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The Duality of Direct Effect of International Law

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Abstract

This article assesses how, 50 years after the ECJ delivered its judgment in Van Gend en Loos (VGL), *the doctrine of direct effect of international law has fared outside the European Union. While obviously the core of* VGL *(that is, that it is EU law, not national law, which requires direct effect) is not replicated anywhere else in the world, the courts of a considerable number of states have been able to give direct effect to international law. Against the background of an exceedingly heterogeneous practice, this article argues that the concept of direct effect is characterized by a fundamental duality. Direct effect may function as a powerful sword that courts can use to pierce the boundary of the national legal order and protect individual rights where national law falls short. But more often than not, the conditions of direct effect legitimize the non-application of international law and shield the national legal order from international law. International law provides support for both functions. But above all, it defers the choice between these functions to national courts. The practice of direct effect of international law exposes how national courts play a critical political function at the intersection of legal orders.*

1 Introduction

Generations of European and international lawyers have marvelled at the bold game-changer that the European Court of Justice (ECJ, now CJEU) delivered in *Van Gend en Loos* (*VGL*).[1] The Court's proclamation that a treaty created individual rights which national courts must protect took the old *Danzig* doctrine (which recognized that states can conclude a treaty that created individual rights that should be enforceable in domestic courts)[2] into territories unknown to international law. It even seemed

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1 Case 26/62, *Van Gend en Loos* [1963] ECR 1 (hereafter *VGL*).

2 *Jurisdiction of the Courts of Danzig* (Advisory Opinion), PCIJ Rep. Series B No. 15 (1928), at 17–18.

to take international law (after all, the Treaty establishing the European Economic Community (EEC Treaty) was a treaty) away from the very states that had created it.

The problem of direct effect in international law has been studied often, and there is a certain tiredness in some of the academic discussion.[3] However, the emergence of more and more information on national judicial practice on questions of direct effect,[4] new empirical studies on conditions in which national legal orders do or do not open themselves to international law,[5] and a stream of scholarship that has explored the normative choices faced by national courts in a pluralistic setting,[6] make the phenomenon of direct effect acutely relevant.

To some extent, direct effect in the European Union (EU) remains a unique phenomenon. *VGL* stands out as a relatively successful attempt to disconnect direct effect from national law. The ECJ proclaimed that in (what now is) the EU, direct effect is a matter of EU law, not of national law. The judgment itself was only a first step in that direction. What fundamentally changed the discourse was that a sizeable group of states accepted that the direct effect of future rules of unknown content and scope was no longer under their exclusive control, but was determined by EU law. This practice has remained unrivalled elsewhere in the world. Direct effect (in the way understood in the EU) has no place even in a relatively integrated legal order such as the European Free Trade Association (EFTA).[7] The ECJ held that, in contrast to the EC Treaty, the European Economic Area was to be established on the basis of an international treaty which merely created rights and obligations between the contracting parties.[8] If this difference holds for the EFTA, it certainly holds for regional integration projects like the Association of Southeast Asian Nations (ASEAN), the Economic Community of West African States (ECOWAS), the Caribbean Community (CARICOM), and MERCOSUR

3 There is a huge body of literature; see for an older overview Henckaerts, 'Self-Executing Treaties and the Impact of International Law on National Legal Systems: A Research Guide', 26 *Int'l J Legal Information* (1998) 566. Perhaps the article most directly on point (though not limited to direct effect) is Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis', 86 *AJIL* (1992) 310.

4 In particular, the case reports in the International Law in Domestic Courts (ILDC) module in *Oxford Reports on International Law*, where now over 1,100 domestic cases are available.

5 See Ginsburg, Chernykh, and Elkins, 'Commitment and Diffusion: How and Why Constitutions Incorporate International Law', *U Illinois L Rev* (2008) 201. See also the discussion in E. Kristjansdottir, A. Nollkaemper, and C. Ryngaert, *Importing International Law in Post-Conflict States: The Role of Domestic Courts* (2012).

6 E.g., N. Krisch, *Beyond Constitutionalism* (2011). See also Schiff Berman, 'A Pluralist Approach to International Law', 32 *Yale J Int'l L* (2007) 301; Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', 11 *European LJ* (2005) 362; M. Rosenfeld, *The Identity of the Constitutional Subject, Selfhood, Citizenship, Culture, and Community* (2009); Rosenfeld, 'The Challenges of Constitutional Ordering in a Multilevel Legally Pluralistic and Ideologically Divided Globalised Polity', in S. Muller, S. Zouridis, M. Frishman, and L. Kistemaker (eds), *The Law of the Future and the Future of Law* (2011), at 109; Von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law', 6 *Int'l J Constitutional L* (2008) 397.

7 Draft agreement between the European Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, Opinion 1/91 [1991] ECR 1–6079.

8 *Ibid.*, at para. 20.

– all projects that are unlikely to embrace a top-down principle of direct effect any time soon.[9]

Direct effect is not unknown outside EU law, however. Case reports compiled by a worldwide network of reporters that sustains the International Law in Domestic Courts (ILDC) database (part of Oxford Reports on International Law) suggest that cases of direct effect can be found across the world. Instances of direct effect, where international law was used as a direct basis for a decision, have been reported in about 30 states outside the EU. When we exclude the US, which accounts for the overwhelming majority of such cases, about 30 per cent of these cases come from Latin America (including Argentina,[10] Brazil,[11] Chile,[12] Colombia,[13] the Dominican Republic,[14] Paraguay,[15] Peru,[16] and Suriname[17]), close to 20 per cent from Asia (including Japan[18] and Nepal[19]), and just over 10 per cent from Africa (including Benin,[20] Cape Verde,[21] Côte d'Ivoire,[22] Egypt (under the old constitution),[23] Ethiopia,[24] Kenya,[25] and Senegal[26]). A substantial number of cases can also be found in Russia (this involves largely, but not exclusively, cases of the European Court of Human Rights (ECtHR)), and Israel.

[9] See references in section 4 below.

[10] S. 31 of the Constitution. See, for an example, *Simón (Julio Héctor) v. Office of the Public Prosecutor*, Appeal judgment, S. 1767. XXXVIII; ILDC 579 (AR 2005), Fallos 328:2056, 14 June 2005, Sup. Ct (Argentina). See also Bakker, 'Note & Comment, A Full Stop to Amnesty in Argentina: The Simón Case', 3 *J Int'l Criminal Justice* (2005) 1106.

[11] *Re Rodrigues*, Habeas Corpus proceeding, Appeal judgment, No. 19087 (2006); ILDC 450 (BR 2006), 18 May 2006.

[12] *Laurie Sáez v. San José School*, Writ of protection, Rol nr 59/2011; ILDC 1728 (CL 2011); *Re Víctor Raúl Pinto*, Decision on Annulment, Case No. 3125-04; ILDC 1093 (CL 2007), 13 Mar. 2007.

[13] *Re Law 1021 of 2006 (General Foresting Law)*, Application for constitutional review, Judgment C-030-08; ILDC 1010 (CO 2008), 23 Jan. 2008.

[14] Constitution of the Dominican Republic, 1994, Art. 3. See, e.g., *Pleno, Sentencia del 9 de febrero de 2005, No 4, Juventud Nacional Comprometida Inc and ors v. Dominican Republic, Cordero Gómez (intervening) and others (intervening)*, Direct constitutional complaint procedure, BJ 1131.34; ILDC 1095 (DO 2005), 9 Feb. 2005, Sup. Ct (Dominican Republic).

[15] *Re Invalidity of Legal Fact of Simulation, Aliendre v. Mendoza and Sanabria*, Appeal judgment, No. 84; ILDC 1522 (PY 2006).

