THE POWER OF SECONDARY RULES OF INTERNATIONAL LAW TO CONNECT THE INTERNATIONAL AND NATIONAL LEGAL ORDERS

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André Nollkaemper*

I. INTRODUCTION

When states make international norms part of the national legal order, whether through automatic incorporation or transformation, such norms start to lead a double life and exist simultaneously at both international and national levels. For instance, fundamental human rights are both part of international law and of the law of most, if not all states, in the world.[1] War crimes and the crime of genocide are both part of the (international) law to be applied by the International Criminal Court (ICC)[2] and part of national law of many states of the world.[3] In such cases, we can properly speak of Multi-Sourced Equivalent Norms (MSENs).[4] As international law increasingly

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[1] See for instance JA Frowein, 'The Interaction between National Protection of Human Rights and the ECtHR' in R Wolfrum and U Deutsch (eds), *The European Court of Human Rights overwhelmed by Applications: Problems and Possible Solutions, International Workshop, Heidelberg, December 17-18, 2007* (New York, Springer Law Publishing, 2009) 51.

[2] Rome Statute of the International Criminal Court, (adopted 17 July 1998 enforce July 1, 2002) 2187 UNTS 90 (ICC).

[3] See e.g. C Kreß and P Benvenuti (eds), *The Rome Statute and Domestic Legal Orders, vol. I: General Aspects and Constitutional Issues* (Baden Baden, Nomos, 2000); William W Burke-White, 'Proactive Complementarity: the International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 *Harvard International Law Review* 53.

[4] See general definition in ____.

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regulates matters that also are covered by national law,[5] the existence of MSENs across the international/national divide norms will increase.

If international norms and their national counterparts are fully identical, no problems of inconsistency, or conflicting prescriptions, or authorizations need arise. Both norms will prescribe or authorise the same behavior. Performance of the international obligation will imply performance of national law, and vice versa. That may be the case in situations of automatic incorporation,[6] use of specific rules of reference,[7] or literal transformation (or as it is sometimes called: 'legislative ad hoc incorporation') of an international obligation in national law.[8]

However, identity between an international norm and its national counterpart is not guaranteed. For one thing, in case of 'legislative ad hoc incorporation' the content of a national norm frequently is not fully identical to the underlying international norm. For instance, many national criminal laws are either broader or narrower in terms of the definition of international crimes than the international definition of such crimes.[9] Frequently, the same will hold true for fundamental rights. Moreover, even if the contents of a domesticated norm is identical to the international original at the moment that that international norm becomes part of the national

[5] JHH Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy' (2004) 64 *Heidelberg Journal of International Law* 547; LF Bravo, 'International and Municipal Law: the Complementarity of Legal Systems', in RS.J Macdonald and DM Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine, and Theory* (The Hague, Martinus Nijhoff, 1984) 715; RY Jennings, 'The Judiciary, International and National, and the Development of International Law' (1996) 45 *International and Comparative Law Quarterly* 1.

[6] A Cassese, *International Law* (2nd edn Oxford, OUP, 2005) 220.

[7] WN Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (The Hague, TMC Asser Press, 2006) 7.

[8] Cassese above (n 6) 221.

[9] Ferdinandusse above (n 7) 117.

legal order, over time that identity may be lost. Subjected to differing normative systems and institutions, the international and the national variant of a norm may start to differ, leading to different and perhaps even competing prescriptions or authorisations.

At a systemic level, the separate existence of international norms and their national counterparts may have implications for the unity of international law. That unity is already limited at the international level.[10] These limits are multiplied by diverging interpretations at the national level. National laws and national organs interpret and apply international obligations in multiple ways and often contradict or even override them. This undermines not only uniform interpretation, but also essential features of the rule of law, notably generality, equality of application and certainty.[11]

To some extent, divergent interpretations at national level are an inevitable and even necessary consequence of the structural dualistic relationship between the international and the national legal order. The margin of appreciation doctrine is one of many reflections of this divide.[12] Indeed, it might be argued that the aspiration of unity of international law is and should be confined to the international level proper. However, given the frequent interactions between international and national law, surely some limits to national variations have to be set. The very rationale of an increasing part of international law lies precisely in the meaning and application it

[10] M Koskenniemi, 'The Politics of International Law – 20 years later' (2009) 20 *European Journal International Law* 7; M Koskenniemi, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553. See also AL Paulus, 'Subsidiarity, Fragmentation and Democracy : Towards the Demise of General International Law?' in T Broude and Y Shany (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity: Essays in Honour of Professor Ruth Lapidoth* (Oxford, Hart, 2008) 99.

[11] BZ Tamanaha, *On the Rule of Law. History, Politics, Theory* (Cambridge, CUP, 2004) 131.

[12] Y Shany, *Toward a General Margin of Appreciation Doctrine in International Law?* (2005) 16 *European Journal International Law* 907.

is given at national level. To limit the ambition of unity to the international level would make that a sterile and esoteric notion, devoid of much practical relevance.

This chapter will address one set of rules that may help to moderate the divergence between international norms and the national versions of such norms, and the resulting divergence of interpretations between states. It will discuss to what extent secondary rules of international law can induce convergence between international norms and domesticated international norms. I use the term 'secondary rules' to refer to those rules that define the normative context within which primary norms function and that thereby affect the operation of such primary norms.[13] Secondary rules include rules of interpretation, rules of change and rules of responsibility.[14] Whether two identical primary norms are given the same interpretation, or applied in a similar manner, depends in part on the question of whether they are governed by the same secondary rules.

The question then arises whether national courts, or other national organs that interpret or give effect to an international obligation that has been made part of national law, are to give effect to the same secondary rules that guide the interpretation and application of that norm in the international legal order. Should a national court interpret and apply national rules that are equivalent to an international norm, in the light of (secondary) international principles of interpretation? Or should they apply them as national rules in the light of national principles of interpretation? Should, for instance, a national court that considers individual criminality for

[13] HLA Hart, *The Concept of Law* (Oxford, OUP, 1961) 91.

[14] See for a definition of secondary norms including such aspects: TM Franck. *The Power of Legitimacy Among Nations* (Oxford, OUP, 1990) 184. In international law the term secondary rules is generally limited to the last form, following Ago's use of the concept, in which primary norms lay down rights and obligations ('rules of conduct'), secondary norms provide the consequences for breaches of primary norms. *See* the discussion by J Combacau and D Alland, 'Primary and Secondary Rules in the Law of State Responsibility: Categorizing International Obligations' (1995) 16 *Netherlands Yearbook of International Law* 81.

genocide consider questions of intent in the light of the relevant international principles, or should they only consider national law?[15]

In considering this question, it should be taken into account that secondary rules are constitutive of legal systems.[16] They inform and determine the connection between different primary rules and it is precisely by virtue of such secondary rules that, despite the wide variety of norms, adopted in different institutions by different actors, we can still speak of a legal system. [17] It is for this reason that the international and the national legal systems have in principle their own secondary rules and indeed constitute separate systems.[18]

It thus may be thought that the operation of secondary norms of international law is limited to the international system itself. International obligations that have been domesticated

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[15] The question arose in the *Van Anraat* case. Van Anraat, a Dutch businessman, was charged with providing chemicals to Saddam Hussein who used these chemicals in attacks in northern Iraq in the late 1980s. The Court of Appeals had to consider whether the criterion of intent as an element of complicity was to be assessed in accordance with domestic law or in line with the corresponding rules of international law. Court of Appeal, The Hague, *Public Prosecutor and ors v Van Anraat*, LJN BA4676, 2200050906-2; ILDC 753 (NL 2007).

