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DOMESTIC APPLICATION OF INTERNATIONAL LAW

by

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normally dismissed by the courts for the reason that it is not binding, the Declaration can aid the courts in the interpretation of national laws, including the constitution. For example, the Japanese Supreme Court relied upon the Universal Declaration to interpret Article 14 of the Constitution (the equal protection clause) broadly and to conclude that it applied not only to nationals but also to aliens [810]. A US court used a Security Council resolution as an aid in the interpretation of the US Constitution [811].

C. Direct Enforceability of Judgments of International Courts

1. Domestic enforcement of international decisions

1. In this section, the focus of our attention turns to judgments of international courts and their effect in domestic law. Strict dualists see international courts and national courts operating in different arenas and refuse to give domestic effect to judgments of international courts. This traditional view has been challenged, especially in recent years [812].

2. Constitutions rarely contain provisions incorporating judgments of international courts into domestic law. Article 93 of the Dutch Constitution *(supra)* is a rare exception. When an international court is an organ of an international institution, its decisions may be regarded as "resolutions by international institutions" within the meaning of Article 93 and those decisions which, according to their terms, can be "binding on anyone" have binding force in the Dutch law [813].

While constitutional provisions explicitly incorporating international decisions into domestic law are rare, decisions of international courts are often considered as being incorporated into domestic law with the following reasoning. International law is incorporated and has the force of law in the domestic legal order through explicit provisions of the constitutions or case law. These written or unwritten rules incorporating

810. Judgment of 18 November 1964, Sup. Ct., 18 *Keishū* 579, 582 (Japan).

811. *United States* v. *Steinberg*, 478 F. Supp. 29 (ND Ill. 1979).

812. See generally Schreuer, *Decisions of International Institutions*, *supra* footnote 780; Y. Shany, *Regulating Jurisdictional Relations between National and International Courts* (2007); A. Giardina, "La mise en œuvre au niveau national des arrêts et des décisions internationaux", 165 *Recueil des cours* 233 (1979); H. Mosler, "Supra-National Judicial Decisions and National Courts", 4 *Hastings Int'l & Comp. L. Rev.* 425 (1981).

813. See also Article 15 (2) of the Honduran Constitution, which proclaims that the validity and obligatory execution of arbitral and judicial awards of an international character are unavoidable.

international law into domestic law may be interpreted to cover binding judgments of international courts. Furthermore, since the State has incorporated the treaty which established the international court with power to issue binding decisions, decisions emanating from the court may be regarded as automatically incorporated into domestic law [814].

(a) *International arbitral awards*

International agreements on international arbitration often contain explicit provisions on the enforcement of arbitral awards. The 1968 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides that "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon" (Art. 3). Similarly, the 1965 Convention of the International Centre for the Settlement of Investment Disputes (ICSID) provides that "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories" (Art. 54) [815]. In States which have ratified these conventions, international arbitral awards can be enforced in accordance with domestic rules of procedure.

(b) *European Court of Justice*

A treaty which explicitly provides for the enforcement of judgments of an international court is the Treaty on the Functioning of the European Union (TFEU). The TFEU is a unique treaty; it obligates the Member States to give the Treaty and its secondary law domestic force of law and recognize their supremacy over national laws. Moreover, Article 280 of the TFEU provides: "The judgments of the Court of Justice shall be enforceable under the conditions laid down in Article 299", and Article 299 provides that decisions of the Council or the Commission "which impose a pecuniary obligation on persons other than States, shall be enforceable". In accordance with these provisions, judgments of the European Court of Justice imposing a pecuniary obligation are enforceable in the domestic law of the Member States. In some States

814. See, e.g., M. Bedjaoui, "The Reception by National Courts of Decisions of International Tribunals", in *International Law Decisions in National Courts* 21, 26 (T. Franck and G. Fox, eds., 1996).

815. See also Art. 39 of the Statute of the International Tribunal for the Law of the Sea; Art. IV (3) of the Algiers Declaration, 20 *ILM* 230 (1981).

(e.g., France, Luxembourg, the Netherlands, Portugal, and Spain), this appears possible by virtue of the provisions of the TFEU with no further legislation. In other States, legislative provisions which give effect to the TFEU also give effect to judgments of the Court (e.g., Denmark, Germany, and Italy). Still other States have special legislation to deal with technicalities such as proof and registration of judgments (Belgium, Greece, Ireland, and the United Kingdom) [816].

For actions against Member States, the TFEU merely provides that if the Court finds that a Member State has failed to fulfil an obligation under the Treaty, "the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice" (Art. 260, para. 1). The State, including its organs, is legally bound by the judgment and is obliged to give it effect. The judgment, however, may require new legislation or amendments of laws in the State for the implementation of the judgment. And, there may be several different ways of implementing the judgment and the State has discretion in choosing one or the other. In such a case, direct enforcement of the judgment is not possible or practical.

Preliminary rulings given by the European Court of Justice under Article 267 of the TFEU (Art. 177 of the EEC Treaty) are binding on the national court which had requested it. By virtue of the principle of supremacy of EU law, the national court is bound to respect the interpretation given by the European Court. The national court will deliver a final judgment in accordance with the interpretation given by the European Court. While the national court gives practical effect to the preliminary ruling of the European Court in domestic law, it does not *enforce* the ruling as such.

(c) *European Court of Human Rights*

Unlike the TFEU, the European Convention on Human Rights is a treaty of a traditional type with no requirement to make it part of domestic law. Although it is not a legal requirement, most States have incorporated the Convention into domestic law and have given it domestic legal force. And yet, the European Convention does not require the States parties to make judgments of the European Court

816. H. Fox *et al.*, "The Enforcement of International Judgments in the Domestic Legal System", in *The Integration of International and European Community Law into the National Legal Order: A Study of the Practice in Europe* 63, 64 (P. Eisemann, ed., 1996).

of Human Rights enforceable in domestic law. It is generally recognized that "incorporation of the Convention does not mean that the decisions of the Court will automatically be enforceable in national law" [817].

Judgments of the European Court of Human Rights are normally of a declaratory nature. The Court does not annul laws or administrative acts of States or judgments of domestic courts. The Court pronounces whether and to what extent the State party violated the Convention without indicating what steps should be taken to remedy the consequences of the violation. Article 46 of the Convention provides that the Parties "undertake to abide by the final judgment of the Court" without specifying how they should give effect to the judgment. Thus, the States have discretion in choosing modalities of giving effect to the judgment. Ress stressed that "[s]ince there exist several possibilities to remedy a violation of the Convention, granting immediate legal effect to decisions of the European Court would raise problems" [818]. Therefore, even in States where judgments of the European Court of Human Rights become part of domestic law (e.g., the Netherlands), the question on how the State should give them effect is not straightforward [819].

Judgments of the European Court are normally implemented by legislative and other measures. Judgments of the Court *per se* do not constitute grounds for revision of national judicial decisions. Many States, however, have included in civil and criminal procedures provisions which allow reopening and reviewing of final national judicial decisions due to judgments of the European Court finding violations of the Convention. Malta is the first State that has introduced a specific procedure for the enforcement of judgments of the European Court of Human Rights. The 1987 European Convention Act of

817. *Op. cit. supra* footnote 816, at 65.

818. G. Ress, "The Effects of Judgments and Decisions in Domestic Law", in *The European System for the Protection of Human Rights* 801, 805 (R. Macdonald *et al.*, eds., 1993).

819. See generally J. Polakiewicz, *Die Verpflichtungen de Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte* 215-271 (1993); T. Barkhuysen *et al.* (eds.), *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (1999); G. Cohen-Jonathan, "Quelques considérations sur l'autorité des arrêts de la Cour Européenne des Droits de l'Homme", in *Liber amicorum Marc-André Eissen* 39 (G. Cohen-Jonathan *et al.*, eds., 1995); Fox *et al.*, *supra* footnote 816; R. Bernhardt, "Judgments of International Human Rights Courts and Their Effects in the Internal Legal Order of States", in 1 *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz* 429 (2004); G. Ress, "The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order", 40 *Tex. Int'l LJ* 359 (2005).

Malta provided that "Any judgment of the European Court of Human Rights . . . may be enforced by the Constitutional Court in Malta, in the same manner as judgments delivered by that court and enforceable by it." [820]

Article 41 of the European Convention on Human Rights provides that if the Court finds a violation and if the domestic law of the State party allows only partial reparation, "the Court shall, if necessary, afford just satisfaction to the injured party". Just satisfaction consists of payment for damages that were caused by the violation. Judgments awarding just satisfaction may be enforceable under the domestic law of the States parties [821]. If they are not enforceable and the State fails to honour the obligation to make the payment, the applicant must bring a claim before a domestic court.

The Court's pronouncements of law have an important precedential and unifying effect. National courts are expected to follow the interpretation set forth by the European Court in its judgments. This effect of the judgments of the European Court of Human Rights is important and should not be underestimated [822].

(d) *International Court of Justice*

1. The domestic enforcement of judgments of the International Court of Justice (ICJ) is a relatively new issue [823]. In accordance with Article 94 of the UN Charter and Article 59 of the Statute of the ICJ, a State is obligated to comply with a decision of the ICJ in any case to which it is a party. There is no question that a judgment of the ICJ is binding under international law. However, neither the UN Charter nor the ICJ Statute has any provision indicating how the judgment should

820. See J. Polakiewicz and V. Jacob-Foltzer, "The European Human Rights Convention in Domestic Law: The Impact of Strasbourg Case-Law in States Where Direct Effect Is Given to the Convention", 12 (3) *Hum. Rts. LJ* 65 (1991), 12 (4) *Hum. Rts. LJ* 125, 127 (1991).

