The Role of Domestic Courts in the Case Law of the International Court of Justice

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Abstract

Recent legal scholarship has argued that the traditional hierarchical relationship between international courts and domestic courts has been replaced by a relationship characterized by such features as co-operation, communication and dialogue. This article examines to what extent the practice of the International Court of Justice supports that development. It concludes that the while the case law of the International Court of Justice remains largely rooted in the traditional perspective, in which decisions of domestic courts are just facts, in recent cases we can see some evidence for a more complementary relationship.

I. Introduction

This article explores the role of (decisions of) domestic courts in the case law of the International Court of Justice (ICJ). It takes as its point of departure that in the dominant perspective, the ICJ and domestic courts are worlds apart: they function in different legal systems and in different legal and political contexts.1 This traditional perspective is under pressure, now that domestic courts increasingly are asked to examine the question of international law. This is mainly a consequence of the escalating degree to which international law deals with matters that are (also) regulated by domestic law,2 as well as the allocation of international rights to individuals, who naturally tend to bring their claims before

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1 See, e.g. G. Fitzmaurice, The General Principles of International Law Considered from the Standpoint of the Rule of Law, 92 RCDI (1958), 1, 97.

domestic courts. These developments have led to a burgeoning literature that holds that we have entered an era of judicial co-operation, communication and dialogue between courts of different States and between domestic and international courts. If these propositions are true, they indeed would be a radical departure from the traditional perspective on the position of domestic courts in the international legal order. The question, then, is—and it is the objective of this article to examine this question—whether this development also is evidenced by the way in which the ICJ has considered decisions of domestic courts. Have we seen, during the 60 years for which the Court has been active, a change in its attitude towards domestic courts?

This question is not an abstract problem of "the relationship" between separate legal phenomena. The role that the ICJ accords to (decisions of) domestic courts is of fundamental jurisprudential and practical importance. It touches upon such issues as the autonomy of international and domestic spheres, and the possibility that courts exercise meaningful jurisdiction over persons, acts and events that straddle into different legal systems. It also allows us to examine whether the ICJ has redefined its position towards domestic courts at a time at which the boundaries between international law and domestic law are less sharply defined than before.

This article discusses two ways in which decisions of domestic courts can be relevant for the ICJ: their relevance for the development of international law (section II) and for the settlement of particular disputes (section III). Section IV contains some conclusions. The approach of the article is an empirical one. It does not seek to engage in the policy debates on the wisdom, or lack thereof, of judicial dialogue across legal systems, but rather seeks to determine what it is that occurs in practice. The main argument that runs through the article, and that is highlighted in the conclusion, is that the potential of communication between international courts and domestic courts that is visible in other


See for the relationship between the direct obligation and authorization of individuals, on the one hand, and the relationship between domestic and international law, on the other, H. Kelsen, Law and Peace in International Relations: the Oliver Wendell Holmes Lectures, 1940–41 (1942), 96. See also P. Allott, State Responsibility and the Unmaking of International Law, 29 Harvard ILJ (1988), 14.


This is the main focal point of much of the recent US literature on the relationship between the ICJ and domestic courts; see, e.g. Julian Ku, International Delegations and the New World Court Order, 81 Washington LR (2006), 1.

international courts and that has been highlighted in doctrine is only to a very limited extent visible in the ICJ. Due to the types of cases that have been submitted to the Court, the position adopted by the Court itself, as well as the continued dominant role of sovereignty, the ICJ does not provide the best examples of a possible trend towards judicial dialogue rather than hierarchical confrontation. Nonetheless, some recent cases show cracks in the traditional dichotomy between the ICJ and domestic courts and allow us to also conclude that the ICJ is not immune from the pressures of internationalization and relaxations of the boundaries between the international and the domestic spheres.

II. The development of international law

The first area in which we can examine a possible change in the relationship between the ICJ and domestic courts is the development of international law. In the traditional paradigm, the role of domestic courts in the development of international law is limited. The status of decisions of domestic courts as facts on the one hand and the structural differences between the domestic and the international legal order on the other oppose a substantial impact of domestic case law on the international scene. The question to be examined is to what extent the processes of internationalization of domestic case law and, more generally, the increasing interaction between domestic and international legal orders have caused a change in this situation.

II.A. Customary international law

The primary contribution of domestic courts to the development of international law probably is in their role as organs of States that are relevant in the formation of customary international law. This is in line with the status of national judicial acts as "facts which express the will and constitute the activities of States." Large parts of customary law, particularly in the field of jurisdiction and immunities, have been precisely developed in the practice of national courts. The Permanent Court of International Justice (PCIJ) expressly considered the contribution of national case law to customary law on jurisdiction in the Lotus case.

9 Jennings, Watts (eds), Oppenheim’s International Law, 9th edn (1992), 41; IIA, Statement of Principles Applicable to the Formation of General Customary International Law, principle 9, reproduced in IIA, Report of the Sixty-Ninth Conference (2000). Older ideas to the effect that State practice consists only of the practice of those organs capable of entering into binding relations on behalf of the State (related the view that that customary law was tacit treaty law) now are generally rejected. The same holds for the view that municipal court cases were only evidence of custom, not a force creating custom.
10 Certain German Interests in Polish Upper Silesia (Germany v. Poland), (Merits) (1926) PCIJ, ser. A No.7, 19: "From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures."
It made clear that, as other forms of practice, domestic case law will need to conform to the normal requirements for them to count towards the formation of customary law. Since judgments of municipal courts pertaining to the alleged rule of international law regarding the exclusive competence of a flag State over its ships were conflicting and the rationales behind them unclear, the Court could not find in the national case law an indication of the existence of a rule of international law contended for by the French government. More recently, the Court referred to domestic judgments as State practice in determining customary law on immunities in the Arrest Warrant case. The Court noted:

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

On the whole, however, such references are exceptional. There is little explicit discussion of decisions of domestic courts as evidence of customary international law. The Court rarely engages in an extensive analysis of State practice, let alone extending that to the practice of domestic courts. More importantly for our purposes, there is no evidence that an increasing involvement of domestic courts with matters relevant to international law leads to an increasing role of domestic decisions in the determination of customary law by the Court. This area appears rather static—perhaps more indicative of propositions on the declining role of customary international law or the changing methods of determining customary law than of a changing role of domestic courts.