[16] Hart above (n 13).

[17] ILC, 'Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law' (2006) UN Doc A/CN.4/L.628 para. 35.

[18] Of course, Hart did not consider that the secondary rules of international law had matured in a way that allowed international law to be qualified as a legal system; Hart above (n 13) 208. See for the term system in regard to international law eg Georges Abi-Saab, 'Cours Géneral de Droit International Public' (1987) 207 *Receuil des Cours*: *Collected Courses of the Hague Academy of International Law* 105. See also ILC, 'Report of the International Commission on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', para. 1, in Report of the ILC on its 58th Session, GAOR 61st session, Suppl. No. 10 UN Doc A/61/10, 407 (stating that 'International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hierarchical levels, their formulation may involve greater or lesser generality and specificity and their validity may date back to earlier or later moments in time').

have become part of a different normative universe.[19] They lead a separate life as national law, governed by separate secondary norms. [20] The point can be illustrated by *R v Safi (Ali Ahmed)*, in which the Court of Appeals held that national defences are available for international crimes that have been made punishable in national law.[21] This is likely to lead to varying interpretations, governed by national law, and to the possibility that a person is convicted of an international crime in one state on the basis of conduct which would not lead to a conviction for the same crime in another, even though that latter state may have enacted the same prohibition for that crime.[22]

Indeed, there is ample practice where national courts apply principles of national (statutory) interpretation without referring to international principles of interpretation.[23] While for instance the United States legal system has developed specific principles of treaty construction, these are not generally the same as rules of international treaty interpretation.[24] To

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[19] M Hakimi, 'Secondary Human Rights Law' (2009) 34 *Yale Journal of International Law* 596.

[20] See eg with regard to treaty interpretation: A Mestre, 'Les Traités et de droit interne' (1931-IV) 38 *Receuil des Cours* at 299 (arguing that national courts should interpret treaty law in the same way as domestic law). Also, with respect to English practice, CH Schreuer, 'The Interpretation of Treaties by Domestic Courts' (1971) 45 *British Yearbook of International Law* 257.

[21] *R v Safi (Ali Ahmed)* [2003] EWCA Crim 1809, CA(Crim Div), 74 BYIL (2003) 471.

[22] R O'Keeffe, commenting on *R v Safi (Ali Ahmed)* ibid.

[23] See e.g. Supreme Court of Pakistan, *Societe Generale de Surveillance S.A. v. Pakistan*, ILDC 82 (PK 2002), at para C5. See for a critical review of treaty interpretation by the US Supreme Court, short of what international law would require, JK Setear, 'A Forest with no Trees: The Supreme Court and International Law in the 2003 Term' (2004) 91 *Virginia Law Review* 579, 614.

[24] DJ Bederman, 'Revivalist Canons and Treaty Interpretation' (1994) 41 *UCLA Law Rev*iew 953; JF Coyle, 'Incorporative Statutes and the Borrowed Treaty Rule' *Virginia Journal of International Law*, forthcoming, 41 (discussing 'treaty canons'), www.ssrn.com/abstract=1373028 (accessed 14 September 2009). See also G Gaja, 'Italy' in FG Jacobs and S Roberts (eds), *The Effects of Treaties in Domestic Law* (London, Sweet & Maxwell, 1987) 107; Supreme Court of Norway, Hans-Jürgen Hartman M/S Kvitnes GmbH & Co KG v Ministry of Fisheries and Coastal Affairs, Final decision on civil interlocutory appeal, Case no HR-2007-00325-A; ILDC 818 (NO 2007).

the extent that the question should be answered in the latter sense and national organs are not guided by international secondary norms, the national interpretation and application of international norms indeed may undermine the unity of international law as it is received at domestic level.

However, it might also be argued that secondary rules of international law remain applicable to the interpretation, modification and termination of corresponding rules at national level. An international norm, while transformed or incorporated into national law, may remain under the guidance of the international legal order. International law then can have a normative impact on the national legal order that to some extent may contribute to a unity in the interpretation and application of international law. There is a substantial amount of state practice, referenced below, that supports the latter model and that seeks to maintain secondary level connections between an international norm and its national manifestations. [25]

Of course, the single fact that two or more states, or their courts, will be guided by the same secondary norms will not ensure uniformity of interpretation and application. The principles of treaty interpretation, for instance, are of a general nature. Given the dominant role of auto-interpretation, their application is likely to differ between states.[26] But at least it can then be said that there is a normative pull towards convergence.

In this article I review the foundations, scope and consequences of the application of secondary rules of international law at the national level, in particular by national courts, so as to

[25] See the references in CH Schreuer, 'The Interpretation of Treaties by Domestic Courts' 45 *British Yearbook of International Law* (1971) 272 et seq. See also FG Jacobs, 'Introduction' in *The Effects of Treaties in Domestic Law* above (n 24) xxix.

[26] Leo Gross, 'States as Organs of International Law and the Problem of Autointerpretation' in George Lipsky (ed), *Law and Politics in the World Community* (1953) 59-88; Prosper Weil, 'Le droit international enquête de son identité. Cours général de droit international public' (1992) 237 *Recueil des Cours* 220-23.

preserve some connection between the international and national manifestations of a norm. The article proceeds as follows. I first provide an overview of the type of situations in which the question of the application of international secondary norms to domesticated international norms may arise (section II). I then discuss whether, as a basis for application of international secondary rules, it is possible to construe the application of secondary rules of international law in terms of obligations (section III) In section IV I discuss, as an alternative foundation, the proposition that there exists an essential connection between primary and secondary norms that can survive the migration of a primary norm into a different legal system. Given that it is not possible to fully construe the effects of secondary norms in terms of obligations, in section V I present a perspective in which secondary rules of international law function as a normative penumbra that guides the interpretation and application of international norms in a different legal system. Finally, I examine to what extent different national (constitutional) arrangements governing the effect of international law in the national legal order may affect the impact of the normative penumbra of secondary rules of international law in the national legal order (section VI). Section VII contains conclusions.