821. The 1967 American Convention on Human Rights is explicit in this regard:

> "That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the executing of judgments against the state." (Art. 68. para. 2.)

822. See *infra* the texts accompanying footnotes 900 and 918-919.

823. See, e.g., S. Ordonez and D. Reilly, "Effect of the Jurisprudence of the International Court of Justice on National Courts", in *International Law Decisions in National Courts* 335, 344 (T. Franck and G. Fox, eds., 1996) ("The reception of ICJ decisions by domestic courts is a relatively new question that lacks an established analytical framework"); R. Higgins, "National Courts and the International Court of Justice", in *Tom Bingham and the Transformation of the Law: A Liber Amicorum* 405 (M. Andenas and D. Fairgrieve, eds., 2009).

be implemented in domestic law. In some States, ICJ judgments are regarded as having the force of law in domestic law following the reasoning outlined above (*supra*, C, 1) [824].

In *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals, the ICJ set forth the following principle concerning domestic enforcement of the ICJ judgments:

> "The *Avena* judgment nowhere lays down or implies that the courts in the States are required to give direct effect to paragraph 153 (9) [825]. The obligation laid down in that paragraph is indeed an obligation of result. . . . [T]he Judgment leaves it to the United States to choose the means of implementation. . . . Nor moreover does the *Avena* Judgment prevent direct enforceability of the obligation in question, if such an effect is permitted by domestic law." [826]

In the past, domestic courts were unwilling to allow direct enforcement of the ICJ judgments. In *Socobelge* v. *Greece*, a Belgian company sought to enforce a judgment of the Permanent Court of International Justice (PCIJ) in the courts of the judgment creditor, Belgium. The plaintiff attempted to attach Greek assets in Belgium in reliance on a PCIJ judgment which had declared certain earlier arbitral awards in favour of the company as "definitive and obligatory" on Greece [827]. A Belgian court, however, refused to enforce the PCIJ judgment because the plaintiff did not obtain an *exequatur* which was needed to give the judgment the same status as that of a Belgian domestic judgment [828]. The court treated the PCIJ judgment as if it were a foreign judgment and refused its direct enforcement [829].

824. See P. Eisemann (ed.), *The Integration of International and European Community Law into the National Legal Order: A Study of the Practice in Europe* (1996), at 235-236 (Bermejo García *et al.* for Spain), 282 (Decaux *et al.* for France), 313 (E. Roucounas for Greece), 457 (C. Brölmann and E. Vierdag for the Netherlands).

825. In paragraph 153 (9) of the *Avena* judgment, the ICJ had found that "the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals". Case concerning *Avena and Other Mexican Nationals (Mex. v. US)*, 2004 ICJ 12, 71.

826. 2009 ICJ 3, 17 (19 January).

827. *Société commercial de Belgique (Belg. v. Greece), 1939, PCIJ (Ser. A/B), No. 78* (15 July).

828. Judgment of 30 April 1951, Civil Trib. Brussels, 18 ILR 3.

829. See also Judgment of 13 August 1954, Ct. App. Int'l Trib. Tangier, 21 ILR 136 (holding that the ICJ judgments cannot have an obligatory character on individuals who might litigate similar matters).

2. In the United States, too, the courts have generally been unwilling to enforce the judgments of the ICJ which had found the United States to be in violation of international law. In *Committee of U.S. Citizens Living in Nicaragua* v. *Reagan*, the plaintiffs sought to enjoin the US Government from continuing to fund Contra rebels in Nicaragua, claiming that the funding had been held illegal by the ICJ in the *Nicaragua* case [830]. The DC Circuit dismissed the claims, stating that "neither individuals nor organizations have a cause of action in an American court to enforce ICJ judgments" [831].

Various states in the United States have failed to inform non-citizens charged with criminal offences of their right to request assistance from their consul in accordance with Article 36, paragraph 1, of the Vienna Convention on Consular Relations. Paraguay, Germany, and Mexico each brought a case against the United States before the ICJ (*Breard*, *LaGrand*, and *Avena*), and the ICJ found that the United States had violated Article 36, paragraph 1, of the Vienna Convention in *LaGrand* and *Avena* [832]. Some of the non-citizens attempted to enforce the provisional order and the judgment of the ICJ in US courts. In *Breard* v. *Greene*, the US Supreme Court rejected an attempt by a Paraguayan national to enforce a provisional order requesting the United States to prevent Breard's execution pending the final decision [833], and Breard was executed before the ICJ completed deliberation. In *LaGrand*, the ICJ ordered the United States not to execute one of the LaGrand brothers pending the final decision (the other brother had already been executed), but he was executed on the same day that the ICJ issued the order.

In 2004 in *Avena*, the ICJ found that the United States had violated the Vienna Convention and ordered it to provide review and reconsideration of the conviction of the Mexican defendants [834]. One US court responded favourably to this decision. In 2005 in *Torres* v.

830. *Military and Paramilitary Activities in and against Nicaragua (Nicar.* v. *US)*, 1986 ICJ 14 (14 June).

831. 859 F. 2d 929, 934 (DC Cir. 1988).

832. *Breard*: case concerning the *Vienna Convention on Consular Relations (Para.* v. *US)*, 1998 ICJ 248 (Order of 9 April). *LaGrand*: case concerning the *Vienna Convention on Consular Relations (FRG* v. *US)*, 1999 ICJ 9 (Order of 3 March), 2001 ICJ 466 (27 June). *Avena*: case concerning *Avena and Other Mexican Nationals (Mex.* v. *US)*, 2003 ICJ 77 (Order of 5 February), 2004 ICJ 12 (31 March), *Request for Interpretation of the Judgment of 31 March 2004*, 2008 ICJ 311 (Order of 16 July), 2009 ICJ 3 (19 January).

833. 523 US 371 (1998).

834. Case concerning *Avena and Other Mexican Nationals (Mex.* v. *US)*, 2004 ICJ 128 (31 March).

State, the Oklahoma Court of Criminal Appeals ordered a lower court to review and reconsider the case of Torres, citing the *Avena* judgment [835].

However, in a case brought by Medellín, another Mexican national involved in the *Avena* case before the ICJ, the US Supreme Court refused to give effect to the judgment of the ICJ in *Avena*. This case *Medellín* v. *Texas* is very important and deserves a close scrutiny [836].

Medellín had filed a *habeas* petition in a federal district court before the *Avena* judgment. After the judgment, Medellín appealed the district court's rejection of his *habeas* petition to the Fifth Circuit invoking the *Avena* judgment. The Fifth Circuit rejected the appeal [837] and Medellín petitioned the Supreme Court for review. The US Government submitted an *amicus* brief and argued that while the United States was obligated to comply with decisions of the ICJ, "as the text and background of Article 94 demonstrates, it does not make an ICJ decision privately enforceable in court" [838]. The Supreme Court dismissed his petition for *certiorari*. Medellín again filed a *habeas* petition in the Texas state courts, which was denied. In 2008, in *Medellín* v. *Texas*, the Supreme Court affirmed the judgment of the Texas court [839].

The Supreme Court set out the question it confronted as "whether the *Avena* judgment has automatic *domestic* legal effect such that the judgment of its own force applies in state and federal courts", and continued as follows. This court has long recognized the distinction between self-executing and non-self-executing treaties. Because none of the treaty provisions invoked by Medellín – the Optional Protocol to the Vienna Convention, the UN Charter, and the ICJ Statute – is self-executing and because implementing legislation does not exist, the court concludes that "the *Avena* judgment is not automatically binding domestic law". Article 94 of the UN Charter indicates that "the UN Charter does not contemplate the automatic enforceability of ICJ decisions in domestic courts". One would expect the parties to have clearly stated their intent to give judgments domestic effect, if they

835. *Torres* v. *State*, No. 2004-442, slip op. (Okla. Crim. App., 13 May 2004). See also *Torres* v. *State*, 120 P. 3d 1183 (2005).

836. Literature on *Medellín* v. *Texas* is voluminous: see, e.g., D. Bederman *et al.*, "Agora: *Medellín*", 102 *Am. J. Int'l L.* 529 (2008); V. Epps *et al.*, "*Medellín* v. *Texas*: A Symposium", 31 *Suffolk Transnat'l L. Rev.* 209 (2008).

837. *Medellín* v. *Dretke*, 371 F. 3d 270 (5th Cir. 2004).

838. Brief for the United States as *Amicus Curiae* Supporting Respondent, in *Medellín* v. *Dretke*, No. 04-5928, at 43.

839. *Medellín* v. *Texas*, 551 US 491 (2008). See also *Sanchez-Llamas* v. *Oregon*, 548 US 331 (2006); *Breard* v. *Greene*, 523 US 371 (1998).

had so intended. There is no such statement in the Optional Protocol, the UN Charter, or the ICJ Statute. This conclusion is confirmed by the post-ratification understanding of signatory nations. Neither Medellín nor his *amici* have identified a single nation that treats ICJ judgments as binding in domestic courts [840].

