering L, 'Beamtenstreik zwischen Karlsruhe und Straßburg: Art. 11 EMRK und die konventionskonforme Auslegung durch das BVerfG' (2019) 79 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 241

——, 'No Right to Strike for Teachers with Civil-Servant Status: "Humpert and Others v Germany"' (App. Nos 59433/18 and Others)' [2024] *European Human Rights Law Review* 345

Herkenroth K, 'Treaty Override von DBA – Teil 1: – Bundesverfassungsgericht Revisited sowie Argumentationslinien vor und unterhalb der Schwelle des Verfassungsrechts –' (2021) 14 *UbG - Die Unternehmensbesteuerung* 137

——, 'Treaty Override von DBA – Teil 2 – Bundesverfassungsgericht Revisited sowie Argumentationslinien vor und unterhalb der Schwelle des Verfassungsrechts' (2021) 14 *UbG - Die Unternehmensbesteuerung* 210

Heun W, 'Art. 59' in Horst Dreier (ed), *Grundgesetz-Kommentar*, vol 2 (3rd edn, Mohr Siebeck 2015)

Hiebert JL, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69 *The Modern Law Review* 7

Higgins Dbe Qc R, '5.13 The Role of Domestic Courts in the Enforcement of International Human Rights: The United Kingdom' in Pat Rogers (ed), *Themes and Theories* (Oxford University Press 2009)

Higgins R, 'The Role of Domestic Courts in the Enforcement of International Human Rights: The United Kingdom' in Benedetto Conforti and Francesco Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (Brill 1997)

Higham C and Setzer J, 'Net Zero, Full Transparency' (*Verfassungsblog*, 28 July 2022)

Hirschl R, 'Comparative Methodologies' in Roger Masterman and Robert Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019)

Hobe S, *Der offene Verfassungsstaat zwischen Souveränität und Interdependenz. Eine Studie zur Wandlung des Staatsbegriffs der deutschsprachigen Staatslehre im Kontext internationaler institutionalisierter Kooperation* (Duncker & Humblot 1998)

Hobsbawm E and Ranger T (eds), *The Invention of Tradition* (Cambridge University Press 2000)

Hoffmeister F, 'Die europäische Menschenrechtskonvention als Grundrechtsverfassung und ihre Bedeutung in Deutschland' (2001) 40 *Der Staat* 349

——, 'Germany: Status of European Convention on Human Rights in Domestic Law' (2006) 4 *International Journal of Constitutional Law* 722

Hofmann R, 'The German Federal Constitutional Court and Public International Law: New Decisions, New Approaches Forum' (2004) 47 *German Yearbook of International Law* 9

Hooper HJ, Hunt M and Yowell P (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015)

Höpfner C, *Die systemkonforme Auslegung* (Mohr Siebeck 2020)

Hoppe C, 'Implementation of LaGrand and Avena in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights' (2007) 18 *European Journal of International Law* 317

Hostovsky Brandes T, 'International Law in Domestic Courts in an Era of Populism' (2019) 17 *International Journal of Constitutional Law* 576

Huber PM, *Recht der Europäischen Integration* (3rd edn, Nomos 2017)

Huertas-Cárdenas J, 'Monismo Moderado Colombiano: Examen a la Teoría Oficial de la Corte Constitucional Desde la Obra de Alfred Verdross' (2016) 65 *Vniversitas* 197

Hwang S-P, 'Trägt die (begrenzte) Völkerrechtsfreundlichkeit als Verfassungsprinzip zum Ausgleich zwischen internationaler Zusammenarbeit und nationaler Souveränität bei?' (2017) 55 *Archiv des Völkerrechts* 349

Hymas C, 'Back the Rwanda Bill or Risk the Sovereignty of Parliament, Say KCs' *The Telegraph* (10 December 2023) <<https://www.telegraph.co.uk/politics/2023/12/10/back-rwanda-bill-or-risk-the-sovereignty-of-parliament/>> accessed 6 January 2025

Iakovidis IV and Tzevelekos VP, 'Greece's Contribution to Public International Law' in Anne van Aaken and others (eds), *The Oxford Handbook of International Law in Europe* (Oxford University Press 2023)

Isiksel NT, 'Fundamental Rights in the EU after Kadi and Al Barakaat' (2010) 16 *European Law Journal* 551

Iturralde M, 'Access to Constitutional Justice in Colombia: Opportunities and Challenges for Social and Political Change' in Daniel Bonilla Maldonado (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press 2013)

Jackson R, *Sovereignty: The Evolution of an Idea* (Polity 2007)

Jackson V, *Constitutional Engagement in a Transnational Era* (Oxford University Press 2013)

Jacobsohn GJ, *Constitutional Identity* (Harvard University Press 2010)

Jacobsohn GJ, 'How to Think about the Reach of Constitutional Identity' (2023) 1 *Comparative Constitutional Studies* 1

Jahn J, 'Domestic Courts as Guarantors of International Climate Cooperation: Insights from the German Constitutional Court's Climate Decision' (2023) 21 *International Journal of Constitutional Law* 859

Janeba E, 'Regulatory Chill and the Effect of Investor State Dispute Settlements' (2019) 27 *Review of International Economics* 1172

Jaramillo LG, 'De la "constitucionalización" a la "convencionalización" del ordenamiento jurídico. La contribución del ius constitutionale commune' [2016] *Revista Derecho del Estado* 131

Jellinek G, *Die rechtliche Natur der Staatenverträge* (A Hölder 1880)

Jestaedt M and others, *Das entgrenzte Gericht: Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Suhrkamp Verlag 2011)

Jiménez WG, 'Papel de la jurisprudencia del tribunal de justicia de la comunidad andina, en decisiones judiciales de los países miembros' (2013) 11 *Revista Colombiana De Derecho Internacional* 87

Kahl HH, 'Respectful Consideration v. Uniformity - A Short Transatlantic Comparative Study How to Deal with Article 36 of the Vienna Convention on Consular Relations' (2007) 32 *DAJV Newsletter* 193

Kahl W and Weller M-P (eds), *Climate Change Litigation: A Handbook* (CHBeck; Hart; Nomos 2021)

Kaiser A-B, 'Streikrecht für Beamte – Folge einer Fehlrezeption?' (2017) 142 *Archiv des öffentlichen Rechts* 417

Kaiser H, 'Die Erfüllung der völkerrechtlichen Verträge des Bundes durch die Länder'

Kantorowicz E, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton University Press 2016)

Kassoti E and Idriz N (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum*, vol 1 (TMC Asser Press 2022)

Kavanagh A, 'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication' in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press 2008) <<https://www.cambridge.org/core/books/expounding-the-constitution/deference-or-defiance-the-limits-of-the-judicial-role-in-constitutional-adjudication/687BA9FA306DA3F5B5C433A26397E5BD>> accessed 23 January 2024

——, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009)

——, 'The Irish Constitution at 75 Years: Natural Law, Christian Values and the Ideal of Justice' (2012) 48 *Irish Jurist* 71

——, 'Unconstitutional Constitutional Amendments from Irish Free State to Irish Republic' in Eoin Carolan (ed), *The Constitution of Ireland: perspectives and prospects* (Bloomsbury Professional 2012)

——, 'What's so Weak about "Weak-Form Review"? The Case of the UK Human Rights Act 1998' (2015) 13 *International Journal of Constitutional Law* 1008

——, *The Collaborative Constitution* (Cambridge University Press 2023)

Kees A, 'Bricht Völkerrecht Landesrecht?' (2015) 54 *Der Staat* 63

Keitner CI, 'To Litigate a Pandemic: Cases in the United States Against China and the Chinese Communist Party and Foreign Sovereign Immunities' (2020) 19 *Chinese Journal of International Law* 229

Keitner CI, 'Sovereignty, Humanity, and Justice: Reflections on U.S. Law of Foreign Sovereign Immunity' in Régis Bismuth and others (eds), *Sovereign Immunity Under Pressure: Norms, Values and Interests* (Springer International Publishing 2022)

Kelemen RD and Pech L, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) 21 *Cambridge Yearbook of European Legal Studies* 59

Kelsen H, *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu einer reinen Rechtslehre* (JCB Mohr (P Siebeck) 1920)

——, *General Theory of Law and State* (Russell & Russell 1961)

