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Author(s)	J. d' Aspremont
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The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order

JEAN D'ASPREMONT*

I. INTRODUCTION

BECAUSE THERE IS no application of law without interpretation,[1] international law, being increasingly applied by domestic courts, has been subject to their interpretation. This chapter examines whether international law contains some prescriptions regarding its interpretation by domestic courts. It particularly zeroes in on the extent to which domestic courts presuppose that international law constitutes a coherent and systemic set of rules and apply the principle of systemic integration of international law enshrined in the Vienna Convention on the Law of Treaties. The chapter simultaneously aims at appraising whether domestic courts, because of different legal and institutional constraints, construe the systemic character of the international legal order differently from international courts and international legal scholars.

Until recently, questions of interpretation of international law by domestic courts had barely been examined in the international legal scholarship for a long time,[2] international legal scholars classically devoting

* Associate Professor and Senior Research Fellow, Amsterdam Center for International Law (ACIL), University of Amsterdam.

[1] G Scelle, *Précis de droit des gens vol II* (Paris, Sirey, 1932–34) 488. See also G Schwarzenberger, 'Myths and Realities in Treaty Interpretation' (1968) 9 *Va J Int'l L* 1, 8.

[2] Among a few exceptions, see: CH Schreuer, 'The interpretation of treaties by domestic courts' (1971) 45 *BYIL* 255; MA Rogoff, 'Interpretation of international agreements by domestic courts and the politics of international treaty relations: reflections on some recent decisions of the United States Supreme Court' (1996) *Am U J Int'l L & Pol'y* 559; J Bederman, 'Revivalist Canons and Treaty Interpretation' (1993–94) 41 *UCLA L Rev* 953.

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their attention to the effect of the interpretation of international law *on* domestic law.[3] Modern developments have, however, sweepingly expanded the information available about domestic decisions involving questions of international law.[4] As a result, this classical disinterest for questions of interpretation of international law by domestic courts has been overturned and the manner in which domestic judges deal with international law irrespective of its effect on domestic law is nowadays the centre of great scholarly attention. The present chapter aspires to buoy this growing interest for the use of international law by domestic courts by shedding some light on some aspects of the conception of international law that is promoted by domestic judges.

After recalling the extent to which international law is applied and interpreted by domestic judges (section II), this chapter examines the degree to and the manner in which domestic judges are in a position to make use of the principle of systemic integration of international law (section III). Because the practice analysed here shows an inclination of domestic judges to resort to systemic integration of international law, this chapter discusses the implications of the use of the principle of systemic integration by domestic judges and especially the possibility of using it as a tool to further the integration of the international legal order (section IV).

II. INTERNATIONAL LAW AND DOMESTIC COURTS

International law has long ceased exclusively to govern inter-state relations and has become more regulatory of internal matters and issues affecting individuals. Compliance with international law has accordingly incrementally required the adoption of domestic rules. Even rules regulating inter-state relations have required domestic implementation. The entry of international law in domestic systems is thus a natural consequence of the extension *ratione materiae* of its object.[5]

[3] See the numerous contributions in OE Fitzgerald and E Eid (eds), *The globalized rule of law: relationships between international and domestic law* (Toronto, Irwin Law, 2006); Y Shany, 'How Supreme Is the Supreme Law of the Land?: Comparative Analysis of the Influence of International Human Rights Treaties upon the Interpretation of Constitutional Texts by Domestic Courts' (2006) 31 *Brooklyn J Int'l L* 341, 341 ff; M Arden, 'The Interpretation of UK Domestic Legislation in the Light of European Convention on Human Rights Jurisprudence' (2004) 25 *Statute L Rev* 165, 165 ff; AM Weisburd, 'Using International Law to Interpret National Constitutions: Conceptual Problems: Reflections on Justice Kirby's Advocacy of International Law in Domestic Constitutional Jurisprudence' (2006) 21 *Am U Int'l L Rev* 365–77; JJ Paust, 'Domestic influence of the International Court of Justice' (1998) 26 *Denv J Intl'l L & Pol'y* 787–805; MJ Glennon, 'Interpreting 'Interpretation' 20 *UC Davis L Rev* 913 (1987).

[4] See, eg: *International Law in Domestic Courts* (ILDC) database, available at www.oxfordlawreports.com.

[5] According to Provost and Conforti, 'The truly legal function of international law essentially is found in the internal legal system of States', see: Provost and Conforti, *International Law and the Role of Domestic Legal Systems* (Dordrecht, Martinus Nijhoff Publishers, 1993) 8;

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That international law regulates objects traditionally deemed to be of domestic relevance does not, however, suffice to explain the growing presence of international law in domestic legal orders. Because international law only enters domestic legal orders if so allowed by them, the greater presence of international law in the domestic legal orders of states also is the direct consequence of the growing amenability of states towards international law. In this respect, it is not disputed that states have proved less reluctant to let international law pervade and enter their own legal order. The basic manner in which states let international law penetrate their legal order is the adoption of measures of incorporation. Indeed, the abiding divide between legal orders has required that international law, to yield any effect in domestic law, be duly incorporated by each state.[6] Simultaneously, more countries have proved monist and, by pruning the formal domestic requirements of incorporation, have further facilitated the entry of international law in their domestic legal order.

Incorporation has not been the only means by which international law enters the domestic legal order. Indeed, most states in the world instruct their courts to construe domestic law in a manner that is consistent with the international obligations of the state. If international law is not the 'law of the land' because it has not been incorporated, it may still yield effect in the domestic legal order if domestic judges interpret national law by drawing on international law.[7] This is true by virtue of the so-called principle of consistent interpretation. According to that principle – which we will return to in this chapter – domestic courts are obliged to interpret domestic law in a manner consistent with international law. As a result, they necessarily heed international law and give weight to it in the domestic legal order. As such, the application of the principle of consistent interpretation does not endow international law with a self-executing character in domestic law – the question of the self-executing character of an international legal instrument being chiefly a question of international law

JHH Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy' (2004) 64 *ZaöRV* 547, 559 ff. See also: A von Bogdandy, 'Globalization and Europe: How to Square Democracy, Globalization and International Law' (2004) 15 *Eur J Int'l L* 885, 889; M Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *Eur J Int'l L* 917, 917. But see also: Arangio-Ruiz, 'Le domaine reservé. L'organisation internationale et le rapport entre le droit international et le droit interne. Cours général de droit international public' 225 *Recueil des Cours* (1990-VI) 29, especially 435 ff.

[6] See: J d'Aspremont and F Dopagne, 'Kadi: the ECJ's Reminder of The Abiding Divide Between Legal Orders' (2008) 5 *Int'l Org L Rev* 371.

[7] This is also known as the 'Charming Betsy' principle; see: US Supreme Court, *Murray v The Schooner Charming Betsy* 6 US (2 Cranch) 64 (1804); see also: *Restatement (Third) of Foreign Relations Law*, para 114 (1987). See on the Charming Betsy principle, generally: RG Steinhardt, 'The Role of International Law as a Canon of Domestic Statutory Construction'(1990) 43 *Vand L Rev* 1103; J Turley, 'Dualistic Values in an Age of International Legisprudence' (1993) 44 *Hastings LJ* 185.

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rather than a question of domestic law.[8] However, the role that international law can play through interpretation is far from negligible and it surely gives it an indirect effect in domestic law.[9] The principle of consistent interpretation is sometimes a means to bypass missing requirements of incorporation and apply international law short of any measure of incorporation.[10] This is why the principle of consistent interpretation has been dubbed the 'phantom' use of international law by domestic courts,[11] domestic judges making use of it being seen as 'worldly judges'.[12]

The growing effect of international law in the domestic legal order through incorporation and consistent interpretation has been accompanied by a general amenability of domestic judges towards international law as a whole, irrespective of whether it is incorporated and binding upon the state.[13] It seems that nowadays there is a steady appeal of international law to domestic judges who occasionally see themselves as agents of the international legal order and the guardians of the international rule of law.[14] This openness towards international law is remarkable, for it has not been out of a sense of a legal obligation imposed upon them by the domestic legal order but rather simply rests on the persuasive character of international law. This has also been explained by some authors as a strategy to preserve the space for domestic deliberation.[15] Benefits expected from reciprocity are probably not alien to such growing openness either.[16] Be that is it may, this calling for the 'international' has

[8] PCIJ, Jurisdiction of the Courts of Danzig, 1928 PCIJ Series B, No 15, 17–18. See: J Verhoeven, 'La notion d'applicabilité directe du droit international' 15 *RBDI* 1980–82, 243 ff.