[16] *Martin Rivas v. Constitutional and Social Chamber of the Supreme Court*, Appeal judgment, Case No. 679-2005-PA/TC; ILDC 960 (PE 2007), 2 Mar. 2007.

[17] *8 December Murders case, Public Prosecutor v. Bouterse and ors*, First instance decision, ILDC 1892 (SR 2012), 11 May 2012.

[18] Y. Iwasawa, *International Law, Human Rights, and Japanese Law: The Impact of International Law on Japanese Law* (1995), at 13, 25, 33.

[19] *Dhakal v. Nepal and ors*, Decision on petition for habeas corpus and mandamus, NLR, Vol. 49, No. 2; Decision No. 7817 P, 169; ILDC 756 (NP 2007).

[20] Art. 147 of the Constitution. See, e.g., *Azonhito and ors v. Public Prosecutor*, Cassation decision, 034/CJ-P; ILDC 1028 (BJ 2000).

[21] Constitution of the Republic of Cape Verde, 1980, Art. 11.

[22] Constitution of the Republic of Côte d'Ivoire, 2000, Art. 87.

[23] *Public Prosecution of Egypt v. Ismail and ors*, Decision on merit, No. 4190/86 Ozbekia (121 Koli Shamal); ILDC 1483 (EG 1987).

[24] Constitution of the Federal Democratic Republic of Ethiopia, 1994, Art. 9(4).

[25] *Kamunzyu v. Kamunzyu and ors*, First instance, Succession Case 303 of 1998; ILDC 1342 (KE 2005).

[26] Constitution of the Republic of Senegal, 2001, Art. 91.

The number of cases is significantly larger if we do not seek to replicate the exact configuration of *VGL*, but consider it from a functional perspective – the function being the protection of individual rights by relying on a rule of international law that is not made part of national legislation. Such a functional perspective allows us to construe *VGL* not as a unique landmark case, but as one particular manifestation of a broader practice where national courts use international law to mediate a power struggle between states and private parties.

But the broader we make the concept, the more heterogeneous becomes the practice that the concept seeks to cover. On the whole, the reported cases outside the EU provide us with a mixed bag. While there is a perhaps surprisingly large number of cases in states that one would not normally associate with direct effect, the number of states without any instances of direct effect far exceeds the number of states where such a practice does exist. In those states where direct effect is known, the number of cases is limited and the actual contribution of direct effect to the protection of rights is uneven. Cases where courts did give direct effect to a rule of international law are often challenged or contested by the political branches. The fate of the Nepalese judiciary's orders to the political branches to act on the basis of the UN Convention on Enforced Disappearances and to introduce appropriate legislation on the compensation of victims and the criminalization of enforced disappearances[27] illustrates the gap between lofty judicial pronouncements on the perceived requirements of international law and the political reality. Faced with this reality, domestic courts may sometimes develop a practice of self-censorship and refuse to give direct effect to a rule of international law if that would lead to a conflict with domestic law or practices.

In this article I argue that the heterogeneous practice of direct effect outside the EU[28] can be understood in terms of the fundamental functional duality of the concept of direct effect of international law. Where direct effect has been recognized and applied, it can function as a powerful sword that can pierce the boundary of the national legal order and protect individual rights where national law falls short. But, more often than not, it legitimizes the non-application of international law and shields the national legal order from the effects of international law. This functional duality is fuelled by a normative duality. International law provides some support for both functions. But, above all, international law defers the choice between these functions to the national level. This leads to two critical consequences. First, the political decisions to moderate the influence of international law in national legal orders are not confined to those cases where direct effect does not apply. Rather, they are based on and employ the concept of direct effect, which thereby acquires an intrinsically political character. Secondly, the concept of direct effect shifts such decisions from the political branches

[27] *Dhakal v. Nepal and ors*, Decision on petition for habeas corpus and mandamus, NLR, Vol. 49, No. 2; Decision No. 7817 P, 169; ILDC 756 (NP 2007). See discussion by Wagle, 'Judicial Activism and the Use of International Law as Gap-Filler in Domestic Law: the Case of Forced Disappearance Committed During Armed Conflict in Nepal', in Kristjansdottir, Nollkaemper, and Ryngaert, *supra* note 5, at 83.

[28] I limit the review of practice to states outside Europe. It may be that similar considerations as discussed in this article apply to the application of international law in European states and even to EU Member States.

to the courts. Thereby, the practice of direct effect of international law exposes the political function of domestic courts at the intersection of legal orders.

I will first identify the concept of direct effect, which will enable us to distinguish cases that involve direct effect from those that do not (section 2). I will then discuss the functional duality of the concept of direct effect – the seemingly opposing functions of 'swords' and 'shields' (section 3) – and the normative duality that sustains it: international law may facilitate direct effect, but structurally works against it (section 4). Finally, I will argue that as international law defers questions of direct effect to the national level, the practice of direct effect exposes the fundamentally political nature of the judicial decisions of whether (or not) to apply international law, and thereby moderates the relationship between legal orders.

2 The Concept of Direct Effect outside EU Law

To assess how *VGL* has been used outside the EU, and to understand the phenomenon of direct effect of international law as it has been applied in many states throughout the world, our inquiry should be directed at situations that are characterized by three features.

First, we can speak of direct effect where courts have applied international law to protect individual rights against the forum state. This is the setting in which national courts typically consider questions of direct effect. We can exclude cases that essentially involve inter-state matters, such as jurisdiction or immunities. Although such cases may be brought by individuals and moreover may also raise the question of whether a court can apply a rule of international law that has not been made part of national law, national courts that decide such cases typically do not resort to the concept of direct effect. If a foreign state is sued, a national court adjudicating on the matter generally does not examine whether principles of immunity (where these have not been made part of national law, yet are part of the 'law of the land') have 'direct effect', but simply proceeds to apply such principles.[29]

For present purposes, we can also exclude from our inquiry cases where courts are called upon to apply international law ('directly') in the relations between private persons. Although, conceptually, these may be treated as cases involving direct effect (here, also, the question is whether a court can apply a rule of international law that has not been transposed into national law to protect private rights), the fact that the interests of the state are not as immediately involved as they are in public law cases that challenge governmental power alters the stakes dramatically. It is telling that we find examples of 'direct effect' in such horizontal private law settings in states where direct effect against the state would be a non-starter. An example is the application of the Warsaw Convention in China.[30]

[29] See, e.g., *Dube v. American Embassy*, ILDC 1347 (BW 2006) (noting that no statute dealt with the sovereign immunity of states in Botswana; the rules of customary international law became part of the law of the land unless they were in conflict with statutes or common law, and proceeding to apply international principles of immunity without considering questions of direct effect).

[30] *Lu v. United Airlines Inc*, China, Shanghai Jing'an District People's Court, [2000] Min Jing Chu No. 1639, (2002) *Gazette of the Supreme People's Court of the People's Republic of China* 141; ILDC 780 (CN 2001).

Secondly, the concept of direct effect comprises situations where the question arises whether international law can be applied without being translated into domestic law. To say that a court gives direct effect to an international right is to say that a court enforces that right *as such*, not in a domesticated form. This obviously does not mean that we can only speak of direct effect of international law if such effect is independent from national law. In the final analysis, the application of all rules of international law is contingent on domestic law, just as the application of domestic law by international courts is contingent on a rule of international law.[31] It is true that in *VGL* the ECJ claimed more than this – in effect, it proclaimed a fully EU law-based version of direct effect. But one cannot disassociate the rule as proclaimed from the rule as received. When we consider the reception of *VGL*, it is clear that even in EU law, full independence from national law cannot be seen as a defining feature of the *VGL* doctrine. This is *a fortiori* true in international law. Direct effect necessarily presumes a general or specific rule of reference. Thus, direct effect has a function comparable to *VGL* if a court is allowed to protect an international right without being dependent on prior or subsequent legislation pertaining to that particular right.