3. In contrast to such a negative attitude of the US Supreme Court, the German Constitutional Court was willing to afford deference to the judgments of the ICJ. In 2006 the Constitutional Court declared that the German judges were obliged, by the principle of openness towards international law *(Völkerrechtsfreundlichkeit)* of the Basic Law, to take into account pertinent decisions of the competent international courts in interpreting treaties. The facts of the case was similar to those faced by the US courts. Foreign nationals were arrested and charged without being notified of their rights under Article 36 of the Vienna Convention on Consular Relations. The German Federal Court held that the notification requirement in Article 36 did not grant any additional protection to individuals [841]. The complainants then filed a complaint of unconstitutionality to the Constitutional Court. The Constitutional Court reversed the decision of the Federal Court. In the judgment delivered in 2006, the Constitutional Court affirmed that Article 36 of the Convention was specific enough to be "self-executing". The court then stated as follows. By ratifying the Optional Protocol to the Convention and accepting the jurisdiction of the ICJ, Germany had agreed to comply with its decisions. When Germany had been a party to a case before the ICJ, German courts had a constitutional duty to take into account the decisions of the ICJ. And, even when Germany had not been a party, wherever Germany had submitted to the interpretative jurisdiction of the ICJ, the duty to take into account *(Berücksichtigungspflicht)* applied.

> "The interpretation of an international treaty by the International Court of Justice must . . . be given a normatively guiding function

840. *Medellín* v. *Texas*, at 504-506, 508-509, 516-517. See also *Mora* v. *N.Y.*, 524 F. 3d 183, 206 (2nd Cir. 2008) (stating that "the interpretation of the international court is 'entitled to respect . . . but only to the extent that [it has] the power to persuade'", and that "we do not find the views of the ICJ expressed in *Avena* and *LaGrand* to be persuasive in the instant case") (the plaintiff was a Dominican Republic national who had not been involved in either *Avena* or *LaGrand*), *cert. denied*, 555 US 943 (2008).

841. Judgment of 7 November 2001, Bundesgerichtshof, 5 StR 116/01, at http://www.bundesgerichtshof.de (FRG). The court cited the judgments of the ICJ but did not follow them.

> [eine normative Lietfunktion] that goes beyond individual cases, and which the contracting parties would have to observe." [842]

The difference between the US and German jurisprudence is striking [843].

4. In Italy, the jurisprudence has swung back and forth. While the courts at first responded favourably to the judgment of the ICJ in *Jurisdictional Immunities of the State (Germany* v. *Italy)*, the Constitutional Court made a great step backward in 2014.

The ICJ case of *Jurisdictional Immunities of the State* arose out of a series of decisions, including the *Ferrini* case [844], in which Italian courts denied Germany's immunity from civil jurisdiction for war crimes committed by German military forces during the Second World War. Germany responded by filing an application before the ICJ. In the judgment of 3 February 2012, the ICJ held that Italy had violated its obligation to respect the immunity which Germany enjoyed under international law and ruled that

> "the Italian Republic must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect".

The ICJ noted:

> "It has not been . . . demonstrated that restitution would be materially impossible in this case, or that it would involve a burden for Italy out of all proportion to the benefit deriving from it. . . . [T]he fact that some of the violations may have been committed by judicial organs, and some of the legal decisions in question have become final in Italian domestic law, does not lift the obligation incumbent upon Italy to make restitution." [845]

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842. Judgment of 19 September 2006, Bundesverfassungsgericht, 2 BvR 2115/01, at http://www.bverfg.de, ILDC 668 (DE 2006) (by C. Tams) (FRG).

843. See J. Gogolin, "*Avena* and *Sanchez-Llamas* Come to Germany: The German Constitutional Court Upholds Rights under the Vienna Convention on Consular Relations", 8 *German LJ* 261 (2007); C. Hoppe, "Implementation of *LaGrand* and *Avena* in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights", 18 *Eur. J. Int'l L.* 317 (2007).

844. Judgment of 11 March 2004, Corte cass., No. 5044, 87 *Rivista di diritto internazionale* 539 (2004), 28 ILR 658. See M. Iovane, "The *Ferrini* Judgment of he Italian Supreme Court: Opening Up Domestic Courts to Claims of Reparations for Victims of Serious Violations of Fundamental Human Rights", 14 *Ital. YB. Int'l L* 165 (2004).

845. *Jurisdictional Immunities of the State (Ger.* v. *Italy, Greece Intervening)*, 2012 ICJ 99, 154-155 (3 February). See B. Conforti *et al.*, "Focus: The ICJ Judgment in

Italian courts promptly complied with the judgment of the ICJ in the absence of legislative measures implementing it [846]. The Tribunal of Florence held on 28 March 2012 less than 40 days after the ICJ judgment that, in accordance with Article 11 of the Constitution, Article 94 of the UN Charter which required States to comply with decisions of the ICJ prevailed over ordinary laws and that the ICJ decision was compulsory for the judge as a State organ [847]. The Court of Appeals of Turin held on 14 May 2012 that the ICJ decision constituted an obligation not only for Italy but also, through Articles 10 and 11 of the Constitution, for the Italian judge [848]. And, on 9 August 2012, the Court of Cassation complied with the ICJ decision by reversing the judgment of the Military Court of Appeals at Rome. The Court of Cassation stated that the evolutionary approach to State immunity ushered in by the *Ferrini* judgment had to be dismissed in light of the ICJ's ruling; that the conservative stance taken by the majority of the ICJ, coupled with the fact that no other domestic court had followed the *Ferrini* precedent, led to the conclusion that the Italian courts' attempt to foster a *jus cogens* exception to State immunity had failed; and that under existing customary international law as authoritatively established by the ICJ, Germany had to be accorded immunity from jurisdiction [849].

Despite such positive response by the Italian judiciary, a legislative intervention was considered necessary to fully implement the ICJ judgment, such as to reverse the final decisions which had already been

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Jurisdictional Immunities of the States (Germany v. Italy: Greece Intervening)", 22 *Ital. YB Int'l L.* 135 (2012).

846. The three Italian judgments discussed below are summarized in G. Nesi, "The Quest for a 'Full' Execution of the ICJ Judgment in *Germany v. Italy*", 11 *J. Int'l Crim. Justice* 185, 188-192 (2013).

847. Judgment of 28 March 2012, Tribunale Firenze, 95 *Rivista di diritto internazionale* 583 (2012) (Italy).

848. Judgment of 14 May 2012, Corte Appello Torino, 95 *Rivista di diritto internazionale* 917 (2012), ILDC 1905 (IT 2012) (Italy).

849. Judgment of 9 August 2012, Corte cass. (Sez. I penale), No. 32139, 95 *Rivista di diritto internazionale* 1197 (2012), ILDC 1921 (IT 2012), 107 *Am. J. Int'l L.* 632 (2013) (Italy). The court, however, expressed dissatisfaction over the approach taken by the ICJ on the relationship between *jus cogens* and State immunity and confirmed that the Court of Cassation was not immediately bound to comply with the ICJ's decision. Thus, the decision was criticized as having given effect to the ICJ judgment as a matter of comity rather than a duty. E.g., M. Sossai, "Are Italian Courts Directly Bound to Give Effect to the *Jurisdictional Immunities* Judgment?", 21 *Ital. YB Int'l L.* 175, 182, n. 40 (2011). Subsequently, the plenary session of the Court of Cassation recognized the need to enforce the ICJ judgment. Order of 21 February 2013, Corte cass. (Sez. Unite civili), No. 4284, ILDC 1998 (IT 2013) (Italy). Judgment of 21 January 2014, Corte cass. (Sez. Unite civili), No. 1136, 23 *Ital. YB Int'l L.* 436 (2013) (Italy). See G. Cataldi, "Italian Practice Relating to International Law: Judicial Decisions", 23 *Ital. YB Int'l L.* 436 (2013).

rendered by the Italian courts. Thus, Law No. 5 of 14 January 2013 inserted, in the law authorizing the ratification of the UN Convention on Jurisdictional Immunities of States and Their Property, Article 3 (Execution of Decisions by the International Court of Justice) which provided:

> "1. . . . when the International Court of Justice, in a judgment in proceedings to which Italy is a party, excluded the possibility of subjecting certain acts of another State to civil jurisdiction, the judge . . . shall declare . . . the lack of jurisdiction . . .
>
> 2. Final judgments that are contrary to the judgment rendered by the International Court of Justice . . ., even when rendered before it, can be challenged by motion for revocation . . . also on the ground of lack of civil jurisdiction." [850]

The first paragraph concerned proceedings in which no final decision had yet been issued and it directed a judge to declare lack of jurisdiction. The provision was not strictly necessary; the Italian courts had been able to declare lack of jurisdiction even before the law entered into force. On the other hand, the second paragraph addressed a situation in which a final decision had already been rendered by an Italian court and the decision had the authority of *res judicata*. This provision would enable Italian courts to enforce the ICJ judgment in such a situation.

In 2014, however, the Italian Constitutional Court delivered a momentous judgment which would make the enforcement of the ICJ judgment nearly impossible in Italy. Civil proceedings were brought by Italians against Germany at the Tribunal of Florence. With the ICJ judgment in *Jurisdictional Immunities of the State* and Law No. 5 of 2013, the Tribunal was required to declare lack of jurisdiction. Under such circumstances, the Tribunal referred the matter to the Constitutional Court, questioning the compatibility of the Italian laws with Article 2 (inviolability of human rights) and Article 24 (rights of access to a court and to an effective remedy) of the Italian Constitution [851].

