DOMESTIC COURTS AND INTERNATIONAL LAW: A COMPARATIVE JURISPRUDENTIAL ANALYSIS

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Annotation. *This article examines how domestic courts mediate between international law and national legal orders, and why comparing their practice has become a method of international legal reasoning in its own right. Building on the monism–dualism debate and on the emerging field of "comparative international law", it contrasts several models of reception: constitutional openness in the Netherlands and Germany, British dualism, the American doctrine of non-self-executing treaties, the Latin American doctrine of conventionality control and, on the text alone, Uzbekistan's 2023 Constitution. It tests these models against five landmark decisions: Kadi (Court of Justice of the EU, 2008), Medellín v. Texas (US Supreme Court, 2008), Judgment 238/2014 of the Italian Constitutional Court following the ICJ's Jurisdictional Immunities ruling, Görgülü (German Federal Constitutional Court, 2004) and Almonacid Arellano v. Chile (Inter-American Court, 2006). The article argues that the formal rank of international law in a constitution predicts judicial behaviour less well than three other variables: the court's institutional position, the fundamental-rights interests at stake, and the presence of a supranational interlocutor. It concludes that comparative analysis of domestic judgments is at once a tool for identifying international law and a channel through which national courts contest it.*

Keywords: *International law; comparative jurisprudence; domestic courts; monism and dualism; judicial dialogue; conventionality control; treaty enforcement; comparative international law.*

INTRODUCTION

International law is made mostly between states, but it is applied first of all by judges inside them. A treaty or customary rule that binds a state internationally reaches individuals only when a domestic court, administration or legislature gives it effect (Nollkaemper 2011). National courts therefore stand in a double position. They are organs of the state whose conduct international law regulates, and their decisions also count as evidence of that state's practice and, under Article 38(1)(d) of the ICJ Statute, as a subsidiary means for determining what the law is (Roberts 2011).

This double position explains why comparison matters. When the same international rule is applied by courts in different constitutional settings, the outcomes diverge, and the divergence is itself information about the rule's content, authority and limits. Roberts (2011) calls the resulting phenomenon comparative international law: international law as a matter of substance, fused with comparative law as a matter of process. Roberts, Stephan, Verdier and Versteeg (2018) develop it into a field of study.

The article asks two questions. First, how do constitutional rules on the status of treaties and customary law shape what domestic courts actually do? Second, why do courts in comparable systems

sometimes reach opposite results when asked to apply the same international rule or judgment? Section 2 sets out the theoretical framework. Section 3 compares constitutional models of reception. Section 4 analyses five landmark decisions. Section 5 turns to comparative law as a source of international law itself, and Section 6 draws conclusions.

The method is qualitative and selective. Five decisions cannot support statistical claims, so the argument in Section 4 is offered as an analytical hypothesis for further testing, not as an empirical finding.

Theoretical framework: from monism and dualism to pluralism

Classical doctrine offers two pictures of the relationship between international and national law. Dualists such as Triepel (1899) treat them as separate systems with different subjects and sources, so that an international rule operates domestically only after the national system has adopted it. Monists such as Kelsen (1967) see a single legal order in which international law sits at the top. Both pictures are better read as theories of validity than as descriptions of what courts do, and Nijman and Nollkaemper (2007) treat the interaction between the two orders as legally more complex than the classical picture suggests.

Two points follow. First, international law is indifferent to the method of reception but not to the result. A state may not rely on its internal law to excuse non-performance of a treaty (Vienna Convention on the Law of Treaties 1969, art. 27, subject to art. 46). States are free to choose a monist or dualist technique, but a court that declines to apply an international rule may still place its state in breach.

Second, the labels hide the places where courts exercise real discretion:

1. Effect: whether a rule is directly applicable or needs implementing legislation (the American "self-executing" doctrine is the best-known device).

2. Rank: which norm prevails when an international rule conflicts with a statute or with the constitution.

3. Interpretation: how far domestic law is read to conform to international obligations.

Pluralist accounts go one step further. Krisch (2010) describes postnational law as a set of overlapping orders with no settled hierarchy, in which conflicts between orders are managed through interaction rather than a pre-set rule of priority. Slaughter (2003) and Waldron (2005) emphasise the horizontal side of this picture: courts talk to one another, and foreign decisions can serve as evidence of a shared body of law (ius gentium). Benvenisti (2008) adds a functional explanation, arguing that courts in democracies cite foreign and international law strategically, to widen the room for domestic deliberation and to resist pressure from executives and interest groups.

The comparative method is itself contested here. Roberts (2011) points out that a domestic judgment is both the object of comparison and part of the evidence for the international rule being compared, which makes the exercise circular unless the two roles are kept apart. The analysis below keeps them apart by asking three questions of each decision: which reception rule applied, which court decided, and which external interlocutor (a supranational court, a treaty body or an executive) the court was answering.

Models of reception: a comparative map

Seven legal orders, chosen for their contrasting reception rules, show that the wording of a constitution sets a starting point and little more.

