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International Law in Domestic Courts

David Sloss
Santa Clara University School of Law, dlsloss@scu.edu

Michael Van Alstine
University of Maryland - College Park

CHAPTER 6: INTERNATIONAL LAW IN DOMESTIC COURTS

I. CONCEPTUAL OVERVIEW

The central premise of this volume is that the relationship of law and politics in international law varies depending on the sites where the relationship unfolds. In this chapter, we analyze that premise in the creation, interpretation, recognition, implementation, and modification of international norms in domestic courts. We will explain, however, that beyond these "stages of governance," a decisive factor in explaining the engagement of domestic courts with international law is the nature of the legal rule at issue. Specifically, our analysis demonstrates that the willingness of domestic courts to view an international issue as one of law, not politics, varies in important ways depending on whether they are being asked to apply a horizontal (state-to-state) rule, a vertical (state-to-private party) rule, or a transnational (private-to-private) rule.

THE "JUDICIALIZATION" OF INTERNATIONAL LAW

In their origin, composition, and institutional competence, domestic courts are legal institutions. Their stock in trade is the identification and application of norms of a legal, not political, nature. It is nonetheless now widely accepted that courts are political actors as well. Political scientists have explained convincingly that courts (especially supreme courts) do not long adhere to policies "substantially at odds with the rest of the political elite."[1] Domestic courts are constituted by, and more generally a product of, their home polity. As a result, it is quite unlikely that they ever could be fully insulated from the cultural, social, and political environments in which they function. The relative influence of law and politics in the work of domestic judicial bodies thus is of intense scholarly interest.

[1] Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, (1957) 6 J. PUB. L. 291.

All of this plays out in international law as well. Indeed, in recent years scholars have demonstrated convincingly the increasing significance of domestic courts in this realm, not only as legal actors but also as agents in the development of international norms.[2] Enthusiasts have championed the "globalization of judicial power."[3] Some, such as Anne-Marie Slaughter, have highlighted the purely political aspects of "judicial globalization."[4] The focus for these scholars is on the means by which judges participate in cross-border dialogue as autonomous political actors.[5]

Scholars have emphasized as well the growing influence of domestic courts in their formal institutional function—that is, in the enforcement of international legal norms in disputes properly before them. As a preliminary matter, however, one must distinguish in this regard between countries that have an independent judiciary and those that do not. Roughly one-third of the countries in the world lack an independent judiciary.[6] In those countries, politics (*i.e.*, the subjective, situational desires of those in power) may trump law as a routine matter. In order to

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[2] *See* André Nollkaemper, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW (2011).

[3] *See* THE GLOBAL EXPANSION OF JUDICIAL POWER (Neal Tate & Torbjom Vallinder eds., 1995).

[4] Anne-Marie Slaughter, *Judicial Globalization*, (2000) 40 VA. J. INT'L L. 1103, 1112-1123.

[5] *See, e.g.*, Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 37 (Thomas M. Franck & Gregory H. Fox eds., 1996). *See also* Antonios Tzanakopoulos, *Judicial Dialogue as a Means of Interpretation*, in INTERPRETATION OF INTERNATIONAL LAW BY DOMESTIC COURTS (H.P. Aust & G. Nolte eds., forthcoming 2015). Osnat Grady Schwartz, *Changing the Rules of the (International) Game: How International Law is Turning National Courts into International Political Actors*, (2105) 24 WASH. INT'L L.J. 99, 101, 129-134.

[6] The Polity IV Project is the best source of data for estimating the number of countries with independent judiciaries. *See* Polity IV Project, *Political Regime Characteristics and Transitions*, 1800–2014, *available at* www.systemicpeace.org/inscrdata.html. The "exconst" variable ranks countries on a scale from 1 to 7, measuring the degree of external constraints on the executive branch. A score of "1" means that there are no significant constraints on executive power; a score of "7" indicates substantial constraints. In the 2014 data, 109 out of 167 rated countries received a score of "5" or better on the "exconst" variable. This is a reasonably good proxy for determining whether a country has an independent judiciary.

analyze the relationship between law and politics in domestic courts in any productive sense, therefore, this chapter focuses on countries with an independent judiciary.

In countries with an independent judiciary, the clear trend in recent decades has been the "judicialization"[7] or "legalization"[8] of international relations. This phenomenon has expanded the field in which claimants may resort to legal argumentation, not political contestation, in international disputes. Moreover, recent decades have witnessed an extraordinary increase in the "density" of international law. It now covers large swaths of the legal landscape, from commercial law to environmental law, family law, and human rights law (among myriad others). The ultimate effect of such "judicialization" is to "shift … the balance of power between law and politics [to] favor judicial institutions over representative and accountable institutions."[9]

The primary question domestic courts must confront, however, is whether any particular norm has passed from the realm of politics to law. As Kenneth Abbott *et al*. have explained,[10] "legalization" of an international norm involves three essential attributes, each of which is "a matter of degree and gradation": (1) "obligation"—the extent to which the norm is *legally* binding on a state or other actor; (2) "precision"—the extent to which the norm unambiguously defines the required, authorized, or proscribed conduct[11]; and (3) "delegation"—the extent to

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[7] *See*; Ran Hirschl, *The New Constitution and the Judicialization of Politics Worldwide*, 75 Fordham L. Rev. 721, 723-724 (2006); MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS AND JUDICIALIZATION (2002); Schwartz, *supra* note 5, 129-134.

[8] *See generally* LEGALIZATION AND WORLD POLITICS (Judith L. Goldstein *et al*., eds., 2001).

[9] Russell A. Miller, *Lords of Democracy: The Judicialization of 'Pure Politics' in the United States and Germany*, (2004) 61 WASH. & LEE L. REV. 587, 590.

[10] *See, e.g.,* Kenneth W. Abbott, *et al*., *The Concept of Legalization*, (2000) 54 INT'L ORG. 401, 401-404.

[11] Franck describes a norm with this attribute as one that is "determinate." Thomas M. Franck, THE POWER OF LEGITIMACY AMONG NATIONS 41-49 (1990). Koskenniemi captures the notion with the term "concreteness." Marrti Koskenniemi, *The Politics of International Law*, (1990) 1 EUR. J. INT'L L. 4, 7-19.

which third party institutions (especially domestic courts, independent agencies, and international courts) have authority "to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules."[12]

In broad terms, one may describe the differing attitudes of domestic courts toward international law based on their tendency to adopt either "harmonization techniques" or "avoidance techniques."[13] The former term covers a wide variety of practices domestic courts employ to give effect to international norms in their domestic legal systems. The latter term describes a range of contrasting techniques some domestic courts have devised "to by-pass otherwise (i.e. under their own constitutional arrangements) applicable international legal provisions."[14]

The most potent "harmonization technique" is a decision by a domestic court that a particular international norm is binding as formal law in the domestic legal system. But some courts also have given effect to international norms that do not formally qualify as domestic law. In this vein, courts have given effect to unincorporated treaties, applied interpretive presumptions to ensure conformity of domestic statutes with international law, and even relied on international norms in constitutional interpretation. Courts inclined to special "friendliness"[15] to international

[12] Sandholtz and Sweet describe this phenomenon as a continuum founded on the extent to which rules are "formal precise, and authoritative" and are "tied to organizational supports, including enforcement mechanisms." Wayne Sandholtz & Alec Stone Sweet, *Law, Politics, and International Governance* 239-242, in THE POLITICS OF INTERNATIONAL LAW (Christian Reus-Smit, ed., 2004).

[13] *See Preliminary Report: Principles on Engagement of Domestic Courts with International Law* 6-9 (ILA Study Group, 2013)(employing these terms to describe the variations in the application of international law by domestic courts).

[14] *Id.*, at 7.

[15] The term "friendliness to international law" often is attributed to Antonio Cassese, *Modern Constitutions and International Law,* III Academie de Droit International, Recueil des Cours (1985) 331, 343.

law also have found fertile ground for the development of domestic law in existing (and even developing) rules of customary international law.

When, in contrast, courts resort to "avoidance techniques" they relegate claims founded in international law to politics or diplomacy.[16] For example, some courts have recognized a "political question" doctrine for issues with particularly important or sensitive foreign policy implications.[17] A narrow conception of "standing" or "justiciability" may severely circumscribe the pool of permitted claimants. Some courts also have afforded deference to the executive branch in interpreting international legal norms. Additionally, courts in some countries apply the doctrine of "non-self-executing" treaties as an avoidance technique. These and related avoidance techniques carry particular significance for the theme of this volume, for they enable domestic courts to weigh political considerations in the application of international norms to specific disputes.

THE SIGNIFICANCE OF SUBJECT MATTER: HORIZONTAL, VERTICAL, AND TRANSNATIONAL RULES

The introductory chapter to this volume suggests that the relationship between politics and international law varies across stages of governance and governance systems. It also notes that "different systems of governance are demarcated by their subject matter, their scope, or both."[18] Our analysis reveals that the relative influence of law and politics in the attitudes of domestic courts toward international law varies considerably across subject matter. That is, the willingness of national courts to view an international issue as one of law—and thus within their

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[16] *See* Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, (2008) 102 AM. J. INT'L L. 241, 242.