[9] See for instance the House of Lords' decision in: *A (FC) v Secretary of State for the Home Department* (Conjoined Appeals) (2005) UKHL 71; or see also the Indian Supreme Court's decision in: *People's Union for Civil Liberties v Union of India* (1997) 125 ILR 510. See for some insights on the Canadian Practice: R Provost, 'Judging In Splendid Isolation'(2008) 56 *Am J Comp L* 125.

[10] See, eg: in Canada and the comments of J d'Aspremont, 'Du dualisme au monisme. La révolution silencieuse de la Cour suprême du Canada' (2003) *RBDC* 399.

[11] CA Bradley, 'The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretative Role of International Law' (1997–98) 86 *Geo LJ* 479.

[12] K Young, 'The World through the Judge's Eye' 28 *AustYIL* 27, 46.

[13] See generally: Y Shany, 'National Courts as International Actors: Jurisdictional Implications' (October 2008) *Hebr U Int'l L Research Paper* No 22-08. See also: R Provost (n 9). See for an early manifestation of that tendency: Bangalore Principles adopted by the Judicial Colloquium on 'The Domestic Application of International Human Rights Norms', India, 24–26 February 1988, reprinted in (1989) 1 *Afr J Int'l & Comp L* 345. The Bangalore Principles is a set of 10 principles meant to guide the work of domestic judges, including human rights and freedom enshrined in international instruments as well as international jurisprudence.

[14] K Young has qualified this attitude as being that of an 'internationalist judge'. See: K Young, 'The World through the Judge's Eye' 28 *AustYBIL* 27, 42.

[15] This argument is made by E Benvenisti and GW Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law' (2009) 20 *Eur J Int'l L* 59–72.

[16] In China (which remains, as a matter of principle, a dualist country) the Supreme Court issued in 1995 an interesting prescription according to which 'in the handling of cases with foreign elements, on the basis of the principle of reciprocity and mutual benefit, international treaty obligations undertaken by China should be strictly observed'. The text is mentioned

manifested itself in various ways. It has been illustrated by a growing reference to decisions of international courts.[17] To some more limited extent, it has also been reflected in what liberal legal scholars have depicted as the transnational interactions between all courts in the world.[18] One should probably not exaggerate this tendency.[19] It is, however, worthy of mention as it undoubtedly constitutes a new gateway for the entry of international law into domestic law.

It is interesting to realise that domestic judges do not have a monopoly on this growing introduction of international law in domestic legal orders. Indeed, it must be acknowledged that the greater amenability of judges towards international law often ensues after the invocation of international law by the parties to domestic proceedings.[20] Likewise, it is important to stress that the promotion of international law has also been spearheaded by governmental authorities who happen to resort to the 'discourse' of international law for domestic purposes, at least when this is consistent with their political agenda.[21] This use of international law by governmental authorities – and to some more limited extent by legislative bodies[22] – has, in turn, influenced the interpretation of international law by domestic judges; at least in those countries where domestic judges are obliged to abide by the interpretation provided by governmental authorities.[23] The growing place of international law in domestic legal orders is thus not solely an accomplishment of domestic judges.

and translated by X Hanqin and J Qian, 'International Treaties in the Chinese Domestic Legal System' (2009) 8 *Chinese J Int'l L* 299–322, especially 315 f.

[17] For some critical remarks, see DJ Kochan, 'Sovereignty and the American Courts at the Cocktail Party of International Law: The Dangers of Domestic Judicial Invocations of Foreign and International Law' (2006) 29 *Fordham Int'l LJ* 508.

[18] AM Slaughter, 'A Global Community of Courts' (2003) 44 *Harv Int'l LJ* 191.

[19] See for a criticism: E Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 *Am J Int'l L* 241.

[20] See for an example: d'Aspremont (n 10).

[21] See for instance the recent dispute between Belgium and the Netherlands on the enlargement of the Schelde River around Antwerp. The Dutch Prime Minister invoked the international agreement with Belgium to proceed with the enlargement which had been opposed (see: 'Coalitie oneens over Westerschelde-zaak' *NRC Handelsblad*, 18 August 2009). See generally on the use of international law in the discourse of governmental authorities: MA Rogoff, 'Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court' (1996) 11 *Am U J Int'l L & Pol'y* 559, 675 ff.

[22] See the discussion about the weight of the US Senate's discussions around treaty ratification before domestic courts. *cf Coplin v United States*, 6 Cl. Ct. 115, 131, fn 16 (1984) and *Rainbow Navigation, Inc v Department of the Navy*, 686 F Supp 354, 357 and n 17 (DDC 1988).

[23] See, eg: in the US, *Restatement (Third) of the Foreign Relations Law of the United States* (1987), para 326: 'The President has authority to determine the interpretation of an international agreement to be asserted by the United States in its relations with other states. Courts in the United States have final authority to interpret an international agreement for purposes of applying it as law in the United States but will give great weight to an interpretation made by the Executive branch'. See for an example: *Kolovrat v Oregon*, 366 US 187, 194 (1961) or *United States v Curtiss-Wright Export Corp*, 299 US 304, 319–20 (1936). On this question, see WM Reisman, 'Necessary and Proper: Executive Competence to Interpret Treaties' (1990) 15

Whether the entry of international law into the domestic legal orders takes the path of incorporation, consistent interpretation, or simple persuasiveness, and whomever this entry can be traced back to, it is uncontested that international law is more present in the domestic legal orders and is relentlessly resorted to by domestic courts. While some may see this as a positive phenomenon, it surely does not come without problems, especially in terms of the consistency of international law. Indeed, the application and the interpretation of international law by domestic courts is anything but a simple process of transmission[24] and is not at all synonymous with greater homogenisation and uniformisation of international law. The same is true of governmental or legislative authorities making use of international law at the domestic level. On the contrary, the growing application and interpretation of international law – be it by judicial or governmental authorities – can give rise to diverging interpretations. Diverging interpretation and the correlative fragmentation of law that ensues do not constitute a new phenomenon. Given the open texture of law, individual rules in all legal orders have been subject to diverging interpretations that have not always been fixed by supreme judicial authorities.[25] Even though diverging interpretation remains an abiding phenomenon of all legal orders, the contradicting interpretations of international law prove alarming when they rest on diverging visions of the international legal order as a whole and are not limited to the content of a single rule. In other words, when they are not about individual rules of international law but about the international legal order as a whole, conflicting interpretations can cause disquiet.

Among the understandings of the international legal order which may potentially pervade the application and interpretation of international law by domestic courts, one must be carefully examined here with reference to the practice.[26] This is the assumption that international law is a systemic set of rules pertaining to one 'system' of international law. Such a predisposition of domestic judges to construe international law as a consistent system of rules corresponds to the principle of interpretation of international law known as the principle of systemic integration. It is the aim of the following section to analyse to what extent this principle applies before domestic courts.

Yale J Int'l L 316; ER Rostow, 'The Reinterpretation Debate and Constitutional Law' (1989) 137 *U Pa L Rev* 1451; GM Buechler, 'Comment, Constitutional Limits on the President's Power to Interpret Treaties: The Sofaer Doctrine, Biden Condition and the Doctrine of Binding Authoritative Representations' (1990) 78 *Geo LJ* 1983; see also: the criticisms of J Bederman, 'Revivalist Canons and Treaty Interpretation' (1993–94) 41 *UCLA L Rev* 953.

[24] See: K Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 *NYU J Int'l L & Pol* 501, 505 (arguing in particular that the interpretation of international law by domestic courts is not simply 'a conveyor belt that delivers international law to the people').