II.B. Other influences on the determination and development of international law

In addition to their role in the formation of customary international law, decisions of domestic courts may fulfil several other roles in the determination and development of international law. They can be elements in the formation and identification of general principles of law. As subsidiary sources, they can be relevant in the determination of...
international law. The ICJ also can refer to (decisions of) domestic courts as analogies in their approach to particular legal issues.

The traditional position here is that the possibilities for the Court to derive lessons from what domestic court have or have not done are limited by structural differences in the context within which the Court, with respect to domestic courts, functions. Using a decision of a domestic court in any of above ways requires that it is isolated from the domestic context in which it was originally rendered and transplanted to the vastly different legal, institutional and political context of the Court. Though, when the PCIJ was set up, at least some had in mind a model of domestic superior courts, neither the Stature of the PCIJ nor that of the ICJ provided for the full judicial powers normally associated with a court of superior jurisdiction. Beyond the straightforward fact that both the ICJ and domestic courts are courts and exercise judicial functions, thus, lies a world of difference. The elements of this difference are well known: the absence of compulsory dispute settlement by the ICJ, the overriding need in the international field for proof of consent to submit to the jurisdiction of any tribunal, the lack of jurisdictional primacy over other settlement mechanisms and the lack of enforcement powers in respect of judgments.

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

... to overestimate the relevance of private law analogies is to overlook significant differences between the legal framework of national societies and that of the

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17 As the Court has recalled, “The Permanent Court, set up in the aftermath of the most devastating conflict the world had seen, embodied the aspirations of a war-torn generation anxious to put behind them the horrors of international lawlessness and to enthrone international law. They sought to achieve this through a Court operating internationally on the model of the superior courts which ensured the rule of law at a domestic level”, Genocide Case (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Further requests for the indication of provisional measures, ICJR (1993), 325, 387.
20 Kal Raustiala, Form And Substance In International Agreements, 99 AJIL (2005), 581, 606.
international community, as well as differences between the jurisdictional basis and powers of the Court and those of national courts; “lock, stock and barrel” borrowings would of course be wrong. . .

More often than not, these differences have induced the Court, or individual judges, to decline to follow approaches adopted by domestic courts. The Court noted in *Certain Phosphate Lands in Nauru* that:

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

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

It appears that the Court is now attempting to render an interlocutory judgment—which is not unusual in domestic legal systems—for the first time in the history of this Court and its predecessor. In my view, the application of this concept of domestic law to the jurisprudence of the International Court of Justice is most inappropriate. In a municipal legal system there is generally no problem of the court’s jurisdiction and it is competent to hand down an interlocutory judgment since its jurisdiction has been established without question. . . . On the other hand, the present Court is now confronted by a question as to whether or not it has the jurisdiction to entertain the Application of Qatar. Without having disposed of this jurisdictional issue, the Court cannot hand down an interlocutory judgment.

In the Advisory Opinion in *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the UN Charter)*, Judge Morelli contrasted the invalidity of domestic administrative acts with the invalidity of acts of the United Nations, and concluded that the Court should “put a very

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24 See also Right of Passage over Indian Territory (Portugal v. India), Preliminary Objections, Judgment (diss. op. Chagla) ICJR (1957), 49–50 (stating that “it would be extremely unsafe to draw an analogy between the rights of an owner and the obligations of States under international law”).

25 *Certain Phosphate Lands in Nauru*, above n.19, 260, para.53.

strict construction on the rules by which the conditions for the validity of acts of the Organization are determined”. He said:

If, ignoring the difference between the nature of the invalidity of domestic administrative acts (voidability) and the nature of the invalidity of acts of the United Nations (absolute nullity), the same extension were given to the conditions for the validity of both these classes of act, very serious consequences would result for the certainty of the legal situations arising from the acts of the Organization. The effectiveness of such acts would be laid open to perpetual uncertainty, because of the lack in the case of acts of the Organization of the means by which the need for certainty is satisfied in connection with administrative acts under domestic law.27

Judge Weeramantry referred in his dissenting opinion in the East Timor case to the difference between domestic systems, in which if a court declines jurisdiction, commonly some other court will be found, and the international system, in which a decline in jurisdiction normally is the end of the matter, to argue for a liberal approach of jurisdictional rules.28

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

... since specific legislative action with direct binding effect is not at present possible in the international legal field, judicial pronouncements of one kind or another constitute the principal method by which the law can find some concrete measure of clarification and development. I agree with the late Judge Sir Hersch Lauterpacht ... that it is incumbent on international tribunals to bear in mind this consideration, which places them in a different position from domestic tribunals as regards dealing with—or at least commenting on—points that lie outside the strict ratio decidendi of the case.29

Finally, in the Oil Platforms case, Judge Owada noted in his Separate Opinion that since, in international law, the procedures and rules on evidence seem to be much less developed and the task of the Court for fact-finding much more demanding than in the case of national courts, the Court should have engaged in a “much more in-depth examination of the problem of ascertaining the facts of the case, if necessary proprio motu”.30