II. SITUATIONS IN WHICH THE APPLICATION OF SECONDARY RULES OF INTERNATIONAL LAW MAY MAKE A DIFFERENCE

Secondary rules of international law may become relevant to the interpretation and application of domesticated international norms in at least five situations. First, and perhaps most importantly, they can affect the interpretation of national rules that emanate from or correspond to international law. It is a not uncommon for national courts to interpret a national norm that

directly or indirectly reflects an international norm in the light of that international origin, taking into account of the international principles that are relevant for determining the meaning of the original.[27] That practice recognizes that international obligations, also when these have been made part of national law, should be given the meaning ascribed to them by the system in which they originate.[28]

The national practice that falls in this category can be further divided into two categories. One category takes a narrow approach and confines international principles of interpretation to rules of national law that incorporate or transform a particular treaty obligation in national law. This category includes, in states with a system of automatic incorporation, international obligations as they have become part of national law and, in states with a system of transformation, statutes that expressly transform an obligation into national law – so-called 'borrowed treaty rules'.[29]

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[27] See eg House of Lords, *King v Bristow Helicopters Ltd*, Re M (on the application of CM), Appeal judgment, [2002] 2 AC 628; ILDC 242 (UK 2002), para 80; United Kingdom High Court, *NEC Semi-Conductors Ltd and ors v Inland Revenue Commissioners*, First instance claim for restitution [2003] EWHC 2813 (Ch); ILDC 260 (UK 2003); Supreme Court of New Zealand, *Attorney–General v Zaoui*, ILDC 81 (NZ 2005), para 12; Court of Cassation of Belgium, *Sabanci v Erdal*, Appeal in cassation, No P 05 1491 N, (2006) Journal des Tribunaux 642; ILDC 592 (BE 2006); Supreme Court of Argentina, Office of the Public Prosecutor v Lariz Iriondo, Ordinary Appeal Judgment, L.845.XL, Vol 328; ILDC 125 (AR 2005). See further R Gardiner, *Treaty Interpretation* (Oxford, OUP, 2008) 128-38. See also the examples given in E Criddle, 'The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation' (2004) 44 *Virginia Journal of International Law* 431. The Supreme Court of Israel adopted a similar approach in a 1980s case concerning the interpretation of the Warsaw Convention on Carriage by Air FH 36/84 *Teichman v Air France* IsrSC 41(1) 589.

[28] See e.g. House of Lords, *R. (Al Fawwaz) vs Governer of Brixton Prison*, [2001] UKHL 69, para 39 (in which Lord Slynn states that 'to apply to … treaties the strict canons appropriate to the construction of domestic statutes would often tend to defeat rather than to serve [their] purpose'). See also J Wouters and M Vidal, 'Non-Tax Treaties: Domestic Courts and Treaty Interpretation' in G Maisto (ed), *Courts and Tax Treaty Law* (Amsterdam, IFBD 2007) 3 at 5-6. See further section VI

[29] Coyle above (n 24).

A broader approach is to also apply international interpretive principles to national rules that in substance overlap with international obligations, but are not necessarily a result of incorporation or transformation of international obligations. Indeed, they may predate the entry into force of international obligations. An example is the interpretation of fundamental constitutional rights that in substance largely overlap with subsequently adopted international human rights, although they originated independently from the international obligation in question. Such rights are also properly regarded as MSEN. Yet, they differ from the first category (that limits the international principles of interpretation to those rules of national law that incorporate or transform a particular treaty obligation) in that it is impossible to base the application of international interpretive rules on the assumption that the legislature intended to maintain conformity with an international obligations.

A second set of international secondary rules may affect the application and interpretation of domesticated international obligations consists of rules of change, that is: rules specifying how primary rules are changed.[30] These rules are determinative for the evolution of the original international norm at the international level, through amendment, modification, subsequent practice, or termination. They may also be relevant for the existence and application of norms at national level. That is most obvious in the case of automatic incorporation or in the case of an express *renvoi* to international law (e.g. a national war crimes statute that criminalizes violations of the international laws of war). Once the original international norm has changed, or has been overtaken by a different international norm, that necessarily will affect the identity of the

[30] Hart above (n 13) 93.

domesticated international norm. Indeed, national courts frequently have assumed a role in making determinations on the invalidity and termination of treaties.[31]

A third set of secondary rules that might be relevant for the application of equivalent norms across the international/national divide consists of conflict rules that, in case of competing obligations, determine which obligation should prevail. At the international level, questions arising out of the concurrent applicability of conflicting obligations obviously are to be answered on the basis of the conflict rules of international law, such as the rules relating to successive treaties,[32] the principle of *lex specialis*,[33] etc. The question is whether, when a domesticated international norm conflicts with another domesticated international norm, that conflict remains subject to the same international conflict rules. There is some practice suggesting that where treaties are part of national law, international principles will be taken into account in determining how a conflict is to be resolved [34]

A fourth secondary rule provides a conflict rule governing conflicts between international and national law. In the case of a conflict between international and national law the principle of

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[31] See for a review of practice of domestic courts in respect of invalidity and termination: B Conforti and A Labella, 'Invalidity and Termination of Treaties: the Role of National Courts' (1990) 1 *European Journal International Law* 44.

[32] The Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force Jan. 27, 1980) 1155 UNTS 331 art 30 (VCLT); see also ILC, 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', para 24, in Report of the ILC on its 58th Session, GAOR 61st session, Suppl. No. 10 (2006) UN Doc A/61/10 416.

[33] ILC, 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' para 5, in Report of the ILC on its 58th Session, GAOR 61st session, Suppl. No. 10 (2006) UN Doc A/61/10 408.

[34] Poland, Supreme Court, Resolution of the Supreme Court, Question of law brought by the Court of Appeal in Gdansk, I KZP 47/02; ILDC 273 (PL 2003); France, Council of State, *Abderrahmane Zaïdi v France*, Decision on annulment, No 206902; ILDC 764 (FR 2000), 21 April 2000.

supremacy of international law proclaims that international law is to set aside national law – a principle that in certain respects can be considered as a secondary rule. [35]

In principle, the claim to supremacy of international law is confined to the international level. It is at that level that states cannot invoke national law to justify the non-performance with an international obligation, and it is at that level that international courts, by virtue of their establishment under international law, have to give precedence to international law over national law.[36]

However, some states have given effect to the international secondary (conflict) rule and have perceived the principle of supremacy as requiring that international law – once duly introduced in national law – also in the *domestic* legal order prevails over national law. For instance, the open nature of the Dutch legal system can be traced to the legislature's belief that international law required that Dutch law be set aside whenever it conflicts with treaty law.[37] Courts in Belgium, [38] Indonesia[39] and Latvia[40] have set aside national law that conflicted with

[35] G Fitzmaurice, 'The General Principles of International law Considered from the Standpoint of the Rule of Law' (1057) 92 *Recueil des cours* 68; C Santuli, *Le Status International de L'Ordre Juridique Étatique* (Pedone, Paris, 2001) 427.

[36] J Verhoeven. 'Article 21 of the Rome Statute and the ambiguities of Applicable Law' (1992) 33 *Netherlands Yearbook of International Law* 3

[37] A Nollkaemper, 'The Application of Treaties in the Netherlands' in D Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (CUP, Cambridge 2009).

[38] *ING België v B I*, Appeal Judgment, 2 March 2007, Nr C.05.0154.N; ILDC 1025 (BE2007). This builds on Court of Cassation's judgment of in the case *Franco-Suisse Le Ski*, Hof van Cassatie/Cour de cassation, 21 May 1971, Pas. 1971, I, 886, in which it was established case law that a directly effective treaty provision had primacy over a conflicting legislative act.

[39] *Constitutional Review of Law No 22 of 1997 on Narcotics*, 23 October 2007, No 2-3/PUU-V/2007; ILDC 1401 (ID 2007).

international law, expressly referring to article 27 VCLT. There are also cases in which courts have suggested that national conflict rules that grant precedence to international law were appropriate, since they respect the supremacy claimed by international law, or by particular international treaties or courts, such as the European Court of Human Rights (ECtHR). [41]

Fifth, secondary rules of international law that are used to determine the consequences of breaches of international obligations may, directly or indirectly, influence the consequences that at national level are or should be attached to breaches of the national manifestations of that obligation. In many states national courts have followed international principles of attribution or reparation.[42] Thereby, at the national level some degree of unity is maintained between the application of an international norms and its domestic manifestation.