[25] HLA Hart, *The Concept of Law* (Clarendon, Oxford, 1997) 136.

[26] See: below section III.C.

III. THE PRINCIPLE OF SYSTEMIC INTEGRATION OF INTERNATIONAL LAW BEFORE DOMESTIC COURTS

For the sake of this chapter, a legal order is deemed consistent if it is an order whose rules coexist without conflicting with one another. A legal order can be made consistent not only by actually devising rules which are in tune with one another but also by interpreting them in a systemic manner. Interpretation is the very first technique that a judge can resort to with a view to enhancing the systemic character of the legal order in which the rules that he applies originate. The current techniques of international law designed to solve conflicts of norm only come into play in judicial proceedings if interpretation has not sufficed to lessen an antagonism between two rules.[27] The situation of domestic judges applying international law is not different in this respect. On the contrary, as will be explained below, interpretation techniques prove particularly crucial for domestic judges confronted with questions of international law since they often are ill-equipped to resolve conflicts of international norms contracted by their governments.

It is argued in this section that domestic judges tend to construe the international legal order as a consistent and systemic order. This leaning of domestic judges to interpret international law in a systemic manner and to give it some consistency deserves some attention in that it undoubtedly mirrors the use of the principle of systemic integration of international law which is enshrined in the Vienna Convention on the Law of Treaties and relied upon by international judges. Before dwelling on the actual use systemic integration of international law by domestic judges (section III.C), a few words will need to be said about the principle of systemic integration of international law in general (section III.A) and the extent to which it is a principle of interpretation relevant before domestic courts (section III.B).

A. The Systemic Integration of International Law

The principles of interpretation of international treaties contained in the Vienna Convention on the Law of Treaties provide for an interpretation of

[27] These various conflict of norms-solving mechanisms are based on the different status of norms (*jus cogens*, art 103), specificity (*lex specialis*), temporality (*lex posterior*) of norms. See the conclusions of the ILC Study Group on the Fragmentation of International Law: International Law Commission (ILC), Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (ILC Fragmentation Report), UN Doc A/CN.4/682 (2006) (finalised by Martti Koskenniemi). These conflict-solving mechanisms provided by international law can also help domestic judges solve conflicts of international norms with which they are confronted when applying and interpreting international law in the domestic legal order.

treaties that takes into account 'any relevant rules of international law applicable in relations between the parties'.[28] When the provision was included in the Vienna Convention on the Law of Treaties, it echoed the previous teaching of some scholars[29] as well as the position of the *Institut de droit international*.[30] It also furthered the somewhat redundant and circular definition of the concept of treaty provided by the Vienna Convention on the Law of Treaties.[31]

The principle of systemic integration finally enshrined in the Vienna Convention[32] is premised on the *fiction* that, despite international law-making being fragmented and decentralised, any new rule has been made with the awareness of other existing rules. In that sense, the principle of systemic integration presupposes the formal unity of the legal system.[33]

The principle of systemic integration prescribes that a treaty be interpreted by reference to its 'normative environment' which includes all sources of international law. That means that when several norms bear on a single issue, they should, to the greatest extent possible, be interpreted so as to give rise to a single set of compatible obligations. Its application is undoubtedly delicate. It presupposes that the status of the 'normative environment' of the norm be clarified, and, in particular, that the status rule to which it is referred be established. It is only after the scope and the applicability of this other rule of international law is defined that it can be taken into account in the interpretation of the rule at issue.

The difficulty in applying the principle of systemic integration has been magnified by international judges themselves. It is particularly important to note that the use of the principle that was made by the International Court of Justice (ICJ) has not helped clarify what 'taken into account' really means. In what probably constitutes one of the most questionable decisions of the ICJ from the standpoint of legal logic, the principle of sys-

[28] Art 31(3)(c).

[29] AD McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961) 466; see also: P Verzijl, Georges Pinson case (1927–28) AD No 292, cited by C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 *Int'l & Comp L Q* 279, 279.

[30] *Annuaire de l'Institut de droit international* (1956) 364–65. See also: www.idi-iil.org.

[31] Art 2(1)(a).

[32] The principle was first designed as a principle of contemporaneity which provided that treaties should be interpreted in the law in force at the time of their adoption. On the drafting history of art 31(3)(c), see: P Merkouris, 'Debating the Ouroboros of International Law: The Drafting History of Article 31(3)(c)' (2007) 9 *Int'l Comm L Rev* 1.

[33] See: P Sands, 'Treaty, Custom and the Cross-Fertilization of International Law' (1998) 1 *Yale Hum Rts & Dev LJ* 85, 95; see also: J Combacau and S Sur, *Droit international public*, 5th edn (Paris, Montchrestien, 2001) 175. On the unity of the legal system, see generally: H Kelsen, 'Les Rapport de système entre le droit interne et le droit international', 'Les rapports de système entre le droit interne et le droit international public' (1926) 14 *Recueil des Cours* (1926-IV) 264 (who argues that the unity of the system rests on the same principle of validity on which all the constitutive elements of the system rest). *cf* PM Dupuy, 'L'unité de l'ordre juridique international, Cours général de droit international public' (2002) 297 *Recueil des Cours* 9–490.

temic integration was expressly relied upon by the Court for the very first time in its decision in the *Oil Platform* case.[34] On that occasion, the Court resorted to Article 31(3)(c) to apply general rules of international law, including rules pertaining to the use of force, to examine whether the measures taken by the United States were necessary under the Treaty of Navigation and Commerce on the basis of which the Court had jurisdiction.[35] In that particular case, the principle of systemic integration allowed the Court to extend its jurisdiction *ratione materiae* in order to judge the behaviour of the United States in the light of rules for which the Court, strictly speaking, had no jurisdiction. It is not surprising that the decision of the Court stirred some unease, not only among legal scholars,[36] but also among judges themselves.[37] This 'bold use'[38] of the principle of systemic integration led the Court to change the applicable law.[39] It proves a makeshift tool to create an opportunity for the Court to say a word about the use of force in the Gulf. It can reasonably be contended that the principle of systemic integration cannot go as far as displacing the applicable law. 'Taking into account' other rules of international law applicable between the parties does not mean that the 'normative environment' of the rule being interpreted can displace the latter, especially before a judge who does not have jurisdiction regarding the former. This decision of the ICJ has certainly stirred some unease as to the possible praetorian manipulations to which the rule enshrined in Article 31(3)(c) of the Vienna Convention can be subject. The more reasonable use of Article 31(3)(c) in the case *Djibouti v France*[40] has done little to expunge this suspect use of that provision in the *Oil Platform* case.

[34] ICJ, *Oil Platform* (Decision of 6 November 2003) [2003] ICJ Rep.

[35] ibid para 78.

[36] See the criticisms of: P d'Argent, 'Du commerce à l'emploi de la force: l'affaire des plates-formes pétrolières (arrêt sur le fond)' (2003) *AFDI* 655 ff.

[37] See: the Opinion of Judge Buergenthal, Judge Higgins, or the Opinion of Judge Kooijmans.

[38] See: C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (n 28) 309.

[39] ibid.

