Journal Articles

JE Alvarez, 'International Organisations: Then and Now' (2006) 100 *American Journal of International Law* 324–47.

MJ Aznar-Gomez, 'The 1996 Nuclear Weapons Advisory Opinion and *Non Liquet* in International Law' (1999) 48 *International and Comparative Law Quarterly* 3–19.

AM Danner, 'When the Courts Make Law: How the International Criminal Tribunals Recast the Laws of War' (2006) 59 *Vanderbilt Law Review* 1–65.

B Desai, 'Non Liquet and the ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons: Some Reflections' (1997) 37 *Indian Journal of International Law* 201–18.

HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593–629.

R Higgins, 'Policy Considerations and the International Judicial Process' (1968) 17 *International and& Comparative Law Quarterly* 58–84.

R Higgins, 'Aspects of the Case Concerning the Barcelona Traction, Light and Power Company, Ltd' (1971) 11 *Virginia Journal of International Law* 327–43.

R Lesaffer, 'Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription' (2005) 16 *European Journal of International Law* 25–58.

AM Rabello, '*Non Liquet*: From Modern to Roman Law' (1974) 9 *Israel Law Review* 63–84.

M Shahabuddeen, 'Does the Principle of Legality Stand in the Way of Progressive Development of Law?' (2004) 2 *Journal of International Criminal Justice* 1007–17.

M Swart, '*Ad hoc* Rules for *Ad hoc* Tribunals? The Rulemaking Power of the Judges of the ICTY and ICTR' (2002) 18 *South African Journal on Human Rights* 570–89.

S Trifunovska, '*Ad hoc* International Criminal Tribunals and the issue of Lawmaking' (2008) 169 *Rechtsgeleerd Magazijn Themis* 121–28.

P Weil, '"The Court Cannot Conclude Definitively..." *Non Liquet* Revisited' (1998) 36 *Columbia Journal of Transnational Law* 109–20.

Working Paper

T Ginsburg, *International Judicial Lawmaking* (University of Illinois College of Law, Law and Economics Working Paper no 26, 2005) http://law.bepress.com/uiuclwps/papers/art26.

Norm Conflict in International Law: Whither Human Rights?

MARKO MILANOVIC*

INTRODUCTION

TWO INCONTESTABLE FEATURES of modern international law—the multiplicity of its law-making processes and the ever-increasing variety of the subject-matter that it seeks to regulate—have one invariable consequence: the increasing likelihood of norm conflict, part of the phenomenon of fragmentation of international law. Much work has been devoted to this topic, and, as is well-known, it has already been the object of a comprehensive study by the International Law Commission (ILC).[1]

Unlike much of the theoretical work on the subject, however, this paper will attempt to deal with the practicalities of norm conflict. Like the ILC Study, it will try to further develop the toolbox that lawyers have at their disposal when dealing with cases involving a collision of norms.[2] It will do so by focusing on situations in which one of the conflicting rules is a rule of human rights law. Moreover, it will focus on norm conflicts in which some other international rule attempts to prevail over, or is at the very least equal to a human rights norm.

There are several reasons for this emphasis on human rights. First, human rights norms operate not only between states, but also between states and individuals. One must hasten to add that this does not mean that human rights law is not about inter-state obligations, but that it is not reducible to synallagmatic bargains between states.[3] Secondly, because of the community interest and values that human rights norms enshrine, norm conflict situations involving human rights are, as we shall see, frequently considered to be of constitutional importance, even though human

* LLB (Belgrade), LLM (Michigan), PhD candidate (Cambridge); Associate, Belgrade Centre for Human Rights. E-mail: marko.milanovic@gmail.com. I would like to thank Vera Gowland-Debbas, Francesco Messineo, Tobias Thienel and Michael Wood, as well as all participants at the forum at the Third Biennial Conference of the European Society of International Law, for their most helpful comments. All errors remain my own. An expanded version of this article appears in (2009) 20 *Duke Journal of Comparative & International Law*.

[1] ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission*, (UN Doc A/CN.4/L.682) (ILC Study).

[2] ibid, para 20.

[3] See generally J Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 *Recueil des Cours de l'Académie de Droit International* 325; B Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Receuil des Cours de l'Académie de Droit International* 221; B Simma, 'International Human Rights and General International Law: A Comparative Analysis' (1993) IV-2 *Collected Courses of the Academy of European Law* 153.

rights norms are per se not hierarchically superior to other norms of international law. These conflicts inspire the use of the language of constitutionalism—very fashionable these days[4]—which can be observed in most of the cases that we will examine. Thirdly, a focus on human rights is useful since, for public international lawyers, human rights (and human rights lawyers) are one of the principal culprits of fragmentation.[5] From a generalist perspective,[6] the human rightist penchant for special solutions is deeply troubling, since it disrupts the (at the very least aspirational) systemic quality of general international law. Human rights norm conflicts thus expose not only the various constitutionalist agendas and projects, but also the universalist agenda espoused by general international lawyers.

As stated above, this article will further narrow its focus by examining those normative conflicts where a putatively hierarchically superior norm attempts to override or prevail over a conflicting human rights norm. Both in practice and in the literature, the posture is usually the other way around—it is human rights that (supposedly) override other rules, not vice versa. One concept in particular is often invoked in that regard, especially by scholars—*jus cogens*, the body of peremptory norms of international law, most of which deal with human rights.[7] However, even a casual survey of the jurisprudence would show that *jus cogens* is used rarely, if ever, to invalidate supposedly conflicting norms. On the contrary, courts generally exhibit a tendency to do what they can to avoid norm conflicts. *Jus cogens* much more frequently figures as a rhetorical device or as a 'weapon of deterrence',[8] an incentive to courts to avoid a conflict through interpretation, instead of resolving it on the basis of normative hierarchy. Thus, as we will see, in regard to conflict resolution based on hierarchy, Article 103 of the Charter, stipulating the primacy of state obligations under the Charter over their other international obligations, is of much greater practical relevance.

The analysis in the following sections of this article must necessarily start from a working framework, which will be explained here and defended as much as space allows. What first needs to be defined is the very notion of a conflict of norms, norms themselves being seen as legally binding rules establishing certain rights and obligations between subjects of international law. The notion of conflict will be

[4] M Wood, 'First Lecture: The Legal Framework of the Security Council' Lauterpacht Lectures, University of Cambridge (7 November 2006) www.lcil.cam.ac.uk/Media/lectures/pdf/2006_hersch_lecture_1.pdf para 17.

[5] See M Koskenniemi and P Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553, 567 et seq. See also AN Pronto, '"Human-Rightism" and the Development of General International Law' (2007) 20 *Leiden Journal of International Law* 753.

[6] It should of course be noted that labels such as 'generalists', 'human rights lawyers' or 'European lawyers' are nothing more than very broad generalisations, and are used in this article simply as convenient shorthand.

[7] For perhaps the most far-reaching example, see A Orakhelashvili, *Peremptory Norms in International Law* (Oxford, Oxford University Press, 2006). To the present author, at least, Prosper Weil's warning against 'seeking to create today the law of tomorrow's international society' is as cogent as ever. See P Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413, 442.

[8] P Weil, 'Le droit international en quête de son identité' (1992) 237 *Recueil des Cours de l'Académie de Droit International* 9, 266, 278 (referring to *jus cogens* as an '*arme de dissuasion—l'arme nucléaire, en quelque sorte, du système international*').

defined broadly: a relationship of conflict exists between two norms if one norm constitutes, has led to, or may lead to, a breach of the other.[9]

A further distinction that must be made is between apparent and genuine norm conflicts, and consequently between conflict avoidance on the one hand, and conflict resolution on the other. An apparent conflict is one where the content of the two norms is at first glance contradictory, yet the conflict can be avoided, most often by interpretative means. There is a powerful force behind international law that tends toward harmonisation and systemic integration that abhors conflicts and seeks to avoid them. Presumptions against conflict and techniques of harmonious interpretation are thus often used by courts, explicitly[10] or implicitly.[11]

Yet there are instances in which all techniques of conflict avoidance will fail, and a genuine, as opposed to an apparent, conflict will emerge.[12] These true norm conflicts are those that cannot be avoided, but which it might be possible to resolve. Unlike avoidance, which interprets away any incompatibility, resolution requires for one conflicting norm to prevail or have priority over another. Moreover, for a genuine conflict to be truly resolved it is necessary not only for one norm to have priority over another, but also for the wrongfulness on the part of the state for failing to abide by the displaced norm to be precluded as a matter of state responsibility. It is only if the state bears no legal cost for disregarding one of its commitments in favour of another that a norm conflict has truly been resolved.

With this basic framework in mind, let us now turn to Article 103 of the Charter, and the first cases of human rights norm conflict to be discussed in this article.

ARTICLE 103 OF THE CHARTER, HUMAN RIGHTS AND THE POWERS OF THE SECURITY COUNCIL

Scope and Effects of Article 103

Article 103 of the Charter reads as follows:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.[13]

Article 103 is unique in international practice. It is not limited merely to prohibiting *inter se* agreements between member states, or the conclusion of conflicting treaties,

[9] J Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge, Cambridge University Press, 2003) 176.

[10] See eg, *Al-Adsani v United Kingdom* [GC] (App No 35763/97) ECHR 2001-XI 79 para 55: 'The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.'

[11] See ILC Study (n 1) para 37; Pauwelyn, *Conflict of Norms* (n 9) 240–44. The sole dissenting view seems to be that of Orakhelashvili, who argues that no such presumption exists, at least not as a rule of interpretation. See A Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong' (2007) 18 *European Journal of International Law* 955, 958.

[12] See Pauwelyn, *Conflict of Norms* (n 9) 272.

[13] Charter of the United Nations (signed 6 June 1945) 1 UNTS XVI.

as was the case, for example, with Article 20 of the League of Nations Covenant.[14] It is distinct in three respects that jointly make it the only truly meaningful prospective conflict clause. First, under its terms a Charter obligation will *prevail* over any conflicting obligation. That does not mean that the conflicting norm is invalidated, as with conflicts involving norms of *jus cogens*. The conflicting norm remains valid and continues to exist, albeit in suspended animation—the state is merely prohibited from following it.[15] Secondly, though other prospective conflict clauses can be extinguished simply by the fact that all of the contracting parties to the treaty conclude another treaty, an agreement concluded by some or even all UN members would not prevail over the Charter, without amending Article 103 through the Charter's amendment procedure.[16] Indeed, Article 30(1) of the Vienna Convention on the Law of Treaties (VCLT) explicitly subjects the application of the *lex posterior* rule to Article 103 of the Charter.[17] Finally, Article 103 is not a simple rule of priority—it also precludes or removes any wrongfulness due to the breach of the conflicting norm.[18] In other words, a State cannot be called to account for complying with its obligations under the Charter, even if in doing so it must violate some other rule—any rule, that is, except a rule of *jus cogens*.[19]

Even though Article 103 of the Charter is strictly speaking not a rule of hierarchy, such as *jus cogens*, since it does not result in the invalidation of a conflicting lower norm, it still largely resembles such a rule. Many authors consequently see in Article 103 a confirmation of the *constitutional* character of the Charter as the founding instrument of the post-Second World War international legal order.[20] This is the first of several constitutionalist agendas that we will encounter.

It should also be noted that Article 103 does not merely say that the Charter itself will prevail over conflicting obligations, but that member states' *obligations under the Charter* will so prevail. This formulation is broader, as it encompasses state obligations arising from binding decisions of UN organs, primarily the Security Council (UNSC), pursuant to Article 25 of the Charter, as in the example given above.[21] That the primacy effect of Article 103 also extends to binding Security

[14] See ILC Study (n 1) para 328.

[15] ibid, paras 333, 334. See also R Liivoja, 'The Scope of the Supremacy Clause of the United Nations Charter' (2008) 57 *International and Comparative Law Quarterly* 583, 597.

[16] Pauwelyn, *Conflict of Norms* (n 9) 339.

[17] Vienna Convention on the Law of Treaties (VCLT) (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art 30(1).

[18] There is no provision in the ILC Articles on State Responsibility that explicitly gives such preclusive effect to Art 103. However, Art 59 of the ILC Articles provides that they are without prejudice to the UN Charter. The ILC commentary to this article makes it clear that this provision was inserted precisely to cover Art 103. UN ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts'(2001) UN Doc A/56/10, chap IV E 2, 365.

[19] See ILC Study (n 1) paras 333–40.

[20] See R Bernhardt, 'Article 103' in B Simma (ed), *The Charter of the United Nations—A Commentary* (Oxford, Oxford University Press, 2002) 1292; B Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 *Columbia Journal of Transnational Law* 529.

[21] See Liivoja, 'The Scope of the Supremacy Clause' (n 15) 585–89.

Council resolutions has been confirmed by both doctrine and practice,[22] as well as by the International Court of Justice (ICJ) in the *Lockerbie* case.[23]

With these preliminary remarks on Article 103 out of the way, we now turn to examining the actual cases in which it played a key role. The first cases to be analysed will be *Al-Jedda* before the House of Lords[24] and *Behrami and Saramati* before the European Court of Human Rights.[25] In both of these cases a grant of authority from the Council to certain member states was interpreted by these states as inter alia allowing them to engage in preventative detention without judicial review, in Iraq and Kosovo respectively. We will then move on to cases before EU courts that concern targeted sanctions by the Council against individuals suspected of financing terrorism.

Al-Jedda *and* Behrami

In June 2004 the Security Council adopted Resolution 1546 (2004), which was to provide the legal framework for the continued presence of the coalition or multi-national forces (MNF) in Iraq after the occupation of the country came to an end.[26] In particular, the resolution independently granted to these forces some of the rights that they enjoyed as occupiers under the law of armed conflict. The specific right that concerns us here is the occupier's power to preventatively detain persons for security reasons, stipulated in Article 42(1) of the Fourth Geneva Convention:[27] 'The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary', as well as in Article 78 thereof: 'If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.'

Acting under Chapter VII of the Charter, the Council decided:

> that the multinational force shall have the *authority to take all necessary measures* to contribute to the maintenance of security and stability in Iraq *in accordance with the letters annexed to this resolution* expressing, *inter alia*, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism.[28]

[22] See ILC Study (n 1) para 331.

[23] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)* (Provisional Measures) [1992] ICJ Rep 114, 126, para 42.

[24] *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332, [2008] 2 WLR 31 (*Al-Jedda*).

[25] *Behrami and Behrami v France, Saramati v France, Germany and Norway* [GC] (App Nos 71412/01 and 78166/01) 2 May 2007 (*Behrami*).

[26] UN Security Council (SC) Res 1546 (8 June 2004) UN Doc S/RES/1546.

[27] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 6 UST 3516, 75 UNTS 287 (Geneva Convention IV).

[28] UNSC Res 1546 (8 June 2004) UN Doc S/RES/1546, para 10 (emphasis added).

The letters referred to by the Council were sent to it by the US Secretary of State, Mr Colin Powell, and the then interim Prime Minister of Iraq, Dr Ayad Allawi. Both letters emphasised the ongoing security threats in Iraq and the need to put them to an end. In particular, Mr Powell in his letter outlined the duties of the MNF forces, stating that these 'will include combat operations against members of [insurgent] groups, internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security.'[29]

Under this authority, in October 2004 British troops of the MNF detained Mr Al-Jedda as a security threat.[30] The detention was authorised and periodically reviewed by senior officers of the British army. Mr Al-Jedda challenged his detention before British courts, relying on Article 5(1) of the European Convention of Human Rights (ECHR) (the ECHR rights being reproduced in English law by virtue of the Human Rights Act 1998 (HRA)), which enshrines the right to liberty of person and does not allow for internment on security grounds.[31] The British Government opposed his challenge on two main grounds—first, that in this particular situation, the ECHR and the HRA did not apply extraterritorially, and second, that even if they did, his internment was authorised by a binding resolution of the Security Council, which prevailed over Article 5(1) under the terms of Article 103 of the Charter. The Government desisted from its first argument after the House of Lords decided the *Al-Skeini* case, in which it established that the HRA and ECHR do apply to persons detained by British forces in Iraq.[32] However, both the High Court and the Court of Appeal, and ultimately the House of Lords, found against Mr Al-Jedda on the basis of Article 103. Let us now examine their Lordships' ruling in detail.

Lord Bingham, who delivered the lead opinion, first dealt with Mr Al-Jedda's argument that Article 103 was inapplicable, since Resolution 1546 merely *authorised* the UK to detain persons considered to be security threats, but did not *oblige* it to do so. He did not find that argument persuasive. He considered that both state practice and academic opinion clearly favoured the applicability of Article 103 to Council authorisations, as the importance of maintaining peace and security in the world could scarcely be exaggerated, and since authorisations have effectively replaced the system of collective security that was envisaged by the drafters.[33] Lord Bingham then rejected the argument that Article 103 should not apply to the ECHR, due to the latter's special character as a human rights treaty, as Article 103

[29] Emphasis added.
[30] *Al-Jedda* (n 24) (Lord Bingham) paras 1–2.
[31] Human Rights Act 1998 s 1(1)(a).
[32] *R (Al-Skeini and others) v Secretary of State for Defence* [2007] UKHL 26, [2007] 3 WLR 33, [2007] 3 All ER 685. For commentary on the decision, see T Thienel, 'The ECHR in Iraq' (2008) 6 *Journal of International Criminal Justice* 115. On the extraterritorial application of human rights treaties, see generally M Milanović, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 *Human Rights Law Review* 411; F Coomans and M Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Antwerp, Intersentia, 2004).
[33] *Al-Jedda* (n 24) (Lord Bingham) paras 33–34; (Lord Rodger) para 115 (concurring).

refers to all international agreements, thus allowing for no exceptions except in cases of conflict with a *jus cogens* norm.[34]

For Lord Bingham, the conflict between two fundamental interests—that of protecting international peace and security on the one hand, and that of protecting human rights on the other—was truly acute, since it was difficult to see how any exercise of the power to detain preventatively, however necessary for imperative reasons of security, and however strong the safeguards afforded to the detainee, could do otherwise than breach the detainee's rights under Article 5(1).[35]

Lord Bingham concluded that there was a genuine norm conflict between a Charter obligation of the UK and Article 5(1) of the ECHR, and that the Charter obligation must prevail:

> Thus there is a clash between on the one hand a power or duty to detain exercisable on the express authority of the Security Council and, on the other, a fundamental human right which the UK has undertaken to secure to those (like the appellant) within its jurisdiction. How are these to be reconciled? There is in my opinion only one way in which they can be reconciled: by ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee's rights under article 5 *are not infringed to any greater extent than is inherent in such detention.*[36]

Though Lord Bingham affirmed the judgment of the Court of Appeal on the issue of Article 103, his opinion introduces an element of subtlety lacking in that of the court below, evident in the somewhat cryptic italicised phrase in the quotation above. Yes, Mr Al-Jedda cannot complain solely because his detention was on preventative grounds, but his rights must not be infringed to any greater extent than is inherent in such preventative detention. The exhaustive list of grounds of detention from Article 5(1) of the ECHR might have temporarily disappeared by virtue of Article 103 of the Charter, yet not only does a kernel of Article 5(1) remain in that the detention must not be unreasonable, but security detainees have *other* rights under Article 5—to be informed of the reasons behind their arrest (Article 5(2)), to be able to challenge the lawfulness of their detention before a court (Article 5(4)) and to be compensated for any unlawful detention (Article 5(5)). Judicial review of detention in particular would be a major departure from the internment regime under the law of occupation, which allows for review by mere administrative boards.[37] This is of course all between the lines of Lord Bingham's opinion—he says none of this explicitly, as the issue raised in the case was solely under Article 5(1) of the ECHR, not Article 5(4),[38] but other Law Lords gave similar hints.[39]

In *Al-Jedda* we can clearly see the presumption against norm conflict at work. Even though Resolution 1546 did prevail over Article 5(1) of the ECHR by virtue

[34] *Al-Jedda* (n 24) (Lord Bingham) para 35.
[35] ibid para 37.
[36] ibid para 39 (emphasis added); (Lord Roger) para 118; (Baroness Hale) paras 125–26; (Lord Carwell) para 131 (concurring).
[37] See Art 43 of the Geneva Convention IV (n 27).
[38] See also *Al-Jedda* (n 24) (Lord Rodger) para 46.
[39] *Al-Jedda* (n 24) (Baroness Hale) para 126; (Lord Carwell) paras 130 and 136.

of Article 103 of the Charter, it did so only to the extent inherent in preventative detention. Even in cases of genuine norm conflict, especially those involving human rights, the scope of the conflict will be *minimised* through interpretation. Other methods of conflict resolution and avoidance could have been applied by the House in *Al-Jedda*, but they were either not relied on by the parties or were not to their Lordships' liking. We will come to some of these below, but first we must turn to the *Behrami and Saramati* case before the European Court of Human Rights.[40] This case was in effect *Al-Jedda*'s sibling, not only because they raised much the same issues, but also as the litigation in the two cases ran in parallel: the lower courts in *Al-Jedda* ruled first, then the European Court decided *Behrami*, and finally the House of Lords delivered its own judgment in *Al-Jedda*.

Behrami and *Saramati* were two joined cases filed against several states participating in KFOR, the NATO-led peacekeeping mission in Kosovo.[41] In *Behrami*, the applicants were the family of a boy who had died while playing in an unmarked field saturated with undetonated cluster bombs. They alleged that the respondent state had the positive obligation to secure the right of the victim, which it failed to fulfil. The *Saramati* case is of more interest to our present discussion, as its facts closely follow *Al-Jedda*. The applicant was preventatively detained by the KFOR commander, as a security threat to the international presence in Kosovo, without recourse to judicial review of his detention. KFOR based its power to detain on Security Council Resolution 1244 (1999), which authorised 'Member States and relevant international organisations to establish the international security presence in Kosovo ... with all necessary means to fulfil its responsibilities.'[42] As in *Al-Jedda*, the applicant based his claim on Article 5 of the ECHR.

The European Court's approach to the case was completely different from that of British courts in *Al-Jedda*. The Court said nary a word about norm conflict, and mentioned Article 103 of the Charter only in passing,[43] even though it was extensively relied on by the respondent states.[44] It disposed of the case on grounds of attribution, ruling that the impugned acts could not be attributed to the respondent states, but solely to the United Nations. It first reasoned that the Security Council was, by Resolution 1244:

> delegating to willing organisations and members states ... the power to establish an international security presence as well as its operational command. Troops in that force would operate therefore on the basis of UN delegated, and not direct, command.[45]

That notion of delegation would prove to be crucial in the Court's attribution analysis:

[40] See also the later case of *Berić v Bosnia and Herzegovina* (App Nos 36357/04 et al) ECHR 16 October 2007 where a Chamber of the Court ruled, relying on *Behrami*, that the acts of the international High Representative in Bosnia were attributable to the UN.

[41] Case noted in P Bodeau-Livinec, GP Buzzini and S Villalpando, '*Behrami and Behrami v France; Saramati v France, Germany and Norway*—International Decisions' (2008) 102 *American Journal of International Law* 323.

[42] UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244 op para 7.

[43] *Behrami* (n 25) paras 26 and 147.

[44] ibid, paras 97, 102, 106, 113.

[45] ibid, para 129.

> While Chapter VII constituted the foundation for the above-described delegation of UNSC security powers, that delegation must be sufficiently limited so as to remain compatible with the degree of centralisation of UNSC collective security constitutionally necessary under the Charter and, more specifically, for the acts of the delegate entity to be attributable to the UN.[46]

Hence, in the Court's view, attribution depended upon 'whether the UNSC retained ultimate authority and control so that operational command only was delegated.'[47] After examining the conditions it thought were necessary for a lawful delegation of the Council's power the Court found this test to be met,[48] and concluded that KFOR 'was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, "attributable" to the UN.'[49] Since the violations in question were not attributable to the respondent states, but to the UN, which is not itself a party to the ECHR, the Court found that the applications were incompatible with the Convention due to lack of jurisdiction *ratione personae*.[50]

The attribution issue in *Behrami* was, in my view, clearly wrongly decided. A detailed account of why this is so is for elsewhere.[51] For our present purposes, suffice it to say that the Court mixed up two entirely separate questions—the delegation of powers by the Security Council and that of State responsibility. The Council may or may not have delegated some of its powers to KFOR, but it is its *effective control* over KFOR (or, indeed, the lack thereof) that is dispositive for attribution.[52] The Court, moreover, found some support for its attribution analysis solely in the work of a single author,[53] and it failed to discuss or even acknowledge the otherwise unanimous contrary authorities, ranging from the legal opinions of the UN itself, to those of the ILC and of numerous scholars, to the effect that the UN cannot be responsible for the acts of troops over which it does not have operational control.[54] Finally, the Court's decision produces unacceptable results as a matter of policy, as it allows States to retain control over their armed forces in

[46] ibid, para 132.