Thirdly, a decision can qualify as an instance of direct effect when a court acknowledges a rule of international law to be a decisive influence on the actual protection of the right involved. This will be the case when a court relies on international law as an exclusive basis for its decision, as was the case in *VGL*. But it is unnecessarily restrictive to limit ourselves to such situations. It is true that the ECJ's language of 'direct effect', as well as the later line of case law, suggested that the Court had in mind something other than consistent interpretation. It is also true that often the application of a rule of construction is not quite the same thing as the application of a rule that itself is a source of a right or an obligation. A case like *Teoh* in the Australian High Court makes clear that whereas that Court could give a certain procedural effect to the UN Convention on the Rights of the Child, even though that had not been made part of the law of Australia, the plaintiffs could not derive any substantive rights from the Convention in the absence of domestic status.[32] Nonetheless, it is difficult to draw hard and fast lines.[33]

The common ground between cases where a court decisively relies on an international right in the construction of national law, and thereby protects that right, on the one hand, and cases where courts rely on such rights directly (without resorting to interpretation), on the other, may be more important than the distinctions. It would be too limiting to exclude cases involving consistent interpretation *prima facie* from the category of cases in which national courts successfully mediate a conflict between a state and individuals by relying on international law – a category to which *VGL* also belongs.

This significantly expands the number of cases worldwide that fall into the *VGL* category. We find examples of consistent interpretation in states we do not commonly

[31] Gaja, 'Dualism: A Review', in J. Nijman and A. Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (2007), at 52.

[32] *Ibid.*

[33] W.N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (2006), at 117.

associate with direct effect, such as Ghana,[34] Israel,[35] Lesotho,[36] and South Africa,[37] and even China.[38] We also find cases where courts could rely on international law to circumscribe and review the exercise of discretion by the executive, for instance in New Zealand[39] and Australia.[40] While these cases show wide differences, the courts in at least some of them protected individual rights on the basis of the weight attached to a rule of international law.

When we apply the thus-defined concept to the reported cases, it is quite clear that the practice across the world is vastly heterogeneous, not only between states where direct effect is known and those where it is unknown, but also within the category of states where the concept has been used. It is that diversity that calls for an inquiry into the functions and normative dimensions of direct effect.

3 A Functional Duality

The reported cases suggest that the concept of direct effect can fulfil two opposing agendas or functions. They allow us to construe direct effect as a sword, piercing the boundary of the national legal order (section A), or as a shield, protecting the national legal order from international law (section B).[41] In this respect the concept of direct effect is one instrument whereby domestic courts can fulfil their double role at the intersection of legal orders.[42]

[34] *Asare and Three other individuals v. Ga West District Assembly and Attorney General*, Decision of the High Court of Justice, Suit No. AP 36/2007; ILDC 1488 (GH 2008), 2 May 2008.

[35] *Zanbech W/Yohannes Belcha and 71 other Petitioners v. Ministry of Internal Affairs and Tribunal for Judicial Review of Detention of Illegal Immigrants*, Administrative petition, AdmAp 2028/05; ILDC 290 (IL 2006), 8 Feb. 2006, DC (Jaffa).

[36] *Ts'epe v. Independent Electoral Commission and ors*, Appeal judgment, C of A (Civ) No. 11/05; ILDC 161 (LS 2005), [2005] LSHC 93, 30 June 2005, CA (Lesotho).

[37] *South Africa v. Makwanyane and Michunu*, Referral to Constitutional Court, Case No. CCT/3/94, [1995] ZACC 3, ILDC 647 (ZA 1995), 1995 (3) SA 391 (CC), 1995 (2) SACR 1, 1995 (6) BCLR 665 (CC), 6 June 1995, Const Ct (South Africa).

[38] *Re Interpretation No 27*, Judicial Interpretation, (2002) No. 27; ILDC 263 (CN 2002).

[39] *Rahman v. Minister of Immigration*, Appeal and judicial review, AP 56/99/CP49/99; ILDC 219 (NZ 2000), 26 Sept. 2000, HC (New Zealand).

[40] *Minister for Immigration and Ethnic Affairs v. Teoh*, ILDC 779 (AU 1995).

[41] See for the debate in the context of EU law Prechal, 'Does Direct Effect Still Matter?', 37 *CML Rev* (2000) 1047, at 1047–1048.

[42] Scelle, 'Règles générales du droit de la paix', 46 *RdC* (1933) 331, at 356. See, for a discussion of Scelle's theory, A. Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (dédoublement fonctionnel) in International Law', 1 *EJIL* (1990) 210, at 210; Schreuer, 'The Implementation of International Judicial Decisions by Domestic Courts', 24 *ICLQ* (1975) 153, at 160; Shany, '*Dédoublement fonctionnel* and the Mixed Loyalties of National and International Judges', in F. Fontanelli, G. Martinico, and P. Carrozza, *Shaping Rule of Law through Dialogue. International and Supranational Experiences* (2010), at 27. See also H. Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht – Vol. 2* (1970), at 567 (noting that where international law is part of national law, courts, instead of proclaiming the exclusive authority of the national legal system, regard themselves, in addition to their normal function, as administering a law of a unit greater than the state).

Both functions co-exist in a somewhat uneasy relationship, but also complement each other and in a way that depends on each other. Direct effect as a sword, without concern for national law and context, is on empirical and normative grounds a poor measure for describing or evaluating the application of international law at the national level. The European model of *VGL* may lessen complexity, but it does not provide a basis for explaining and judging countervailing practices. It cannot capture the normative complexity and the loss of legal stability and legitimacy that are strengthened by new concerns over the legitimacy of international law. Conversely, the normative ambition of direct effect as a shield, while protective of national context and diversity and locality, falls short on descriptive and normative grounds.[43] Each function of direct effect may provide what the other lacks.[44]

A *Direct Effect as a Sword*

The traditional understanding of direct effect, at least as it functions in EU law, is that it can function as a sword. The term refers to a process whereby international rights or obligations pierce the shield of the national legal order. It allows for the exercise of judicial power to apply international law in the national legal order, where this, without direct effect, would not be possible. An obligation that has direct effect under, say, the Inter-American Convention on Human Rights (IACHR), can be used by and supports the powers of domestic courts to protect that right where national law fails. In contrast, courts generally lack the power to grant such direct effect to obligations under international environmental law or international humanitarian law.

The sword function is particularly strong in those cases where courts can combine direct effect with the principle of supremacy of international law. When an international right collides with national law, and that collision cannot be removed by interpretation, an international right can only have actual effect if it has supremacy over national law: that is, if it hierarchically ranks higher and trumps domestic law. Where a court can rely on a principle of supremacy, it can add significant power to the principle of direct effect. Conversely, a lack of supremacy under national law will then preclude the possibility of direct effect.[45]

More particularly, direct effect as a sword serves two significant functions. First, direct effect locks in particular rights in the domestic sphere. It can entrench domestic policies and ensure that they will survive changes of power by locking them in with

[43] See also Peters, 'Precommitment Theory Applied to International Law: Between Sovereignty and Trivality. A Comment on: Commitment and Diffusion: How and Why Constitutions Incorporate International Law', *U Illinois L Rev* (2008) 239.

[44] See Von Bogdandy, *supra* note 6, at 397.

