
Judging International Judgments Anew? The Human Rights Courts before Domestic Courts

Raffaella Kunz*

Abstract

In recent times, instances of contestation against the European Court of Human Rights and the Inter-American Court of Human Rights have made headlines, and, in many of these cases, domestic courts have played a role by refusing to follow the human rights courts or even declaring their judgments to be unconstitutional. This article undertakes an in-depth analysis of these instances of judicial resistance and puts them into context. This shows that domestic courts, even though originally not having been allocated this role, have become important ‘compliance partners’ of the human rights courts and now play an important and autonomous role in the implementation of their judgments. At the same time, they act as ‘gatekeepers’ and limit their effects in the domestic order. Recent cases even suggest a turn to a less open and more national self-perception of domestic courts. While this reflects to some extent the multiple – and sometimes conflicting – roles domestic courts perform at the intersection of legal orders, the article argues that the open and flexible stance many domestic courts take when faced with international judgments is better suited to cope with the complex and plural legal reality than systematically judging anew on matters already decided by the human rights courts.

1 Introduction

The European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) are unquestionably going through a tough period. In the Americas, the Dominican Republic is about to leave the system over a politically sensitive judgment;¹

* Senior Research Fellow, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany. Email: kunz@mpil.de.

¹ Huneeus and Urueña, ‘Treaty Exit and Latin America’s Constitutional Courts’, 111 *AJIL Unbound* (2018) 456, at 458–459.

Venezuela already turned its back on the IACtHR in 2012,² possibly inspiring other states where the Court faces discontentment, such as Ecuador, Bolivia and Nicaragua.³ Apart from that, the Organization of American States, and, with it, the Inter-American Commission on Human Rights and, inevitably, also the Court, have lately been shaken by a serious financial crisis.⁴ In Europe, the case of Russia, which is openly refusing to follow certain Strasbourg rulings, is currently making headlines, and the – long despised – exit option is not off limits anymore.⁵ On top of that, the draft Copenhagen Declaration proposed by the Danish chairmanship of the Council of Europe to once more reform the European human rights system,⁶ despite having been considerably softened up in the finally adopted version,⁷ has caused an outcry in the expert community, with concerns raised by many that the proposal could lead to a significant weakening of the ECtHR.⁸

Whereas some of these instances of resistance of the two most active regional human rights courts are clearly linked to the (populist) agendas of political actors in the respective countries, it is striking that, in many member states and notably also in states with robust rule-of-law institutions that have generally been open towards the regional human rights courts, it is the judiciary that in recent times has taken a more reticent or even critical stance towards the IACtHR and the ECtHR. By way of example, in February 2017, the Argentinian Supreme Court – long considered to be one of the strongest allies of the IACtHR and defender of neo-constitutionalism in Latin America⁹ – issued a judgment in which it declared its unwillingness to execute a prior judgment of the San José Court because of the latter’s alleged overstepping of

² See Inter-American Court of Human Rights (IACtHR), ‘IACHR Deeply Concerned over Result of Venezuela’s Denunciation of the American Convention’, press release (2013), available at www.oas.org/en/iachr/media_center/preleases/2013/064.asp.

³ ‘Analistas temen “efecto dominó” tras salida de Venezuela de la CADH’, *El Universal* (2013), available at www.eluniverso.com/noticias/2013/09/14/nota/1439651/analistas-temen-efecto-dominio-tras-salida-venezuela-cadh.

⁴ V. Sandoval and F. Carvahlo Veçoso, ‘A Financial Crisis or Something More? A Turning Point for the Inter-American Commission on Human Rights’, *Volkerrechtsblog*, 13 June 2016, available at <https://voelkerrechtsblog.org/a-financial-crisis-or-something-more/>; Soley, ‘A Response to “A Financial Crisis or Something More?”’, *Volkerrechtsblog*, 22 June 2016, available at <https://voelkerrechtsblog.org/a-response-to-a-financial-crisis-or-something-more/>.

⁵ Whereas, in Switzerland and the United Kingdom, the withdrawal debate seems to have calmed down more recently, the exit of Russia from the Council of Europe over a dispute going back to resolutions regarding Crimea has become a serious possibility. For a recent debate on treaty exit in general, see ‘Symposium on Treaty Exit at the Interface of Domestic and International Law’, 111 *AJIL Unbound* (2017) 425.

⁶ The draft of the Copenhagen Declaration is available at https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/nyheder/draft_copenhagen_declaration_05.02.18.pdf.

⁷ High Level Conference on the Future of the European Court of Human Rights, Copenhagen Declaration (2018), available at <https://rm.coe.int/copenhagen-declaration/16807b915c>.

⁸ See the various contributions on *EJIL:Talk*, available at www.ejiltalk.org/tag/copenhagen-declaration/ as well as on *Strasbourg Observers*, available at <https://strasbourgobservers.com/2018/02/25/blog-seminar-the-draft-copenhagen-declaration-food-for-thought/>.

⁹ Huneeus, ‘Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights’, in J. Couso, A. Huneeus and R. Sieder (eds), *Cultures of Legality: Judicialization and Political Activism in Latin America* (2010) 112, at 113–114; see further Huneeus, ‘Constitutional Lawyers and the Inter-American Court’s Varied Authority’, 79 *Law and Contemporary Problems* (2016) 179.

competences.¹⁰ The Constitutional Court of Italy, on its side, decided in a judgment in March 2015 that the Italian judiciary now has to closely scrutinize the jurisprudence of the ECtHR and, based on a handful of quite controversial criteria, decide whether it is ‘well established case-law’.¹¹ If this is not the case, the Italian courts may not follow it. This judgment stands in stark contrast to the earlier jurisprudence of the Italian Constitutional Court, which in two landmark decisions in 2007 had given Strasbourg judgments effects much beyond what is required under Article 46 of the European Convention on Human Rights (ECHR).¹²

This development might appear surprising insofar as the phenomenon of backlash is usually rather associated with governments and political actors. The prevailing picture of courts is that they are guardians of legality, contributing to the rule of law also on the international plane,¹³ thus giving ‘a new contemporary vitality’¹⁴ to Scelle’s famous theory of *dédoulement fonctionnel*.¹⁵ The more recent instances now suggest that domestic courts are not just ‘impartial enforcers’ of international law¹⁶ but, rather, also see their role – and increasingly so – as ‘gatekeepers’, controlling the effects of international law at the domestic level and ready to cushion its impact if deemed necessary.

This calls for a further examination. This article systematically analyses cases of judicial resistance and explores the ways in which domestic courts deal with the judgments of the human rights courts. By delving deep into the doctrinal arguments put forward by the domestic courts, it inquires how domestic courts position themselves *vis-à-vis* the human rights courts. The aim is, on the one hand, to shed some new light on the old debate on the role of domestic courts in international law – a question that in times of global governance has not lost any of its currency. On the other hand, the article aims to contribute to the burgeoning debate on resistance to international

¹⁰ Supreme Court (Argentina) 368/1998 (34-M)/CS1, *Ministerio de Relaciones Exteriores y Culto s/ informe sentencia dictada en el caso ‘Fontevecchia y D’Amico v. Argentina’ por la Corte Interamericana de Derechos Humanos*, 14 February 2017, 340:47.

¹¹ Constitutional Court (Italy), Judgment no. 49/2015 of 26 March 2015, ECLI:IT:COST:2015:49.

¹² Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950, 213 UNTS 2889. On the Italian Constitutional Court, see Part 3.A below.

¹³ A. Nollkaemper, *National Courts and the International Rule of Law* (2011). On the role of domestic courts in international law, see generally the report of the study group of the International Law Association (ILA), *Principles of the Engagement of Domestic Courts with International Law* (2016), available at www.ila-hq.org/index.php/study-groups. On the role of domestic courts in the implementation of human rights treaties, see Venice Commission, *Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts*, Doc. CDL-AD(2014)036, 8 December 2014, para. 85.

¹⁴ Cassese, ‘Remarks on Scelle’s Theory of “Role Splitting” (dédoulement fonctionnel) in International Law’, 1 *European Journal of International Law (EJIL)* (1990) 210, at 225.

¹⁵ Scelle, ‘Le phénomène juridique du dédoublement fonctionnel’, in W. Schätzel and H.-J. Schlochauer (eds), *Rechtsfragen der Internationalen Organisation: Festschrift für Hans Wehberg* (1956) 324. On this, see Shany, ‘Dédoulement Fonctionnel and the Mixed Loyalties of National and International Judges’, in F. Fontanelli, G. Martinico and P. Carrozza (eds), *Shaping Rule of Law through Dialogue: International and Supranational Experiences* (2010) 29; Cassese, *supra* note 14.

¹⁶ Roberts, ‘Comparative International Law? The Role of National Courts in Creating and Enforcing International Law’, 60 *International and Comparative Law Quarterly (ICLQ)* (2011) 57, at 58–59.

courts. The method is empirical without claiming to be exhaustive. The article relies on a rich set of cases from diverse jurisdictions that is drawn from the *Oxford Reports on International Law in Domestic Courts* as well as from the relevant literature.

The article proceeds as follows. It begins by taking the perspective of the two human rights courts and recalls how both the IACtHR and the ECtHR over the last years have developed tools to increase their impact on the ground and have also augmented the pressure on domestic courts. Doing so, they have contributed to overcoming the strict duality between the international and the domestic sphere. In a next step, and changing perspective, the article explores how domestic courts react to this development. It is shown that, despite originally not having been allocated this role, many domestic courts have indeed followed the invitation of their international counterparts and started to actively contribute to the implementation of their judgments, at times even against domestic law in force and oftentimes not limiting themselves to cases rendered against their state. They have thus become important ‘compliance partners’ of the human rights court and now play an important international judicial function. At the same time, the increased interaction has also multiplied cases of conflict and tensions between legal orders and has led many domestic courts to more strongly act as ‘gatekeepers’ and signal limits to their openness. The last part of the article assesses this development and addresses the question whether we are currently witnessing a shift to a more nationalized jurisprudence. It concludes that, even though looking more closely the overall picture looks less dramatic, the flexible and open stance many domestic courts take when dealing with judgments of the human rights courts is better suited to the complex and plural legal reality than systematically judging anew on matters already decided by the human rights courts.

2 Paving the Way for ‘Compliance Partnerships’: The Techniques of the Human Rights Courts to Overcome the Strict Duality between Legal Orders

Despite the fact that in recent years domestic courts have taken centre stage also on the international plane, not only contributing to the creation of new rules of customary international law but also taking on a role in the enforcement of international law and, thus, filling one of the most important gaps of the existing international legal order,¹⁷ it was for a long time less clear whether domestic courts could also play a role in the enforcement of international judgments. The reason is that, while it is undisputed that international judgments also need to pass the ‘acid test’ of enforcement,¹⁸ this task was traditionally considered a political matter, best confined to the executive.¹⁹

¹⁷ On the dual – and ambiguous – role of domestic courts in creating and enforcing international law, see *ibid.*, at 58–59.

¹⁸ Jennings, ‘The Judicial Enforcement of International Obligations’, 47 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* (1987) 3, at 3; Huneeus, ‘Compliance with Judgments and Decisions’, in C. Romano, K. Alter and Y. Shany (eds), *The Oxford Handbook of International Adjudication* (2014) 437, at 437.

¹⁹ Oppong and Barreto, ‘Enforcement’, in W.A. Schabas and S. Murphy (eds), *Research Handbook on International Courts and Tribunals* (2017) 273, at 276, 286; see also Venice Commission, *supra* note 13, para. 98.