[40] ICJ Reports, 1999, paras 113–14:

> The provisions of the 1977 Treaty of Friendship and Co-operation are 'relevant rules' within the meaning of Article 31, paragraph (3)(c), of the Vienna Convention. That is so even though they are formulated in a broad and general manner, having an aspirational character. According to the most fundamental of these rules, equality and mutual respect are to govern relations between the two countries; co-operation and friendship are to be preserved and strengthened. While this does not provide specific operational guidance as to the practical application of the Convention of 1986, that Convention must nevertheless be interpreted and applied in a manner which takes into account the friendship and co-operation which France and Djibouti posited as the basis of their mutual relations in the Treaty of 1977. . . . The Court thus accepts that the Treaty of Friendship and Co-operation of 1977 does have a certain bearing on the interpretation and application of the Convention on Mutual Assistance in Criminal Matters of 1986. But this is as far as the relationship between the two instruments can be explained in legal terms. An interpretation of the 1986 Convention duly taking into account the spirit of friendship and

This being said, the case law of the Court pertaining to Article 31(3)(c) is difficult to evaluate, for the Court has not always been willing to expressly invoke that principle while carrying out an interpretation of the same nature. For instance, the Court impliedly applied a principle of systemic integration in its *Namibia* advisory opinion where it deemed that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation'.[41] In its case law pertaining to the application of human rights obligations, the Court, under the guise of the principle of *lex specialis*, also made use of the principle of systemic integration. Indeed, it actually engaged in an interpretation of the protection of the rights of individuals that reconcile human rights law and international humanitarian law.[42] In these cases, the Court resorted to the principle of *lex specialis* less to solve a conflict of norms than to determine the norm of reference of the normative environment of the obligations at stake.[43]

The principle of systemic integration has also been expressly referred to by regional courts – and especially human rights courts[44] or by international arbitral tribunals – as is illustrated by the 2005 Iron Rhine Railway arbitral award (*Ijzeren Rijn*).[45] The WTO appellate body also applied it in the *EC – Measures Affecting the Approval and Marketing of Biotech Products*.[46]

co-operation stipulated in the 1977 Treaty cannot possibly stand in the way of a party to that Convention relying on a clause contained in it which allows for non-performance of a conventional obligation under certain circumstances. The Court can thus not accede to the far-reaching conclusions on the impact of the Treaty of 1977 upon the Convention of 1986 put forward by the Applicant.

[41] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 21 June 1971, para 53.

[42] See in particular: ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep, para 25.

[43] See: V Gowlland-Debbas, 'The Right to Life and Genocide: The Court and International Public Policy' in L Boisson de Chazournes and P Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge, Cambridge University Press, 1999) 315 ff.

[44] See, eg: ECtHR, *Golder v United Kingdom* (1975) Series A No 18, 13 f; see also: *Loizidou v Turkey* (1996) Reports 1996-VI, para 44. More recently, see *Al-Adsani v United Kingdom*, App No 35763/97 (2001), ECHR – 2001-XI, 79, *Fogarty v United Kindgdom* App No 37112/97 (2001), ECHR – 2001-XI, 157; *McElhinney v Ireland*, App No 31253/96 (2001), ECHR – 2001-XI, 37; *Bankovic v Belgium and others*, ECHR 2001-XII, 351. See for an insightful analysis of the variations in the use of the principle of systemic integration by the European Court of Human Rights: V Tzevelekos, 'The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systemic Integration' (2010) 31 *Mich J Int'l L* 621.

[45] Arbitration regarding the *Iron Rhine Railway, Kingdom of Belgium v Kingdom of the Netherlands* (24 May 2005) available at www.pca-cpa.org, para 58, 79. See the remarks of: P d'Argent, 'De la fragmentation à la cohésion systémique: la sentence arbitrale du 24 mai 2005 relative au Rhin de fer (Ijzeren Rijn)' in *Droit du pouvoir, pouvoir du droit, Liber amicorum Jean Salmon* (Bruylant, 2007) 1113–37.

[46] (29 September 2006) WT/DS291/R; WT/DS292/R; WT/DS293/R, para 7.68.

It is worthy of mention that in all these cases, the normative environment upon which interpretation has been based according to the principle of systemic integration has not always been construed in the same manner, especially regarding the similarity that must exist between the respective memberships to the two instruments at stake.[47] Some of these tribunals have themselves been seesawing between different uses of the principle of systemic integration.[48]

Leaving aside these controversies as to the *material* scope of the principle of systemic integration, it is important, for the sake of this chapter, to shed some light on the customary status of the principle of systemic integration. In this respect, it can be defended that the principle of systemic integration is of customary nature. Indeed, Article 31 of the Vienna Convention on the Law of Treaties as a whole is traditionally seen as customary international law.[49] There seems to be no reason why the principle of systemic integration would not be endowed with a customary character, as are all other principles of interpretation contained in Article 31. This seems further underpinned by the numerous abovementioned decisions by international tribunals which have resorted to that interpretative principle. The customary character of the principle of systemic integration is not limited to the interpretation of treaties. Although its conventional consecration is limited to the law of treaties, it does not seem unreasonable to submit that the principles governing the interpretation of customary international law and unilateral acts mirrors the interpretative principle devised for international treaties.[50]

[47] See the very restrictive interpretation by the WTO Appellate body in: *EC – Measures Affecting the Approval and Marketing of Biotech Products* (29 September 2006) WT/DS291/R; WT/DS292/R; WT/DS293/R, para 7.68 ('Indeed, it is not apparent why a sovereign State would agree to a mandatory rule of treaty interpretation which could have as a consequence that the interpretation of a treaty to which that State is a party is affected by others of international law which that State has decided not to accept'). On this point, see the remarks of B Simma, 'Universality of International Law from the Perspective of a Practitioner (2009) 20 *Eur J Int'l L* 276–77.

[48] See V Tzevelekos, 'The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systemic Integration, (2010) 31 *Mich J Int'l L* 621.

[49] See generally: JM Sorel, 'Article 31' in P Klein and O Corten, *Les Conventions de Vienne sur le Droit des Traités. Commentaire article par article* (Bruxelles, Bruylant, 2006) 1289–1334; ME Villiger, *Customary International Law and Treaties: A Study of their Interactions and Interrelations with Special Consideration of the 1969 Vienna Convention on the Law of Treaties* (Dordrecht, Martinus Nijhoff Publishers, 1985) 334 ff; see: ICJ, *Territorial Dispute (Libyan Arab Jamahiriya v Chad)* [1994] ICJ Rep, para 6; *Kasikili/Sedudu Island (Botswana v Namibia)* [1999] ICJ Rep, para 1059; *LaGrand (Germany v United States of America)* [2001] ICJ Rep 501, para 99. See: *Affaire concernant l'apurement des comptes entre le Royaume des Pays-Bas et la République Française en application du Protocole du 25 septembre 1991 additionnel à la Convention relative à la protection du Rhin contre la pollution par les chlorures du 3 décembre 1976 (The Netherlands v France)* (Award of 12 March 2004) UNRIAA, vol XXV, 312, para 103; WTO AB Report, *United States – Standards for Reformulated and Conventional Gasoline* (29 April 1996) WT/DS2/AB/R, 16–17.

[50] See on the principle of interpretation of unilateral acts: J d'Aspremont, 'Les travaux de la Commission du droit international relatifs aux actes unilatéraux des Etats' (2005) *RGDIP* 163.

B. The Relevance of Systemic Integration before Domestic Courts

The determination of the principles governing the interpretation of international law by domestic judges has long been a matter of contention. It is argued here that when applying the rules of another legal order, judges should heed the rules of interpretation of that legal order. In other words, the rules of a given legal order, even when applied by the judiciary of another legal order, should be interpreted according to the principles of interpretation of the legal order in which they originate.[51] Failing to do so, judges would simply apply another rule than the rule originating in that foreign legal order.[52] Such a position seems to have been convincingly supported by the Permanent Court of International Justice (PCIJ) with respect to the application of foreign domestic law.[53] This is true as much for foreign law as for international law when they are applied by domestic courts, as is confirmed by the practice pertaining to the interpretation of international law by domestic judges. Indeed, practice shows that when interpreting international law, domestic judges resort to the rules of interpretation of Article 31 – or the corresponding principles pertaining to customary international law or unilateral acts of states.[54] The absence of incorporation of the principles of interpretation of international law designed by international law in the domestic legal order does not bar their application by domestic judges, for the principle of systemic integration, as was explained above, can be deemed a customary rule of international law and consequently becomes part of domestic law in most states in the world. Even the so-called dualist domestic legal systems have usually endorsed a monist position regarding customary international law.[55] As a result, domestic judges are undoubtedly in a position to apply the customary principle of systemic integration when applying rules of international law.