[45] Some courts even have treated the question of supremacy as a condition of direct effect. The Sup. CA of Malawi suggested that a rule of international law that is not supreme over national law is not part of national law – and thus could not be applied directly: *Re Adoption of Children Act Chapter 26:01 of the Laws of Malawi and Re Chifundo James (an infant)*, MSCA Adoption Appeal No. 29 of 2009; ILDC 1345 (MW 2009) (holding that 'whether an international agreement forms part of our law, regardless of when it was entered into, will depend on whether there is no Act of Parliament that provides to the contrary. And the question whether customary international law forms part of our law will depend on whether it is consistent with our Constitution or our statutes').

international commitments.[46] In this context it is relevant that the case reports suggest there is a high correlation between direct effect and human rights. Though conceptually direct effect may well apply in other fields (it certainly does in the EU), over 60 per cent of the reported cases involved human rights. This sustains the idea that there is a close relationship between the protection of individual rights, on the one hand, and the piercing of the shield between the international and the national legal orders, on the other.[47]

Locking in international rights, and enabling courts to protect them, has been particularly relevant in the transition from an authoritarian towards a democratic rule of law-based legal system. In such situations a choice for direct effect has commonly been made to lock in particular rights and to safeguard against a return to authoritarian rule.[48] Examples are the 1946 Constitution of Japan[49] and a range of Eastern European constitutions after the fall of the Berlin Wall in 1989.[50] The courts that have acted on these mandates have, by granting direct effect, actually secured internationally protected rights.

The second, and to some extent derivative, function of direct effect is that it may strengthen the power of courts. Direct effect allows courts to draw power from rights and obligations that are not immediately controlled by the political branches.[51] This is quite obvious in states where international law has been made part of the law of the land, in particular when direct effect can be combined with a hierarchically superior status of international law over (part of) national law. If we employ a broad definition of direct effect, this is also true for states outside that category.

Though direct effect is mostly associated with monist states, where international law is part of the law of the land, we find cases that can be qualified as direct effect in a broad sense also in so-called 'dualist' states. It is true that the courts of these states have commonly declined to enforce a treaty on the grounds that the legislature had not yet acted – without any scenario of direct effect arising. We can find examples in Australia,[52] Botswana,[53] Gambia,[54] India,[55] Israel,[56] Kenya,[57]

[46] Ginsburg, 'Locking in Democracy: Constitutions, Commitment, and International Law', 38 *NYU J Int'l L & Policy* (2010) 707.

[47] H. Kelsen, *Law and Peace in International Relations. The Oliver Wendell Holmes Lectures, 1940–41* (1942), at 96.

[48] Stein, 'International Law in Internal Law: Towards Internationalization of Central-Eastern Constitutions', 88 *AJIL* (1994) 427, at 428; A. Cassese, 'Modern Constitutions and International Law', 192 *RdC* (1985) 331, at 351; Ginsburg, Chernykh, and Elkins, *supra* note 5, at 101.

[49] Iwasawa, 'The Relationship Between International and National Law: Japanese Experiences', 64 *British Yrbk Int'l L* (1993) 343, at 375.

[50] Vereschetin, 'New Constitutions and the Old Problem of the Relationship between International Law and National Law', 7 *EJIL* (1996) 29; Stein, *supra* note 48, at 447.

[51] Benvenisti and Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law', 20 *EJIL* (2009) 59.

[52] Australia, High Ct, *Dietrich v. the Queen* [1992] HCA 57; (1992) 177 CLR 292 (13 Nov. 1992), at 24.

[53] *Good v. Attorney-General*, Botswana, CA, Civil Appeal No. 028; ILDC 8 (BW 2005) [33].

[54] *Sabally v. Inspector General of Police and ors*, Referral from the High Ct on Constitutional Review, Civil Ref. No. 2/2001 (Sup. Ct); ILDC 11 (GM 2001), (2002) AHRLR 87 (GaSC 2001), [1997–2001] GR 878, 5 Dec. 2001, Sup. Ct (Gambia).

[55] India, Sup. Ct, *Daya Singh Lahoria v. India*, AIR 2001 SC 1716; ILDC 170 (IN 2001) [A1].

[56] Israel, Sup. Ct sitting as a Court of Appeals, *Anonymous (Lebanese citizens) v. Minister of Defence*, FCrA 7048/97; ILDC 12 (IL 2000), at para. 20.

[57] Kenya, High Ct, *Okunda v. Republic* (3 Nov. 1969), [1970] East Africa Law Reports 453, (1970) 51 ILR 414.

Malawi,[58] Nigeria,[59] Pakistan,[60] Uganda,[61] and Zambia.[62] However, in several states in this category, courts have found ways to protect international individual rights that were not part of national law. The Icelandic Supreme Court relied on the UN Convention on the Law of the Sea (UNCLOS), particularly with regard to the need for the protection and reasonable utilization of fish stocks, to determine the legality of the Icelandic fisheries management system, even though it was not incorporated into national law.[63] In Kenya, even though the system under the previous constitution was dualist,[64] the High Court held that international law was applicable in Kenya as part of Kenyan law so long as it was not in conflict with existing domestic law.[65] The Supreme Court of Bangladesh observed, in *Prof. Nurul Islam v. Government of Bangladesh*,[66] that in view of the resolution of the World Health Organization, the government should have taken appropriate steps to restrict the promotion of cigarette-related products.[67] And the Indian Supreme Court in the *Narmada* case reviewed a disputed act in the light of Article 12 of International Labour Organization (ILO) Convention 107, which protects the rights of populations not to be removed from their habitual territories without their free consent, and grants a right to compensation where removal is nonetheless necessary. India had ratified ILO Convention 107 but had not transposed it into law.[68] This may not be quite far removed from *VGL*, but it shares the feature that courts rely on an international norm to decide a case and thereby shift the balance between courts and political branches.

[58] Art. 211 of the Constitution.

[59] Art. 12 of the 1999 Constitution; see, e.g., Nigeria, Sup. Ct, *Abacha v. Fawehinmi,* SC 45/1997; ILDC 21 (NG 2000); Nigeria, Sup. Ct, *The Registered Trustees of National Association of Community Health Practitioners of Nigeria v. Medical and Health Workers Union of Nigeria,* SC 201/2005; ILDC 1087 (NG 2008).

[60] *Société Générale de Surveillance SA v. Pakistan, through Secretary, Minister of Finance, Revenue Division and Islamabad*, Appeal to Sup. Ct, Civil Appeal No. 459/2002, Civil Appeal No. 460/2002, ILDC 82 (PK 2002), 2002 SCMR 1694, 3 July 2002, Sup. Ct (Pakistan).

[61] Uganda, Const. Ct, *Uganda Law Society and Jackson Karugaba v. Attorney General*, Constitutional Petitions Nos 2 and 8 of 2002; ILDC 1284 (UG 2009), at para. A4.

[62] Zambia, Sup. Ct, *Re Order 53 of the Rules of the Supreme Court and Re Application for Leave for Judicial Review by Roy Clarke, Attorney General v. Roy Clarke*, Appeal No. 96A/2004; ILDC 1340 (ZM 2008).

[63] Iceland, Sup. Ct, *Public Prosecutor v. Kristjánsson*, Case No. 12/2000; H (2000) 1534; ILDC 67 (IS 2000), at para. 12.

[64] *Okunda v. Republic, supra* note 57, at para. 4.

[65] *Kamunzyu v. Kamunzyu,* Succession Cause 303 of 1998, [2005] eKLR; ILDC 1342 (KE 2005) (forthcoming). See also Kenya, Eldoret CA, *Rono v. Rono* (29 Apr. 2005), Civil Appeal No. 66 of 2002, [2008] 1 KLR 803; ILDC 1259 (KE 2005). See also Killander, 'The Role of International Law in Human Rights Litigation in Africa', in E.K. Quansah and W. Binchy (eds), *Judicial Protection of Human Rights in Botswana: Emerging Issues* (2009), available at: http://ssrn.com/abstract=1438556 (accessed 27 Nov. 2013), at 14.