The Italian Constitutional Court held that Article 1 of Law 848/1957 and Article 3 of Law No. 5 of 2013 were unconstitutional insofar as they compelled Italian judges to comply with the ICJ judgment. Article 1 of Law 848/1957 incorporates the United Nations Charter,

850. Law No. 5 of 14 January 2013, Art. 3.
851. Order of 21 January 2014, Tribunale Firenze, 23 *Ital. YB Int'l L.* 436 (2013).

including Article 94 which obliges all State organs to comply with ICJ judgments. The Court held that compliance with Article 94 in this case had to be excluded because it conflicted with the basic principles of the Italian Constitution. It considered that compliance with the judgment of the ICJ would deprive the victims of the war crimes and crimes against humanity of any alternative means of redress, and that such an absolute sacrifice of the victims' access to justice and to an effective remedy was indefensible. As for the challenge on the constitutionality of the domestic norm created in the Italian legal order by the incorporation through Article 10 of the Constitution of the customary rule on State immunity as defined by the ICJ, the Court found it ill-founded because, given its violation of the human rights of access to justice and to an effective remedy, the rule had not entered the Italian legal order and had produced no legal effect in Italy [852].

This extraordinary judgment has attracted a great deal of attention not only in Italy but also elsewhere [853]. The Italian Constitutional Court did not challenge the interpretation given by the ICJ on customary international law of State immunity, but questioned the constitutionality of the Italian laws giving effect to the ICJ judgment. The decision was a manifest display of rigid dualism. It has been characterized as the Italian version of *Medellín* v. *Texas*, preventing the ICJ judgment from having effect within the Italian legal system. There is, however, an important difference. While the US Supreme Court held that "the *Avena* judgment is not automatically binding domestic law" and put the blame of its inability to comply with the ICJ judgment on the legislature's negligence, the Italian Constitutional Court condemned the Italian laws implementing the ICJ judgment as unconstitutional. The decision has thus done considerable damage to the prestige of the ICJ and put Italy in a difficult position as regards the implementation of the ICJ judgment.

852. Judgment of 22 October 2014, No. 238, Corte cost., 98 *Rivista di diritto internazionale* 237 (2015), English version http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf, ILDC 2237 (IT 2014).

853. See, e.g., K. Oellers-Frahm, "Das italienische Verfassungsgericht und das Völkerrecht – eine unerfreuliche Beziehung: Anmerkung zur Entscheidung des italienischen Verfassungsgerichts vom 22. Oktober 2014", 42 *Europäische Grundrechte-Z.* 8 (2015); E. Cannizzaro, "Jurisdictional Immunities and Judicial Protection: The Decision of the Italian Constitutional Court No. 238 of 2014", 98 *Rivista di diritto internazionale* 126 (2015). See also M. Arcari *et al.*, "Colliding Legal Systems or Balancing of Values?: International Customary Law on State Immunity vs Fundamental Constitutional Principles in the Italian Constitutional Court Decision No 238/2014", *QIL, Zoom Out II* 1 (2014); A. Peters, "Let Not Triepel Triumph: How To Make the Best Out of Sentenza No. 238 of the Italian Constitutional Court for a Global Legal Order", *EJIL: Talk!* (22 December 2014).

5. As we have seen, the practice of States is mixed as regards the enforcement of ICJ judgments. One may say, however, that the courts in Europe are more receptive to the enforcement of ICJ judgments than their counterparts in the United States. In *Medellín*, the US Supreme Court pointed out that "neither Medellín nor his *amici* have identified a single nation that treats ICJ judgments as binding in domestic courts", and argued that "the lack of any basis for supposing that any other country would treat ICJ judgments as directly enforceable as a matter of its domestic law strongly suggests that the treaty should not be so viewed in our courts" [854]. Aptness of this statement is open to question.

(e) *World Trade Organization*

1. The domestic status of reports of the Appellate Body and panels of the World Trade Organization (WTO) is attracting increasing attention [855]. In the WTO dispute settlement procedures, a Member State can submit a dispute against another Member to the Dispute Settlement Body (DSB) and request that a panel be established. The panel examines the dispute and issues a report finding certain measures of the defendant Member to be consistent or inconsistent with the WTO Agreement. When the case is appealed to the Appellate Body, the Appellate Body examines the dispute and issues a report upholding, modifying or reversing the findings of the panel. The DSB then adopts the report of the Appellate Body, together with the panel report as modified by the Appellate Report. Once adopted, findings and conclusions contained in the reports become recommendations and rulings of the DSB and

854. *Medellín* v. *Texas*, 551 US 491, 516-517 (2008).

855. E.g., L. Gramlich, "Die Wirkung von Entscheidungen des Dispute Settlement Body der WTO: Völkerrecht, Europarecht, staatliches Recht", in *Völkerrechtlicher Vertrag und staatliches Recht vor dem Hintergrund zunehmender Verdichtung der internationalen Beziehungen* 187 (R. Geiger, ed., 2000); D. Blanchard, "Les effets des rapports de l'Organe de Règlement des Différends de l'OMC: A la lumière du Règlement (CE) 1515/2001 du Conseil de l'Union Européenne", 464 *Revue du Marché Commun et de l'Union Européenne* 27 (2003); M. Mendez, "The Impact of WTO Rulings in the Community Legal Order", 29 *Eur. L. Rev.* 517 (2004); A. Thies, "*Biret* and Beyond: The Status of WTO Rulings in EC Law", 41 *Common Mkt. L. Rev.* 1661 (2004); A. von Bogdandy, "Legal Effects of WTO Decisions within European Union Law: A Contribution to the Theory of the Legal Acts of International Organizations and the Action for Damages under Article 288 (2) EC", 39 *J. World Trade* 45 (2005); E. De Angelis, "The Effects of WTO Law and Rulings on the EC Domestic Legal Order: A Critical Review of the Most Recent Developments of the ECJ Case Law (Part 1 & 2)", 15 *Int'l Trade L. & Reg.* 88, 137 (2009); O. Tsymbrivska, "WTO DSB Decisions in the EC Legal Order: Approach of the Community Courts", 37 *L. Issues Econ. Integration* 185 (2010).

bind the parties to the dispute. In *Japan – Alcoholic Beverages*, the Appellate Body acknowledged that adopted panel reports are binding "with respect to resolving the particular dispute between the parties to the dispute" [856]. Thus, while the Appellate Body and panels are not tribunals in a strict sense, adopted reports are binding and comparable to decisions of international tribunals. WTO dispute settlement procedures are quasi-judicial, and reports of the Appellate Body and panels are adjudicatory in nature [857].

2. The domestic effect of WTO reports is attracting increasing attention especially in the European Union. The European Court of Justice not only has denied the direct applicability of the GATT and the WTO Agreement, but also has disregarded reports of panels and the Appellate Body of GATT/WTO. In *Dürbeck*, the European Court mentioned a GATT panel report in the judgment but rejected the plaintiffs' arguments based on the GATT [858]. In *Sofrimport*, the European Court ignored the relevant GATT panel report [859]. The *Banana* cases in the WTO [860] have prompted a number of commentators to argue that the reports of the Appellate Body and panels issued in cases involving the EU should bind the European Court of Justice [861]. The Advocate General Alber and some commentators have contended that the reports of the WTO adjudicatory bodies have "direct effect" [862].

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856. *Japan – Taxes on Alcoholic Beverages* 14, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (1996).

857. See generally Iwasawa, *Dispute Settlement of the WTO*, *supra* footnote 404; Y. Iwasawa, "WTO Dispute Settlement as Judicial Supervision", 5 *J. Int'l Econ. L.* 287 (2002).

858. Case 112/80, *Dürbeck* v. *Hauptzollamt Frankfurt am Main-Flughafen*, 1981 ECR 1095. The Court had been misinformed by the Commission of the contents of the panel report.

859. Case C-152/88, *Sofrimport* v. *Comm'n*, 1990 ECR I-2477. See also Case C-104/97 P, *Atlanta* v. *Council & Comm'n*, 1999 ECR I-6983; Case C-93/02 P, *Biret Int'l* v. *Council*, 2003 ECR I-10497; C-377/02, Van Parys, 2005 ECR I-1465; Case T-18/99, *Cordis* v. *Comm'n*, 2001 ECR II-913; Case T-30/99, *Bocchi Food Trade Int'l* v. *Comm'n*, 2001 ECR II-943; Case T-52/99, *T. Port* v. *Comm'n*, 2001 ECR II-981; Cases T-64/01 and T-65/01, *Afrikanische Frucht-Campagnie*, 2004 ECR II-521; Case T-19/02, *Chiquita Brands Int'l* v. *Comm'n*, 2005 ECR II-315.

860. *EC – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA (1997); WT/DS27/AB/R (1997); WT/DS27/RW/ECU (1999); WT/DS27/RW/EEC (1999); WT/DS27/RW2/ECU (2008); WT/DS27/RW/USA (2008); WT/DS27/AB/RW/USA, WT/DS27/AB/RW2/ECU (2008).

861. Eeckhout, "WTO Agreement", *supra* footnote 406, at 53. J. Beneyto, "The EU and the WTO: Direct Effect of the New Dispute Settlement System?", 7 *Europäische Z. für Wirtschaftsrecht* 295, 299 (1999). Zonnekeyn, *supra* footnote 481, at 608.