[47] ibid, para 133.

[48] ibid, paras 134–40.

[49] *Behrami* (n 25) para 141.

[50] ibid, paras 144–52.

[51] See M Milanović and T Papić, 'As Bad As It Gets: The European Court of Human Rights' *Behrami and Saramati* Decision and General International Law' (2009) 58 *International and Comparative Law Quarterly*.267.

[52] See Draft Art 5, UN ILC 'Draft Articles on Responsibility of International Organizations' (2004), UN Doc A/59/10, chap V at 99.

[53] See D Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Oxford, Clarendon Press, 1999) 163–66.

[54] See eg, European Commission for Democracy through Law (Venice Commission), 'Opinion on Human Rights in Kosovo: Possible establishment of review mechanisms' (11 October 2004) No 280/2004, CDL-Ad (2004) 033, at 18 para 79; R Wolfrum, 'International Administration in Post-Conflict Situations by the United Nations and Other International Actors' (2005) 9 *Max Planck Yearbook of United Nations Law* 649 ; A Paulus, 'Article 29' in B Simma (ed), *The Charter of the United Nations—A Commentary* (Oxford, Oxford University Press, 2002) 542, MN 9; J Frowein and N Krisch, 'Article 42' in B Simma (ed), *The Charter of the United Nations—A Commentary* (Oxford, Oxford University Press, 2002) 759 MN 29; *cf* Amerasinghe, *Principles of the Institutional Law of International Organizations*, Cambridge Studies in International and Comparative Law 36, 2nd edn (Cambridge, Cambridge University Press, 2005) 403; J Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo' (2001) 12 *European Journal of International Law* 469, 486.

peacekeeping operations, instead of putting them at the disposal of the UN, and at the same time allows them to blame the UN for any of their actions.[55]

There can thus be little doubt that the Court's attribution reasoning in *Behrami* is untenable.[56] Yet, how can we explain the very *obviousness* of the flaws in the Court's decision? In my view, there is at least one possible explanation—what the Court said in its decision is conditioned above all by the things that it did *not* want to say. The issue that it wanted to avoid the most was precisely that of norm conflict and the pre-emptive effect of Article 103 of the Charter. It did not, *it would not*, say that Resolution 1244 prevailed over Article 5 of the ECHR, as the British courts did in *Al-Jedda*. For the European Court, the ECHR is the 'constitutional instrument of European public order',[57] of which the Court itself is the ultimate guardian. Accepting in *Behrami* that fifteen States sitting in the Security Council could whisk away this 'constitutional instrument' on the basis of Article 103 would have created a precedent capable of abuse in a not-so-distant future. On the other hand, the Court also did not want to openly defy the Council or interfere with the Chapter VII system and peacekeeping operations such as Kosovo—sympathise with the applicants it might, but rule in their favour it would not. And so the Court came up with its strained attribution to the UN rationale, which solved its immediate problems—it not only avoided a norm conflict, but also what the Court saw as a conflict of constitutional importance.

Kadi

We now turn to the Court of First Instance of the European Communities (CFI), which decided several cases on sanctions imposed by the Security Council against suspected terrorists and their supporters. The most notable of these cases was *Kadi*.[58] The background to the case concerns the sanctions originally established by the Security Council in its Resolution 1267 (1999) against the Taliban regime in Afghanistan. The sanctions regime was expanded by subsequent resolutions to the Al-Qaeda network and persons associated with it.[59] The Council set up a Sanctions Committee as its subsidiary body to monitor the implementation of sanctions,

[55] The issue of attribution was also raised in *Al-Jedda* (n 24) before the House of Lords, after *Behrami* (n 25) was decided. The House refused to follow *Behrami*, inter alia because it would produce simply absurd consequences in the Iraq context, as it would for example be the UN, instead of the US, who would bear responsibility for the Abu Ghraib torture scandal. The House managed to avoid relying on *Behrami* not by holding that it was wrongly decided, but by (not entirely persuasively) distinguishing it on the facts. See more Milanović and Papić, 'As Bad As It Gets' (n 51).

[56] See also P Bodeau-Livinec, GP Buzzini and S Villalpando, '*Behrami and Behrami v France; Saramati v France, Germany and Norway*—International Decisions' (n 41) 325–31; A Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases' (2008) 8 *Human Rights Law Review* 151, 162–65; B Knoll, 'Rights Without Remedies: The European Court's Failure to Close the Human Rights Gap in Kosovo' (2008) 68 *Heidelberg Journal of International Law* 431; K Mujezinovic Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test' (2008) 19 *European Journal of International Law* 509.

[57] *Behrami* (n 25) para 145.

[58] Case T-315/01 *Kadi v Council and Commission* [2005] ECR-II 3649 (*Kadi CFI*).

[59] See generally C Lehnardt, *European Court Rules on UN and EU Terrorist Suspect Blacklists*, ASIL Insight (31 January 2007) www.asil.org/insights/2007/01/insights070131.html.

which did so by maintaining lists of suspected terrorists. Member states were obliged to enforce sanctions against these listed individuals.

Having this sanctions regime in view, the member states of the European Union (EU)[60] decided that instead of implementing this regime individually in their respective domestic legal systems, they should do so through the mechanisms of the EU. The EU Council thus adopted several common positions, as well as Regulation No 881/2002 implementing the sanctions regime.[61] Annexed to the Regulation was the list of persons whose funds were to be frozen, on the basis of the lists made by the Sanctions Committee of the Security Council.[62] As Community law, the Regulation had direct effect in the legal orders of the member states, and took precedence over any contrary domestic legislation.

The assets of the applicant in *Kadi* were frozen in this manner. He complained to the CFI, asking the Court to annul the implementing Regulation on the grounds that it violated his fundamental human rights, as protected by primary EU law (that, under long-standing jurisprudence, protects as general principles a corpus of fundamental rights, including the rights enshrined in the ECHR), including the right to a fair hearing, the right to property and the right to judicial review.[63] One of his key arguments was that:

> [T]he Security Council resolutions relied on by the [EU] Council and the Commission do not confer on those institutions the power to abrogate those fundamental rights without justifying that stance before the Court by producing the necessary evidence. As a legal order independent of the United Nations, governed by its own rules of law, the European Union must justify its actions by reference to its own powers and duties vis-à-vis individuals within that order.[64]

The import of this argument cannot be overemphasised, as it challenges the most fundamental operating assumption of Article 103 of the Charter. Like any rule of hierarchy (or something closely resembling one), it can only prevail over a norm *which is a part of the same legal order*. As the US Constitution is the supreme law only in the US legal system, but not in the legal orders of France or China, so is Article 103 of the Charter superior law only in the international legal system. According to Kadi's argument, however, he was entitled to human rights protections under EU law, and that legal order 'was independent of the United Nations.' The Security Council resolution could not prevail over these rights, as it could not penetrate this independent legal order. This, as we shall see, was one of the main themes of the Advocate-General's opinion in *Kadi*, as wells as the decision on appeal of the European Court of Justice (ECJ), to which we will turn shortly.

[60] Purely as a matter of convenience, the terms European Union and European Community (EC) are used interchangeably throughout this paper, as will EU law, EC law and Community law.

[61] Council Regulation (EC) 881/2002 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 [2002] OJ L139.

[62] Annex to Council Regulation (EC) 881/2002 (n 61).

[63] *Kadi CFI* (n 58) para 59.

[64] *Kadi CFI* (n 58) para 140.

Thus, before the Court was a much more fundamental question than the resolution of a single norm conflict—that of the relationship between general international law and EU law.[65] Only if the Court found that the two legal orders were one, even though to a great extent autonomous, could it entertain the Article 103 argument. It went on to do just that, finding that obligations under the UN Charter prevail over any other obligations under EU law.[66]

The Court then proceeded to examine the lawfulness of the contested Regulation. It found that the Regulation was merely implementing Security Council resolutions, and that neither the member states nor the EU institutions had any autonomous discretion in that regard.[67] In particular, they could neither directly alter the content of the resolutions at issue, nor set up any mechanism capable of giving rise to such alteration.[68] If the Court were to review and annul the Regulation as violative of human rights, that would necessarily mean that the resolutions, which the Regulation was implementing, were so violative, and that the Court would be exercising indirect review of a Security Council decision, a competence that both member states and EU institutions denied it had.[69]

The Court agreed, with the proviso, however, that it could indirectly review:

> the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.[70]

If the Council's resolutions failed to observe the norms of *jus cogens*, however improbable that might be, 'they would bind neither the Member States of the United Nations nor, in consequence, the Community.'[71]

The Court then proceeded to conduct this limited form of review, which unsurprisingly ended up being deferential to the Security Council.[72] Although the Court—with very little support—gave a very broad reading to *jus cogens* and considered that human rights such as the right to property or the right of access to a court fall within that category, the limitations on the applicant's rights were justified, as they were inherent in the rights themselves as guaranteed by *jus cogens*.[73] If anything, the judgment demonstrates the limited utility of *jus cogens* as a mechanism for conflict resolution, even in instances in which a court is prepared to broadly construe this body of norms.

[65] ibid, para 178.
[66] ibid, paras 181–95.
[67] ibid.
[68] ibid, paras 213–14.
[69] ibid, paras 216–17.
[70] ibid, para 226.
[71] ibid, para 230.
[72] ibid, para 231.
[73] ibid, paras 231, 238.

Specific Methods of Avoidance and Resolution

As we have seen, the cases presented above either employ or hint at several methods of norm conflict avoidance and resolution in addition to Article 103 of the Charter. As with *jus cogens*, Article 103 creates incentives for courts to avoid norm conflicts (and reliance on Article 103 itself) when they can, especially when 'constitutional' values are implicated, such as the protection of human rights. Even when a genuine conflict truly exists, as in *Al-Jedda*, courts will attempt to minimise its impact through interpretative means.

In *Kadi*, we have witnessed both the application of Article 103 and what can be termed the testing of the *external* validity of a Security Council resolution, ie the review of its compatibility with the one body of international law that the Council cannot override, *jus cogens*. Surely there is no great controversy in saying that a Security Council resolution ordering states to torture suspected terrorists would be void, due to a conflict with a peremptory norm. But the Security Council would never adopt such a resolution. States can be subtle, even if, or particularly if they wish to limit the rights of individuals, and the likelihood of them being foolish enough to openly adopt norms contrary to *jus cogens* is nil. We have thus learned in *Kadi* that such review of external validity as exercised by the CFI is of little practical use, as the Council resolution will survive this review even when the court (wrongly) reads the content of *jus cogens* expansively.[74] Or, if we take *Al-Jedda* as an example, if the House wished to review the external validity of Resolution 1546,[75] it could have come to no other conclusion than that the resolution is valid, since the prohibition of preventative detention certainly does not qualify as *jus cogens*, if for no other fact than that internment is expressly allowed in armed conflict.[76] It is only if the concept of *jus cogens* is stretched to the breaking point that it could potentially be used to invalidate a Security Council resolution. In my view, this neither should nor is very likely to happen.[77]

Yet, there is no cogent legal reason to test Security Council decisions solely on their external validity. The Council is not some sort of global sovereign, a prince who is *legibus solutus*. It is an organ of an international organisation, the UN, and its powers are necessarily limited by that organisation's constitutive instrument, the

[74] As ICJ President Higgins recently stated in relation to *jus cogens*, '[t]he examples [of such norms] are likely to be very, very few in number.' R Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55 *International and Comparative Law Quarterly* 791, 801. For a much more expansive take on the role of *jus cogens* in limiting the Security Council, see A Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions' (2005) 16 *European Journal of International Law* 59.
[75] Lord Bingham did indeed briefly mention that Security Council resolutions could not override rules of *jus cogens*—see *Al-Jedda* (n 24) (per Lord Bingham) para 35.
[76] See *also* M Wood, 'Second Lecture: The Security Council's Powers and their Limits', Lauterpacht Lectures, University of Cambridge (8 November 2006) www.lcil.cam.ac.uk/Media/lectures/pdf/2006_hersch_lecture_2.pdf (last accessed 30 June 2009) para 50.
[77] As one author put it, 'one of the major threats posed to the concept of *jus cogens* is the tendency by some of its most fervent supporters to see it everywhere.' See A Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19 *European Journal of International Law* 491, 506.

Charter.[78] That treaty cannot be plausibly interpreted as granting the Council the power to do whatever it wishes. There can be no doubt that, as a matter of substantive law, a decision of the Council, which is ultra vires and contrary to the Charter has no binding force.[79]

Thus, the *internal* validity of a Council resolution against the Charter can also be tested. When it comes to human rights in particular, a persuasive argument can be made that the Council is *Charter-bound* to conform to certain human rights norms, which are not limited just to those norms belonging to *jus cogens*. A textual argument would be that Article 24(2) of the Charter requires the Council to act 'in accordance with the Purposes and Principles of the United Nations', while Article 1(3) provides for 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion' as one of the purposes of the UN.[80]

That there is no principled reason for rejecting review of the internal validity of Council decisions does not mean that there are not severe practical difficulties in doing so. First, the Charter does not specify in any way the human rights that could serve as a check on the Council's power.[81] Secondly, any review of a Council decision, especially in the context of Chapter VII, would have to be deferential, both as to the Council's determination that a threat to the peace, breach of the peace or act of aggression exist, and as to what measures are appropriate to deal with this situation. Finally, and most importantly, the main problem is not with the substantive position that an ultra vires resolution of the Council is invalid, but with the *claim of authority* to exercise judicial review. In other words, the fundamental question is who will be the judge of whether a Security Council resolution is in accordance with the Charter.[82] The Charter itself does not say that the ICJ or any other court, international or domestic, has the power to do so. On the other hand, the Charter does not say either that the Security Council only and exclusively will be the judge of its own powers. Though Council resolutions cannot be subjected as such to a specific action for annulment, they could still be challenged incidentally in other judicial proceedings.

This dilemma is of course familiar to any student of constitutionalism. The US Supreme Court, for example, was faced with the exact same question in *Marbury v*

[78] See D Bowett, 'The Impact of Security Council Decisions on Dispute Settlement Procedures' (1994) 5 *European Journal of International Law* 89, 92–93 (stating that '[t]he Council decisions are binding only in so far as they are in accordance with the Charter.')

[79] See ILC Study (n 1), para 331: 'Since obligations for Member States of the United Nations can only derive out of such resolutions that are taken within the limits of its powers, decisions ultra vires do not give rise to any obligations to begin with.'

[80] See generally D Akande, 'The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?' (1997) 46 *International and Comparative Law Quarterly* 309; A Boyle and C Chinkin, *The Making of International Law* (Oxford, Oxford University Press, 2007) 230.

[81] See J Schott, 'Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency' (2007) 6 *Northwestern University Journal of International Human Rights* 24, 119–22.

[82] See more TM Franck, 'The "Powers of Application": Who Is the Ultimate Guardian of UN Legality?' (1992) 86 *American Journal of International Law* 83; JE Alvarez, 'Judging the Security Council' (1996) 90 *American Journal of International Law* 1.

Madison.[83] The Court there asserted its power to review the constitutionality of the acts of the other branches of the US government, without any explicit basis in the Constitution's text.[84] That does not mean that the mere *assertion* of such a power by the Court was enough to actually establish it—what truly mattered was that this claim to authority was *accepted* by the other actors concerned, and gradually became an entrenched and uncontested (if not uncontroversial) feature of the system.

The same could eventually happen in the international system, yet that is by no means a certainty. The ICJ or some other court might assert its authority to decide on the validity of Security Council resolution, but that does not mean that this claim will be accepted by states and by the Council. So far, the ICJ, in particular, has refrained from attempting such a *Marbury* moment.[85] In two cases—*Lockerbie* and *Genocide*—the parties' arguments presented it with an opportunity to review a Security Council resolution. In both cases the Court gave this opportunity a pass,[86] though in their individuals opinions some judges expressed their views both for and against judicial review.[87] The closest we have come to *Marbury* before any international court was in the *Tadić* case[88] before the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), established by a Chapter VII resolution of the Security Council. In that case, the first ever decided by the ICTY, the defendant challenged the Tribunal's legality, claiming that the Council did not have the legal power to establish a judicial body.[89] The Trial Chamber held that it did not have jurisdiction to pronounce on the legality of the ICTY's establishment, as it could not review a decision of the Council.[90] The Appeals Chamber, on the other hand, ruled that as a part of its inherent *compétence de la compétence* it did have the power to enquire about its own legality, and (unsurprisingly) found that the Council did indeed have the authority under the Charter to establish the ICTY.[91]

Yet, *Tadić* did not provoke a *Marbury* moment. The Appeals Chamber was dealing with a very specific issue, a challenge to its own legality. No other court so far has reviewed the internal validity of any Council resolution. Though *Tadić* remains an important precedent, whether it will be followed or not remains to be seen. Courts will generally find arguments based on the internal validity of a

[83] *Marbury v Madison*, 5 US (1 Cranch) 137 (1803).

[84] ibid, para 7.

[85] See S Chesterman, 'An International Rule of Law?' (2008) 56 *American Journal of Comparative Law* 331, 351–54.

[86] See more B Martenczuk, 'The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?' (1999) 10 *European Journal of International Law* 517; Alvarez, 'Judging the Security Council' (n 82).

[87] See *Lockerbie* (n 23) [1998] ICJ Rep 115; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*; Order of 8 April 1993 [1993] ICJ Rep 3; Order of 13 September 1993 [1993] ICJ Rep 325

[88] *Prosecutor v Tadić* (Appeal on Jurisdiction) ICTY IT-94–1-AR72 (2 October 1995). See also *Prosecutor v Kanyabashi* (Decision), ICTR 96–15-T (8 June 1997).

[89] ibid.

[90] *Prosecutor v Tadić* (Decision on the Defence Motion on Jurisdiction in the Trial Chamber of the International Tribunal) ICTY IT-94–1-AR72 (10 August 1995).

[91] *Tadić* (n 88) paras 18–22.

resolution unattractive, and that especially goes for domestic courts. To take *Al-Jedda* as an example, if the appellants had actually made such an argument (as they had not) and contested the validity of Resolution 1546, it would still have been most unlikely for national judges to become the *avant-garde* of international law by assuming for themselves the power to review Chapter VII decisions of the Security Council. Moreover, it should also be noted that the review of Council resolutions by domestic, as opposed to international courts, would in essence amount to the review of UN acts by its individual member states. Though in principle unobjectionable, this could still in practical terms potentially spell disaster for the system of collective security established by the Charter.[92]

The possibility that courts will start reviewing decisions of the Council relatively soon is not to be excluded. The more the Council impinges on human rights and the more invasive it becomes, the greater the temptation for courts will be.[93] Yet, because of the very limited scope of *jus cogens*, because of the lack of specificity of human rights constraints on the Council in the Charter itself, and because of the large deference that would be due to the Council in any case involving the maintenance of international peace and security, even if a court was willing to entertain a challenge to the external or internal validity of a Council resolution, it would be most unlikely that such a challenge would succeed.[94]

The review of external validity of Council resolution against *jus cogens* and the review of their internal validity vis-à-vis the Charter are at the same time tools of both conflict avoidance and of conflict resolution. An apparent conflict between a resolution and some other norm of international law is avoided, because a second conflict between the resolution and either the Charter or *jus cogens* is resolved in the latter's favour. Now, however, it might be helpful to advance another interpretative mechanism of conflict avoidance. This mechanism has thus far not been explicitly used by courts, though this may change, since it provides more practical avenues for the effective protection of human rights than theories of judicial review.

As we have seen above, some Security Council resolutions use exceptionally broad language. For example, Resolution 1546 at issue in *Al-Jedda* gave the MNF 'the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq', while Resolution 1244 at issue in *Behrami and Saramati* authorised 'Member States and relevant international organizations to establish the international security presence in Kosovo ... with all necessary means to fulfill its responsibilities.'[95] Should Article 103 of the Charter truly attach to these kinds of vague phrases, with the effect of prevailing over contrary treaties and denying individuals some of their basic rights? Should open language such as 'all

[92] See Wood, 'The Security Council's Powers and their Limits' (n 76) para 64.

[93] In a similar vein, see A Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion' (2006) 17 *European Journal of International Law* 881, 912–14.

[94] See also Wood, (n 76) para 6 (stating that 'it would be difficult to conceive of circumstances arising in practice that could raise serious doubts about the legality of the Council's actions.') But see M Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' (2003) 16 *Leiden Journal of International Law* 593, 607 (arguing that Resolution 1373 is ultra vires).

[95] UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244 op para 7.

necessary measures' and 'all necessary means' be read as encompassing everything and anything that the authorised states might want—say preventative detention without recourse to judicial review—thus trumping the very clear and detailed provisions of human rights treaties, like Article 5(1) of the ECHR? Surely not. It is one thing to say that the phrase 'all necessary means' has in practice developed as the appropriate diplomatic euphemism for the use of military force, but it cannot be plausibly read as an absolution from all human rights constraints that do not qualify as *jus cogens*.[96] The Charter may give the Council the power to override legally valid treaties, and even custom, but this power is by definition exceptional. If, in other words, the Council truly wishes to derogate from otherwise applicable human rights guarantees, it must do so clearly and explicitly, and it and its members must consequently bear the political responsibility for such an action.

What I am advocating, therefore, is for the creation of a rebuttable interpretative presumption supported by a clear statement rule—Security Council resolutions should be interpreted as far as possible to be compatible with human rights, as well as with other rules of general international law, in the absence of a clear statement by the Council to the contrary. Such a presumption is warranted by several considerations of policy and principle. First and most generally, by the presumption against norm conflict in international law.[97] Secondly, by the indisputable fact that the Security Council was not created as a global legislator,[98] a quick and dirty substitute for the ordinary international law-making process via treaty or custom.[99] It is a body with the singular and extremely important mission of safeguarding international peace and security, but despite its apparent omnipotence and the broad exercise of its powers, as for instance in the quasi-legislative Resolution 1373,[100] its role is limited. The legally binding norms that it may create and to which the Charter grants priority are still conditioned upon that mission of maintenance of peace.[101] Important as that mission undoubtedly is, it is not a licence to the Council to ignore the rest of international law.

Thirdly, reading the Council's resolutions so that they are compatible with states' human rights obligations is consistent with the Council's own statements on the matter. For example, in Resolution 1456 (2003), the Council, working at the level of Ministers of Foreign Affairs, affirmed that 'States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, in particular human rights, refugee and humanitarian law.'[102] The Council

[96] See Liivoja (n 15) 589.

[97] See generally Pauwelyn, (n 9) 240–44.

[98] See generally M Fremuth and J Griebel, 'On the Security Council as a Legislator: A Blessing or a Curse for the International Community?' (2007) 76 *Nordic Journal of International Law* 339; B Elberling, 'The *Ultra Vires* Character of Legislative Action by the Security Council' (2005) 2 *International Organizations Law Review* 337.

[99] See also I Johnstone, 'Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit' (2008) 102 *American Journal of International Law* 275, 299–300; Boyle and Chinkin, *The Making of International Law* (n 80) 113–15.

[100] UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

[101] See also Wood, 'The Legal Framework of the Security Council' (n 4) para 23 et seq.

[102] UNSC Res 1456 (20 January 2003) UN Doc S/RES/1456 op para 6.

should not be taken to have departed from a commitment that it itself has promulgated without clear evidence to the contrary.

Fourthly, as important as are peace and security,[103] they are not a priori more important than human rights (and vice versa). These rights are not gifts or privileges granted to individuals by generously disposed states, but rights which are inherent in the individuals' own dignity as human beings that cannot easily be sacrificed at the altar of security by overly eager states.

Finally, states to which an authority is given by the Council will naturally tend to interpret that authority broadly, as is the case with preventative detention. There is no indication, for example, that the Council truly wished to authorise unreviewable military detentions in Kosovo by Resolution 1244, as was argued by KFOR member states. A presumption can help curtail this tendency, thought it cannot eliminate it altogether.

Interpretative presumptions of this sort are ubiquitous in domestic law and they have a pride of place in the human rights sphere. Perhaps the best examples can be had in the public law of the United Kingdom. Not only is a presumption favouring compatibility of legislation with human rights now laid down by statute, in section 3 of the Human Rights Act 1998,[104] but courts have for *constitutional reasons* applied such presumptions independently of the HRA and the ECHR. As Lord Hoffmann put it:

> 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. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.[105]

Note that it has been an axiomatic assumption of English constitutional law that Parliament is sovereign and capable of doing as it pleases with human rights,[106] but

[103] See, eg, *Behrami* (n 25) paras 148–49, where the European Court affirms the 'imperative' aim of the UN of safeguarding international peace and security.

[104] On the strength of which see especially *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 paras 44 *et seq* (Lord Steyn).

[105] *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 at 131 (Lord Hoffmann).