[66] *Prof. Nurul Islam v. Bangladesh*, 52 DLR (2000) 413; ILDC 477 (BD 2000). See also Bangladesh, Sup. Ct, *Dr Shipra Chaudhury v. Government of Bangladesh*, 29 BLD (HCD) 2009; ILDC 1515 (BD 2009), at para. 30.

[67] *Prof. Nurul Islam v. Bangladesh, supra* note 66, at paras 9–10.

[68] *Narmada Bachao Aandolan v. India*, AIR 2000 SC 3751; ILDC 169 (IN 2000); see also India, Sup. Ct, *Vishaka v. State of Rajasthan* (13 Aug. 1997), (1997) 6 SCC 247; AIR 1997 SC 3011; (1998) BHRC 261; (1997) 3 LRC 361; (1997) 2 CHRLD 202.

These functions of direct effect serve aims that are both domestic and internationalist (as they can secure performance of international obligations). A single decision that grants direct effect to an international obligation serves both agendas at the same time. Indeed, it may be said that the practice of direct effect erodes the separation between the international and the domestic spheres – not unlike the effect of *VGL* in the EU.

B *Direct Effect as a Shield*

Although the concept of direct effect primarily has the connotation of a sword, the principle of direct effect more often than not functions as a shield. It can justify the non-application of international law by the courts, and thereby protect domestic political organs and, more generally, domestic values, from review based on international law. The key to understanding this function as a shield is that direct effect is not only a term that describes a process (leading to actual effect), but is also a concept with its own normative content, which contains a threshold requirement before international law can be applied. The concept of direct effect comprises criteria that have to be fulfilled before a court can give effect to international law. Generally, what counts are, first, the question of whether a provision is clear enough and, secondly, whether or not it grants a right to private parties.[69] Both criteria set quite formidable thresholds. If a court finds that they are not fulfilled, international law remains unenforceable by the courts.

Surely, direct effect is not the only shield that can be set up between national and international legal orders. It is part of a wider set of doctrines and principles, including the requirement in (dualist) states that international law should be implemented through legislation before it can have effect, the principle that accords supremacy to (parts of) national law, and principles that defer decisions on international law to the political branches, like the principle of non-justiciability. Within this wider set, the concept of direct effect fulfils a distinct role in shielding national legal orders.

The argument here is thus that the mere fact that a rule of international law has been made part of 'the law of the land' is not sufficient for it to be applied on the same footing as domestic law. Something more is needed – this 'something more' being the conditions of direct effect (notably specificity and individual rights).[70] If these conditions are construed in a demanding way, they can lead, in effect, to a shift towards a more dualist model of transformation – even though international law may formally be part of the law of the land, the courts are not able to protect it.[71]

[69] See further A. Nollkaemper, *National Courts and the International Rule of Law* (2011), at 130.

[70] That also holds for use of the concept in EU law: see, e.g., Gerkrath, 'Chapter 6 – Direct Effect in Germany and France; A Constitutional Comparison', in J.M. Prinssen and A.A.M. Schrauwen (eds), Direct Effect*: Rethinking a* Classic *of EC Legal Doctrine* (2002), at 129.

[71] Morgenstern, 'Judicial Practice and the Supremacy of International Law', 27 *British Yrbk Int'l L* (1950) 42, at 68; Klabbers, 'International Law in Community Law: The Law and Politics of Direct Effect', 21 *Yrbk European L* (2002) 263.

This function of direct effect to provide a shield is not unique for international law. In regard to direct effect in EU law, it has been said that the restrictions set by direct effect would be (and perhaps should be) only temporary. Pescatore noted that once the democratic ideal of Europe had taken root, reference to direct effect would become redundant – the effective application of EC law would be a matter of the ordinary state of the law.[72] From this perspective, direct effect is not so much a powerful means to an end, but rather a temporary obstacle to realizing the full unity of EU and national law. While this shield function may have been pushed to the background by the pervasive and largely non-controversial uses of direct effect in EU law, it remains dominant in international law.

Like the use of direct effect as a shield, the construction and use of the conditions of direct effect as a (high) threshold for the application of international law can serve critical domestic agendas.[73] A narrow construction of the conditions for direct effect fixates the separation of powers by protecting political branches from review by national courts on the basis of international law. For instance, although Article VI of the US Constitution says that treaties are the supreme law of the land, the self-executing treaties doctrine imposes restrictions on judicial enforcement and protects the powers of political branches.[74] In China, even though the situation appears to be that treaties as such are part of Chinese law,[75] the fact that human rights treaties lack direct effect makes the courts powerless to give effect to such treaties in constitutional or administrative proceedings.[76]

In combination with the principle of supremacy of national (constitutional) law, a demanding construction of the conditions of direct effect also preserves the ultimate priority of national constitutional law, so as to allow for domestically induced contestation and change, even when that would override international law that does not conform to domestic policy preferences.[77] Direct effect may sit uneasily with the principles of the rule of law as domestically construed.[78] Direct effect is then a useful technique that allows domestic courts to fulfil a role as a safety valve, or 'gatekeeper':[79] states may find it acceptable that international law as such is part

[72] Ward, 'Chapter 3 – More than an "Infant Disease"; Individual Rights, EC Directives, and the Case for Uniform Remedies', in Prinssen andSchrauwen (eds), *supra* note 70, at 45.

[73] See generally Ginsburg, Chernykh, and Elkins, *supra* note 5.

[74] *Foster v. Neilson*, 27 US (2 Pet) 253; 1829 WL 3115 (1829).

[75] Guo, 'Implementation of Human Rights Treaties by Chinese Courts: Problems and Prospects', 8 *Chinese J Int'l L* (2009) 161, at 165.

[76] *Ibid.*, at 166.

[77] See Ginsburg, Chernykh, and Elkins, *supra* note 5, at 237 ('[i]nternational policies are dynamic, and the policies protected at the time the constitution was adopted may change over time, particularly with regard to customary international law').

[78] Jennings, 'The Judiciary, International and National, and the Development of International Law', 102 *Int'l Law Reps* (1951) ix, at xii.

[79] See Kratochwil, 'The Role of Domestic Courts as Agencies of the International Legal Order', in R.A. Falk, F.V. Kratochwil, and S.H. Mendlovitz (eds), *International Law, a Contemporary Perspective* (1985), at 236, 237; Peters, 'The Globalization of State Constitutions', in Nijman and Nollkaemper (eds), *supra* note 31, at 251, 267. See also Capps, 'The Court as Gatekeeper: Customary International Law in British Courts', 70 *MLR* (2007) 458.

of the domestic legal order, but the effects of international law have to be controlled. Domestic courts are the controlling agents, and the concept of direct effect is one of their tools.

The functions of direct effect as a shield are fuelled by the well-documented shortcomings of international law-making. While the overlap in substance and subjects, captured by the 'regulatory turn' in international law,[80] may force some form of osmosis between the international and national domains, it also increases the demands on the qualities of international rule-making. Even where consent may formally be available as a legitimizing force, its role is reduced by the fact that it appears late in the process, and for many states, non-participation in international regimes is not an option.[81] Lack of influence in the process of law-making explains and justifies a continuing divide, and will encourage a cautious approach when states consider opening their legal orders for international law.[82] Controlling the direct effect of international law serves useful societal purposes in an internationalized society where patterns of authority and control are sometimes difficult to grasp. In conjunction with other shielding principles, the direct effect doctrine can then mediate the effects of international obligations that are wanting in terms of democracy and rule of law quality, and that may upset these values domestically.[83] This holds particularly with respect to decisions of international organizations.[84]

4 A Normative Duality

While direct effect is embedded in domestic law that serves domestic purposes, international law to some extent explains and justifies both the sword and the shield functions of direct effect. In this respect, international law is itself characterized by a normative duality that sustains and justifies the functional duality of direct effect. International law pulls in different directions, which in a paradoxical way sustain each other. International law may colour and influence direct effect (A), but at the same time fuel its opposition (B). The normative foundations discussed here are limited to what can be derived from international law; obviously they supplant the normative grounds for the sword and shield functions that may be derived from domestic law,

[80] See Cogan, 'The Regulatory Turn in International Law', 52 *Harvard Int'l LJ* (2011) 322.