28 East Timor (Portugal v. Australia), Judgment (sep. op. Weeramantry), ICJR (1995), 90, 160 (noting that “In the international judicial system, an applicant seeking relief from this Court has, in general, nowhere else to turn if the Court refuses to hear it, unlike in a domestic jurisdiction where, despite a refusal by one tribunal, there may well be other tribunals or authorities to whom the petitioner may resort”). Judge Weeramantry referred to Gerald Fitzmaurice, 2 The Law and Procedure of the International Court of Justice (1986), 438 (noting that in the international field, issues of jurisdiction “assume a far greater, and usually a fundamental importance”).
Despite the many and obvious differences between the ICJ and domestic courts, in some respects, a court is a court, and one court may draw lessons from what other courts can or cannot do. In the recent commentary on the ICJ Statute, it is, for instance, observed that the question of whether the proper function of the judges of the Court is to try to do what they see as "justice" between the parties or whether they should try to act as an umpire between the performance of each team of counsel arises similarly for the Court and for domestic courts. The same is true for the question of the limits to the discretionary powers of the Court. Apparently, looking at how domestic courts deal with such issues is helpful for understanding the way in which the Court deals, or should deal, with them.

It is to be recalled that while Judge McNair warned against importing principles from private law "lock, stock and barrel" into international law, he did recognize that domestic principles may show a course to follow: "... the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles." In the case at hand, he went on to derive from the domestic concept of trust lessons for the mandate system. There is indeed broad consensus that while automatic transplantation is to be rejected, domestic principles can be made applicable in the international context through a process of abstraction, generalization and, more generally, adjustment.

The case law of the Court shows several examples in which the Court, or individual judges, followed examples of domestic case law or referred to them as background arguments. In the Effect of Awards Advisory Opinion, the Court said:

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

Judge Alvarez noted in his dissenting opinion in the Advisory Opinion on the Competence of the General Assembly for the Admission of a State to the United Nations that "Because of the progressive tendencies of international life", it is necessary today to interpret treaties, as

33 Above n. 22, 148. See also Shahabuddeen, above n. 21, 99–100.
34 Above n. 22, 149.
well as laws, in a different manner from what was customary when international life showed few changes. One of the considerations that supported that assertion was that:

... national courts, in their interpretation of private law, seek to adapt it to the exigencies of contemporary life, with the result that they have modified the law, sometimes swiftly and profoundly, even in countries where law is codified to such an extent that it is necessary today to take into consideration not only legal texts, but also case law. It is the same, a fortiori, in the interpretation of international matter, because international life is much more dynamic than national life.37

While in the above cases, the references to domestic courts seem to escape the formal methods of law-making,38 in some cases, the impact of domestic case law on the case law of the Court was considered in terms of general principles.39 In their separate opinions in, respectively, Certain Phosphate Lands in Nauru and the Oil Platforms case, Judges Shahabuddcen and Simma noted that domestic case law on the principle of joint and several liability could be used to infer a general principle of law.40 The fact that in international courts, a right to contribution may be more difficult to achieve due to the lack of access to the courts did not mean that the principle as such cannot be transplanted from domestic case law to the international level. This illustrates the need and possibility of adaptation of principles to a different legal system. Judge Shahabuddeen said:

The fact that recourse to the Court may not be open to a party seeking contribution is not decisive... The claim to contribution may be pursued in other ways. ... In international law a right may well exist even in the absence of any juridical method of enforcing it... Thus, whether there is a right to contribution does not necessarily depend on whether there exists a juridical method of enforcing contribution.41

There thus exists a limited practice in the case law of the Court (but, in particular, in individual opinions) of references by way of analogies, general principles or otherwise, to domestic courts. However, the overriding conclusion for our purposes is that there is little evidence of a qualitative or quantitative shift in this practice. It is true that in the past, the prevailing positivism and the dominant role of sovereignty may have impeded use of domestic analogies.42 However, the rigid opposition against reference to such domestic principles was abandoned long ago, as illustrated by references in the older case law of the ICJ and

37 ICJR (1950), 4, 15-16.
38 De Wet, above n.23, 89.
39 See also Appeal Relating to the Jurisdiction of the Icao Council (sep. op. Dillard), above n.18, 109-10 (discussing municipal law analogy).
40 Certain Phosphate Lands in Nauru (sep. op. Shahabuddcen), above n.19, 287. In the Oil Platforms case, Judge Simma similarly found it possible to transplant the domestic notion of joint and several liability to the international sphere; Oil Platforms case, above n.30 (sep. op. Simma), ICJR (2003), 161, 324.
41 Certain Phosphate Lands in Nauru (sep. op. Shahabuddcen), above n.19, 289.
42 Hersch Lauterpacht, Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration) (1927), ix.
indeed the PCIJ. There is little evidence that at the beginning of the twenty-first century, which saw the spur in attention for internationalization of domestic case law and increasing transactions across legal systems, there is an increasing resort to domestic concepts or domestic case law as inspiration for the development of international law, certainly not in the judgments of the Court itself. One can speculate why this would be so. One obvious factor is that despite the changes in the position of domestic courts and the case law of many States, the structural differences between domestic law and international law have not really disappeared. It also may be due to the nature of the cases submitted to the Court, to the relatively established nature of the legal issues pertaining to such cases, to the pleadings of the parties, the position of the Court or simply because of the fact that the established principles for determining or developing the law are adequate. The fact is that this area of the case law is relatively stable and does not show effects of a trend of internationalization and dialogue.

II.C. Assessment

Apart from sparse references to elements of custom, analogies and general principles, on the whole, it remains quite rare for the Court to refer to domestic case law in its determination of the state of international law. There is a world of a difference between the Court and, for instance, the European Court on Human Rights, which widely makes use of a comparative method, including consultation of judgments of domestic courts, to settle particular legal questions. We also see little evidence of the process of judicial communication that has been highlighted, for instance, by Slaughter. This does not necessarily mean that the court may not consult domestic cases; but it is difficult to find in the case law of the Court evidence that domestic cases are a meaningful force in the Court's approach to certain questions.