[106] See A Dicey, *An Introduction to the Study of the Law of the Constitution* (London, Macmillan, 1959) 39–40: 'The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament … 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.'

that the interpretative presumption exists notwithstanding Parliamentary sovereignty.[107] All the more reason to apply such a presumption to the Security Council, which is, most certainly, not a sovereign in the likeness of Parliament.[108]

Similarly, in the United States, the Supreme Court recently had the opportunity to decide on the habeas corpus rights of detainees in Guantanamo Bay. Inter alia, it invoked a clear statement rule, holding that 'Congress should "not be presumed to have effected such denial [of habeas corpus relief] absent an unmistakably clear statement to the contrary".'[109]

The foregoing discussion should not be taken as a facile application of some domestic law analogy to international law. As well noted, such analogies can be 'more misleading than enlightening'.[110] In this case, however, the basic ideas are the same. A rebuttable interpretative presumption of this type can clearly be a useful method for avoiding conflicts of norms arising from competing (constitutional) considerations—the Charter and peace and security on the one hand, and human rights on the other.[111] To take the facts of *Behrami and Saramati* as an example, it would have been a much better tool of avoidance for the European Court than its misguided theory of attribution. Why should, after all, the phrase 'all necessary means' be read as authorising preventative detention without any judicial review?

Al-Jedda, on the other hand, is more difficult. Though the Council again used vague language of authorisation, it did tie it to the two letters annexed to Resolution 1546, which did expressly mention internment on security grounds.[112] Thus it could be plausibly asserted that the presumption has been rebutted and that the clear statement rule is satisfied. On the other hand, as we have seen above, the House of Lords nonetheless narrowly interpreted this authorisation, in essence reading it as dispensing solely with the exhaustive numeration of grounds of detention in Article 5(1) of the ECHR.

In conclusion, a clear statement rule is not a magic bullet. It will not be able to avoid all situations of conflict—for instance, it would have been of little use in *Kadi*, where the Council made its intentions perfectly clear. It is, however, necessary for channelling through law the great powers that the Security Council rightly has, and advancing the (at the moment undoubtedly aspirational) international rule of

[107] See also *R v Secretary of State ex p Pierson* [1998] AC 539, 575D (Lord Browne-Wilkinson).

[108] The House of Lords likewise employs a clear statement rule in instances of apparent norm conflict between UK law and EU law, with priority being given to the latter in absence of an express statement of Parliament to the contrary. See *Macarthys Ltd v Smith* [1979] 3 All ER 325, 329 (Lord Denning).

[109] *Boumediene v Bush* No 06–1195, 553 US (2008), slip op at 7, citing *Hamdan v Rumsfeld*, 548 US 557 (2006) 575. See also *Kent v Dulles* 357 US 116 (1958) (narrowly interpreting a statute relied on by the Executive to refuse issuing a passport to a suspected Communist, finding that Congress can curtail the constitutionally protected right to free movement only if its does so in explicit terms).

[110] See Wood (n 76) para 58 (quoting E Lauterpacht, 'The Legal Effect of Illegal Acts of International Organizations', in *Cambridge Essays in International Law—Essays in honour of Lord McNair* (London, Stevens, 1965) 88).

[111] See also Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures' (n 92) 916: '[R]arely would one need to construe human rights obligations as conflicting with SC anti-terror measures. A presumption of consistency of the latter with human rights obligations, and—one may add—all the more so with regard to peremptory norms, seems a perfectly viable interpretive tool to guarantee the required degree of consistency of SC resolutions with the international legal order.'

[112] UNSC Res 1546 (8 June 2004) UN Doc S/RES/1546 Annex p 11.

law.[113] If the Council truly intends to derogate from human rights, that intent *must* be manifested in the language of the resolution, and the reasons for doing should be explained openly, not left to backroom dealings between diplomats as they are now.[114]

CONCLUSION

If there is one thing that the cases presented above make obvious, it is that courts generally do what they can to avoid norm conflicts. The most common are the instances of harmonious interpretation used in numerous cases before the European Court, such as *Al-Adsani*,[115] *Prince of Liechtenstein*,[116] and *Maumousseau*.[117] To these we can add the equivalent protection cases in their intra-systemic, purely conflict-avoiding variant, as represented by *Bosphorus*,[118] as opposed to their inter-systemic, *Solange*[119] variant, which presupposes the existence of two separate legal systems.

Rarer are the cases where norm conflict is genuine and unavoidable. Rarer still are those situations in which norm conflict is both unavoidable and. For example, the famous *Soering* case[120] could be taken as an example of an unresolvable conflict between the *non-refoulement* component of Article 3 of the ECHR and a valid extradition treaty which recognised no such exception.[121] Likewise, if the applicant's argument in *Al-Jedda* that Article 103 of the Charter does not apply to Security Council authorisations had been accepted by the House of Lords, there would still have been a valid Chapter VII resolution conflicting with the equally valid ECHR.

[113] See Chesterman, 'An International Rule of Law?' (n 85) 360–61.

[114] See Johnstone, 'Legislation and Adjudication in the UN Security Council' (n 99) 305–06 (emphasising the need for the Council to justify its actions publicly).

[115] *Al-Adsani v United Kingdom* [GC] (App No 35763/97) ECHR 2001-XI 79 (holding that the *jus cogens* prohibition of torture did not conflict with the law of state immunity). See *also Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* [2006] UKHL 26, [2006] 2 WLR 1424.

[116] *Prince Hans-Adam II of Liechtenstein v Germany* [GC] (App No 42527/98) ECHR 2001-VIII 1 (holding that the right of access to court in Article 6 of the ECHR did not conflict with the Convention on the Settlement of Matters Arising out of the War and the Occupation, prohibiting German courts to entertain claims arising out of confiscations of German property in the name of reparations for damages in World War II).

[117] *Maumousseau and Washington v France* (App No 39388/05) ECHR 6 December 2007 (holding that the ECHR does not conflict with the Hague Convention on the Civil Aspects of International Child Abduction).

[118] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Ireland* (App no 45036/98) ECHR 2005-VI 107.

[119] *Solange I*, The German Constitutional Court, (Karlsruhe, 29 May 1974) [1974] 37 BVerfGE 271; *Solange II*, The German Constitutional Court, (Karlsruhe, 22 October 1986) [1986] 73 BVerfGE 339.

[120] *Soering v United Kingdom* Series A no 161 (1989) 11 EHRR 439 (holding that under Art 3 of the ECHR a state cannot extradite a person to another state where that person is at a substantial risk of being subjected to cruel or inhuman treatment of punishment).

[121] See T Thienel, *Can the Security Council Displace Human Rights Treaties?*, Opinio Juris Weblog (16 January 2008) http://opiniojuris.org/2008/01/16/can-the-security-council-displace-human-rights-treaties-al-jedda-part-2/.

Perhaps the most important insights from examining the practicalities of norm conflict can be gained in relation to Article 103 of the Charter. There, the tension between the integrationist commitment to general international law and the potentially fragmentationist commitment to human rights is the most palpable. Even the most dedicated adherent of the UN Charter can appreciate the potential for abuse inherent in the Security Council's wide discretion. That discretion might or might not get reviewed by courts in the future. More importantly, it can be curtailed through the use of interpretative presumptions, without stretching the relationship between general international law and human rights to a breaking point. There is nothing extravagant or earth-shattering in requiring the Council to derogate from human rights clearly and unambiguously if and when it wishes to do so. If such a request is good enough for democratically elected legislatures such as Congress or Parliament, surely it must be good enough for the Security Council.

When it comes to *Kadi*, while some general international lawyers have applauded the CFI's ruling that EU law is part of a unified international legal order,[122] the reaction of most EU lawyers,[123] as well as that of the ECJ itself, has been quite different. Both the opinion of Advocate General Maduro[124] and the appellate judgment of the ECJ in *Kadi*[125] held that EU law is a *constitutional* legal order independent from international law and the UN Charter, and that only this constitutional order can define how the norms of other legal orders can enter it. The ECJ has thus resorted to the ultimate form of norm conflict avoidance—the denial that the two potentially conflicting norms actually operate within the same legal system.[126] Of course, the ECJ in *Kadi* never explains what *exactly* in its view makes the EU legal order distinct and independent from international law, even if though it was created by treaties between states. At best, its reasoning is conclusory, even solipsistic—it *says* that EU law is constitutional, therefore it *is* constitutional, and therefore it is *not* international. Nonetheless, from the perspective of EU law, the ECJ can also be said to have defended what it sees as its own values and its own legal system from the aggressive intrusion into that order by the Security Council.

In that regard, general international lawyers must realise that justifying the primacy of the Charter simply on the basis that Article 103 says so might not be reason enough for courts and lawyers who have a commitment to some other system, especially if they perceive that system as somehow being constitutional in character.[127] If one shares the generalist agenda, as the present author does—and it must be said that the universality or general applicability of international law is nonetheless just that, an agenda, a project, if perhaps one less ambitious than the

[122] See, eg, C Tomuschat, 'Note: *Kadi v Council*' (2006) 43 *Common Market Law Review* 537, 551.

[123] See, eg, M Claes and WT Eijsbouts, 'Editorial—The Difference' (2008) 4 *European Constitutional Law Review* 1, 5.

[124] Case C-402/05 P *Kadi v Council* (Opinion of Advocate General Poiares Maduro) 16 January 2008, esp paras 21 and 24.

[125] Joined Cases C-402/05 P and C-415/05 P *Kadi & Al Barakaat International Foundation v Council and Commission* (Judgment) 3 September 2008, esp paras 281–82, 285, 316–17.

[126] ibid, paras 2, 4–6, 81, 202.

[127] See in that regard Koskenniemi and Leino, 'Fragmentation of International Law?' (n 5) 559, who argue that: '[e]ven as Article 103 may seem like a constitutional provision, few would confidently use it to uphold the primacy of Security Council decisions over, for example, human rights treaties.'

various constitutional ones out there—then it must also be said that it is quite naïve to think that general international law will always prevail over fragmentationist impulses, or even that it *should* prevail simply by virtue of being general, or because the Charter says so, or that there is a clearly correct position. In the final analysis, the debate about fragmentation has always been about competing political, ideological and institutional interests, not about coherence in the abstract.[128] General international law will thus prevail only if it accommodates, as far as possible, the concerns of these other actors, be they 'constitutional' or not.[129] If pushed hard enough by the Security Council, for example, even the European Court of Human Rights will be sorely tempted to declare independence from general international law. In accordance with one of the persistent themes of this article, such a conflict can and should be avoided.

BIBLIOGRAPHY

Books

CF Amerasinghe, *Principles of the Institutional Law of International Organizations,* Cambridge Studies in International and Comparative Law 36, 2nd edn (Cambridge, Cambridge University Press, 2005).

A Boyle and C Chinkin, *The Making of International Law* (Oxford, Oxford University Press, 2007).

F Coomans and M Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Antwerp, Intersentia, 2004).

A Dicey, *An Introduction to the Study of the Law of the Constitution* (London, Macmillan, 1959).

A Orakhelashvili, *Peremptory Norms in International Law* (Oxford, Oxford University Press, 2006).

J Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge, Cambridge University Press, 2003).

D Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Oxford, Clarendon Press, 1999).

Chapters in Edited Volumes

R Bernhardt, 'Article 103' in B Simma (ed), *The Charter of the United Nations – A Commentary* (Oxford, Oxford University Press, 2002).

[128] See Koskenniemi and Leino, (n 5) 578.

[129] After all, international law has always had 'the object of assuring the co-existence of different interests which are worthy of legal protection.' Weil, 'Towards Relative Normativity in International Law' (n 7) 419 (quoting Max Huber in *Island of Palmas (Netherlands v US)* 2 *Reports of International Arbitral Awards* 831).

J Frowein and N Krisch, 'Article 42' in B Simma (ed), *The Charter of the United Nations – A Commentary* (Oxford, Oxford University Press, 2002).

A Paulus, 'Article 29' in B Simma (ed), *The Charter of the United Nations – A Commentary* (Oxford, Oxford University Press, 2002).

Collected Courses

J Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 *Recueil des Cours de l'Académie de Droit International* 325–482.

International Law Commission (2006) *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission* (UN Doc A/CN 4/L 682).

B Simma, 'International Human Rights and General International Law: A Comparative Analysis' (1993) IV-2 *Collected Courses of the Academy of European Law* 153–236.

B Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Receuil des Cours de l'Académie de Droit International* 221–384.

P Weil, 'Le droit international en quête de son identité' (1992) 237 *Recueil des Cours de l'Académie de Droit International* 9–340.

International Documents

European Commission for Democracy through Law (Venice Commission), 'Opinion on Human Rights in Kosovo: Possible establishment of review mechanisms' (11 October 2004) No 280/2004, CDL-Ad.

International Law Commission (2001) 'Articles on the Responsibility of States for Internationally Wrongful Acts' UN Doc A/56/10.

International Law Commission (2004) 'Draft Articles on Responsibility of International Organizations' UN Doc A/59/10.

Journal Articles

D Akande, 'The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?' (1997) 46 *International and Comparative Law Quarterly* 309–43.

A Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion' (2006) 17 *European Journal of International Law* 881–919.

A Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19 *European Journal of International Law* 491–508.

P Bodeau-Livinec, GP Buzzini and S Villalpando, '*Behrami and Behrami v France*; *Saramati v France, Germany and Norway*—International Decisions' (2008) 102 *American Journal of International Law* 323–30.

D Bowett, 'The Impact of Security Council Decisions on Dispute Settlement Procedures' (1994) 5 *European Journal of International Law* 89–101.
J Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo' (2001) 12 *European Journal of International Law* 469–88.
S Chesterman, 'An International Rule of Law?' (2008) 56 *American Journal of Comparative Law* 331–62.
M Claes, and WT Eijsbouts, 'Editorial—The Difference' (2008) 4 *European Constitutional Law Review* 1–19.
B Elberling, 'The *Ultra Vires* Character of Legislative Action by the Security Council' (2005) 2 *International Organizations Law Review* 337–60.
B Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 *Columbia Journal of Transnational Law* 529–619.
M Fremuth and J Griebel, 'On the Security Council as a Legislator: A Blessing or a Curse for the International Community?' (2007) 76 *Nordic Journal of International Law* 339–61.
M Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' (2003) 16 *Leiden Journal of International Law* 593–610.
R Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55 *International and Comparative Law Quarterly* 791–804.
I Johnstone, 'Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit' (2008) 102 *American Journal of International Law* 275–308.
B Knoll, 'Rights Without Remedies: The European Court's Failure to Close the Human Rights Gap in Kosovo' (2008) 68 *Heidelberg Journal of International Law* 431–51.
M Koskenniemi, and P Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553–79.
R Liivoja, 'The Scope of the Supremacy Clause of the United Nations Charter' (2008) 57 *International and Comparative Law Quarterly* 583–612.
B Martenczuk, 'The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?' (1999) 10 *European Journal of International Law* 517–47.
M Milanović, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 *Human Rights Law Review* 411–88.
M Milanović and T Papić, 'As Bad As It Gets: The European Court of Human Rights' *Behrami and Saramati* Decision and General International Law' (2009) 58 *International and Comparative Law Quarterly* 267–96.
A Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong' (2007) 18 *European Journal of International Law* 955–70.
AN Pronto, '"Human-Rightism" and the Development of General International Law' (2007) 20 *Leiden Journal of International Law* 753–65.
A Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases' (2008) 8 *Human Rights Law Review* 151–70.

J Schott, 'Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency' (2007) 6 *Northwestern University Journal of International Human Rights* 24–80.
T Thienel, 'The ECHR in Iraq' (2008) 6 *Journal of International Criminal Justice* 115–28.
C Tomuschat, 'Note: *Kadi v Council*' (2006) 43 *Common Market Law Review* 537–51.
P Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413–42.
R Wolfrum, 'International Administration in Post-Conflict Situations by the United Nations and Other International Actors' (2005) 9 *Max Planck Yearbook of United Nations Law* 649–96.

Website Sources

C Lehnardt, 'European Court Rules on UN and EU Terrorist Suspect Blacklists', ASIL Insight (31 January 2007) www.asil.org/insights/2007/01/insights070131.html.
T Thienel, 'Can the Security Council Displace Human Rights Treaties?' Opinio Juris Weblog (16 January 2008) http://opiniojuris.org/2008/01/16/can-the-security-council-displace-human-rights-treaties-al-jedda-part-2/.
M Wood, 'First Lecture: The Legal Framework of the Security Council', Lauterpacht Lectures, University of Cambridge (7 November 2006) www.lcil.cam.ac.uk/Media/lectures/pdf/2006_hersch_lecture_1.pdf.

The Rapprochement between the Supremacy of International Law at International and National Levels

ANDRÉ NOLLKAEMPER*

INTRODUCTION

IN THIS PAPER, I will review whether domestic courts can duly refrain from giving effect to an international obligation, on the ground that performance of that obligation would contravene a fundamental right, recognised by the domestic law of that state.

The problem that is considered here can be illustrated by the judgment of the European Court of Justice in *Kadi v Council of the European Union*.[1] The ECJ refrained from giving effect to Security Council Resolution 1333 (2000) on the ground that performance of the obligations contained in the Resolution would conflict with fundamental rights under EU law. While the first reactions to the judgment suggest that many international lawyers feel compelled by the Court's resolution of the conflict, the question is whether and how international law can accommodate such challenges. Non-performance of international obligations with reference to fundamental rules of national law, or internal rules of international organisations, sits uneasily with the supremacy of international law.

While claims that domestic law should be supreme are by no means unusual, such claims have received a new impulse due to the nature of modern international law-making. Two developments in particular are critical: the dynamics of international law-making and the internal focus of much of modern international law.

First, challenges to the supremacy of international law in the performance of international obligations are especially likely to occur when an obligation acquires, through dynamic interpretation, a meaning that differs from the meaning as it was

* Professor of Public International Law and Director, Amsterdam Center for International Law, University of Amsterdam. Parts of earlier versions of this paper were presented at the *Law of the Future* Conference, The Hague, 26–27 October 2007, the Jean Monnet Conference *The European Union at 50: Assessing the Past: Looking Ahead*, Macau, 27–28 May 2008, and at the ESIL 2008 in Heidelberg. I thank Catherina Brölmann, Jean d'Aspremont, Tom Eijsbouts, Warda Henning, Hege Kjos, Jan Herman Reestman for comments on earlier drafts.

[1] Joint Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International*

understood by states at the time of the conclusion of the treaty, or when treaties are embedded in institutional structures that lead to normative development beyond the initial consent.[2]

Second, as international law becomes more regulatory in nature, and more directly governs domestic matters, including legal rights and obligations of private persons,[3] domestic actors will expect it to conform to equivalent standards of rule of law and protection of fundamental rights that apply at the domestic level.[4]

It is a plausible argument that international law should, in those areas where it prescribes or supervises domestic law, be sensitive to domestic (constitutional) law.[5] The criterion of equivalent protection in the ECHR's judgments in cases such as *Bosphorus*[6] is just a manifestation of a much wider phenomenon. As long as that standard cannot be met (both in terms of the applicability of human rights protection against acts of international institutions and in terms of procedural remedies against such acts), backlashes at the domestic level are likely to emerge.

It is against this background that this article will review whether, and on what basis, international law can accommodate challenges to the supremacy of international law based on the protection of fundamental rules of domestic law.[7] I will first

[2] See eg T Gehring, 'Treaty-Making and Treaty Evolution' in D Bodansky et al (eds), *The Oxford Handbook of International Environmental Law* (Oxford, Oxford University Press, 2007) 466–99. See for an example of domestic resistance to the domestic legal force of decisions of international institutions after the expression of the initial consent: *Natural Resources Defense Council v Environmental Protection Agency et al* Appeal Judgment 464 F3d 1; ILDC 525 (US 2006); 373 US App DC 223; 63 *Environment Reporter* (BNA) 1203; 36 *Environmental Law Report* 20181 (DC Cir 2006); ILDC 525 (US 2006), 29 August 2006 (holding that decisions by the parties to the 1987 Montreal Protocol were not judicially enforceable in the United States).

[3] *See* generally on the increasing role of international law in this area: JHH Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy' (2004) 64 *Heidelberg Journal of International Law* 547; M Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law* 907.

[4] J Crawford, 'International Law and the Rule of Law' (2004) 24 *Adelaide Law Review* 3, 10. *Cf* D Bodanksy, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 *American Journal of International Law* 596, 606 (noting that the more international law resembles domestic law, the more it should be subject to the same standards of legitimacy).

[5] J Crawford, 'International Law and Australian Federalism: Past, Present and Future' in BR Opeskin and DR Rothwell (eds), *International Law and Australian Federalism* (Victoria, Melbourne University Press, 1997) 325, 333; Crawford, 'International Law and the Rule of Law' (n 4); A Bianchi, 'International Law and US Courts: The Myth of Lohengrin Revealed' (2004) 15 *European Journal of International Law* 751, 781.

[6] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Ireland* (App no 45036/98) ECHR 2005-VI 107.

[7] The prime focus of the article is the principle of supremacy of international law over domestic law. To some extent, the analysis will also apply to the relationship between international law and the internal law of international organisations; the *Kadi* case (n 1) is a case in point. See generally on this relationship: G Arangio-Ruiz, 'International Law and Interindividual Law' in J Nijman and A Nollkaemper (eds), *New Perspectives on the Divide between International and National Law* (Oxford, Oxford University Press, 2007) 15, 39–43. However, in several respect the latter category raises distinct questions, a full analysis of which lies beyond the scope of this article. In its work on responsibility of international organisations, the International Law Commission (ILC) recognised the different nature of these issues; see eg ILC, 'Report of the International Law Commission on the work of its 55th Session' (5 May–6 June and 7 July–8 August 2003) UN Doc A/58/10, paras 9–10 of the Commentary to draft Article 3.

summarise the principle of supremacy and its formal nature that prevents international law from accepting domestic challenges to international obligations. I then discuss whether a solution may be found in the international nature of fundamental rights that are invoked as justification for non-compliance with an international obligation. The last section contains brief conclusions.

THE FORMALITY OF THE PRINCIPLE OF SUPREMACY

Gerald Fitzmaurice wrote that the principle of supremacy is 'one of the great principles of international law, informing the whole system and applying to every branch of it'.[8] In general terms, the principle of supremacy of international law seeks to subordinate the sovereignty of states to international law.[9] One of its specific manifestations is that international law is supreme over, and takes precedence in the international legal order, over national law.[10] In the event of a conflict between international law and domestic law, international law will have to prevail in the international legal order, domestic law being considered a fact from the standpoint of international law. This aspect is at the heart of the law of treaties[11] and the law of international responsibility.[12] The principle of supremacy of international law thus is key to the international rule of law, which, if anything, requires that states exercise their powers in accordance with international law, not domestic law.[13] Allowing states to prioritise fundamental rules of domestic law over international law would undermine the efficacy of international law and indeed the international rule of law as such. It even can be said that the principle that international law is supreme over domestic law, and the international rule of law,

[8] G Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92 *Recueil des Cours de l'Académie de Droit International* 1.

[9] ibid 6.

[10] See for a comprehensive treatment of this aspect of the principle of supremacy: D Carreau, *Droit International*, 8th edn (Paris, Pedone, 2004) 43–97; Fitzmaurice, *The General Principles* (n 8) 68–94. See also C Santuli, *Le Status International de L'Ordre Juridique Étatique* (Paris, Pedone, 2001) 427.

[11] Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 Arts 27 and 46.

[12] ILC *Articles on the Responsibility of States for Internationally Wrongful Acts*, annex to UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83 (Articles on State Responsibility) Arts 3 and 32. The Articles are reproduced in J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, Cambridge University Press, 2002). A comparable principle is contained in Art 35 of the Draft Articles of the ILC on the Responsibility of International Organizations, UN Doc A/CN4/L270. On the other hand, the Draft Articles of the ILC on the Responsibility of International Organizations do not contain an Article comparable to Art 3 of the Articles on State Responsibility; see discussion in ILC 'Report of the International Law Commission on the work of its 55th Session' (5 May–6 June and 7 July–8 August 2003) UN Doc A/58/10 paras 9–10 of the Commentary to draft Art 3.

[13] I Brownlie, *The Rule of Law in International Affairs. International Law at the Fiftieth Anniversary of the United Nations* (The Hague, Nijhoff, 1988) 213–14. See also G Fitzmaurice, *The Law and Procedure of the International Court of Justice* Vol II (Cambridge, Grotius Publications, 1986) 587 (noting that the principle is generally accepted as 'a *sine qua non* of the efficacy and reality of international obligation').

have a common denominator as there cannot be any rule of law without the precedence of some principles over others deemed of a lesser importance.[14]

Of course, the principle of supremacy of international law does not mean that international law is insensitive to domestic law. Such sensitivity may be reflected in the substance of the law, in the fact that many international obligations contain a *renvoir* to domestic law and in use of a margin of appreciation by supervisory mechanisms.[15]

However, it is one thing to say that primary rules or supervisory mechanisms should reflect particular sensitivities of domestic law, and quite something else that international law should accept a general exception to the principle of supremacy in the international legal order based on the protection of fundamental norms of domestic law.