[17] The leading United States Supreme Court case on the subject rejected the notion that all cases that involve foreign affairs implicate the political question doctrine. *See* Baker v. Carr, 369 U.S. 186 (1962).

[18] *See* Chapter One, p. __.

realm of authority notwithstanding the political implications—depends heavily on the subject matter of the legal rule involved. Specifically, judicial behavior varies depending on whether an international legal rule regulates the "horizontal" relations between states, the cross-border "transnational" relations between private actors, or the "vertical" relations between states and private actors.

Horizontal Rules. Part II analyzes the role of domestic courts in applying legal rules that govern relations between and among sovereign states. This is the traditional realm of interstate diplomacy dominated by political considerations and national interest.

International law rules governing horizontal relations may be both highly obligatory and highly precise. An arms control treaty with detailed limits on armaments represents a good example. But even when international law has these attributes, Part II describes a strong presumption that the sovereign states involved have not delegated enforcement authority to national courts. The main exception involves rules protecting the jurisdictional immunity of states in domestic courts.

Transnational Rules. Part III then examines the sharply divergent judicial attitude toward "transnational" legal rules: international norms that regulate cross-border legal relations between private actors. As one of us observed, disputes on this plane "rarely have sufficient political salience to become the subject of interstate diplomacy."[19] The benefits of uniform law for cross-border private transactions nonetheless have led states to adopt wide-ranging international norms governing transnational relationships, including multilateral treaties in commercial law, civil procedure, arbitration, family law, and aviation law, among others.

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[19] David Sloss, *Domestic Application of Treaties* 377, in THE OXFORD GUIDE TO TREATIES (D. Hollis, ed., OUP 2012).

In this realm, a legal perspective predominates, and as Part III explains, judicial avoidance doctrines play little role. Instead, for transnational rules the norm in domestic courts is harmonization. And in sharp contrast to horizontal rules, domestic courts recognize, interpret, and apply international law here almost irrespective of the political implications. This is true even if the relevant norms are obscure, equitable, or highly imprecise. Norms of "good faith" and "reasonableness" in the U.N. Convention on Contracts for the International Sale of Goods represent a good example.

Vertical Rules. Part IV takes up the third category of international legal rules—those governing the "vertical" relations between states and private parties. This category includes both treaty law and customary international law related to refugees, human rights, and international humanitarian law (IHL). When called upon to apply vertical rules, domestic courts oscillate between harmonization and avoidance techniques, depending partly upon whether they perceive the contested issue as legal or political.

Rules governing vertical relations between States and private actors often present challenging issues for domestic courts. Disputes in this realm equally may touch on sovereign functions traditionally allocated to political discretion and implicate the traditional judicial function of protecting private rights from governmental intrusion. Vertical rules require, therefore, a particularly careful analysis of the form and nature of state consent, of comparative constitutional structures, of the relative institutional competence of the judicial branch, and of the special need for judicial independence. Questions of legal obligation and precision will play an important role. But a key point of divergence is the domestic courts' own assessment of whether it is appropriate for them to apply international legal rules to protect individual rights against infringement by government actors.

Ultimately, as Part IV explains, the relative influence of law and politics in this realm depends on the extent to which particular domestic courts adopt avoidance techniques (as in horizontal disputes) or harmonization techniques (as in transnational disputes). But it is also on this issue, perhaps more than any other we examine in this chapter, that a comparative law perspective exposes striking differences among national court systems.

COMPARATIVE LAW PERSPECTIVES

Throughout this chapter we analyze the relative influence of law and politics in international law from a comparative perspective. Recent years have witnessed an increasing interest of scholars in the application of international law in domestic legal systems. Detailed analyses now exist for a number of states, especially on treaty law.[20] We have participated in some of those projects.[21] We provide a brief review of the principal system types here to set a context for the more detailed analysis that follows.

Nearly every constitutional system contains rules for the making and ratification of treaties. Some—especially more modern ones—contain express provisions on the subject.[22] Nearly fifty include references to the domestic legal force of specific treaties, especially on human rights.[23] Other constitutional structures, especially those that follow the British

[20] *See* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT (David Sloss, ed., Cambridge 2009)("Treaty Enforcement"); NATIONAL TREATY LAW AND PRACTICE (Duncan B. Hollis, Merritt R. Blakeslee and L. Benjamin Ederington, eds., Martinus Nijhoff, 2005). *See also* The Oxford Guide to Treaties, *supra* note 19; Anthony Aust, MODERN TREATY LAW AND PRACTICE (2nd ed. CUP 2007).

[21] *See* Sloss, *supra* note 19; David Sloss, *Treaty Enforcement in Domestic Courts: A Comparative Analysis*, 1-60, in Treaty Enforcement, *supra* note 20; Michael P. Van Alstine, *The Role of Domestic Courts in Treaty Enforcement: Summary and Conclusions* 555-613, in Treaty Enforcement, *supra* note 20.

[22] Sloss, *supra* note 19, 373-376; Van Alstine, *supra* note 20, 566-569.

[23] *See* Wayne Sandholtz, *How Domestic Courts Use International Law*, (2015) 38 FORDHAM INT'L L.J. 595, 605.

parliamentary system, have established conventions on the subject.[24] Some constitutions, though substantially fewer, also include express references to customary international law.[25]

It is common in this context to draw a distinction between so-called "dualist" and "monist" approaches to international law. Theoretical debates aside, we use those terms to describe two broad types of domestic legal systems. The fundamental issue that divides the two is whether international norms have the status of law in the domestic legal system.

Treaty law provides the clearest illustration of the distinction. As one of us has observed, "[t]he key distinguishing feature of dualism is that no treaties have the formal status of law in the domestic legal system unless the legislature enacts a statute to incorporate the treaty into domestic law."[26] Thus, even if the executive department has expressed consent as a matter of international law, in dualist systems the legislature must "incorporate" the treaty by standard legislation in order for it to have the force of domestic law. Otherwise, the treaty remains "unincorporated" (although, as noted below, some courts have recognized an influence for such treaties as well). This is the approach of almost all British Commonwealth States, as well as a few others.[27]

It is harder to generalize about states that follow a monist approach. Nonetheless, the key feature of this type of state is that at least some treaties function as directly applicable domestic law without implementing legislation. Beyond this generalization, the monist states differ among themselves in several respects. Because of the different approaches to legislative consent and

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[24] Sloss, *supra* note 19, 370-371; Van Alstine, *supra* note 20, 569-576.

[25] *See* Van Alstine, *supra* note 20, 581.

[26] Sloss, *supra* note 19, 370.

[27] *Id.*

implementation, in this chapter we shall refer to these states as "hybrid monist."[28)] Some hybrid monist states require advance legislative approval for all treaties before the executive may express consent under international law; others require such approval only for certain treaty types. Considerable differences also exist on which treaties require subsequent legislative implementation. It is here that debates over self-executing and non-self-executing treaties are most significant. Hybrid monist states diverge as well on the hierarchical status of treaties, with some even elevating them (in certain contexts) over the domestic constitution.[29]

Despite the formal distinctions, our analysis reveals few functional differences between dualist and hybrid monist states in the application of international norms. Indeed, as described in Parts II to IV, our conclusions about the important role of subject matter hold across the diversity of state systems. Thus, courts in dualist and hybrid monist states alike commonly defer to the political branches on horizontal rules (see Part II). With transnational rules, in contrast, courts from all system types routinely apply appropriately sanctioned international norms to resolve legal disputes that come before them (see Part III).

With vertical rules, a state's formal classification as dualist or hybrid monist does not seem to be a decisive factor in explaining the behavior of courts.[30] Nonetheless, as Part IV analyzes in detail, domestic courts diverge substantially in their willingness to defer to political interests in disputes between governments and private parties. And on no subject is this more glaring than in the protection of international human rights.

DOMESTIC COURTS AND THE STAGES OF GOVERNANCE

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[28] *See* Van Alstine, *supra* note 20, at 569-570 (employing this term).

[29] *See generally* Sloss, *supra* note 19, 373-376; Van Alstine, *supra* note 20, 569-581.

[30] Sloss, *supra* note 19, 378-379.

This volume analyzes the relationship between law and politics based on five "stages of governance." On two of these stages, domestic courts are frequent and substantial players. *Interpretation* of legal norms is an essential function of an independent judiciary. Domestic courts also play an important role in the *implementation* of international law by issuing authoritative judgments in litigated disputes. These two subjects occupy much of our attention in this chapter.