It is a plausible proposition that the combination of structural differences and the status of domestic courts' judgments as facts that belong to a particular domestic legal order continue to explain that the Court does not lightly use them to consider legal issues in a dispute involving other States. Jessup noted that "The Court, qua Court, naturally hesitates to cite individuals or national courts lest it appear to have some bias or predilection". Similarly, Charles De Visscher wrote that "The rarity of such references is a matter of prudence; the Court is careful not to introduce into its decisions elements whose heterogeneous character might escape its vigilance". For all the talk about interactions, communication and

43 This is often cited as a reason why the ICTY would, in the field of criminal law, make reference to domestic case law much more often.


45 Above n.4; ibid., A Global Community of Courts, 44 Harvard ILJ (2003), 191.


dialogue between courts, both domestic and international, this characterization of the ICJ has not really changed.

III. Settlement of disputes

An entirely different set of questions that, in many respects, has spurred a much richer debate concerns the role and weight of decisions of domestic courts in the settlement of individual disputes that are submitted to the Court. The traditional paradigm on this point is, again, that due to the status of decisions of domestic courts as facts, there is no real interaction between the Court and domestic courts. The question, then, is whether, in recent practice, we see signs of a more complementary relationship between the ICJ and domestic courts in the settlement of international disputes.

III.A. Judgments of domestic courts as facts

The dominant paradigm regarding the relevance of domestic case law for the Court is based on a strict divide between international and domestic law and between international and domestic courts. From the perspective of the international legal order, decisions of domestic courts are facts, not law. The ICJ is a court of the international legal order; established by a treaty and empowered to apply international law. Indeed, its role as an international court—“an organ of international law”—is in part defined by the fact that it applies international rather than domestic law. In 2006, this paradigm remains valid in many respects. A Chamber of Court said in the Frontier Dispute case that the fact that the Chamber had to refer to domestic law did not mean that there would exist a “continuum juris, a legal relay between such law and international law”.

One of the consequences of the notion of domestic judgments as facts is that such judgments can be defining parts of the cause of a dispute that the Court then will attempt to solve by applying international law. In that respect, there is no difference between a decision of a domestic court, a legislative or executive act, or some other “fact” that causes a dispute.

There is ample evidence in the case law of the Court that decisions of domestic courts can be (part of) the cause of a dispute. In some cases, it may be possible to single out domestic judgments as causes of disputes. Since it is accepted that judicial decisions can result in

48 Certain German Interests in Polish Upper Silesia, above n.10, 19.
49 Above n.32, 696; Corfu Channel (United Kingdom v. Albania), Merits, Judgment, ICJR (1949), 4, 35 (in which the Court said: “... to ensure respect for international law, of which it is an organ ...”).
50 Frontier Dispute (Benin/Niger), Judgment, ICJR (2005), para.28. This approach is shared by many other courts, including domestic ones. A few days earlier, the Superior Court of Justice of Ontario said that “International law and domestic law are distinct entities that operate in different spheres”. Ontario Superior Court of Justice, Council of Canadians v. Canada (Attorney General), Case 01-CV-208141, 8 July 2005, Carswell Ontario Cases 2005, 2973, paras 41, 43.
51 According to the consistent jurisprudence of the Court and the Permanent Court of International Justice, a dispute is a disagreement on a point of law or fact—a conflict of legal views or interests between parties (see Mandemakers Palestine Concessions, Judgment No.2 (1924), PCIJ, Series A, No.2, 11; Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, ICJR (1988), 27, para.35.
responsibility, it is obvious that they can also be a cause of a dispute. In denial of justice cases, a judgment of a domestic court may be the decisive element of a denial of justice. In the dispute underlying Certain Criminal Proceedings in France, the act of the investigating judge seemed a direct cause of a dispute. However, mostly judicial decisions are part of a complex of national acts, and cannot be singled out as the cause of a dispute. The real cause of the dispute often precedes domestic judicial decisions. In his separate opinion in the Norwegian Loans case, Judge Lauterpacht said that the international nature of a dispute was independent from any consideration of the matter by the Norwegian courts.
The crucial point is that, assuming that Norwegian law operates in a manner injurious to French bondholders, there are various questions of international law involved. To introduce in this context the question of exhaustion of local remedies is to make the issue revolve in a circle. The exhaustion of local remedies cannot in itself bring within the province of international law a dispute which is otherwise outside its sphere. The failure to exhaust legal remedies may constitute a bar to the jurisdiction of the Court; it does not affect the intrinsically international character of a dispute.

Moreover, if a domestic court is asked to judge on an alleged international wrong caused by a rule of domestic law, the court often can do little else but apply the rule of domestic law and it would then be odd to say that a decision of a domestic court caused the dispute.