In principle, defects in terms of rule of law quality of international law do not affect the application of the principle of supremacy. After all, the principle is a formal one. It requires that international law prevails over domestic law, whatever the contents of international law and whatever the nature of the decision-making process through which international obligations have come into existence. Whether or not a particular rule that would be set aside because of the principle of supremacy is a *fundamental* rule does not make a difference. It is for this reason that Sir Arthur Watts noted that the supremacy of law is not, by itself, a sufficient indication of what the rule of law involves. He wrote that since the law which is to enjoy supremacy may itself be unjust and oppressive, 'the supremacy of such a law is not what is meant by the rule of law.'[16] Supremacy is, as a formal principle, blind to substance and effect—the rule of law, bare in its most minimalist definition, is not.

Indeed, it is difficult to see how, without further benchmarks, it is possible to qualify the general principle of supremacy without fundamentally undermining the cause of international law. Notwithstanding many common elements in national constitutions, there are significant differences in constitutions across the world. Allowing rules of domestic (constitutional) law, without further qualification, to justify non-compliance with international obligations could fundamentally undermine the effectiveness of international law. Limiting this power to an undefined category of 'fundamental constitutional norms' will not help, as what is fundamental will differ from one state to another.

This may be different, however, in the EU context. In Europe, there is wide support for the proposition that supremacy of EC law should not be understood as

[14] Fitzmaurice, 'The General Principles of International Law' (n 8) 69 (equating the principle that the sovereignty of states is subordinated to the supremacy of international law with the rule of law in the international field). See also (more critically) A Watts, 'The International Rule of Law' (1993) 36 *German Yearbook of International Law* 15, 22–23;

[15] E Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 *New York University Journal of International Law and Politics* 843; Y Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2006) 16 *European Journal of International Law* 907, 912; *cf* Kumm, *The Legitimacy of International Law* (n 3) 927.

[16] Watts, *The International Rule of Law* (n 14) 22–23.

blind precedence over fundamental constitutional rules of the member states.[17] The relative homogeneity arguably would make it possible to accept an exception on the principle of supremacy.[18] Among European states there is some unanimity on what the fundamental constitutional norms are—especially since most of them have been enshrined in EU law—and there would accordingly be less controversy as to the situations where courts could decline to give supremacy to international law for incompatibility with these standards. At the international level, such an exception would be much more difficult to accept as the risks for instability in treaty performance would be much greater.

Allowing states to escape compliance with their obligations based on fundamental rules of domestic law would entail serious risks. Recognition, at the international level, of a power of states (or international organisations like the EU) to prioritise domestic law over binding international obligations might obliterate boundaries of legality, and 'might reinforce perceptions of international law as non-law (or quasi-law) – i.e., a loose system of non-enforceable principles, containing little, if any real constraints on state power.'[19]

Of course, the fact that international law will be unable to accept an exception to the principle of supremacy at the international level by allowing states a right to invoke fundamental rules of domestic constitutional law does not mean that states will change their practice at the domestic level. As indicated above, the number of instances in which states (or courts) may give priority to domestic law can be expected to increase rather than to decline. The result may be that in terms of descriptive analysis, we may well see an increasing collision between the international and the domestic legal order, with neither system recognising the internal effects of the claim to supremacy of the other legal order. At the same time, however, both systems in some respects can complement defects in rule of law protection of the other system.[20] The European Court of Human Rights, or other international courts, may compensate for defects in the rule of law at domestic level, by determining a violation of the Convention and obliging the state to cure the defect. On the other hand, domestic courts may provide redress against decisions of international organisations where no such redress is available at international level. However, the descriptive and perhaps explanatory power of the model of two colliding yet sometimes complementary systems does not easily translate into a norm that international law can accept.

[17] eg C Joerges, 'Rethinking European Law's Supremacy' (2005) European University Institute Working Paper Law No 2005/12 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=838110.

[18] L Besselink, *A Composite European Constitution* (Groningen, Europa Law Publishing, 2007) 10–11 (arguing on the basis of Art 5 of the Treaty on the European Union that 'European acts which do no respect … fundamental values do not take precedence over national rules and acts which express that national identify and the common values of the democratic rule of law.').

[19] Shany, *Toward a General Margin of Appreciation* (n 15).

[20] A von Bodgandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6 *International Journal of Constitutional Law* 397. See for the notion of complementary between international and national legal orders A Nollkaemper, 'Multilevel accountability in international law: a case study of the aftermath of Srebrenica' in Y Shany and T Broude (eds) *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy, and Subsidiarity* (Oxford, Hart Publishing, 2008) 345–67.

SUBSTANTIVE QUALIFICATIONS TO THE PRINCIPLE OF SUPREMACY

It may be possible to take a narrower approach and to identify a more specific criterion for qualifying the principle of supremacy. This criterion is the conformity of a rule of domestic law to international law. Decisions to refrain from giving effect in domestic legal orders to international law may be based on rules of domestic law that conform to or give effect to another rule of international law. In effect, they thus may protect values that international law itself seeks to protect as well. For instance, where domestic law gives effect to international obligations for the protection of fundamental rights, it is not obvious that an international obligation, particularly when adopted in a forum with limited accountability, should always prevail over such a domestic law.

Domestic constitutional, legislative and judicial challenges[21] to the full application of international law need not then be characterised as nationalistic reflexes that seek to undermine the international rule of law. Rather, they may be seen as legitimate responses that are necessary to preserve the rule of law—not only at the domestic level but also at the international level. The larger point here is that the distinction between these two levels cannot always easily be made.

This approach shows similarities with what in European law has come to be known as the *Solange II* doctrine,[22] as well with the approach adopted by the ECtHR in regard to its relationship to other international courts.[23] It is equally relevant to the relationship between domestic law and international law. There are a seemingly increasing number of cases in domestic courts that may be explained and justified from this perspective.

One example is the *Görgülü* decision, in which the German *Bundesverfassungsgericht* declined to give effect to a judgment of the European Court of Human Rights which would have restricted the protection of the individual's fundamental rights under the Constitution. The Court held that, while it normally should give effect to a judgment of the European Court, that would not be so when to do so would 'restrict or reduce the protection of the individual's fundamental rights under the Constitution.'[24] The Court noted that the commitment to international law takes effect only within the democratic and constitutional system of the Basic Law. Significantly, it referred in this context to a joint European development of fundamental rights.[25] As to the effects on third parties, it stated that it is the task of the domestic courts to integrate a decision of the ECtHR into the relevant partial

[21] Of course, the effect of (a lack of) legitimacy of international law is not only or not even primarily a matter for appreciation by the courts. A perceived lack of legitimacy will manifest itself primarily in decisions of (constitutional) legislatures to disallow their courts to apply international law.

[22] *Solange II*, The German Constitutional Court (Karlsruhe, 22 October 1986) [1986] 37 BVerfGE 3. See on comparable cases in other states: A Peters, 'The Globalization of State Constitutions' in J Nijman and A Nollkaemper (eds), *New Perspectives on the Divide between International and National Law* (Oxford, Oxford University Press, 2007) 266–67.

[23] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Ireland* (App no 45036/98) ECHR 2005-VI 107.

[24] *Görgülü*, The German Constitutional Court (Karlsruhe, 14 October 2004) [2004] 111 BVerfGE 307, para 32 (emphasis added); see also para 62.

[25] ibid, para 62.

legal area of the national legal system by balancing conflicting rights, and that the ECtHR could not aim to achieve such solutions itself.[26]

Likewise, challenges in domestic courts of decisions of the Security Council Sanctions Committee that impose restrictions on individual human rights, which would score low on most indicators of the international rule of law, may be seen as justifiable attempts to preserve individual rights, and indeed the rule of law.[27] In some respects this also holds for the *Kadi* judgment of the European Court of Justice. The Court protected fundamental rules of Community law, which in substance overlapped and indeed were informed by international (ECHR) standards.[28]

It might be argued that in at least some of these cases, courts do not and indeed cannot present the conflict in terms of a conflict between two international norms. In 'dualistic' states like Germany or Italy, the conflict will generally be phrased in terms of a conflict between two domestic (often constitutional) norms, or between a domestic norm on the one hand and a competing international obligation on the other. An example of the former approach was the *Von Hannover* case;[29] examples of the latter are the judgment of the *Bundesverfassungsgericht* in *Görgülü* and the judgment of the Court of Justice in *Kadi*.

Also courts in monist states may phrase such questions in terms of an international–domestic law conflict or, as a middle way, as a conflict between an international obligation and international public policy. An example of the latter is a decision of the French Court of Cassation in a dispute pertaining to the immunity from suit of the African Development Bank. The Court of Appeal of Orleans had denied the immunity, on the ground that no administrative tribunal had been established by the Bank; allowing the Bank to rely on immunity would be in breach of the right of access to court under Article 6 of the ECHR.[30] Though France is a 'monist' state, like the Netherlands, and thus could have referred to international law, the Court of Cassation held that granting immunity would violate the right to a court which, in France, is part of the international public order.[31]

However, while in such cases, it may be said that at the domestic level we are concerned with a conflict between international law and domestic law, at the international level a parallel conflict may exist between two international norms. For the domestic law in question might be nothing else than the implementation of

[26] ibid, para 58

[27] E de Wet and A Nollkaemper, 'Review of Security Council Decisions by National Courts' (2002) 45 *German Yearbook of International Law* 166.

[28] *Kadi v Council* (n 1). In para 283 the Court recalled that 'according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance.'

[29] *Von Hannover v Germany* (App no 59320/00) ECHR 2004-VI 1.

[30] P Callé, 'L'acte authentique établi à l'étranger—Validité et execution en France' (2005) 94 *Revue Critique de Droit International Privé* 377, 405.

[31] *African Development Bank v Mr X* (25 January 2005) Appeal No 04–41012 ILDC 778 (2005).

an international obligation, or even a domestic norm that pre-existed and separately exists from an international obligation, yet in substance is largely identical. In such cases, the conflict between an international and a domestic norm may, at the international level, be transformed into a conflict between two international norms. An example of such a transformation of domestic constitutional rights into international rights is provided by *Von Hannover v Germany*, decided by the ECtHR.[32] Princess Caroline of Monaco had brought a claim against the publication of certain photos in newspapers, arguing before the *Bundesverfassungsgericht* that there had been an infringement of her personality rights under Article 2(1) of the German Basic Law. The *Bundesverfassungsgericht* found that Germany had violated the rights of Princess Caroline, in regard to some photos, but dismissed the claim in regard to other photos, based inter alia on the principle of freedom of the press in Article 5(1) of the Basic Law.[33] When Princess Caroline petitioned the ECtHR, the parties and the Court construed the legal issue in terms of a conflict between Article 8 and Article 10 of the European Convention. The conflict between these two rights thus is resolved (in this case, in favour of the applicant) at the international level.

Likewise, though in cases such as *Görgülü* and *Kadi* the conflict was not exclusively expressed as a conflict between international obligations, the international dimension of the constitutional principles that were invoked lurked in the background. In the hypothetical situation where the state (or organisation) that allegedly fails to comply with an obligation is required to justify itself at the international level, it may well build its defence in such terms. It may be that the Court of Justice in *Kadi* understated its case, and perhaps limited its acceptability at the international level, by not putting more emphasis on the commonality between the European standards it sought to protect, on the one hand, and the human rights standards under the UN Conventions and customary law that were relevant to the exercise of powers by the Security Council, on the other.[34]

The approach proposed here thus is based on a substantive overlap between international law and domestic law and a commonality of constitutional values at the international and the domestic level.[35] That commonality presents us with a criterion to distinguish these cases from, say, *Medellin* or from challenges to international law based on sharia.[36]

[32] *Von Hannover v Germany* (n 29).

[33] *Caroline von Monaco II*, The German Constitutional Court, (Karlsruhe, 15 December 1999) [1999] 101 BVerfGE 361.

[34] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI Article 24(2); see further discussion in De Wet and Nollkaemper, *Review of Security Council Decisions by National Courts* (n 27).

[35] See further discussion in J Nijman and A Nollkaemper, 'Beyond the Divide' in J Nijman and A Nollkaemper (eds), *New Perspectives on the Divide between International and National Law* (Oxford, Oxford University Press, 2007) 341–60.

[36] Though obviously not all such challenges would necessarily violate international law, see discussion by J Rehman, 'The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq' (2007) 21 *International Journal of Law, Policy and the Family* 108–27.

For that reason, a distinction should be drawn between attempts to prioritise domestic law that conforms to international obligations and other justifications for non-performance of obligations. A hard core, and a relatively safe common ground, seems to be international human rights law. Indeed, the cases cited above (*Görgülü*, *IPGRI* and *Kadi*) all revolve around human rights. It also is not insignificant that many states restrict the precedence of international law in domestic legal order to cover solely international human rights treaties.[37] There thus may be reciprocity between, on the one hand, states' acceptance of domestic supremacy for fundamental human rights and, on the other hand, the acceptance that states may restrict the application of international law where to do so would violate such fundamental human rights.

It is doubtful whether the international legitimacy endowed on qualifications of the principle of supremacy advocated here should go much beyond this category of fundamental human rights. At a global scale, international law could for instance not accept the argument that international decisions suffer democracy deficits that would justify non-compliance.[38]

It is in respect to those domestic values that correspond to international law that, at the domestic level, the supremacy of international law does not need not be understood as blind formalism, but can be construed in substantive terms. It cannot be presumed; it has to be earned on substance. The strength and persuasive power of the principle of supremacy at the domestic level depends on its ability to conform to rule-of-law requirements and to the values that international law itself proclaims.[39]

SUPREMACY AND CONFLICTS OF NORMS AT THE INTERNATIONAL LEVEL

It may be said that the issue need not be presented as a conflict between international law and domestic law, but can be construed as a conflict between international legal obligations that can be wholly dealt with at the international level. The usual rules governing conflict between international norms then may lead to the priority of one norm, without any question of supremacy arising.[40]

However, a conflict between an international obligation and a competing fundamental right cannot always be resolved at the international level—at least not in a manner that would conform to the way that domestic courts would solve the problem. Even if a domestic court were to view a dispute in terms of a conflict between two international norms, its solution would not necessarily be identical to the solution that an international court would propose. For one thing, a domestic

[37] Peters, *The Globalization of State Constitutions* (n 22) 260, 269–70. But see the *Görgülü* case (n 24), in which the BVerfG said that ECHR only enjoys the rank of a federal act and needs to be applied within the confines of the Basic Law (para 30, 35).

[38] T Cottier and D Wüger, 'Auswirkungen der Globalisierung auf das Verfassungsrecht: Eine Diskussionsgrundlage' in B Sitter-Liver (ed), *Herausgeforderte Verfassung: Die Schweiz im globalen Konzert* (Freiburg,Universitätsverlag, 1999) 263–64; cited in Peters (n 22) 267.

[39] ibid.

[40] See ILC, 'Report of the Study Group on the Fragmentation of International Law, finalized by Martti Koskeniemmi' 56th session (3 May–4 June and 5 July–6 August 2004) UN Doc A/CN4/L628.

court might seek to balance two obligations binding on the forum state (such as the ECHR and an extradition treaty), whereas an international court might not have that power, for instance because one of the parties before the international court was not a party to the ECHR. Consider the example of the judgment of the Supreme Court of the Netherlands in *Short v Netherlands*. The Court had to resolve a conflict between an obligation under a bilateral extradition treaty and the ECHR, arising from the fact that the US had requested extradition of a US soldier who might have faced the death penalty in the United States.[41] The Court found that the obligation under the ECHR prevailed on the basis of a balance of interests. A similar approach was taken by the Constitutional Court of the Czech Republic in respect of an extradition request from Thailand.[42] If such a conflict were to be adjudicated by an international court that only had jurisdiction in respect to the extradition treaty, the outcome obviously might be different.

Moreover, even if an international court were to have jurisdiction in respect of all relevant treaties, it might apply a different conflict rule than a domestic court would. The weighing of interests and obligations applied in the Dutch and Czech extradition cases referred to above, does not easily conform to international principles for the reconciliation of competing obligations.[43] The same would hold for a hypothetical scenario where an international court reviewed the international responsibility of member states of the EU following the *Kadi* judgment.[44] An international court might for instance find that it could not, like a state, give precedence to international human rights law, in view of the effects of Article 103 of the Charter at the international level—a principle that would not come into play domestically.[45] Indeed, the ECtHR decisions in *Behrami* and *Saramati*[46] show that that the European Court is likely to arrive at a different balance of interest. The few hierarchies that international law does establish, such as Article 103 of the UN Charter, need not be recognised domestically. Conversely, domestic courts may establish a hierarchy of norms (with fundamental rights on top), or come to a balance of interests, that international courts need not follow.

This situation is significantly different from the situation addressed by the traditional principle of supremacy, which, in its practical manifestations, means that a state cannot plead provisions of domestic law as a ground for non-observance of international obligations. If the reason for non-observance is a rule of domestic law that conforms to an international obligation, the conflict is not

[41] *CDS v The State of the Netherlands* Netherlands Supreme Court, (The Hague, 30 March 1990) [1991] 22 *Netherlands Yearbook of International Law* 432

[42] *Recognition of a Sentence Imposed by a Thai Court,* Constitutional Court of the Czech Republic (Brno, 21 February 2007), I ÚS 601/04, International Law in Domestic Courts 990.

[43] See the various principles governing the conflict of norms discussed in ILC, *Report of the Study Group on the Fragmentation of International Law*, finalised by Martti Koskeniemmi (United Nations, UN Doc A/CN4/L628, 2004).

[44] *Kadi v Council* (n 1).

[45] Unless it would find that the Council would have acted ultra vires; see de Wet and Nollkaemper (n 27) 375, or the Council would have violated a rule of ius cogens; see A Orakhelsashvili, *Peremptory Norms in International Law* (Oxford, Oxford University Press, 2006) 465.

[46] *Behrami and Behrami v France* (App no 71412/01) and *Saramati v France, Germany and Norway* (App no 78166/01) ECHR 2 May 2007.

between international law and domestic law, but between a (possible) international determination of how a conflict between two obligations should be resolved and a domestic determination of how such a conflict should be resolved.

It is debatable whether this conflict should be construed in terms of the principle of supremacy. On the one hand, it may not be a problem of supremacy in the narrow sense of the term, as for instance codified in Article 27 of the Vienna Convention on the Law of Treaties (VCLT). On the other hand, if we use the concept of supremacy in a broad meaning, as referring to the subordination of the sovereignty of states to international law, it still may be possible to construe such a conflict between an international and a domestic interpretation as a problem of supremacy. The subordination of the sovereignty of states to international law may be said to include the supremacy of international over purely domestic decisions on how to reconcile two competing obligations.

In either case, the normative conflict discussed here is of an essentially different nature to traditional international law–domestic law conflicts. First, there is a difference of principle. Rather than seeking to prioritise domestic law over international law, states seek to contribute to the effective performance of international obligations. We are thus not concerned with nationalistic solutions that undermine the cause of international law, and that for this reason are principally rejected at the international level. Rather, courts seek to give effect to what they perceive as (domestic translations) of fundamental rules of international law. It seems that the international legal order should treat such cases differently to attempts to prioritise domestic law over international law.

Second, the fact that a state seeks to justify non-compliance with an international obligation by reference to another international obligation, rather than to a rule of domestic law, changes the parameters of the dispute. Rather than being analysed in a black and white manner (domestic law can never trump international law), the conflict is now subjected to rules of international law pertaining to conflicts between two or more international norms.[47] While these rules do establish some parameters, they are much more flexible and the outcome is much less straightforward than the application of the principle of Article 27 of the VCLT.

The difference may be illustrated by the proceedings instituted by Germany against Italy for failing to respect the jurisdictional immunities of Germany.[48] The dispute may be framed as a conflict between the rights of jurisdictional immunity vis-à-vis the Italian argument that in cases of international crimes, no such right exist. If the conflict were to be presented purely in terms of a dispute ofinternational law versus domestic law, Germany's argument could be endorsed by the court by simple reference to the principle of supremacy and to Article 3 of the Articles on State Responsibility. If however the conflict is presented, as seems likely, in terms of two opposing rules of international law, that argument would be immaterial. The question then becomes one of interpretation of the law of

[47] See the comprehensive discussion of conflict rules in ILC (n 43).

[48] See *Respect of the Jurisdictional Immunity as a Sovereign State (Germany v Italy)* (Pending) ICJ Press Release 2008/44 www.icj-cij.org/docket/files/143/14925.pdf (last accessed 24 May 2009).

immunities and the rules governing the resolution between competing international obligations—a question that leaves room for a wider analysis.

It is true that in those rare instances in which a case reaches an international court, such as the case now brought by Germany against Italy, this court eventually would have to come up with a single answer as to which interpretation should prevail. In the event of the international court not accepting the hierarchy of norms as interpreted by the state, the outcome might be identical to the situation where the state relies on domestic rather than international law. An international court is likely to reject the attempt of a state to justify non-performance by reference to a fundamental obligation that is not recognised as being hierarchically superior.[49]

However, two qualifications are in order. First, there is a good argument to be made that domestic decisions on balancing of international obligations are entitled to a deference that gives states a wide margin of appreciation in the definition, interpretation and balancing of fundamental rights. That obviously is true in cases concerning a conflict between two norms, each covered by the ECHR and the ICCPR, as was the case in the *von Hannover* case.[50] In that respect also Article 53 of the ECHR is relevant, providing that 'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.'[51] Arguably it also may apply when a domestic court balances a fundamental right with a substantive right of another state. For the question would be which state should incur the costs of normative ambiguity caused by the conflict between two international norms.[52] Leaving no deference to the state in question 'marks a questionable policy preference for inaction (i.e., the prevailing *status quo*), even when action is legitimized by international law.'[53] In effect, it would freeze the law, precisely in an area where emerging practice at national level can change hierarchies at the international level.

Second, in the majority of cases, no claim is brought to an international court. In such cases the situation will be that a domestic court, which in a normative ambiguous situation prioritises fundamental rights over other state rights, will have a credible claim of legitimacy. The case of *Short* is illustrative. Even though the

[49] This is indeed suggested by the Judgment of the ECHR in *Al-Adsani v the United Kingdom* (App no 35763/97) ECHR 2001-XI 79.

[50] *Von Hannover v Germany* (n 29).

[51] See for an application: *Decision regarding the scope of the fundamental right to protection of personality rights pursuant to Article 2.1 in conjunction with Article 1.1 of the Basic Law (Grundgesetz—GG) in respect of photographs of celebrities within the context of entertaining media reports concerning their private and everyday life*,Bundesverfassungsgericht (26 February 2008) 1 BvR 1602/07 para 52 (holding that 'Gewährleistungen der Konvention und die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte dienen darüber hinaus auf der Ebene des Verfassungsrechts als Auslegungshilfen für die Bestimmung von Inhalt und Reichweite von Grundrechten, sofern dies nicht zu einer - von der Konvention selbst nicht gewollten (vgl Art 53 EMRK) - Einschränkung oder Minderung des Grundrechtsschutzes nach dem Grundgesetz führt').

[52] Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (n 15) 925.

[53] ibid.

choice to abide by the ECHR, and not the extradition treaty, caused the Netherlands to violate an international obligation towards the United States, few would contest the legitimacy of the balance struck by the Dutch court.[54]

CONCLUDING OBSERVATIONS

With the increase of decisions of international organisations and perhaps also treaty obligations that may not satisfy requirements that have been set at domestic level in terms of protection of the rule of law and fundamental rights, we seem likely to witness a growing reluctance of domestic courts to give supremacy to international law in their domestic legal order. From one perspective, this leads to international law and domestic law complementing each other in the protection of the rule of law and fundamental rights. However, without further benchmarks, international law will not be able to accept domestic challenges to the performance of international obligations based on a conflict with domestic law, and will assert the supremacy of international law.

The benchmark on which acceptance by international law may be based can only be found in international law itself. In a substantial and probably increasing number of cases, challenges based on domestic fundamental rights overlap with and thus can also be based on international norms. The substantive overlap and interdependence between international law and domestic law leads to a qualification of the principle of supremacy as states may acquire more power to assert domestic/international norms to justify non-performance of international obligations. This is not necessarily an apologetic move that sacrifices the normative ideals of international law and its supremacy. Paradoxically, by bringing the (application of the) principle close to domestic practice, the ideals of international law may be better served.