Each of these five manifestations can help to maintain a certain unity between international obligations, on the one hand, and the domestic manifestations of such obligations, on the other. Thereby they may counteract the pull to fragmentation that is the natural result of the

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[40] *Judgment of the Constitutional Court of the Republic of Latvia on a Request for Constitutional Review*, ILDC 189 (LV 2004). The Court had to consider whether the Latvian Code of Administrative Penalties was compatible with the International Convention on Facilitation of International Maritime Traffic, which provides that states shall not impose any penalty upon ship owners if their passengers possess inadequate control documents. The Court derived from the obligations of Latvia under the VCLT, in particular, the obligation to perform treaties in good faith that in a case of contradiction between rules of international law and national legislation, the provisions of international law must be applied. Hence, the Court set aside the domestic law.

[41] Eg. *Al-Nashif v National Police Directorate at the Ministry of the Interior*, Judicial review, Judgment No 4332; ILDC 608 (BG 2003) 10-11.

[42] See the examples given in A Nollkaemper, 'Internationally Wrongful Acts in Domestic Courts' (2007) 101 *American Journal International Law* 760.

combination of the dualistic relationship between international and national law[43] and the principle of auto-interpretation.[44]

III. OBLIGATIONS TO GIVE EFFECT TO SECONDARY NORMS

In some cases, the justification for giving effect to international secondary norms may be found in express obligations. Such obligations may exist under either international law (IVA) or national law (IVB).

A. INTERNATIONAL OBLIGATIONS TO GIVE EFFECT TO SECONDARY NORMS

Some secondary rules contain an obligation to give effect to such rules. Of the five types of rules discussed in section II, this holds in particular for the principles of responsibility and, more controversially, supremacy. It is difficult to conceive of principles of interpretation or change in terms of international obligations, even though it may be argued that the interpretation to be given to domesticated norms should be affected by a more general obligation to ensure conformity between international and national law.[45]

A brief overview of secondary obligations pertaining to international responsibility may illustrate how international secondary obligations may be relevant to the national level. General international law formulates several obligations of states in relation to international wrongs that

[43] G Arangio-Ruiz, 'Dualism Revisited: International Law and Interindividual Law' (2003) 86 *Rivista di Diritto Internazionale* 909; G Gaja, 'Dualism: a Review' in G Gaja (ed), *New Perspectives on the Divide between National and International Law* (Oxford, OUP, 2007) 57.

[44] Gross above (n 26); Weil above (n 26).

[45] See infra, section V.

may be relevant to national courts. Examples are the obligation of states not to recognize as lawful a situation created by a serious breach of an obligation arising under peremptory norms of international law and the obligation not to render aid or assistance in maintaining that situation.[46] Article 41 of the Articles on State Responsibility was for instance relied upon by the Italian Court of Cassation as an argument for denying the immunity of Germany in a case involving alleged violations of *jus cogens* (forced labour in the Second World War).[47]

Another example is the obligation not to aid or assist another state in the commission of an international wrong.[48] This principle, that may in fact have more a character of a primary than of a secondary norm,[49] was considered by the German Bundesverfassungsgericht in a decision granting extradition of a Yemeni national to the United States. The German authorities had arrested the person in question, based on an arrest warrant issued by the United States District Court for the Eastern District of New York. The United States prosecution authorities charged the complainant with having provided (financial) aid to terrorist groups, in particular Al-Qaeda and Hamas, and with having recruited new members for these groups. The complainant travelled to

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[46] Article 41(2) of the Articles on the Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility) are contained in the Annex (28 January 2002) UN Doc A/Res/56/83.

[47] *Ferrini v Federal Republic of Germany*, ILDC 19 (IT 2004) ¶ 9 (holding that the recognition of immunity from jurisdiction for a state that is responsible for breaches of peremptory norms would be in contrast with, inter alia, the obligation of states not to recognize situations determined by its commission, the prohibition to provide help or assistance for the maintenance of situations that originated from such violations and the obligation to use legitimate means to bring about the end of illicit activities); *see* also A Bianchi, 'Italian Court of Cassation ruling on immunity from suit for damages for deportation and forced labor during World War II (Comment to decision)' (2005) 99 *American Journal of International Law* 242 and, critically, A Gattini, *War Crimes and State Immunity in the Ferrini Decision* (2005) 3 *Journal International Criminal Justice* 224, 236. The question whether this case-law conforms to international law is now before the ICJ in *Jurisdictional Immunities of the State (Germany v. Italy)*.

[48] Article 16 of the Articles on State Responsibility above (n 46).

[49] B Graefrath, 'Complicity in the Law of International Responsibility' (1996) 2 *Revue Belge de Droit International* 370, 371.

Germany as a result of conversations that a Yemeni citizen had had with him in Yemen, but this was part of an undercover mission of United States authorities. The complainant alleged that the 'abduction' by means of trickery constituted an obstacle precluding extradition. The Bundesverfassungsgericht said that the administrative authorities and the courts of Germany are prevented from participating in a decisive manner in acts by (non-German) organs of state authority that are performed in violation of general rules of international law. Since tortuous action on the part of the United States would establish the responsibility of the United States under international law vis-à-vis Yemen, 'there would be the risk that by extraditing the complainant, Germany would support a United States' action that is possibly contrary to international law, which would make Germany itself responsible under international law vis-à-vis Yemen.' [50] The Court expressly referred to article 16 of the Articles on State Responsibility. Even though the Court eventually allowed the extradition,[51] this example shows obligations that at the international level are part of a set of secondary rules can be relevant at national level.[52]

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[50] *Al-M, Individual constitutional complaint procedure*, Bundesverfassungsgericht, BVerfG, 2 BvR 1506/03 *Order of 5 November 2003*; ILDC 10 (DE 2003) 47.

[51] The Court held that 'the general rule of international law that is alleged by the complainant, i.e. the existence of an obstacle precluding extradition in the case of an "abduction" by means of trickery, does not exist', *id.* 48. It thus considered the matter under the question whether or not the primary rule would preclude extradition, rather than under the general principle of complicity.

[52] Another example is a decision by the Bundesverwaltungsgericht of 21 June 2005, in which the Court considered that the attacks on Iraq by the United States and the United Kingdom in 2003 were unlawful and that aid or assistance to that international wrong by Germany would in itself constitute a wrongful act, expressly referring to article 16 of the ILC Articles (ILDC 483 (DE 2005); see discussion by N Schultz, 'Case Note – Was the War on Iraq Illegal? – The Judgment of the German Federal Administrative Court of 21st June 2005' (2006) 7 *German Law Journal* 25.