Kennedy D, 'The Disciplines of International Law and Policy' (1999) 12 *Leiden Journal of International Law* 9

King J, 'Dialogue, Finality and Legality' in Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon (eds), *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge University Press 2019)

——, 'The Province of Delegated Legislation' in Elizabeth Fisher, Jeff King and Alison Young (eds), *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford University Press 2020)

——, ‘The House of Lords, Constitutional Propriety, and the Safety of Rwanda Bill’ (*UK Constitutional Law Association*, 26 January 2024)

Kingsbury B, Krisch N and Stewart RB, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15

Klabbers J, ‘International Constitutionalism’ in Roger Masterman and Robert Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019)

Klabbers J and Palombella G (eds), *The Challenge of Inter-Legality* (Cambridge University Press 2019)

Klatt M (ed), *Constitutionally Conforming Interpretation - Comparative Perspectives: Volume 1: National Reports* (Hart Publishing 2023)

Klein E, ‘Germany’ in Janneke Gerards and JWA Fleuren (eds), *Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case-law: a comparative analysis* (Intersentia 2014)

Kleinlein T, ‘Alfred Verdross as a Founding Father of International Constitutionalism?’ (2012) 4 *Goettingen Journal of International Law* 385

——, ‘International Law-Making: Domestic Channels to Express Consent to Be Bound’, *Research Handbook on International Law and Domestic Legal Systems* (Edward Elgar Publishing 2024)

Kline HF, *Colombia: Democracy Under Assault* (2nd edn, Routledge 2019)

Klooster JV’t and de Boer N, ‘The ECB, the Courts and the Issue of Democratic Legitimacy after *Weiss*’ (2020) 57 *Common Market Law Review* 1689

Klug F, ‘Judicial Deference under the Human Rights Act 1998’ [2003] *European Human Rights Law Review* 125

Knop, Daniel, *Volker- und Europarechtsfreundlichkeit als Verfassungsgrundsätze* (Mohr Siebeck 2014)

Kokott J, ‘Die Staatsrechtslehre und die Veränderung ihres Gegenstandes: Konsequenzen von Europäisierung und Internationalisierung’, *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer* (De Gruyter 2004)

Kokott J and Sobotta C, ‘The Kadi Case - Constitutional Core Values and International Law - Finding the Balance?’ (2012) 23 *European Journal of International Law* 1015

Kończal K and Moses AD (eds), *Patriotic History and the (Re)Nationalization of Memory* (Routledge 2023)

Koskenniemi M, ‘The Subjective Dangers of Projects of World Community’ in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012)

Kotzé LJ, ‘Neubauer et al. versus Germany: Planetary Climate Litigation for the Anthropocene?’ (2021) 22 *German Law Journal* 1423

Kovács K, ‘The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts’ (2017) 18 *German Law Journal* 1703

——, ‘Introduction’ in Kriszta Kovács (ed), *The Jurisprudence of Particularism: National Identity Claims in Central Europe* (Hart Publishing 2023)

Krasner SD, ‘Compromising Westphalia’ (1995) 20 *International Security* 115

Krieger H, ‘Die Herrschaft der Fremden — zur demokratietheoretischen Kritik des Völkerrechts’ (2008) 133 *Archiv des öffentlichen Rechts* 315

——, ‘Populist Governments and International Law’ (2019) 30 *European Journal of International Law* 971

Krisch N, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2010)

——, ‘The Decay of Consent: International Law in an Age of Global Public Goods’ (2014) 108 *American Journal of International Law* 1

Krohn S, ‘Die internationale Dimension der Staatszielbestimmung des Art. 20a GG’ [2021] *Zeitschrift für Umweltrecht* 603

Krumm M, ‘Legislativer Völkervertragsbruch im demokratischen Rechtsstaat’ (2013) 138 *Archiv des öffentlichen Rechts* 363

Krygier M, ‘Law as Tradition’ (1986) 5 *Law and Philosophy* 237

——, ‘The Traditionality of Statutes’ (1988) 1 *Ratio Juris* 20

——, ‘Too Much Information’ in Helge Dedek (ed), *A Cosmopolitan Jurisprudence* (Cambridge University Press 2021)

Kulick A, *Das konservative Gericht* (Mohr Siebeck 2021)

Kumm M, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’ (2004) 15 *European Journal of International Law* 907

——, ‘Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law’ (2006) 7 *German Law Journal* 341

——, ‘Sovereignty and the Right to Be Left Alone: Subsidiarity, Justice-Sensitive Externalities and the Proper Domain of the Consent Requirement in International Law’ (2016) 79 *Law and Contemporary Problems* 239

——, ‘Un-European Identity Claims: On the Relationship between Constituent Power, Constitutional Identity and Its Implications for Interpreting Article 4(2) TEU’ in Kriszta Kovács (ed), *The Jurisprudence of Particularism: National Identity Claims in Central Europe* (Hart Publishing 2023)

Kunz R, *Richter über internationale Gerichte?: Die Rolle innerstaatlicher Gerichte bei der Umsetzung der Entscheidungen von EGMR und IAGMR* (Springer Berlin Heidelberg 2020)

Landau D, 'The Promise of Aminimum Core Approach: The Colombian Model for Judicial Review of Austerity Measures' in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014)

——, 'Beyond Judicial Independence: The Construction of Judicial Power in Colombia' (Doctoral Thesis, Harvard University 2014)

——, 'Constitutional Backsliding: Colombia' in David S Law (ed), *Constitutionalism in Context* (Cambridge University Press 2022)

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

Lang A, *Die Verfassungsgerichtsbarkeit in der vernetzten Weltordnung: Rechtsprechungskoordination in rechtsordnungsübergreifenden Richternetzwerken*, vol 293 (Springer 2020)

Larkin PJJr, 'Suing China over COVID-19' (2020) 100 *Boston University Law Review Online* 91

Lavranos N, 'Revisiting Article 307 EC: The Untouchable Core of Fundamental European Constitutional Law Values and Principles' in Filippo Fontanelli, Giuseppe Martinico and Paolo Carrozza (eds), *Shaping Rule of Law Through Dialogue. International and Supranational Experiences* (Europa Law Publishing 2010)

——, 'Protecting European Law from International Law' (2010) 15 *European Foreign Affairs Review* 265

Laws J, *The Common Law Constitution* (Cambridge University Press 2014)

Lehner R, 'Die "Integrationsverfassungsbeschwerde" nach Art. 38 Abs. 1 S. 1 GG: Prozessuale und materiell-rechtliche Folgefragen zu einer objektiven Verfassungswahrungsbeschwerde' (2013) 52 *Der Staat* 535

Lewis N (ed), *Global Governance and the Quest for Justice - Volume I: International and Regional Institutions* (Hart 2006)

Leyland P, 'The Multifaceted Constitutional Dynamics of U.K. Devolution' (2011) 9 *International Journal of Constitutional Law* 251

——, 'The UK's Rwanda Asylum Policy and the Courts: Reflections on the Constitutional Consequences? Il Piano Britannico Sull'asilo in Rwanda e Le Corti: Riflessioni Sulle Conseguenze Costituzionali?' (2024) 64 *DPCE Online*

Liakopoulos D, 'State Immunity and Inter-State Negotiations on Korean Comfort Women' (2021) 19 *Indonesian Journal of International Law* 599

Liivoja R, 'The Scope of the Supremacy Clause of the United Nations Charter' (2008) 57 *International and Comparative Law Quarterly* 583

Lombaerde P de and Rodriguez LL, 'International Regionalism and National Constitutions: A Jurimetric Assessment' (2014) 24 *Journal of Transnational Law & Policy* 23

Londras F de and Dzehtsiarou K, 'Mission Impossible? Addressing Non-Execution through Infringement Proceedings in the European Court of Human Rights' (2017) 66 *International & Comparative Law Quarterly* 467

López Cortés OA and Medina Sánchez AM, 'Desarrollo Sostenible y Constitución Ecológica ¿Simple Ambigüedad o Una Coartada Oportuna?' in Tania Luna Blanco and Francisco Jose Chaux Donado (eds), *Tres décadas de constitución* (Ministerio de Justicia y del derecho 2022)

Lord Irvine of Lairg, *Human Rights, Constitutional Law and the Development of the English Legal System: Selected Essays* (Hart 2003)