This was not so different for the two human rights courts. Both the American Convention on Human Rights (ACHR)²⁰ and the ECHR start from a classical international law model. Article 46 of the ECHR, dealing with the 'binding force and execution' of the judgments of the Court, as well as its pendant, Article 68 of the ACHR, address the 'high contracting parties' and the 'states parties' respectively as an entity or 'black box'. From this, it has generally been concluded that the intention of the drafters was to leave it up to the states to decide how to give effect to the courts' judgments internally.²¹ It is out of respect for their sovereignty that the conventions formulate the obligations arising out of the judgments as obligations of result, stopping 'short at the outer boundaries of the State machinery'.²² This means that the judgments do not display a direct effect on the national plane as a matter of international law; in other words, they are not 'self-executing'.²³ The question whether domestic courts are bound to give effect to them in principle thus depends on the internal law. In this sense, the traditional paradigm according to which domestic and international courts are 'courts of a different legal order' also holds true for the human rights courts.²⁴

However, it can be said that this strict duality has by now been overcome in both human rights systems. Whereas this has happened straightforwardly in the Inter-American system, the ECtHR has also developed new and more 'intrusive' techniques to enhance the effectiveness of its judgments in recent times.

A The Far-Reaching Jurisprudence of the IACtHR to Enhance Its Effectiveness

The IACtHR, operating in a politically and historically challenging environment, started early to develop a very unique and far-reaching jurisprudence, not only filling the convention guarantees with life but also enhancing their effectiveness in the domestic realm. For one thing, the Court developed its one-of-a-kind jurisprudence on reparations, oftentimes adding very detailed lists of remedies to be taken by states as a consequence of violations of the ACHR. These include a wide array of measures,

²⁰ American Convention on Human Rights (ACHR) 1969, 1144 UNTS 17955.

²¹ Cremer, 'Entscheidung und Entscheidungswirkung', in R. Grote and T. Marauhn (eds), *EMRK/GG. Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (2nd edn, 2013) 2053, para. 83; M.E. Góngora Mera, *Inter-American Judicial Constitutionalism: On the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication* (2011), at 61–63; on the situation in public international law generally, see J. Polakiewicz, *Die Verpflichtungen der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte* (1993), at 205–212; Ferdinandusse, 'Out of the Black Box? The International Obligation of State Organs', 29 *Brooklyn Journal of International Law* (2003) 45.

²² International Law Commission (ILC), 'Report of the Commission to the General Assembly on the Work of Its Twenty-Ninth Session, 9 May–29 July 1977', 2(2) *ILC Yearbook* (1977) 1, at 19.

²³ The part of the judgments of the IACtHR on the financial compensation is an exception to that. The ACHR foresees the direct domestic enforceability of this part. ACHR, *supra* note 20, Art. 68(2): 'That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state.'

²⁴ *Certain German Interests in Polish Upper Silesia*, 1925 PCIJ Series A, No. 6, 3, at 20.

including medical and psychological care for victims of human rights violations,²⁵ information on the whereabouts of forcefully disappeared persons²⁶ as well as measures of satisfaction, such as public excuses²⁷ and the establishment of monuments.²⁸ On a regular basis, the IACtHR has also ordered the reopening of domestic procedures in violation of the ACHR in the operative part of its judgments.²⁹ In some cases, which are usually particularly grave, this can lead to the reopening of criminal proceedings to the detriment of individuals (*reformatio in peius*).³⁰ In some – albeit very exceptional – cases, it even seems that the IACtHR has conferred a direct effect to its orders.³¹

But the IACtHR also started – much more straightforwardly than the ECtHR – to enter into a direct dialogue with its domestic counterparts. Its conventionality control doctrine (*control de convencionalidad*) is the second characteristic feature of the Inter-American system. In *Almonacid Arrellano*, the IACtHR famously stated that ‘the Judiciary must exercise a sort of “conventionality control” between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention’.³² In later judgments, the doctrine

²⁵ IACtHR, *Case of Manuel Cepeda Vargas v. Colombia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 26 May 2010. All IACtHR decisions are available at www.corteidh.or.cr/index.php/en/jurisprudencia.

²⁶ IACtHR, *Case of Radilla-Pacheco v. Mexico*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), 23 November 2009.

²⁷ IACtHR, *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), 24 November 2010.

²⁸ IACtHR, *Case of Kawas-Fernández v. Honduras*, Judgment (Merits, Reparations and Costs), 3 April 2009. For an overview, see Antkowiak, ‘Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond’, 46 *Columbia Journal of Transnational Law* (2008) 351; J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2012), at 188–250.

²⁹ See, e.g., IACtHR, *Case of Tristán Donoso v. Panamá*, Judgment (Preliminary Objection, Merits, Reparations, and Costs), 27 January 2009, operative para. 14: ‘The State shall set aside the criminal conviction entered against Mr. Tristán Donoso and all the consequences arising therefrom, within one year as from the date notice of the instant Judgment be served and pursuant to the provisions of paragraph 195 hereof.’

³⁰ See, e.g., IACtHR, *Case of Bulacio v. Argentina*, Judgment (Merits, Reparations and Costs), 18 September 2003, operative para. 4: ‘[T]he State must continue and complete the investigation of all the facts of this case and punish those responsible for them.’ In the reasoning, the Court added that the extinguishment provisions may not oppose compliance with the judgment (para. 117), with the consequence that an earlier final judgment based on such provisions had to be set aside.

³¹ In its famous *Barrios Altos* ruling, the Court arguably declared domestic legislation on amnesties void. See IACtHR, *Case of Barrios Altos v. Peru*, Judgment (Merits), 14 March 2001, para. 44: ‘Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible, nor can they have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the American Convention have been violated.’ For an appraisal, see Binder, ‘Auf dem Weg zum lateinamerikanischen Verfassungsgericht? Die Rechtsprechung des Interamerikanischen Menschenrechtsgerichtshofs im Bereich der Amnestien’, 71 *ZaöRV* (2011) 1.

³² IACtHR, *Caso Almonacid Arellano y otros v. Chile*, Judgment (Excepciones Preliminares, Fondo, Reparaciones y Costas), 26 September 2006, para. 124.

has been refined and extended to actors beyond the judiciary, but the main consequence remains that the IACtHR obliges domestic judges to check whether domestic legislation conforms to the ACHR as interpreted by the Court and, if not, to disapply it, thus moving the convention in the direction of the supranational effect conferred to European Union law by the Court of Justice of the European Union (CJEU).³³

Not surprisingly, this far-reaching doctrine has had a strong impact on the domestic level and has been criticized, including by one of its 'fathers', Sergio García Ramírez,³⁴ for the practical difficulties its application raises in the face of the very diverse systems of judicial review.³⁵ The IACtHR recognizes this and somewhat mitigates some of these problems by stating that the conventionality control must be exercised by judges 'obviously within the framework of their respective competences and the corresponding procedural regulations'.³⁶ The rationale behind the doctrine is for the convention to reach greater effectiveness in light of the limited means of the Court.³⁷ The IACtHR sees the conventionality control as part of the principle of subsidiarity.³⁸ To use the words of one of its justices, the doctrine transforms domestic judges into 'the first and true guardians of the American Convention'.³⁹ In the view of the Court, domestic courts are mainly 'vehicles for translating the obligations specified in international human rights treaties into domestic norms'.⁴⁰ However, in recent times, this very hierarchical view increasingly comes under pressure. It is argued that in light of the more stable democratic governance in Latin America, the IACtHR 'should reconceive

³³ For an overview, see Ferrer Mac-Gregor, 'Conventionality Control: The New Doctrine of the Inter-American Court of Human Rights', 109 *AJIL Unbound* (2015) 93; Burgorgue-Larsen, 'Chronicle of a Fashionable Theory in Latin America: Decoding the Doctrinal Discourse on Conventionality Control', in Y. Haec, O. Ruiz-Chiribonga and C. Burbano-Herrera (eds), *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (2015) 647; C. Ayala Corao, *Del diálogo jurisprudencial al control de convencionalidad* (2012). For a critical appraisal, see Dulitzky, 'The Constitutionalization of International Law in Latin America: An Alternative Approach to the Conventionality Control Doctrine', 109 *AJIL Unbound* (2015) 100; Contesse, 'The International Authority of the Inter-American Court of Human Rights: A Critique of the Conventionality Control Doctrine', 22(9) *International Journal of Human Rights* (2017) 1168.

³⁴ García Ramírez is said to have used the term 'control de convencionalidad' for the first time in a separate opinion. See IACtHR, *Case of Myrna Mack Chang v. Guatemala*, Judgment (Merits, Reparations and Costs), 25 November 2003, para. 27, Reasoned Concurring Opinion of Judge García Ramírez ('treaty control' in the English version; 'control de convencionalidad' in the Spanish version).

³⁵ García Ramírez, 'El control judicial interno de convencionalidad', in A. von Bogdandy, F. Piovesán and M. Morales Antoniazzi (eds), *Estudios Avanzados de Derechos Humanos: Democracia e Integragao Jurídica: Emergência de um novo Direito Público* (2013) 557, at 582–583; see also Dulitzky, *supra* note 33, at 102.

³⁶ IACtHR, *Case of Cabrera García and Montiel Flores v. Mexico*, Judgment (Preliminary Objection, Merits, Reparations and Costs), 26 November 2010, para. 225.

³⁷ IACtHR, *Case of the Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 24 November 2006, Separate Opinion Sergio García Ramírez, at para. 8.

³⁸ IACtHR, *Case of the Santo Domingo Massacre v. Colombia*, Judgment (Preliminary Objections, Merits and Reparations), 30 November 2012.

³⁹ Cabrera García, *supra* note 36, concurring Opinion of ad hoc judge Eduardo Ferrer Mac-Gregor Poisot, at para. 24.

⁴⁰ Manuel Cepeda Vargas, *supra* note 25, Concurring Opinion of Judge Diego García-Sayán, at para. 30.

the conventionality control as partnership with national courts⁴¹ and move more towards a true ‘dialogue of judges’ in the sense of giving and taking.⁴²

B The More Cautious Stance of the ECtHR

In the European system, despite the much described transformation of the ECHR into a ‘constitutional instrument of European public order’,⁴³ and the assumption of certain traits of a constitutional court with regard to the effects of its rulings,⁴⁴ the ECtHR for a long time stuck to a very dualistic view, highlighting the essentially declaratory nature of its judgments and leaving it up to the states concerned to choose the means to redress breaches.⁴⁵ Other than its counterpart on the other side of the Atlantic, the Court was in the comfortable situation that it could rely on well-functioning states with established rule-of-law structures, needing less guidance to fulfil their obligations. Only when confronted with complex new questions related to the widespread and oftentimes severe human rights violations in the course of the expansion of the convention system towards Central and Eastern Europe, the dramatic increase in the number and diversity of member states and the resulting backlog crisis did the Court gradually start to develop techniques to increase its impact on the ground.⁴⁶ Whereas the pilot judgment procedure is probably the best known of these techniques, there are also the so-called ‘individual measures’ that the ECtHR started to impose in the early years of the new millennium as a last resort for certain qualified convention violations.⁴⁷ Like the IACtHR, the Strasbourg judges started to order specific action, such

⁴¹ Dulitzky, *supra* note 33, at 104.

⁴² Contesse, ‘The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights’, 15 *International Journal of Constitutional Law (IJCL)* (2017) 414.

⁴³ ECtHR, *Loizidou v. Turkey*, Appl. no. 15318/89, Judgment of 23 March 1995, para. 75. All ECtHR decisions are available at <http://hudoc.echr.coe.int/>.

⁴⁴ See, e.g., Greer and Wildhaber, ‘Revisiting the Debate about “Constitutionalising” the European Court of Human Rights’, 12 *Human Rights Law Review* (2012) 655; Alkema, ‘The European Convention as a Constitution and Its Court as a Constitutional Court’, in P. Mahoney *et al.* (eds), *Protection des droits de l’homme: la perspective européenne* (2000) 41.