Principles of cessation[53] and reparation[54] provide obligations that may be binding on a state that has committed an internationally wrongful act and that as such may also be as legally relevant for a national court as the primary norms that were breached in the first place. In this context, it is relevant that the Articles on State Responsibility suggest that secondary obligations are not only owed to states but also to individuals;[55] what in many cases will be a precondition for national courts' willingness to consider international claims. Indeed, several treaties which provide for international primary rights of individuals, also grant individuals a right to reparation vis-à-vis the state, which may apply if these primary rights are breached. These treaties thus recognize that a primary right of individuals can be matched by a secondary right and a corresponding obligation of the state.[56]

The national relevance of secondary obligations of reparation is particularly clear for treaties that recognize a right to substantive reparation, such as a right to compensation or to material restitution. Examples are article 13 of the Torture Convention,[57] article 5(5) of the European Convention on Human Rights (ECHR), [58] article 9(4) of the International Covenant on

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[53] Article 30 of the Articles on State Responsibility above (n 46).

[54] Ibid article 31 and articles 35-37.

[55] Crawford noted that 'in form a saving clause, it nonetheless clearly envisages that some "person or entity other than a State" may be directly entitled to claim reparation arising from an internationally wrongful act of a state.' J Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 *American Journal International Law* 874, 887. Similarly: The American Law Institute, *Restatement of the Law. Foreign Relations Law of the United States*, Vol. 2 (American Law Institute, 1986) para 906.

[56] C Tomuschat, 'Individual Reparation Claims in Instances of Grave Human Rights Violations: the Position under General International Law' in A Randelzhofer and C Tomuschat (eds), *State Responsibility and the Individual* (The Hague, Martinus Nijhoff Publishers, 1999) 7.

[57] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984 enforce 26 June 1987)1465 UNTS 85.

[58] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950 enforce 3 September 1953) 213 UNTS 222 (ECHR). See generally on right to reparation under the ECHR; see e.g. M

Civil and Political Rights (ICCPR)[59] (providing for a right of compensation to be awarded by national court in cases of unlawful detention), and article 14(6) of ICCPR (providing for a right to compensation in case of a miscarriage of justice). Like the underlying primary norms, such remedies are to be given effect before national courts. [60] One may doubt whether such rules are properly to be considered as secondary rules – since they are treaty-based obligations - but this is an example of a situation where the distinction between primary and secondary rules has little legal relevance. The abovementioned treaty regimes couple a breach of an internationally protected right with the right to reparation. For a state or (national court), it is immaterial whether the remedy is part of a primary or a secondary rule. While the classification of treaty-based remedies as primary rules may have been a convenient tool for the codification exercise of the International Law Commission, it adds little to the resolution of legal questions before national courts.[61]

The practice outside the scope of treaty regimes in support of a customary principle that a state would be obliged to provide in its national legal order remedies for individuals whose international rights have been violated, is limited. Some support can be found in the adoption by the General Assembly in March 2006 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and

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Pellonpää, 'Individual Reparation Claims under the European Convention on Human Rights' in A Randelzhofer and C Tomuschat (n 56).

[59] International Covenant on Civil and Political Rights 999 UNTS 171 (adopted 16 December 1966 enforce 23 March 1976) 999 UNTS 171.

[60] *See* generally D Shelton, *Remedies in International Human Rights Law*, 2nd edn (Oxford, OUP, 2006) ch 9.

[61] The savings clause of article 33 of the Articles on State Responsibility (n 46 above) appears to be introduced precisely with a view to such treaty-based rights or reparation, without concern for their status as primary or secondary rules.

Serious Violations of International Humanitarian Law.[62] These principles provide that victims of such violations would have a right of access to (domestic) justice as well as to adequate, effective, and prompt reparation for harm suffered, enforceable in the national legal order. However, customary international law has not (yet) followed the example of EC law, which has established that an individual who suffers damage as a result of a failure of a member state to respect his or her obligations under Community law enjoys a right of reparation for the damage caused by such unlawful behaviour, which must be allowed to be exercised in the national legal order.[63]

Obligations to provide reparation frequently are formulated by international courts that have determined that reparation is due, in particular when the constituent treaty provides that judgments of that court are binding on the state concerned.[64] On this basis a decision of an international court relating to the (non-)performance of an international obligation, may, depending on the national law of the state concerned, have effects at national level. Indeed, the Italian Court of Cassation has said that when the ECtHR established a violation of rights under the ECHR, individuals might rely upon a right to reparation, either of a pecuniary nature or as *restitutio in integrum*, which the national courts were obligated to enforce.[65]

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[62] UN Doc. A/Res/60/147 (2006). See discussion by M Zwanenburg, 'The Van Boven/Bassiouni Principles: An Appraisal' (2006) 24 *Netherlands Quarterly of Human Rights* 641.

[63] Court of Justice EC, 19 November 1991, Joined cases C-6/90 and C9/90 *Francovich* and *Bonifaci* [1991] ECR. I-5357; Tomuschat (n 55) 9.

[64] See e.g. article 94 of the Charter of the United Nations; article 59 of the Statute of the International Court of Justice (adopted 26 June 1945 entered into force 24 October 1945) 3 Bevans 1179; article 46 ECHR (n 58) and article 62 American Convention on Human Rights (adopted 21 November 1969 entered into force 18 July 1978) 1144 UNTS 123.

[65] *Dorigo*, Appeal judgment, No 2800/2007; ILDC 1096 (IT 2007). See also Supreme Administrative Court of Bulgaria, Al-Nashif v National Police Directorate at the Ministry of the Interior, Judicial review, Judgment No 4332;

The conclusion is thus that if a national court determines that an international obligation has been breached, certain secondary obligations may be applicable, particularly in the sphere of reparation. Such secondary rules may result in a convergence between the meaning and application of equivalent norms at international and national level.

However, basing the application of secondary principles by national courts on express secondary obligations has only limited explanatory or normative power for our present inquiry. Its power would seem to be confined to principles of reparation and will not easily cover other types of secondary rules. Many other principles of international responsibility (such as principles of attribution and circumstances precluding wrongfulness) are not easily phrased in terms of obligations binding on a state. The same is true for principles of interpretation or rules of change. It is for that reason that we have to consider (in sections IV-V below) alternative bases for the application of secondary rules at national level.

B. NATIONAL OBLIGATIONS TO GIVE EFFECT TO SECONDARY NORMS

Before discussing alternative normative foundations of the domestic effect of secondary rules, it is relevant to point out that in certain cases, national law provides for such effect. An illustration is the *Al-Jedda* case. The House of Lords considered international principles of attribution of acts to international organizations. The basis thereof did not lie in international law, however. Under the UK Human Rights Act, the rights of Mr Al-Jedda depended on this right under the ECHR. He could have no better rights under the Act than he would be held by the Convention.[66]

ILDC 608 (BG 2003). Of course, this is not a universally accepted construction; see the different approach taken by the US Supreme Court in Medellín v Texas, Appeal Judgment, No 06-984; 552 US; ILDC 947 (US 2008).

[66] *Al Jedda v The Secretary of State for Defence* [2007] UKHL 58, [2008] 2 WLR 31.