The role of a domestic court's judgment as the cause of a dispute was also raised in the Certain Property case. The Court needed to define the cause of the dispute in order to determine its temporal jurisdiction. Liechtenstein contended that the decisions of the German courts in the Pieter van Laer Painting case were the cause of the dispute. Before these decisions, it was said to be understood between Germany and Liechtenstein that Liechtenstein property confiscated pursuant to the Beneš Decrees could not be deemed to have been covered by the Settlement Convention because of Liechtenstein's neutrality. German courts would therefore not be barred by that Convention from passing on the lawfulness of these confiscations. In Liechtenstein's view, the decisions of the German courts in the 1990s made it clear that Germany no longer adhered to that shared view, which thus amounted to a change of position, and it would thus be the decisions of the German courts that

53 In the Barcelona Traction case, the Court linked the objection to admissibility based on denial of justice to the merits because it was interwoven with the denial of justice. Barcelona Traction, Light and Power Company (Belgium v. Spain), Preliminary Objections, Judgment, ICJR (1964), 6, 46.
54 See Application of the Republic of the Congo, Certain Criminal Proceedings in France (Republic of the Congo v. France), (2002... ICJ, General List, No.129.
55 Certain Norwegian Loans (France v. Norway), Preliminary Objections (sep. op. Lauterpacht), ICJR (1957), 9, 38.
56 Indeed, for this reason, it has been said that no effective remedies are to be expected from a domestic court; this was position of the French Government in the Norwegian Loans case. As a general proposition, though, this cannot be maintained; see Certain Norwegian Loans (sep. op. Lauterpacht), above n.55, 39.
gave rise to the dispute.\textsuperscript{57} In his separate opinion, Judge Kooijmans noted that the German court decisions in the \textit{Pieter van Laer Painting} case applied the Settlement Convention to neutral assets for the very first time, and that this introduced a new element.\textsuperscript{58} He suggested that these decisions could be considered as the source or real cause of the dispute.\textsuperscript{59}

The Court disagreed. While it accepted that the dispute was triggered by the decisions of the German courts, it found that the dispute has its “source or real cause” in the Beneš Decrees under which the painting was confiscated and the Settlement Convention which the German courts invoked as grounds for declaring themselves without jurisdiction to hear that case.\textsuperscript{60}

The situation in the \textit{LaGrand} and \textit{Avena} cases was somewhat comparable. The Court noted that a distinction must be drawn between the procedural default rule as such and its specific application in the present case. It found that in itself, the procedural default rule did not violate Article 36 of the Vienna Convention on Consular Relations. The breach occurred at the moment at which the procedural default rule prevented counsel to effectively challenge before a domestic court the convictions and sentences other than on US constitutional grounds.\textsuperscript{61} This effect manifested itself for the first time in the judicial proceedings, but the decision of the courts could not be isolated from the underlying legislation that precluded the courts from allowing these challenges.\textsuperscript{62}

The above examples show that, in line with the general notion that the Court treats decisions of domestic courts as facts, such decisions may be a part of the cause of a dispute. The role of the Court, then, is to apply international law to a dispute. This may require it to apply international law to decisions of domestic courts.\textsuperscript{63} In the \textit{Avena} case, the Court said that:

\begin{quote}
If and so far as the Court may find that the obligations accepted by the parties to the Vienna Convention included commitments as to the conduct of their municipal courts in relation to the nationals of other parties, then in order to ascertain whether there have been breaches of the Convention, the Court must be able to examine the actions of those courts in the light of international law.\textsuperscript{64}
\end{quote}

\textsuperscript{57} Certain Property (Liechtenstein v. Germany), Judgment, ICJR (2005), 296, para.33.
\textsuperscript{58} Certain Property (Liechtenstein v. Germany), Judgment (diss. op. Kooijmans), ICJR (2005), para.18.
\textsuperscript{59} Above n.58, para.21.
\textsuperscript{60} Above n.57, paras 47–8. The Court also noted that under Art.27(a) of the European Convention for the Peaceful Settlement of Disputes, the critical issue is not the date at which the dispute arose, but the date of the facts or situations in relation to which the dispute arose.
\textsuperscript{61} LaGrand (Germany v. United States), Judgment, ICJR (2001), 466, paras 90–1.
\textsuperscript{62} The Court said that “... although United States courts could and did examine the professional competence of counsel assigned to the indigent LaGrands by reference to United States constitutional standards, the procedural default rule prevented them from attaching any legal significance to the facts, inter alia, that the violation of the rights set forth in Article 36, paragraph 1, prevented Germany, in a timely fashion, from retaining private counsel for them and otherwise assisting in their defence as provided for by the Convention. Under these circumstances, the procedural default rule had the effect of preventing full effect [from being] given to the purposes for which the rights accorded under this article are intended", and thus violated paragraph 2 of Article 36", ibid., para.91.
\textsuperscript{63} LaGrand, above n.61, para.52.
\textsuperscript{64} Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, ICJR (2004), 12, 30, para.28.
The status of domestic cases as facts has practical consequences. One is that while the Court may be called upon to express itself upon the application of a particular domestic rule (e.g. the procedural default rule), it will not examine whether a domestic court has acted properly under domestic law. The Court must confine itself to examining whether such application is in accordance with the obligations which international law imposes on the State in question.65 Another consequence is that the Court will be obliged to reach a decision with regard to municipal law (including judgments of domestic courts) on the basis of evidence submitted to it in the proceedings. Judge Ad Hoc Guggenheim noted in the Nottebohm case that:

[The Court] cannot freely examine the application and interpretation of municipal law but can merely enquire into the application of municipal law as a question of fact, alleged or disputed by the parties and, in the light of its own knowledge, in order to determine whether the facts are correct or incorrect.66

In both respects, the position of the Court vis-à-vis domestic judgments differs fundamentally from the position of domestic courts of appeal or cassation vis-à-vis lower courts. It is for that reason that it is correct that the Court in LaGrand rightly rejected the notion that it would act as a court of appeal of national proceedings. The Court said:

Although Germany deals extensively with the practice of American courts as it bears on the application of the Convention, [its submissions] seek to require the Court to do no more than apply the relevant rules of international law to the issues in dispute between the Parties to this case. The exercise of this function, expressly mandated by Article 38 of its Statute, does not convert this Court into a court of appeal of national criminal proceedings.67

III.B. Building blocks for a dialogue

Despite the well established position of domestic judgments as facts that might seem to preclude meaningful legal dialogue, a different perspective is possible. Before examining, in the next section, the contours of that perspective as it has been developed in recent literature, it is necessary to define some building blocks for such a different perspective.