⁴⁵ ECtHR, *Case of Marckx v. Belgium*, Appl. no. 6833/74, Judgment of 13 June 1979, para. 58: ‘[T]he decision cannot of itself annul or repeal these provisions: the Court’s judgment is essentially declaratory and leaves to the State the choice of the means to be utilised in its domestic legal system for performance of its obligation under Article 53.’

⁴⁶ See generally Sadurski, ‘Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments’, 9 *Human Rights Law Review (HRLR)* (2009) 397.

⁴⁷ Keller and Marti, ‘Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights’ Judgments’, 26 *EJIL* (2016) 829; Cremer, ‘Prescriptive Orders in the Operative Provisions of Judgments by the European Court of Human Rights: Beyond *res judicanda*?’ in A. Seibert-Fohr and M.E. Villiger (eds), *Judgments of the European Court of Human Rights: Effects and Implementation* (2014) 39; Sicilianos, ‘The Role of the European Court of Human Rights in the Execution of Its Own Judgments: Reflections on Article 46 ECHR’, in Seibert-Fohr and Villiger, *ibid.*, 285; Jahn, ‘Ruling (In)directly through Individual Measures? Effect and Legitimacy of the ECtHR’s New Remedial Power’, 74 *ZaōRV* (2014) 1; Colandera, ‘On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures: Some Remarks in Light of the Assanidze, Broniowski and Sejdicovic Cases’, 7 *HRLR* (2007) 396. On the pilot judgment procedure, see Fyrnys, ‘Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights’, 12 *German Law Journal* (2011) 1231.

as the release of unlawfully detained persons⁴⁸ and the reopening of judicial proceedings,⁴⁹ in the operative provisions of its judgments.

Despite the vivid scholarly debate this jurisprudential development raised because the ECHR – unlike the ACHR⁵⁰ – does not foresee an explicit basis for the ordering of concrete remedial measures,⁵¹ the concretization of the duties flowing from ECtHR judgments has generally been welcomed. When faced with grave and sometimes ongoing human rights violations, it is argued that it would almost be cynical for a court called upon to deal with these situations to limit itself to finding a breach and possibly ordering financial compensation: ‘As opposed to just throwing cash at a problem, orders can be tailored to specific violations suffered by individual victims and even society at large.’⁵² More concrete obligations are said to improve the compliance rate and, thus, effectuate the human rights systems.⁵³ Scientific evidence suggests that also in the European context and especially in states with weak rule-of-law structures, where sometimes the necessary expertise for implementation is missing, the concrete orders facilitate compliance.⁵⁴ In addition, and importantly for the questions dealt with in this article, by formulating more concrete obligations and reducing the leeway in the implementation process, the human rights courts contribute to the direct enforceability of their judgments through the domestic judiciary and thus facilitate ‘compliance partnerships’ with domestic courts.⁵⁵

⁴⁸ ECtHR, *Case of Assanidze v. Georgia*, Appl. no. 71503/01, Judgment of 8 April 2004, operative para. 14: ‘Holds unanimously (a) that the respondent State must secure the applicant’s release at the earliest possible date.’

⁴⁹ ECtHR, *Case of Sejdic v. Italy*, Appl. no. 56581/00, Judgment of 10 November 2004. This judgment was later watered down by the Grand Chamber. See ECtHR, *Case of Sejdic v. Italy*, Appl. no. 56581/00, Judgment (GC) of 1 March 2006. Often, the Court only orders the reopening of proceedings if the domestic order foresees this possibility. Recent case law suggests that this type of remedy remains disputed among the judges. See ECtHR, *Case of Moreira Ferreira v. Portugal (no. 2)*, Appl. no. 19867/12, Judgment (GC) of 11 July 2017.

⁵⁰ See ACHR, *supra* note 20, Art. 63(1): ‘If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.’

⁵¹ The ECtHR in these cases regularly finds that the state discretion is reduced, as the violation found ‘does not leave any real choice as to the measures required to remedy it’. See, e.g., *Case of Assanidze v. Georgia*, *supra* note 48, para. 202. For an overview, see Cremer, *supra* note 47.

⁵² Antkowiak, *supra* note 28, at 387.

⁵³ Keller and Marti, *supra* note 47, at 839–840; Staton and Romero, ‘Clarity and Compliance in the Inter-American Human Rights System’, available at http://paperroom.ipsa.org/papers/paper_26179.pdf; Staton and Vanberg, ‘The Value of Vagueness: Delegation, Defiance, and Judicial Opinions’, 52 *American Journal of Political Science* (2008) 504.

⁵⁴ Anagnostou and Mungiu-Pippidi, ‘Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter’, 25 *EJIL* (2014) 205.

⁵⁵ This term was coined by Huneeus. See Huneeus, ‘Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights’, 44 *Cornell International Law Journal* (2011) 493.

Occasionally, the ECtHR also uses formulations that resemble the conventionality control formula.⁵⁶ In a judgment rendered against France, it directly addressed the domestic judiciary and stated that ‘the adoption of general measures requires the State concerned to prevent, with diligence, further violations similar to those found in the Court’s judgments ... *This imposes an obligation on the domestic courts to ensure, in conformity with their constitutional order and having regard to the principle of legal certainty, the full effect of the Convention standards, as interpreted by the Court*’.⁵⁷ While this judgment could be read as a further step in ‘piercing the veil’ of the unitarian state, the Strasbourg Court so far does not seem to have gone further down this road. In this sense, the brave formulation might be owed to the fact that the *Fabris* judgment is but a reinforcement of an earlier judgment on a similar matter rendered against France⁵⁸ as well as the fact that the ordinary judiciary in France now seems to undertake a conventionality control.⁵⁹

As we will see, many domestic courts have indeed agreed to assume the role as compliance partners and now frequently contribute to the implementation of the San José and Strasbourg rulings. However, the ‘activism’ of the two regional courts has also provoked criticism for being too far-reaching, intrusive and undemocratic.⁶⁰ Furthermore, evidence seems to suggest that international human rights law can become ‘overlegalized’, which can result in backlash.⁶¹ Before turning to the question whether this is the development that we are witnessing at the moment, the following part addresses the dual – and often delicate – role that domestic courts play in the implementation phase.

3 The Multiple Roles of Domestic Courts at the Intersection of Legal Orders

Both human rights courts – to different extents – have thus developed techniques to foster compliance with their judgments and ‘pierce the veil’ of state sovereignty. How do their domestic counterparts react to this? Based on a rich set of cases, this part examines how domestic courts deal with judgments of the human rights courts when

⁵⁶ See also Gerards, ‘The European Court of Human Rights and the National Courts: Giving Shape to the Notion of “Shared Responsibility”’, in J. Gerards and J. Fleuren (eds), *Implementation of the European Convention of Human Rights and of the Judgments of the ECtHR in National Case-Law* (2014) 13, at 27.

⁵⁷ ECtHR, *Fabris v. France*, Appl. no. 16574/08, Judgment (GC) of 7 February 2013, para. 75 (emphasis added).

⁵⁸ ECtHR, *Case of Mazurek v. France*, Appl. no. 34406/97, Judgment of 1 February 2000.

⁵⁹ See Part 3.A below.

⁶⁰ For the Inter-American context, see Malarino, ‘Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights’, 12 *International Criminal Law Review* (2012) 665; for the ECtHR, see generally P. Popelier, S. Lambrecht and K. Lemmens, *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (2016).

⁶¹ Helfer, ‘Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes’, 102 *Columbia Law Review* (2002) 1832.

asked to give effect to them. It will be shown that, despite the fact that originally they have not been allocated this role, many domestic courts have indeed followed the invitation of their international counterparts and started to actively contribute to the implementation of their judgments. Thus, they have become important 'compliance partners' of the human rights courts. Most of them, however, are not ready to follow the human rights courts unconditionally and, rather, are choosing to decide on a case-by-case basis whether or not to give effect to a judgment. The much-increased interaction has even led many courts to act more actively as 'gatekeepers'. More recent developments indicate that the tensions between legal orders have grown over the last few years.

A Domestic Courts as 'Compliance Partners' of the Human Rights Courts

For a long time, the judicial enforcement of most international judgments was considered to be 'clearly impracticable or inappropriate'.⁶² Traditionally, the execution of international judgments was considered to be mainly a political matter,⁶³ and courts were only deemed suited to enforce judgments on monetary compensation.⁶⁴ Numerous examples now suggest that this view, at least in the context of the two human rights courts, has been overcome. In fact, today, it frequently happens that individuals, having no other venue domestically, approach domestic courts in order to give effect to judgments rendered in their favour. Many examples show that courts are now willing in almost any situation to contribute to the implementation of judgments from human rights courts – that is, no matter whether acts of the judiciary, legislative or executive branches are at stake. Courts adjust their own interpretation of the law to the human rights courts;⁶⁵ reopen final domestic judicial proceedings following a judgment of the ECtHR or the IACtHR;⁶⁶ order the executive to take action to implement orders of the human rights courts;⁶⁷ and disapply or even quash laws that have been declared by the human rights courts to violate the conventions. For example, the Mexican Supreme Court in *Radilla Pacheco* formally accepted its duty to undertake a conventionality control and refused to apply a norm that also extended the

⁶² W.C. Jenks, *The Prospect of International Adjudication* (1964), at 711.

⁶³ See note 19 above.

⁶⁴ C. Schreuer, *Decisions of International Institutions before Domestic Courts* (1981), at 193–194.

⁶⁵ See the judgment of the Federal Court of Justice, changing its long-standing jurisprudence on the balancing between the right to privacy and the freedom of expression. Federal Court of Justice (Germany) VI ZR 51/06, 6 March 2007, BGHZ 171, 275, implementing ECtHR, *Case of Von Hannover v. Germany* (No. 2), Appl. nos. 40660/08 and 60641/08, Judgment (GC) of 7 February 2012.

⁶⁶ An example is the judgment of the Supreme Court of Guatemala concerning a person given the death penalty that the IACtHR had found to be in violation of the ACHR. Supreme Court of Justice (Guatemala) 96–2006, *Caso Fermín Ramírez*, 23 January 2006, 2 Diálogo Jurisprudencial (2007) 213, implementing IACtHR, *Caso Fermín Ramírez v. Guatemala*, Judgment (Fondo, Reparaciones y Costas), 20 June 2005.

⁶⁷ Constitutional Court (Colombia) T-653/2012, 23 August 2012, implementing IACtHR, *Case of the 19 Merchants v. Colombia*, Judgment (Merits, Reparations and Costs), 5 July 2004.

jurisdiction of military tribunals to certain cases involving civilians.⁶⁸ In Switzerland, the possibility for individuals to go to Strasbourg even led the Federal Tribunal to overcome the strict prohibition to review legislation and, thus, extended the competences of the court considerably. Even though it still does not have the power to quash federal statutes, Federal Tribunal now frequently disapplies legislation that is not in conformity with the standards of the ECHR.⁶⁹ Also the Peruvian Constitutional Court, following the declaration of the IACtHR that the Peruvian amnesty legislation was invalid due to its manifest incompatibility with human rights standards,⁷⁰ found the amnesty laws to be unconstitutional and dismissed the complaint of a plaintiff who claimed to be protected by them.⁷¹ The German Constitutional Court quashed German legislation after the ECtHR's judgment in *M. v. Germany*,⁷² despite the fact that in an earlier case it had found the law in question to be constitutional.⁷³

Often, courts do not only limit themselves to considering judgments rendered against their own state. Many courts started to anticipatorily look towards Strasbourg and San José in order to preventively bring the legal order in accordance with the convention standards and avoid a judgment rendered against their state.⁷⁴ A good example is the French Court of Cassation which declared a provision of the law on criminal procedure inapplicable following two judgments of the ECtHR rendered against Turkey.⁷⁵ Some courts even systematically take the body of jurisprudence of the human rights courts into account when reviewing domestic legislation.⁷⁶ The Italian Constitutional Court, for example, declared in its famous 'twin judgments' in 2007 that not only the Italian Constitution, but also the ECHR as interpreted by the Strasbourg Court, builds the yardstick for the control of domestic legislation.⁷⁷ It came to this result by

⁶⁸ Supreme Court (Mexico) varios 912/2010, Resolution of 14 July 2011, 1 Semanario Judicial de la Federación y su Gaceta (2011) 313.