An alternative national law argument is that as a result of domestic constitutional law, courts may have to respect the will or intent of the legislature. When the political branches of a state have allowed automatic incorporation, or chose to enact legislation that incorporates the terms of a treaty, they make a decision to conform national law to international law. Considerations of separation of powers then may require that national courts that are to interpret or give effect to the national manifestation of the international obligation, do so in a manner that keeps close to that intention and thus maintains the conformity between international and national law. If the courts do not interpret that treaty in the light of an underling treaty, they would overturn the decision of the political branches.[67] Likewise, if they would not consider the impact in subsequent modifications of a rule at international level, they would disconnect the link between the international and the national domain that the legislature sought to establish. The same could be said for the application of secondary principles of responsibility.

The normative effect of international secondary rules may also flow from the fact that secondary rules themselves may be part of national law. That will be the case when such rules are part of a treaty that, through automatic incorporation or legislation, have been made part of national law, for instance VCLT as regards treaty interpretation or the ECHR as regards remedies flowing from a breach of the Convention. It also may be the case for secondary rules that are part of customary law, and that as such have become part of national law. This would for instance be relevant for a state that is not a party to VCLT, but that is bound by the customary rules of the law of treaties As many states in the world accept the national effect of customary rules of international law, their courts would be empowered and perhaps obliged to give effect to domesticated international obligations in the light of such secondary rules.

[67] Coyle (n 23) 19.

However, the domestic status of secondary rules does not seem to be a necessary or sufficient condition for the effect of such rules. While sometimes national courts have determined that a particular rule of treaty interpretation or responsibility was part of national law,[68] the application of the international normative context does not necessarily depend on the formal status of secondary rules in the national legal order. [69] In many cases, courts have given effect to secondary rules of international law without considering the domestic status of such norms. An example is a decision of the District Court of the Hague that applied secondary rules of attribution to review responsibility of a claim based in part on international rules.[70]

IV. THE ESSENTIAL CONNECTION BETWEEN PRIMARY AND SECONDARY NORMS

The proper basis for giving domestic effect to secondary rules of international law is the essential connection between such norms, on the one hand, and primary norms, on the other. Secondary norms determine the existence and meaning of a primary norm and the consequences of its breach. It may be argued that the fundamental connection between primary and secondary norms should not be broken when a primary norm is transplanted into a national legal system. If a court gives effect to an international obligation disconnected from its secondary context, it does not give effect to that obligation, but to another norm.

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[68] High Court of Justice, Queens Bench Division, Commercial Court, *The Republic of Ecuador v Occidental Exploration & Production Co*, 2 February 2006; [2006] EWHC 345 (Comm), per Aikens, J, 90.

[69] See Crawford (n 54) 890 (noting that 'the secondary rules of state responsibility are only indirectly applicable in domestic courts, and they do not require legislative implementation').

[70] *HN v Netherlands (Ministry of Defence and Ministry of Foreign Affairs)*, First instance judgment, LJN: BF0181/265615; ILDC 1092 (NL 2008).

This is both relevant to the application of national norms by an international court and to the application of international norms by national courts. As to the former, the PCIJ said: '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.'[71]

As to the latter, the essential connection between primary and secondary norms may help explain national cases that are guided by corresponding secondary norms of international law, both as regards interpretation[72] and as regards remedies.[73] A particularly far-reaching, though rarely followed example, is the decision of the District Court of Rotterdam in the Netherlands, that in adjudicating claims of Dutch farmers who had suffered damage as a result of discharges of chlorides into the river Rhine by French mines near Strasburg, based its conclusion that a tort had been committed directly on the general principle of (international) law that a wrongful act entails responsibility.[74] Even though such cases are rare, there is a large number of other cases by which courts gave a more modest application to secondary rules and thereby maintained some convergence between the international and the national legal order. It is also this consideration that underlies the significant practice of judicial dialogues between national and international

[71] Brazilian Loans, France v United States, Judgment, PCIJ Series A no 21; ICGJ 261 (PCIJ 1929), para 72. See also G Schwarzenberger, *International Law vol I International Law as Applied by International Courts and Tribunals* (London, Stevens & Sons, 1945) 25.

[72] Gardiner (n 26) 128; Criddle (n 26) 431.

[73] *Republic of Kenya v Minister For Home Affairs & 2 Others Ex parte Leonard Sitamze*, High Court, Miscellaneous Civil Case 1652 of 2004, (2008) eKLR, ILDC 1094; 18 April 2008 (holding that where Kenya is a party to an international instrument whose provisions are not reflected in the Constitution, the Court must interpret the to address, recognize, and give remedies under that instrument provided that the instrument is not inconsistent with the Constitution).

[74] See District Court of Rotterdam, 8 January 1979, NJ 1979, nr 113, *Id*., 16 December 1983, NJ 1984, nr 341.

courts, even when decisions of international courts are not binding on the forum state,[75] as well as the practice of national courts to refer to interpretations of courts different states concerning the interpretation of international obligations.[76]

Decisive in this approach is the qualification of the international or national nature of the obligation. If an obligation is qualified in international terms, it follows that international secondary rules should be applied. In the Advisory Opinion on the *Reparation for Injuries Suffered in the Service of the United Nations*, in reply to the question whether the United Nations has the capacity to bring an international claim against the responsible government to obtain reparation for damage to the United Nations, the ICJ stated:

> As the claim is based on the breach of an international obligation on the part of the Member held responsible by the Organisation, the Member cannot contend that this obligation is governed by municipal law, and the Organisation is justified in giving its claim the character of an international claim.[77]

Likewise, an English court held that when an arbitral tribunal addressed the rights of Occidental Exploration & Production Co (OEPC) in international law vis-à-vis Ecuador, that 'if the tribunal

[75] See eg Supreme Court of Cyprus, Scattergood v Attorney General, Appeal decision, Civil appeal no 12/2005; ILDC 921 (CY 2005) ((granting interpretive effect of to decisions of the ECtHR in cases to which Cyprus was not a party); Constitutional Court of Peru, Callao Bar Association v Congress of the Republic, Constitutional Review, Case No 00007-2007-PI/TC; ILDC 961 (PE 2007) (granting interpretive effect of to decisions of the Inter-American Court of Human Rights in cases to which Peru was not a party).

[76] See e.g. MA Waters, 'Mediating Norms and Identity; The Role of Transnational Judicial Dialogue in Creating and Enforcing International Legal Norms' (2005) 93 *Georgetown LJ* 487; ME Adjami, 'African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?' (2002) 24 *Michigan Journal of International Law* 103; E Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 *American Journal of International Law* 241.

[77] *Reparation for Injuries Suffered in the Service of the United Nations* [1949] 174 ICJ REP 180.

concluded that international law rights of OEPC had been violated by Ecuador, or the latter was in breach of its international law obligations, then the tribunal will have to consider what remedies are available *in international law* to repair any damage caused to OEPC by Ecuador's breach of OEPC's international law rights' (emphasis added).[78]

V. SECONDARY RULES AS A NORMATIVE PENUMBRA

Given the essential connection between primary and secondary norms, the effect of secondary norms for the national legal order follows from the general principle of effective interpretation and application of international obligations.[79] The principle of effectiveness of performance serves to coordinate and ensure some degree of convergence between two legal systems. While states are not obliged to implement or copy all rules of international law into their national legal order, they should make those alterations and adjustments, and resort to those interpretations, that are necessary to ensure an effective application of their international obligations.[80] This effect also can be based on the principle of good faith, as enshrined in article 26 VCLT.[81] The ECtHR followed the same principle when it noted that 'it follows from the Convention, and from article 1 in particular, that in ratifying the Convention the Contracting States undertake to ensure that their

[78] High Court of Justice, Queens Bench Division, Commercial Court, per Mr Justice Aikens, *The Republic of Ecuador v Occidental Exploration & Production Co.* [2006] EWHC 345 (Comm) 122.