——, 'A British Interpretation of Convention Rights' [2012] *Public Law* 237

Lord Sumption, 'The Limits of Law' in Nicholas William Barber, Paul Yowell and Richard Ekins (eds), *Lord Sumption and the Limits of the law* (Hart Publishing Ltd 2016)

Loughlin M, 'Representation' in Martin Loughlin (ed), *The Idea of Public Law* (Oxford University Press 2004)

——, 'Why Sovereignty?' in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013)

——, *Against Constitutionalism* (Harvard University Press 2022)

Loughlin M and Tierney S, 'The Shibboleth of Sovereignty' (2018) 81 *The Modern Law Review* 989

Lovric D, 'A Constitution Friendly to International Law: Germany and Its Volkerrechtsfreundlichkeit' (2006) 25 *Australian Year Book of International Law* 75

Lozada Gómez M, *La Corte Constitucional colombiana en el contexto de la fragmentación del derecho internacional: desafíos y posibles alternativas para la recomposición* (Universidad Externado de Colombia 2019)

Luciani M, 'Interpretazione conforme a costituzione', *Enciclopedia del diritto* (Giuffrè 2016) 391

Lustig D and Weiler JHH, 'Judicial Review in the Contemporary World—Retrospective and Prospective' (2018) 16 *International Journal of Constitutional Law* 315

Mac-Gregor EF, 'Conventionality Control the New Doctrine of the Inter-American Court of Human Rights' (2015) 109 *93*

Macpherson E, Ventura JT and Ospina FC, 'Constitutional Law, Ecosystems, and Indigenous Peoples in Colombia: Biocultural Rights and Legal Subjects' (2020) 9 *Transnational Environmental Law* 521

Madsen MR, *International Court Authority* (Oxford University Press 2018)

Main-Klingst L and Ott HE, 'Climate Litigation, Extraterritoriality of Human Rights and the German Constitution' <[https://brill.com/view/journals/cjel/7/2/article-p273\\_9.xml](https://brill.com/view/journals/cjel/7/2/article-p273_9.xml)> accessed 2 January 2025

Majewski K, 'Mirroring the Margin' [2022] *Public Law* 553

Mance J, 'International Law in the UK Supreme Court' (King's College, London, 13 February 2017) <<https://ukscy.org.uk/doi/10.19152/ukscy.714>> accessed 30 November 2024

Martinico G, 'National Judges and Supranational Law: Goals and Structure of the Research' in Giuseppe Martinico and Oreste Pollicino (eds), *The national judicial treatment of the ECHR and EU laws: a comparative constitutional perspective* (Europa Law Publishing 2010)

——, 'Is the European Convention Going to Be "Supreme"? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts' (2012) 23 *European Journal of International Law* 401

——, 'The Autonomy of EU Law: A Joint Celebration of Kadi II and Van Gend En Loos', *Kadi on Trial* (Routledge 2014)

——, 'The "Polemical" Spirit of European Constitutional Law: On the Importance of Conflicts in EU Law' (2015) 16 *German Law Journal* 1343

——, 'Building Supranational Identity: Legal Reasoning and Outcome in Kadi I and Opinion 2/13 of the Court of Justice' (2016) 8 *Italian Journal of Public Law* 235

——, 'Constitutionalism, Resistance, and Openness: Comparative Law Reflections on Constitutionalism in Postnational Governance' (2016) 35 *Yearbook of European Law* 318

——, 'Constituciones, Apertura y Derecho Comparado' (2019) 67 *Estudios de Deusto* 111

——, *Filtering Populist Claims to Fight Populism: The Italian Case in a Comparative Perspective* (Cambridge University Press 2021)

Martinico G and Pollicino O, *The Interaction between Europe's Legal Systems: Judicial Dialogue and the Creation of Supranational Laws* (Edward Elgar Publishing 2012)

——, 'Use and Abuse of a Promising Concept: What Has Happened to National Constitutional Identity?' (2020) 39 *Yearbook of European Law* 228

Masterman R, 'Deconstructing the Mirror Principle' in Roger Masterman and Ian Leigh (eds), *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (British Academy 2013)

——, 'The United Kingdom: From Strasbourg Surrogacy Towards a British Bill of Rights?' in Patricia Popelier, Sarah Lambrecht and Koen Lemmens (eds), *Criticism of the European Court of Human Rights* (Intersentia 2016)

Masterman R and Wheatle S, 'A Common Law Resurgence in Rights Protection?' [2015] *European Human Rights Law Review* 57

Matusiak-Frączzak M, 'Terrorism Exception to State Immunity: An Emerging Customary Norm of International Law?' in Régis Bismuth and others (eds), *Sovereign Immunity Under Pressure: Norms, Values and Interests* (Springer International Publishing 2022)

McCrudden C, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *European Journal of International Law* 655

McHarg A, 'Devolution in Scotland', *The Changing Constitution* (Oxford University Press)

McLachlan C, *Foreign Relations Law* (Cambridge University Press 2014)

——, 'The Foreign Relations Power in the Supreme Court' (2018) 134 *Law Quarterly Review* 380

——, 'The Assault on International Adjudication and the Limits of Withdrawal' (2019) 68 *International & Comparative Law Quarterly* 499

Mégret F, 'Civil Disobedience and International Law: Sketch for a Theoretical Argument' (2009) 46 *Canadian Yearbook of International Law* 143

Meinel F, 'Das Bundesverfassungsgericht in der Ära der grossen Koalition: zur Rechtsprechung seit dem Lissabon-Urteil' (2021) 60 *Der Staat* 43

Mendez M, 'Constitutional Review of Treaties: Lessons for Comparative Constitutional Design and Practice' (2017) 15 *International Journal of Constitutional Law* 84

Merryman JH, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3rd edn, Stanford University Press 2007)

Meyer T, 'Institutions and Expertise: The Role of Science in Climate Change Lawmaking' in Kevin R Gray, Richard Tarasofsky and Cinnamon P Carlarne (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016)

Michelman FI, 'The Interplay of Constitutional and Ordinary Jurisdiction', *Comparative Constitutional Law* (Edward Elgar Publishing 2011)

Michelsen D, 'State Civil Disobedience: A Republican Perspective' (2018) 14 *Journal of International Political Theory* 331

Millet F-X, 'Constitutional Identity in France: Vices and – Above All – Virtues' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019)

Mitsilegas V and Guild E, 'The UK and the ECHR After Brexit: The Challenge of Immigration Control' (2024) 5 *European Convention on Human Rights Law Review*, The 116

Modugno F, 'Fonti Del Diritto', *Enciclopedia Giuridica* (Treccani 1989)

——, 'Fonti Del Diritto (Gerarchia Delle)', *Enciclopedia del Diritto* (Giuffrè 1997) 561

Molano-Rojas A, 'La "Constitución Exterior" y La Constitucionalización de La Política Exterior Colombiana"' in Karen Nathalia Cerón Steevens, Walter Arévalo Ramírez and Ricardo Abello Galvis (eds), *De la Constitución de 1991 a la realidad: debates políticos, jurídicos, territoriales e internacionales* (Universidad del Rosario, Facultad de Ciencia Política y Gobierno, y de Relaciones Internacionales 2015)

Moreno DY, *Derecho Constitucional Colombiano* (15th edn, Legis Informacion Profesional 2017)

Morison J, "'A Sort of Farewell": Sovereignty, Transition, and Devolution in the United Kingdom' in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013)

Morrone A, *Fonti normative: concetti generali, problemi, casi* (Seconda edizione, Il Mulino 2022)

Morsink J, 'World War Two and the Universal Declaration' (1993) 15 *Human Rights Quarterly* 357

Mortati C, *La costituzione in senso materiale* (Giuffrè 1940)

Mortati C, *Lezioni sulle forme di governo* (Cedam 1973)

Mosler H, 'Supra-National Judicial Decisions and National Courts' (1981) 4 *Hastings International and Comparative Law Review* 425

Mückl S, 'Kooperation oder Konfrontation? — Das Verhältnis zwischen Bundesverfassungsgericht und europäischem Gerichtshof für Menschenrechte' (2005) 44 *Der Staat* 403

Muinzer TL, *Climate and Energy Governance for the UK Low Carbon Transition: The Climate Change Act 2008* (Springer International Publishing 2019)