⁶⁹ Federal Supreme Court (Switzerland), 15 November 1991, BGE 117 Ib 367. On this case, see M. Hottelier, H. Mock and M. Puéchy, *La Suisse devant la Cour européenne des droits de l'homme* (2nd edn, 2011), at 28–29.

⁷⁰ *Barrios Altos*, *supra* note 31.

⁷¹ Constitutional Court (Peru) 679-2005-PA/TC, *Martin Rivas v. Constitutional and Social Chamber of the Supreme Court*, 2 March 2007, ILDC 960 (PE 2007).

⁷² ECtHR, *M. v. Germany*, Appl. no. 19359/04, Judgment of 17 December 2009.

⁷³ Federal Constitutional Court (Germany) 2 BvR 2365/09, *Sicherungsverwahrung*, 4 May 2011, BVerfGE 128, 326. However, the Court ordered that the law should remain in place for two years.

⁷⁴ Some courts explicitly address this 'preventive function'; see Supreme Court (Mexico), *Contradicción de Tesis 293/2011*, 3 September 2013, at 63 ('*función preventiva*'); Constitutional Court (Peru) 00007-2007-PI/TC, *Callao Bar Association v. Congress of the Republic*, 19 June 2007, ILDC 961 (PE 2007), a para. 26: '[M]ediante su observancia se evitan las nefastas consecuencias institucionales que acarrearán las sentencias condenatorias de la Corte Interamericana de Derechos Humanos para la seguridad jurídica del Estado peruano'; *Sicherungsverwahrung*, *supra* note 73, para. 90: '[A]voiding a condemnation of the Federal Republic of Germany' (translation by the author).

⁷⁵ Court of Cassation (France) 589–592, Judgments of 15 April 2011, referring to ECtHR, *Case of Salduz v. Turkey*, Appl. no. 36391/02, Judgment (GC) of 27 November 2008; *Case of Dayanan v. Turkey*, Appl. no. 7377/03, Judgment of 13 October 2009.

⁷⁶ See also Paris, 'Allies and Counterbalances: Constitutional Courts and the European Court of Human Rights: A Comparative Perspective', 77 *ZaōRV* (2017) 623, at 625–630.

⁷⁷ Constitutional Court (Italy), Judgments nos 348 and 349 of 22 October 2007, ECLI:IT:COST:2007:348/349.

interpreting Article 117 of the Constitution, prescribing the priority of international law before domestic legislation in a Strasbourg-friendly way.⁷⁸

Some courts in Latin America have gone even further. Based on often extremely open and human rights-friendly constitutions,⁷⁹ they have declared the Inter-American body of law to be a part of the ‘block of constitutionality’, thus granting the ACHR and the jurisprudence concretizing it constitutional status. An example is the Supreme Court of Argentina, which declared early that the jurisprudence of the San José Court was an important ‘guideline’ for the interpretation and application of the ‘bloque de constitucionalidad’, which explicitly includes the ACHR in Argentina.⁸⁰ In its milestone *Simón* decision, the Supreme Court, based on the *Barrios Altos* judgment of the IACtHR, quashed the Argentinian amnesty laws.⁸¹ In Colombia, it was the Constitutional Court that elevated the ACHR to constitutional rank, which has been called a case of ‘judicial constitutionalization’.⁸² Later on, it declared that the jurisprudence of the Inter-American organs was a ‘relevant hermeneutic criterion’ for the establishment of the content of the block of constitutionality and, in this case, even followed a – non-binding – advisory opinion of the IACtHR that had been requested by Costa Rica years before.⁸³

These few examples show the broad spectrum of cases in which domestic courts now take meaningful implementation action without the previous involvement of the other branches and, at times, even disregard domestic law that stands in the way. This is made easier, on the one hand, because of the particular nature of this type of international law. As we have just seen, many constitutions especially in Latin America

⁷⁸ *Ibid.*, Judgment no. 348/2007, para. 4; Judgment no. 349/2007, para. 6.2: ‘[I]n light of the overall regulation provided for in the Convention, as well as the case law of this court, Article 117(1) of the Constitution must be examined and systematically interpreted as a parameter in relation to which the compatibility of the contested provision with Article 1 of the Additional Protocol to the ECHR, as interpreted by the Strasbourg Court, is to be assessed.’

⁷⁹ Constitutional lawyers use the term of ‘open statehood’ (*estatalidad abierta*) to describe the post-dictatorial constitutions of many Latin American states. See Morales Antoniazzi, ‘La doble estatalidad abierta: interamericanización y mercosurización de las Constituciones suramericanas’, in A. von Bogdandy, F. Piovesán and M. Morales Antoniazzi (eds), *Estudios Avanzados de Derechos Humanos. Democracia e Integración Jurídica: Emergencia de um novo Direito Público* (2013) 178.

⁸⁰ Supreme Court (Argentina) 32/93, *Giroldi, Horacio David y otros*, 7 April 1995, 318:514, para. 11: ‘[L]a aludida jurisprudencia deba servir de guía para la interpretación de los preceptos convencionales en la medida en que el Estado Argentino reconoció la competencia de la Corte Interamericana para conocer en todos los casos relativos a la interpretación y aplicación de la Convención Americana.’ Argentinian Constitution, 1 May 1853, revised in 1994, OCW CD 710 [AR], Art. 75(22), granting several human rights instruments, including the ACHR, constitutional status.

⁸¹ Supreme Court (Argentina), *Simón and ors v. Office of the Prosecutor*, 14 June 2005, ILDC 579 (AR 2005).

⁸² Góngora Mera, *supra* note 21, at 100. The Constitutional Court based its jurisprudence on Art. 93 of the Colombian Constitution of 5 July 1991, OCW CD 939 [CO]: ‘1. International treaties and agreements ratified by Congress that recognize human rights and that prohibit their limitation in states of emergency have priority domestically. 2. The rights and duties mentioned in this Charter shall be interpreted in accordance with international treaties on human rights ratified by Colombia.’

⁸³ Constitutional Court (Colombia) C-01/00, 19 January 2000, para. 7: ‘[E]s indudable que la jurisprudencia de las instancias internacionales, encargadas de interpretar esos tratados, constituye un criterio hermenéutico relevante para establecer el sentido de las normas constitucionales sobre derechos fundamentales.’ The Court relied on the Advisory Opinion OC-5/85 of 13 November 1985.

grant a special status to human rights treaties, and, even if this is not the case, most constitutions contain rights that are quite similar to those enshrined in the human rights conventions, allowing domestic (constitutional) courts to harmonize the two bodies of law. On the other hand, the human rights courts themselves, by ‘legalizing’ the implementation phase, have reduced drastically the political element of implementation.⁸⁴ In any case, these observations already indicate that domestic courts are at times willing to disregard national interests and thus fulfil a truly ‘international judicial function’ in the sense of George Scelle’s theory.⁸⁵ We will come back to this point later.

B Domestic Courts as ‘Gatekeepers’

1 The Reasons Brought Forward Not to Follow an International Judgment

However, the implementation of international judgments through the judiciary does not always occur without problems. In other words, ‘the “downloading” of an international decision by a domestic court might encounter unexpected technical problems’.⁸⁶ This is especially the case if domestic law stands in the way, which can amount to a true dilemma: domestic courts may face situations in which they either follow international law, violating domestic (constitutional) law, or abide by domestic law, not giving effect to a judgment rendered in favour of an individual claimant. It is therefore not surprising that many courts from the outset reserve the right not to follow the human rights courts in certain cases. In fact, it is rather rare that courts declare the unconditional priority of the judgments of the human rights courts and declare themselves to be strictly bound by them. Instead, many courts formulate certain barriers to the increasing ‘intrusion’ of international law and, at times, also make use of their factual ‘veto’ power at the intersection of legal orders.

To be sure, there are examples, especially from the Latin American context, where domestic courts have felt entirely bound by judgments of the human rights courts, treating them as higher courts and granting a direct effect to their judgments in the domestic sphere. A case in point is the case of *Fermín Ramírez*, in which the Supreme Court of Guatemala treated the judgment of the IACtHR in the same case as binding (*‘vinculante’*) and declared that it was mandatory to give effect to the ruling.⁸⁷ In another case, the same Court even found that due to the self-executingness (*‘autoejecutividad’*) of the IACtHR’s judgment in the same case, the domestic proceeding that had been declared to be in violation of the ACHR was automatically invalidated.⁸⁸

⁸⁴ On the ECtHR, see Keller and Marti, *supra* note 47.

⁸⁵ Scelle, *supra* note 15.

⁸⁶ Gattini, ‘Domestic Judicial Compliance with International Judicial Decisions: Some Paradoxes’, in U. Fastenrath *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011) 1168, at 1169.

⁸⁷ *Caso Fermín Ramírez*, *supra* note 66.

⁸⁸ Supreme Court of Justice (Guatemala) MP001/2005/46063, *Ejecución de sentencia de la Corte Interamericana de Derechos Humanos*, 11 December 2009, 7 *Diálogo Jurisprudencial* (2009) 113, operative paras: ‘Considerando que es obligado ejecutar la nulidad de la resolución nacional referida, iniciar

The Supreme Court of Panama gave effect to a prior ruling of the IACtHR and declared that ‘Panama, as a member of the international community, recognizes, respects and abides by the rulings of the IACtHR’.⁸⁹ The Colombian Constitutional Court concluded in a follow-up case to an IACtHR judgment that the international obligations in this case had priority in the domestic order (‘prevalecen en el orden interno’).⁹⁰

But these cases are rare. More often than not, courts take a more reticent stance, displaying the will to maintain at least a certain oversight over the effects of the rulings of the human rights courts in the domestic order. Famously, the German Federal Constitutional Court, despite having proven to be loyal towards the ECtHR, emphasized that the ‘last word’ remains with the German Constitution and, since the law is what the judges say, with itself. It argued that the German basic law did not seek ‘a submission to non-German acts of sovereignty that is removed from every constitutional limit and control’.⁹¹ Also the Italian Constitutional Court declared in its twin judgments of 2007, which opened up the way for the systematic integration of the Strasbourg jurisprudence in the Italian order, that it reserves the option to verify ‘whether the provisions of the ECHR, as interpreted by the Strasbourg Court, guarantee a protection of fundamental rights that is at least equivalent to the level guaranteed by the Italian Constitution’.⁹² It added that the ‘purpose of such operations is not to assert the primacy of the national legal system, but rather to supplement protection’.⁹³

The reasons that domestic courts bring forward to limit the effects of the judgments of the human rights courts are twofold. First, courts refuse to follow judgments they consider to be wrong. An example is a decision of the Swiss Federal Tribunal in which it declared that it did not share the view of the ECtHR in *Quaranta contre Suisse*⁹⁴ and could therefore not follow it. The Federal Tribunal argued that the position of the Strasbourg judges on the question when free legal advice in criminal proceedings was required was counter to the *telos* of Article 6 of the ECHR.⁹⁵ In another case, the same court refused to follow Strasbourg because of an alleged overstepping of competences. The Federal Tribunal argued that in *Udeh contre Suisse*⁹⁶ the Strasbourg judges had

un nuevo procesamiento y ofrecer en el mismo el irrestricto respeto de las reglas del debido proceso y el cumplimiento de los fines del proceso penal de demostración de los hechos y sanción de los autores responsables.’