[51] See regarding the application of the secondary rules of responsibility by domestic courts in case involving issues of state responsibility: A Nollkaemper, 'Internationally Wrongful Acts in Domestic Courts' 101 *Am J Int'l L* 760 (2007).

[52] See generally: A Nollkaemper, 'The Power of Secondary Rules of International Law to Connect the International and National Legal Orders' Amsterdam Center for International Law, Working Paper 2009, 22, available at www.ssrn.com/abstract=1515771 (last visited 1 June 2011).

[53] See: *Brazilian Loans (France v United States)* (Judgment) PCIJ Rep Series A No 21, para 72 ('Once the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force').

[54] See: below section II.C.

[55] See, eg: in the US, US Supreme Court, *The Paquete Habana*, 175 US 677, 678–79 (1900). For a contemporary reexamination of that jurisprudence, see DR Koslosky, 'Ghost of Horace Gray: Customary International Law as Expectation in Human Rights Litigation' (2008–09) 97 *Ky LJ* 615.

The conjugation of customary character of the principle of systemic integration and the idea that the interpretation of a norm should be based on the interpretative principles of its legal order of origin is not the only reason why domestic judges are in a position to apply the principle of systemic integration. It is also argued here that the principle of systemic integration can be applied by domestic judges by virtue of the abovementioned principle of *consistent interpretation* of domestic law with international law. Indeed, if read in conjunction with the principle of systemic integration which applies to all rules of international law, the principle of consistent interpretation of domestic law does not only call upon domestic judges to interpret domestic law in conformity with the international obligations of the state but also requires that such interpretation of domestic law rests on an interpretation of international law that does away with conflicts between the obligations of the state and other rules of international law. To correctly understand this articulation between the principle of consistent interpretation and the principle of systemic integration, it is necessary to recall that the principle of consistent interpretation has *spontaneously* been adopted by most domestic legal orders because of fear of a breach of international law that could lead to conflicts with other nations[56] or, because of the fiction that the domestic legislature necessarily takes into account the international obligations of the state when making law.[57] More recently, the principle of consistent interpretation has also been endorsed by virtue of the idea that domestic judges also constitute some sort of agents of the international legal order entrusted with the function of harmonising international law.[58] Whatever its rationale, this principle has classically been rooted in constitutional law.[59] In that sense, the principle of consistent interpretation is imposed upon the judge by the domestic legal order and does not stem from any international legal obligation.[60] And it is no surprise that a similar principle is found in regional legal orders, as is illustrated by the European legal order where European

[56] S Jay, 'The Status of the Law of Nations in Early American Law' (1989) 42 *Vand L Rev* 819, 821.

[57] *Restatement (Third) of Foreign Relations Law*, para 115 (1987). See also: US Supreme Court *Schooner Paulina's Cargo v United States* 11 US (7 Cranch) 52 (1812).

[58] See, eg: *Amerada Hess Shipping Corp v Argentine Republic*, 830 F2d 421 (2nd Cir 1987). See generally the comments of: CA Bradley, 'The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretative Role of International Law' (1997–98) 86 *Geo LJ* 479, 497.

[59] G Betlem and A Nollkaemper, 'Giving effect to Public International Law'(2003) 14 *Eur J Int'l L* 569, especially 573. They argue, however, that international is not completely neutral, see: ibid 574. See also the comments of: A von Bogdandy, 'Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law' (2008) *Int'l J Const L* 1–17.

[60] See the decision of the German Federal Court of 14 October 2004 in: *Görgülü* B VerfG, docket number 2 BvR 1481/04, English translation available at www.bverfg.de/entscheidungen/rs20041014_2bvr148104en.html (last visited 1 June 2011).

law ought to be interpreted in conformity with international law.[61] Consequently, domestic judges, being required by their own domestic law to interpret domestic rules in conformity with international law, simultaneously have to ensure that the obligations binding the state – and with which domestic law must be consistently interpreted – are in conformity with other rules of international law. In other words, because of the interaction between the (domestic) principle of consistent interpretation and the (international) principle of systemic integration, domestic judges end up being in charge of the twofold task of construing domestic law in a manner consistent with international law and, *at the same time*, reconciling conflicts between international obligations of the state and other existing international rules. This means that, by virtue of the domestic principle of consistent interpretation of domestic law, it is possible to root the principle of systemic integration in domestic law as well.

It is not entirely certain that application of the principle of systemic integration of international law by domestic judges by virtue of an international obligation (*top-down* application) and as the result of a voluntary choice of the state (*bottom-up* application) always leads to a consistent understanding of its substantive meaning. This means that it cannot be excluded that the manner in which domestic judges construe the source of systemic integration of international law impinges on their actual use of it. Such an assumption is however hard to verify, for domestic judges, as is demonstrated below, often fail to indicate the source of the interpretative principles that they apply. Such an affirmation thus remains mostly speculative. However, it cannot be entirely excluded that, if systemic integration of international law is seen as originating in an obligation imposed upon the state, domestic judges prove less amenable to such an 'obligatory' conception of the international legal order than if it seems to be a voluntary choice of the state.

C. Systemic Integration in the Practice of Domestic Courts

As has already been indicated above, domestic courts commonly ground their interpretation of international law in Article 31 of the Vienna Convention. They expressly do so when they base their interpretation on the object and purpose of the treaty in issue,[62] the ordinary meaning of its

[61] See: Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337; see also *Poulsen and Diva Corp* [1992] ECR-I 6019.

[62] German Federal Constitutional Court, 12 December 2000, *Jorgic Case*, Individual constitutional complaint, BVerfG, 2 BvR 1290/99; ILDC 132 (DE 2000); *Anonymous v Republic of Austria*, 16 December 2004, Final Appeal/Cassation, B 484/03; ILDC 139 (AT 2004); Supreme Court of Benin, 23 July 2003, Legal Opinion on the Compatibility of the Bilateral Agreement Between the Governments and the United States and Benin with Article 98 of the Rome Statute of the International Criminal Court, Case No 029-C; ILDC 844 (BJ 2003); Australian

terms,[63] the principle of good faith,[64] or any subsequent practice.[65] For the sake of this brief study, it is interesting to note that domestic courts are not only in a position to resort to the principle of systemic integration – as was demonstrated in the previous section – but actually engage in a systemic integration of international law. For instance, the Greek Court of Appeal of Piraeus ruled that the International Convention on Civil Liability for Oil Pollution Damage and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage had to be read as one single instrument.[66] Likewise, the Latvian Constitutional Court decided that the protection owed to diplomatic premises provided for by the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations did not go as far as to restrict the freedom of assembly.[67] Likewise, the Italian Court of Cassation contended that the (customary) rule of sovereign jurisdictional immunity must be read in conjunction with the European Convention on State Immunity, the Inter-American Draft Convention on Jurisdiction Immunity of States, the 1980 Rome Convention on the Law Applicable to Contractual Obligations which provides for a limitation to foreign state jurisdiction immunity.[68]

As these cases demonstrate, systemic integration can be witnessed when domestic judges are confronted with a conflict between the international rules which they are asked to apply.[69] In these cases, systemic integration is rarely express and takes the form of a conciliatory interpretation of international legal rules which could otherwise be deemed

High Court, *Povey v Quantas Airways Ltd and British Airways Plc*, Appeal judgment, (2005) HCA 33, ILDC 506 (AU 2005) 216 ALR 427, (2005) 79 ALJR 1215.

[63] Belgian Court of Cassation, 27 June 2006, *Sabanci v Erdal* (Appeal in cassation) No P 05 1491 N, (2006) Journal des Tribunaux 642, ILDC 592 (BE 2006); Dutch Supreme Court, *Secretary of State for Finance v X Inc*, 1 November 2000, Final appeal judgment, Case No 35398; ILDC 1073; Australian High Court, *Povey v Quantas Airways Ltd and British Airways Plc* (Appeal judgment) (2005) HCA 33, ILDC 506 (AU 2005) 216 ALR 427, (2005) 79 ALJR 1215; Indonesian Constitutional Court, 23 October 2007, *Sianturi and ors v Indonesia*, Constitutional Review, Nos 2, 3/PUU-V/2007; ILDC 1041 (ID 2007).