[81] Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', 15 *EJIL* (2004) 907, at 914; Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy', 64 *Heidelberg J Int'l L* (2004) 547, at 557.

[82] See Buchanan, 'Writing Resistance Into International Law', 10 *Int'l Community L Rev* (2008) 1.

[83] MacGinnis and Somin, 'Should International Law be Part of Our Law?', 59 *Stanford L Rev* (2007) 1175.

[84] Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', 93 *AJIL* (1999) 596; R. Wolfrum and V. Röben (eds), *Legitimacy in International Law* (2009); J.M. Coicaud and V. Heiskanen (eds), *The Legitimacy of International Organizations* (2001); Donoho, 'Democratic Legitimacy in Human Rights: The Future of International Decision-Making', 21 *Wisconsin Int'l LJ* (2003) 1; A. Ribeiro Hoffmann and A. van der Vleuten (eds), *Closing or Widening the Gap? Legitimacy and Democracy in Regional Integration Organizations* (2007).

briefly identified above. Combined, the competing ambitions and claims of direct effect seem largely irreconcilable, and reflect the pluralistic relationship between international and national law.[85]

A *Normative Foundation of Direct Effect as a Sword*

Compared to EU law, the support that international law provides for direct effect is exceedingly weak. There is no authoritative judgment of an international court that direct effect is required, and also no grounds can be found otherwise for arguing that courts should give effect to an international right where that right has not been made effective in national law.[86]

Yet courts in principle are competent to give direct effect to particular international rights or obligations, and can find in international law some support for doing so. We can distinguish between a general normative basis for direct effect and specific grounds that can be used to support a finding of direct effect,

The general ground is that direct effect furthers the effective application of international obligations. Even when direct effect is not obligatory as a matter of international law, it supports an internationalist ambition to render international law effective at the national level. This was well captured by the Italian Court of Cassation, which noted (in a by now outdated ruling) that 'an interpretation finding GATT rules self-executing … corresponds better to principles of international law, given the obligation of States to ensure that the most adequate steps are taken so that treaties can be applied and their objects realised within the internal legal system'.[87] In this line it has been argued that where an international right does exist, and national law fails to protect it, applying the right directly may be the only way to perform the obligation.[88] Direct effect also allows for more consistency between the content of international obligations and national law, without their meaning being lost in translation.[89]

[85] See Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States', in J.L. Dunoff and J.P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009), at 426; see Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global', 30 *Sidney L Rev* (2008) 326, at 389 ('if one envisions matters from the standpoint of a global or transnational legal system, that legal system is immediately pluralistic because it contains and interacts with a multitude of coexisting, competing, and overlapping legal systems at many levels and in many contexts').

[86] See *infra* sect. 5.

[87] B. Conforti, *International Law and the Role of Domestic Legal Systems* (1993), at 34 (discussing the GATT (adopted 30 Oct. 1947, entered into force 1 Jan. 1948) 55 UNTS 187 (GATT)).

[88] Murphy, 'Does International Law Obligate States to Open Their National Courts to Persons for the Invocation of Treaty Norms That Protect or Benefit Persons?', in D. Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009) ('in some circumstances perhaps the only reasonable way to apply a treaty that protects or benefits individuals is for national courts to be available for individuals to litigate claims arising from the treaty.'). Whether that statement is correct depends on the question whether the state will have the discretion and the time to change legislation or adopt other measures to perform the obligation. In the *Avena* Interpretation Judgment, the ICJ found that such leeway was available, and that direct effect was not required: Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)* (Judgment) General List No. 139 [2004] ICJ Rep. 12; ICGJ 349 (ICJ 2009).

[89] Ferdinandusse, *supra* note 33, at 110.

The potential for direct effect to ensure conformity between international and national law was recognized, for instance, by the Committee set up under the International Covenant on Economic, Social and Cultural Rights (ICESCR)[90] and the Inter-American Court of Human Rights (IACtHR).[91]

The more specific ground is that international law can support and influence the interpretation and application of the criteria of direct effect.[92] Direct effect of a treaty is in part a function of the interpretation of what the parties to that treaty agreed to, and thus 'what was promised'.[93] Illustrative of this is that in *Medellin*, the US Supreme Court referred to 'our obligation to interpret treaty provisions to determine whether they are self-executing'.[94]

While state practice is too diverse, and also too limited, to identify a single authoritative concept of direct effect as it exists in EU law, there is a remarkable convergence in the conditions and criteria that are applied in those states where direct effect is known. Generally, what count are, first, the question of whether a provision is clear enough and, secondly, whether or not it grants a right to private parties. Answering both questions cannot neglect international law.[95] Of course, it is rare that states conclude a treaty that requires the contracting parties to ensure that all or some of its provisions have the status of directly applicable law and must be enforced by their domestic courts.[96] But even when they do not, the structure and content of international obligations may lead domestic courts to conclude that they are complete and, in terms of their subjects, are addressed to private parties.[97] In that respect, the notion of direct effect 'rests on a characteristic inherent in the treaty', and is thus a matter of treaty interpretation.[98]

In those cases where international courts and other international institutions are empowered to interpret international obligations, such institutions may further exert the influence of international law on direct effect. One reason is that where direct effect depends on the interpretation of an international norm (notably in relation to

[90] ICESCR 'General Comment 9' (3 Dec. 1998) UN Doc E/C.12/1998/24 [4].

[91] *Almonacid-Arellano et al. v. Chile*, IACtHR, Series C, No. 154, Preliminary Objections, Merits, Reparations and Costs, Judgment of 26 Sept. 2006, at 144.

[92] Buergenthal, 'Self-Executing and Non-Self-Executing Treaties in National and International Law', IV *RdC* (1992) 303, at 319 (noting that in some states, the determination of whether a treaty is self-executing is made dependent on its international characterization).

[93] McDougal, 'The Impact of International Law upon National Law: A Policy-Oriented Perspective', 4 *S Dakota L Rev* (1959) 25, at 77.

[94] *Medellin v. Texas*, ILDC 947 (US 2008), at para. 37.

[95] Kaiser, 'Treaties, Direct Applicability', in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law* (2013) 1468, at para. 8.

[96] Buergenthal, *supra* note 92, at 319; Sørensen, 'Die Verplichtungen Eines Staates im Bereich Seiner Nationalen Rechtsordnung auf Grund eines Staatsvertrages', in G. Winkler and K. Vasak (eds), *Menschenrechte im Staatsrecht und im Völkerrecht* (1967), at 15, 26.

[97] *Jurisdiction of the Courts of Danzig, supra* note 2, at 17–18. See for analysis Van Panhuys, 'Relations and Interactions between International and National Scenes of Law', 112 *RdC* (1964) 24.

[98] This was, in cautious words, also confirmed in *Medellin v. Texas, supra* note 94, at para. 37 (stating that given 'our obligation to interpret treaty provisions to determine whether they are self-executing, we have to confess that we do think it rather important to look to the treaty language to see what it has to say about the issue').

its specificity and its addressees), a prior decision by an international court may be influential. Another is that international courts may expressly direct themselves to national courts and charge them with the task of giving effect to international rights where national law falls short. Basing itself on an advisory opinion of the IACtHR,[99] the Supreme Court of Argentina held in *Ekmekdjian v. Sofovich* that Article 14(1) of the IACHR provides a directly enforceable right of reply to an individual who was injured by inaccurate or offensive statements disseminated to the public, and that the courts had the power to give direct effect to that right.[100] The case law of the IACtHR, addressing itself directly to national courts, has been critiqued for encroaching on domestic affairs.[101] But from the perspective of national courts, it does provide international legal argument for granting direct effect to international law.