The strongest argument for an alternative perspective is the fact that domestic courts can adjudicate conflicts that, in whole or in part, are governed by international law. If we define international disputes as disputes in which the rivalling claims are in whole or in part based on international law, 68 and recognize that these may include claims between a private person

66 Ibid. See also Brazilian Loans (1929), PCIJ, Series A 20/21, 124 (noting that the rule or act under municipal law is to be regarded merely as a fact but such facts may be proved "by means of any researches which the Court may think fit to undertake or to cause to be undertaken").
67 LaGrand, above n.61, para.52.
68 Anne Peters, International Dispute Settlement: A Network of Cooprrational Duties, 14 EJIL (2003), 1, 3.
and a State, or even between two private persons,\textsuperscript{69} it is clear that international disputes also may be submitted before domestic courts. The defining element is the legal substance of the dispute.\textsuperscript{70} If the legal norm that underlies claims in a domestic court (even though the claim itself may be presented under domestic law) is of an international nature, the dispute itself becomes one relevant to the international legal order and, indeed, may be characterized as an international dispute.

Overlap of claims between the ICJ and domestic courts may, in particular, occur in cases involving diplomatic protection. If a right of a national of a foreign State has been disregarded in violation of international law, international law allows the State in which the violation occurred an opportunity to redress that violation of international law. The claim eventually brought by the national State will be the claim of the State, in contrast to the claim of the private person in the national court. However, this fiction cannot hide the fact that the substance of the claim may, in the context of exhaustion of local remedies, already have been brought before the domestic courts.\textsuperscript{71}

Neither the claim presented to a domestic court nor the remedy that it provides needs to refer to or be based on international law. As to the former aspect, the Court recalled in \textit{ELSI} that the local remedies rule does not “require that a claim be presented to the municipal courts in a form, and with arguments, suited to an international tribunal, applying different law to different parties”.\textsuperscript{72} It added that “for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success”.\textsuperscript{73} As to the latter, the Court said in the \textit{Interhandel} case that the State should be allowed to provide a remedy, if by its own means, within the framework of its own domestic legal system.\textsuperscript{74} However, in substance, the claim may overlap with the claim eventually brought before the Court.

This overlap is particularly clear when a claim is brought and/or decided on the basis of international law that has been made valid within the domestic legal order. In a few cases, the Court suggested that the effectiveness of local remedies depended on the possibility that the claimant could invoke in the domestic court, at least in substance, the same rules of international law that later formed the core of the dispute before the ICJ. In the \textit{Interhandel} case, the Court found it relevant to consider the possibility of resolving the dispute in the

\textsuperscript{69} But see J.G. Merrills, International Dispute Settlement, 3rd edn (1998), 1, defining international disputes as disputes between States.

\textsuperscript{70} Peters, above n.68, 3.

\textsuperscript{71} In the \textit{ELSI} case, the Court said: “the Chamber has no doubt that the matter which colours and pervades the United States claim as a whole, is the alleged damage to Raytheon and Machlett, said to have resulted from the actions of the Respondent. Accordingly, the Chamber rejects the argument that in the present case there is a part of the Applicant’s claim which can be severed so as to render the local remedies rule inapplicable to that part”, Case Concerning Elettronica Sicula S.p.A. (\textit{ELSI}) (U.S. v. Italy), Judgment, ICJR (1989), 15, 43, para.52.

\textsuperscript{72} \textit{ELSI}, above n.71, 46, para.59.

\textsuperscript{73} Ibid.

\textsuperscript{74} \textit{Interhandel} (Switzerland v. United States of America), Preliminary Objections, ICJR (1959), 6, 27.
domestic courts by applying international law to set aside conflicting domestic law. The Court said:

It has also been contended on behalf of the Swiss Government that in the proceedings based upon the Trading with the Enemy Act, the United States courts are not in a position to adjudicate in accordance with the rules of international law and that the Supreme Court, in its decision of June 16th, 1958, made no reference to the many questions of international law which, in the opinion of the Swiss Government, constitute the subject of the present dispute. But the decisions of the United States courts bear witness to the fact that United States courts are competent to apply international law in their decisions when necessary. In the present case, when the dispute was brought to this Court, the proceedings in the United States courts had not reached the merits, in which considerations of international law could have been profitably relied upon. 75

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

There has been a tendency in the practice of courts of many States to regard international law, in some way, as forming part of national law or as entering legitimately into the national conception of ordre public. Although the Norwegian Government has admitted that in no case can a Norwegian court overrule Norwegian legislation on the ground that it is contrary to international law, it has asserted that it is possible that a Norwegian court may consider international law to form part of the law of the Kingdom to the extent that it ought, if possible, to interpret the Norwegian legislation in question so as not to impute to it the intention or the effect of violating international law. 76

In the ELSI case, the Court discussed whether the provisions of the treaties that were at issue in the case (the FCN Treaty and the Supplementary Agreement) could be invoked in protection of individual rights before the Italian courts. The Court found, on the evidence presented to it, that "In none of the cases cited was the FCN Treaty provision relied on to establish the wrongfulness of conduct of Italian public officials"77 and that it was "impossible to deduce, from the recent jurisprudence cited, what the attitude of the Italian courts would have been had Raytheon and Machlett brought an action, some 20 years ago, in reliance on Article 2043 of the Civil Code in conjunction with the provisions of the FCN Treaty and the Supplementary Agreement". Italy thus had not discharged the burden of proving the existence of a remedy which was open to the US stockholders and which they failed to employ. 78

75 Ibid., 28.
76 Certain Norwegian Loans, above n.55, 40–1.
77 ELSI, above n.71, 47, para.62.
78 Ibid.
The possibility of overlapping claims is not limited to cases involving the exhaustion of local remedies. In the *Avena* case, the Court observed that “In these special circumstances of interdependence of the rights of the State and of individual rights, the duty to exhaust local remedies did not apply”.79 Still, the claim of the Mexican nationals in the US courts as well as the Mexican claim, based on its own right, in the ICJ both involved the claim that the United States failed to comply with the individuals rights of private persons under international law. In that respect, there was an overlap in the claims adjudicated in the domestic courts and in the ICJ.