Legal order

Reception rule

Judicial posture in practice

Netherlands: Constitution arts 93–94: treaty provisions able to bind everyone apply after publication and prevail over conflicting statutes. Art. 120 bars courts from reviewing statutes and treaties against the Constitution.

Courts test statutes against treaties but not against the Constitution, so treaty review doubles as a form of judicial review.

Germany: Basic Law art. 25: general rules of international law are part of federal law and prevail over statutes. Art. 59(2): treaties enter by federal statute and rank as federal statutes.

A later statute can override a treaty (Treaty Override, 2015), yet domestic law is read in a way that is friendly to international law (Görgülü, 2004).

Italy: Constitution art. 10(1): the legal order conforms to generally recognised rules of international law. Art. 117(1): legislation must respect international obligations. The Constitutional Court treats fundamental principles as "counter-limits" to the entry of custom (Judgment 238/2014).

United Kingdom: Unincorporated treaties do not change domestic law without an Act of Parliament. Dualist: courts decline to enforce treaty rights absent legislation (Rayner, 1990; Miller, 2017).

United States: Constitution art. VI(2): treaties are supreme law. Customary law is applied by courts absent a controlling act (The Paquete Habana, 1900).

Non-self-executing treaties need implementing legislation (Medellín, 2008).

Uzbekistan: Constitution (2023) art. 15: treaties and generally recognised principles of international law are part of the legal system; where a treaty differs from legislation, the treaty applies. Monist on its face, with treaty primacy over statute. How courts apply art. 15 is not assessed here.

First, rank predicts less than expected. German law places treaties at the level of statutes, yet the Federal Constitutional Court required lower courts to take European Court of Human Rights judgments into account. Dutch law places treaties above statutes, yet no Dutch court may test a statute against the Constitution. Italy's art. 10(1) opens the legal order to custom, and the same Constitutional Court partly closed that door in 2014.

Second, the doctrines that matter most are judicial inventions rather than constitutional text. "Self-executing", "counter-limits" and "conventionality control" are each tools by which a court assigns itself the role of gatekeeper between the two orders.

Third, a text-based comparison can place a system but cannot predict its courts. On its face, Uzbekistan's art. 15 resembles the Dutch model, with treaty primacy over legislation. Whether it works the same way depends on judicial practice, which would need separate empirical study.

Judicial dialogue: five landmark decisions

Five decisions show courts in different systems answering the same question, whether an external legal authority binds them and on what terms, with different answers.

4.1 Kadi (Court of Justice of the EU, 2008)

The Council had adopted a regulation freezing the assets of Mr Kadi and the Al Barakaat foundation to implement UN Security Council sanctions. In 2005 the Court of First Instance held that Community courts could review the measure only against jus cogens. The Court of Justice set that approach aside. It held that reviewing a Community act which implements a Security Council resolution is a guarantee under the constitutional principles of the EC Treaty, including respect for fundamental rights. It found that the rights of defence, effective judicial protection and property had been infringed, and annulled the regulation as regards the two appellants (Joined Cases C-402/05 P

and C-415/05 P). In 2013 the Court of Justice upheld the renewed annulment in Kadi II. Halberstam and Stein (2009) read the first judgment as a pluralist move: the EU legal order defends its constitutional core while staying open to cooperation with the UN.

4.2 Medellín v. Texas (US Supreme Court, 2008)

In Avena (2004) the ICJ held that the United States had breached the Vienna Convention on Consular Relations by failing to inform Mexican nationals of their consular rights, and it required review and reconsideration of their convictions. President Bush then issued a memorandum directing state courts to comply. By six votes to three the Supreme Court held that Avena was not directly enforceable federal law, that the treaty provisions relied on were non-self-executing, and that the President could not convert such an obligation into domestic law on his own (552 U.S. 491). The case shows the American model at work: a binding international judgment can leave a domestic court with no operative rule until Congress acts.

4.3 Italy: Judgment 238/2014

In Jurisdictional Immunities of the State the ICJ held that Italy had violated Germany's immunity by allowing civil claims for war crimes committed by German forces in 1943–45 (2012 ICJ Reports 99). Italy legislated to comply. In Judgment 238/2014 of 22 October 2014 the Constitutional Court held that the customary rule on state immunity, as the ICJ had stated it, could enter the Italian order through art. 10(1) only if it respected fundamental constitutional principles and inviolable rights. It therefore refused to apply the rule to war crimes and crimes against humanity, and struck down the Italian legislation that required compliance with that part of the ICJ judgment (Gennusa 2016). Rossi (2022) notes that the Court made no secret of its wish to change the law of state immunity itself, so the judgment is both a limit on reception and a bid to influence international law.