B *Normative Foundations of Direct Effect as a Shield*

While it may seem counter-intuitive to argue that international law itself provides grounds for resisting the direct effect of international law, we can derive from the system of international law two sets of reasons to be reluctant to engage in broad practices of direct effect. In this respect, a construction of the conditions of direct effect that impede the domestic judicial application of international law need not be regarded as nationalistic reflexes that seek to undermine the performance of international obligations. Rather, it may be seen as a legitimate response to the shortcomings of international law,[102] which fulfils a critical role in maintaining international law as a system that allows states to coordinate their policies and secure common objectives.

Also, here we can distinguish between a narrow and a broader ground. The narrow ground is that international law fuels the resistance by protecting values that it itself may undermine. International law and international institutions protect in a variety of ways fundamental rights, democracy, and the rule of law at the national level.[103] It is internally contradictory to protect such values while at the same time requiring that international laws that score poorly in terms of democracy or rule of law should be given direct effect – certainly if they would override domestic law. In (admittedly) rare cases, courts can justify the non-application of particular international rights or

[99] *Enforceability of the Right of Reply or Correction*, Advisory Opinion OC-786, Inter-American Court of Human Rights Ser. A No. 7 (29 Aug. 1986).

[100] Argentina, Sup. Ct of Justice, *Ekmekdjian, Miguel A v. Sofovich and Gerardo* (1992) Codices No. E.64. XXIII, ARG-1995-3-002, Fallos de la Corte Suprema de Justicia de la Nación (Official Digest), Vol. 1492, Revista Jurídica La Ley, Vol. 1992-C, 540. See the discussion in Buergenthal, 'International Tribunals and Courts: the Internationalization of Domestic Adjudication', in U. Beyerlin *et al.* (eds), *Recht Zwischen Umbruch und Bewahrung. Festschrift für Rudolf Bernhardt* (1995), at 687, 695–699.

[101] Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights', 12 *German LJ* (2011) 1203, available at: www.germanlawjournal.com/index.php?pageID=11&artID=1358 (last accessed 27 Nov. 2013).

[102] See further discussion in Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts', 34 *Loyola of LA Int'l and Comp L Rev* (2011) 153.

[103] Aust and Nolte, 'International Law and the Rule of Law at the National Level', in M. Zurn, A. Nollkaemper, and R. Peerenboom, *Rule of Law Dynamics in an Era of International and Transnational Governance* (2012), at 48.

obligations on the basis of international law itself. This will hold mainly for human rights law.

The broader ground is that, in light of the noted deficiencies of international law, a wide application of direct effect of international law at the national level that would allow courts to set aside conflicting national policies, or even laws, would attribute to the international legal system more than what it can bear in terms of its substantive and procedural qualities and in terms of its overall legitimacy. It is one thing to say that international law, with all its deficiencies, coordinates relations between states. It is quite something else to say that it dictates the law applying in a particular state. National practices that limit the direct effect of international law then should not necessarily be seen as a threat to the effectiveness of international law and the stability of treaty performance, but as a strategy that provides checks and balances that are lacking at the international level, and which supports the system of international law and its overall legitimacy. This is particularly so when the grounds for rejection of direct effect rise beyond the particular national context and are framed in terms to which other states and, indeed, the international system, can be receptive. This opens up possible dialogue between states/courts on their justification for contestation,[104] as well as exchanges between states/courts, on the one hand, and international institutions, on the other.

Construing direct effect in a demanding way, which allows the concept to function as a shield rather than as a sword, should not only then be seen as fuelling conflicts between competing claims, but also in terms of accommodation and adjustment between legal orders that depend on each other.[105] They (and thereby the concept of direct effect itself) constitute an essential component of international law as a dynamic body of law that can cater to competing and diverse social interests at different layers of governance.

5 The Political Role of Courts

Even though international law may thus be relevant for decisions on direct effect, either in construing direct effect as a sword or direct effect as a shield, its actual impact on shaping the practice of direct effect is quite marginal. In part this results from the fact that these considerations that support, respectively, international law as a sword or as a shield neutralize each other. But above all, international law plays a marginal role because it has to defer to and is contingent upon national law.[106] The contingency

[104] See Tzanakopoulos, 'Judicial Dialogue in Multi-level Governance: The Impact of the Solange Argument', in O.K. Fauchald and A. Nollkaemper (eds), *The Practice of International and National Courts and the (De-) Fragmentation of International Law* (2012).

[105] See generally Krisch, *supra* note 6, at 100.

[106] See Buergenthal, *supra* note 92, at 320–321 (noting that 'a treaty that, as a matter of international law, is deemed to be directly applicable is not self-executing ipso facto under the domestic law of the states parties to it. All that can be said about such a treaty is that the States party thereto have an international obligation to take whatever measures are necessary under their domestic law to ensure that the specific provisions of the treaty …, not only of its substantive obligations, are accorded the status of domestic law'). See also P. Reuter, *Introduction to the Law of Treaties* (1995), at 21; Borchard, 'The Relation between International and Municipal Law', *Proceedings, 8th American Scientific Congress, Washington, 1940, X* (1943) 77, at 82; H.W. Briggs, *The Law of Nations. Cases, Documents and Notes* (2nd edn, 1952), at 63.

of direct effect on national law does not constitute a clash between international law (that would seek to secure judicial application where national law falls short) and national law (that would pull in a different direction) that in some way is 'won' by national law. That, surely, would be too simplistic a construction. Instead it is international law itself that sustains and fuels this contingency.

International law sustains the contingency by respecting and protecting the autonomy of national legal orders, and the freedom of each state to determine how it arranges its relationship with international law. While an internationalist agenda may foster the argument that the traditional freedom of states may no longer be appropriate, seen from a global perspective the diversity and resistance are too significant to support any change in this freedom. If the International Court of Justice (ICJ) were to have stated in *Avena*[107] what the ECJ said in *VGL* (that is, if it had said that a particular group of states, which differ in the degree to which international law has been made part of national law, had as a matter of international law to give effect to rights that were not part of national law), that statement would have been without basis in international law, and would have lacked any chance of being accepted by states.

Despite all the discussion of an increasing regulatory and internal focus of international law, very little has changed in the fact that international obligations are generally formulated as obligations of result, stopping 'short at the outer boundaries of the State machinery',[108] and respecting the right of states to determine for themselves whether or not they allow their courts to give direct effect to an international obligation. The ICJ's response to Mexico's suggestion in the *Request for Interpretation* case that as a matter of international law the US Supreme Court would have been required to give effect to paragraph 153(9) of the *Avena* Judgment, rather than defer to the legislature, was indicative of the situation under general international law:

> The *Avena* Judgment nowhere lays down or implies that the courts in the United States are required to give direct effect to paragraph 153(9). The obligation laid down in that paragraph is indeed an obligation of result which clearly must be performed unconditionally; non-performance of it constitutes internationally wrongful conduct. However, the Judgment leaves it to the United States to choose the means of implementation, not excluding the introduction within a reasonable time of appropriate legislation, if deemed necessary under domestic constitutional law.[109]

The neutrality of customary international law on this point is simply a reflection of the continuing significant differences in the practice of states as regards the way in which they give effect to their international obligations.[110] With a majority of states

[107] Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning *Avena and Other Mexican Nationals, supra* note 88.

[108] ILC, 'Report of the Commission to the General Assembly on the work of its twenty-ninth session, 9 May–29 July 1977', Commentary to Art. 21 of the draft Arts on State Responsibility 'Breach of an international obligation requiring the achievement of a special result adopted on first reading', (1977) II *Yrbk ILC* (Part Two), 19, at para. 1.