[64] UK House of Lords, 9 December 2004, *Regina (European Roma Rights Centre) v Immigration Officer at Prague Airport and another*, Appeal, (2004) UKHL 55, ILDC 110 (UK 2004); Indonesian Constitutional Court, 23 October 2007, *Sianturi and ors v Indonesia*, Constitutional Review, Nos 2, 3/PUU-V/2007; ILDC 1041 (ID 2007).

[65] Ontario Court of Appeal, 30 June 2004, *Bouzari and ors v Iran*, Appeal decision, 71 OR (3d) 675 (Ont CA); ILDC 175 (CA 2004), (2004) 243 DLR (4th) 406; 2004 CarswellOnt 2681; 122 CRR (2d) 26; (2004) OJ No 2800; 2004 CanLII 871 (ON CA).

[66] Greek Court of Appeals of Piraeus, 16 February 2004, *Marine Environmental Services MC and Environmental Protection Technical SA v International Oil Pollution Compensation Fund 199*2, Appeal Judgment No 103/2004, ILDC 855 (GR 2004).

[67] Latvian Constitutional Court, 23 November 2006, *Assemblies Case*, *Agešins and ors v Parliament of Latvia (Saeima)*, Constitutional Review, Case No 2006-03-0106; ILDC 1062 (LV 2006).

[68] Italian Court of Cassation, 22 July 2004, *Verspignani v Bianchi* (Final appeal on a preliminary question) No 13711; ILDC 556 (IT 2004), Foro Italiano I-428 (2005).

[69] Latvian Constitutional Court, (n 67).

contradictory.[70] Systemic integration may thus not always be a goal in itself but results from the attempts of domestic judges to provide consistent interpretation of international law. Yet, the implicit systemic integration of international law by domestic courts is not only a by-product of conciliatory interpretation. Indeed, the systemic integration of international law by domestic courts is not constricted to the law applicable to the case of which they are seized. Interestingly, when domestic courts venture into a systemic integration of international law, they not only take into account the rules binding upon the state but also the rules of international law by which the state is not bound.[71] The fact that they do not balk at taking into account rules that are not applicable in the case shows that the systemic integration of international law by domestic is not only a side-effect of their endeavours to make conciliatory interpretations of international rules. It can also be a more conscious and purposed enterprise.

It is important to note that, in the cases referred to above, the systemic integration was rarely decisive as it was often used to shore up a conclusion already reached by the Court[72] or which could have been reached otherwise. However, this does not thwart the conclusion that domestic courts, while being in a position to make use of the principle of domestic integration, occasionally carry out a systemic integration of international law. Such an integration of international law has usually manifested itself in a conciliatory interpretation of the rules but not exclusively, for domestic judges have occasionally integrated rules which were not applicable to the case of which they were seized. It is the aim of the following section to discuss a few of the implications of this possibility – confirmed by the practice – of domestic judges conducting a systemic integration of international law.

IV. DOMESTIC COURTS AS ARCHITECTS OF THE CONSISTENCY OF THE INTERNATIONAL LEGAL ORDER

As has been explained by Lauterpacht, 'it is a fallacy to assume that the existence of [rules of interpretation of international law] is a secure safeguard against arbitrariness and impartiality'.[73] Indeed, the principles of

[70] Greek Court of Appeals of Piraeus, (n 66); Italian Court of Cassation, (n 68); Latvian Constitutional Court, (n 67); Argentinean Supreme Court, 10 May 2005, *Office of the Public Prosecutor v Lariz Iriondo*, Ordinary Appeal Judgment, L.845XL, Vol 328; ILDC 125 (AR 2005); Indonesian Constitutional Court, 23 October 2007, *Sianturi and ors v Indonesia*, Constitutional Review, Nos 2, 3/PUU-V/2007; ILDC 1041 (ID 2007).

[71] Indonesian Constitutional Court, (n 70); Italian Court of Cassation, (n 68).

[72] Argentinean Supreme Court, n 70); Indonesian Constitutional Court, (n 70); Italian Court of Cassation, (n 68).

[73] H Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 *BYIL* 48, 53.

interpretation of international law provided for by the Vienna Convention on the Law of Treaties do not in any way rein in the open texture[74] of law. Interpretation of law continues to take place in a context to which judges are not completely insensitive.[75] The same is true of the principle of systemic integration which can pave the way for different interpretations of international law, and hence, diverging conceptions of the international legal order (section IV.A). A few words must thus be said about the different constraints which bear upon the interpretation of international law respectively by domestic and international judges and which could lead to different interpretations of that law (section IV.B). Finally, the chapter will elaborate on the theoretical possibility – underpinned by the practice reported above – of domestic courts using the principle of systemic integration as a tool for furthering the integration of international law, for this is not without impact on the function and the role played by domestic judges (section IV.C).

A. Multiple Uses of the Principle of Systemic Integration

The considerable leeway inherent in the principle of systemic integration stems from the choice of the norm of reference on which interpretation will be based. In particular, the determination of the normative environment of the interpreted rule leaves much discretion to the interpreter.

Among the vast array of different interpretations that can be carried out by virtue of the principle of systemic integration, not all necessarily lead to a greater development of international law. Indeed, it is conceivable that international law may be interpreted on the premise of its unity and account taken of other rules in force while still providing a very restrictive interpretation of international law. In other words, interconnection between international rules can possibly provide very restrictive readings of each of them.[76] The practice of international tribunals does not offer any such example but this use of the principle of systemic integration is utterly conceivable.[77]

[74] H Hart, *The Concept of Law*, 2nd edn (Oxford, Oxford University Press, 1997) 124 ff.

[75] See generally: G Schwarzenberger, 'Myths and Realities of Treaty Interpretations: Articles 25–29 of the Vienna Draft Convention on the Law of Treaties'(1968) 9 *Va J Int'l L* 1, 15.

[76] While not formally applying the principle of systemic integration, the US Supreme Court, in *Alvarez Machain* gave a very narrow understanding of the Extradition Treaty between Mexico and the US, resorting to other rules of international law to back its contention. For a criticism, see MA Rogoff, 'Interpretation of international agreements by domestic courts and the politics of international treaty relations: reflections on some recent decisions of the United States Supreme Court' (1996) *Am U J Int'l L & Pol'y* 559.

[77] While not providing a clear example of restrictive interpretation of international law, the practice of international tribunals shows that the principle of systemic integration has been applied in a manner that further fragments international law. This has been argued

Even if it is used in a manner favourable to the greater development of international law, there are various degrees of integration which can be achieved through the principle of systemic integration. For instance, the extent to which the principle of systemic integration can be used to reinforce the integration of the international legal order can go as far as the promotion of an international legal order endowed with all the features of a constitutional order that rests on hierarchy in procedures and substantive standards.[78] Such a use of the principle of systemic integration permeates the case law of the European Court of Human Rights.[79] In that sense, the principle of systemic integration can be wielded as a tool that enhances the formal and substantive unity of international law.[80] Yet, this very integrationist use of the principle of systemic integration is not the only manner in which this principle of interpretation can be wielded. Other, less integrationist, uses can be envisaged. Such uses are more in line with the practice reported above, for they will usually not imply any hierarchy of international rules or values. This is not to say that the systemic integration of international law by domestic courts is minimalistic. Indeed, as explained above, domestic courts have happened to conduct systemic integration of rules which were not binding upon the state nor applicable to the case of which they were seized.[81]

B. Dissimilar Constraints on Domestic and International Judges

As has already been mentioned, there are some cogent reasons to consider that when applying and interpreting the rules originating in another legal

with respect to the *Loizidou* decision of the ECHR. See: *Loizidou v Turkey*, 18 December 1996, Reports, 1996-VI, 2216, 2221 ff. See also: *Behrami v France* & *Saramati v France, Germany and Norway* (Decision as to the admissibility) App Nos 71412/01 & 78166/01, para 129 ff. See on this particular use of systemic integration: V Tzevelekos, 'The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systemic Integration' (2010) 31 *Mich J Int'l L* 621, 671 f or 677.