⁸⁹ Supreme Court of Justice (Panama), Acuerdo no. 240 of 12 May 2010, 8 Diálogo Jurisprudencial (2010) 99, at 100.

⁹⁰ Constitutional Court (Colombia), T-367/2010, 11 May 2010, para. 3.7.

⁹¹ Federal Constitutional Court (Germany) 2 BvR 1481/04, *Görgülü*, 14 October 2004, BVerfGE 111, 307, para. 36.

⁹² Judgment no. 349/2007, *supra* note 77, para. 6.2.

⁹³ Constitutional Court (Italy), Judgment no. 264/2012 of 19 November 2012, ECLI:IT:COST:2012:264, para. 4.2.

⁹⁴ ECtHR, *Affaire Quaranta c. Suisse*, Appl. no. 12744/87, Judgment of 24 May 1991.

⁹⁵ Federal Supreme Court (Switzerland), 7 January 1994, BGE 120 Ia 43, at E.2b.

⁹⁶ ECtHR, *Affaire Udeh c. Suisse*, Appl. no. 2020/09, Judgment of 13 April 2013.

based their findings on facts that had happened after the final decision of the Swiss courts. According to the highest Swiss court, this violated the principle of subsidiarity.⁹⁷ The Italian Constitutional Court considered the judgment of the ECtHR in the case of *Maggio*, dealing with pension benefits,⁹⁸ to be wrong on the ground of its insufficient acknowledgement of local realities. The court concluded that, whereas it was the task of the ECtHR to adjudicate individual cases, with individual rights as a reference point, it was the task of the Constitutional Court to ‘assess how and to what extent the application of the Convention by the European Court interacts with the Italian constitutional order’⁹⁹ and to carry out ‘a systemic and not an isolated assessment of the values affected by the provisions reviewed from time to time’.¹⁰⁰

Second, many courts consider that the domestic order and, especially, the constitution contains limits to the ‘intrusion’ of international judgments. They either invoke the constitution as such,¹⁰¹ certain fundamental principles of the constitutional order¹⁰² or fundamental rights more specifically, arguing that the conventions themselves state that they should not be ‘construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws’ of the state parties.¹⁰³ The Mexican Supreme Court, for example, obliges the Mexican judiciary to make sure that, in accordance with the principle of *pro persona*, the position more favourable to human rights prevails. In this sense, the *pro persona* principle in Mexico builds the basis for the reception of the jurisprudence of the IACtHR and, at the same time, its limit.¹⁰⁴ The German Federal Constitutional Court, in its leading case, particularly highlighted the rights of third persons not party to the proceeding before the ECtHR to be the limit for the implementation of judgments because of the possibility that a judgment ‘does not give a complete picture of the legal positions and interests involved’.¹⁰⁵ In these cases, it is ‘the task of the domestic courts to integrate a decision of the ECtHR into the relevant partial legal area’.¹⁰⁶ In German legal scholarship, this position has been criticized because the ECtHR arguably also does take into account the rights and interests of other involved persons, therefore minimizing the risk of unbalanced solutions.¹⁰⁷

⁹⁷ Federal Supreme Court (Switzerland), 30 August 2013, BGE 139 I 325, at E.2.4.

⁹⁸ ECtHR, *Case of Maggio and Others v. Italy*, Appl. nos 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, Judgment of 31 May 2011.

⁹⁹ Judgment no. 264/2012, *supra* note 93, para. 4.2.

¹⁰⁰ *Ibid.*, at para. 5.4.

¹⁰¹ Judgment no. 348, *supra* note 77, para. 4.7.

¹⁰² See, e.g., *Sicherungsverwahrung*, *supra* note 73, para. 93, referring to its jurisprudence on ‘constitutional identity’; Supreme Court (Venezuela), *Solicitor General of the Republic v. Venezuela*, Final Award on Jurisdiction of the Constitutional Chamber, 18 December 2008, ILDC 1279 (VE 2008); Constitutional Court (Dominican Republic) no. TC/0256/14, 4 November 2014; *Fontevicchia*, *supra* note 10.

¹⁰³ ECHR, *supra* note 12, Art. 53; ACHR, *supra* note 20, Art. 29.

¹⁰⁴ *Contradicción de Tesis 293/2011*, *supra* note 74, at 29–30. See in more detail Part 3.B.2 below.

¹⁰⁵ *Görgülü*, *supra* note 91, para 59.

¹⁰⁶ *Ibid.*, at para. 58.

¹⁰⁷ Cremer, *supra* note 21, para. 107; K. Mellech, *Die Rezeption der EMRK sowie der Urteile des EGMR in der französischen und deutschen Rechtsprechung* (2012), at 103–104.

2 A Reconciliatory Middle-Ground Position

As a consequence, several courts from the outset have stated that they are only willing to 'take into account' the judgments of the human rights courts and, thus, have implied the possibility of not following them. Perhaps the best-known example is again the German Federal Constitutional Court, which, in its landmark *Görgülü* decision, stated that, in principle, German courts were bound by the judgments of the ECtHR. However, this does not mean that courts mechanically have to implement its judgments. Rather, they are expected to 'fit' them into the German legal order, which means that they are allowed to deviate from them if needed. The conditions are that they must deal with the ruling in question carefully and justify why they cannot follow it.¹⁰⁸ The Supreme Court of the United Kingdom, based on the Human Rights Act 1998, which explicitly requires the judiciary to 'take into account' the Strasbourg jurisprudence, follows a similar approach.¹⁰⁹

Examples from the other side of the Atlantic suggest that also there the reception of international judgments often is not a mechanical procedure. The Constitutional Court of Peru explicitly stated that the consequence of judgments of the IACtHR was not the 'automatic derogation' of domestic law and that domestic courts should rather strive towards 'harmonization and integration' of the different legal orders.¹¹⁰ Similarly, the Mexican Supreme Court pleaded for a flexible solution. In accordance with the principle of *pro persona*, it aims to give precedence to the position that better protects human rights.¹¹¹ This implies that it is willing to deviate from the IACtHR if this is necessary to grant a protection that, in its eyes, better serves human rights. Also, in some cases, the Argentinian Supreme Court and the Colombian Constitutional Court have treated the jurisprudence of the Inter-American organs as a mere 'guideline' and, thus, indicate the possibility to deviate from it.¹¹²

Despite formally keeping a certain control in practice, domestic courts also in these cases often do give effect to international judgments. In deciding whether or not to follow a ruling, the analysed cases suggest that, unlike for the question of the direct effect or self-executingness of treaty law, formal criteria such as the concreteness of a norm are not decisive for domestic courts.¹¹³ Furthermore, legal requirements of the domestic legal order, such as the status of international law as well as the formal powers of domestic courts, play a surprisingly marginal role.¹¹⁴ While the nature of

¹⁰⁸ *Görgülü*, *supra* note 91, para. 50.

¹⁰⁹ Supreme Court (United Kingdom), *Manchester City Council (Respondent) v. Pinnock (Appellant)*, Judgment of 3 November 2010, [2010] UKSC 45, para. 48: '[S]ection 2 of the HRA requires our courts to "take into account" EurCtHR decisions, not necessarily to follow them.' Human Rights Act 1998, 1998, c. 42.

¹¹⁰ *Martin Rivas*, *supra* note 71, para. 35: '[N]o se postula la derogación automática de las normas internas, en caso de conflicto con sus obligaciones en el plano internacional, ni el desconocimiento de estas últimas en el orden nacional, sino su armonización e integración.'

¹¹¹ Contradicción de Tesis 293/2011, *supra* note 74, at 29–30.

¹¹² *Giroldi*, *supra* note 80; C-01/00, *supra* note 83.

¹¹³ On the criteria of direct effect, see Iwasawa, 'Domestic Application of International Law', 378 *Recueil des Cours* (2016) 9, at 157–184.

¹¹⁴ For a similar result, see also N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010), at 146; but see Kosar and Petrov, 'The Architecture of the Strasbourg System of Human Rights:

the domestic law at stake and the question whether it is open to interpretation certainly plays a role, it is noteworthy that conflicts in many cases could be avoided, at times through quite creative interpretation.¹¹⁵ Rather than taking a formal, categorical stance, what seems to matter more for domestic courts are substantive questions and the circumstances of each case. Many courts choose a flexible and, at times, even pragmatic approach, balancing the different interests at stake and deciding on a case-by-case basis.

First of all, many courts, even though they look beyond cases rendered against their own state and also consider the wider jurisprudence of the human rights courts, make a differentiation between cases in which they are asked to actually enforce a judgment rendered against their state and cases in which they merely prevent a possible finding of a convention violation.¹¹⁶ Moreover, courts take into account whether a judgment follows a consistent, well-established line of jurisprudence of the human rights courts. The Italian Constitutional Court, for example, recently stated that it is ‘only “consolidated law” resulting from the case law of the European Court on which the national courts are required to base their interpretation, whilst there is no obligation to do so in cases involving rulings that do not express a position that has not become final’.¹¹⁷ Also the Argentinian Supreme Court in its *Simón* decision followed the IACtHR without waiting for a judgment on the particular situation in Argentina on the ground that it considered the jurisprudence on the matter to be well established.¹¹⁸

What seems to be the pivotal factor in many cases is the gravity of the human rights violation in question or the fact that the violation is still ongoing. In other words, in situations of grave human rights violations, courts are more likely to implement an order from Strasbourg or San José even if domestic law stands in the way. A good example for this is the jurisprudence of the Spanish Constitutional Court, which was willing only in certain qualified situations to reopen proceedings in the course of a finding of a convention violation by the ECtHR before Parliament introduced this possibility.¹¹⁹ Even though the Court regularly held that ECtHR judgments could not be enforced directly through the judiciary (‘sin efecto directo anulatorio interno, ni ejecutoriedad a cargo de los Tribunales españoles’),¹²⁰ it allowed constitutional complaints in cases where the convention violation found by the Strasbourg Court constituted at the same time an ongoing violation of the domestic constitution (‘actual

The Crucial Role of the Domestic Level and the Constitutional Courts in Particular’, 77 *ZaōRV* (2017) 585, at 598–604.

¹¹⁵ See, e.g., Acuerdo no. 240, *supra* note 89. On the open nature of many constitutions, especially in Latin America, see Part 3.A above.

¹¹⁶ See in more detail Part 3.A above and Part 4.A below.

¹¹⁷ Judgment no. 49/2015, *supra* note 11, para. 7.

¹¹⁸ *Simón*, *supra* note 81, para. 29: ‘[Considerando] Que, por lo demás, la sentencia en el caso “Barrios Altos” no constituye un precedente aislado, sino que señala una línea jurisprudencial constante.’

¹¹⁹ Since 2015, there exists now a legal basis to reopen proceedings. Organic Law 7/2015 on the Judiciary of 21 July, amending Organic Law 6/1985 of 1 July 1985.

¹²⁰ Constitutional Court (Spain) no. 197/2006, *Fuentes Bobo v. Public Prosecutor and Televisión Española SA*, 3 July 2006, ILDC 997 (ES 2006), para. 32.

violation doctrine').¹²¹ In practice, however, the Constitutional Court only allowed the reopening of proceedings in the particularly grave situation where complainants were still serving – potentially unjustified – prison sentences.¹²² In application of this doctrine, the Audiencia Nacional, a Spanish criminal court competent to hear particular criminal cases, ordered the immediate release of an imprisoned person in implementation of an order of the Strasbourg Court.¹²³

The link between the severity of human rights violations and the willingness of domestic courts to step in also becomes clear in cases where domestic courts are confronted with international judgments that have negative effects for individuals. This happens in the context of the 'criminal' jurisprudence of the IACtHR – that is, in cases where the San José judges order that severe human rights violations have to be investigated and prosecuted.¹²⁴ This constellation regularly provokes conflicts with (fundamental) rights of individual perpetrators who were previously granted amnesties or other forms of impunity.