862. E.g., Case C-93/02, *Biret Int'l* v. *Council*, 2003 ECR I-10497 (Op. AG Alber); I. Cheyne, "International Agreements and the European Community Legal System", 19

To support the contention, they relied in particular on the judgment of the European Court in *Sevince* [863]. The European Court, however, has rejected arguments based on decisions of the DSB (adopting reports of the Appellate Body and panels). In *Biret*, the European Court reaffirmed that the WTO Agreement had no direct effect, and added that "[t]he decision of the DSB of 13 February 1998 . . . cannot alter that" [864]. In *Van Parys*, the European Court declared that an individual "cannot plead before a court of a Member State that Community legislation is incompatible with certain WTO rules, even if the DSB has stated that that legislation is incompatible with those rules" [865].

3. In the United States, Section 102 *(c)* of the Uruguay Round Agreement Act (URAA) denied the direct applicability of the WTO Agreement. In the Statement of Administrative Action which the US Administration submitted to Congress together with the URAA, the Administration stated that "Reports issued by panels or the Appellate Body under the DSU have no binding effect under the law of the United States." [866] When a state law is inconsistent with WTO law, the Federal Government may bring an action for the purposes of declaring such law invalid. Section 102 *(b)* (2) (B) (i) of the URAA provided that "a report of a dispute settlement panel or the Appellate Body convened under the [DSU] regarding the State law . . . shall not be considered as binding or otherwise accorded deference".

Eur. L. Rev. 581, 595 (1994); C. Schmid, "Immer wieder Bananen : Der Status des GATT/WTO-Systems im Gemeinschaftsrecht", 51 (No. 4) *Neue Juristische Wochenschrift* 190, 196 (1998); A. Weber, "Rechtswirkungen von WTO-Streitbeilegungsentscheidungen im Gemeinschaftsrecht", 10 *Europäische Z. für Wirtschaftsrecht* 229, 234-235 (1999). See also A. Tancredi, "On the Absence of Direct Effect of the WTO Dispute Settlement Body's Decisions in the EU Legal Order", in *International Law as Law of the European Union* 249 (E. Cannizzaro *et al.*, eds., 2012).

863. Cheyne, *op. cit.* In *Sevince*, the Court found that decisions adopted by the Association Council established under the EEC-Turkey Association Agreement had direct effect. C-192/89, *Sevince* v. *Staatssecretaris van Justie*, 1990 ECR I-3461, 3501-3504.

864. Case C-93/02 P, *Biret Int'l* v. *Council*, 2003 ECR I-10497, 10551.

865. C-377/02, *Van Parys*, 2005 ECR I-1465, 1524-1525. See also Case C-104/97 P, *Atlanta* v. *Council & Comm'n*, 1999 ECR I-6983; Case T-18/99, *Cordis* v. *Comm'n*, 2001 ECR II-913; Case T-30/99, *Bocchi Food Trade Int'l* v. *Comm'n*, 2001 ECR II-943; Case T-52/99, *T. Port* v. *Comm'n*, 2001 ECR II-981; Cases T-64/01 and T-65/01, *Afrikanische Frucht-Campagnie*, 2004 ECR II-521; Case T-19/02, *Chiquita Brands Int'l* v. *Comm'n*, 2005 ECR II-315; Case C-351/04, *Ikea Wholesale Ltd* v. *Comm'ners Customs & Excise*, 2007 ECR I-7723; Case C-120/06 P and C-121/06 P, *FIAMM* v. *Council*.

866. US Government, Statement of Administrative Action, Understanding on Rules and Procedures Governing the Settlement of Disputes (1994), HR Doc. 103-316, at 1032-1033 (1994).

In *Footwear Distributors and Retailers of America* v. *United States*, the plaintiff did not argue that reports of GATT panels were binding on the courts but that the statutes should be construed in conformity with international obligations of the United States. The US Court of International Trade, nonetheless, disregarded the panel report, stating: "However cogent the reasoning of the GATT panels reported above, it cannot . . . lead to the precise domestic, judicial relief for which the plaintiff prays." [867] The US courts show no respect to WTO reports either. For example, in *Corus Staal* v. *Department of Commerce*, the Federal Circuit dismissed arguments based on a report of the Appellate body, stating that "WTO decisions are 'not binding on the United States, much less this court'." [868]

4. When the WTO adjudicatory bodies find certain measures of a Member State to be inconsistent with the WTO Agreement, they request the State to bring them into conformity with the WTO Agreement. The WTO adjudicatory bodies refrain from indicating to the State a particular way of fulfilling the obligations under the Agreement. Such WTO reports may not be enforceable as such by courts of the State, but need to be given effect through legislative and other measures. Besides, the WTO Agreement is not considered as directly applicable in the United States, the European Union, or Japan. When the WTO Agreement is devoid of direct applicability, it cannot be expected that the reports issued by the WTO adjudicatory bodies have binding or controlling effect on the courts of the State [869]. On the contrary, in States where the WTO Agreement is considered as directly applicable, one can argue that the WTO reports should be used as authoritative or persuasive source for the interpretation of the WTO Agreement. Even in those States, however, the WTO reports may be difficult to enforce as such.

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867. *Footwear Distributors & Retailers of Am.* v. *United States*, 852 F. Supp. 1078, 1096 (Ct. Int'l Trade 1994).

868. *Corus Staal* v. *Dep't of Commerce*, 395 F. 3d 1343 (Fed. Cir. 2005). See also *Timken* v. *United States*, 354 F. 3d 1334 (Fed. Cir. 2004); *Koyo Seiko* v. *United States*, 442 F. Supp. 2d 1360 (Ct. Int'l Trade 2006). For an overview of US cases on the domestic effect of WTO reports, see R. Miller, "Effect of World Trade Organization (WTO) Decisions upon United States", 17 ALR Fed. 2d 1 (2007); G. Gattinara, "The Relevance of WTO Dispute Settlement Decisions in the US Legal Order", 36 *L. Issues Econ. Integration* 285 (2009).

869. While Eeckhout defended the European Court's decision in *Portugal* v. *Council* excluding direct applicability of the WTO Agreement in the European Union, he argued that WTO rulings should be given effect through consistent interpretation and the *Nakajima/Fediol* principle. Eeckhout, "Further Reflections", *supra* footnote 406.

2. Direct enforceability

Jenks used the term "self-executory" for international decisions and awards. In his book entitled *The Prospects of International Adjudication*, he inserted a section entitled "Self-Executory Decisions and Awards" [870]. Apparently he used the term self-executory in the sense that no further action is called for [871]. He stressed that "certain types of decisions and award present no enforcement problem because they are self-executory", and added that "[t]he most obvious example of a self-executory decision is a decision dismissing the claim submitted to the court or tribunal" [872] and that "any determination by an international decision or award of a question of law or fact is self-executory" [873]. Such usage of the term "self-executory" or self-executing is confusing and to be avoided. Citing Jenks, El Ouali wrote an article entitled "La sentence internationale directement applicable" and applied the notions of self-executing or directly applicable to judgments of international courts. In the article, he tried to show that the execution of declaratory judgments of international courts did not depend on discretionary powers of States [874]. Such use of "direct applicability" for judgments of international courts is equally inadvisable. Judgments of international courts may be *enforced* in domestic law but are not *applied.*

In the Member States of the European Union, acts of the Council or the Commission of the EU and judgments of the European Court of Justice which impose a pecuniary obligation are "enforceable"

870. C. Jenks, *The Prospects of International Adjudication* 688-690 (1964).

871. One sees a certain parallel with the American usage of the term self-executing. In the United States, the term self-executing is used not only for treaties but also for domestic legal acts which operate by themselves without further action. A US court stated that "[s]ome judgments are self-executing, (that is, require no affirmative action of the court, or action under a process issued by the court, to execute them), and are fully executed when they are rendered". *Aetna Casualty & Sur. Co.* v. *Board of Supervisors*, 168 SE 617, 629 (1933). See also *State ex rel. W. G. Platts, Inc.* v. *Superior Court*, 349 P. 2d 1087, 1088 (1960) (orders before the court were self-executing "in the sense that no further action of the court is necessary to enforce them"); *Evans* v. *Supreme Council of the Royal Arcanum*, 120 NE 93, 95 (1918) (finding that a forfeiture provision in the by-laws of a society were self-executing stating that "[n]o affirmative action on the part of the society was required"); *Estes* v. *Gatliff*, 163 SW 2d 273, 276 (1942) (holding a forfeiture provision in a lease non-self-executing and stating that the landlord's right of forfeiture was dependent upon his written notice).

872. Jenks, *supra* footnote 870, at 688.

873. *Ibid.* at 689.

874. A. El Ouali, "La sentence international directement applicable", in *Mélanges offerts à P. Reuter* 269 (1981). See also F. Fotanelli, "International Decisions", 107 *Am. J. Int'l L.* 632, 637 (2013) (stating that the 2012 judgment of the ICJ in the *Jurisdictional Immunities of the State* is "clearly" "directly applicable in domestic courts (that is, [is] 'self-executing')").