[79] See on the former principle H Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 *British Yearbook of International Law* 67.

[80] The PCIJ referred to the principle according to which a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken', *Greco-Bulgarian Communities*, 1930 PCIJ Rep Ser B, No 17, at 20; G Schwarzenberger, *International Law* (Sweet & Maxwell, London, 1976) 68; S Kadelbach, 'International Law and the Incorporation of Treaties in Domestic Law', 42 *German Yearbook of International Law* 66 (1999).

[81] M Virally, 'Review Essay: Good Faith in Public International Law' (1983) 77 *American Journal of International Law* 130–34, at 132.

national legislation is compatible with it.'[82] This effect also is related to the principle of effective treaty interpretation.

The principle of effective performance of international obligations thus should not be confined to the substantive principles in question, but should extend to the secondary rules that inform the meaning and application of the primary norms, to the extent that this would be necessary to ensure effective application of the international norm in question. A failure to make secondary rules part of national law will not in itself result in an internationally wrongful act. But a failure to give effect to an international obligation with the meaning and contents it has at the international plane may constitute a wrong. For giving effect to an international norm devoid of its international normative context, may well be, to give effect to a different norm.

In the event that a state would have to answer for an alleged wrong before an international tribunal, it would have to convince that tribunal that it did not only give effect to an isolated international norm, but that that norm was interpreted and applied in the meaning that international law ascribed to it. It is this consideration, and the resulting need to give domestic effect to an international obligation in its international context, that explains the tendency of national courts to refer to the interpretative practice of international and foreign courts.[83]

In one respect, however, the power of this argument based on effective performance is limited. The scope of the principle of effective treaty interpretation and application, in principle is limited to the scope of the primary obligations. Secondary obligations are primarily relevant where it is necessary to perform an international obligation.

The situation is essentially different for cases where national courts seek guidance on international norms in areas where no obligation exists, for instance in regard to the adoption of

[82] *Maestri v Italy*, Application no 39748/98 (2004) 39 EHRR 832.

[83] Above n 65 and n 66.

national criminal laws that copy the provisions of the ICC Statute. Many states considered it desirable to follow the Statute, perhaps to enhance the chances that national trials would be respected under the complementarity principle. In doing so, they may be inclined to interpret provisions of the ICC Statute in line with secondary rules of international law, precisely to enhance the prospect that they will apply the same law as the ICC would apply. Yet, that would not be the result of legal obligation.[84] Likewise, the South African Constitutional Court referred to VCLT to interpret provisions of the Constitution that substantively related to, but formally were not connected to international norms.[85] In this context it is to be recalled that many, though not all, states apply the presumption of consistent interpretation (that is: national law should be construed as much as possible in conformity with international law) not only to legislation post-dating an international obligation, but also to legislation that existed independently and perhaps even before an international obligation came into force.[86] In such cases national courts may still value coherence between national and international law, for instance because they see themselves as part of a larger enterprise in the interest of the international community.[87]

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[84] G Werle and F Jessberger, *Principles of International Criminal Law* (Cambridge, CUP, 2005) 74.

[85] L du Plessis, 'International Law and the Evolution of (Domestic) Human-Rights Law in Post-1994 South Africa International Law and the Evolution of (Domestic) Human-Rights Law in Post-1994 South Africa' in JE Nijman & A Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (Oxford, OUP, 2007).

[86] G Betlem and A Nollkaemper, 'Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation' (2003) 14 *European Journal of International Law* 569.

[87] Georges Scelle, 'Règles générales du droit de la paix', (1933) 46 *Recueil des Cours de l'Académie de La Haye* 331-703 at 356 ; H Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht* vol 2 (CUP, Cambridge, 1970) 567 (noting that where international law is part of national law—instead of proclaiming the exclusive authority of the national legal system, courts—regard themselves, in addition to their normal function—as administering a law of a unit greater than the State); see also D Halberstam and E Stein, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order'

This also means that the normative impact of secondary rules of international law may differ between particular rules of international law. For instance, the normative pull of principles of treaty interpretation may be strongest in case of treaties that seek to establish a uniform regime.[88] These considerations may be quite different and in fact less relevant than for a treaty that does not aim to lay down a minimum regime, but only minimum norms, such as the ECHR.[89]

Given that it is not (always) possible to construe the impact of secondary rules in terms of an international obligation to give effect to such rules, their impact may be explained in less formal terms. A convenient concept to describe the impact of secondary norms is the notion of 'normative penumbra'. Penumbra means, literally, 'dim light'. It is the outer filamentary region of a sunspot. A 'penumbra' may be any area of transition around an area of great light. The gray area in between the light and the shadow is the penumbra. This use of this term follows the use of the term by US Supreme Court Justice Holmes, who used the term penumbra to refer to 'outer bounds of authority emanating from a law.'[90] Later the Supreme Court used the concept to find

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(2009) 46 *CMLR* 72 (noting in respect to the ECJ that 'the Court acts not only as a court of the Community, but also as a court of the international legal system).

[88] See e.g. US Supreme Court, Olympic Airways v Husain, Appeal Judgment, 540 US 644 (2003); ILDC 703 (US 2003) 124 S Ct 1221 (2003), 24 February 2004, Scalia, dissenting (arguing that the interpretation of the Warsaw Convention should give serious consideration to how foreign courts of other signatories to the Convention had resolved these legal issues).

[89] Jacobs (n 24) xxxi.

[90] *Danforth v. Groton Water Co,* 178 Mass. 472, 476–77, 59 N.E. 1033, 1034 [1901]. 477. Also see OW Holmes and M Lerner, 'Tax Law and the Prenumbra – Schlesinger v. Wisconsin' in OW Holmes and M Lerner (ed), *The Mind and Faith of Justice Holmes: his Speeches, Essays, Letters, and Judicial Opinions* (Edison, Transaction Publishers, 1988) 257 and A Lief, *The Dissenting Opinions of Mr. Justice Holmes* (Buffalo, Hein Publishing, 1981) 156.

that privacy in the 'marital bedroom' is defined in the 'penumbra' of constitutional rights, which do not specifically define a privacy right, but imply it.[91]

The term normative penumbra is used here to refer to the phenomenon that international norms may exert normative power beyond the international legal system, into its periphery or penumbra. It may be argued that the secondary rules of international law serve as a normative penumbra, that informs the meaning of corresponding rules at national level, and that remain applicable to the interpretation, modification and termination of international obligations at national level.[92] Secondary rules of international law are connected to the primary norms, and when the latter are applied, the former lift along.

VI. THE LIMITING EFFECT OF NATIONAL LAW

The degree in which a domesticated international norm will, in any particular case, be determined or influenced by secondary rules of international law will depend to a large extent on the constitutional principles governing the status of international law in the national legal order.