Recognising a substantive qualification of supremacy may help solve the opposition, and resulting paralysis, between the supremacy of international law and the supremacy of domestic law. States may be more willing to allow international law into their domestic legal orders, if they can be relatively certain that they will have a final check that international law does not upset their fundamental rights. This would be in line with the practice of states that allows for domestic precedence of international human rights law.[55] It has the advantage of bringing the principle of supremacy at the international level and the principle of supremacy at the domestic level closer together.[56]

A related asset of this perspective is that it allows us to recognise the role that domestic courts can play in upholding the international rule of law by scrutinising whether international acts (in particular acts of international organisations, but also treaties) are compatible with fundamental rights. Determining whether or not such international acts of law-making conform to fundamental rights ideally would be a

[54] *CDS v The State of the Netherlands* (n 41).

[55] Peters (n 22).

[56] *cf* for a similar argument in the context of EU law Besselink, *A Composite European Constitution* (n 18).

task of international courts. But in the absence of such courts with adequate jurisdiction, national courts can provide the missing link by assessing international acts against fundamental rights, either 'as international norms' or in the form of domestic constitutional rights.

Rather than seeing domestic filters as an unwarranted barrier to the full effect of international law, such filters may be complementary to the ambitions of international law itself. Rather than being faithful but blind enforcers of international law, domestic courts may have to fulfil a role as a safety-valve or 'gate keepers'.[57] Thereby, they also can put pressure on international decision-makers to get it right, much in the same manner as the *Solange* case law in Germany put pressure on decision-makers in the EC to recognise and protect fundamental rights. Similarly, the *Kadi* case may put pressure on the Security Council to adjust the procedures, assuming that the Council is concerned about the effects of its resolutions in the European Union and that the defects in terms of rule-setting cannot be resolved at the European level.

The substantive approach to supremacy advanced here does not at all solve or prevent normative conflicts—it just may relocate them. The approach advanced here also is not entirely risk-free. But it is grounded in attempts to give effect to international obligations, rather than to deny such effect. Whatever concerns remain, may be outweighed by the defects in the rule of law quality of international law, which needs to be solved at the international level.

BIBLIOGRAPHY

Books

L Besselink, *A Composite European Constitution* (Groningen, Europa Law Publishing, 2007).

I Brownlie, *The Rule of Law in International Affairs. International Law at the Fiftieth Anniversary of the United Nations* (The Hague, Nijhoff, 1988).

D Carreau, *Droit International,* 8th edn (Paris, Pedone, 2004).

J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, Cambridge University Press, 2002).

G Fitzmaurice, *The Law and Procedure of the International Court of Justice* Vol II (Cambridge, Grotius Publications, 1986).

A Orakhelsashvili, *Peremptory Norms in International Law* (Oxford, Oxford University Press, 2006).

C Santuli, *Le Status International de L'Ordre Juridique Étatique* (Paris, Pedone, 2001).

[57] F Kratochwil, 'The Role of Domestic Courts as Agencies of the International Legal Order' in R Falk, F Kratochwil and S Mendlovitz (eds), *International Law, A Contemporary Perspective, Studies on a Just World Order* 2 (Boulder, Westview, 1985) 237; Peters, 'The Globalization of State Constitutions' (n 22) 267.

Chapters in Edited Volumes

G Arangio-Ruiz, 'International Law and Interindividual Law' in J Nijman and A Nollkaemper (eds) *New Perspectives on the Divide between International and National Law* (Oxford, Oxford University Press, 2007).

T Cottier and D Wüger, 'Auswirkungen der Globalisierung auf das Verfasungsrecht: Eine Diskussionsgrundlage' in B Sitter-Liver (ed), *Herausgeforderte Verfassung: Die Schweiz im globalen Konzert* (Freiburg, Universitätsverlag, 1999).

J Crawford, 'International Law and Australian Federalism: Past, Present and Future' in BR Opeskin and DR Rothwell (eds), *International Law and Australian Federalism* (Victoria, Melbourne University Press, 1997).

T Gehring, 'Treaty-Making and Treaty Evolution' in D Bodansky et al (eds), *The Oxford Handbook of International Environmental Law* (Oxford, Oxford University Press, 2007).

F Kratochwil, () 'The Role of Domestic Courts as Agencies of the International Legal Order' in: R Falk, F Kratochwil and S Mendlovitz (eds), *International Law, A Contemporary Perspective,* Studies on a Just World Order 2 (Boulder, Westview, 1985).

J Nijman and A Nollkaemper, 'Beyond the Divide' in J Nijman and A Nollkaemper (eds), *New Perspectives on the Divide between International and National Law* (Oxford, Oxford University Press, 2007).

A Nollkaemper, 'Multilevel accountability in international law: a case study of the aftermath of Srebrenica' in Y Shany and T Broude (eds) *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy, and Subsidiarity* (Oxford, Hart Publishing, 2008).

A Peters, 'The Globalization of State Constitutions' in J Nijman and A Nollkaemper (eds), *New Perspectives on the Divide between International and National Law* (Oxford, Oxford University Press, 2007).

International Documents

International Law Commission (2001) *Articles on Responsibility of States for Internationally Wrongful Acts*, Annex to UNGA Res 56/83 – UN Doc A/RES/56/83 (United Nations).

International Law Commission (2006) *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission*, A/CN 4/L 682 (United Nations).

Journal Articles

E Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 *New York University Journal of International Law and Politics* 843–54.

A Bianchi, 'International Law and US Courts: The Myth of Lohengrin Revealed' (2004) 15 *European Journal of International Law* 751–81.

D Bodanksy, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 *American Journal of International Law* 596–624.

P Callé, 'L'acte authentique établi à l'étranger—Validité et execution en France' (2005) 94 *Revue Critique de Droit International Privé* 377–412.

J Crawford, 'International Law and the Rule of law' (2004) 24 *Adelaide Law Review* 3–12.

E de Wet and A Nollkaemper, 'Review of Security Council Decisions by National Courts' (2002) 45 *German Yearbook of International Law* 166–202.

G Fitzmaurice, 'The General Principles of International law Considered from the Standpoint of the Rule of Law' (1957) 92 *Recueil des Cours de l'Académie de Droit International* 1–227.

M Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law* 907–31.

J Rehman, 'The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq' (2007) 21 *International Journal of Law, Policy and the Family* 108–27.

Y Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2006) 16 *European Journal of International Law* 907–40.

A von Bodgandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6 *International Journal of Constitutional Law* 397–413.

A Watts, 'The International Rule of Law' (1993) 36 *German Yearbook of International Law* 15–45.

JHH Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy' (2004) 64 *Heidelberg Journal of International Law* 547–62.

Working Papers

C Joerges, 'Rethinking European Law's Supremacy' European University Institute Working Paper Law No 2005/12 (2005) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=838110.

Natural Law and the Possibility of Universal Normative Foundations

BEBHINN DONNELLY-LAZAROV*

INTRODUCTION

OUR WORLD IS heterogeneous; its cultures differ, its territories and their resources are unevenly formed and, fundamentally, each of its individual citizens is unique. Unsurprisingly, the normative orders that regulate these aspects of being, not just discretely but as interacting phenomena, differ too. Legal systems exist in what may be shifting territories with shifting cultural populations, unstable natural resources, against the challenges of political and popular pressure, and in evolving international normative structures. The role of international law is a particularly complex one; normatively to represent and/or reconcile heterogeneity where it is legitimate to do so.

There is not much in this picture that appears to be universal, fundamental, or unshifting, and in seeking to determine which norms should be recognised universally, if any, it seems that there is little in the world of fact to assist. The analysis that follows will propose that certain norms are based on universal grounds and deserve universal recognition. Despite heterogeneity, it will be suggested that the world of fact, in particular our specifically human nature, can inform our account of what these norms may be. The suggestion is not that there are norms that should *apply* without exception and without consideration for their impact on other norms (universality at the level of norm application is not argued for) but, rather, that certain features of human nature give rise to rights that should be *recognised* universally.[1] A natural law perspective will be used in an attempt to ascertain how grounds for universal norms may be discerned in a heterogeneous world.

* Senior Lecturer, School of Law, Swansea University

[1] The task here may usefully be distinguished from the task that Bogdandy and Dellavalle set themselves in recent work. Their aim is meticulously to analyse the paradigms of universalism and particularism as responses to the question 'how far truly public order can reach.' 'Is it confined to the borders of the homogeneous political community (particularism) or does it potentially include all societies and human beings (universalism)?' See A von Bogdandy and S Dellavalle, *Universalism and Particularism as Paradigms of International Law* (Institute for International Law and Justice/New York University School of Law, International Law and Justice Working Paper no 3, 2008) 1.

Here the aim is to consider whether there are *norms* that *warrant* universal recognition. There is little attempt to discern whether global public order is the appropriate legal mechanism to secure such recognition, though the issue is touched upon.

Universality of International Law from the Perspective of a Practitioner

BRUNO SIMMA*

INTRODUCTORY REMARKS

A KEYNOTE SPEECH at a conference on 'International law in a heterogeneous world' devoted to the 'universality' of international law might remind the listener, especially an audience like tonight's, with, I am sure, a particularly high percentage of post-modernists, of frightened people whistling in the dark—for which there is no reason, I would submit right at the outset. But what the topic I have been asked to talk about certainly seems to evoke is a tension between the two notions of heterogeneity and universality. The choice of the topic suggests the idea (or the hope) that heterogeneity does not exclude universality, that in today's world the continued existence and vitality of universal international law will be contingent upon its capacity to accommodate an ever-larger measure of heterogeneity. Therefore, my focus tonight will be on international rules and mechanisms (particularly judicial) and international institutions serving this very purpose—that is, the accommodation of heterogeneous values and expectations by means of international law.

I am aware that my topic will necessarily engage a number of buzzwords in contemporary international law, but beyond juggling with these, my approach tonight will be characterised by two main features.

First, I will treat my topic from the perspective of a practitioner. That is, I will deal with the huge amount of theoretical writing on the subject only when absolutely necessary, and instead concentrate on practical aspects, and thus demonstrate how the theoretical problems that I come across in my presentation play out in practice. In doing so, I will have to condense or summarise quite a few issues that we will encounter on our rather extensive journey together, but with which, I trust, most of you will be familiar.

* Judge at the International Court of Justice. This paper was originally presented as the Keynote Speech at the opening session of the Biennial Conference of the European Society of International Law in Heidelberg on 4 September 2008. I would like to thank Markus Benzing for his extremely valuable and inspired assistance. I have kept the paper in its original format and only added footnotes where absolutely necessary. Also, I have not updated the text with regard to developments, for instance in the case law referred to, but only indicated such developments and commented on them in the footnotes.

As the second specific take on my topic, I will base myself as much as I can on my personal experience, that is, on insights gained through giving occasional advice to governments, by serving in a few legal teams before the International Court of Justice (ICJ), through membership in one of the UN's human rights treaty bodies, namely the Committee on Economic, Social and Cultural Rights, through my work in the International Law Commission, as an arbitrator, and ultimately in the ICJ.

THREE CONCEPTIONS (LEVELS) OF UNIVERSALITY

In the following, I will define what I understand the 'universality' of international law to mean. I will arrive at three different conceptions, or levels, each with its own range of implications and problems. I will then deal with these conceptions in turn, and select from among the clusters of problems which they encounter—which I will call 'challenges'—as well as from the ways to cope with these challenges, the one(s) on which I hope I will be able to say something meaningful.

Let me now turn to my three different understandings, or 'levels', of universality of international law.

At a first, if you want, basic level, and corresponding to what I would regard as the 'classic' understanding of our notion, universality of international law means that there exists on the global scale an international law that is valid for and binding on all states.[1] Universality thus understood as global validity and applicability excludes neither the possibility of regional (customary) international law nor that of treaty regimes creating particular legal sub-systems, nor the dense web of bilateral legal ties between states (I exclude constructs like 'persistent objection' from tonight's analysis). But all these particular rules remain 'embedded', as it were, in a fundamental universal body, or core, of international law. In this sense, international law is all-inclusive.

At a second level, a wider understanding of universality responds to the question whether international law can be perceived as constituting an organised whole, a coherent legal system, or whether it remains no more than a 'bric-à-brac', to use Jean Combacau's expression[2]—a random collection of norms, or webs of norms, with little interconnection. This question is probably best termed that of the 'unity' or 'coherence' of international law; and strong connotations of predictability and legal security will be attached to such (in my terminology) second-level universality.[3] International law has, of course, long been perceived as a legal system by international lawyers, most of them admittedly not much bothered by fine points of systems theory, while today many commentators see this systemic character threatened by a process of 'fragmentation', a challenge to which I will turn later.

[1] RY Jennings, 'Universal International Law in a Multicultural World' in M Bos and I Brownlie (eds), *Liber Amicorum for the Rt. Hon. Lord Wilberforce* (Oxford, Clarendon Press, 1987) 39, 40–1.

[2] J Combacau, 'Le droit international: bric–à–brac ou système ?' (1986) 31 *Archives de philosophie du droit* 85, 85.

[3] ILC, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission* (United Nations, A/CN.4/L.682, 2006) 491.

At a third level, universality may be taken to refer to an—actual or perceived—(changing) nature of the international legal system in line with the tradition of international legal thinking known as 'universalism'. A universalist approach to international law in this sense expresses the conviction that it is possible, desirable, indeed urgently necessary (and for many, a process that is already under way), to establish a public order on a global scale, a common legal order for mankind as a whole.[4] International law, according to this understanding, is not merely a tool-box of rules and principles destined to govern inter-state coordination and cooperation; rather it constitutes a 'comprehensive blueprint for social life', as Christian Tomuschat has called it.[5] Universalism thus understood goes far beyond the addition of a layer of what Wolfgang Friedmann[6] has called the 'international law of cooperation' to the body of the law. The concept implies the expansion of international law beyond the inter-state sphere, particularly by endowing individuals with international personality, establishing a hierarchy of norms, a value-oriented approach, a certain 'verticalisation' of international law, de-emphasising consent in law-making, introducing international criminal law, by the existence of institutions and procedures for the enforcement of collective interests at the international level—ultimately, the emergence of an international community, perceived as a legal community.[7] Indeed, international law has undoubtedly entered a stage at which it does not exhaust itself in correlative rights and obligations running between states, but also incorporates common interests of the international community as a whole, including not only states, but all human beings. In doing so, it begins to display more and more features that do not fit into the 'civilist', bilateralist structure of the traditional law. In other words, it is on its way to being a true *public* international law.[8]

Just two quick remarks completing this point: first, and addressing concerns of certain voices coming from the Left, one can perfectly adhere to an universalist view as described without entertaining, or accepting, hegemonic second thoughts. And further, one can adhere to such a universalist approach without necessarily subscribing to the view that contemporary international law is undergoing a process of 'constitutionalisation'. I will return to this issue at the very end of this address.

[4] A von Bogdandy and S Delavalle, *Universalism and Particularism as Paradigms of International Law* (Institute for International Law and Justice/New York University School of Law, International Law and Justice Working Paper no 3, 2008) 1.

[5] C Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century (General Course on Public International Law)' (1999) 281 *Recueil des Cours de l'Académie de Droit International* 9, 63.

[6] WG Friedmann, *The Changing Structure of International Law* (London, Stevens, 1964).

[7] HEH Mosler, 'The International Society as a Legal Community' (1974) 140 *Recueil des Cours de l'Académie de Droit International* 1, 11–12.

[8] B Simma, 'From Bilateralism to Community Interest in International Law (1994) 250 *Recueil des Cours de l'Académie de Droit International* 217, at 231–34.

CHALLENGES FACED BY UNIVERSALITY AT ITS VARIOUS LEVELS

After the preceding brief *tour d'horizon* of what 'universality' of international law may be taken to mean, let me describe the challenges which the notion faces, and the ways to cope with them, using as a point of departure the conceptions I have just developed.

The understanding of universality of international law in the classic (level I) sense, that is, its global reach, has encountered many challenges, indeed attacks, from different quarters, both philosophical/theoretical and practical, for a long time. They embrace more aggressive strands of regionalism and related, more 'innovative', concepts like those of a 'League of (liberal) democracies' versus 'pariah' or 'rogue' states, designed to bypass the United Nations, cultural relativism in international human rights discourse, as well as what I would call 'post-modern' challenges stemming from Critical Legal Studies, Marxist theory, the theory of Empire and Feminist theory. Level II universality in particular has not only come under fire from a new species of *Voelkerrechtsleugner* (negligible intellectually, if they were not to teach at influential US universities), but has also come under more friendly, if ultra-theoretical, fire from a very specific sociological school, 'global legal pluralism', which sees many autopoietic functional systems emerge on a global scale to eventually substitute the state.[9] Finally, to formulate a challenge of my own to level III universality, universalism as thus understood appears to me not as far advanced as many of its protagonists (want to) believe; it suffers from serious practical shortcomings, and is also being attacked by several post-modern theories.

But let us now turn to tonight's specials, so to speak, from among the menu of challenges to universality. As I indicated at the outset, my choice is determined by the topic assigned to me, namely the viewpoint of a practitioner, particularly of the humble practitioner in front of you. This specific point of departure leads me to turn to a range of problems which German international lawyers would regard as belonging to *Voelkerrechtsdogmatik* rather than genuine theory, but which, wherever they may belong, have also considerable practical relevance. Thus, the challenge to level I universality, which I have selected for discussion is that of the alleged fragmentation of international law; as my 'favourite' challenge to level II universality, I will take up the proliferation of international courts and tribunals, while I could not yet find a comparable buzzword to sum up the problems encountered by the common-legal-order-of-mankind approach embodied in level III universality.

Let me emphasise that these are quite subjective choices. The links between the various understandings of universality and 'their' respective challenges are anything but mutually exclusive, and notions like 'fragmentation' and 'proliferation' are not separated by sharp dividing lines. For instance, I could have selected fragmentation as the principal threat to universality in the sense of unity and coherence of

[9] A Fischer-Lescano and G Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999.

international law, and many observers would regard the proliferation of international courts and tribunals as one aspect, or one prominent cause of, such fragmentation.

In Particular: The 'Fragmentation' of International Law

The Phenomenon

After these clarifications, I turn to the phenomenon of fragmentation, conceived as a challenge to the universality of international law in the sense of the latter's global validity and applicability, and to the international legal responses developed to cope with it.

Fragmentation has become one of the great favourites in international legal literature over the past years. Its connotations are clearly negative: something is splitting up, falling apart, or worse: bombs or ammunition can be designed to fragment and thus become even more destructive. In international legal parlance the term gained such prominence out of the fear that international law might lose its universal applicability, as well as its unity and coherence, through the expansion and diversification of its subject-matters, through the development of new fields in the law that go their own way, and that legal security might thereby suffer (remember that I will take up the proliferation issue separately). In particular, it is the appearance of more and more international treaties of a law-making type, regulating related or identical matters in a variety of, sometimes conflicting, ways and binding different but sometimes overlapping groups of states, that is a matter of concern.[10] Indeed, there is simply no 'single legislative will behind international law'.[11] The Arbitral Tribunal in the *Southern Bluefin Tuna* case has spoken of 'a process of accretion and cumulation' of international legal obligations.[12] The Tribunal regarded this as beneficial to international law, and I would agree in principle. However, if taken to the extreme, the question does of course arise whether this development might lead to a complete detachment of some areas of international law from others, without an overarching general international law remaining and holding the parts together. In arriving at this question, one would not have to go as far as suspecting that '[p]owerful States labour to maintain and even actively promote fragmentation because it enables them to preserve their dominance in an era in which hierarchy is increasingly viewed as illegitimate, and to opportunistically break the rules without seriously jeopardizing the system they have created'.[13]

[10] K Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdictions – Problems and Possible Solutions' (2001) 5 *Max Planck United Nations Yearbook* 67, 71.

[11] ILC, *Report on Fragmentation* (n 3), para 34.

[12] *Australia and New Zealand v Japan – Southern Bluefin Tuna case,* Award (adopted 14 August 2001) (Jurisdiction and Admissibility), 23 UNRIAA (2004) 40, para 52.

[13] E Benvenisti and GW Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 *Stanford Law Review* 595.

In my view, to see such sinister motives at work behind our phenomenon is not justified. I prefer to offer a much more natural, or let me say, technical, explanation: the phenomenon described as 'fragmentation' of international law is nothing but the result of a transposition of functional differentiations of governance at the national to the international plane;[14] which means that international law today increasingly reflects the differentiation of branches of the law that are familiar to us from the domestic sphere. Consequently, international law has developed, and is still developing, its own more or less complete regulatory regimes, which may at times compete with each other.

International Law's Ways to Cope with Fragmentation

Institutional Aspects So much about fragmentation as a phenomenon. Now, what are the institutions and methods by which international law attempts to reconcile necessary functional differentiation with unity and coherence? This task places responsibilities on different international actors: First—and leaving aside the law-making activities of international organisations—states as the principal creators of international legal rules ought to be aware of the need for coherence of the international legal system as a whole, for instance when they negotiate new international agreements. Second, international organisations and courts, when they interpret and apply international law, need to bear in mind that they are acting within an overarching framework of international law, residual as it may be. Last but not least, national courts, which play an ever more relevant role in the application of international law, must also be aware of the impact that their activities can have on the development of a coherent international legal system.

Staying with the institutional aspects for a second, I would submit that—especially from my perspective as a practitioner—both the International Law Commission and the International Court of Justice represent pillars of unity and coherence of universal international law.

While the Court has to, and thus claims to, apply the law as it stands, the Commission is supposed to systematise and progressively develop it. It is not unimportant to note that the personal ties between the two organs are strong. Many ICJ judges have formerly served on the ILC (in late 2008: seven out of 15). This has led to an interesting complementary relationship between the two bodies. Specifically with regard to tonight's topic, the Commission's projects pursue the purpose of fostering universality at all the levels that I have introduced, with an emphasis on levels I and II; its work products aim to be applied as widely as possible, even though more recently the Commission has also drafted rules that are designed for concretisation at the regional, or even bilateral, plane.[15] Neither is the Commission shying away from the elaboration of special regimes if necessary. A

[14] M Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1, 4.

[15] See, eg, Convention on the Law of the Non-navigational Uses of International Watercourses (adopted and opened for signature 21 May 1997, not yet entered into force) (1997) 36 ILM 700, UN ILC 'Draft articles on the law of transboundary aquifers' (2008) UN Doc A/CN 4/L724, UN ILC 'Draft Articles on Prevention of Transboundary Harm from Hazardous Activities' (2001) GAOR 56th Session Supp 10, 370, UN ILC 'Draft articles on the allocation of loss in the case of transboundary harm arising out of hazardous activities' (2006) GA 59th Session Supp No 10 (A/59/10).

case in point would be the accommodation of specific features of reservations made to human rights treaties that is currently under way in the context of the wider ILC project on reservations: even Special Rapporteur Alain Pellet has come to accept that *leges speciales* to serve that purpose are no threat to the unity of the law, but will lead to a more responsive regime, not 'self-contained' in any sense, and thus to a progressive development of international law.

The most recent, and most direct, contribution of the ILC to the unity and coherence of international law is the 2006 (final) Report of Martti Koskenniemi's Study Group on Fragmentation with its 'tool box' of ways and means to cope with the undesirable effects of our phenomenon.[16] While this voluminous study has been criticised by some as merely stating the obvious, from my specific viewpoint it is of immense value as a piece of work which attempts to assemble the totality of international law's devices available to counter the negative aspects of fragmentation.

As to the role of the ICJ as a guarantor of the unity of international law, I will say a few words on this later, in the context of judicial proliferation.

I now turn from the institutions to the methods developed in international law to sustain its unity and coherence in the face of expansion and diversification. Again, the 2006 ILC Report on fragmentation is a great source of inspiration in this regard.

Methods Employed The first device to be mentioned here is the introduction of a normative hierarchy in international law, above all the development of peremptory limits to the making and administering of international law in states' relations *inter se*.

From a voluntarist point of departure, the idea of any hierarchical relationship between international legal rules is problematic. Nevertheless, we have witnessed the recognition of two types of norms that do imply superior status: *jus cogens*, or peremptory norms, and, possibly, norms leading to obligations *erga omnes*. As to the latter concept, it does not necessarily entail a hierarchically superior position; therefore I will categorise it as a method of sustaining coherence in its own right. Let me just mention at this point that, while the ICJ was not the first to use the notion of obligations *erga omnes*, it was the Court's famous dictum in the *Barcelona Traction* judgment of 1970 that triggered the doctrinal fascination with the concept.[17] Concerning *jus cogens*, and in rather surprising contrast, it was not until 2006, ie, no less than 36 years after the *Barcelona Traction* judgment, and 25 years after the blessing of the concept by the entering into force of the Vienna Convention on the Law of Treaties with its Articles 53 and 64, that the ICJ could finally bring itself to issue an authoritative pronouncement. This was eight years after the ICTY had first explicitly mentioned *jus cogens* in its *Furundžija* judgment

[16] See ILC (n 3).