In such cases, domestic courts thus can be in position to remedy the violation and to prevent or settle the dispute over international law, by applying, at least in substance, international law. While the role of the Court in such cases remains limited to examining whether a domestic court properly applied international law, rather than engaging in a full appeal,80 it would be simply to reduce the role of the ICJ to one as examiner of facts under international law.

### III.C. Elements of a dialogue

The above account of overlap in the basis of the claim in a domestic court and in the ICJ is not necessarily at variance with the traditional formal account of the relationship between the ICJ and domestic courts. Also when a domestic court reviews a claim based on the same rule of international law that later is invoked in the ICJ, the international procedure, in principle, will be based on a separate and independent cause of action.81 Moreover, in the relationship between domestic courts and the ICJ, the principle of *res judicata* is not applicable.82 The Court can review the compatibility of a domestic ruling on a matter of international law with international law itself.

However, an alternative, less formalistic account is possible. In this account, domestic courts and the ICJ have complementary roles with respect to what, in substance, can be (part of) the same dispute. For our purposes, the question is whether we find evidence for it in the case law of the Court. To enable that assessment, we can derive from the literature two main elements (or stages) that would characterize a judicial dialogue.

A first element is that, partly as a consequence of the local remedies rule, domestic courts have the primary role in adjudicating the claim. The role of the ICJ, then, would be a subsidiary one, which may be also be described as “backstopping domestic institutions where they fail to act”.83 It acts if and to the extent that domestic courts have failed to apply the substance of) international law properly.84

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79 *Avena*, above n.64, para.40.
80 Above, text to n.67.
81 *Vivendi v. Argentina* (Decision on Annulment) 41 ILM (2002), 1135, para.113.
84 LaGrand, above n.61, para.52.
A key feature of this subsidiary role, then, would be that when the Court is asked to adjudicate a matter that, in whole or in part, has been considered in a domestic court, it should, to a certain extent, defer to prior assessments of domestic courts. Young, for instance, argues that decisions should be allocated to particular institutions on the basis of institutional competence and that decisions by the primary institution, once made, should generally be respected absent a sufficiently good reason for overruling them. The deference that the ICJ could show towards domestic courts would be similar to the margin of appreciation doctrine applied by the European Court of Human Rights vis-à-vis the national courts of States Parties to the European Convention or by a NAFTA Tribunal in Gami Investments v. Mexico.

It was for the Mexican courts to rule on the licitness of the expropriation as a matter of Mexican law. The present Tribunal defers to the Sentencia as an authoritative expression of national law. The present Tribunal will moreover give respectful consideration to the Sentencia insofar as it applies norms congruent with those of NAFTA.

This deference would be justified by the fact that the objectives of adjudication, particularly when private persons are involved, may be better protected at domestic than at international level. It also would be justified by the fact that national authorities are better positioned to assess the factual and legal context of a dispute. Shany observes that this is illustrated by the differences between the decisions of the Israeli Supreme Court and the Advisory Opinion of the ICJ concerning the Wall:

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

An additional reason for deference might be that in many cases (LaGrand and Avena are illustrative), the international claim is intertwined with aspects of domestic law and the ICJ is not well positioned to consider such matters of domestic law.

85 Ahdieh, above n.4, 2052.
86 Young, above n.4, 1143.
88 NAFTA, Gami Investments, Inc. v. The Government Of The United Mexican States, 15 November 2004, 44 ILM (2005), 545, para.41.
89 Alvarez, above n.6, 438-9.
90 R.A. Lawson, "Internationale rechtspraak in de Nederlandse rechtsorde", 129 Handelingen der Nederlandse Juristen-Vereeniging (1999), 51; Posner et Yoo, above n.6, 12.
92 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJR (2004), 136.
93 Yuval Shany, Capacities and Inadequacies: A Look at the Two Separation Barrier Cases, 38 Israel LR (2005), 230.
94 Nottebohm (diss. op. Guggenheim), above n.65, 52, para.4.
However, the empirical support for the above account is very thin. The ICJ Advisory Opinion on the Separation Wall did not acknowledge any advantages in terms of fact-finding that the Israeli Supreme Court may have had and it did not assign any weight to its decision on the legality of the separation barrier. In LaGrand and Avena, the Court did not have the possibility to show much deference, as the US courts did not adjudicate the claims based on international law. The interesting scenario, which could have provided some evidence for the above construction, could have materialized if the US courts had considered the claims based on Article 36 of the Vienna Convention but rejected them because of, for instance, lack of prejudice. If, after the US courts had had a chance to review and reconsider individual convictions, the case had come back to the ICJ, it might be better positioned to clarify its position on deference to domestic courts.

The second element of the dialogue is that domestic courts can or should play a meaningful role in the implementation of judgments of the ICJ. Arguably, the institutional advantages of the domestic courts (e.g. better capacity to appreciate the facts, greater enforceability of decisions) should be recognized by leaving to domestic courts some margin of appreciation in implementing the international decision. There is indeed some evidence supporting this construction in the LaGrand and Avena cases. The Court said that the assessment of the question of whether the violation of Article 36 had caused prejudice, as well as the determination of adequate remedies, “is an integral part of criminal proceedings before the courts of the United States and it is for them to determine the process of review and reconsideration”. In Avena, it said that:

... the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of [the respective] nationals’ cases by the United States courts ... with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice.