In numerous domestic proceedings that followed the orders of the IACtHR to reopen 'sham proceedings', domestic courts complied, denying fundamental rights claims by the alleged perpetrators. The examples show that the reason they did so was because of the particularly grave nature of the human rights violations in question. The Constitutional Court of Bolivia, for example, in compliance with the order to 'investigate, identify and punish those responsible for the harmful facts that are the subject of the instant case',¹²⁵ dismissed the claims of four accused persons that the reopening of their proceeding violated the principle of legality. It argued that, in light of the nature of the human rights violations in question, these were not ordinary offences and not subject to limitation period.¹²⁶

Similarly, the Argentinian Supreme Court followed the order of the IACtHR to seriously investigate and prosecute the persons responsible in the case of the death of a young man in custody. The San José Court highlighted that 'extinguishment provisions or any other domestic legal obstacle that attempts to impede the investigation and punishment of those responsible for human rights violations are inadmissible'.¹²⁷

¹²¹ *Ibid.*, para. 34: 'De ello se sigue que, declarada por Sentencia de dicho Tribunal una violación de un derecho reconocido por el Convenio europeo que constituya asimismo la violación actual de un derecho fundamental consagrado en nuestra Constitución, corresponde enjuiciarla a este Tribunal, como Juez supremo de la Constitución y de los derechos fundamentales, respecto de los cuales nada de lo que a ello afecta puede serle ajeno.'

¹²² Torres Pérez, 'Fuentes Bobo y la infra-ejecución de las sentencias del Tribunal Europeo de Derechos Humanos', 21 *Revista española de Derecho Europeo* (2007) 145, at 164–165.

¹²³ Audiencia Nacional (Spain) no. 61/2013, *Inés del Río Prada*, 22 October 2013; see also Supreme Court (Estonia) no. 3-1-3-13-03, 6 January 2004.

¹²⁴ Huneeus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts', 107 *American Journal of International Law (AJIL)* (2013) 1; A. Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (2009).

¹²⁵ IACtHR, *Case of Trujillo-Oroza v. Bolivia*, Judgment (Reparations and Costs), 27 February 2002, operative para. 3.

¹²⁶ Constitutional Court (Bolivia) no. 0110/2010-R, 10 May 2010.

¹²⁷ IACtHR, *Case of Bulacio v. Argentina*, Judgment (Merits, Reparations and Costs), 18 September 2003, para. 116.

Even though they abided by the judgment, the Argentinian judges in this case heavily criticized the IACtHR. The majority argued that the implementation of the order led to a violation of fundamental criminal defence rights of the accused that were not only granted by the Argentinian Constitution, but also the ACHR.¹²⁸ The reason that the Court was nonetheless willing to follow the IACtHR was because of the gravity and particular nature of the human rights violations at stake.

This conclusion is supported by the fact that, in another case, the Supreme Court was not willing to disregard due process rights. In this case, the complainant – a former policeman – was accused of having mistreated an arrested man by having beaten him and refused to give him his medicine. The IACtHR had qualified these acts as torture and ordered the investigation of the allegations.¹²⁹ In Argentina, however, the case had already been closed through final judgment, the court in charge having found the offence to be time-barred. The Supreme Court in its judgment clearly distinguished this case from cases involving crimes against humanity. Only in the latter cases, it argued, was it permissible to set aside time limitations. It held that the duty to investigate human rights violations was governed by rule-of-law principles and that, in this case, the reopening of proceedings would be *contra legem*.¹³⁰

Domestic courts are also willing to step in and grant further-reaching effects when they are the last resort for the affected individuals and the competent organs have failed to take the necessary steps for implementation. This happened in the case of Paolo Dorigo, an Italian citizen who stayed imprisoned for many years even though the former European Commission of Human Rights had found his trial to have violated Article 6 of the ECHR.¹³¹ Even though attempts were made to reform the domestic legislation to allow the review of the process, they did not succeed until the Court of Cassation in 2007 decided that the situation was no longer tenable. In light of the ‘prolonged inertia’ of the legislator and the ‘déní de justice flagrant’, it ordered the competent judge to declare the unenforceability of the domestic judgment.¹³² In one of its ‘additive’ judgments, the Italian Constitutional Court later declared the

¹²⁸ Supreme Court (Argentina) E.224.XXXIX, *Espósito, Miguel Angel s/ incidente de prescripción de la acción penal promovido por su defensa*, 23 December 2004, 327:5668, para. 16: ‘[S]e plantea la paradoja de que sólo es posible cumplir con los deberes impuestos al Estado Argentino por la jurisdicción internacional en materia de derechos humanos restringiendo fuertemente los derechos de defensa y a un pronunciamiento en un plazo razonable, garantizados al imputado por la Convención Interamericana.’

¹²⁹ IACtHR, *Case of Bueno-Alves v. Argentina*, Judgment (Merits, Reparations and Costs), 11 May 2007.

¹³⁰ Supreme Court (Argentina) D.1682.XL, *Derecho, René Jesús s/ incidente de prescripción de la acción penal*, 11 July 2007, 330:3074, para. VI: ‘[L]a obligación de investigar y sancionar las violaciones de los derechos humanos lo es en el marco y con las herramientas del Estado de Derecho, y no con prescindencia de ellas.’ Later, however, the Supreme Court enforced the IACtHR judgment. See Supreme Court (Argentina) D.1682.XL, *Derecho, René Jesús s/ incidente de prescripción de la acción penal*, 29 November 2011, 334:1504.

¹³¹ European Commission of Human Rights, *Dorigo c. Italie*, Appl. no. 33286/96, Judgment of 9 September 1998, adopted by the Committee of Ministers, Interim Resolution no. DH(99)258, 15 April 1999 (finding of a violation).

¹³² Court of Cassation (Italy) no. 2800, *Dorigo*, 25 January 2007, ILDC 1096 (IT 2007), para. 7.

relevant provision of the Code of Criminal Procedure to be unconstitutional exactly for the reason that it did not foresee the possibility of reopening proceedings following a judgment of the ECtHR and amended it single-handedly.¹³³

These examples show that domestic courts in numerous cases and situations are willing to follow the human rights courts, at times despite the fact that domestic law stands in the way, be it in the form of *res iudicata*, unconventional domestic legislation or the fact that implementation action falls in the competences of the other branches. The limit might be the clear conflict with the domestic constitution, but it is noteworthy that, in practice, such conflicts often can be avoided through interpretation.¹³⁴ Domestic courts in these cases balance the different interests at stake – that is, the interest of the swift implementation of an international judgment and possible countervailing interests like the separation of powers, the principle of legality and legal certainty. Dealing with international judgments thus somehow reveals the true, constitutional nature of the question of the self-executingness of international law, which is often mistaken for a purely technical question.¹³⁵ The fact that many courts seriously consider the different interests at stake and carefully balance them shows that, rather than being judges of one particular legal order, courts in these cases are trying to find just solutions for the cases they are dealing with. This shows that, when dealing with judgments of the human rights courts, domestic courts are not merely guided by national interests and supports the view that domestic courts today are independent actors in matters involving international law.¹³⁶

C Growing Tensions between International and Domestic Law?

The above examples show that domestic judges have become important compliance partners of the human rights courts. Yet, only rarely do domestic courts declare that they are willing to follow their international counterparts unconditionally. More often than not, domestic judges highlight that they reserve the right to control the effects of international judgments and even deviate from them. In more recent times, domestic courts have increasingly started to signal limits to their openness and to more actively control and, at times, even restrict the effects of the judgments of the human rights

¹³³ Constitutional Court (Italy), Judgment no. 113/2011 of 7 April 2011, ILDC 1732 (IT 2011). On the ‘additive’ judgments (*sentenze additive*), see V. Barsotti *et al.*, *Italian Constitutional Justice in Global Context* (2016), at 86–87; see also T-653/2012, *supra* note 67.

¹³⁴ For an example of conflict, see Constitutional Court (Russia), Case no. 12-P/2016, 19 April 2016. For a case not addressing the possible conflict between the ECtHR and the Constitution, see Federal Constitutional Court (Germany), 2 BvR 1738/12, *Beamtenstreikrecht*, 12 June 2018, ECLI:DE:BVerfG:2018:rs20180612.2bvr173812. On the Constitution as a limit to the reception of international judgments, see Part 3.B.1 above.

¹³⁵ Von Bogdandy, ‘Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law’, 6 *IJCL* (2008) 397, at 398; A. Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (2016), at 495.

¹³⁶ For a further discussion, see Part 4.A below.

courts.¹³⁷ An increasing number of courts have begun especially to invoke the constitution or certain of its provisions as a barrier to the ‘intrusion’ of international law.¹³⁸

To be sure, it is not claimed here that this is a completely new phenomenon. It is widely known that, in Europe, many high courts have reserved the right to defend a certain constitutional core against the ‘intrusion’ of European and international law, and the German Federal Constitutional Court may be the most famous example.¹³⁹ Already in 2004, this Court stated that similar reservations were also valid for the ECtHR.¹⁴⁰ And long before that, the Austrian Constitutional Court declared in its *Miltner* decision of 1987 that, in the case of a conflict between the constitution and an interpretation of the Strasbourg Court, it would give precedence to the former.¹⁴¹

Nonetheless, in recent years, the tensions seem to be growing. The most obvious example is the Russian Constitutional Court, which recently started to take control of the constitutionality of ECtHR judgments. This development goes back to a judgment of 2015 in which the Constitutional Court, while stressing that it would only make use of this possibility in ‘extremely rare cases’, emphasized the priority of the Russian Constitution over the ECHR and declared that it had a ‘right to objection’ in cases where an interpretation given to the ECHR by the Strasbourg judges violated the Russian Constitution.¹⁴² The possibility of checking the constitutionality of international decisions has subsequently been adopted in Russian legislation.¹⁴³

To date, the Russian Constitutional Court has made use of these new powers twice. The first time it was confronted with the question of constitutionality of an ECtHR judgment was following the judgment in *Anchugov and Gladkov*, in which the ECtHR held that the blanket ban on convicted prisoners’ voting rights enshrined in the Russian Constitution was incompatible with the ECHR.¹⁴⁴ To solve the conflict, the Strasbourg Court alluded to the possibility to amend the Constitution or to interpret it in harmony with the ECHR.¹⁴⁵ However, the Constitutional Court found that

¹³⁷ See also Martinico, ‘National Courts and Judicial Disobedience to the ECHR: A Comparative Overview’, in O. Mjöll Arnardóttir and A. Buyse (eds), *Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations between the ECHR, EU and National Legal Orders* (2016) 59.

¹³⁸ On this development, see also Palombino, ‘Compliance with International Judgments: Between Supremacy of International Law and National Fundamental Principles’, 75 *ZaōRV* (2015) 503; Battini, ‘È costituzionale il diritto internazionale?’, 3 *Giornale di diritto amministrativo* (2015) 367; Peters, ‘Supremacy Lost: International Law Meets Domestic Constitutional Law’, 3 *Vienna Online Journal on International Constitutional Law* (2009) 170.

¹³⁹ Federal Constitutional Court (Germany) BvL 52/71, *Solange I*, 29 May 1974, BVerfGE 37, at 271; for more examples, see Peters, ‘The Globalization of State Constitutions’, in J.E. Nijman and A. Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (2007) 251, at 266–267.

¹⁴⁰ See Part 3.B.2 above.