Musil A, 'Treaty Override Als Dauerproblem Des Internationalen Steuerrechts' [2014] *Internationales Steuerrecht* 192

Nam S, 'Court Decisions in the Republic of Korea on Japan's Accountability for Sexual Slavery of the Comfort Women' (2022) 20 *Journal of International Criminal Justice* 459

Nash C, *Cuadernillo de Jurisprudencia de La Corte Interamericana de Derechos Humanos No. 7: Control de Convencionalidad* (Corte Interamericana de Derechos Humanos 2021)

Neal M, 'Respect for Human Dignity as "Substantive Basic Norm"' (2014) 10 *International Journal of Law in Context* 26

Neff SC, 'United Kingdom' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2011)

Nicol D, 'The Human Rights Act and the Politicians' (2004) 24 *Legal Studies* 451

Nigro R, 'Il fondo ristori italiano alla luce dei "rimedi alternativi" all'immunità degli Stati esteri dalla giurisdizione esecutiva' (2023) 106 *Rivista di diritto internazionale* 629

Nijman JE and Nollkaemper A (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007)

Nijman JE and Werner WG (eds), *Netherlands Yearbook of International Law 2018: Populism and International Law*, vol 49 (TMC Asser Press 2019)

Nishitani Y, 'Foreign Law in Domestic Courts: Challenges and Future Developments' in Franco Ferrari and Diego P Fernández Arroyo (eds), *Private International Law* (Edward Elgar Publishing 2019)

Nollkaemper A, *National Courts and the International Rule of Law* (Oxford University Press 2011)

——, 'Conversations among Courts: Domestic and International Adjudicators' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013)

——, 'The Duality of Direct Effect of International Law' (2014) 25 *European Journal of International Law* 105

Nollkaemper A, Shany Y and Tzanakopoulos A (eds), *The Engagement of Domestic Courts with International Law: Comparative Perspectives* (Oxford University Press 2024)

Nolte G and Philipp Aust H, 'European Exceptionalism?' (2013) 2 *Global Constitutionalism* 407

O'Donoghue A, 'Alfred Verdross and the Contemporary Constitutionalization Debate' (2012) 32 *Oxford Journal of Legal Studies* 799

Oellers-Frahm K, 'A Never-Ending Story: The International Court of Justice – The Italian Constitutional Court – Italian Tribunals and the Question of Immunity' (2016) 76 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 193

Öhlinger T, 'The Genesis of the Austrian Model of Constitutional Review of Legislation' (2003) 16 *Ratio Juris* 206

O’Keefe R, ‘State Immunity and Human Rights: Heads and Walls, Hearts and Minds’ (2011) 44 *Vanderbilt Journal of Transnational Law* 999

——, *International Criminal Law* (Oxford University Press 2015)

——, ‘Public International Law and English Law’ in Michael Wood (ed), *Halsbury’s Laws of England: International law and foreign relations* (LexisNexis 2018)

O’Keefe D, ‘God, the Natural Law and the 1937 Constitution’ in Eoin Carolan (ed), *The Constitution of Ireland: perspectives and prospects* (Bloomsbury Professional 2012)

Olaya MA, ‘El bloque de constitucionalidad en la jurisprudencia de la Corte Constitucional colombiana’ [2004] *Precedente* 79

Orjuela CG, ‘Competencias del Congreso de la República, en Materia de Tratados Internacionales: Procedimiento y Características de la Aprobación de Tratados Internacionales en el Ordenamiento Jurídico Colombiano’ (2005) 61 *Colombia Internacional* 148

Orozco OMA, ‘Perspectiva del Control de Constitucionalidad de los Tratados Públicos en Colombia: Una Visión Latinoamericana’ (2010) 2 *Revista Jurídica Mario Alario D’Filippo*

Osorio KVR, ‘La naturaleza en el ordenamiento jurídico colombiano: ¿del antropocentrismo al ecocentrismo?’ [2024] *Revista Derecho del Estado* 337

Osuna Patino Nestor I and others, ‘El Sistema de Justicia Constitucional En Colombia’ in Jesús María Casal H. and others (eds), *La jurisdicción constitucional en América Latina: un enfoque desde el ius constitutionale commune* (Instituto Max Planck: Universidad Externado de Colombia 2019)

Pabel K, ‘Germany: The Long Way of Integrating the Strasbourg Perspective into the Protection of Fundamental Rights’ in Patricia Popelier, Sarah Lambrecht and Lemmens, Koen (eds), *Criticism of the European Court of Human Rights* (Intersentia 2016)

Paladin L, *Le fonti de diritto italiano* (Ristampa, Il Mulino 2001)

Palombella G, ‘German War Crimes and the Rule of International Law’ (2016) 14 *Journal of International Criminal Justice* 607

——, ‘“Formats” of Law and Their Intertwining’ in Jan Klabbers and Gianluigi Palombella (eds), *The Challenge of Inter-Legality* (1st edn, Cambridge University Press 2019)

Palombino FM, ‘Compliance with International Judgments: Between Supremacy of International Law and National Fundamental Principles’ (2015) 75 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 503

—— (ed), *Duelling for Supremacy: International Law vs. National Fundamental Principles* (Cambridge University Press 2019)

Palomino SAC, 'Tendencia jurisprudencial y criterio de aplicabilidad del control difuso de convencionalidad: análisis del caso colombiano y su contravía a la corte IDH' (2023) 15 *Revista Jurídica Mario Alario D'Filippo* 508

Passero L, *Dionisio Anzillotti e la dottrina internazionalistica tra Otto e Novecento* (Giuffré 2010)

Paulus A, 'A Comparative Look at Domestic Enforcement of International Tribunal Judgments' (2009) 103 *Proceedings of the ASIL Annual Meeting* 42

——, 'Völkerrechtsfreundlichkeit und Völkerrechtsskepsis in der politischen Praxis der deutschen Exekutive und Legislative' in Thomas Giegerich (ed), *Der 'offene Verfassungsstaat' des Grundgesetzes nach 60 Jahren: Anspruch und Wirklichkeit einer großen Errungenschaft* (1st edn, Duncker & Humblot 2010)

——, 'Völkerrechtsfreundlichkeit in der Rechtsprechung des Bundesverfassungsgerichts' (2023) 83 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 869

Paulus A and Leiaë JR, 'Ch.XVI Miscellaneous Provisions, Article 103' in Bruno Simma and others (eds), *The Charter of the United Nations: a commentary* (Third edition, Oxford University Press 2012)

Paulus AL, 'The Emergence of the International Community and the Divide Between International and Domestic Law' in Janne E Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007)

Payandeh M, 'Völkerrechtsfreundlichkeit als Verfassungsprinzip' (2009) 57 *Jahrbuch des öffentlichen Rechts der Gegenwart. Neue Folge (JöR)* 465

——, 'Grenzen der Völkerrechtsfreundlichkeit' [2016] *Neue juristische Wochenschrift* 1279

——, 'Normative Unscharfen zwischen Offenheit und Introvertiertheit: Die Gorgulu-Entscheidung in retrospektive Rundfrage 70 Jahre BVerfG-Rechtsprechung' (2022) 77 *Zeitschrift für Öffentliches Recht (ZoR): Journal of Public Law* 711

——, 'Verfassungsrechtliche Grundlagen der Völkerrechtsfreundlichkeit in Deutschland' (2023) 83 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 609

Peel J, 'Precaution' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2021)

Peel J and Osofsky HM, 'Climate Change Litigation' (2020) 16 *Annual Review of Law and Social Science* 21

Pellegrini D, *I controlimiti al primato del diritto dell'Unione europea nel dialogo tra le Corti* (Firenze University Press 2021)

Pernice I, 'BVerfG, EGMR und die Rechtsgemeinschaft' [2004] Europäische Zeitschrift für Wirtschaftsrecht 705

Peters A, 'The Globalization of State Constitutions' in Janne E Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007)

——, 'Humanity as the  $\Lambda$  and  $\Omega$  of Sovereignty' (2009) 20 *European Journal of International Law* 513

——, 'Supremacy Lost: International Law Meets Domestic Constitutional Law' (2009) 3 *ICL Journal* 170

——, 'Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse' (2010) 65 *Zeitschrift für öffentliches Recht* 3