In response to Mexico’s arguments, which aimed to limit the discretion of the United States in choosing how to provide review and reconsideration, the ICJ held that the determination of whether confessions or statements obtained prior to the time at which the national is informed of his right to consular assistance were to be excluded would have to be made on a case-by-case basis by US courts during the process of review and reconsideration. The review and reconsideration by domestic courts thus have two purposes: first, to assess whether the defendant suffered actual prejudice from the violation; and second, if so, to

95 Beit Sourik Village Council v. Gov’t of Israel, above n.91.
97 Avena, above n.64, para.122.
98 Ibid., para.121.
99 Ibid., para.127; see also Bruno Simma and Carsten Hoppe, From LaGrand and Avena to Medellin: A Rocky Road Toward Implementation, 14 Tulane JICL (2005), 7, 25.
determine which remedy is appropriate in the specific case.\textsuperscript{100} For both tasks, the ICJ is not well positioned.

The ICJ did, however, define some markers for the subsequent task for the US courts.\textsuperscript{101} It made it clear that the Convention does create individual rights, that domestic courts can no longer apply the procedural default rule and that they have to provide review and reconsideration. Though aspects of this matter are presently before the US courts, it seems difficult for domestic courts to profess any doubt on these three points.

It thus can be said that the Court sparked "a judicial dialogue by setting a few minimum requirements and leaving the bulk of the task of implementation to the complete discretion of the United States".\textsuperscript{102} However, it must be added that there is not too much evidence that domestic courts accept a role in the implementation of the judgments of the Court.\textsuperscript{103} Dialogue and communication is a two-way street. While, in other areas, especially in the field of human rights and European Community law, there is much evidence that domestic courts recognize a role in applying and implementing decisions of international courts, the practice in regard to the ICJ is less positive. The refusals by US courts to respect provisional measures issued by the ICJ in the \textit{Breard} and \textit{LaGrand} cases are illustrative.\textsuperscript{104} Also, the post-\textit{Avena} case law is not encouraging. Though the Court of Criminal Appeals of Oklahoma ordered, following \textit{Avena}, a stay of execution for one of the individuals with respect to whom Mexico had filed the claim in \textit{Avena},\textsuperscript{105} overall, the emerging jurisprudence on Article 36 claims falls short of what is required to implement the reparation ordered in the \textit{LaGrand} and \textit{Avena} cases.\textsuperscript{106} In a great number of cases, courts have not recognized individual rights. Indeed, Simma and Hoppe conclude that "there seems to be a lack of judicial dialogue between the ICJ, which is empowered to interpret the Convention, and U.S. courts that face claims under it" and that "where there are actually signs that such dialogue takes

100 Above n.99, 25.
101 Ibid., 59.
105 Simma and Hoppe, above n.99.
place, we frequently encounter misunderstandings leading to erroneous conclusions". In other cases, domestic courts upheld the procedural default rule. In still others, they decline review and reconsideration. Simma and Hoppe convincingly show that even where US courts proceed with such review and reconsideration, they tend to set the bar very high by putting the burden of proof on the claimant, and applying tests that are difficult to meet.

III.D. Assessment

The picture that has been sketched of the modern relationship between domestic courts and international courts is one of complementarity and dialogue, rather than opposition and hierarchy. It is a picture that, in investment law, was indicated in Occidental EPC v. Ecuador, in which the Tribunal noted that the domestic and international procedures "may interact reciprocally". One can also say that international and domestic courts play interlocking functions in dispute settlement and are part of a system of "multilevel governance". In this account, the dualist dogma that domestic decisions are mere facts may be misleading.

The circumstances under which this account of the relationship between the ICJ and domestic courts has some explanatory or predictive power are very narrow. Essentially, they are limited to situations like those in the LaGrand and Avena cases, in which private persons can invoke individual rights, protected by international law in domestic courts, and the same claims subsequently emerge in the ICJ. Different scenarios are possible (such as the Arrest Warrant case, in which domestic courts and the ICJ may have considered similar claims on immunities or jurisdiction). Even for this narrow type of cases, the evidence for a model of judicial dialogue is rather modest, with little evidence (but also few possibilities) of deference by the ICJ to domestic courts, and little evidence that US courts accept a role in the implementation of the ICJ judgments. The most important development seems to be the role that the ICJ leaves to domestic courts in the implementation of particular types of judgments.

IV. Conclusion

The developments that have spurred the stream of scholarship revolving around judicial dialogue and co-operation are mostly found outside the ICJ: in communication between courts of different States, in human rights law, regional integration, investment law, etc. In many respects, the ICJ remains an unlikely forum for providing substantive evidence. Its role overwhelmingly remains confined to traditional inter-State disputes that have little chance of

107 Ibid., 37 ff.
109 Slaughter, above n.4, 69.
being litigated in domestic courts. Its powers and efficacy depend strongly on consent and support by States; elevating judgments of any single State to a different status from "facts" sits uneasily with this dominant paradigm.

One might say that this causes a certain fragmentation with respect to the relationship between domestic courts and international courts: there is not one "relation", but much depends on the courts and issue areas involved.

Nonetheless, the combination of allocation of rights to individuals, the likelihood that claims by individuals are being adjudicated primarily in a domestic context, and the fact that the ICJ will not be ideally positioned to review all matters of fact and law colored by a domestic context have caused a slight crack in the traditional dualistic position. LaGrand and Avena remain rather atypical cases for the Court, but may well be a sign of things to come. In view of the seemingly unstoppable developments in which rights are allocated to private persons and domestic courts accept a role in adjudicating claims on such rights, it may well be that in the next 60 years of the Court, the relationship between the Court and domestic courts does take on a more complementary character.