¹⁴¹ Constitutional Court (Austria) B 267/86, 14 October 1987, VfSlg 11.500/1987=EuGRZ 1988, 166, at 172.

¹⁴² Constitutional Court (Russia), Case no. 21-P/2015, 14 July 2015, para. 6.

¹⁴³ Federal Law no. 7-KFZ of 14 December 2015, amending the Federal Constitutional Law on the Constitutional Court of the Russian Federation.

¹⁴⁴ ECtHR, *Anchugov and Gladkov v. Russia*, Appl. nos 11157/04 and 15162/05, Judgment of 4 July 2013.

¹⁴⁵ *Ibid.*, at para. 111: ‘[T]here may be various approaches to addressing the question of the right of convicted prisoners to vote. In the present case, it is open to the respondent Government to explore all possible

it was impossible to interpret the clear and unequivocal constitutional provision differently. As a consequence, it declared the judgment to be partly unconstitutional. Nonetheless, it left the door slightly ajar insofar as it indicated that the federal legislator had the power ‘to optimize the system of criminal penalties’.¹⁴⁶

In the second case as well, the Constitutional Court declared the ECtHR judgment in question – namely, the judgment on just satisfaction in the *Yukos* case¹⁴⁷ – to be contrary to the Constitution. It is worth mentioning that the Venice Commission had questioned whether an order on monetary compensation could ever violate the Constitution.¹⁴⁸ Not surprisingly, the conflict with the Constitution in the judgments seems rather construed.¹⁴⁹ The Court found that payment of just compensation from the Russian budget to the shareholders of a company that was involved in vast tax-avoiding activities would violate the constitutional principles of equality and fairness.¹⁵⁰

While, for many, the tensions between Moscow and Strasbourg might not be so surprising in light of the complicated relationship of Russia with the ECHR system,¹⁵¹ it is striking that also courts that have generally been considered to be open towards the human rights courts recently seem to have taken a more reticent stance. The first remarkable example is the already mentioned Argentinian Supreme Court, which in 2017 adopted the view that judgments of the IACtHR had to respect ‘fundamental principles of public law’ in order to be implemented in Argentina. In this case, the IACtHR had ordered the reopening of a civil proceeding.¹⁵² Not only did the Argentinian judges find this to be an overstepping of competences on the side of the IACtHR but also to violate core provisions of the Argentinian Constitution by undermining the superiority of the Supreme Court in the Argentinian legal order.¹⁵³

Another notable case is the Italian Constitutional Court. Even though this Court, just like other constitutional courts, has always stated that it preserves a certain

ways in that respect and to decide whether their compliance with Article 3 of Protocol No. 1 can be achieved through some form of political process or by interpreting the Russian Constitution by the competent authorities – the Russian Constitutional Court in the first place – in harmony with the Convention in such a way as to coordinate their effects and avoid any conflict between them.’

¹⁴⁶ Case no. 12-P/2016, *supra* note 134, at para. 5.5.

¹⁴⁷ ECtHR, *Neftyanaya Kompaniya Yukos v. Russia*, Appl. no. 14902/04, Judgment (Just Satisfaction) of 31 July 2014.

¹⁴⁸ Venice Commission, Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court, Doc. CDL-AD(2016)016, 13 June 2016, paras 28–30.

¹⁴⁹ On this point, see also Padsokimaite, ‘Constitutional Courts and (Non)execution of Judgments of the European Court of Human Rights: A Comparison of Cases from Russia and Lithuania’, 77 *ZaōRV* (2017) 651, at 680.

¹⁵⁰ Constitutional Court (Russia), Case no. 1-II/2017, 19 January 2017.

¹⁵¹ See generally L. Mälksoo and W. Benedek, *Russia and the European Court of Human Rights: The Strasbourg Effect* (2018).

¹⁵² IACtHR, *Case of Fontevecchia y D’Amico v. Argentina*, Judgment (Merits, Reparations and Costs), 29 November 2011, operative para. 2: ‘The State must set aside the civil sentence imposed on Mr. Jorge Fontevecchia and Mr. Hector D’Amico, as well as all of its consequences, within one year from legal notice of this Judgment, pursuant to paragraph 105 thereof.’

¹⁵³ *Fontevecchia*, *supra* note 10, paras 16–17. For more detail, see Part 3.B.1 above.

discretion to decide whether or not to follow international judgments, it has followed a rather open course *vis-à-vis* Strasbourg since its famous ‘twin judgments’ of 2007.¹⁵⁴ The Constitutional Court has occasionally even been criticized for being too open towards Strasbourg.¹⁵⁵ In more recent times, however, instances where this court has spoken up against international courts have made headlines. In its (in)famous Judgment no. 238 of 2014, it declared *de facto* a judgment of the International Court of Justice to be unconstitutional.¹⁵⁶ Most recently, it threatened to disobey the CJEU if the latter would not give in. The Constitutional Court considered that the previously rendered judgment of the Luxembourg Court endangered fundamental rights and, especially, the principle of legality and non-retroactivity in Italy.¹⁵⁷

So far, however, the Constitutional Court has never made use of the ‘nuclear option’ of unconstitutionality in the context of the ECHR and has applied more subtle techniques to control and limit the effects of the Strasbourg Court’s judgments.¹⁵⁸ Nonetheless, the Court has gradually restricted its very Strasbourg-friendly twin judgment jurisprudence.¹⁵⁹ One example is a judgment following the *Maggio* judgment of the ECtHR. The Constitutional Court highlighted that the interest in following the ECtHR had to be balanced ‘against other interests protected under constitutional law’ and, in this case, particularly the principles of equality and solidarity.¹⁶⁰ The consequence was that the Court did not apply the twin judgment jurisprudence and upheld the legislation that made up the basis of the ECtHR’s judgment.¹⁶¹ More recently, the Constitutional Court – clearly changing its tone – highlighted the ‘predominance’ of the Italian Constitution, adding that it is ‘beyond doubt that the (Italian) courts will be required to abide first and foremost by the Constitution’.¹⁶² It emphasized that the Italian judges were not ‘passive recipients of an interpretative command issued elsewhere in the form of a court ruling’.¹⁶³ In the end, it found that the judgment of the ECtHR in *Varvara*, which found that Italy had violated Article 7 of the ECHR in certain cases of confiscation in the context of unlawful land development,¹⁶⁴ was ‘little suited to Italy’,¹⁶⁵ highlighting the need for a certain margin in the area of criminal law.¹⁶⁶ But, above all, the national court

¹⁵⁴ *Ibid.*.

¹⁵⁵ Cannizzaro, ‘The Effect of the ECHR on the Italian Legal Order: Direct Effect and Supremacy’, 19 *Italian Yearbook of International Law* (2009) 173, at 183.

¹⁵⁶ Constitutional Court (Italy), Judgment no. 238/2014 of 22 October 2014; ECLI:IT:COST:2014:238.

¹⁵⁷ Constitutional Court (Italy), Order no. 24/2017 of 26 January 2017, ECLI:IT:COST:2017:24.

¹⁵⁸ See generally Paris and Oellers-Frahm, ‘Zwei weitere völkerrechts “unfreundliche” Entscheidungen des italienischen Verfassungsgerichtshofs aus dem Jahr 2015 (Nr. 49 und 50)’, 43 *Europäische Grundrechte-Zeitschrift* (2016) 245.

¹⁵⁹ See Part 3.A above.

¹⁶⁰ Judgment no. 264/2012, *supra* note 93, para. 5.3.

¹⁶¹ Because the ECtHR had not ordered the law to be amended as a general measure, no conflict with Art. 46 of the ECHR arose.

¹⁶² Judgment no. 49/2015, *supra* note 11, para. 4.

¹⁶³ *Ibid.*, para. 7.

¹⁶⁴ ECtHR, *Case of Varvara v. Italy*, Appl. no. 17475/09, Judgment of 29 October 2013.

¹⁶⁵ Judgment no. 49/2015, *supra* note 11, para. 7.

¹⁶⁶ *Ibid.*, para. 6.2.

indirectly reproached the ECtHR for being inconsistent and deviating from its own jurisprudence.¹⁶⁷

The most important consequence of this judgment is that, instead of following the ECtHR as a general rule (twin judgments), the Constitutional Court now requires Italian judges to systematically undertake a control of the Strasbourg jurisprudence and to decide for every single judgment whether it amounts to what the Constitutional Court calls ‘consolidated law’.¹⁶⁸ Only then are courts to follow the ECtHR. Criteria to determine whether or not there is consolidated case law, according to the Constitutional Court, are if a judgment is rendered by the Grand Chamber, if there are dissenting opinions or if a judgment stands out for its ‘creativity’.¹⁶⁹ In this sense, this turn in the jurisprudence of the Constitutional Court can also be read as a criticism of the dynamic interpretation of the ECtHR.¹⁷⁰

In a similar vein, the German Federal Constitutional Court, in its most recent judgment, concretized and restricted the effects flowing from the ECtHR’s judgments beyond Article 46 of the ECHR. In a case that dealt with the application of judgments rendered against Turkey to the German legal order, which could possibly have led to a conflict with the German Constitution, the Constitutional Court held that differences in terms of legal culture needed to be considered. Furthermore, beyond the *inter partes* effect, it was mainly ‘principal values’ that needed to be identified in the Strasbourg jurisprudence.¹⁷¹

These cases, therefore, clearly suggest a turn to a less open and more nationalized jurisprudence of domestic courts. But what are the reasons for this changing attitude, and is this development necessarily a bad thing? What would an adequate position of domestic courts at the intersection of legal orders be from a more normative point of view? These are the questions that we turn to now and that shall be discussed in some length in the remainder of this article.

4 Which Role for Domestic Courts? Assessing the Court Practice

The aim of this last part of the article is thus to assess the practice of domestic courts and to put it into context. It is argued that not all instances of ‘resistance’ by domestic courts amount to actual clashes between legal orders. Looking more closely, many cases, rather than being instances of backlash and signs of nationalism trumping

¹⁶⁷ *Ibid.*, para. 6.1.

¹⁶⁸ *Ibid.*, para. 7: ‘It is thus only “consolidated law” resulting from the case law of the European Court on which the national courts are required to base their interpretation, whilst there is no obligation to do so in cases involving rulings that do not express a position that has not become final.’

¹⁶⁹ *Ibid.*

¹⁷⁰ For a comment on the decision, see Pin, ‘A Jurisprudence to Handle with Care: The European Court of Human Rights’ Unsettled Case Law, Its Authority, and Its Future. According to the Italian Constitutional Court’, *International Journal of Constitutional Law Blog*, 30 April 2015, available at www.icconnectblog.com/2015/04/mini-symposium-on-cc-judgment-49-2015.

¹⁷¹ *Beamtenstreikrecht*, supra note 134, para. 132.

multilateralism, can be seen as adjustments to an ever more complex legal reality. Despite the fact that the overall picture looks less dramatic, it is argued that the flexible and pragmatic stance that many domestic courts take when dealing with judgments of the human rights courts is better suited to reconcile their different roles and to cope with the complex and plural legal reality than systematically judging anew on matters already decided by the human rights courts.