[17] Barcelona Traction, Light and Power Company Limited, Judgment, ICJ Reports 1970, p 3, para 33.

of 1998,[18] five years after the European Court of Human Rights had done so in *Al-Adsani*,[19] and three years after the Inter-American Court of Human Rights had followed suit.[20] Better late than never, in its *Congo v Rwanda* judgment of 2006, the Court affirmed both that this category of norms was part of international law and that the prohibition of genocide belonged to it.[21] A year later, the Court restated its recognition of *jus cogens* in the *Genocide* case.[22]

However, even though the existence and the relevance of *jus cogens* are by now almost universally accepted, 'the car has remained in the garage' (to use Ian Brownlie's metaphor[23]) most of the time. This might actually be a good thing (no offence intended to British cars!), because in instances in which the concept, or rather its legal consequences, became operational, its application has met with considerable difficulties. This is exemplified by two rather recent cases that had to do with *jus cogens* in the field of human rights. In the first case, *Al-Adsani,* the European Court of Human Rights held that, even though the prohibition of torture had the character of *jus cogens*, the rules of state immunity were not trumped and set aside by it.[24] In effect, the Court blocked a specific protection afforded to individuals (Article 6 of the European Convention on Human Rights) by interpreting the Convention in accordance with general international law on state immunity, resorting to Article 31(3)(c) of the Vienna Convention on the Law of Treaties, on which later. The Strasbourg Court stated that '[t]he Convention, including Article 6, cannot be interpreted in a vacuum'; rather, the Court would have to take into account the 'generally recognised rules of public international law on State immunity'.[25]

Against this stands the joint dissenting opinion of those judges of the Grand Chamber, which possessed maybe the strongest international law credentials on the Strasbourg bench at the time: while they did not question the majority's method of interpreting (away) Article 6 of the European Convention, they were of the opinion that, under general international law, the rules on state immunity could no longer render a claim against a foreign state inadmissible in national courts where the claim was based on the peremptory prohibition of torture.[26] But, as I said, this remained the view of the minority.

The ICJ's recognition of the status *juris cogentis* of the prohibition of genocide did not have much impact in the *Congo v Rwanda* Case either. The Court

[18] *Prosecutor v Furundžija* (Judgment) ICTY IT-95–17/1 (10 December 1998) para 153.

[19] See *Al-Adsani v UK* (App no 35763/97) ECHR 2001-XI 79.

[20] *Juridical Condition and Rights of Undocumented Migrants* (Advisory Opinion) IACtHR OC-18/03 (17 September 2003) paras 97 ff.

[21] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda) (Jurisdiction of the Court and Admissibility of the Application)* (ICJ, 3 February 2006) <http://www.icj-cij.org/docket/files/126/10435.pdf> (accessed 24 March 2009) para 64.

[22] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (ICJ, 26 February 2007) <http://www.icj-cij.org/docket/files/91/13685.pdf> (accessed 24 March 2009) para 161.

[23] Which I remember from discussions in the International Law Commission.

[24] *Al-Adsani v UK* (n 18), para 61.

[25] ibid, paras 55–56.

[26] ibid, Joint Dissenting Opinion Rozakis and Caflisch, joined by Wildhaber, Costa, Cabral Barreto and Vajić, para 3.

emphasised that its jurisdiction remained governed by consent, irrespective of the *jus cogens* character of the substantive law involved. Lacking such consent on the part of Rwanda, which had excluded ICJ jurisdiction to rule on the Genocide Convention by way of a reservation, there was, in the circumstances of the case, no possibility for the Court to deal with the merits of the case.[27]

However, a joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma pointed out that it was 'not self-evident that a reservation to Article IX (of the Genocide Convention) could not be regarded as incompatible with the object and purpose of the Convention and we believe that this is a matter that the Court should revisit for further consideration'.[28] The Opinion highlighted the role of decentralised enforcement of obligations under the Genocide Convention, with the states parties being the sole monitors of each other's compliance (in contrast to later human rights treaties establishing treaty bodies with the competence of such oversight). According to the Opinion, this decentralised system can only function properly if states can bring a case before the ICJ concerning the alleged infringement of the Convention by another state.

In conclusion of this point, the last word in this tug-of-war between old and new international law within the Strasbourg and Hague Courts may not yet have been spoken—as far as the ICJ is concerned, at present, it looks as if a new opportunity to probe *jus cogens* against state immunity might come its way.[29]

Another method of inserting hierarchy into international law, somehow related to the acceptance of *jus cogens,* has been embodied in Article 103 of the UN Charter, according to which the obligations of UN members under the Charter prevail over their obligations 'under any other international agreement'. The ICJ has paid tribute, as it were, to Article 103 in the *Lockerbie* cases,[30] followed by the European Union's Court of First Instance in *Yusuf and Kadi,*[31] while the respect shown to the Charter and the human rights regime established under its auspices by the European Court of Justice itself in its final *Kadi* decision[32] has, deservedly or undeservedly, shrunk to a mere pro forma gesture—I will return to this development towards the end of my speech.

Let us have a brief look at obligations *erga omnes*. For any observer capable of grasping the meaning of the Latin words involved, the relevance of this concept as

[27] *Armed Activities* (n 20) para 67.

[28] ibid, (Joint Separate Opinion of Judge Higgins, Judge Kooijmans, Judge Elaraby, Judge Owada and Judge Simma) <http://www.icj-cij.org/docket/files/126/10441.pdf> (accessed 24 March 2009) para 29.

[29] What looked like a possibility in September 2008 turned into reality in December of the same year when Germany brought an Application suing Italy for breaches of international law committed by the Italian Corte di Cassazione through its refusal to accept the German plea to jurisdictional immunity for alleged crimes against humanity perpetrated by Germany in Italy and against Italian citizens between 1943 and the end of World War II. *Jurisdictional Immunities of the State (Germany v Italy)*.

[30] In the Provisional Measures phase of the Lockerbie cases: eg, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America) (Provisional Measures)* [1992] ICJ Rep 114, paras 42–44.

[31] Case T–306/01 *Yusuf v Council* [2005] ECR II-3533; Case T–315/01 *Kadi v Council* [2005] ECR II-3649.

[32] Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission,* [2008] ECR-II-3649.

a means to secure the universal grip of fundamental values consecrated by modern international law is obvious (let me mention in passing that the intricacies of the Latin phrase involved were not the least of the reasons why the point of departure upon which the minimalist regime of 'ce qui reste des crimes' (that is, of notorious draft article 19 on "crimes of states') rests in the ILC Articles on State responsibility of 2001, was finally changed from breaches of obligations *erga omnes* to breaches of peremptory norms. Of course, *jus cogens* is also Latin, but this phrase has apparently lost its horror for the younger generation of international lawyers, having been around for half a century). While the concept of obligations *erga omnes* is certainly related to that of *jus cogens*, the fine points of their relationship are far from clear. Something resembling a regime of our obligations is in the making, but still finds itself in a very initial stage—let me refer to the ILC's Articles on State responsibility, to the resolution of the *Institut de droit international* based on reports by Giorgio Gaja and adopted in Cracow in 2005,[33] and to the monograph on the enforcement of obligations *erga omnes* by Christian Tams,[34] as major doctrinal efforts in this direction. On the other hand, state practice has not (yet?) embraced the concept with any notable passion—in this sense I would still stick to what I wrote in 1993: 'Viewed realistically, the world of obligations *erga omnes* is still the world of the "ought" rather than of the "is" ' (this, of course, not in the Kelsenian sense).[35] In view of this, the bold confirmation of the concept by the ICJ in its *Wall* Opinion of 2004 is remarkable,[36] as, unfortunately, is the confusion about its use by the Court in certain commentaries on the Opinion.

A further tool for coping with negative consequences of fragmentation is to be seen in the establishment of a regime around the *lex specialis/lex generalis* distinction, with the more specific norm setting aside a more general one. The rationale of this is that the more specific rule is more to the point, regulates the matter more effectively and is better able to accommodate particular circumstances.[37]

Turning to a specific aspect of *lex specialis*, let me make a short remark on 'self-contained regimes'.[38] In the wake of a problematic statement of the ICJ in the 1980 *Tehran* judgment, the international academic community has taken increasing notice of this phenomenon—a development that recently culminated in the profound analysis of 'self-contained regimes' by the ILC's Study Group on Fragmentation. The Study Group's final report identified three uses of the term, even though, as the report acknowledges, these might not always be clearly distinguishable from

[33] Resolutions of the Institut de droit international, Rapporteur: Giorgio Gaja, *Fifth Commission: Obligations and rights erga omnes in international law* (Krakow, 2005).

[34] CJ Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge, Cambridge University Press, 2005).

[35] B Simma, 'Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations erga omnes?', in J Delbrueck (ed.), *The Future of International Law Enforcement. New Scenarios – New Law* (Berlin, Duncker & Humblot, 1993) 125.

[36] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, paras 155ff.

[37] *cf* ILC (n 3) paras 65 ff.

[38] B Simma and D Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 *European Journal of International Law* 483.

each other: first, and perhaps most commonly, the term refers to primary rules coupled with special sets of secondary rules under the law of state responsibility; second, 'self-contained regimes' are said to consist of subsystems of international law, that is, sets of rules, not necessarily secondary in nature, that regulate specific questions differently from general international law; third, the concept is sometimes accorded an even wider meaning, denoting an entire area of international law allegedly following its own rules of interpretation and enforcement, such as international human rights law or international trade law.[39]

What there now seems to be agreement about is that all three categories of 'self-contained regimes' cannot, at least not completely, 'contract out' of, decouple themselves from, the system of general international law. It is a fact, however, that differing approaches to interpretation and application of such regimes have developed, for instance in international trade law, human rights, or environmental law. Each regime has thus established its separate epistemic communities of lawyers working in the field, institutions developing and applying the law, and courts and tribunals enforcing it. But this is not necessarily a development that threatens the unity and coherence of international law. The formation of specific methods of interpretation or enforcement is inherent in the set-up of such regimes, and the expertise that lawyers will accumulate by working within them, as well as bodies of case law of courts and tribunals mandated to interpret and enforce these regimes, will contribute to a growing and intensifying corpus of law that responds to the needs of the specific regime. In a positive light, these sub-systems of international law, more densely integrated and more technically coherent, may show the way forward for general international law, as both laboratories and boosters for further progressive development at the global level.

The last method to which I turn in my *'tour d'horizon'* of ways and means developed in international law to cope with the challenge of fragmentation is that of systemic integration of regimes *inter se* by way of interpretation.

I think we can speak of a presumption that states, when creating new rules of international law, do not aim at violating their obligations under other, pre-existing rules, but rather intend to operate within this framework.[40] This very general proposition can be complemented by the maxim that any legal rule should be read in context with other rules applicable to the parties. For the law of treaties, this idea has been encapsulated in Article 31(3)(c) of the 1969 Vienna Convention.

The exact conditions for the application of this provision are far from clear, however. Article 31(3)(c) stipulates that, in interpreting a treaty, there shall be taken into account 'any relevant rules of international law applicable in the relations between the parties'. While it is now agreed that the 'relevant rules' within the meaning of the provision can be norms having their pedigree in any of the recognised sources of international law,[41] it is still disputed whether the term

[39] ILC (n 3) paras 128–9.

[40] In this sense RY Jennings and A Watts, *Oppenheim's International Law* 9th edn (Harlow, Longman, 1992) 1275.

[41] ILC (n 3) para 426; ECtHR, *Golder v UK* (App no 4451/70) (1975) Series A no 18, 17 (para 35); *Al-Adsani* (n 18) para 55.

'parties' refers to all parties to, for instance, the treaty establishing the 'relevant rules', or whether it is sufficient that the parties to a particular dispute are bound by the rule in question. A WTO panel in the *EC—Approval and Marketing of Biotech Products* case[42] has opted for the first approach, basing its reasoning on the principle of state sovereignty and the corollary principle of consent: 'Indeed, it is not apparent why a sovereign State would agree to a mandatory rule of treaty interpretation which could have as a consequence that the interpretation of a treaty to which that State is a party is affected by other rules of international law which that State has decided not to accept.'[43]

As the ILC's Study on Fragmentation rightly observes, such a construction of the term 'parties' 'makes it practically impossible ever to find a multilateral context where reference to other multilateral treaties as aids to interpretation under Article 31(3)(c) would be allowed',[44] due to 'the unlikeliness of a precise congruence in the membership of most important multilateral conventions'.[45] If the *Biotech* approach were followed, the most important multilateral agreements could not be interpreted by reference to one another. On the other hand, interpreting 'parties' to mean only those involved in a particular dispute before a court or tribunal would risk divergent interpretations of one and the same rule even for multilateral treaties of the law-making type. Hence, it has been suggested that it would be sufficient for the purposes of Article 31(3)(c) that the parties in dispute are both parties to the other treaty (ie, the treaty informing the interpretation of the instrument in question), if this instrument is of a 'reciprocal', 'synallagmatic', or 'bipolar' type, whereas the rule adopted by the panel in *Biotech* should apply if the treaty to be interpreted is of the 'integral' or 'interdependent' type.[46] While this solution takes into account different structures of international treaties, it has yet to be adopted by and applied in practice. What the discussion certainly shows is that the principle of 'systemic integration' is far from providing a panacea to fragmentation. Besides, as the judgment of the European Court of Human Rights in *Al-Adsani* demonstrates, Article 31(3)(c) may, if applied 'strictly', 'solve' norm collisions in a way that is at odds with other rules of international law, such as *jus cogens*.

Let me conclude this sub-chapter with a brief look at fragmentation as a matter before the ICJ. In explicit terms, and contrary to some of its former Presidents, the Court has not yet raised its voice in the discourse about this challenge. However, certain recent judgments do offer insights into the Court's perception of the coherence and unity of international law and the ways to preserve these qualities. Thus, the Court has used the tool of systemic interpretation in the *Oil Platforms* case, resorting to Article 31(3)(c) of the Vienna Convention on the Law of Treaties

[42] *EC-Measures Affecting the Approval and Marketing of Biotech Products*, Panel Report (adopted 29 September 2006) WT/DS291/R; WT/DS292/R; WT/DS293/R, para 7.68.
[43] ibid, para 7.71.
[44] ILC (n 3) para 450.
[45] ibid, para 471.
[46] ibid, para 472.

to place a specific bilateral treaty within the broader context of general international law.[47] Although this approach has been criticised by some observers as getting dangerously close to a circumvention of the principle of consent delimiting the jurisdiction of the Court, it demonstrates that international law does provide us with tools that allow for a coherent conception of its rules. In the recent case of *Djibouti v France*, the Court again applied Article 31(3)(c) of the Vienna Convention, this time to two bilateral treaties, and interpreted a Convention on Mutual Assistance in Criminal Matters of 1986, whose alleged violation by France constituted the essence of Djibouti's claim, in the light of a Treaty of Friendship and Cooperation concluded between the two parties in 1977. This proved to be far less contentious than the use of our Vienna Convention Article in the *Oil Platforms* case, especially since the Court clarified that the earlier treaty, while having 'a certain bearing' on the interpretation and application of the later one, neither broadened the scope of the Court's jurisdiction, nor could it significantly alter the interpretation of the Mutual Assistance Convention of 1986.[48]

The 'Proliferation' of International Courts and Tribunals as a Challenge

The phenomenon and its effects

In the second part of my speech I now turn to the issue of the proliferation and growing diversity of international courts and tribunals (but not of the substance of international law itself), here conceived as a challenge particularly to what I have called 'second-level universality', that is, the systemic coherence of international law, but of course also to be seen as an accelerant of fragmentation.

In recent years, maybe the last two decades, a growing number of international legal scholars, among them several Presidents of the ICJ, have become quite concerned by this development and the ensuing problems. The choice of the word 'proliferation' must have been born out of these concerns, because, like 'fragmentation', the term has all kinds of undesirable connotations and undertones, again stemming mostly from the military world. Returning to the concerns as such, they result in part from the fact that, quite naturally, the jurisdiction of most international tribunals is limited to the rules established by the treaty instruments that set them up, ie, that such tribunals are not normally mandated to apply 'general' international law, at least not in express terms.

There is no doubt that international judicial dispute settlement is decentralised, without coordinated allocation of jurisdiction or hierarchy between different international courts. Some international courts and tribunals have explicitly

[47] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (ICJ, 6 November 2003) <http://www.unhcr.org/refworld/docid/414b00604.html> (accessed 25 March 2009) para 41.
[48] *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment) (ICJ, 4 June 2008) <http://www.icj-cij.org/docket/files/136/14550.pdf> (accessed 25 March 2009) para 112.

described themselves as 'self-contained systems',[49] or as 'autonomous judicial institutions'.[50] International dispute settlement is indeed 'insular'.[51] On the other hand, some authors manage to see in the same picture the emergence of a system of international courts. Of course, this is a question of definition: Even those arguing for an 'international court system' or a 'global community of courts'[52]—defined to comprise both international and national courts—recognise that 'the international judiciary is an evolving, complex, and self-organising system'.[53] Most of them would probably also agree that the international judiciary is 'dancing on the edge of chaos'.[54]

But, irrespective of whether we are in the presence of an emerging system or an uncoordinated mess of diverse mechanisms, the fact is that the present state of affairs, characterised as an 'explosion of international litigation and arbitration', has not—yet?—led to any significant contradictory jurisprudence of international courts; such cases remain the exception and actually courts have gone to great lengths to avoid contradicting each other.[55] The discussion also to some extent misconceives the mindset and professional ethos of international judges. In the words of Anthony Aust: 'No wise judge (international or national) wants to reinvent the wheel'.[56] Thus, most international judges fundamentally agree on the way the international legal system is structured; often, they have similar educational backgrounds. Furthermore, it will obviously add to the legitimacy of a judgment if an international court relies on the case law of other such courts, applies and maybe develops it, without, however, changing it fundamentally. Finally, quite a few international judges have moved from one court to another, thus also, more or less consciously, adding to the consistency of international jurisprudence.[57]

Rather than resulting in fragmentation, the emergence of more international courts, combined with an increasing willingness of states to submit their disputes to judicial settlement, has revived international legal discourse. This discourse has gained in frequency and intensity: courts nowadays have a greater say in it compared to doctrine. The more international courts apply a specific rule of international law in the same manner, the more legitimacy it will be accorded, and the more can we be certain about its normative strength. On the other hand, if

[49] *Prosecutor v Dusko Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber) ICTY IT-94-1-AR72 (2 October 1995) para 11.

[50] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (Advisory Opinion) IACtHR OC-16/99 (1 October 1999) para 61.

[51] Y Shany, *The Competing Jurisdiction of International Courts and Tribunals* (Oxford, Oxford University Press, 2003) 109.

[52] AM Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191, 191.

[53] J Martinez, 'Towards an International Judicial System' (2003) 56 *Stanford Law Review* 429, 443–44.

[54] ibid.

[55] B Simma, 'Fragmentation in a Positive Light' (2004) 25 *Michigan Journal of International Law* 845, 846.

[56] A Aust, 'Peaceful Settlement of Disputes: A Proliferation Problem?' in TM Ndiaye and R Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes. Liber Amicorum Judge Thomas A. Mensah* (Leiden, Nijhoff, 2007) 131, 137.

[57] Martinez, 'Towards an International Judicial System' (n 49) 436.

various international courts do disagree on a point of law, the ensuing judicial dialogue may possibly further progressive development of the law.[58]

Convergence and Divergence of International Jurisprudence

Instances of Divergence Let me now illustrate the *problématique* of proliferation by telling you a few stories about divergence and convergence in international jurisprudence and the phenomenon of parallel proceedings, to provide you with a concrete picture of the actual weight of the problem. First, instances of divergence: let me state at the outset that these few cases can be explained to a large extent by reference to the specific functions of the courts involved within the sub-systems, in which they have been set up.

The most prominent of all these cases is certainly the collision between the ICJ in *Nicaragua*[59] and the ICTY in *Tadić*.[60]

In the *Tadić* case, the ICTY—in what has been called an 'aggressive attack'[61]—diverged from the ICJ's holding in the *Nicaragua* case on the question of the level of control necessary for the attribution of acts of paramilitary forces present in one state to another state. Whereas the ICJ had decided that, for these acts to be attributable, the state in question had to exercise 'effective control' over such paramilitaries, the ICTY Appeals Chamber did not hold the *Nicaragua* test to be persuasive and proposed that a less stringent test, ie 'overall control', was sufficient.[62]

The ICJ used the 2007 *Genocide* judgment to give its response to *Tadić*. It held that the argument in favour of the *Tadić* test was unpersuasive and did not reflect international law on state responsibility. In the Court's view, the 'overall control' test suggested by the ICTY had:

> the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf.

The Court thus came to the conclusion that the ICTY's reading of the rules of attribution in question had gone too far, stretching the connection between the conduct of a state's organs and its international responsibility 'almost to the breaking point'.[63]

[58] Simma, 'Fragmentation' (n 51) 846.

[59] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merrls, Judgment, ICJ Rep 1986, p 14.

[60] *Prosecutor v Tadić* (Judgment, Appeals Chamber) ICTY IT-94-1-A (15 July 1999) paras 99 ff, in particular 115 ff.

[61] RJ Goldstone and RJ Hamilton, '*Bosnia v. Serbia*: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia' (2008) 21 *Leiden Journal of International Law* 95, 101.

[62] *Prosecutor v Tadić* (n 546).

[63] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (ICJ, 26 February 2007) <http://www.icj-cij.org/docket/files/91/13685.pdf> (accessed 25 March 2009) para 406.

In an exercise of judicial diplomacy, the ICJ made it appear as if the ICTY had intended to limit its divergent test to the specific (jurisdictional) question of whether a conflict was internal or international. While *Tadić* can certainly be read in such a conciliatory way, a member of the ICTY Appeals Chamber that had decided the *Tadić* case, Nino Cassese, has recently stated quite bluntly that the Yugoslavia Tribunal actually did want to replace the *Nicaragua* standard developed by the ICJ at the level of general international law and posit two different tests or degrees of control leading to attribution: one for acts performed by private individuals, in case of which attributability would require 'effective control', and one for acts of organised and hierarchically structured groups, such as military or paramilitary units, in case of which 'overall control' would suffice. Cassese emphasised that—contrary to what the ICJ found in its *Genocide* judgment—the Appeals Chamber did in fact hold that the legal criteria for these two tests reflected the state of international law both for international humanitarian law and the law of state responsibility. The ICJ, Cassese suggested, should pay attention to state practice and case law, instead of simply and uncritically restating its previous views.[64]

As concerns the ICTY itself, it probably will not have much of a chance left to reply to the ICJ and thus initiate another round in what (with all due respect for my own Court) might be called a *dialogue des sourds*. But the International Criminal Court appears set to do so: quite recently, in the *Lubanga* case, an ICC Pre-Trial Chamber, about one month before the ICJ rendered its judgment in the *Genocide* case in early 2007, held—without discussing *Nicaragua*—that the overall control test as established in *Tadić* was also valid for the purposes of determining the nature of the conflict under the ICC Statute.[65]

A further example of divergent views on the same matter held by different international courts or human rights treaty bodies is provided by the question of the territorial scope of the application of human rights treaties. The European Court of Human Rights has developed its approach in this matter in a long line of case law, not without a little meandering, however. In the *Banković* case, concerning a complaint arising from the NATO bombing of a Serbian television station in April 1999, the Strasbourg Court held that the European Convention on Human Rights did not apply to acts of Member States of the Convention effected outside their territory, and stressed the 'essentially territorial notion of jurisdiction' under the European Convention.[66] The Court distinguished the case from other situations where it had extended the applicability of the European Convention to extraterritorial acts, such as in *Louzidou v Turkey* and *Cyprus v Turkey*. In *Loizidou*, the Court had held that the responsibility of contracting states can be involved by acts and omissions of their authorities which produce effects outside their own territory. Responsibility could also arise when as a consequence of military action—whether lawful or unlawful—a state exercises effective control of an area outside its national

[64] A Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *European Journal of International Law* 649ff, particularly 657, 663 and 668.

[65] *Prosecutor v Thomas Lubanga Dyilo* (Decision on the Confirmation of Charges, Pre-Trial Chamber 1),ICC-01/04–01/06 (29 January 2007) paras 210–11.