(Arts. 299 and 280 of the TFEU). Some European commentators explained this phenomenon as "direct applicability" of acts of the Council or Commission or judgments of the Court [875]. Rigaux criticized such usage of direct or immediate applicability in the following words:

> "[L]'efficacité de ces actes suscite des problèmes étrangers à la notion *d'application immédiate*. . . . La notion *d'application* directe ou immédiate nous parait devoir être réservée aux dispositions générales ou réglementaires (lois en sens matériel) qu'il est, en effet, possible aux autorités nationales *d'appliquer* à un nombre indéterminé de situations individuelles. . . . Tout ce que peuvent faire les juridictions et les autorités nationales c'est, non pas appliquer un tel acte mais en *reconnaître* les effets." [876]

As he admonished, enforceability *(force exécutoire)* of judgments and awards of international courts and tribunals should not be confused with the notion of direct applicability. When judgments of international courts are enforced, their effects are accepted and recognized. The notion of direct applicability should be reserved to general norms which need to be interpreted and applied to particular situations.

In recent years, European commentators have used the term "direct effect" in the sense of direct enforceability for decisions of international tribunals such as the ICJ [877], the European Court of Human Rights [878], ICSID [879], and the WTO adjudicatory bodies [880]. Because direct effect

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875. Constantinidès-Mégret, *supra* footnote 518, at 49-51. R. Lecourt, *Le juge devant le Marché commun* 39 (1970). P. Teitgen, *Droit institutionnel communautaire: Les cours de droit, 1977-1978*, at 260 (1977). A. Bredimas, *Methods of Interpretation and Community Law* 86 (1978). Bleckmann, "L'applicabilité directe", *supra* footnote 338, at 110-115.

876. Rigaux, "Rapport belge", in *Deuxième Colloque*, *supra* footnote 350, at 192-193.

877. Nollkaemper, *National Courts*, *supra* footnote 23, at 117-119 (claiming that this use of "direct effect" conformed to the use of the concept by the ICJ). In *Request for Interpretation of the Judgment in the Avena Case*, the ICJ stated that

> "[t]he *Avena* Judgment nowhere lays down or implies that the courts in the United States are required to give *direct effect* to paragraph 153 (9) . . . Nor moreover does the *Avena* Judgment prevent *direct enforceability* of the obligation in question, if such effect is permitted by domestic law." *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals *(Mex. v. US)*, 2009 ICJ 3, 177 (19 January) (emphasis added).

See also S. Aktypis, "L'effet direct de l'arrêt *Avena*: regards croisés de la Cour internationale de justice et de la Cour suprême des Etats-Unis d'Amérique", 64 *Revue hellénique de droit international* 397 (2011).

878. E.g., Frowein and Oellers-Frahm, "Allemagne", *supra* footnote 646, at 106; Ress, "Domestic Legal Order", *supra* footnote 819, at 374.

879. Mosler, *supra* footnote 812, at 453-454.

880. See *supra* text accompanying footnotes 862-863.

and direct applicability are often used interchangeably, the use of direct effect in the sense of direct enforceability of international decisions is also to be avoided.

3. Acts of international supervisory bodies

(a) *International Labour Organization*

Reports of international supervisory bodies are also often invoked before domestic courts. The International Labour Organization (ILO) has an elaborate mechanism to supervise implementation of ILO conventions and recommendations [881]. The Committee of Experts on the Application of Conventions and Recommendations annually examines the application of ILO conventions and recommendations by ILO members, pointing out problems in its reports. The Committee on Freedom of Association examines specific complaints regarding freedom of association and presents its conclusions in its reports. On some occasions ILO has established Fact-Finding and Conciliation Commissions on Freedom of Association, which carry out fact-finding and conciliation on particular matters and compiles reports. These reports of ILO organs have been invoked before domestic courts.

Since ILO reports are not legally binding, arguments based on them are usually rejected by courts on the ground that they are not binding. For example, Japanese courts have stated that ILO reports do not constitute sources of law to be applied by courts because they are not legally binding. One Japanese court stated that ILO reports did not constitute "subsequent practice" within the meaning of Article 31, paragraph 3 *(b)*, of the Vienna Convention on the Law of Treaties. The court dismissed arguments based on ILO reports, declaring that "[they] do not bind the parties . . . unless they amount to 'subsequent practice . . .' as provided for in the Vienna Convention . . . [and that they] fall short of it" [882]. Domestic courts, however, can refer to ILO reports to support and reinforce their conclusions in their judgments [883].

(b) *United Nations human rights treaty bodies*

1. Human rights conventions adopted under the auspices of the United Nations establish committees to supervise the implementation

881. For details on the supervisory mechanism of the ILO, see, e.g., N. Valticos, "Les méthodes de la protection internationale de la liberté syndicale", 144 *Recueil des cours* 79 (1975).

882. Judgment of 19 January1993, Oita Dist. Ct., 1457 *Hanrei jihō* 36, 49 (Japan).

883. For examples, see Iwasawa, *Impact*, *supra* footnote 48, at 108-113.

of the convention, and the committees issue various documents in the course of their supervision. In the 1990s, the human rights treaty bodies began the practice of adopting country-specific concluding observations at the end of consideration of a report submitted by a State party, in which they evaluate the human rights situation of the State party making recommendations. Many treaty bodies have competence to consider communications from individuals who claim to be a victim of a violation by a State party of a right set forth in the convention. After consideration of a communication, the committee forwards its views or decision to the State and the individual concerned, in which it concludes whether the facts before it disclose a violation of the convention. In addition, the human rights treaty bodies have developed the practice of adopting general comments or general recommendations, in which they indicate their interpretation of the substantive provisions of the convention [884]. Since concluding observations and views are addressed to a specific State with findings and recommendations, they may be considered as adjudicatory acts of international organizations. In contrast, general comments are addressed to all States parties and contain general statements on the law. They are comparable to norm-creating acts of international organizations.

In a limited number of States (e.g., Colombia), views of the treaty bodies may be enforced because special enabling legislation has been enacted to secure their implementation in domestic law. However, since the treaty bodies normally leave wide room for discretion to the State party as to how to give effect to their findings, views can rarely be enforced even in those States [885].

Nonetheless, it is undeniable that the work of the supervisory bodies has considerable importance for the interpretation of the conventions. The ICJ has recognized the interpretative value of the outputs of the human rights treaty bodies. In the *Construction of a Wall* case of 2004, the ICJ concluded that the International Covenant on Civil and Political Rights (ICCPR) was applicable not only on the territories of the States parties but also outside them. The Court noted that "[t]he constant practice of the Human Rights Committee is consistent with this", citing the Committee's views on individual communications and concluding

884. Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.9 (2008).

885. R. van Alebeek and A. Nollkaemper, "The Legal Status of Decisions by Human Rights Treaty Bodies in National Law", in *UN Human Rights Treaty Bodies: Law and Legitimacy* 356, 362-367 (H. Keller and G. Ulfstein, eds., 2012).

observations on Israel. Furthermore, the Court referred to General Comment No. 27 in interpreting Article 12, paragraph 3, of the ICCPR and concluded that the conditions spelled out in the general comment "are not met" in the case [886].

In 2010 in the *Ahmadou Sadio Diallo* case, the ICJ explicitly recognized the value of the interpretation given to the ICCPR by the Human Rights Committee in the following words:

> "the Human Rights Committee has built up a considerable body of interpretative case law. . . . Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty." [887]

2. Before domestic courts, the parties increasingly rely on the outputs of the human rights treaty bodies as guides for the interpretation of not only the convention but also for the constitution and other national laws [888]. The International Law Association Committee on International Human Rights Law did a study on the impact of the work of the United Nations human rights treaty bodies on national courts [889]. The study found a number of cases in which domestic courts were sympathetic to invocation of treaty body outputs. In some cases, treaty body outputs appear to have had considerable influence on the outcome of the case. In other cases, courts interpreted national law and made a passing reference to treaty body outputs as one of the grounds to support their conclusions. Yet, still other courts totally rejected arguments

886. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ 136, 177-181, 192-193 (9 July).

887. *Ahmadou Sadio Diallo (Guinea* v. *DRC)*, 2010 ICJ 639, 664 (30 November).

888. See generally Y. Iwasawa, "Legal Significance of the Human Rights Committee's Interpretation of the ICCPR", 29 *Sekaiho Nenpo* 50 (2010) (in Japanese); van Alebeek and Nollkaemper, *supra* footnote 885.

889. ILA, Committee on International Human Rights Law, "Interim Report on the Impact of the Work of the United Nations Human Rights Treaty Bodies on National Courts and Tribunals: Report of the Committee on International Human Rights Law and Practice", in *International Law Association, Report of the Seventieth Conference (New Delhi)* 507 (2002) (the author was one of the co-rapporteurs); ILA, Committee on International Human Rights Law, "Final Report on the Impact of the Work of the United Nations Human Rights Treaty Bodies on National Courts and Tribunals: Report of the Committee on International Human Rights Law and Practice", in *International Law Association, Report of the Seventy-First Conference (Berlin)* 621 (2004) (the author was one of the co-rapporteurs).

based on treaty body outputs for the reason that they were not legally binding [890].