——, 'Let Not Triepel Triumph – How To Make the Best Out of Sentenza No. 238 of the Italian Constitutional Court for a Global Legal Order' [2014] *Verfassungsblog* <<https://verfassungsblog.de/let-not-triepel-triumph-make-best-sentenza-no-238-italian-constitutional-court-global-legal-order-2/>> accessed 13 January 2025

——, 'Völkerrechtsfreundlichkeit – mehr als ein Lippenbekenntnis' (2023) 83 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law* 587

Peters B, 'Germany's Dialogue with Strasbourg: Extrapolating the Bundesverfassungsgericht's Relationship with the European Court of Human Rights in the Preventive Detention Decision' (2012) 13 *German Law Journal* 757

Philpott D, 'Sovereignty: An Introduction and Brief History' (1995) 48 *Journal of International Affairs* 353

Pino G, 'Norme e Gerarchie Normative' [2008] *Analisi e Diritto* 263

——, 'La Gerarchia Delle Fonti Del Diritto. Costruzione, Decostruzione, Ricostruzione' [2011] *Ars interpretandi*

Pizzorusso A, *Delle fonti del diritto: art. 1-9* (2nd edn, Zanichelli - Soc ed del Foro italiano 2011)

Pizzorusso A, Ferreri S and Alpa G, *Le fonti del diritto italiano* (UTET 1998)

Polimeni S, *Controlimiti e identità costituzionale nazionale: contributo per una ricostruzione del dialogo tra le Corti* (Editoriale scientifica 2018)

Polzin M, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law' (2016) 14 *International Journal of Constitutional Law* 411

——, *Verfassungsidentität. Ein normatives Konzept des Grundgesetzes?* (Mohr Siebeck 2018)

——, ‘Identity and Eternity: The German Concept of Constitutional Identity’ in Kriszta Kovács (ed), *The Jurisprudence of Particularism: National Identity Claims in Central Europe* (Hart Publishing 2023)

——, ‘Reichweite und Grenzen der völkerrechtskonformen Interpretation des Grundgesetzes’ (2023) 83 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 741

Post R, ‘Introduction’ in Seyla Benhabib, *Another cosmopolitanism* (Oxford University Press 2006)

Preece JJ, *National Minorities and the European Nation-States System* (Oxford University Press Oxford 1998)

Preston BJ, ‘The Influence of the Paris Agreement on Climate Litigation: Legal Obligations and Norms (Part I)’ (2021) 33 *Journal of Environmental Law* 1

Preuss L, ‘International Law in the Constitutions of the Länder in the American Zone in Germany’ (1947) 41 *American Journal of International Law* 888

Prieto G, ‘The Colombian Constitutional Court Judgment C-252/19: A New Frontier for Reform in International Investment Law’ (*EJIL: Talk!*, 29 July 2019) <<https://www.ejiltalk.org/the-colombian-constitutional-court-judgment-c-252-19-a-new-frontier-for-reform-in-international-investment-law/>> accessed 9 January 2025

Proelß A, ‘Die verfassungsrechtliche Berücksichtigungspflicht im Lichte des respectful consideration-Erfordernisses des U.S. Supreme Court’ in Thomas Giegerich (ed), *Der ‘offene Verfassungsstaat’ des Grundgesetzes nach 60 Jahren: Anspruch und Wirklichkeit einer großen Errungenschaft* (Duncker & Humblot 2010)

Prötzel N, ‘Die EMRK und die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte in der Rechtsprechung des Bundesverfassungsgerichts: Neuere Entwicklungen: Aspekte der Einbeziehung und Einbeziehbarkeit’ in Sandra Lukosek and Alix Schlüter (eds), *Band 7 Linien der Rechtsprechung des Bundesverfassungsgerichts: erörtert von den wissenschaftlichen Mitarbeiterinnen und Mitarbeitern* (De Gruyter 2024)

Rainer G, ‘Westphalian System’, *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2006)

Rajamani L, ‘International Law and the Constitutional Schema’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016)

Rajamani L and Bodansky D, ‘The Paris Rulebook: Balancing International Prescriptiveness with National Discretion’ (2019) 68 *International & Comparative Law Quarterly* 1023

Ramelli A, ‘Sistema de fuentes del derecho internacional público y “bloque de constitucionalidad” en Colombia’ (2004) 1 *Cuestiones Constitucionales Revista Mexicana de Derecho Constitucional*

——, ‘El Control de Constitucionalidad de Los Tratados Internacionales En Colombia’ (2007) 20 *Revista Derecho del Estado* 19

Ramírez MFQ, ‘El control de convencionalidad y el sistema colombiano’ (2009) 12 *Revista Iberoamericana de Derecho Procesal Constitucional* 163

Rawlings R, ‘The Welsh Way/Y Ffordd Gymreig’, *The Changing Constitution* (Oxford University Press)

Rawlings R, Leyland P and Young A (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013)

Raz J, ‘The Rule of Law and Its Virtue’ in Id., *The authority of law: Essays on law and morality* (Oxford University Press 1979)

——, ‘Authority, Law and Morality’ (1985) 68 *The Monist* 295

Reich J, ‘Due Process and Sanctions Targeted against Individuals Pursuant to Resolution 1267 (1999)’ (2008) 33 *Yale Journal of International Law* 505

Reimann M, ‘A Human Rights Exception to Sovereign Immunity: Some Thoughts on *Princz v. Federal Republic of Germany*’ (1995) 16 *Michigan Journal of International Law* 403

Rensmann T, *Wertordnung und Verfassung* (Mohr Siebeck 2007)

——, ‘Die Genese des „offenen Verfassungsstaats“ 1948/49’ in Thomas Giegerich (ed), *Der ‘offene Verfassungsstaat’ des Grundgesetzes nach 60 Jahren: Anspruch und Wirklichkeit einer großen Errungenschaft* (Duncker & Humblot 2010)

——, ‘BVerfGE 111, 307 – Görgülü. Das „letzte Wort“ im Dialog zwischen Karlsruhe und Straßburg’ in Jörg Menzel and Ralf Müller-Terpitz (eds), *Verfassungsrechtsprechung: Ausgewählte Entscheidungen des Bundesverfassungsgerichts in Retrospektive* (3rd edn, Mohr Siebeck 2017)

——, ‘Article 46’ in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018)

——, ‘Germany. Domestic Courts as International Human Rights Courts: A German Perspective’ in Stefan Kadelbach, Thilo Rensmann and Eva Rieter (eds), *Judging International Human Rights: Courts of General Jurisdiction as Human Rights Courts* (Springer International Publishing 2019)

Repetto G, ‘Between the “No Longer” and the “Not Yet”. Shifting Sovereignties at the Age of Supranational Constitutionalism’ (2016) 7 *Comparative Law Review* 1

Ress G, ‘Verfassungsrechtliche Auswirkungen der Fortentwicklung völkerrechtlicher Verträge: Überlegungen zum Verhältnis des Grundgesetzes zur europäischen Wirtschaftsgemeinschaft und zur europäischen Menschenrechtskonvention’ in Walther Fürst, Roman Herzog and Dieter C Umbach (eds), *Festschrift für Wolfgang Zeidler* (de Gruyter 1987)

Riesenfeld SA and Abbott FM (eds), 'Symposium on Parliamentary Participation in the Making and Operation of Treaties' (1991) 67 *Chicago-Kent Law Review* 293

Rinella A, 'The Irish Constitutional Preamble in a Comparative Perspective' in Giuseppe Franco Ferrari and John O'Dowd (eds), *75 years of the Constitution of Ireland: an Irish Italian dialogue* (Clarus Press 2014)

Röben V, *Außenverfassungsrecht* (Mohr Siebeck 2007)

——, 'Die Genese des „offenen Verfassungsstaats“ – Rückblick auf 1919 und 1871 –' in Thomas Giegerich (ed), *Der 'offene Verfassungsstaat' des Grundgesetzes nach 60 Jahren: Anspruch und Wirklichkeit einer großen Errungenschaft* (Duncker & Humblot 2010)

Roberts A and others (eds), *Comparative International Law* (Oxford University Press 2018)

Roblot-Troizier A, 'Le Conseil constitutionnel et les sources du droit constitutionnel' (2018) 21 *Jus Politicum. Revue de droit politique* 129