While secondary rules of international law may have a normative impact in all national legal systems, the foundation and the degree in which they will do so will differ between states. Three situations may be distinguished. First, when states have incorporated an international obligation into national law, based on a general rule of reference, such as is the case in the United States[93] or the Netherlands, [94] that obligation generally will remain recognizable as such. A

[91] *Griswold v. Connecticut*, 381 U.S. 479 (1965); see also *Roe v Wade*, 410 U.S. 113 (1973).

[92] Nollkaemper (n 41) 760.

[93] Such as article VI of the US Constitution, providing that 'This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in

national court that gives effect to that norm, in any case when it is self-executing, will apply that norm, not a domestic "translation" thereof. The situation is similar in states, like the UK or Israel, where customary law is automatically part of national law.[95] Courts then continue to apply international law (rather than national law) also after its incorporation into the national legal system.[96]

In this situation, secondary rules of international law remain attached to the primary norms and there remains a direct connection between the international origin of a norm and its domestic life. It may not be entirely accurate to say that what national courts apply is exclusively international law, as it is obvious that once the relevant international norms have been made part of national law, they are for all sorts of purposes also part of national law. However, it may at least be said that the domesticated international norm maintains an international quality and that the normative context of the international norms will feed the reception at national level.

To some extent this also applies in another situation, when states use incorporating legislation. This holds both for 'monistic' states (in particular when treaty provisions are not self-executing) and 'dualistic' states, that by necessity rely on such legislation. In such cases, the international origin may still be relatively clear when an implementing statute refers to an

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the Constitution or laws of any State to the contrary notwithstanding.' CM Vazquez, 'Treaties as Law of the Land: the Supremacy Clause and the Judicial Enforcement of Treaties' (2008) 122 *Harvard Law Review* 599.

[94] JG Brouwer, 'The Netherlands' in JG Brouwer (ed), *National Treaty Law and Practice: Dedicated to the Memoryof Monroe Leigh* (Leiden, Nijhoff, 2005) 483.

[95] Supreme Court of Israel, *Physicians for Human Rights and ors v Prime Minister and ors, and joined case*, Original petition to the High Court of Justice, HCJ 201/09, 248/09; ILDC 1213 (IL 2009), para 15. An English translation is available at www. elyon1.court.gov.il/files_eng/09/010/002/n07/09002010.n07.pdf (accessed 17 December 2009).

[96] MS McDougal, 'The Impact of International Law Upon National Law: A Policy-oriented Perspective' (1959) 4 *South Dakota Law Review* 25; *reprinted in* McDougal and Associates, *Studies in World Public Order* (New Haven, Yale University Press, 1960) 206; R Müllerson, *Ordering Anarchy: International Law in International Society* (The Hague, Martinus Nijhoff Publishers, 2000) 200.

international norm without copying it. For instance, the immigration rules of the United Kingdom define an asylum applicant as a person who 'makes a request to be recognised as a refugee under the Geneva Convention on the basis that it would be contrary to the United Kingdom's obligations under the Geneva Convention for him to be removed from or required to leave the United Kingdom'.[97] For the application of this provision, a court will have to interpret the Convention clearly as an international instrument. Another example is the UK Human Rights Act, which clearly is based on the European Convention and that indeed in terms of its interpretation is influenced by the interpretation of the European Convention.[98]

A different situation arises in a third category, where a treaty is translated into statutes that do not expressly recognize its origin. In these cases the original international quality may go unrecognized. The international origin then may be clouded and, for all practical purposes, the international norm has started indeed to lead a separate, domestic, life. There may a certain paradox here. In particular when an international obligation of non-self executing, domestic legislatures will necessarily have to adopt national law to make it effective and give contents to such an obligation. Yet, the more an international obligation becomes embedded in and made effective in national law, the more the international origin will be lost.

In each of these three situations, national law is likely to set limits to the degree secondary rules of international law indeed may cast their effect into national law. National law and domestic constituencies may counteract the pull towards normative convergence exercised by

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[97] Para 327a of the Immigration Rules, available at www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part11/ (accessed 14 September 2009).

[98] See e.g. *House of Lords, R (on the application of Ullah) v Special Adjudicator; R (on the application of Do) v Secretary of State for the Home Department*, Appeal judgment, (2002) EWCA Civ 1856 (CA); ILDC 249 (UK 2002), para 48 (relying on jurisprudence of the ECtHR).

secondary rules of international law. The familiar patterns of collisions between primary norms of international law and national law finds its parallel in potential conflicts between secondary norms of international law and national law.

National law will in particular limit the effects of secondary rules of international law in the third situation identified in the previous sub-section (incorporation of an obligation in a statute that no longer displays the international origin), but it also holds for the first two categories, in which various methods may be used to limit the power of courts (or other organs) to give full effect to the meaning of an international norms as recognized at the international level, for instance by precluding the self-executing nature of a treaty (thus dis-connecting the link between the national norm and its international origin) or by obliging the courts to defer to the executive. For instance, a US Court of Appeals held that there was no need to resort to a review of the *travaux préparatoires* with regard to an ambiguous treaty provision when enforcement of that provision was controlled by national law.[99] Moreover, in many states, courts tend as a matter of national law to defer to the executive in matters of treaty interpretation [100] An example is the US Military Commissions Act, conferring upon the President the authority for the United States to interpret the meaning and application of the Geneva Conventions that shall be authoritative as a matter of US law, and thus may restrict the scope of interpretation otherwise afforded to the judicial branch. [101]

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[99] *Cornejo v County of San Diego and ors*, Appeal Judgment, 504 F3d 853 (9th Cir 2007); ILDC 1080 (US 2007), 24. See also *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961).

[100] United States, Court of Appeals for the Second Circuit, *Mora v New York*, Appeal Judgment, 524 F3d 183 (2d Cir 2008); ILDC 1100 (US 2008), 24 April 2008 (H5: Consistent with the common practice of US courts in treaty interpretation cases, the views of the US government were entitled to substantial deference). See also J Yoo, *The Powers of War and Peace: the Constitution and Foreign Affairs after 9/11* (University of Chicago Press, 2005) 190; CR Sunstein, 'Chevronizing Foreign Relations Law' (2007) 116 *Yale Law Journal* 1170.

[101] Military Commissions Act of 2006, Public Law 109 – 366 (17 October 2006).

The notion of normative penumbra is not a conflict rule that can resolve conflicts between international law and national law in favour of the former. To the extent that national law indeed pulls in a different direction, similar primary norms, existing at international and national level, indeed will start to lead a different life, each serving different constituencies.

VII. CONCLUSION

Within limits set by the domestic legislature, national courts have considerable leeway in placing their application of an international obligation in its international context. There is a not insignificant and probably increasing practice in which national courts do not just apply single international norms, but give effect to the wider normative context. This practice has great potential in allowing national courts to contribute to a normative convergence between international and national law across legal orders. This practice can only partially be explained in terms of obligations of states to give effect to such secondary norms. Rather, the proper explanation and normative basis may be found in the combination of the connection between primary and secondary norms of international law, and the principles of good faith and effective treaty performance. The result is that secondary rules have the power to project, as a penumbra, their meaning into domestic legal orders that, by way of obligation or otherwise, have adopted equivalent norms. However, the power of the penumbra weakens where national law interjects and imposes its own secondary rules, serving its own domestic purposes.