For the remaining three stages of governance, in contrast, the influence of domestic courts is more limited. From their constitutional station and institutional competence, domestic courts have only a circumscribed role in international law *rule-making*. In a formal sense, states make treaties, and courts are not empowered to adjust the substance to advance broader interests. In some systems the common law opens a channel for the recognition of norms of customary international law. As a more general matter, a "transjudicial dialogue" may foster epistemic communities for the recognition of such norms. But here as well, a faithful adherence to the judicial function places constraints on judges making, as opposed to finding, the law. A rare exception may be on the subject of conduct-based immunity of former government officials for acts of torture committed while in office.[31]

A distinct stage of governance involves *decision-making* by the subjects of legal rules. Courts are not generally the subjects of international legal norms—beyond the general obligation of a state institution to apply the law created by the political branches. However, some international rules target proceedings in domestic courts themselves. Thus, for example, domestic courts ultimately are the subjects for the rules of customary international law on state

[31] *Compare* Yousuf v. Samantar, 699 F.3d 763 (4th Cir. 2012)(rejecting a claim of immunity) with Jones v Ministry of the Interior of the Kingdom of Saudi Arabia, (2006) UKHL 26, 14 June 2006 (recognizing immunity).

immunity, for the very question is whether *the court* will exercise jurisdiction over a foreign state. Transnational treaties on civil procedure matters and the enforcement of foreign arbitral awards fall in the same general category.

Though limited, the actions of domestic courts are also significant in *legal change*. Of their nature, independent courts are sources of "rule innovation,"[32] a phenomenon equally applicable to international law. Indeed, transnational judicial dialogue may be most pronounced in the development of customary international law. Although formally only a "subsidiary means" for determining the law, decisions of domestic courts contribute to the content of the law through an iterative process of recognition and adjustment over time. Moreover, on some subjects (*e.g.*, immunity, court procedure, the act of state doctrine) the actions of domestic courts, as state organs, constitute "state practice" that drives the development and modification of customary international law.

Disputes in domestic courts over the meaning and effect of treaties likewise provide a platform for *legal change*. Fundamental principles of treaty interpretation—good faith, autonomous interpretation, respect for foreign court judgments—support the development of epistemic communities among domestic courts that may lead to progressive changes in agreed meaning over time. Some treaties even expressly or impliedly delegate authority to courts to engage in "dynamic" interpretation to address future developments. In all of this, domestic courts, intentionally or not, may contribute to evolution in the content of international legal norms over time.

II. HORIZONTAL RULES

[32] Sandholtz & Sweet, *supra* note 12, 247-248.

Horizontal rules regulate relationships between sovereign states. When domestic courts confront horizontal disputes, they often view the cases as "political," not "legal," and they apply various avoidance techniques to avoid decisions on the merits. The governing model of enforcement is diplomacy, political contestation, and non-judicial sanctions in the parties' interstate relations. Domestic courts commonly employ avoidance doctrines "to align their findings and judgments with the preferences of their governments and thus to guarantee [the governments] complete latitude in external affairs."[33] In this realm, domestic courts do not play an active role at any of the five "stages of governance," subject to the exception of state immunity, discussed below.

An Italian decision in *Presidency of the Council of Ministers v. Markovic* is illustrative.[34] In April 1999, NATO forces bombed a radio station in Yugoslavia, killing Dejan Markovic and Slobodan Jontic. Surviving family members filed suit in Italy against the Ministry of Defence and others. Plaintiffs alleged violations of international humanitarian law (IHL) rules prohibiting the use of weapons "directed against a non-military objective and intentionally intended to harm civilians."[35] Defendants argued that Italian courts lacked jurisdiction. The Supreme Court of Cassation ruled for defendants on jurisdictional grounds, holding "that neither the ordinary courts nor any other court can consider the dispute."[36] The court said: "The choice of a means of conducting hostilities is an act of Government. These are acts that constitute the manifestation of a political function . . . . The provisions of the [Geneva Conventions] . . . which govern the

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[33] Benvenisti, *supra* note 16, at 242.

[34] 85 RIVISTA DI DIRITTO INTERNAZIONALE 799 (2002), ILDC 293 (IT 2002) ["Markovic"]. Throughout this chapter, the abbreviation "ILDC" refers to the Oxford database on International Law in Domestic Courts. The designation "ILDC 293" is an identifier assigned by the editors of that database. Quotations from the case are taken from the English translation available in the Oxford database.

[35] *Markovic*, The Facts, para. 1.

[36] *Id.*, The Law, para. 5.

conduct of hostilities are . . . provisions of international law [that] govern relations between States."[37]

In sum, the court described the relevant legal rules as horizontal rules that "govern relations between states" and it characterized the underlying conduct as "the manifestation of a political function." These two ideas — that the rule is horizontal and that the function is political — are closely related. The plaintiffs thought they were asking the court to apply a vertical rule of law that protects individual civilians from unlawful use of weapons by state actors. From their perspective, their claim was similar to a claim that government officers violated the European Convention on Human Rights: a type of claim that Italian courts often adjudicate.[38] However, from the court's perspective, the fact that the use of force occurred in the context of an international armed conflict meant that the case was properly viewed as a horizontal dispute between states, not a vertical dispute between state actors and private parties. Thus, *Markovic* illustrates two important points. First, domestic courts often have discretion in choosing whether to frame a dispute in horizontal or vertical terms. Second, the choice to frame it as a horizontal dispute typically means that the court views the contested issues as political, not legal, and domestic courts generally avoid the merits of political questions.[39]

However, domestic courts often enforce horizontal rules on state immunity. Customary international law provides that states may not permit their domestic courts to exercise

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[37] *Id*., The Law, paras. 2-3.

[38] *See* Dorigo and President of the Council of Ministers (intervening), No. 113/2011 (Corte Costituzionale, Italy) (holding that Italian courts must re-open criminal proceedings in cases where the European Court of Human Rights finds a violation of fair trial rights).

[39] *See also* Varvarin Bridge Case, BGHZ 166, 384 (Federal Supreme Court of Germany), ILDC 887 (DE 2006) (dismissing claim against Germany by victims of NATO bombing in Serbia).

jurisdiction over foreign sovereigns, unless one of several exceptions applies.[40] The rules governing state immunity are properly viewed as horizontal rules because they protect one state from the exercise of sovereign (judicial) power by another state. Even so, immunity issues frequently arise in vertical disputes between states and private parties.

A recent decision by the Supreme Court of Ghana is illustrative. In May 2006, a federal court in New York issued a judgment in favor of a bond holder, NML Capital, against the Republic of Argentina, the issuer of sovereign bonds.[41] Argentina had waived its immunity from jurisdiction. However, NML could not execute the judgment because Argentina did not waive its immunity from attachment. In an attempt to collect the money it was owed, NML undertook a global search for Argentine assets subject to attachment.[42] When an Argentine warship docked at a port in Ghana, NML tried to attach the warship to collect on the prior judgment. A lower court granted an attachment order and seized the vessel.[43] At this point, the dispute was effectively transformed from a vertical dispute between NML and Argentina to a horizontal dispute between Ghana and Argentina, as evidenced by the fact that Argentina sued Ghana in the International Tribunal for the Law of the Sea (ITLOS). ITLOS held that the attachment order breached an international obligation that Ghana owed to Argentina: the obligation to refrain from exercising

[40] *See* Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), Judgment, 2012 I.C.J. 143.

[41] NML Capital, Ltd. v. Republic of Argentina, 2006 WL 1294853 (S.D.N.Y. 2006).

[42] *See* Republic of Argentina v. NML Capital, Ltd., 134 S.Ct. 2250, 2253 (noting that "NML has pursued discovery of Argentina's property" since 2003).

[43] *See* The Republic v. High Court (Comm. Div.) Accra, Supreme Court of Ghana (20 June 2013).

jurisdiction over Argentina in Ghana's domestic courts.[44] The Supreme Court of Ghana remedied the breach by reversing the attachment order.[45]

Chapter One identifies "decision-making" as a stage of governance in which "the actors whose behavior is governed by a rule" make decisions on the basis of that rule.[46] State immunity rules are unusual because domestic courts are key actors governed by those rules—in a practical sense, if not a formal sense. The Supreme Court of Ghana effectively implemented the international immunity rule by reversing the attachment order.[47] The Ghanaian Court's decision is similar to the Italian court's decision in *Markovic*, in that both courts relied on jurisdictional rules to avoid the merits of the underlying dispute. However, the Ghanaian Court applied the international immunity rule to justify its jurisdictional decision, whereas the Italian court applied a domestic jurisdictional rule to avoid application of the international (IHL) rule.

III. TRANSNATIONAL RULES

The governance system for transnational legal rules in domestic courts is strikingly different from that for horizontal rules. For rules governing disputes between private parties, domestic courts play an active role almost irrespective of the salience of political interests. In this respect, the governance system for transnational rules in domestic courts differs even from "vertical" legal rules with significant effects on private interests.

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[44] *See* Argentina v. Ghana (The ARA Libertad Case), International Tribunal of the Law of the Sea, No. 20.

[45] Republic v. High Court, *supra* note 45.

[46] *See* Chapter one, p. __.

[47] The government of Ghana released the ship before the Supreme Court of Ghana issued its ruling, but the Supreme Court decision validated the legality of the government's action.

As noted in Part One, the predominant model of governance for transnational legal rules is "judicialization."[48] In this realm, domestic courts commonly assume—often without detailed analysis—that they have enforcement authority even if the relevant norms may touch on political sensitivities, are highly imprecise, or involve substantial discretion. The result is that courts routinely apply, interpret, and develop transnational norms in the disputes before them.

The Significance of Multilateral Treaties.