Japanese cases exemplify positive reliance on treaty body outputs by domestic courts. Article 900 (iv) of the Japanese Civil Code provided that a share of inheritance of a child born out of wedlock was half that of a legitimate child. In September 2013, the Supreme Court Grand Bench found this provision to be contrary to Article 14 of the Constitution as unreasonable discrimination. This judgment is important because the court referred to the concluding observations of the Human Rights Committee and the Committee on the Rights of the Child, explaining reasons for the decision. The judgment is particularly noteworthy given that the Supreme Court of Japan rarely finds a law to be unconstitutional and that the court found a provision of the Civil Code, the key code of Japan, to be unconstitutional, referring to the recommendations of the treaty bodies [891]. A district court of Japan was more explicit in accepting the value of the treaty body outputs. The Tokushima District Court declared in 1998 that "it is desirable that interpretation of the ICCPR is carried out in conformity, as much as possible, with general comments of the United Nations treaty bodies" [892].

3. Generally speaking, the following factors appear to influence the extent to which domestic courts use the treaty body outputs: the kind of the legal norm being interpreted (a human rights convention, the constitution, or a statute), the domestic legal force and rank of international law, the knowledge about the activities of the treaty bodies, the familiarity of lawyers and courts with the treaty body outputs, their accessibility particularly in the language of their own, the quality and persuasiveness of the reasoning underlying the treaty body outputs, their usefulness for the resolution of the specific issue before the court, the general attitude of the courts to international law, acceptance by the State of the system of individual communications, and so forth [893]. Domestic courts of States where treaties have the force of law are more

890. ILA Committee, "Interim Report", *op. cit. supra* footnote 889. ILA Committee, Final Report, *ibid.* See also Iwasawa, "Legal Significance", *supra* footnote 888 (giving many Japanese examples).

891. Judgment of 4 September 2013, Sup. Ct. Grand Bench, 57 *Japanese YB Int'l L.* 480 (2014). See also Judgment of 16 December 2015, Sup. Ct. Grand Bench (the court found Article 733 (1) of the Civil Code prohibiting women from remarrying within six months after divorce to be unconstitutional in part; Justice Yamaura found it unconstitutional in its entirety referring to the concluding observations of the Human Rights Committee and the CEDAW in his dissenting opinion).

892. Judgment of 21 July 1998, Tokushima Dist. Ct., 1674 *Hanrei jihō* 123.

893. ILA Committee, "Interim Report", *supra* footnote 889, at 513.

likely to refer to international materials. It is, however, only half true. Domestic courts of States where treaties have no domestic legal force may also refer to the treaty body outputs, and some courts do so actively (e.g., in Canada) [894].

4. It has been debated, especially in Japan, how the use of treaty body outputs for the interpretation of the convention can be justified under the principles of interpretation stipulated in the Vienna Convention on the Law of Treaties. Some courts and scholars take the view that they fall within "subsequent practice" under Article 31, paragraph 3 *(b)*, of the Convention [895]. This theory faces difficulties because, according to the Convention, what shall be taken into account is "subsequent practice in the application of the treaty *which establishes the agreement of the parties* regarding its interpretation" (emphasis added). Thus, in Japan, the predominant view is that the treaty body outputs may be taken into account as "supplementary means of interpretation" (Art. 32) [896]. The juridical basis for the reliance on the treaty body outputs is often found in more practical factors such as the impartiality, neutrality, objectivity and legitimacy of the treaty bodies, and the expertise, experience and reputation of their members.

4. Other effects

1. Even if judgments of international courts and adjudicatory acts of international organizations (international decisions) are not directly enforceable in domestic law, they may still have significant effects in domestic law. First, domestic courts refer to international decisions to strengthen their findings on international law. In particular, judgments of the ICJ provide important evidence as to the state of international law. The ICJ is "the principal judicial organ of the United Nations" (Art. 92 of the UN Charter) and is recognized as the most important international court by the international community. Its case law has unquestionable authority and domestic courts cite the ICJ judgments most frequently as persuasive authority or evidence on questions of international law [897]. For example, a Japanese court referred to the judgment of the ICJ in the *North Sea Continental Shelf* cases to confirm

894. See *infra* the text accompanying footnotes 904-906.
895. E.g., M. Herdegen, *Völkerrecht* 126-127 (4th ed., 2005).
896. See Iwasawa, "Legal Significance", *supra* footnote 888, at 63-71.
897. Ordonez and Reilly, *supra* footnote 823, at 369.

its interpretation that the legal regime of the continental shelf had become customary international law [898].

2. Secondly, domestic courts refer to international decisions to interpret a treaty. The German Constitutional Court derived from the Basic Law's principle of openness towards international law the duty of German courts to take into account the ICJ judgments. Even when Germany was not a party before the ICJ, the court suggested that wherever Germany had submitted to the interpretative jurisdiction of the ICJ, the duty to take into account applied [899]. When a treaty establishes a court or other body to supervise the fulfilment of the obligations under the treaty, their decisions carry great weight for the interpretation of the treaty. Thus, interpretation adopted by the European Court of Human Rights or the Inter-American Court of Human Rights is of undeniable significance for the interpretation of the respective human rights convention. After surveying the effect of the case law of the European Court of Human Rights on national law, Polakiewicz and Jacob-Folzer concluded that

> "The interpretation of the Convention given by the European Court of Human Rights has proved to be highly persuasive with regard to national jurisdictions and legislatures. With the exception of some rulings . . . it has never been openly defied by national courts." [900]

As the wordings of the ICCPR and the European Convention on Human Rights are similar, even courts of States which are not parties to the European Convention refer to the jurisprudence of the European Court of Human Rights for the interpretation of the ICCPR. Domestic courts justify reliance on the jurisprudence of the European Court either as "supplementary means of interpretation" of the ICCPR in accordance with Article 32 of the Vienna Convention [901], or as "relevant rules of international law applicable in the rela-

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898. Judgment of 22 April 1982, Tokyo Dist. Ct., 28 *Shōmu geppō* 2200, 27 *Japanese Ann. Int'l L.* 148 (1984) (Japan). *North Sea Continental Shelf* cases (*FRG* v. *Denmark; FRG* v. *Neth.*), 1969 ICJ 3 (20 February). For further discussion on the Japanese cases in which the courts referred to the ICJ judgments, see Iwasawa, *Impact*, *supra* footnote 48, at 108.

899. See *supra* footnote 842.

900. Polakiewicz and Jacob-Foltzer, *supra* footnote 820, at 141.

901. E.g., Judgment of 28 October 1994, Osaka High Ct., 1513 *Hanrei jihō* 71, 87, 38 *Japanese Ann. Int'l L.* 118 (1995); Judgment of 31 July 1998, Tokyo District Court, 1657 *Hanrei jihō* 43 (Japan).

tions between the parties" in accordance with Article 31, paragraph 3 *(c)* [902].

3. Thirdly, domestic courts refer to international decisions to interpret national laws, especially the constitution. The South African Constitution has an explicit provision directing courts to have regard to international human rights law. As a result, the Constitutional Court of South Africa is liberal in its treatment of decisions of the human rights treaty bodies. In *State* v. *Makwanyane & Mchunu*, in which the court held capital punishment to be unconstitutional, the President stated that

> "decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organization may provide guidance as to the correct interpretation of particular provisions of the [Constitution]" [903].

Even in States in which treaties have no domestic legal force (e.g., Canada and the United Kingdom), treaties and judgments of international courts may be used as aids in the interpretation of national laws. Canadian courts frequently refer to international human rights documents in interpreting the Canadian Charter of Rights and Freedoms. Canadian courts refer not only to the text of the treaties but also to adjudicatory acts of supervisory bodies in interpreting the treaty [904]. In 1987, the Chief Justice of the Supreme Court of Canada stated:

> "The Charter conforms to the spirit of this contemporary international human rights movement. . . . The various sources of international human rights law – declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms – must, in my opinion, be relevant and persuasive sources for interpretation of the Charter's provisions." [905]

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902. E.g., Judgment of 15 March 1996, Tokushima Dist. Ct., 1597 *Hanrei jihō* 115, 123 (Japan).

903. *State* v. *Makwanyane & Mchunu*, 16 *Hum. Rts. LJ* 154, 160 (1995) (Const. Ct. 1995) (S. Afr.).

904. See Schabas and Beaulac, *supra* footnote 749.

905. *Re Pub. Serv. Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act*, 38 DLR 4th 161, 184-192, 239 (Can. 1987) (Dickson and Wilson, JJ., dissenting). Another justice of the Canadian Supreme Court later confirmed: "Though speaking in dissent, his comments on the use of international

In the United Kingdom, the Judicial Committee of the Privy Council referred extensively to decisions of the human rights treaty bodies in *Pratt* v. *Attorney-General for Jamaica*. In interpreting the phrase "inhuman or degrading punishment or other treatment" in Section 17 (1) of the Jamaican Constitution, the Privy Council referred to views of the Human Rights Committee, a decision of the Inter-American Commission on Human Rights, and a judgment of the European Court of Human Rights. The Privy Council declared that although "not of legally binding effect", the views of the Human Rights Committee "should be afforded weight and respect" [906].

4. In considering the value of interpretation put forward by international courts and international supervisory bodies, it is pertinent to distinguish *authentic* interpretation and *authoritative* interpretation. In the *Question of Jaworzina* case (1923), referring to the principle *ejus est interpretare legem cujus condere* (only the one who made the law can interpret it), the PCIJ stated that "it is an established principle that the right of giving an [authentic] interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it" [907]. In 1855, Phillimore had stated: "*Authentic Interpretation*, in its strict sense, means expositions given by the Lawgiver himself." [908] Since 1923, international lawyers have used the concept of authentic interpretation in the sense spelled out by the PCIJ in the *Question of Jaworzina* Opinion. In a lecture at the Hague Academy of International Law in 1928, Ehrlich referred to "l'interprétation authentique, c'est-a-dire l'accord formel de toutes les parties contractantes" [909]. International lawyers today generally view authentic interpretation as interpretation made by the person who has the law-making power or interpretation that is agreed upon by the parties to a treaty [910].