[78] See for an analysis of the possible features that make a legal order a constitutional order: B Fassbender, *The United Nations Charter as the constitution of the international community* (Leiden, Martinus Nijhoff Publishers, 2009); B Fassbender, 'The United Nations Charter as constitution of the international community' (1998) 36 *Colum J Transnat'l L* 529–619; *cf* G Arangio-Ruiz, 'The "Federal Analogy" and UN Charter Interpretation: a crucial issue' (1997) 8 *Eur J Int'l L* 1.

[79] See generally: M Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern L Rev* 1, 4.

[80] See generally on the distinction between formal and substantive unity: PM Dupuy, 'L'unité de l'ordre juridique international, Cours général de droit international public' (2002) 297 *Recueil des Cours* 9.

[81] Indonesian Constitutional Court, 23 October 2007, *Sianturi and ors v Indonesia*, Constitutional Review, Nos 2, 3/PUU-V/2007; ILDC 1041 (ID 2007); Italian Court of Cassation, 22 July 2004, *Verspignani v Bianchi* (Final Appeal on a Preliminary Question) No 13711; ILDC 556 (IT 2004), Foro Italiano I-428 (2005).

order, a judge should always interpret these rules according to the principles of interpretation of that other legal order.[82] If this is true, domestic and international judges, when they engage in an interpretation of international law, should use the same principles of interpretation designed by international law. This does not mean, however, that domestic and international judges, although they should be using the same principles of interpretation of international law, will necessarily interpret international law in the same manner. On the contrary, it is argued here that there are various reasons why the systemic interpretation of the international legal order by domestic judges may depart from that by international judges.[83]

In particular, it can hardly be contested that domestic judges are not subject to the same constraints as international judges.[84] International judges are entrusted with the powers that have been granted to them by those have accepted to subject themselves to their authority. As a result, the use that an international judge can make of its powers is not totally alien to the manner in which the states involved will subsequently perceive international justice and dispute settlement as a whole.[85] This is why international courts – especially since they generally feel themselves entrusted with the role of guardian of international society – can be more amenable to the subtleties of inter-state relations.

Conversely, when they are applying and interpreting international law, domestic courts do not usually see themselves as protector of the political *equilibrium* of the international society. The subtle contingencies of the international society as well as states' sensitivities do not constitute a chief concern for domestic courts,[86] especially since their powers are not based on the consent of those subject to it. Hence, domestic judges commonly feel less constrained than international judges in the interpretation that they give to international law. This does not mean, however, that domestic judges are totally indifferent to contingencies of international relations. They surely heed some of the imperatives dictated by the foreign relations

[82] *cf* above section III.B. as well as nn 52–53.

[83] The differences of interpretation between domestic and international judges has sometimes be dubbed the 'dual-treaty interpretation', see: M Halberstam, 'A Treaty is a Treaty is a Treaty' (1992) 3 *Va J Int'l L* 51 –54.

[84] See generally on the diverging jurisprudential environments of domestic and international courts: MA Rogoff, 'Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court' (1996) 11 *Am U J Int'l L & Pol'y* 559, 611; see also: J Bederman, 'Revivalist Canons and Treaty Interpretation' (1993–94) 41 *UCLA L Rev* 953.

[85] It is for instance well known that the ICJ was partly boycotted by developing states after its decision in the *South West African* case. It was not until the Court's condemnation of the US in the *Nicaragua* case in 1986 that the suspicions of these countries towards the Court were allayed.

[86] See for a similar argument: E Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (n 19); see also: E Benvenisti and GW Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law' (n 16) 68.

between their state and others. Yet, they will usually be less sensitive to the political contingencies. The possibility for domestic judges to carry out integrationist interpretations of international law, even when they come at the expense of their state's interest, is simultaneously bolstered by the separations of powers enshrined in most domestic orders.

There is another set of factors of differentiation between domestic and international jurisdiction that ought to be mentioned. This relates to the *material means* when handling cases involving issues of international law. It should not be overlooked that domestic courts are very often ill-equipped to deal with questions of international law in the sense that they may not have the human and scholarly resources to engage in wide-ranging studies of international law. Moreover, when confronted with conflicting obligations contracted by the state, domestic courts will find very little help in the scant and sometimes obscure conflict-solving principles of international law.[87] As a result, they may feel a lot of unease towards any finding of inconsistency between international rules. The scarcity of their international legal expertise for providing a conciliatory interpretation of all the legal obligations contracted by the state may explain why domestic courts prove potentially more inclined to stifle any possible conflict between the rules of international which they are supposed to apply, and especially those binding the state.

There is probably a wide variety of other constraints that affect the use of international law by domestic judges. For the sake of this chapter, the lesser amenability of domestic judges to the political contingencies of the international arena, the separation of powers at the domestic level as well as the scarcity of the international legal expertise at the disposal of domestic judges sufficiently explain why the use of the principle of systemic integration by domestic judges can potentially be more integrationist than that by international courts.

C. Domestic Judges as Agents of the Greater Integration of International Law

The previous sections have shown that domestic judges are in a position to use the principle of systemic integration and carry out a very integrationist interpretation of international law. In doing so, domestic judges can potentially elevate themselves into architects of the consistency of the international legal system. The limited practice mentioned above also underpins that conclusion. Yet, one must acknowledge that the use of the principle of systemic integration by domestic judges can simultaneously yield contradicting interpretations, for each domestic court, as was

[87] *cf* n 30.

explained above, can carry out various systemic integrations of international law. First, because systemic integration can yield very different interpretations, even ones that restrict international law.[88] Second, even systemic integration favourable to the greater development of international law can be of various degrees and lead to different results. Such a risk of diverging systemic integrations of international law is probably higher at the domestic level than at the international level, although, as is demonstrated by the practice, international tribunals have also made diverging uses of the principle of systemic integration.[89] Yet, this possible dissonance among domestic judges engaged in a systemic integration of international law should probably not be exaggerated. The limited practice referred to above points to a rather integrationist interpretation of international law with few obvious divergences.[90]

Be that is it may, the fact that positive law as well as practice show that domestic judges are in a position to integrate international law – with significant room for manoeuvre that can include some bold systematisation of international law – will surely be welcomed by those scholars who have always been sympathetic to constitutionalist understandings of international law. These scholars will hail the possibility to further integrate the international legal system through the systemic interpretation of international law by domestic courts. This is not to say that participating in the greater integration of international law amounts to reinforcing its constitutional character. Constitutionalist accounts of international law – and their idea of transcendental substantive principles – by far surpass the idea that law be made consistently with existing rules of the legal order and rests on the belief in the existence of substantive foundations.[91]

[88] *cf* above section IV.A.

[89] *cf* in particular the 2005 award in the *Iron Rhine* arbitration (n 45) paras 58 and 79 with the ICJ in the *Oil Platforms* case (n 34) para 41. Some international courts have also not been consistent in their use of the principle of systemic integration. A good illustration is provided by the European Court of Human Rights. See on this point: V Tzevelekos, 'The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systemic Integration' (2010) 31 *Mich J Int'l L* 621.

[90] *cf* above section III.C.

[91] See for a few illustrations: C Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course on Public International Law' (1999) 281 *Recueil des Cours* 10, especially 237, 306; E de Wet, 'The International Constitutional Order' (2006) 55 *Int'l & Comp L Q* 51; E de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order' (2006) 19 *Leiden J Int'l L* 611; H Mosler, *The International Society As a Legal Community* (Alphen aan den Rijn, Sijthoff & Noordhoff, 1980) 17 f. See also: 'Der "Gemeinschaftliche Ordre Public" in Europäischen Staatengruppen' (1968) *RDDI vol 21*, 523, 532; J Delbrück (ed), *New Trends in International Lawmaking – International 'Legislation' in the Public Interest* (Berlin, Duncker & Humblot) especially 18 f; B Simma, 'From Bilateralism to Community interest' *Recueil des Cours* 1994-VI vol 250, 217 ff, especially 233; A Peters, 'Compensatory Constitutionalism: The Function of Potential of Fundamental International Norms and Structure' (2006) 19 *Leiden J Int'l L* 579; PM Dupuy, 'Some reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi' (2005) 16 *Eur J Int'l L* 131;

However, the systematicity and consistency of international law that can potentially accompany the systemic integration of international law by domestic judges is classically perceived as a necessary condition for international law to weather the emergence of common substantive principles.