Historically, customary norms predominated in transnational private relations in areas such as commercial and maritime law. As A. Claire Cutler has exhaustively demonstrated, however, since the nineteenth century domestic statutory and common law have displaced the private customary law of the *lex mercatoria*.[49]

The active engagement of domestic courts with transnational norms becomes clearest through their role in applying multilateral treaties. Treaties governing transnational private relations are numerous and practically significant. To choose just a few prominent examples, widely accepted conventions cover enforcement of international arbitral awards (the 1958 New York Convention, with over 150 member states); international carriage by air (the 1999 Montreal Convention, with over 110 member states); the civil aspects of international child abduction (the 1980 Hague Convention, with nearly 100 member states); and contracts for the international sale of goods (the 1980 Vienna Convention (CISG), with over 80 member states). Numerous other treaties cover other aspects of commercial and family law, as well as civil procedure and other private law subjects.

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[48] *See* A. Claire Cutler, PRIVATE POWER AND GLOBAL AUTHORITY 2 (CUP 2003)(citing a trend toward "the *juridification* of political, social, and economic life").

[49] *See id*. at 141-179.

The practical significance of these transnational treaties finds expression in the fact that the distinction between dualist and hybrid monist states becomes almost entirely irrelevant in this realm. "Scheduling" is a common means for the incorporation of such treaties in dualist states. Under this practice, the legislature gives a treaty the force of domestic law by appending its text to an implementing statute.[50] Thus, for example, the U.K.'s Child Abduction and Custody Act of 1985 declares that "the provisions of that [Hague] Convention set out in Schedule 1 to this Act shall have the force of law in the United Kingdom."[51] The result is that the treaty *itself* falls within the enforcement authority of domestic courts.

The result is similar in hybrid monist states. For such states, some treaties function as directly applicable domestic law. But in contrast to vertical treaties, transnational treaties have not triggered debates over "self-execution" (or "direct effect").[52] Rather, either the political departments declare in advance that the treaties have direct effect, or domestic courts simply assume, with little analysis, that this is the case. Even in the sometimes-skeptical United States, the issue of self-execution of transnational treaties barely has caused a ripple in judicial analysis.[53]

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[50] *See* Van Alstine, *supra* note 20, at 568-569 (summarizing the practice for Australia, Canada, Israel, and the United Kingdom).

[51] Child Abduction and Custody Act of 1985, § 1. *See also, e.g.*, Kenya's International Interests in Aircraft Equipment Act (2013), § 4 (providing that the Cape Town Convention and its protocol on aircraft equipment "shall have the force of law"); Canada's International Sale of Goods Contracts Convention Act (1991), § 4 (declaring that the UN Sales Convention has "the force of law in Canada").

[52] *See* Van Alstine, *supra* note 20, at 599-603.

[53] *See, e.g.*, Ozaltin v. Ozaltin, 708 F.3d 355, 359-60 (2nd Cir. 2013)(declaring that the Hague Child Abduction Convention is self-executing); Hanwha Corp. v. Cedar Petrochemicals, Inc., 760 F. Supp. 2d 426, 430 (S.D.N.Y. 2011)(same for the CISG); Baah v. Virgin Atlantic Airways Ltd., 473 F.Supp.2d 591, 593 (S.D.N.Y. 2007)(same for the Montreal Air Carriage Convention). *See also generally* David Sloss, United States 504 *et seq.*, in Treaty Enforcement, *supra* note 20 (comprehensively analyzing the application of treaties by U.S. courts).

Domestic courts rely on such treaties not merely as "persuasive authority"—which "attracts adherence as opposed to obliging it"[54]—but rather as binding and directly enforceable domestic law. And with the force of law, transnational treaties fall within the enforcement authority of domestic courts, like norms of a purely domestic origin.[55] Thus, in both dualist and hybrid monist states transnational treaties are perhaps the "hardest" of international legal norms in the routine work of domestic courts.

Although often overlooked by public law scholars, treaties governing private relations are among the most common sources for the application of international law in domestic courts. Such treaties have generated thousands of reported opinions (and likely many more unreported ones). Judicial decisions applying the CISG alone number over ten thousand.[56] At least 1750 domestic court decisions apply the New York Convention.[57] The International Child Abduction Database of the Hague Conference lists nearly one thousand domestic court opinions.[58] The Montreal Convention and its predecessor, the Warsaw Convention, have generated over 660 decisions in total in just six jurisdictions.[59] These formally reported opinions likely only scratch the surface in the routine resolution of disputes by domestic courts in commercial law, civil procedure, family law, aviation law, and the many other fields now governed by transnational treaties.

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[54] Sandholtz, *supra* note 23, at 611-612 (quoting H. Patrick Glenn, *Persuasive Authority*, (1987) 32 MCGILL L.J. 261, 263).

[55] *See, e.g.*, 28 U.S.C. § 1331 (providing that federal district courts in the United States "shall have original jurisdiction of all civil actions arising under … treaties of the United States").

[56] *See* CISG Database, http://www.cisg.law.pace.edu/cisg/text/digest-cases-toc.html.

[57] *See http://newyorkconvention.org*.

[58] *See http://www.incadat.com/index.cfm?act=text.text&lng=1*.

[59] A search of the WestLaw database revealed 653 cases that have cited the Warsaw or Montreal Conventions in just Australia, Canada, Hong Kong, South Korea, the United Kingdom, and the United States.

The Preeminence of Law over Politics

The primary theme of this volume is that the relative influence of law and politics varies according to the sites in which their relationship unfolds. At the site of domestic court application of transnational legal norms, law predominates over politics in nearly every respect.

The realm of transnational private relations is highly "legalized." Thus, the permissible grounds for argumentation by disputants (the "argumentation frameworks")[60] are legal (not political) in source, form, and content. Litigants and judges alike revert to "the text, purpose, and history of the rules, their interpretation, admissible exceptions, applicability to classes of situations, and particular facts."[61] Likewise, the dominant model of judicial decision-making is "legal."[62] Judges cite transnational treaties "because they contain relevant law and interpretive guidelines" that are binding in the domestic legal system. Theories of "attitudinal" judging (*i.e.*, based on political or ideological preferences) or "strategic" judging (*i.e.*, to satisfy the interests of other institutional actors such as the executive, the legislature, or public opinion) are of minimal relevance.[63]

The contrast with horizontal, and even many vertical, rules in this respect is striking. The attitude of the United States Supreme Court provides a clear example. That court hardly is "friendly" to international law, as its decisions on Article 36 of the Vienna Convention on Consular Relations (a vertical provision) amply demonstrate.[64] But the Court has embraced

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[60] Sandholtz & Sweet, *supra* note 12, at 245-247.

[61] *Id.*

[62] *See* Sandholtz, *supra* note 23, at 611.

[63] *Id.*, at 611 (reviewing models of judicial decision-making).

[64] *See, e.g.*, Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006); Breard v. Greene, 523 U.S. 371 (1998)(per curiam).

transnational legal norms with enthusiasm. Thus, for example, the Court issued this declaration in a custody dispute governed by the Hague Child Abduction Convention:

> Custody decisions are often difficult. Judges must strive always to avoid a common tendency to prefer their own society and culture[.] International law serves a high purpose when it underwrites the determination by nations to rely upon their domestic courts to enforce just laws by legitimate and fair proceedings.[65]

The touchstone nonetheless remains legal, as the Court emphasized in a recent opinion applying the same treaty. In a marked departure from its reliance on procedural default rules in disputes over the Vienna Consular Convention, the Court declared that it was "unwilling to apply equitable tolling principles that would, in practice, rewrite the treaty."[66]

Domestic courts throughout the world routinely assume that they have enforcement authority even for transnational norms that only dimly satisfy the other recognized attributes of "legalization" (obligation and precision).[67] Many provisions in transnational treaties are highly indefinite or involve substantial discretion. For example, the Hague Child Abduction Convention recognizes an exception if a return order would place a child in an "intolerable situation."[68] As a more general matter, as the U.K. House of Lords has observed, "[i]nternational jurisprudence supports a broad interpretation of the factors that may be relevant in the discretionary exercise" of returning under that treaty.[69] The CISG also repeatedly defines rights or obligations by what is "reasonable" or "unreasonable" under the circumstances.[70] And the New York Convention

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[65] Abbott v. Abbott, 560 U.S. 1, 20 (2010).

[66] Lozano v. Montoya Alvarez, 134 S. Ct. 1224, 1235 (2014).

[67] *See* text accompanying notes 7-12 *supra*.

[68] *See* art. 13.

[69] *See* In re M and Another [2007] UKHL 55.

[70] *See* arts. 34, 35(2)(b), 37, 48(1), 60(a), 75, 77, 79(1), 79(4), 85, 86(1), 86(2), 87, 88(2), 88(3).

grants exceptions based on an absence of "proper notice" or "public policy."[71] Numerous similar examples exist in other transnational treaties. Notwithstanding such highly imprecise norms, domestic courts routinely adopt the "legal" model of judicial decision-making. They interpret and apply the treaties as binding legal norms—even if doing so requires the exercise of substantial judicial discretion.