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law generally reflect what we all do." Statement of G. V. La Forest, J, at the Canadian Council on International Law in 1988, cited in Schabas and Beaulac, *supra* footnote 749, at 87.

906. *Pratt* v. *Attorney-General for Jamaica*, [1994] 2 AC 1, 27, 14 *Hum. Rts. LJ* 338, 342 (PC 1993). For further discussion on this case, see, e.g., Buergenthal, "International Tribunals", *supra* footnote 682, at 689-695.

907. *Question of Jaworzina (Polish-Czechoslovakian Frontier), Advisory Opinion, 1923, PCIJ (Ser. B), No. 8*, at 37 (6 December)

908. 2 R. Phillimore, *Commentaries upon International Law* 72 (1855).

909. L. Ehrlich, "L'interprétation des traités", 24 *Recueil des cours* 5, 36-37 (1928).

910. E.g., V. Degan, *L'interprétation des accords en droit international* 18 (1963); R. Bernhardt, *Die Auslegung völkerrechtlicher Verträge, insbesondere in der neueren Rechtsprechung internationaler Gerichte* 44-45 (1963); W. Karl, *Vertrag und spätere Praxis im Völkerrecht* 40-41 (1983); P. Reuter, *Introduction to the Law of Treaties* 95 (2nd ed., 1995). A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* 514-519 (2008). Many textbooks on international law explain

A book published by Voïcu in 1968, *De l'interprétation authentique des traités internationaux*, was a valuable contribution on authentic interpretation. In his book, Voïcu distinguished two kinds of authentic interpretation: "l'interprétation authentique express" and "l'interprétation authentique par la pratique" [911]. The Vienna Convention of the Law of Treaties provides that the following shall be taken into account in interpreting a treaty: *(a)* any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, and *(b)* any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (Art. 31, para. 3). According to the distinction made by Voïcu, a subsequent agreement between the parties regarding the interpretation of the treaty falls within "l'interprétation authentique express", while subsequent practice which establishes the agreement of the parties falls within "l'interprétation authentique par la pratique". The International Law Commission used authentic interpretation in the same sense [912].

Regrettably, however, authentic interpretation and authoritative interpretation are often not distinguished and used interchangeably in literature in English. For example, Skubiszewski used the term "authoritative ('authentic') interpretation" repeatedly in one article [913].

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authentic interpretation in this sense. E.g., Verdross, *Völkerrecht*, *supra* footnote 717, at 173; Rousseau, *supra* footnote 607, at 242-243; Verdross and Simma, *supra* footnote 9, at 490-491; P. Reuter, *Droit international public* 144 (7th ed., 1993); Jennings and Watts, *supra* footnote 575, at 1268-1269; L. Damrosch *et al.*, *International Law: Cases and Materials* 505 (4th ed., 2001); P. Daillier *et al.*, *Droit international public* 277-282 (8th ed., 2009); K. Ipsen (ed.), *Völkerrecht: Ein Studienbuch* 407-408 (6th ed., 2014).

911. I. Voïcu, *De l'interprétation authentique des traités internationaux* 2-4, 87, 195-210 (1968).

912. Report of the International Law Commission on the Work of the Second Part of Its Seventeenth Session, 2 [1966] *YB Int'l L. Comm'n* 169, 222 (commentaries on the draft convention on the law of treaties). Waldock, a Special Rapporteur, had used authentic interpretation in this sense, too. Third Report on the Law of Treaties, by Sir Humphrey Waldock, 2 [1964] *YB Int'l L. Comm'n* 5, 59-60; Sixth Report on the Law of Treaties, by Sir Humphrey Waldock, 2 [1966] *YB Int'l L. Comm'n* 51, 98-99.

913. K. Skubiszewski, "Remarks on the Interpretation of the United Nations Charter", in *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit, Menschenrechte: Festschrift für Hermann Mosler* 891, 898-899 (1983). According to Schwarzenberger, "authoritative" interpretation has two meanings:

> "In the sense that parties to a case before an international court or tribunal are bound by a judgment or award as *res judicata*, any judicial interpretation of a treaty is authoritative. Used in a narrower meaning, authoritative interpretation is interpretation of the treaty by the parties themselves." 1 G. Schwarzenberger, *International Law* 531 (3rd ed., 1957).

What he called "a narrower meaning" of "authoritative" interpretation is in fact "authentic" interpretation in the sense used here.

Unfortunately, in the *Question of Jaworzina* case, the PCIJ used the term "authoritative" in the English version of the judgment: "it is an established principle that the right of giving an *authoritative* interpretation of ["le droit d'interpréter *authentiquement*" in the French text] a legal rule belongs solely to the person or body who has power to modify or suppress it" [914]. This unfortunate mistranslation may have fostered confusion and misuse of the two distinct concepts.

Authentic interpretation has the same force as the rule interpreted and has priority over other interpretation. Interpretation agreed upon by the parties to a treaty is authentic and binds the parties.

5. Interpretation set forth by international courts in their judgments is not authentic in the sense indicated above, because it is not given by the person who has the law-making power [915]. Nonetheless, interpretation put forward by international courts, especially the ICJ, in their judgments, has substantial authority in the international community. International courts have the power to interpret international law and apply it to cases brought before them.

In particular, when parties to a treaty empower an international court with competence to settle disputes concerning interpretation and application of the treaty, interpretation put forward by the court during the course of performing its dispute settlement function may be regarded as authoritative.

According to the meaning of authentic interpretation indicated above, interpretation given by supervisory bodies during the course of their supervisory function is not authentic, either. Ipsen pointed out that characterization of interpretation of international bodies as "authentic" was incorrect, stating: "Auslegunsbeschlüsse der Organe Internationaler Organisationen werden im völkerrechtlichen Schrifttum vereinzelt . . . als authentische Interpretation bezeichnet, dies jedoch zu Unrecht." [916] And yet, interpretation put forward by supervisory bodies during the course of their supervisory function deserves due respect by States and may be regarded as authoritative. Orakhelashvili stressed: "Authoritative interpretation is that performed by the treaty-based organ that is empowered with such competence. It differs from

914. *Question of Jaworzina (Polish-Czechoslovakian Frontier), Advisory Opinion, 1923, PCIJ (Ser. B), No. 8*, at 37 (6 December) (emphasis added).

915. Verdross, *Völkerrecht*, *supra* footnote 717, at 173. Verdross and Simma, *supra* footnote 9, at 490. Daillier *et al.*, *supra* footnote 910, at 280-281. Orakhelashvili, *supra* footnote 910, at 519.

916. Ipsen, *supra* footnote 910, at 408 (W. Heintschel von Heinegg).

authentic interpretation which the parties perform jointly."[917] While he denied that interpretation of the treaty bodies were authentic, he acknowledged that it was authoritative.

6. In sum, interpretation put forward by international courts or international supervisory bodies deserves due respect by States because of the special functions States entrust to these bodies and may be regarded as authoritative. It is, however, not authentic, and unlike authentic interpretation, authoritative interpretation is not binding *per se* on the parties to the treaty.

Judgments of international courts have binding force between the parties. Therefore, when the State has been a party before an international court, one can argue that domestic courts as organs of the State are bound by the judgment and have a duty to respect the interpretation put forward in the judgment by the court. In 2007, the Italian Constitutional Court suggested that the case law of the European Court of Human Rights had a binding value, stating that national judges retained no discretion as to the interpretation of a provision of the European Convention on Human Rights and must rely on the interpretation given to it by the European Court[918]. This statement was criticized as too far-reaching[919]. If there is a legitimate reason for domestic courts to depart from the case law of an international court, for instance, when the constitution is ranked higher than treaties and the interpretation put forward by an international court clashes with a constitutional principle of the State, domestic courts should be able to depart from the interpretation by the international court while explaining the reasons for doing so.

Interpretation put forward by an international supervisory body in a non-binding report has less force than interpretation put forward by international courts in binding judgments. Interpretation by supervisory bodies is not binding on domestic courts, though they may be authoritative.

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917. Orakhelashvili, *supra* footnote 910, at 515. See also Karl, *supra* footnote 910, at 41; Daillier *et al.*, *supra* footnote 910, at 281-282.

918. Judgments of 24 October 2007, Nos. 348 and 349, Corte cost., 17 *Ital. YB Int'l L.* 292 (2007) (Italy). Compare this with a subsequent judgment of the Court. Judgment of 26 March 2015, No. 49, Corte cost., http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2015&numero=49 (Italy).

919. E.g., E. Cannizzaro, "The Effect of the ECHR on the Italian Legal Order: Direct Effect and Supremacy", 19 *Ital. YB Int'l L.* 173, 182 (2009); A. Nollkaemper, "The Effect of the ECHR and Judgments of the ECTHR on National Law: Comments on the Paper of Enzo Cannizzaro", 19 *Ital. YB Int'l L.* 189, 196 (2009); A. Caligiuri and N. Napoletano, "The Application of the ECHR in the Domestic Systems", 20 *Ital. YB Int'l L.* 125, 157-158 (2010).