4.4 Görgülü (German Federal Constitutional Court, 2004)

The European Court of Human Rights had found in February 2004 that the refusal of custody and of contact with his son violated Mr Görgülü's right to family life (art. 8 ECHR). The domestic Higher Regional Court did not follow the judgment. On 14 October 2004 the Federal Constitutional Court (2 BvR 1481/04) held that the Convention has the rank of a federal statute, but that the Basic Law is to be read in a way that is friendly to international law. German courts must take Strasbourg decisions into account and consider their effect on the domestic order. Ignoring them can infringe fundamental rights. The Court also made clear that this means integrating the decisions into the domestic system, not applying them schematically.

4.5 Almonacid Arellano v. Chile (Inter-American Court, 2006)

Chile's 1978 amnesty decree-law covered crimes committed between 11 September 1973 and 10 March 1978, including the 1973 killing of Mr Almonacid Arellano. The Inter-American Court held the law incompatible with the American Convention. It added that domestic judges, as part of the state, are bound by the Convention, must not let it be undermined by contrary laws, and must exercise a form of "conventionality control" between domestic norms and the Convention, taking into account the Court's own interpretation (para. 124). Ferrer Mac-Gregor (2015) traces how the doctrine later developed.

Three variables account for most of the variation, and the argument here is that they explain it better than constitutional rank does.

1. Institutional position. Courts that see themselves as guardians of a constitutional core (the Italian and German constitutional courts, and the Court of Justice in Kadi) limit reception where that

core is touched. A court that is itself the external authority, as in Almonacid Arellano, pushes reception outward.

2. Rights stakes. Fundamental-rights reasoning cuts both ways. It is used to resist an external norm in Kadi and Judgment 238/2014, and to expand reception in Görgülü and Almonacid Arellano. Medellín stands apart because structural questions of federalism and separation of powers decided it.

3. Type of interlocutor. Where a standing court has a continuing relationship with the national court (Strasbourg for Germany, the Inter-American Court for its states), reception takes an institutional form such as "taking into account" or "control". Where the demand comes once, from the Security Council or in a single ICJ judgment, the domestic court weighs it as an isolated external claim against local values.

5. General principles and comparative law as a source of international law

Comparison is built into the doctrine of sources, not only into scholarly method. Article 38(1)(c) of the ICJ Statute lists general principles of law recognised by nations, and identifying such a principle means comparing national legal systems. International criminal tribunals have done this routinely. In Furundžija (1998) the ICTY Trial Chamber surveyed national criminal laws to find the elements of rape that major legal systems share, and used them to define the crime in international law. In 2025 the Drafting Committee of the International Law Commission adopted, on second reading, twelve draft conclusions on general principles of law (UN Doc. A/CN.4/L.1018), which shows how far this source of law is now being systematised.

Domestic judgments play a second role. Under art. 38(1)(d) they are a subsidiary means for determining the law, and as acts of a state's organs they are also evidence of that state's practice (Roberts 2011). The two roles can collide. A court that departs from an international rule, as the Italian Constitutional Court did in 2014, produces a possible breach and, at the same time, a possible contribution to the development of custom. The same judgment can be read either way, depending on whether other states follow.

Citing external law is not a sign of deference. In Roper v. Simmons (2005) the US Supreme Court noted that the United States was the only country still officially sanctioning the juvenile death penalty, and used that as confirmation of its reading of the Eighth Amendment. Three years later Medellín refused to treat an ICJ judgment as binding domestic law. Read together, the two decisions fit Benvenisti's (2008) account: courts use external law when it widens their room for domestic deliberation, and resist it when it constrains them. Benvenisti and Downs (2009) extend the point to the development of international law itself, arguing that national courts shape it as well as apply it.

Three limits apply to the comparative method. Selection matters, because a sample drawn mainly from Western courts will describe a Western practice. Comparability matters, because the same label ("self-executing", "direct effect") can mean different things in different systems. And legitimacy matters, because a court that borrows from abroad must still justify the borrowing in domestic terms. Roberts and colleagues (2018) treat the divergences themselves as the object of study. This article's sample is weighted towards Europe and North America and adds one Latin American doctrine and one Central Asian constitutional text. Practice in Asia, Africa and Central Asia would test whether the three variables in Section 4 travel.

The comparison supports three findings. First, the formal rank of international law in a constitution is a poor predictor of what courts do: statute-level treaties in Germany produced a strong duty to consider Strasbourg judgments, and treaty primacy in the Netherlands sits beside a ban on constitutional review. Second, the institutional position of the court, the fundamental-rights interests

at stake and the type of external interlocutor explain more of the variation in the five decisions studied. Third, comparison cuts both ways. It helps identify international law (art. 38(1)(c) and (d) of the ICJ Statute), and it is also how national courts signal agreement or resistance to it.

These findings are hypotheses drawn from five decisions and a text-based map, not tested results. Three questions remain open.

For drafters and judges the practical lesson is modest. Reception rules work best when they say what a court should do on conflict and whether it should consider the interpretations of treaty bodies and international courts, because the doctrines courts invent to fill silence, from "self-executing" to "counter-limits", determine outcomes.

REFERENCE

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