[66] *Banković v Belgium and others* (App no 52207/99) ECHR 2001-XII 333, para 61.

territory.[67] In *Cyprus v Turkey*, the ECHR had found that, '[h]aving effective overall control over northern Cyprus, [Turkey's] responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support'.[68] Extraterritorial acts would thus only exceptionally qualify as an exercise of 'jurisdiction' within the meaning of Article 1 of the Convention, said the Strasbourg Court in *Banković,* if the state, 'through effective control of the relevant territory and its inhabitants ... as a consequence of military occupation ... exercises all or some of the public powers normally to be exercised by that Government'.[69] More recently, in *Ilaşcu v Moldova and Russia*, and again in *Issa v Turkey,* the Court has confirmed this jurisprudence.[70]

The ICJ followed a somewhat more liberal approach in its *Wall* Opinion of 2004 with regard to the extraterritorial application of both UN Human Rights Covenants as well as the Convention on the Rights of the Child. The Court did so in a considerably less nuanced way, however. It stated simply that:

> while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.[71]

In an equally broad manner, the UN Human Rights Committee, in its General Comment No 31 [80] of the same year on the territorial scope of the International Covenant on Civil and Political Rights, expressed the view that 'a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.'[72]

While you will probably agree with me that the Strasbourg, Hague and Geneva views on the extraterritorial applicability of human rights treaties differ in rather subtle ways only, my next example is more robust. It concerns the characterisation of Article 36(1)(b) of the 1963 Vienna Convention on Consular Relations by the Inter-American Court of Human Rights on the one hand and the ICJ on the other. While the Inter-American Court, in an advisory opinion rendered in 1999, had held that a detained foreigner's right to have his consular post notified was 'part of the body of international human rights law',[73] the ICJ in the *LaGrand* judgment of

[67] *Loizidou v Turkey* (App no 15318/89) ECHR 1996-VI 2216, para 52.

[68] *Cyprus v Turkey* (App no 25781/94) ECHR 2001-IV 1, para 77.

[69] *Bankovic v Belgium and others* (n 60) para 71.

[70] *Ilaşcu v Moldova and Russia* (App no 48787/99) ECHR 2004-VII 179, para 316; *Issa and Others v Turkey* (App no 31821/96) ECHR 16 November 2004, paras 68–71.

[71] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 32), para 109. In its Order on Provisional Measures of 15 October 2008 in the case *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (ICJ, 15 August 2008) <http://www.icj-cij.org/docket/files/140/14669.pdf> (press release, accessed 25 March 2009), the Court took the same view with regard to the territorial reach of CERD, see para 109.

[72] HRC, *General Comment no 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (Geneva, United Nations, CCPR/C/21/Rev 1/Add 13, 2004) para 10.

[73] *The Right to Information on Consular Assistance* (n 46) para 141.

2001 saw no necessity to enter into this controversial question and contented itself with holding that Article 36 amounted to an individual right, without pronouncing on its human rights character *vel non*.[74] A few years later, in the *Avena* case, Mexico unfortunately raised this issue again and squarely confronted the Court with a respective submission—which led a somewhat irritated Court to finally state that the characterisation of the individual Article 36 right as a human right found support neither in the text nor in the *travaux préparatoires* of the Consular Convention.[75] This finding was not necessary for the disposition of the case; it has rightly been criticised as an unfortunate instance of deliberate divergence of jurisprudence[76] as well as an unnecessary obstacle to the development of a new human right.

(Much More Numerous) Cases of Convergence Let me now show you the other side of the coin and speak about convergence of international jurisprudence.

In a major study on our topic published in 1999, Jonathan Charney concluded that 'the different international tribunals of the late twentieth century do share a coherent understanding of [international] law.'[77] A more recent analysis (published in 2002) came to the conclusion that 'by a margin of 173 to 11, tribunals are much more likely to refer to one another in a positive or neutral way than to distinguish or overrule.'[78] Rather than damaging the unity of international law, frequent cross-referencing between international courts has thus contributed to its strengthening and greater coherence. By way of example for this tendency, I will concentrate on reference made by specialised courts and tribunals to ICJ jurisprudence.

Thus, the WTO Appellate Body has often referred to decisions of the ICJ (and other international courts), mostly with respect to the rules on treaty interpretation,[79] but also with regard to procedural issues such as the allocation of the burden of proof.[80]

The European Court of Human Rights has also looked to the case law of the ICJ in interpreting its own procedural law. For instance, the ICJ's judgment in *LaGrand* to the effect that the Court's provisional measures were binding upon the parties, was referred to in the *Mamatkulov* case decided by the Strasbourg Court, which

[74] *LaGrand Case (Germany v United States)* (Judgment) (2001) ICJ Rep 466 paras 77–78.
[75] *Avena and Other Mexican Nationals (Mexico v United States of America)* (Judgment) (2004) ICJ Rep 12, para 30.
[76] R Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) *55 International and Comparative Law Quarterly* 791, 796.
[77] JI Charney, 'Is International Law Threatened by Multiple International Tribunals?' (1998) 271 *Recueil des Cours de l'Académie de Droit International* 101, 161.
[78] N Miller, 'An International Jurisprudence? The Operation of "Precedent" Across International Tribunals' (2002) 15 *Leiden Journal of International Law* 483, 495.
[79] See, eg, *US Standards for Reformulated Gasoline,* Appellate Body Report adopted 29 April 1996 WT/DS2/AB/R, p 17; *Japan – Taxes on Alcoholic Beverages,* Appellate Body Report adopted 4 October 1996, WT/DS8/AB/R; WT/DS10/AB/R; WT/DS11/AB/R, p 12; *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products,* Appellate Body Report adopted 14 December 1999, WT/DS98/AB/R, para 81.
[80] *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India,* Appellate Body Report adopted 25 April 1997, WT/DS33/AB/R, p 14.

confirmed that its interim measures were equally binding.[81] More recently in the *Stoll* case, the European Court of Human Rights has approvingly referred to ICJ case law on the interpretation of multilingual treaties, and in the *Blečić* case on the question of temporal jurisdiction.[82]

The Inter-American Court of Human Rights has relied on holdings of the ICJ in numerous instances as well. Most importantly, it has looked to the Hague Court and its predecessor, the Permanent Court of International Justice, with regard to questions of reparation[83] or the standard of proof.[84]

The International Tribunal on the Law of the Sea has made reference to the jurisprudence of the ICJ in the *M/V 'Saiga'*, the '*Grand Prince*' and more recently, in the *Straits of Johor* and the '*Hoshinmaru*' cases,[85] on issues as varied as the existence of a state of necessity, the power and duty of an international court to examine its jurisdiction *proprio motu* and the question whether international law required the exhaustion of diplomatic negotiations between states before they could turn to an international court.

Among the tribunals vested with international criminal jurisdiction, the ICTY has made so ample use of ICJ jurisprudence that the divergence in the *Tadić* judgment has to be seen in perspective. For some more recent instances of favourable references, let me mention the Trial Chamber judgments in the *Boškoski*[86] and *Strugar*[87] cases, where the Yugoslavia Tribunal turned to the ICJ's jurisprudence for the interpretation of Security Council resolutions and the customary law status of the Hague Regulations. As to the International Criminal Court, its Pre-Trial Chamber in the *Lubanga* case (already mentioned in another context) has favourably quoted the ICJ on the legal issue of when a territory is considered to be occupied under customary international law. It also took into account the factual findings of the ICJ with regard to the Ugandan involvement in the DRC in the *Armed Activities on the Territory of the Congo* case, and used it to qualify the conflict as international in character rather than internal, which had been the submission of the ICC Prosecutor.[88] Concerning the ICC Appeals Chamber, it seems to have made only cursory reference to ICJ decisions so far.

[81] *Mamatkulov and Abdurasulović v Turkey (GC)* (App nos 46827/99 and 46951/99) ECHR 2005-I 295, paras 116–17.
[82] *Stoll v Switzerland (GC)* (App no 69698/01) ECHR 10 December 2007, para 59; *Blečić v Croatia* (App no 59532/00) ECHR 2006-III-51, para 47.
[83] *'White Van' (Paniagua–Morales et al v Guatemala)* (Judgment) IACtHR, Series C, No 76 (25 May 2001) para 75 (fn 19).
[84] *Velásquez Rodríguez v Honduras* (Judgment) IACtHR Series C, No 4 (29 July 1988) para 127.
[85] *'SAIGA' (No 2) Case (Saint Vincent and the Grenadines v Guinea) (Merits)* ITLOS Case No 2 (1 July 1999) para 133; *The 'Grand Prince' Case (Belize v France) (Prompt Release) (Judgment)* ITLOS Case No 8 (20 April 2001) para 78; *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore) (Order)* ITLOS Case No 12 (10 September 2003) para 52; *'Hoshinmaru' Case (Japan v Russian Federation) (Prompt Release) (Judgment)* ITLOS Case No 14 (6 August 2007) paras 86–87.
[86] *Prosecutor v Boškoski (Judgment)* ICTY-04–82-T (10 July 2008) para 192 (fn 779).
[87] *Prosecutor v Strugar* (Judgment) ICTY-01–42-T (31 January 2005) para 227 (fn 775).
[88] *Prosecutor v Thomas Lubanga Dyilo* (n 59), paras 212, 214–17, 220.

Arbitral Tribunals in inter-state cases have relied on ICJ jurisprudence as a matter of routine.[89] ICSID tribunals regularly quote decisions of the ICJ and its predecessor, in particular in relation to treaty interpretation or procedural questions, such as those related to jurisdiction and evidence, but also with regard to the protection of shareholders *(Barcelona Traction)*, the assessment of damages and other matters.

Interestingly, the jurisprudence of the ICJ, on its part, displays very little reciprocity, so to speak. The Court has until recently carefully refrained from referring to the case law of other existing international courts (while having no problems with citing old arbitral decisions and the like). (Un)fortunately this is not the place to speculate about the reasons for such abstinence. The Court's attitude changed fundamentally in the *Genocide* case, in which the ICJ followed the jurisprudence of the ICTY on various fundamental issues as a matter of practical necessity. We will have to wait and see whether this new openness will spill over into other areas.

Parallel Proceedings

The Challenge Let me continue with some observations on the phenomenon of parallel proceedings, understood as the initiation of litigation in different international courts on what is essentially the same substantive dispute. The most prominent example to date is the *Swordfish* case.[90] Chile had closed its ports to Spanish ships that—as Chile contended—had overfished swordfish in the high seas adjacent to Chile's EEZ. While the EU regarded the case as predominantly trade-related, and consequently initiated a case in the WTO, Chile saw it as relating to the law of the sea, bringing proceedings before ITLOS in Hamburg. While the case has been suspended before both institutions, pending an amicable settlement, it demonstrates that multiple proceedings before several international courts and tribunals are a real possibility.

A somewhat different situation occurred in the *MOX Plant* case, where the EU Commission initiated proceedings against Ireland in the European Court of Justice for breach of EU law committed through bringing a case against the United Kingdom under the Law of the Sea Convention. Here, it was not only the parties which initiated parallel proceedings (before ITLOS, an arbitral tribunal under the OSPAR Convention as well as an arbitral tribunal under UNCLOS[91]), but also the

[89] See, eg, *The Kingdom of Belgium v The Kingdom of The Netherlands (Award)* Permanent Court of Arbitration (25 May 2005) in: — *The Iron Rhine (Ijzeren Rijn) Arbitration (Belgium-Netherlands) Award of 2005* (The Hague, TMC Asser Press, 2007) 37–142, paras 45 and 59.

[90] *Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community) (Order)* ITLOS Case No 7 (20 December 2000); on the developments referred to above, see the Hamburg Tribunal's Press Releases on the case.

[91] See, *'Mox Plant' Case (Ireland v United Kingdom) (Order)* ITLOS Case No 10 (3 December 2001); *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v United Kingdom and Northern Ireland)*, (PCA, 2 July 2003) (2003) 42 ILM 1118; Case C–459/03 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [2006] ECR I–4635.

organ of a regional organisation which tried effectively to prevent the states involved from having their dispute settled by an independent arbitral tribunal outside the EU legal system.

The most recent examples of parallel proceedings are probably the cases brought by Georgia against Russia in relation to the war in the Caucasus in 2008. Georgia initiated proceedings before both the ICJ and the European Court of Human Rights. The President of the ICJ issued an Urgent Communication to the parties (pursuant to Article 74(4) of the ICJ Rules of Court),[92] while her Strasbourg counterpart indicated provisional measures (under rule 39 of the Strasbourg Rules of Court).[93] As a state party to the ICC Statute, Georgia could also have made a state referral to the ICC under Articles 13(a) and 14 of its Statute.

Possible Remedies There are several rules that might help solve the dilemma of parallel proceedings on the same dispute. The principle of *lis alibi pendens* requires a court to abstain from exercising jurisdiction where the same parties have already instituted proceedings before another court on the same subject-matter. It has been argued that this principle forms part of international procedural law as a general principle of law in the meaning of Article 38(1)(c) of the ICJ Statute.[94] And of course the principle of *res judicata* is relevant here, too.

Another concept that has recently been resorted to in the case of parallel proceedings is the principle of comity, that is, of respect for the competence of other tribunals. In the *MOX Plant* case, the Hague arbitral tribunal suspended its proceedings in order to wait for the decision of the ECJ, invoking 'considerations of mutual respect and comity which should prevail between judicial institutions'.[95] An example to the contrary would be the stance taken by the Inter-American Court of Human Rights in its advisory opinion on the *Right to Information on Consular Assistance*. Here, the Court refused to suspend proceedings with a view to a case (albeit one that was contentious) on similar legal questions before the ICJ (*Breard*), insisting on its status as an 'autonomous judicial institution'.[96] These two opposed approaches show that the principle of comity can hardly claim to be firmly rooted in international procedural law, even though considerations of the good administration of international justice speak in its favour.

[92] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (n 65); on 15 October 2008, the ICJ issued an Order on Provisional Measures directed at both parties to the conflict, http://www.icj-cij.org/docket/files/140/14803.pdf (last accessed 25 March 2009).

[93] ECHR, Press Release 2008/581 of 12 August 2008.

[94] A Reinisch, 'The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to avoid Conflicting Dispute Settlement Outcomes' (2004) 3 *The Law & Practice of International Courts and Tribunals* 37, 48.

[95] Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of UNCLOS for the Dispute Concerning the MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea, *'MOX Plant' Case (Ireland v United Kingdom)*, Order No 3 (Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures) (PCA, 24 June 2003) < http://www.pca-cpa.org/upload/files/MOX%20Order%20no3.pdf> (accessed 25 March 2009) para 28.

[96] *The Right to Information on Consular Assistance* (n 46), paras 61–65.

Other possibilities for preventing parallel proceedings before international courts are conflict clauses in international treaties (eg Article 292 of the EC Treaty, Article 23 of the WTO Dispute Settlement Understanding, Article 55 of the European Convention on Human Rights and Article 282 UNCLOS). However, a survey of different provisions contained in jurisdictional instruments and treaties reveals a rather disorganised picture. Equally, a look at the practice of international courts and tribunals shows that the instruments described for the prevention of parallel proceedings are hardly coordinated or effective.

Before I leave this point, let me mention the approach taken by the Arbitral Tribunal in the *Iron Rhine* case between Belgium and the Netherlands, in which the Tribunal saved its turf in matters of EC law vis-à-vis the European Court of Justice and *MOX*-type problems, by resorting to an analogy with the position of domestic courts in a preliminary ruling procedure according to Article 234 of the EC Treaty. The Tribunal proceeded to put itself in the shoes of a domestic court, as it were, and in so doing arrived at the conclusion that the questions of EC law arising in connection with the track of the Iron Rhine were not to be referred to Luxembourg because they were not relevant (*entscheidungserheblich)* for the decision of the case,[97] and then went on to decide the case itself.

The Challenge Posed to International Courts and Tribunals

A Particular Task for the ICJ? Does the ICJ have a particular responsibility, and particular competence, to ease the undesirable consequences of the birth of so many brothers and sisters, as it were?

The question of a role for the ICJ as a 'guarantor of the unity of international law' (to be distinguished from that of a 'guardian of the *ancien regime*' in international law[98]) has different aspects. In favour of such a function, it could be said, first, that the ICJ is the only court with general jurisdiction, and the principal judicial organ of the UN (Article 92 UN Charter). Moreover, the Hague Court constitutes a universal interpretative community, in the sense that all principal legal systems are represented on its bench. Article 9 of the ICJ Statute specifically mandates the General Assembly to take into account 'that in the body as a whole the representation of the main forms of civilisation and of the principal legal systems of the world should be assured' when electing judges of the Court.

Turning from institutional rules to their practical application, it has been suggested that in the discourse among international courts, the voice of the ICJ ought to receive particular attention. As a matter of course, findings by the Court on questions of general international law will as such counteract tendencies of fragmentation arising from the increase in the number of judicial 'speakers'. The less 'transactional' the ICJ's jurisprudence becomes,[99] the more will it be able to unify and homogenise the law.

[97] *'Ijzeren Rhine'* (n 83), paras 97–137.

[98] A von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 47 *Harvard Journal of International Law* 223, 226.

[99] *cf*, G Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks' (1999) 31 *New York University Journal of International Law and Politics* 919, 929–30.

On the other hand, as I have mentioned earlier, ICJ jurisprudence on its part has hardly ever openly referred to other international courts and tribunals, the Court's reliance on the work of the ICTY in the 2007 *Genocide* judgment being the recent exception. One can surely regard this recent example as an instance of judicial dialogue, even though it took the ICJ quite a few years to reply to the challenge posed from about one mile away. What the *Genocide* judgment also illustrates is that international courts are entitled to respect for their interpretation of those areas of international law over which they have been given jurisdiction. In this sense, the ICJ stressed that the ICTY did not have jurisdiction *ratione materiae* over questions of state responsibility, and thus in the *Tadić* case did not have to decide the question of the proper test of control. On the other hand, the ICJ expressly stated that it attached utmost importance to legal findings made by the ICTY in ruling on the criminal liability of the accused, since this was the Tribunal's proper area of jurisdiction.[100] What I take from this is that judicial respect for the specialised jurisdictional regimes of other international courts could possibly be considered an emerging general principle of international procedural law.

The possibility of divergence of views between international courts not only exists with regard to the law, but also with regard to the factual assessment of a situation. Until now, this aspect has not been of major significance, probably because many of the 'older' international cases have been decided on more or less undisputed factual bases. However, one recent example of two international courts looking at essentially the same set of facts is, again, the *Genocide* case. There, the ICJ referred to the ICTY not only with respect to findings of law, but also concerning findings of facts. Out of sheer necessity, it relied heavily on those findings, carefully distinguishing, however, between different forms of documents and decisions produced by the Tribunal (such as indictments, on the one hand, and judgments, on the other). The case is thus an example of how two international courts can avoid divergence in the determination of facts, while it is clear that the principle of *res judicata* does not apply here.

The Task of Other International Courts Let me turn to the role of other international courts. As a rule, these courts, while being aware of their specialised character and their specific mandate to interpret the instruments under which they were set up, have recognised that the special rules which they have the jurisdiction to apply and interpret, are not detached from general international law. Thus, for instance, the WTO Appellate Body, early in its history, accepted that WTO law 'should not be read in clinical isolation from public international law'.[101] Likewise, the European Court of Human Rights has held that 'the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law . . ., although it must remain mindful of the Convention's special character as a human rights treaty.'[102]

[100] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 58), para 403.

[101] *US Standards of Reformulated Gasoline* (n 73), 16.

[102] *Banković v Belgium and others* (n 61), para 57.

The perceived risk of divergent interpretations of international law and 'forum shopping' by states made possible by the remarkable increase in the number of international judicial bodies has led to a discussion on the need for some kind of hierarchical structure among international courts. It has been suggested, for instance, that it should be possible (or even mandatory) for other (specialised) international courts to refer questions of general international law to the ICJ for some kind of preliminary ruling.[103] Some commentators have gone as far as suggesting that the ICJ should be turned into a constitutional court of the world community, or given appellate jurisdiction.[104] However, apart from the question whether sufficient know-how and resources would be available at the Hague Court to tackle the highly complicated technical issues on the agenda of many of the specialised international courts and tribunals—and some psychological difficulties for the Alpha personalities involved—a direct reference by a specialised international tribunal to the Hague Court would require both an amendment to the ICJ Statute and an enabling provision in the treaty establishing the specialised court.

Frankly speaking, another question that could—and should—legitimately be asked in this context would be whether it would necessarily always be a good idea for other international courts to look for guidance to, and defer to, the ICJ in all circumstances. The Court's jurisprudence is sometimes infuriatingly 'transactional', and its reasoning sometimes more than sparse. Further, we have already come across instances where other, regional, international courts have taken desirable innovative steps and introduced more adequate solutions in ways that are far ahead of those of the ICJ. Let me remind you of the way in which the Court has for decades beaten around the bush concerning *jus cogens,* or its recent unnecessary negation of the character of the right to consular information as a human right. The Court has been rather timid, faced with the challenge of setting judicial limits to the powers of the UN Security Council.[105] And if one compares the treatment of the issue of reparation in the 2007 *Genocide* judgment with certain decisions of the Inter-American Court of Human Rights on the matter of reparation of violations of human rights obligations, or with the 2003 Decision of the Human Rights Chamber for Bosnia and Herzegovina in the *Selimovic (Srebrenica)* cases,[106] one could not be blamed for indeed regarding the Hague Court as a stubborn defender of certain '*ancien regimes*' in international law.

Returning to the issue of coordination and cooperation between international courts, such courts have explored other, less formal, cooperative mechanisms on their own initiative. For instance, more recently, meetings of judges of international courts also at the universal level have been organised upon the initiative of the ICJ, and are on their way to being institutionalised. Such meetings are certainly useful for the development of a common understanding of legal questions and for the fostering of mutual professional respect, but of course they cannot be a substitute

[103] G Guillaume, 'The Future of International Judicial Institutions' (1995) 44 *International and Comparative Law Quarterly* 848, 848ff.
[104] Charney, 'Is International Law Threatened by Multiple International Tribunals?' (n 71), 130–31.
[105] In the Provisional Measures phase of the Lockerbie cases: eg, *Lockerbie* (n 28a), paras 42–44.
[106] *Ferida Selimovic & Others v Republika Srpska,* (Decision on Admissibility and Merits) (Human Rights Chamber for Bosnia and Herzegovina, 7 March 2003) Case No CH/01/8365.

for a sound conceptualisation of overlapping and conflicting jurisdictions. It is also true that such meetings lack transparency.

In conclusion of my remarks on the issues of fragmentation and proliferation: even critics of the idea of a coherent international legal system now seem to have conceded that international law can, and indeed does, form a system. For instance, Martti Koskenniemi recently agreed that '[h]ere is a battle European jurisprudence seems to have won. Law is a whole—or in the words of the first conclusion made by the ILC Study Group, "International law is a legal system" '.[107]

As to fragmentation, it seems to me that many of the concerns about this phenomenon have been overstated. No 'special regime' has ever been conceived as independent of general law.[108] And no master plan of *divide et impera* lies behind this development. Rather than couching it in terms of the 'dangers' of fragmentation, the phenomenon ought to be assessed in a much more positive way: the significance of international law has grown; it regulates more and more fields that before were left solely to foreign policy or domestic jurisdiction, like the protection of the individual, environmental concerns, or international trade. International law is dynamic, and globalisation calls for global legal solutions.

As for the 'proliferation' of international courts and tribunals, I would submit that the debate on fragmentation has made international judges even more aware of the responsibility they bear for a coherent construction of international law. Nevertheless, the great increase in the number and subject areas of international courts has led to certain problems. The possibility of divergence between the jurisprudence of international courts does exist. Ultimately, from a very practical viewpoint, because of the 'structural bias' of specialised fields of international law and of the corresponding international institutions and courts, the real issue about fragmentation may be which court may be resorted to in order to decide a particular dispute. This choice will, in many cases, prejudge the outcome, given that a dispute may be conceived under different paradigms, for instance, as either a trade or an environmental dispute.[109] Any international institution will necessarily be biased in its analysis of the dispute, depending on the specialised area which it has been designed to service. I thus agree with Martti Koskenniemi that, looked at from this angle, the phenomenon of fragmentation of international law, or proliferation of international courts and tribunals, essentially appears as the struggle of different international institutions, mainly international courts, for what he has called 'institutional hegemony'.[110]

But, as I said, this struggle has hitherto been one among friends. It is being led with a sense of responsibility by all concerned. It has not been in the way of mutual respect, coordination and cooperation where necessary.

[107] Koskenniemi, 'The Fate of Public International Law', 2007 (n 14), 17.
[108] ibid, 16.
[109] ibid, 5 ff.
[110] ibid, 8 and M Koskenniemi, 'International Law and Hegemony: A Reconfiguration' (2004) 17 *Cambridge Review of International Affairs* 197, 205–06.

Related Responsibilities of National Courts: Two Brief Observations

Let me add to my treatment of relations between international courts and tribunals a few observations on the relationship between international and national courts and the responsibility arising for the latter in the context of our topic. As I have already mentioned at the outset, the jurisprudence of domestic courts on questions of international law is gaining more and more relevance for the development of the law. But together with this, there also arises an increasing responsibility on the part of these courts to maintain the law's coherence and integrity. It would be tempting to pursue this topic in more depth—today I can only touch upon it in passing and limit myself to two remarks that lead back to the issue of the relations between courts at the international and the national level.