Scholars who embrace a very monistic understanding of the relationship between international and domestic law will similarly applaud the integrationist role taken on by domestic judges. It is true that the systemic integration of international law should not be conflated with a monist understanding of international law. One can still further the integration of the international legal order while backing away from a monist vision of international law. However, monism and systemic integration of international law by domestic judges bears some resemblance with respect to the conception of the role of domestic judges. Indeed, according to a purely monist reasoning, the international legal order encompasses the domestic legal orders of Member States and domestic courts naturally are 'agents of the international community' entrusted with the duty to give a systemic and consistent interpretation of international law as a whole.[92] Against this monist backdrop, domestic judges are more inclined to participate in the systematisation of the international legal order to which it belongs.

The possibility of domestic judges playing the role of architects when using the principle of systemic integration of international law may nonetheless not please everyone and some may find the 'integrationist' role slightly unsettling. Such a possible role for domestic judges is especially not self-evident if one assumes that the international legal order and the domestic legal orders are distinct legal orders.[93] There is, *per se*, no reason why judges of a given legal order ought to participate in the systematisation of another legal order. In that sense, domestic judges are solely entrusted with the power to apply the law of the domestic legal order

JHH Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 *ZaöRV* 547, especially 556 f; C Walter, 'International Law in a Process of Constitutionalization' in J Nijman and A Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford, Oxford University Press, 2007) 191 ff. It is interesting to note in this respect that in its conclusions, the ILC Study Group on the Fragmentation of International Law alluded to the 'constitutional character of the UN Charter', *Yearbook of the International Law Commission vol II*, part two, para 35. On Constitutionalism in general see: A von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 47 *Harv Int'l LJ* 223.

[92] G Scelle, 'Règles générales du droit de la paix' (1933) 46 *Recueil des Cours* 331, 356. See on the Monism of Kelsen according to whom international law ought to have supremacy but is not necessarily endowed with it: H Kelsen, 'Les rapports de système entre le droit interne et le droit international public' (1926) 14 *Recueil des Cours* IV, 276 ff.

[93] See: J d'Aspremont and F Dopagne, 'Kadi: the ECJ's Reminder of The Elementary Divide Between Legal Orders', available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1341982 (last visited 1 June 2011) (n 3); see also: G Arangio-Ruiz, 'International Law and Interindividual Law' in Nijman and Nollkaemper (n 91) 39 ff, especially 42.

which empowers them to do so and do not need to heed the systemic consistency of legal orders distinct from their own.

Domestic judges' possible role as architects can equally be opposed by those who believe that the integration of international law is a function reserved to legal scholarship and not to judges. The role of architects of the consistency of the international legal order that domestic judges can potentially endorse through systemic integration can be seen as an encroachment on what has classically been seen as a task of international legal scholars. Indeed, international legal scholars have usually understood their task as being directed at the depiction and explanation of the rules of international law in a systemic and consistent manner.[94] Legal scholars have always had the tendency to see international legal order as a legal system[95] and it was classically assumed that systematising the international legal order was one of the responsibilities of legal scholars. This is why the 'integrationist' role of domestic judges that could stem from the application of the principle of systemic integration could be perceived as outweighing the classical role of scholars in the systematisation of international law and raise the hackles of those who deem such a task to be the exclusive responsibility of scholars.

The potential involvement of domestic judges in the greater integration of international law by virtue of the principle of systemic integration can thus yield opposing sentiments. It must be acknowledged that whether domestic judges should or should not engage in furthering the integration of domestic law and endorse the role of an architect boils down to a political question, for it hinges on whether one wants to leave the integration of international law exclusively to international actors and how the latter are to be understood. It is not the aim of this chapter to take a position on whether or not domestic judges should engage in the integration of the international legal order through interpretation of international norms. That is a fundamental theoretical issue that touches upon the organisation of the international law making and the delineation of the law-making powers of the actors involved which is beyond the ambit of this brief study.

Although it leaves aside the question of whether domestic judges *should* or *should not* further the integration of international law, this chapter, drawing on the practice mentioned above, contends that the fact that domestic judges are in a position to promote a very consistent conception

[94] According to Kelsen, 'Un ordre juridique . . . doit être conçu par la science du droit comme un système de normes placées dans un rapport réciproque, où les unes sont subordonnées aux autres': H Kelsen, 'Théorie du droit international public' (1953) *Recueil des Cours* III, 6; see also: M Virally, *La pensée juridique* (Paris, LGDJ, 1999) XXII f; and the enlightening and famous interpretation of the role of scholars by Reuter, 'Principes de droit international public' (1961) 103 *Recueil des Cours* II, 459.

[95] See the enlightening and insightful comments of J Combacau, 'Le droit international: bric-à-brac ou système' (1986) 31 *Arch Phil Droit* 85.

of international law through systemic integration should not be bemoaned. Judges can work well towards the consistency and systemic character of other legal orders whose norms they apply in their own legal order. Likewise, there is no reason why legal scholars should enjoy a monopoly on systemic interpretation of international law.[96] On the contrary, the 'competition' between judges and scholars in terms of consistent and systemic interpretation of international law could surely bring about diversity in the understanding of the international legal system.[97] It could also make those scholars that enthuse about constitutionalist discourses about international law more pragmatic and attuned to the practical solutions of legal problems.[98]

While coming to terms with the possible integration of international law by domestic judges through systemic integration, this chapter ends by formulating a caveat. It is has been demonstrated that systemic interpretation of international law by domestic judges can potentially contribute to the greater integration of the international legal order. As was said, this can foster diversity in the understanding of international law and prod international legal scholars towards more modesty. This is not to say, however, that we should wholeheartedly and unconditionally acclaim the role of architects potentially bestowed upon domestic courts through systemic integration of international law. This is first, because the risk of contradictory systematisations of international law, although widely exaggerated as is illustrated by the – albeit limited – practice mentioned above, continue to lurk behind the growing application of international law by domestic judges. But the attention that is drawn here to the risks inherent to the integrationist role played by domestic judges is not limited to diverging interpretations of international law. Unconstrained by the subtle equilibrium of the international society, domestic judges can also be unaware of dangers and oversimplifications inherent in an *impulsive and unbridled integration* of international law.[99] While domestic judges' contribution to the systematisation of international law may help tone down the idealism that sometimes permeates constitutionalist understanding of international law, it can also give undue weight to the pipe dream of a constitutional legal order that rests on allegedly universally accepted global values. When applying the principle of systemic inte-

[96] See on the contemporary self-centrism of international legal scholars: J d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2008) 19 *Eur J Int'l L* 1075.

[97] See the well-known plea for diversity made by Martti Koskenniemi, eg: 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern L Rev* 1.

[98] See on the need for a more pragmatic legal scholarship: J d'Aspremont, 'La doctrine du droit international face à la tentation d'une juridicisation sans limites' (2008) *RGDIP* 849.

[99] J d'Aspremont, 'International Law in Asia: The Limits to the Western Constitutionalist and Liberal Doctrines' (2008) 13 *AsianYBIL* 89. See: J d'Aspremont, 'The Foundations of the International Legal Order' (2007) 12 *FinnishYBIL* 261.

gration, domestic judges should thus not delude themselves as to the existence of a sweeping substantive and procedural harmony of the international legal order and should instead remain amenable to the realities of international law. International law-making procedures remain fragmented and decentralised. While the practice mentioned above does not prove that domestic judges have been lured by the mirage of a fully entirely integrated international legal order, the growing place of international law in domestic legal orders calls for a greater awareness by domestic judges of the risks inherent in an all-out systemic interpretation of international law at the domestic level.