Domestic courts also do so in situations of high political salience. Granted, transnational legal rarely touch on political nerves in an appreciable way (compared to horizontal and vertical rules). Disputes involving transnational rules simply are too numerous or mundane for the executive branch to assert its policy preferences on a regular basis. Moreover, the competing interests often cut across the political divide: A buyer or seller in an international sale is equally likely to be a member of one political party as another; so too is a father or mother in an international child custody dispute. As a result, the political branches commonly are content to leave the resolution of the related legal issues to the courts.[72]

Even transnational disputes, however, sometimes trigger significant international political conflicts. For example, controversies over the alleged failure of some foreign courts to adhere to the Hague Child Abduction Convention recently spawned a special statute in the United States authorizing targeted sanctions by the executive branch.[73] Similarly, the United States Supreme Court recently highlighted "the diplomatic consequences resulting from this Court's interpretation of 'rights of custody' " under the Convention, "including the likely reaction of other contracting states and the impact on the State Department's ability to reclaim children

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[71] *See* arts. V(1)(b), V(2)(b).

[72] *See* Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary* (1993) 7 STUD. AM. POL. DEV. 35 (demonstrating that party moderates across the political divide sometimes invite the judiciary to resolve certain sensitive issues).

[73] *See* The Sean and David Goldman International Child Abduction Prevention and Return Act of 2014. PL 113-150, August 8, 2014, 128 Stat 1807, codified at 22 U.S.C. § 9101 et seq.

abducted from [the United States]."[74] Nonetheless, the Court proceeded to interpret and apply the Convention. Likewise, one finds little weighing of political sensitivities in the application of transnational legal norms by domestic courts around the world.

This is true even for domestic courts in states that do not have an exemplary reputation for judicial independence. Thus, courts in China have issued scores of opinions on the CISG,[75] applied aviation treaties (beginning with a landmark opinion by a District Court in Shanghai[76]), and enforced arbitral awards under the New York Convention.[77]

As should be clear from the preceding discussion, judicial avoidance doctrines have played a quite limited role in the realm of transnational legal relations. One finds here almost no mention of political question, non-justiciability, or similar doctrines. Likewise, the debate over whether particular treaty provisions are "self-executing" or have "direct effect" simply has not featured prominently in transnational disputes. Most domestic courts do not grant deference to the executive branch in treaty interpretation.[78] Although United States courts use the rhetoric of deference in transnational disputes,[79] little evidence exists that the executive branch has exercised political influence over judicial decisions.[80]

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[74] Abbott v. Abbott, 560 U.S. 1, 15 (2010).

[75] *See http://www.cisg.law.pace.edu/cisg/text/casecit.html#china*.

[76] *See* Hong v United Airlines Incorporated, (Dist. Ct. of Shanghai, First instance, Nov. 26, 2001) 4 Gazette of Supreme People's Court of the People's Republic of China 141, [2000] Min Jing Chu No 1639, ILDC 780 (CN 2001)(applying the Warsaw Convention on international air carriage).

[77] *See* http://www.newyorkconvention.org/court-decisions/decisions-per-country#chinapr. *See also* Xue Hanqin & Jin Qian, *International Treaties in the Chinese Domestic Legal System*, 8 CHINESE J. INT'L L. 299 (2009)

[78] *See* Van Alstine, *supra* note 20, at 592-593.

[79] Abbott v. Abbott, 560 U.S. 1, 15 (2010); El Al Israel Airlines v. Tsui Yuan Tseng, 525 U.S. 155, 168 (1999).

[80] The U.S. executive branch often expresses its opinion on the interpretation of transnational treaties in the form of *amicus curiae* briefs, and it is not uncommon for the Supreme Court to agree with those expressed opinions. *See, e.g.*, Abbott v. Abbott, 560 U.S. 1, 15 (2010)(noting that the Court's

Domestic Court Engagement and the Stages of Governance.

As noted in Part One, domestic courts generally do not play an active role in rule-making or decision-making regarding international legal norms. But for transnational legal rules, domestic courts have noteworthy influence in interpretation, implementation, and progressive development over time.

The role of domestic courts in the *interpretation* of transnational legal norms is expansive and significant. The influence of domestic courts has become most pronounced through the process of developing an international consensus on the *meaning* of treaty provisions. Determining the meaning of treaties leaves considerable discretion for domestic courts in their primary duty "to say what the law is."[81] For transnational legal rules, this essential judicial role creates a platform for a process of judicial dialogue across jurisdictions. The foundation for this process is the recognition, including by courts from dualist states,[82] that the relevant source of interpretive evidence is the treaty itself, including its drafting history (*travaux préparatoires*) and the subsequent practice of states. Most courts rely on the interpretive rules of the Vienna Convention on the Law of Treaties.[83] With the foundation of uniform source materials and principles, together with a recognized goal of uniform interpretation, the result has been substantial cooperation and collaboration by domestic courts around the world.

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interpretation of the Hague Child Abduction Convention was "supported and informed by the State Department's view on the issue").

[81] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[82] *See* Povey v Qantas Airways Limited [2005] HCA 33 (2005)(High Court of Australia)(involving a claim by a passenger against an airline); Sidhu v British Airways Plc [1997] AC 430, 443 (House of Lords)(same).

[83] *See* Van Alstine, *supra* note 20, at 587-591.

Of great importance in this cooperation is the widespread reliance on the opinions of courts from other treaty member states.[84] Courts from dualist[85] and hybrid monist[86] traditions alike have emphasized that decisions of other member state courts are "entitled to considerable weight" (in the words of the United States Supreme Court[87]). Indeed, for transnational treaties, "transnational judicial dialogue" is not merely theoretical or aspirational. A formal International Hague Network of Judges (composed of domestic judges from sixty-one jurisdictions) works to secure uniform interpretations of the Hague Child Abduction Convention.[88] Official compilations of domestic court interpretations also exist to advance uniformity in the application of other transnational treaties. And, significantly, this substantial judicial cooperation transpires without the formal involvement of the political branches.

The influence of domestic courts on *decision-making* (as noted in Part I) is limited, even for transnational legal rules. The narrow exception is for treaties that provide rules affecting procedure in the courts themselves. Thus, in a real sense, domestic courts are the subjects of transnational treaties on service of process and taking of evidence abroad,[89] as well as the New York Convention on the enforcement of arbitral awards. Nonetheless, for these treaties as well, a

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[84] *See* Tzanakopoulos, *supra* note 5.

[85] *See, e.g.*, Smallmon vs. Transport Sales Ltd., (2010), Civ.-2009-409-000363, para 82 (High Court of New Zealand)(applying the CISG); In re M and Another [2007] UKHL 55 (U.K. House of Lords)(applying the Hague Child Abduction Convention); Povey v Qantas Airways Limited [2005] HCA 33 (2005)(High Court of Australia)(applying the Warsaw Convention).

[86] *See, e.g.*, Van Alstine, *supra* note 20, at 591-592 (noting the practice by courts in the Netherlands, Poland, and Germany).

[87] Abbott v. Abbott, 560 U.S. 1, 20 (2010)(quoting an earlier opinion).

[88] *See* Judith Kreeger, *The International Hague Judicial Network—A Progressing Work*, (2014) 48 FAM. L.Q. 221; Robin Moglove Diamond, *The International Hague Network of Judges*, available at http://www.iawj.org/International_Hague_Network_of_Judges-Justice_Diamond.pdf.

[89] Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, opened for signature Nov. 15, 1965; the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature Mar. 18, 1970.

legal perspective predominates, and there is little evidence that political considerations play a noteworthy role in decision-making by domestic courts.

Domestic courts fulfill an essential function in the *implementation* of transnational legal norms. In disputes between private parties, domestic courts are the principal state institutions in this stage of governance based on their authority to issue final judgments. But again, the governing model here is "judicialization." In nearly all cases, courts treat norms that regulate transnational private relations as legal in nature and thus subject to the courts' traditional enforcement authority in disputes properly before them. Resort to avoidance doctrines as a cover for political sensitivities is neither common nor significant. At the site of the implementation of transnational rules by domestic courts, in short, law nearly always triumphs over politics.

Regarding *legal change* in transnational rules, domestic courts do not have formal authority to modify the law created by the political branches. But transnational treaties, more than any other type, require active engagement by domestic courts to ensure the continued fulfillment of their purpose over time. Of their nature, such treaties regulate the activities of substantially more actors and in dynamic social and technological environments. As a result, over time the domestic courts charged with interpretation and application increasingly confront issues that the drafters did not foresee, or simply chose not to resolve. To ensure the continued vitality and relevance of such treaties, domestic courts must adapt their provisions to new and unexpected environments.[90] Indeed, some commercial law treaties expressly empower domestic courts to fill regulatory gaps as they emerge over time, which one of us has described as a

[90] In situations of doubt, some courts even have turned to a decidedly "soft" form of international norms, the UNIDROIT Principles of International Commercial Contracts. *See* Michael Bonell, *The CISG, European Contract Law and the Development of a World Contract law*, 56 AM. J. COMP. L. 1, 22-25 (2008)(surveying the application of the Principles by domestic courts and arbitral tribunals).

delegated authority to engage in "dynamic treaty interpretation."[91] The result is that domestic courts have the power (whether formally or practically) to effect legal change in fulfillment of the fundamental purposes of transnational treaties.