Rodotà S, 'Ideologie e Tecniche Della Riforma Del Diritto Civile' (1967) 65 *Rivista del Diritto Commerciale* 83

Romeo G, 'A Material Understanding of Constitutional Changes: Revisiting "Constitutional Maintenance" Doctrines' in Marco Goldoni and Michael A Wilkinson (eds), *The Cambridge Handbook on the Material Constitution* (Cambridge University Press 2023)

Rosas A and Armati L, *EU Constitutional Law: An Introduction* (3rd edn, Hart Publishing 2018)

Rosenfeld GD, 'The Rise of Illiberal Memory' (2023) 16 *Memory Studies* 819

Rosenfeld M, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2009)

——, 'Constitutional Identity' in Michel Rosenfeld and András Sajó (eds), *The Oxford handbook of comparative constitutional law* (Oxford University Press 2012)

——, 'Deconstructing Constitutional Identity in Light of the Turn to Populism' in Ran Hirschl and Yaniv Roznai (eds), *Deciphering the Genome of Constitutionalism: The Foundations and Future of Constitutional Identity* (Cambridge University Press 2024)

Rossi P, 'Using International Law for Construing Domestic Law: A Study of Consistent Interpretation' (2020) 58 *Archiv des Völkerrechts* 279

Roughan N, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (Oxford University Press 2013)

Roznai Y, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017)

Rubinelli L, 'Costantino Mortati and the Idea of Material Constitution' (2019) 40 *History of Political Thought* 515

Rubinelli L, 'The Constitution in the Material Sense According to Costantino Mortati' in Marco Goldoni and Michael A Wilkinson (eds), *The Cambridge Handbook on the Material Constitution* (Cambridge University Press 2023)

Ruda JM, 'The Opinions of Judge Dionisio Anzilotti at the Permanent Court of International Justice' (1992) 3 *European Journal of International Law* 100

Rueda P, 'Legal Language and Social Change during Colombia's Economic Crisis' in Alexandra Huneeus, Javier Couso and Rachel Sieder (eds), *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge University Press 2010)

Rust A and Reimer E, 'Treaty Override Im Deutschen Internationalen Steuerrecht' [2005] *Internationales Steuerrecht* 843

Ruttloff M and Freihoff L, 'Intertemporale Freiheitssicherung oder doch besser „intertemporale Systemgerechtigkeit“? – auf Konturensuche' [2021] *Neue Zeitschrift für Verwaltungsrecht* 917

Sacco R, 'Dottrina (fonte del diritto)', *Digesto delle discipline privatistiche* (UTET 1991) 214

——, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)' (1991) 39 *The American Journal of Comparative Law* 1

——, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)' (1991) 39 *The American Journal of Comparative Law* 343

Sadurski W, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler' (2019) 11 *Hague Journal on the Rule of Law* 63

Safrin S, 'The Un-Exceptionalism of U.S. Exceptionalism' (2008) 41 *Vanderbilt Journal of Transnational Law* 1307

Saiger A-J, 'Domestic Courts and the Paris Agreement's Climate Goals: The Need for a Comparative Approach' (2020) 9 *Transnational Environmental Law* 37

Saldias O, 'Comparative Community Law: Latin American Scholarship on Regional Integration and the Peril of Legal Functionalism' (2008) 26 *UCLA Pacific Basin Law Journal* 51

Sales P, 'Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine' [2012] *Public Law* 253

——, 'The Developing Jurisprudence of the Supreme Court on Convention Rights' [2024] *Public Law* 444

- Sales P and Clement J, 'International Law in Domestic Courts: The Developing Framework' (2008) 124 *Law Quarterly Review* 388
- Saliba AT and Lima LC, 'The Law of State Immunity before the Brazilian Supreme Court: What Is at Stake with the "Changri-La" Case? *Cronicas*' (2021) 18 *Brazilian Journal of International Law* 53
- Sanchez WA, 'On (the Lack of) Latin American Supranationalism' (2017) 29 *Global Change, Peace & Security* 179
- Sands A, 'Regulatory Chill and Domestic Law: Mining in the Santurbán Páramo' (2023) 22 *World Trade Review* 55
- Sanger A and Young AL, 'Deference and Dualism Are Not Friends of The Earth' (2023) 82 *The Cambridge Law Journal* 195
- Sarmiento D, 'The EU's Constitutional Core' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivinia (eds), *National constitutional identity and European integration* (Intersentia 2013)
- Sathanapally A, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford University Press 2013)
- Sauer H, 'Die neue Schlagkraft der gemeineuropäischen Grundrechtsjudikatur' (2005) 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 35
- , *Staatsrecht III: auswärtige Gewalt, Bezüge des Grundgesetzes zu Völker- und Europarecht, offene Verfassungsstaatlichkeit* (5th edn, CH Beck 2018)
- , 'Principled Resistance to and Principled Compliance with ECtHR Judgments in Germany' in Marten Breuer (ed), *Principled Resistance to ECtHR Judgments - A New Paradigm?* (Springer Berlin Heidelberg 2019)
- Saul B, *Defining Terrorism in International Law* (Oxford University Press 2008)
- , 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism' (2011) 24 *Leiden Journal of International Law* 677
- Scalia A, 'The Rule of Law as a Law of Rules' (1989) 56 *University of Chicago Law Review* 1175
- Scarcello O, 'On the Role of Normative Hierarchies in Constitutional Reasoning: A Survey of Some Paradigmatic Cases' (2018) 31 *Ratio Juris* 346
- Schäfer M, *Treaty Overriding* (Mohr Siebeck 2020)
- Schestag L, 'Weimar International. Zur Entstehung und Bedeutung von Artikel 4 WRV' (2022) 70 *Jahrbuch des öffentlichen Rechts der Gegenwart. Neue Folge* 373
- Schmalenbach K, 'Article 53' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018)

Schmidt S, 'To Order the Minds of Scholars: The Discourse of the Peace of Westphalia in International Relations Literature' (2011) 55 *International Studies Quarterly* 601

Schneiderman D, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge University Press 2008)

——, 'Disabling Constitutional Capacity: Global Economic Law and Democratic Decline' in Mark A Graber, Sanford Levinson and Mark V Tushnet (eds), *Constitutional democracy in crisis* (Oxford University Press 2018)

——, *Constitutional Review and International Investment Law: Deference or Defiance?* (Oxford University Press 2024)

Scholtes J, *The Abuse of Constitutional Identity in the European Union* (Oxford University Press 2023)

Schönberger C, 'Lisbon in Karlsruhe: Maastricht's Epigones At Sea' (2009) 10 *German Law Journal* 1201

——, 'Der introvertierte Rechtsstaat als Krönung der Demokratie? — zur Entgrenzung von Art. 38 GG im Europaverfassungsrecht: Zu Dietrich Murswiek JZ 2010, 702' (2010) 65 *JuristenZeitung* 1160

Schönfeld KM, 'Rex, Lex et Judex: Montesquieu and La Bouche de La Loi Revisited' (2008) 4 *European Constitutional Law Review* 274

Schorkopf F, *Grundgesetz und Überstaatlichkeit: Konflikt und Harmonie in den auswärtigen Beziehungen Deutschlands* (Mohr Siebeck 2007)

——, 'Völkerrechtsfreundlichkeit und Völkerrechtsskepsis in der Rechtsprechung des Bundesverfassungsgerichts' in Thomas Giegerich (ed), *Der 'offene Verfassungsstaat' des Grundgesetzes nach 60 Jahren: Anspruch und Wirklichkeit einer großen Errungenschaft* (Duncker & Humblot 2010)

Schreuer CH, 'The Implementation of International Judicial Decisions by Domestic Courts' (1975) 24 *International and Comparative Law Quarterly* 153

Schriewer B, *Zur Theorie der internationalen Offenheit und der Völkerrechtsfreundlichkeit einer Rechtsordnung und ihrer Erprobung am Beispiel der EU-Rechtsordnung*. (Duncker & Humblot 2017)

Schulze-Fielitz H, 'Umweltschutz im Föderalismus - Europa, Bund und Länder' [2007] *Neue Zeitschrift für Verwaltungsrecht* 249

Schütze R, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press 2009)