[109] Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning *Avena and Other Mexican Nationals, supra* note 88, at para. 44.

[110] Sørensen, *supra* note 96, at 21.

not allowing for direct effect, international law could indeed hardly do otherwise than express a liberty for states to determine, according to their own national legal systems, whether direct effect is possible at all and, if so, what conditions and consequences apply. All this excludes what Iwasawa called the 'given-theory': the idea that international law would determine whether or not a particular rule of international law has direct effect.[111] Direct effect outside Europe is essentially a decentralized process.

Although in theory, states could conclude a treaty that requires the contracting parties to ensure that all or some of its provisions have the status of directly applicable law and be enforced by their domestic courts,[112] the point is that states have preferred not to do so, and have not set up international courts that have articulated that requirement in the absence of an expression of will of states. This is true even for regional integration organizations outside Europe. The closest resemblance can be found in the Andean Community of States. In its first preliminary ruling, the Andean Tribunal declared Andean law to have supremacy over national law, assuming that it had direct effect.[113] However, in later cases the Tribunal backtracked and adopted a more deferential position. It is difficult to identify traces of a direct effect doctrine that looks like the international variant of *VGL*.[114] The same holds for CARICOM.[115] The reluctance to accept a direct effect doctrine, comparable to *VGL*, is understandable with a view to the dualist legal tradition of most CARICOM member states. Also, the ECOWAS Community Court of Justice (ECCJ) has not followed the lead of the ECJ in *VGL*.[116] Whether the ECOWAS Treaty, Protocols, Decisions, and Regulations thereunder would have direct effect in ECOWAS national courts 'is a matter entirely determined by the legal system of each Member State'.[117] There are even fewer traces of direct effect in MERCOSUR[118] and ASEAN.[119] In these institutions, the absence of a court with the power to propel direct effect makes any comparison with the *VGL*

[111] Iwasawa, 'The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis', 26 *Virginia J Int'l L* (1986) 627, at 650.

[112] Buergenthal, *supra* note 92, at 303. Sørensen, *supra* note 96, at 26. An example that comes close is Art. 54 of the ICSID Convention, providing for (judicial) execution of arbitral awards. See for discussion R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2012), at 310–311; G. van Harten, *Investment Treaty Arbitration and Public Law* (2007), at 117–119.

[113] ATJ ruling 1-IP-87.

[114] Alter and Helfer, 'Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice', 64 *Int'l Org* (2010) 563, at 572; ATJ ruling 2-IP-90, at pt 1.

[115] O'Brien, 'CARICOM: A Novel Approach to Regional Integration?', Oxford Brookes University, 2010, available at: www.juridicas.unam.mx/wccl/ponencias/18/325.pdf (last accessed 27 Nov. 2013).

[116] See also Helfer, Alter, and McAllister, 'A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice', available at: http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5546&context=faculty_scholarship (last visited 5 Nov. 2013).

[117] 2 NANTS Regional Trade Advocacy Series 4 (2013), at 2–3; Nwauche, 'Enforcing ECOWAS in West-African National Courts'. 2 *J African L* (2011) 55, at 185.

[118] Rodriguez Yong, 'Providing Legal Certainty in South America: Can MERCOSUR Help?', 2(3) *Pace Int'l L Rev Online Companion* (2010) 1, at 11–12.

[119] Desierto, 'ASEAN's Constitutionalization of International Law: Challenges to Evolution under the new ASEAN Charter', 49 *Columbia J Transnat'l L* (2010) 28.

variant a non-starter. Perhaps the most noteworthy exception outside Europe is the practice of the IACtHR.[120] But even then, what matters at the end of the day is the acceptance of such constructions in national law.

The deference to national law explains and, at least from an international law perspective, justifies the wide diversity in the practice of direct effect. The heterogeneity of constructions and applications of direct effect demonstrates that the doctrine of direct effect fulfils multiple functions that are marginally influenced by international law. Otherwise, it is a concept that reflects a particular unique national legal and political context. This also means that direct effect is not a politics-free zone where the normal political contestation between legal orders is neutralized and put in the hands of courts. Direct effect instead embodies competing political ideals and becomes an instrument whereby choices are made and legitimized.

These political dimensions of direct effect are not only relevant to the national legal order, as they determine whether and how international law is applied *vis-à-vis* the political branches. They also have a relevant role to play *vis-à-vis* international law. The interplay between the role of direct effect as a sword or as a shield and the deference to national law for resolving the apparently competing pulls provide the political context for the international legal order and its application in the national legal order. It is a trite observation that the development, interpretation, application, and change of international law depend on politics. That, surely, also affects the application of international law at the domestic level. Political processes are not limited to negotiations of treaties or the framework of international institutions. The practices of direct effect of international obligations at the national level provide a necessary political context for the international legal order that otherwise lacks organized political structures – they provide for checks and balances, and change.[121]

From the perspective of direct effect, two critical features of this political process should be highlighted. First, the political process does not, as is commonly assumed, play a role in those cases where direct effect cannot be given; it instead plays out in the construction and application of the doctrine of direct effect. Secondly, the entry of direct effect in any particular legal order shifts this political role from the political branches (in particular, the constitutional legislature) to the courts. Case law demonstrates that the seemingly objective criteria of concreteness and private rights are in fact fundamentally open to multiple interpretations. This transforms direct effect from the seemingly technical principle it is in *VGL*, which is properly placed in the hands of courts, to a fundamentally political principle that makes courts powerful actors at the intersection of legal orders. It is that feature that allows us to understand, and to assess, the wide diversity in the practice of direct effect outside the EU.

[120] *Supra* note 91, at 99.

[121] See Krisch, *supra* note 6, at 85–89. See also Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts', 102 *AJIL* (2008) 241 (arguing that the practice of national courts has the potential of both providing an effective check on executive power at the national and international levels alike and promoting the ideals of the rule of law in the global sphere).

6 Conclusion

While the ECJ took a great leap when it pronounced *VGL*, it did not make up an entirely new concept. Nor is the concept of direct effect – standing for the principle that under certain conditions a rule of international law can be applied where national law falls short – unique. It existed before *VGL* and continues to exist outside it, both within and outside Europe. The concept responds to a need that is bound to arise once domestic legal orders open up to international law, but for good reasons quail in the light of the enormity of the potential consequences.

Compared to the relatively uniform application of *VGL* in the EU, the practice of direct effect of international law is extremely heterogeneous. One way of structuring the cases, and making sense of the heterogeneity, is to distinguish between those cases where direct effect functions as a sword and those where it puts in place a shield between the international and national legal orders. In a somewhat paradoxical way, international law provides some support for either of these functions. But as these normative grounds cancel each other out, and international law otherwise defers to the national level, at the end of the day direct effect is a tool that is determined by domestic political choices.

The article has highlighted that the political process at the interface of international and national legal orders does not, as is commonly assumed, play a role in those cases where direct effect cannot be given. In contrast, it plays out in the construction and application of the doctrine of direct effect.[122] Critically, the introduction of the concept of direct effect in any particular legal order shifts this political role from the political branches (in particular, the constitutional legislature) to the courts. The diversity in the practice of direct effect reflects the diverse choices made in this political process – and because of this very diversity, international law has not been able to impose normative guidance.

All of this may seem far removed from *VGL* as it operates in EU law. However, the political dimensions of the concept are not entirely alien to EU law. They constitute an image that reminds us where *VGL* came from – and from which it can never be entirely insulated. As in international law, so too in EU law domestic courts can play a critical political role if the domestic support for international prescriptions wanes.

[122] Klabbers, *supra* note 71, at 264.