IV. VERTICAL RULES

It is difficult to formulate general statements describing application of vertical international rules by domestic courts because national legal systems vary greatly. Even so, to identify some order amidst the chaos, three preliminary observations may be helpful. First, following the theme introduced in Part I, this Part focuses on countries with independent judiciaries. In states whose judicial branch is not truly independent, domestic courts rarely provide remedies to private parties when government actors violate domestic legal norms,[92] so they can hardly be expected to provide remedies when government actors violate international norms. Second, one can distinguish between cases where the government invokes an international norm to justify imposing a sanction on a private party (as in domestic application of international criminal law),[93] and cases where a private actor seeks a remedy against the government for violation of an international norm. This Part focuses on cases in the latter category. Third, one can distinguish between cases where private litigants file suit in State A against *domestic* government actors from State A, and cases where litigants file suit in State A

[91] *See* Michael P. Van Alstine, *Dynamic Treaty Interpretation*, (1998) U. PA. L. REV. 687, 726-791.

[92] *See, e.g.*, U.S. Dept. of State, Country Reports on Human Rights Practices for 2013, Venezuela, at 14-17 (discussing denial of fair trial rights).

[93] *See, e.g.*, Canada v. Mugesera, [2005] 2 SCR 100, ILDC 180 (Supreme Court of Canada) (ordering deportation of Rwandan national accused of incitement to commit genocide).

against *foreign* government actors from State B.[94] This Part focuses on cases where litigants ask courts to hold *domestic* officials accountable for violations of international norms. Three distinct bodies of law account for most domestic litigation in this field: international human rights law, international refugee law, and international humanitarian law (IHL).[95] The following analysis cites examples from all three areas.

In states with independent judiciaries, domestic courts frequently provide remedies for private parties whose rights are violated by government actors. If the norm at issue is a domestic legal norm, courts perform their routine functions. But if the norm at issue is an international legal norm, courts apply harmonization techniques in some cases and avoidance techniques in others. When courts apply harmonization techniques, they effectively treat the contested issue as a legal issue. When they apply avoidance techniques, they treat the contested issue as a political issue. Hence, the key question is this: In cases where private actors seek remedies against domestic officials for alleged violations of international legal norms,[96] how can we explain decisions by domestic courts to apply harmonization techniques in some cases and avoidance techniques in others? To address this question, we distinguish among three methods for applying international law: (1) "silent application," where courts apply a domestic rule derived from international law without mentioning international sources; (2) "indirect application," where courts apply international law as a guide to interpreting domestic statutory or constitutional

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[94] *See, e.g.*, Fang v. Jiang, [2007] NZAR 420, ILDC 1226 (High Court of New Zealand) (claim filed in New Zealand against Chinese government officials based upon acts of torture allegedly committed in China).

[95] IHL can be divided broadly into three sets of rules: a) rules governing the means and methods of warfare; b) rules governing the treatment of detainees in armed conflict; and c) rules related to administration of occupied territory. Domestic courts tend to view cases involving means and methods of warfare as horizontal cases, whereas they tend to view cases in the other two categories as vertical cases.

[96] This formulation encompasses cases where private actors raise international law defenses in actions initiated by the government, as well as cases where private plaintiffs bring civil suits against government actors.

provisions; and (3) "direct application," where courts apply international law directly as a rule of decision. Each of these methods involves domestic courts in two prominent stages of governance: the *interpretation* and *implementation* of international law.

SILENT APPLICATION OF INTERNATIONAL LAW

When judges apply domestic legal rules, they often do so without acknowledging that those "domestic" rules are derived from international norms. Several countries adopted new Constitutions in the decades after World War II. Many of those new Constitutions include Bill of Rights provisions that were heavily influenced by international human rights instruments.[97] Domestic courts often apply those Bill of Rights provisions without mentioning international law. For example, the drafters of the Canadian Charter of Rights and Freedoms, which has constitutional status in Canada, "looked to Canada's international treaty obligations, especially the ICCPR, for inspiration and guidance."[98] Even so, the Supreme Court of Canada rarely looks to international law for guidance in interpreting the Charter.[99] When courts apply domestic constitutional provisions modeled on international human rights provisions, the effect may be to harmonize international and domestic norms, because the constitutional drafters internalized the international norm into domestic constitutional law.

A similar process occurs when national legislatures incorporate international norms into domestic statutes. For example, the United States enacted the Refugee Act of 1980 to implement

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[97] *See* Zachary Elkins, Tom Ginsburg & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT'L L. J. 61, 63 (2013) (showing that the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights "have played crucial roles in the spread of formal human rights into national constitutions")

[98] Gib van Ert, USING INTERNATIONAL LAW IN CANADIAN COURTS 333 (2d ed. 2008).

[99] *See id.* at 332-37.

its obligations under the 1967 Protocol Relating to the Status of Refugees.[100] The U.S. Supreme Court has occasionally referenced international sources expressly in an effort to harmonize its interpretation of the statute with the nation's international legal obligations.[101] In most cases, though, U.S. courts apply the statute without reference to the Protocol or other international legal authorities.[102] The courts' narrow focus on the statute may sometimes create discrepancies between international and domestic rules. However, in many cases, straightforward application of the domestic statute on its own terms promotes harmony with the international norm because Congress incorporated the international norm into the statute.[103] It is impossible to measure the harmonizing effects of different methods for domestic application of international law, but incorporation of international law into domestic constitutional and statutory provisions is undoubtedly one of the more effective techniques for entrenching international law in the realm of "law," rather than "politics."

INDIRECT APPLICATION OF INTERNATIONAL LAW

International Law in Statutory Interpretation

Indirect application of international law as a guide to statutory interpretation is probably the most widely used overt judicial technique for harmonizing domestic law with international

[100] *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987). Over one hundred legislative provisions in the U.S. define legal norms with reference to "the law of nations" or "international law." *See* Michael P. Van Alstine, Stare Decisis *and Foreign Affairs*, (2012) 61 DUKE L.J. 941, 977-978.

[101] *See* INS v. Cardoza-Fonseca, 480 U.S. at 437-40 (1987).

[102] *See, e.g.*, Matter of Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996) (holding that the practice of female genital mutilation can be the basis for a grant of asylum under the federal statute). The main opinion in *Kasinga* did not mention the Protocol, but Board Member Rosenberg's concurring opinion did reference the Protocol.

[103] The domestic definition of refugee, codified at 8 U.S.C. § 1101(a)(42), is substantially identical to the international definition. *See* Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, art. 1 (defining the term "refugee") and Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, art. 1 (modifying that definition).

norms.[104] Domestic courts in numerous states apply an interpretive presumption that domestic statutes should be construed in a manner consistent with international norms, including both treaties and customary international law. This interpretive presumption is sometimes called a "presumption of conformity" or a "presumption of compatibility."[105] In the United States, it is referred to as the *Charming Betsy* canon.[106] Courts in hybrid monist states—including Germany,[107] the Netherlands,[108] Poland,[109] South Africa,[110] and the United States[111]—apply the presumption frequently in cases involving vertical rules to help ensure that government conduct conforms to the nation's international legal obligations. Similarly, domestic courts in strict dualist states—including Australia,[112] Canada,[113] India,[114] Israel,[115] and the United Kingdom[116]—apply the presumption in a very similar manner. There do not appear to be any significant differences between hybrid monist states, as a group, and dualist states, as a group, in terms of the manner in which they apply the presumption of conformity. Notably, courts in

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[104] This paragraph and the next borrow heavily from Sloss, *Domestic Application*, *supra* note 19.

[105] *See, e.g.*, Gib van Ert, *Canada* 166, 188–97, in Treaty Enforcement, *supra* note 20; David Kretzmer, *Israel* 273, 287–92, in Treaty Enforcement, *supra* note 20.

[106] The canon takes its name from an 1804 decision by Chief Justice Marshall. *See* Murray v Schooner Charming Betsy, 6 U.S. 64, 118 (1804).

[107] *See* Andreas L. Paulus, *Germany* 209, in Treaty Enforcement, *supra* note 20 ("German courts are also bound to interpret domestic law, as far as possible, in a way that avoids the breach of international legal obligations.").

[108] *See* André Nollkaemper, *The Netherlands*, 326, 348–51 in Treaty Enforcement, *supra* note 20.

[109] *See* Lech Garlicki, Malgorzata Masternak-Kubiak, and Krzysztof Wójtowicz, *Poland* 370, 404, in Treaty Enforcement, *supra* note 20.

[110] *See* John Dugard, *South Africa* 448, 457, in Treaty Enforcement, *supra* note 20.

[111] *See* David Sloss, *United States* 504, 526-27, in Treaty Enforcement, *supra* note 20.

[112] *See* Donald R. Rothwell, *Australia* 120, 152-56, in Treaty Enforcement, *supra* note 20.

[113] *See* van Ert, *supra* note 105, at 188-97.