Scott SD, 'Brexit and the Challenges of a "Post-Sovereign" Legal Landscape' in Elizabeth Fisher, Jeff King and Alison Young (eds), *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford University Press 2020)

Seiler C, *Der souveräne Verfassungsstaat zwischen demokratischer Rückbindung und überstaatlicher Einbindung* (Mohr Siebeck 2005)

Setzer J and Higham C, 'Global Trends in Climate Change Litigation: 2024 Snapshot' (The Grantham Research Institute on Climate Change and the Environment 2024)

Shany Y, *Regulating Jurisdictional Relations Between National and International Courts* (Oxford University Press 2007)

——, 'National Courts as International Actors: Jurisdictional Implications' [2009] *Federalismi.it*

——, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary' (2009) 20 *European Journal of International Law* 73

Shelton D (ed), *International Law and Domestic Legal Systems. Incorporation, Transformation, and Persuasion* (Oxford University Press 2011)

Shu-Perng H, 'Trägt die (begrenzte) Völkerrechtsfreundlichkeit als Verfassungsprinzip zum Ausgleich zwischen internationaler Zusammenarbeit und nationaler Souveränität bei? Zugleich Anmerkung zur Treaty Override-Entscheidung des BVerfG' (2017) 55 *Archiv des Völkerrechts* 349

Simma B, 'From Bilateralism to Community Interest in International Law (Volume 250)', *Collected Courses of the Hague Academy of International Law* (Brill 1994)

Simma B, 'The Contribution of Alfred Verdross to the Theory of International Law' (1995) 6 *European Journal of International Law* 33

Simma B and Hoppe C, 'From LaGrand and Avena to Medellín - A Rocky Road toward Implementation' (2005) 14 *Tulane Journal of International and Comparative Law* 7

Simmons BA, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009)

Sinclair I, Dickson SJ and Maciver G, 'National Treaty Law and Practice: United Kingdom' in Hollis Duncan, Merritt Blaklee and Benjamin Ederington (eds), *National Treaty Law and Practice* (Brill 2005)

Sindico F and others (eds), *Research Handbook on Climate Change Litigation* (Edward Elgar Publishing 2024)

Sindico F and Mbengue MM (eds), *Comparative Climate Change Litigation: Beyond the Usual Suspects* (Springer International Publishing 2021)

Sinha SP, 'Perspective of the Newly Independent States on the Binding Quality of International Law' (1965) 14 *The International and Comparative Law Quarterly* 121

Slaughter A-M, *A New World Order* (Princeton University Press 2009)

Slaughter A-M and Burke-White W, 'The Future of International Law Is Domestic (or, The European Way of Law)' in Janne E Nijman and André Nollkaemper (eds), *New*

*Perspectives on the Divide Between National and International Law* (Oxford University Press 2007)

Sommermann K-P, 'Völkerrechtlich garantierte Menschenrechte als Maßstab der Verfassungskonkretisierung — Die Menschenrechtsfreundlichkeit des Grundgesetzes —',

Spagnolo A, 'The Conclusion of Bilateral Agreements and Technical Arrangements for the Management of Migration Flows: An Overview of the Italian Practice' (2019) 28 *The Italian Yearbook of International Law Online* 209

Spieker LD, 'Framing and Managing Constitutional Identity Conflicts: How to Stabilize the *Modus Vivendi* between the Court of Justice and National Constitutional Courts' (2020) 57 *Common Market Law Review*

Stein E, 'International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?' (1994) 88 *American Journal of International Law* 427

Stolleis M, 'Judicial Review, Administrative Review, and Constitutional Review in the Weimar Republic' (2003) 16 *Ratio Juris* 266

Suteu S, *Eternity Clauses in Democratic Constitutionalism* (Oxford University Press 2021)

Swaine ET, 'International Foreign Relations Law Executive Authority in Entering and Exiting Treaties' in Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law: Bridges and Boundaries* (Cambridge University Press 2021)

Syed SG, 'Sovereign Immunity and Jus Cogens: Is There a Terrorism Exception for Conduct-Based Immunity' (2015) 49 *Columbia Journal of Law and Social Problems* 251

'Symposium: The Changing Landscape of British Constitutionalism' (2011) 9 *International Journal of Constitutional Law* 79

Tamayo-Álvarez R, 'Constitutionality of the Colombia-France Bilateral Investment Treaty' (2020) 114 *American Journal of International Law* 471

Tarello G, 'La Scuola Dell'esegesi e La Sua Diffusione in Italia', *Scritti per il XL della morte di P. E. Bensa* (Giuffré 1969)

——, 'Scuola Dell'Esegesi', *Novissimo digesto italiano* (UTET 1969) 819

Templeman, 'Treaty-Making and the British Parliament Europe' (1991) 67 *Chicago-Kent Law Review* 459

The American Law Institute, *Restatement of the Law Fourth. The Foreign Relations Law of the United States* (The American Law Institute Publisher 2017)

Tienhaara K, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7 *Transnational Environmental Law* 229

Tierney S, 'Reframing Sovereignty? Sub-State National Societies and Contemporary Challenges to the Nation-State' (2005) 54 *International and Comparative Law Quarterly* 161

Titi C, 'The Right to Regulate' in Makane Moïse Mbengue and Stefanie Schacherer (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (Springer International Publishing 2019)

Todorov T, *Hope and Memory: Lessons from the Twentieth Century* (Princeton University Press 2003)

Tomuschat C, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century General Course on Public International Law (Volume 281)', *Collected Courses of the Hague Academy of International Law* (Brill 1999)

——, 'The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court' (2010) 11 *German Law Journal* 513

——, '§226 staatsrechtliche Entscheidung für die internationale Offenheit' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol XI (CF Müller 2013)

Triepel H, *Völkerrecht und Landesrecht* (CL Hirschfeld 1899)

Troper M, 'Behind the Constitution? The Principle of Constitutional Identity in France' in András Sajó and Renáta Uitz (eds), *Constitutional Topography: Values and Constitutions* (Eleven International Publishing 2010)

Tucker A, 'The Rwanda Policy, Legal Fiction(s), and Parliament's Legislative Authority' (*UK Constitutional Law Association*, 22 November 2023)

Tuori K, *Ratio and Voluntas* (Routledge 2016)

——, 'Whose Voluntas, What Ratio? Law in the State Tradition' (2018) 16 *International Journal of Constitutional Law* 1164

Tushnet M, *Taking the Constitution Away from the Courts* (Princeton University Press 2000)

——, 'Alternative Forms of Judicial Review' (2003) 101 *Michigan Law Review* 2781

——, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2009)

——, 'How Do Constitutions Constitute Constitutional Identity?' (2010) 8 *International Journal of Constitutional Law* 671

——, ‘National Identity as a Constitutional Issue: The Case of the Preamble to the Irish Constitution of 1937’ in Eoin Carolan (ed), *The Constitution of Ireland: perspectives and prospects* (Bloomsbury Professional 2012)

——, ‘Weak-Form Review: An Introduction’ (2019) 17 *International Journal of Constitutional Law* 807

Tuzet G, Canale D and Sardo A, ‘Scenario Analysis in Karlsruhe: Exploring New Argumentative Steps of the Federal Constitutional Court’ (2024) 25 *German Law Journal* 707

Twining W, *Globalisation and Legal Scholarship* (Wolf Legal Publishers 2011)

Tzanakopoulos A, ‘Domestic Court Reactions to UN Security Council Sanctions’ in August Reinisch (ed), *Challenging Acts of International Organizations Before National Courts* (Oxford University Press 2010)

——, ‘The Solange Argument as a Justification for Disobeying the Security Council in the Kadi Judgments’, *Kadi on Trial* (Routledge 2014)

Uprimny Yepes R, ‘La fuerza vinculante de las decisiones de los organismos internacionales de derechos humanos en Colombia: un examen de la evolución de la jurisprudencia constitucional’ in Viviana Krsticevic, Liliana Tojo, and Center for Justice and International Law (eds), *Implementación de las decisiones del Sistema Interamericano de Derechos Humanos: jurisprudencia, normativa y experiencias nacionales* (CEJIL 2007)

——, *Bloque de Constitucionalidad, Derechos Humanos y Proceso Penal* (Consejo Superior de la Juricatura 2008)