First, it is quite obvious that in these relations, mutual respect is as important as it is between different courts at the international level. As for the position taken by national courts towards the jurisprudence of their international counterparts, we come across remarkable varieties indeed. Just compare the professional respect with which the Israeli High Court of Justice has dealt with the *Wall* Opinion of the Hague Court on the legal questions of necessity and proportionality relating to the course of the wall (while disagreeing on the factual assessment by the ICJ),[111] with the way in which US courts, including the Supreme Court, disposed of the domestic repercussions of the *LaGrand* and *Avena* judgments concerning the individual right to consular information enshrined in the Vienna Convention on Consular Relations and the consequences of its violation spelt out by the ICJ;[112] and compare this again with the position taken on the same matter by the German Federal Constitutional Court.[113]

With my second remark I refer to an article by Eyal Benvenisti in the *American Journal*.[114] Benvenisti sees national courts engaging in what he calls a 'globally coordinated move' to constrain national governments caught in the 'debilitating grip of globalisation' from resorting to policies (for instance in the field of counter-terrorism, environmental protection, or migration), which the judiciary considers to lead to disproportionate infringements of civil and democratic rights. According to Benvenisti, governments have begun to react to this judicial move and attempt to pre-empt their courts from reviewing such sensitive decisions by setting up, or mandating, international institutions which are—presumably—immune from

[111] Above all, *Mara'abe and others v The Prime Minister of Israel and others*,The Supreme Court of Israel (Jerusalem, 15 September 2005) [2005] IsrSC (not yet published, procedure no HCJ 7957/04), particularly paras 56 and 74.

[112] B Simma and C Hoppe, 'From *LaGrand* and *Avena* to *Medellin* – a Rocky Road Toward Implementation' (2005) 14 *Tulane Journal of International and Comparative Law* 7; B Simma and C Hoppe, 'The *LaGrand* Case: A Story of Many Miscommunications' in JE Noyes *et al* (eds), *International Law Stories* (New York, Foundation Press, 2007) 371. The developments described and evaluated in these two papers were then topped, as it were, by the decision of the Supreme Court of 25 March 2008 in *Medellin v Texas*, 128 S Ct 1346 (2008).

[113] C 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.

[114] E Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 *American Journal of International Law* 241.

national judicial review (such as the UN Security Council Counter-Terrorism Committee, or the EU apparatus in charge of legislating migration policy). Then the author touches the point which is directly relevant to us here: he views a 'potential standoff' between national and international courts. While national courts have, thus far, shown deference to international courts (the House of Lords in *Jones v Ministry of Interior (Kingdom of Saudi Arabia)* for instance, saying that the claimants in that case were 'obliged to accept' the ICJ's ruling in the *Arrest Warrant* case), this may change once national courts realise that their international counterparts are more acquiescent with respect to intrusive governmental action, less assertive in restraining governments, and that international courts are somehow dependent on them, for instance, when they look at national jurisprudence to ascertain customary international law, or when international decisions need to be enforced at the domestic level.

The Claims of 'Universalism' Facing the Reality of Recent International Decisions

Eyal Benvenisti's interesting ideas lead me directly to the third—and concluding—part of my speech. Up till now, I have dealt with the topic of universality linked to the two buzzwords of 'fragmentation' and 'proliferation' viewed from a practical angle. Let me, in the third and last part of my speech, make a few observations on a challenge encountered by what I have called the third-level universality of international law, that is, its 'universalist' understanding as a common legal order, not only for states, but for all human beings. Obviously, the idealistic traits of this conception face many problems, questions and doubts, even about its justification outside the philosophical world of the pure 'ought'. But quite apart from any idealism, the application of international law in a multi-level system of international governance with manifold consequences for the individual is already a fact of life. This phenomenon has led to the creation of legal responsibilities for individuals and their being directly targeted by international acts or decisions. These acts or decisions may emanate from precisely the international regulatory mechanisms that Benvenisti has in mind when he speaks of the attempts of governments to pre-empt their courts from scrutinising human rights-sensitive policy moves.[115] This brings us to the question of international remedies: individuals seeking judicial review of such decisions enacted against them turn to international or supranational courts with increasing frequency. Let us have a brief look at where they can go, and how far they can get.

First, *Yusuf* and *Kadi* before the European Community courts. In these cases, the Court of First Instance of the EC had decided on an action for annulment of EU legislative acts implementing the UN Security Council regime for the suppression of international terrorism. The CFI declined to review these acts on the basis of EU law.[116] Its main reason for doing so was that the EC was bound by the obligations

[115] ibid.

[116] *Yusuf & Kadi* (n 286).

under the UN Charter in the same way as its member states[117] and that, in accordance with Article 103 of the Charter, decisions of the Security Council take precedence over any other obligations. Neither did the CFI see itself in a position to review the lawfulness of the Security Council resolutions indirectly,[118] given that the Community did not have any discretion in implementing them by EC regulations. What the CFI did, however, was to test the Security Council Resolutions in question against international *jus cogens*.[119] The CFI found no conflict in this regard. The approach thus described was remarkable—and markedly universalist, to say the least, given that a judicial organ of one entity (the EC/EU) undertook to review acts of an organ of another entity (the UN) against the standards to which that second entity is subjected (*jus cogens*, ie international law).

The judgment of the CFI in the *Kadi and Al Barakaat* cases was appealed. In his identical Opinions on these cases of 16 January 2008, Advocate General *Poiares Maduro* recommended that the European Court of Justice take a different stand than the CFI, assert jurisdiction, review the EC regulation in question against higher EC law, and consequently annul the regulation.[120] The Advocate General stressed that the Community legal order was autonomous, the EC Treaty having created 'a municipal legal order of trans-national dimensions, of which it forms the "basic constitutional charter".'[121] However, according to the Advocate General, the relationship between the Community legal order and international law was not a completely detached one: '[T]he Community's municipal legal order and the international legal order [do not] pass by each other like ships in the night.'[122] While there was a presumption that the Community intended to honour its international legal commitments, it was the task of the 'Community Courts [to] determine the effect of international obligations within the Community legal order *by reference to conditions set by Community law*' (emphasis added).[123] The case law of the European courts showed that, while respecting the international legal obligations of the Community, the Community's Court of Justice, as a priority, had to preserve the constitutional framework established by the EC/EU Treaty. 'The 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.'[124] A limit on permissible judicial review by the Community Courts could be derived neither from Article 307 of the EC Treaty nor from a 'political questions doctrine' *à l'Américaine*. 'On the contrary, when the risks to public security are believed to be extraordinarily high, the pressure is particularly strong to take measures that disregard individual rights, especially in respect of individuals who

[117] ibid, paras 243 ff.
[118] ibid, para 266.
[119] ibid, para 277.
[120] *Yusuf & Kadi* (n 286), Opinion Advocate General Poiares Maduro 16 January 2008.
[121] ibid, para 21.
[122] ibid, para 22.
[123] ibid.
[124] ibid, para 24.

have little or no access to the political process',[125] and thus, the greater the urgency to provide these persons with a judicial remedy.

Given the unavailability of state-of-the-art judicial review against the listing of the claimants in the case at the UN level, and the questionable legitimacy of the process of listing altogether, Advocate General Maduro certainly had a point. What he consequently proposed was that the Luxembourg Court assumes the role of protector of individual rights that Professor Benvenisti diagnoses at the level of domestic courts.

Yesterday, the European Court of Justice rendered its judgment in the *Kadi* and *Al Barakaat* cases.[126] The Court appears to have followed *grosso modo* the Opinion of the Advocate General, even though the jury still seems to be out on the question of just how determined the judgment was designed to be with regard to Mr Kadi's human rights concerns.[127]

The judgment of the CFI was worrisome insofar as its approach would have rendered the actions of the Security Council immune to judicial review on any level, subject only to the rather indeterminate standard of *jus cogens* (which might in this context shrink from a car in the garage, to a fig-leaf). Such deference was problematic, given that no efficient judicial remedy exists at the level of the UN law and institutions administering the regime of smart anti-terrorism sanctions. From the angle of the universality of international law, what was also problematic about the CFI's approach was that here, for the first time, a regional international court declared itself competent to directly review Security Council resolutions passed under Chapter VII of the UN Charter, a power from which even the ICJ has hitherto shied away—remember its caution, if not deference, in the *Lockerbie* cases. Hence the danger that the universal application of international law might be hindered by a court that does not even belong to the institutional set-up of that (universal) international organisation.

The ECJ's judgment of yesterday declared that the CFI had no competence at all to engage in a review of this kind. The judgment of 3 September 2008 carefully abstains from reaching into the UN system in the way that the CFI did; rather, it adopts the opposite approach and stops –albeit half-heartedly[128]—the impact of this system at the EU's legal borders, as it were, insofar as the UN system does not provide adequate protection of individual rights.[129]

[125] ibid, para 35.
[126] *Kadi and Al Barakaat International Foundation* (n 28c).
[127] In conformity with the policy that I set out at the beginning, I will not comment on *Kadi* beyond the few remarks that I made in my speech of 4 September, neither do I claim already to have a firm opinion on the judgment. What I have begun to realise, however, is that *Kadi* represents probably neither the ultimate step by which Community law emancipates itself from public international law, nor the principled high stand on the protection of individuals against Kafkaesque diplomatic bureaucracies.
[128] See the preceding and the following footnotes.
[129] Just how sincere the Court's judgment actually is with regard to the purported aim of protecting Mr Kadi's rights is another matter, and not for me to take up here. In light of the follow-up to the case I cannot avoid the impression that, maybe, once the dust has settled, the decision will share the reputation of quite a few ECJ leading cases of being grandiose on principles without being of much help for the individual claimant.

From a strictly universalist viewpoint, neither the CFI solution, nor the Maduro approach, nor the solution ultimately adopted by the ECJ appears satisfactory. Such decentralised, either direct (CFI) or indirect (ECJ), judicial review of acts of the Security Council always involve the risk of divergent assessments by different courts and thus, fragmentation.

However, I am not only a proponent of universality but also a moderate *droit-de-l'hommiste* in Alain Pellet's classification. To repeat: for the individuals affected, no effective judicial review is being offered at the UN level. How should this dilemma be solved? It seems that here we really are between a rock and a hard place: As international institutional lawyers and defenders of universal, ie, UN law, we would have to argue that the European courts, just like national courts, overstep their jurisdiction if they review acts of the Security Council. On the other hand, as human rights lawyers, we will have to advocate the upholding of human rights review also under circumstances as those encountered in the fight against international terrorism. If, under such conditions, universal institutions like the UN cannot maintain a system of adequate protection of human rights,[130] considerations of human rights deserve to trump arguments of universality. The only question is whether this effectively happened in the ECJ judgment of 3 September 2008. The decisions in *Yusuf* and *Kadi* thus also exemplify the difficulties faced by judicial review within a multi-level system of international governance: In the end, it is the individuals addressed by international measures that may get caught up in its wheels.

The next two cases I have in mind are *Behrami and Saramati*, decided by the European Court of Human Rights. The applicants had sought relief against both actions and omissions by states contributing to UNMIK or KFOR in Kosovo. *Behrami* concerned a claim for compensation for the failure of troops of the French KFOR contingent to mark or defuse undetonated bombs or mines known to be present on a specific site. Two children had played on the site; one was seriously injured by the explosives, the other died. In *Saramati*, the applicant demanded compensation for extra-judicial detention. The Court declined jurisdiction in both cases, since the acts of both KFOR and UNMIK were not attributable to individual UN member states, but rather to the UN as an 'organisation of universal jurisdiction fulfilling its imperative collective security mandate'.[131] The Court concluded that reviewing acts or omissions of states parties to the European Convention on Human Rights, which, however, had been acting on behalf of the UN would 'interfere with the fulfilment of the UN's key mission in this field

[130] In my view, this was demonstrated with unfortunate precision by the Decision of the Human Rights Committee of 22 October 2008 on the individual communication by *Nl Sayadii and P Vinck*, Communication No 1472/2006, CCPR/C/94/D/1472/2006.

[131] *Behrami and Behrami v France, Saramati v France, Germany and Norway* (GC) (App nos 71412/01 and 78166/01) ECHR 2 May 2007, para 151.

including . . . with the effective conduct of its operations'.[132] The Strasbourg Court has since reiterated this reasoning in the cases of *Kasumaj v Greece*[133] and *Gajić v Germany*.[134]

The European Court of Human Rights apparently did not consider it possible that the UN, NATO and the particular state in question could be concurrently liable (multiple attribution).

Thirdly, *Berić and others v Bosnia and Herzegovina*. Here, the Strasbourg Court likewise declined jurisdiction to review acts of the High Representative for Bosnia and Herzegovina, acting under the Dayton Peace Agreement and the so-called 'Bonn powers'. Between June and December 2004, the UN High Representative, Paddy Ashdown, had removed the applicants from all their public and political-party positions and indefinitely barred them from holding any such positions as well as from running for elections, for having personally contributed to obstructing the arrest and surrender of persons indicted by the ICTY in the Republika Srpska. When the Constitutional Court of Bosnia and Herzegovina ordered the domestic authorities to make sure that an effective remedy against the removal from office was available, the High Representative reacted in a manner that the Court mildly characterised as 'vigorous', but which can more aptly be compared to the behaviour of an absolute monarch. He decided that:

> [a]ny step taken by any institution or authority in Bosnia and Herzegovina in order to establish any domestic mechanism to review the Decisions of the High Representative issued pursuant to his international mandate shall be considered by the High Representative as an attempt to undermine the implementation of the civilian aspects of the [[Dayton] Peace Agreement] and shall be treated in itself as conduct undermining such implementation.[135]

The High Representative decided further that:

> for the avoidance of any doubt or ambiguity . . . it is hereby specifically ordered and determined, in the exercise of the . . . international mandate of the High Representative . . . that no liability is capable of being incurred on the part of the Institutions of Bosnia and Herzegovina . . . in respect of any loss or damage allegedly flowing, either directly or indirectly, from such Decision of the High Representative made pursuant to his or her international mandate, or at all

and that:

> it is hereby specifically declared and ordered that the provisions of the Order contained herein are, as to each and every one of them, laid down by the High Representative pursuant to his international mandate and are not, therefore, justiciable by the Courts of Bosnia and Herzegovina or its Entities or elsewhere, and no proceedings may be brought in respect of duties in respect thereof before any court whatsoever at any time thereafter.[136]

[132] ibid, para 149.

[133] *Kasumaj v Greece* (App no 6974 /05) ECHR 5 July 2007.

[134] *Gajić v Germany* (App no 31446/02) ECHR 28 August 2007, para 1.

[135] *Berić and Others v Bosnia and Herzegovina* (App no 36357/04) ECHR 16 October 2007, para 19.

[136] ibid, para 19.

The Strasbourg Court held that the UN Security Council had 'effective overall control' over the High Representative and that thus his acts were attributable to the UN, rather than to individual member states.[137]

You will agree that the European Convention cases, I have presented, have the tendency, to put it mildly, to confirm Eyal Benvenisti's point about the higher degree of 'acquiescence' on the part of even specialised human rights courts towards problematic policies of their government clientele.[138]

What these cases show is that the question of judicial review of the exercise of public authority by or at the behest of international institutions is of utmost topicality. Regional international courts such as the European Court of Human Rights have demonstrated their unwillingness to efficiently control the acts of the UN Security Council or its sub-organs, operating at the universal level. Such lack of protection at the regional level is, however, not compensated by any effective individual complaint mechanism at the UN level.[139] And this brings me back to my principal challenge to third-level universality: as international law becomes more universal in the sense of directly regulating the behaviour of individuals, it is mandatory that this development is accompanied by judicial control through independent courts to which those individuals have access and which are ready to assume jurisdiction over acts of international institutions that directly encroach upon individual freedoms. If it were a regional court deciding that it was willing to provide for adequate judicial control, universality might suffer, but it would be a kind of universality which deserved to suffer.[140]

CONCLUSION

Thus far my review of the various conceptions of universality of international law, of the challenges that universality in its various appearances meets, and of the ways by which international law, especially the international judiciary, attempts to cope with them. I have exposed you to a veritable *tour de force,* also with regard to the amount of time I have been assigned to fill tonight. For this reason, I will desist from treating you to a typical German academic 'conclusion', ie, another 15 minutes of condensed wisdom, but only say the following: From the viewpoint of us practitioners, the universality of international law in all its variations is in relatively good shape. We may not always be aware of how thin the theoretical ice is on which we are moving, but what we keep in mind in very pragmatic ways is that we must handle the law, its reach, unity and coherence, in a responsible way. This is a state of mind whose presence, and dominance, I have personally experienced in Geneva at the sessions of the Committee on Economic, Social and

[137] ibid, paras 27–30.

[138] Benvenisti, 'Reclaiming Democracy' (n 108).

[139] I am speaking of 'regional international courts' here so as to exclude the European Community's Court of Justice, which in its *Kadi* judgment has indicated its own way out of what I would call a denial of international justice. Particularly in the 'light' of the follow-up to the *Kadi* judgment, I am not sure, however, whether the ECJ was really determined to go the whole way in this regard.

[140] See the preceding note.

Cultural Rights, during entire summers spent with the International Law Commission, and now in the Great Hall of Justice of the Peace Palace. The international judiciary in particular has developed a set of tools to cope with the undesirable aspects of both fragmentation and proliferation, and appears to employ it in full awareness of these challenges on a regular basis. Hence, there is among us practitioners no feeling of urgent need for a 'constitutionalisation' of international law—to finally introduce the third great buzzword to which German international lawyers in particular supposedly have to bow if they want to be 'cool'. Personally, I could never get rid entirely of the suspicion that the great attraction that 'constitutionalisation' of international law seems to have for German colleagues must have something to do with the fact that most, if not all, of them also have to teach *Staatsrecht* and European Community law at their universities, compared to which public international law does indeed still look pretty dishevelled in many places. Thus, the desire to imbue international law with some of the orderliness and hierarchy that constitutions create in most of our countries in most instances most of the time. In the words of Goethe: '*Legt ihr's nicht aus, so legt was unter*'.[141] Take this as the statement of the practitioner which I am supposed to impersonate. And do not get me wrong: we practitioners are not hostile towards any of the features or developments on which the protagonists of 'constitutionalisation' rest their case. We are as happy about the 'widening and thickening' of international law, to use Rosalyn Higgins' words,[142] without, however, seeing the necessity of couching our happiness in misleading terms or forcing it into some Procrustean bed.

BIBLIOGRAPHY

Books

WG Friedmann, *The Changing Structure of International Law* (London, Stevens, 1964).

RY Jennings and A Watts, *Oppenheim's International Law*, Volume I Parts 2–4, 9th edn (Harlow, Longman, 1992).

Y Shany, *The Competing Jurisdiction of International Courts and Tribunals* (Oxford, Oxford University Press, 2003).

CJ Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge, Cambridge University Press 2005).

Chapters in Edited Volumes

A Aust, 'Peaceful Settlement of Disputes: A Proliferation Problem?', in TM Ndiaye and R Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes. Liber Amicorum Judge Thomas A. Mensah* (Leiden, Nijhoff, 2007).

[141] *Zahme Xenien.*

[142] R Higgins, 'A Just World Under Law – Keynote Address' (2006) 100 *ASIL Proceedings* 388, 389.

RY Jennings, 'Universal International Law in a Multicultural World', in M Bos and I Brownlie (eds), *Liber Amicorum for The Rt Hon Lord Wilberforce* (Oxford, Clarendon Press, 1987).

B Simma, 'Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations erga omnes?' in J Delbrück (ed), *The Future of International Law Enforcement. New Scenarios – New Law* (Berlin, Duncker & Humbolt, 1993).

B Simma, and C Hoppe, 'The *LaGrand* Case: A Story of Many Miscommunications', in JE Noyes, LA Dickinson and MW Janis (eds), *International Law Stories* (New York, Foundation Press, 2007).

International Documents

Human Rights Committee, *General Comment no 31 [80] – The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev 1/Add 13 (Geneva, United Nations, 2004).

Institut de droit international, *Fifth Commission: Obligations and rights erga omnes in international law – Rapporteur Giorgio Gaja*, (Krakow, 2005).

International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission*, A/CN.4/L.682 (United Nations, 2006).

Journal Articles

G Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks' (1999) 31 *New York University Journal of International Law and Politics* 919–33.

E Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 *American Journal of International Law* 241–74.

E Benvenisti and GW Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 *Stanford Law Review* 595–609.

A von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 47 *Harvard Journal of International Law* 223–42.

A Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', (2007) 18 *European Journal of International Law* 649–68.

J Combacau, 'Le droit international: bric-à-brac ou système ?' (1986) 31 *Archives de philosophie du droit* 85–105.

A Fischer-Lescano and G Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999–1046.

RJ Goldstone and RJ Hamilton, '*Bosnia v. Serbia*: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia' (2008) 21 *Leiden Journal of International Law* 95–112.

G Guillaume, 'The Future of International Judicial Institutions' (1995) 44 *International and Comparative Law Quarterly* 848–62.

R Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55 *International and Comparative Law Quarterly* 791–804.

—— —— 'A Just World Under Law– – Keynote Address' (2006) 100 *ASIL Proceedings* 388–95.

C 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* 317–36.

M Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *The Modern Law Review* 1–30.

—— —— 'International Law and Hegemony: A Reconfiguration' (2004) 17 *Cambridge Review of International Affairs* 197–218.

J Martinez, 'Towards an International Judicial System' (2003) 56 *Stanford Law Review* 429–530.

N Miller, 'An International Jurisprudence? The Operation of "Precedent" Across International Tribunals' (2002) 15 *Leiden Journal of International Law* 483–526.

K Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdictions – Problems and Possible Solutions' (2001) 5 *Max Planck United Nations Yearbook* 67–104.

A Reinisch, 'The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to avoid Conflicting Dispute Settlement Outcomes' (2004) 3 *The Law & Practice of International Courts and Tribunals* 37–77.

B Simma, 'Fragmentation in a Positive Light' (2004) 25 *Michigan Journal of International Law* 845–47.

B Simma and C Hoppe, 'From *LaGrand* and *Avena* to *Medellin* – a Rocky Road Toward Implementation' (2005) 14 *Tulane Journal of International and Comparative Law* 7–59.

B Simma and D Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 *European Journal of International Law* 483–529.

AM Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191–219.

Collected Courses

JI Charney, 'Is International Law Threatened by Multiple International Tribunals?' (1998) 271 *Recueil des Cours de l'Académie de Droit International* 101–382.

HEH Mosler, 'The International Society as a Legal Community' (1974) 140 *Recueil des Cours de l'Académie de Droit International* 1–320.

B Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours de l'Académie de Droit International* 217–384.

C Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century (General Course on Public International Law)' (1999) 281 *Recueil des Cours de l'Académie de Droit International* 9–438.

Working Paper

A von Bogdandy and S Delavalle, (2008) *Universalism and Particularism as Paradigms of International Law* (Institute for International Law and Justice/ New York University School of Law, International Law and Justice Working Paper no 3).

Democracy after the Fall of the Berlin Wall

It has Come—It is Coming—Will it Come?

REIN MÜLLERSON*

THE POST-Cold War globalisation includes, as its substantial components, the broadening of both market economy and democracy. Both have spread by way of borrowing from more developed societies what has worked there and made them successful, as well as by means of purposeful efforts to promote these ideas and practices. Often seen as God, motherhood and apple pie, markets and democracy have, however, been a mixed blessing: successful and beneficial in many cases, while rather destructive in other circumstances. Why has it been so? What factors have determined success in some states of affairs, and failure in others? Today, I will try to give some tentative answers to these questions.

Democracy has certainly something to do with international law. Professor Thomas Franck in 1990 wrote of the emergence of the right to democratic governance.[1] Some years later, Professor James Crawford, as a new Whewell Professor of International Law in Cambridge, gave his inaugural lecture entitled 'Democracy in International Law'.[2]

However, notwithstanding optimistic views of distinguished professors (I myself at that time belonged to this category of optimists, and was even quoted by Professor Crawford) the right to democracy has hardly become universal because, first, its content is too general to be of much help in practice, and secondly, its practical implementation is not general enough to reflect universal normative values.

Why is it so? Why do we have so many problems, setbacks and backlashes with democracy and democratisation in today's world? There are many reasons for that, and in my short presentation I cannot even enumerate all the problems and difficulties. Therefore, I will concentrate only on some of them.

* Professor and Chair of International Law at King's College, London; former Foreign Minister of Estonia, former member of the UN Human Rights Committee; Institut de Droit International, member.

[1] T Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46–91.

[2] J Crawford, *Democracy in International Law. Inaugural Lecture* (Cambridge, Cambridge University Press, 1994).

Select Proceedings of the European Society of International Law

Volume 2 2008

Edited by

Hélène Ruiz Fabri
Rüdiger Wolfrum
and
Jana Gogolin

OXFORD AND PORTLAND, OREGON
2010