[114] *See* Nihal Jayawickrama, *India* 243, 247-51, in Treaty Enforcement, *supra* note 20.

[115] *See* Kretzmer, *supra* note 105, at 287–92.

[116] *See* Anthony Aust, *United Kingdom* 476, 482-83, in Treaty Enforcement, *supra* note 20.

dualist states frequently apply the presumption to unincorporated treaties in roughly the same way that they apply it to incorporated treaties.[117]

One recurring issue concerns the threshold conditions necessary to trigger application of the presumption. There is broad agreement that courts may apply the presumption in cases where the statute is facially ambiguous. The Supreme Court of Canada has gone further, holding that "it is reasonable to make reference to an international agreement at the very outset of the inquiry to determine if there is any ambiguity, even latent, in the domestic legislation."[118] Former Justice Kirby advocated a similar approach in Australia, arguing that courts should refer to international law "not only when there exists statutory ambiguity, but also where the construction of a statute would result in an interpretation contrary to international human rights standards."[119] However, the majority of the Australian High Court has rejected this approach, refusing "to endorse a wider role for [international law] in statutory interpretation other than where the legislature has clearly envisaged such a role or where there exists a clear ambiguity on the face of the statute."[120]

Although the presumption of conformity is a well-established principle of statutory interpretation in most countries with independent judiciaries, application of the principle is inconsistent. In most countries, careful scrutiny of judicial decisions would probably reveal numerous cases where the presumption was potentially applicable, but courts did not apply it.[121] In part, judicial failure to apply the presumption in cases where it is potentially relevant may be indicative of litigators' failure to raise the issue. In part, though, inconsistent application of the

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[117] *See* Van Alstine, *supra* note 20, at 593-95, 608-10.

[118] National Corn Growers Association v Canada [1990] 2 SCR 1324, 1372-73.

[119] *See* Rothwell, *supra* note 112, at 153-54.

[120] *Id*. at 156.

[121] *See, e.g.*, I.N.S. v. Aguirre-Aguirre, 526 U.S. 415 (1999) (where foreign national sought to avoid deportation by invoking the Refugee Protocol, the Court applied a domestic statute as the controlling rule without mentioning the *Charming Betsy* canon).

presumption also manifests a tendency to apply the presumption in cases where harmonization of domestic with international law yields results that the judge considers normatively appealing, and to avoid applying it in cases where harmonization with international law would yield unattractive results. For vertical rules that regulate government conduct, one might describe the latter situation as a "silent" avoidance technique—the result is that courts refuse to apply the international rule in deference to the government's interests.

In addition to applying a presumption of conformity as a guide to statutory interpretation, courts have also applied international law in cases involving judicial review of administrative action. For example, Israel's Supreme Court routinely applies Geneva Convention IV (GC IV) to review the legality of actions by military authorities in the Occupied Territories.[122] The court has justified judicial application of GC IV—even though it has no formal status as law in Israel—by invoking the government's declared commitment to "respect the humanitarian provisions of the Convention." The Australian High Court's reasoning in *Minister of State for Immigration and Ethnic Affairs v. Teoh*[123] is similar to the Israeli Supreme Court's approach to GC IV. In *Teoh*, the government ordered deportation of a Malaysian national who had six young children in Australia. Teoh argued that the deportation order violated the Convention on the Rights of the Child, an unincorporated treaty that has no formal status as law in Australia. The High Court said:

> [R]atification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. The positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-

[122] *See* Kretzmer, *supra* note 105, at 309-14.

[123] [1995] 128 ALR 353.

> makers will act in conformity with the Convention and treat the best interests of the children as a primary consideration.[124]

The High Court ruled in favor of Teoh because he had a legitimate expectation that the government would act in accordance with treaty requirements, and the government failed to meet that expectation.[125] Courts in other dualist states have generally declined to adopt the "legitimate expectations" doctrine,[126] although Canadian courts have achieved similar results by applying the presumption of conformity.[127]

Human Rights and Constitutional Interpretation

Courts in both hybrid monist and dualist states apply international law—especially international human rights law—as an aid to interpreting national constitutions. Countries in Europe and Latin America that are subject to supranational judicial review, respectively, by the European Court of Human Rights and the Inter-American Court of Human Rights, use international law to harmonize domestic constitutional law with the jurisprudence of international human rights tribunals. For example, Peru's Constitutional Court has said that Peruvian courts must interpret constitutional provisions pertaining to rights and liberties in a manner that is consistent with decisions of the Inter-American Court.[128] Indeed, Inter-American Court decisions holding that national amnesty laws contravene human rights treaty obligations have had significant impact on constitutional developments in Argentina, Chile, Colombia, and

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[124] Rothwell, *supra* note 112, at 148 (quoting *Teoh*, [1995] ALR at 36).

[125] *See id*. at 146-49.

[126] *See* van Ert, *supra* note 105, at 173; Aust, *supra* note 116, at 482 n.37.

[127] *See* van Ert, *supra* note 105, at 194-95 (discussing Baker v. Canada, [1999] 2 SCR 817).

[128] President of the Lima Bar Association v. Ministry of Defence, Exp. No, 0012-2006-PI/TC, ILDC 671 (Constitutional Court, Peru 2006).

Peru.[129] Germany's Constitutional Court has said that the German constitutional order is open towards international law, and that constitutional provisions should be interpreted in light of international law to avoid conflicts with Germany's international obligations.[130] Poland's Constitutional Court invokes the European Convention on Human Rights and decisions of the European Court "as additional arguments in establishing the scope and meaning of relevant constitutional provisions."[131]

International human rights law has also exerted significant influence on constitutional jurisprudence in some states that are not subject to the jurisdiction of regional human rights tribunals.[132] South Africa and India are leading examples.[133] The South African Constitution states: "When interpreting the Bill of Rights, a court, tribunal, or forum . . . must consider international law; and may consider foreign law."[134] Given this constitutional mandate, the jurisprudence of South Africa's Constitutional Court is broadly consistent with the principle "that the spirit, purport and objects of the bill of rights . . . are inextricably linked to international law and the values and approaches of the international community."[135] Similarly, India's Constitution states: "The State shall endeavor to . . . foster respect for international law and treaty obligations in the dealings of organized peoples with one another."[136] Accordingly,

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[129] *See* Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 GERMAN L.J. 1203, 1218-26 (2011).

[130] German Consular Notification Case, F v T, 2 BvR 2115/01, ILDC 668 (Constitutional Court, Germany 2006). *See also* Paulus, *supra* note 107, at 232.

[131] Garlicki *et al.*, *supra* note 109, at 405.

[132] This paragraph and the next borrow heavily from Sloss, *Domestic Application*, *supra* note 19.

[133] *See generally* Jayawickrama, *supra* note 114; Dugard, *supra* note 110.

[134] S. Afr. Const. § 39(1).

[135] N. Botha, *The Role of International Law in the Development of South African Common Law*, (2001) S. AF. YBK. INTL L. 252, 259.

[136] India Const. § 51.

decisions by India's Supreme Court manifest a view "that any international convention not inconsistent with the fundamental rights provisions in the Constitution and in harmony with its spirit must be read into those provisions to enlarge the meaning and content thereof."[137]

In contrast, the use of international law in constitutional interpretation has been controversial in Australia and the United States. In Australia, former Justice Kirby was a strong advocate for judicial application of international law in constitutional interpretation, but he never persuaded a majority of the High Court to adopt his preferred approach.[138] The United States Supreme Court has occasionally cited international human rights law to support its interpretation of a contested constitutional provision. In every such case, though, the majority's reliance on international law provoked a sharp dissent.[139] The contrast between India and South Africa, on one hand, and the United States and Australia, on the other, suggests that countries with newer constitutions tend to embrace the use of international human rights law in constitutional interpretation. However, countries with older constitutional traditions are more hesitant to apply international law in constitutional interpretation, unless they are subject to the jurisdiction of an international human rights tribunal.

DIRECT APPLICATION OF INTERNATIONAL LAW

Direct Application of Treaties

In strict dualist states, direct application of treaties is not possible because treaties are not part of the domestic legal order unless the legislature enacts a statute to incorporate the treaty. Once a treaty has been incorporated, courts apply the statute, not the treaty, at least as a formal

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[137] Jayawickrama, *supra* note 114, at 246.

[138] *See* Rothwell, *supra* note 112, at 156-58.

[139] *See, e.g.*, Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2005); Lawrence v. Texas, 539 U.S. 558 (2003).

matter. Courts in dualist states apply other techniques to harmonize domestic law with international law, but direct application of treaties is not an available option.[140]

In hybrid monist states, some or all treaties have domestic legal force, even without implementing legislation. However, the fact that a treaty has domestic legal force does not necessarily mean that it is directly applicable by courts.[141] In most hybrid monist states, treaties are directly applicable if they are intended to benefit private parties, provided that the particular treaty provision at issue is sufficiently clear and precise that courts are competent to apply it as a rule of decision. For example, in a case where arresting officers did not inform arrestees of their right to consular assistance under Article 36 of the Vienna Convention on Consular Relations, the German Constitutional Court reversed the criminal convictions, holding that Article 36 is directly applicable under Article 59(2) of the German Basic Law.[142] Similarly, where a Dutch political party invoked freedom of association principles to justify its policy denying women the right to stand for election, the Netherlands Supreme Court held that Article 7 of the Convention on Elimination of Discrimination Against Women required the government to ensure that all political parties allow women to run for elective offices.[143] And in *Eichenlaub v. Axa France*, a French appellate court held that Article 6.1 of the International Covenant on Economic, Social, and Cultural Rights, which protects the right to work, was directly applicable and superseded

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[140] *See* Sloss, *Domestic Application*, *supra* note 19, at 370-73.