——, ‘El bloque de constitucionalidad en Colombia. Un análisis jurisprudencial y un ensayo de sistematización doctrinal’ (2014) 3 *Ius Inkarrí* 115

Uprimny Yepes R, Ruano S and García GM, ‘The Impact of the United Nations Human Rights Treaties on the Domestic Level in Colombia’ in Christof Heyns, Frans Jacobus Viljoen and Rachel Murray (eds), *The Impact of the United Nations Human Rights Treaties on the Domestic Level: Twenty Years On* (2nd edn, Brill Nijhoff 2024)

Van De Heyning CJ, ‘The Natural “Home” of Fundamental Rights Adjudication: Constitutional Challenges to the European Court of Human Rights’ (2012) 31 *Yearbook of European Law* 128

van Leeuwen L and Leeuwen L van, *Klimawandel und Grundgesetz – Umfang und Grenzen eines Verfassungsrechtlichen Anspruchs auf Klimaschutz* (Nomos Verlagsgesellschaft mbH & Co KG 2023)

Verdier P-H and Versteeg M, ‘International Law in National Legal Systems: An Empirical Investigation’ (2015) 109 *American Journal of International Law* 514

——, ‘Separation of Powers, Treaty-Making, and Treaty Withdrawal: A Global Survey’ in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press 2019)

- Verdross A, *Die Verfassung der Völkerrechtsgemeinschaft* (Springer 1926)
- Villiger ME, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009)
- Viñas MLH and Leiva JIN, ‘Conventionality Control: An Expression of the Basic Elements of the Judicial Function’ in Armin von Bogdandy and others (eds), *The Impact of the Inter-American Human Rights System: Transformations on the Ground* (Oxford University Press 2024)
- Vogel K, *Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit: ein Diskussionsbeitrag zu einer Frage der Staatstheorie sowie des geltenden deutschen Staatsrechts* (Mohr 1964)
- , ‘Völkerrechtliche Verträge und innerstaatliche Gesetzgebung. Eine neue Entscheidung des BVerfG hat Bedeutung auch für die Beurteilung des Treaty Override’ [2005] *Internationales Steuerrecht* 29
- Voigt C, ‘The Paris Agreement: What Is the Standard of Conduct for Parties?’ (2016) 26 *Questions of International Law* 17
- , ‘The Power of the Paris Agreement in International Climate Litigation’ (2023) 32 *Review of European, Comparative & International Environmental Law* 237
- von Bogdandy A, ‘Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law’ (2008) 6 *International Journal of Constitutional Law* 397
- , ‘Ius Constitutionale Commune En América Latina: Observations on Transformative Constitutionalism’ in Armin von Bogdandy and others (eds), *Transformative constitutionalism in Latin America: the emergence of a new ius commune* (Oxford University Press 2017)
- (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford university press 2017)
- Von Bogdandy A and Urueña R, ‘International Transformative Constitutionalism in Latin America’ (2020) 114 *American Journal of International Law* 403
- von Bogdandy A and Venzke I (eds), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (Springer 2012)
- Voßkuhle A, ‘Rechtspluralismus als Herausforderung’ (2019) 79 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 481
- Voßkuhle A, ‘Umweltschutz und Grundgesetz’ [2013] *Neue Zeitschrift für Verwaltungsrecht* 1
- Wade HWR, ‘The Basis of Legal Sovereignty’ (1955) 13 *The Cambridge Law Journal* 172

Wahl R, 'Der offene Staat und seine Rechtsgrundlagen' [2003] *Juristische Schulung* 1145

Waldron J, 'The Core of the Case against Judicial Review' (2006) 115 *The Yale Law Journal* 1346

Walker N, 'The Idea of Constitutional Pluralism' (2002) 65 *The Modern Law Review* 317

——, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders' (2008) 6 *International Journal of Constitutional Law* 373

Walker N, 'Constitutionalism and Pluralism in Global Context' in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012)

Walker N, 'Sovereignty Frames and Sovereignty Claims' in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013)

——, *Intimations of Global Law*: (Cambridge University Press 2014)

——, 'When Sovereigns Stir' in Bas Leijssenaar and Neil Walker (eds), *Sovereignty in Action* (Cambridge University Press 2019)

Walter C, 'Die europäische Menschenrechtskonvention als Konstitutionalisierungsprozeß' (1999) 59 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 961

Waters MA, 'Using Human Rights Treaties to Resolve Ambiguity: The Advent of a Rights-Conscious Charming Betsy Canon' (2007) 38 *Victoria University of Wellington Law Review* 237

Wegener BW, 'Menschenrecht auf Klimaschutz? Grenzen grundrechtsgestützter Klimaklagen gegen Staat und Private' [2022] *Neue juristische Wochenschrift* 425

Wegener L, 'Can the Paris Agreement Help Climate Change Litigation and Vice Versa?' (2020) 9 *Transnational Environmental Law* 17

Weiler JHH, 'Federalism Without Constitutionalism: Europe's Sonderweg' in Kalypso Nicolaidis and Robert Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press 2001)

Weiler JHH, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 547

Wendel M, *Permeabilität im europäischen Verfassungsrecht verfassungsrechtliche Integrationsnormen auf Staats- und Unionsebene im Vergleich* (Mohr Siebeck 2011)

Wendel M, 'Comparative Reasoning and the Making of a Common Constitutional Law: EU-Related Decisions of National Constitutional Courts in a Transnational Perspective' (2013) 11 *International Journal of Constitutional Law* 981

Wendel M, 'The Two-Faced Guardian – or How One Half of the German Federal Constitutional Court Became a European Fundamental Rights Court' (2020) 57 *Common Market Law Review* 1383

Wenzel N, 'Under the Watchful Eyes of the Federal Constitutional Court: Compliance in Germany' in Rainer Grote, Mariela Morales Antoniazzi and Davide Paris (eds), *Research Handbook on Compliance in International Human Rights Law* (2021)

Wesche P, 'Rights of Nature in Practice: A Case Study on the Impacts of the Colombian Atrato River Decision' (2021) 33 *Journal of Environmental Law* 531

Wessels W, *Die Öffnung des Staates* (Springer Fachmedien Wiesbaden 2000)

Wet E de, 'Human Rights Considerations and the Enforcement of Targeted Sanctions in Europe: The Emergence of Core Standards of Judicial Protection' in Bardo Fassbender (ed), *Securing Human Rights?: Achievements and Challenges of the UN Security Council* (Oxford University Press 2011)

Wildhaber L, *Treaty-Making Power and Constitution: An International and Comparative Study* (Helbing & Lichtenhahn 1971)

———, *Treaty-Making Power and Constitution. An International and Comparative Study* (Helbing & Lichtenhahn 1971)

———, 'The European Convention on Human Rights and International Law' (2007) 56 *International and Comparative Law Quarterly* 217

Wolff D, *Der Einzelne in der offenen Staatlichkeit: Grundgesetzlicher Grundrechtsschutz in der zwischenstaatlichen Kooperation* (Mohr Siebeck 2020)

Woolaver H, 'From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal' (2019) 30 *European Journal of International Law* 73

Wyrzykowski M and Ziółkowski M, 'Illiberal Constitutionalism and the Judiciary', *Routledge Handbook of Illiberalism* (Routledge 2021)

Yoo JC, 'Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution' (1999) 99 *Columbia Law Review* 2218

Young AL, 'Hunting Sovereignty: Jackson v Her Majesty's Attorney-General' [2006] *Public Law* 187

Young AL, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing 2009)

Young AL, 'Parliamentary Sovereignty Re-Defined' in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013)

Young AL, *Democratic Dialogue and the Constitution* (Oxford University Press 2017)

Zagrebelsky G, *Il diritto mite: legge, diritti, giustizia* (Einaudi 1992)

Zander M, *The Law-Making Process* (Bloomsbury Publishing 2015)

Zimmermann A, 'Rezeption völkerrechtlicher Begriffe durch das Grundgesetz' (2007) 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 297

Zolo D, 'Hans Kelsen: International Peace through International Law' (1998) 9 *European Journal of International Law* 306

Zolo D, 'Teoria e critica dello Stato di diritto' in Pietro Costa and Danilo Zolo (eds), *Lo stato di diritto: storia, teoria, critica* (Feltrinelli 2002)