[141] Courts and commentators sometimes use the term "self-executing" as a synonym for "directly applicable," but that terminology can be misleading because the term "self-executing" is also used to mean that the treaty has domestic legal force. To avoid confusion, we distinguish between two different questions: 1) whether a treaty has the force of law in the domestic legal system, and 2) whether the treaty can be applied directly by the courts as a rule of decision.

[142] German Consular Notification Case, F v T, 2 BvR 2115/01, ILDC 668 (Constitutional Court, Germany 2006).

[143] Netherlands, Ministry of the Interior and Kingdom Relations v. Stichting Proefprocessenfonds Clara Wichmann, LJN: BK4549, ILDC 1632 (Supreme Court, Netherlands 2010).

Article 75 of the local commerce code.[144] Similarly, domestic courts in Latin America have often held that treaties involving human rights or humanitarian law are directly applicable.[145]

Courts in the United States, by contrast, generally do not apply human rights treaties directly because the federal political branches have consistently inserted declarations in the instruments of ratification for human rights treaties specifying that the treaties are not self-executing.[146] The correct interpretation of such "NSE declarations" is contested.[147] Regardless, no U.S. court has specifically held that a human rights treaty is self-executing, and the courts have typically refrained from applying the treaties directly as rules of decision.[148] Some U.S. courts have held that portions of the 1949 Geneva Conventions are self-executing,[149] but judicial authority is divided on this question.[150]

A judicial decision that a treaty is not directly applicable (or not self-executing) is a common avoidance technique that courts utilize to justify application of domestic law without

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[144] Appeal judgment, Case No 05-40876, ILDC 2139 (Social Division, France 2008).

[145] *See, e.g.*, Aliendre v. Mendoza, No. 84, ILDC 1522 (Civil Court of Appeal, Paraguay 2006) (appellate court declared property transfer void because it violated Convention on Elimination of Discrimination Against Women, which ranks above domestic law in Paraguay); Shining Path Case, Peru v Reinoso, No. 560-03, ILDC 670 (National Criminal Court, Peru 2006) (holding that domestic criminal prosecution did not contravene the principle of legality because defendants had violated Common Article 3 of the Geneva Conventions).

[146] *See* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 138-44 (1999).

[147] *See* David Sloss, *Self-Execution in the Restatement (Fourth) on Treaties*, 2015 BYU L. Rev. xxx (forthcoming 2015) (analyzing five different possible interpretations of NSE declarations).

[148] *See, e.g.*, Renkel v. United States, 456 F.3d 640, 644 (6th Cir. 2006) (holding that the Convention Against Torture is not self-executing because the political branches included an NSE declaration in the U.S. instrument of ratification). *But see* Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431 (9th Cir. 1996) (rejecting an ICCPR claim on the merits, without discussing the NSE declaration).

[149] *See, e.g.*, United States v. Lindh, 212 F. Supp. 2d 541, 553-54 (E.D. Va. 2002) (holding that portions of the Prisoner of War Convention are self-executing); United States v. Noriega, 808 F. Supp. 791, 799 (S.D. Fla. 1992) (same).

[150] *See, e.g.*, Al-Bihani v. Obama, 619 F.3d 1, 20 (D.C. Cir. 2010) (stating that "the 1949 Geneva Conventions are not self-executing treaties and thus are not domestic U.S. law").

reference to international law. In contrast, direct application of treaties by domestic courts is an important technique for harmonizing domestic law with international law. It bears emphasis, though, that direct application does not guarantee harmonization because domestic courts sometimes interpret directly applicable treaties in a way that is not entirely consistent with the dominant international interpretation.

Direct Application of Customary International Law

Domestic courts in numerous countries apply customary international law directly as a rule of decision in cases where foreign states and/or foreign government officials raise a sovereign immunity defense.[151] In the United States, lower federal courts have applied customary international law directly as a rule of decision in numerous cases under the Alien Tort Statute (ATS) where foreign plaintiffs alleged human rights violations by foreign government officials.[152] However, U.S. Supreme Court decisions in 2004 and 2013 imposed significant constraints on plaintiffs who seek to raise similar claims in the future.[153]

Domestic courts rarely apply customary international law directly as a rule of decision to resolve claims by private plaintiffs against *domestic* government actors. The most notable line of cases is a set of decisions by the Israeli Supreme Court involving the Occupied Territories.[154] In Israel, courts have the authority to apply customary international law directly as a rule of

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[151] *See* Jones v. United Kingdom, App. Nos. 34356/06 & 40528/06 (Eur. Ct. H.R. Jan. 2014) ¶¶ 116-149 (providing an excellent survey of the law of sovereign immunity in the United States, Canada, New Zealand, Australia, Italy, Greece, Poland, France, and Slovenia).

[152] *See generally* Beth Stephens *et al.*, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (2d ed. 2008).

[153] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013); Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

[154] *See* Kretzmer, *supra* note 105 , at 305-09.

decision where there is no controlling statute.[155] For almost fifty years, Israeli military authorities have governed the Occupied Territories by promulgating military orders. Israel's Supreme Court was initially reluctant to review the legality of such orders, but the Court held in the *Beth El* case[156] that the 1907 Hague Convention (IV) Regarding the Laws and Customs of War on Land is part of customary international law, and is therefore directly applicable by the judiciary in cases involving the Occupied Territories. Since that time, Israel's Supreme Court has applied customary IHL directly to decide dozens, if not hundreds, of cases arising from the ongoing military occupation.[157]

SUMMARY

The preceding analysis of domestic courts' engagement with vertical international rules supports two main conclusions. First, domestic courts in states subject to the jurisdiction of a regional human rights tribunal that has authority to issue legally binding judgments are more likely to apply harmonization techniques, and less likely to apply avoidance techniques, than their counterparts in states that are not subject to the jurisdiction of any such tribunal. Interestingly, the fact that states are subject to supranational jurisdiction under a *regional treaty* may make their courts less inclined to engage in avoidance behavior with respect to *global treaties*, including global treaties that do not provide for supranational judicial review. Second, domestic courts in states whose national constitutions were promulgated or substantially amended after adoption of the 1948 Universal Declaration of Human Rights (UDHR) are more likely to apply harmonization techniques, and less likely to apply avoidance techniques, than their counterparts in states with older national constitutions. For human rights norms, in

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[155] *See id*. at 278-79.

[156] HCJ 606/78, Ayyub v. Minister of Defence, 33 P.D. (2) 113.

[157] *See* Kretzmer, *supra* note 105, at 305-25.

particular, the tendency to prefer harmonization over avoidance is especially true for states whose post-1948 constitutions incorporate human rights norms embodied in the UDHR and/or the International Covenant on Civil and Political Rights.

V. CONCLUSIONS

Chapter One in this volume suggests that the relationship between politics and international law varies across stages of governance and governance systems. It notes that "different systems of governance are demarcated by their subject matter, their scope, or both." This chapter has shown that the role of domestic courts in applying international law depends heavily on the subject matter of the international legal rule at issue—in particular, whether the rule is horizontal, transnational, or vertical.

Domestic courts typically view horizontal rules as "political," not "legal." Accordingly, domestic courts rarely apply horizontal rules. Rules governing the jurisdictional immunities of states are the most notable exception. Domestic courts routinely apply immunity rules because they are seen as legal, despite the fact that they regulate horizontal relationships between states. Patterns of judicial enforcement and non-enforcement of horizontal rules do not differ substantially between dualist states and hybrid monist states.

In contrast, domestic courts typically view transnational rules as legal, not political. Accordingly, courts in both dualist states and hybrid monist states routinely apply transnational rules to help resolve cross-border disputes between private parties. Although many transnational rules were part of customary international law in the nineteenth century, most of the key rules have since been codified in treaties. The political branches play an important role in incorporating transnational treaties into the domestic legal order—either by means of legislative incorporation, or by means of legislative approval for treaty ratification (in hybrid monist states).

However, once the treaty is incorporated, the political branches are largely disengaged, and domestic courts have primary responsibility for treaty implementation.

Application of vertical rules by domestic courts straddles the boundary between legal and political. If courts view a particular issue as political, they are likely to employ one of several avoidance techniques, leaving the issue to be resolved by politics. However, if courts view an issue as legal, they are likely to employ one of several harmonization techniques in an effort to harmonize domestic law with the relevant international legal rule. Several factors influence the decision between harmonization and avoidance in any particular case. Here, the distinction between dualist and hybrid monist states has little influence over the choice between harmonization and avoidance, but it does influence the particular type of harmonization or avoidance technique that courts utilize.