A Non-Enforcement and the Obligations under Article 46 of the ECHR and Article 68 of the ACHR

The above analysis suggests that the relationship between the human rights courts and domestic courts has become more strained in recent years. It is important to highlight, however, that only very few of these cases amount to actual legal conflicts – that is, entailing a violation of the obligations under the conventions. The first reason is that, as described above, many domestic courts engage with the human rights courts far beyond specific judgments rendered against their state. While Strasbourg and San José judgments, strictly speaking, only bind the parties to a case, many domestic courts take into account the wider jurisprudence of the human rights courts, often with the aim of preventing a ‘condemnation’.¹⁷² A good example is the fact that courts use the jurisprudence of the human rights courts as a parameter for the review of domestic legislation.¹⁷³ The Italian Constitutional Court regularly takes into account judgments of the Strasbourg Court when reviewing domestic legislation, including in cases where the ECtHR did not require Italy to change its laws. The refusal of the Constitutional Court to use an ECtHR judgment as a standard for constitutional review is thus somewhat unfriendly towards Strasbourg, but not a violation of Italy’s obligations under the ECHR.¹⁷⁴ More than actually challenging the human rights courts as such, the aim of domestic courts in these cases seems to be to change or reverse a line of jurisprudence. This is commonly referred to as a form of ‘judicial dialogue’,¹⁷⁵ which, in this sense, provides ‘a constructive way for channelling substantive disagreement or criticism’ and enhances ownership.¹⁷⁶

But, even regarding judgments that fall under the strictly binding category, it is important to stress that a refusal by a domestic court to follow the human rights courts does not automatically lead to a breach of the obligation to comply. Courts may conclude that they cannot implement an international court order without the aid of the other branches, and, especially, of parliament, because this would require, for

¹⁷² See Part 3.A above.

¹⁷³ *Beamtenstreikrecht*, *supra* note 134.

¹⁷⁴ Paris and Oellers-Frahm, *supra* note 158.

¹⁷⁵ See generally Slaughter, ‘A Global Community of Courts’, 44 *Harvard International Law Journal (HILJ)* (2003) 191; McCrudden, ‘A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights’, 20 *Oxford Journal of Legal Studies* (2000) 499; Choudry, ‘Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation’, 74 *Indiana Law Journal* (1999) 819.

¹⁷⁶ Lambrecht, ‘Assessing the Existence of Criticism of the European Court of Human Rights’, in P. Popelier, S. Lambrecht and K. Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics and the National and EU Level* (2016) 505, at 549.

example, legislative changes.¹⁷⁷ In this sense, a decision of non-execution of an international judgment can simply be a call on the political branches to act.¹⁷⁸

Problematic from the viewpoint of Article 46 of the ECHR and Article 68 of the ACHR are cases in which domestic courts declare judgments to be non-enforceable or unconstitutional altogether. This becomes particularly clear in the case of Russia, where the 2015 amendments to the law on the Constitutional Court explicitly rule out the possibility of amending the Constitution in cases of conflict with an international judgment.¹⁷⁹ The same might also be true in other states when judges declare an international judgment to be incompatible with fundamental principles of the domestic order.¹⁸⁰ Also in these cases, the adaptation of the domestic order might be precluded. A declaration of unconstitutionality can thus render an international judgment unenforceable in the domestic order and lead to a violation of the obligation to comply with the binding judgments of the human rights courts.

Such cases of unconstitutionality, of course, are quite an affront to the human rights courts. Both of them consider that such forms of contestation pose a threat to their authority. The IACtHR has found that non-compliance imperils 'the *raison d'être* for the functioning' of international courts,¹⁸¹ and the ECtHR – in the domestic context – has stated that the 'deliberate attempt to prevent the implementation of a final and enforceable judgment ... is capable of undermining the credibility and authority of the judiciary and of jeopardising its effectiveness'.¹⁸² Not surprisingly, cases of actual contestation tend to receive a great deal of attention, but it is important to stress that they are rare. It is thus more adequate to distinguish instances of actual conflict from those in which domestic courts merely restrict the effects that go beyond strictly binding effects. Such a view is in line with more recent scholarship calling for a differentiated view on the phenomenon of resistance to international courts. In other words, it is claimed that not every criticism of an international court or judgment puts into question its authority as such and thus amounts to a backlash.¹⁸³ Even though domestic courts in both cases in the end might pursue similar goals – namely, to push

¹⁷⁷ The German Federal Constitutional Court in some cases explicitly defers to the legislator for full implementation. See, e.g., *Sicherungsverwahrung*, *supra* note 73. The Italian Constitutional Court in rare cases makes use of its *sentenze additive* to complement laws. See note 133 above.

¹⁷⁸ For a discussion of the different approaches of the Russian and the Lithuanian Constitutional Courts in this sense, see Padskocimaite, *supra* note 149.

¹⁷⁹ Federal Law no. 7-KFZ, *supra* note 143, Arts 104(4), 106; see also Venice Commission, *supra* note 148, paras 23–27.

¹⁸⁰ In the recent controversy around the *Fontev ecchia* judgment (see Part 3.C above), however, the Argentinian Supreme Court and the IACtHR in the end found a compromise. See Supreme Court (Argentina), Resolution no. 4015/17 of 5 December 2017.

¹⁸¹ IACtHR, *Case of Baena Ricardo v. Panama*, Judgment (Competence), 28 November 2003, para. 72.

¹⁸² ECtHR, *Broniowski v. Poland*, Appl. no. 31443/96, Judgment (GC) of 22 June 2004, para. 175. See further ECtHR, *The Authority of the Judiciary*, available at www.echr.coe.int/Documents/Seminar_background_paper_2018_ENG.pdf, at 6: 'Shortcomings in the enforcement of judicial decisions may undermine judicial authority.'

¹⁸³ See Rask Madsen, Cebulak and Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts', 14 *International Journal of Law in Context* (2018) 197.

for change – it is submitted that the term ‘dialectical review’ fits better with the more conflictual cases than the term ‘judicial dialogue’.¹⁸⁴ In any case, and given that cases of actual conflict remain rare, this differentiated view shows that the overall picture looks less dramatic.

Similarly, it seems too simplistic to see the different patterns of resistance by domestic courts simply as an expression of national interest trumping multilateralism. It is submitted that judicial resistance should be distinguished from the political resistance that at times occurs when governments consider that international judgments are too costly to comply with or that otherwise harm domestic political interests.¹⁸⁵ To be sure, courts – even if legally independent – are not entirely apolitical institutions,¹⁸⁶ and probably when judgments bear high compliance costs for their state, some courts might tend to have a stronger allegiance towards their governments.¹⁸⁷ A good example might be the *Yukos* judgment of the Russian Constitutional Court, which some observers see as an attempt to avoid the harsh consequences of the corresponding ECtHR’s judgment.¹⁸⁸ Also, there are instances where the line between the judicial and the political is blurred, and this is of course particularly visible in cases where the independence of the judiciary is questionable. For example, the Venezuelan Supreme Court – which is not considered an independent court anymore¹⁸⁹ – declared the politically sensitive judgment of the IACtHR in the case of *Apitz Barbera and ors*, in which the Court had ordered the re-installment of three judges suspended by the government,¹⁹⁰ to be non-executable (*‘inejecutable’*) for violation of fundamental principles of the constitutional order.¹⁹¹ The Supreme Court even asked the government to withdraw from the jurisdiction of the IACtHR. Similarly, the Dominican Constitutional Court quashed the law consenting to the jurisdiction of the IACtHR following a judgment in which the Court had found widespread

¹⁸⁴ Cf. Ahdieh, ‘Between Dialogue and Decree: International Review of National Courts’, 79 *New York University Law Review* (2004) 2029.

¹⁸⁵ Sandholtz, Bei and Caldwell, ‘Backlash and International Human Rights Courts’, in A. Brysk and M. Stohl (eds), *Contracting Human Rights: Crisis, Accountability, and Opportunity* (2018) 159. For a call for the separate study of the judicial branch, see also Huneeus, *supra* note 55.

¹⁸⁶ See generally Hirschl, ‘The Judicialization of Mega-Politics and the Rise of Political Courts’, 11 *Annual Review of Political Science* (2008) 93.

¹⁸⁷ On the traditional deference of domestic courts towards the executive in matters of international law, see Benvenisti, ‘Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts’, 102 *AJIL* (2008) 241; E. Benvenisti and G.W.E. Downs, *Between Fragmentation and Democracy: The Role of National and International Courts* (2017) 105; see also Institut de droit international, *The Activities of National Judges and the International Relations of Their State*, 7 September 1993, available at www.idi-iil.org/app/uploads/2017/06/1993_mil_01_en.pdf.

¹⁸⁸ See, e.g., Timofeyev, ‘Money Makes the Court Go Round: The Russian Constitutional Court’s *Yukos* Judgment’, *Verfassungsblog*, 26 January 2017, available at <http://verfassungsblog.de/money-makes-the-court-go-round-the-russian-constitutional-courts-yukos-judgment/>.

¹⁸⁹ Taylor, ‘The Limits of Judicial Independence: A Model with Illustration from Venezuela under Chávez’, 46 *Journal of Latin American Studies* (2014) 229.

¹⁹⁰ IACtHR, *Apitz Barbera and ors v. Venezuela*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 5 August 2008.

¹⁹¹ *Solicitor General of the Republic*, *supra* note 102.

discrimination of people of Haitian descent in the Dominican Republic.¹⁹² Two weeks earlier, the Dominican government had explained that it had rejected the decision of the San José judges.¹⁹³

But the above analysis clearly shows that it would be wrong to view domestic courts on the international plane only as the extended arms of their governments. These cases suggest instead that courts generally take their role as interpreters and appliers of international law seriously and that the enforcement of international law in the form of judgments of the human rights courts has become quite commonplace. Thus, courts today, in many instances, fulfil a truly international judicial function in the sense understood by Scelle¹⁹⁴ and do not shy away anymore from enforcing international law against their governments and parliaments.¹⁹⁵

It thus makes sense to treat judicial resistance as a particular form of resistance that follows its own logic.¹⁹⁶ Among the reasons why the tensions between international and domestic courts seem to be growing in recent times is that there has not only been a quantitative increase of cases in which domestic courts are faced with international judgments. There is also qualitative change. Whereas international law has traditionally remained vague, leaving considerable leeway for its implementation, the concrete remedies many international courts order today drastically reduce this leeway. Not only might domestic courts, anxious to preserve spaces for their own decision-making, increasingly feel ‘threatened’ by their powerful counterparts that directly ‘intrude’ into their terrain,¹⁹⁷ but since international law is much more concrete and directive, frictions between different legal orders also simply become more likely.¹⁹⁸ Courts can thus find themselves in a dilemma: on the one hand, they are ‘servants’ to international law within the domestic realm and act as pivotal safeguards for its effectiveness. On the other hand, they remain ‘answerable to the dictates of applicable domestic law’¹⁹⁹ and, therefore, can be – and, in times of global governance and much increased activity of international courts, probably will be – increasingly torn between the sometimes conflicting commands of domestic and international law.

All of this becomes particularly visible in the case of the two human rights courts. They are two of the most active international courts and are said to have genuine

¹⁹² IACtHR, *Case of Expelled Dominicans and Haitians v. Dominican Republic*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 28 August 2014.

¹⁹³ ‘El Gobierno rechaza la sentencia de la Corte Interamericana de los Derechos Humanos’, *Diario Libre*, 24 October 2014, available at www.diariolibre.com/noticias/el-gobierno-rechaza-la-sentencia-de-la-corte-interamericana-de-los-derechos-humanos-MFDL851951.

¹⁹⁴ Scelle, *supra* note 15.

¹⁹⁵ See Part 3.A above.

¹⁹⁶ See also Huneeus, *supra* note 55.

¹⁹⁷ Martinico, *supra* note 137, at 68; Huneeus, *supra* note 55, at 514.

¹⁹⁸ See also Krisch, ‘Pluralism in International Law and Beyond’, in J. d’Aspremont and S. Singh (eds), *Fundamental Concepts for International Law: The Construction of a Discipline* (2019) 691.

¹⁹⁹ Higgins, ‘National Courts and the International Court of Justice’, in M. Adenas and D. Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (2009) 405, at 417.

influence on public policy and thus exercise significant public authority.²⁰⁰ Both – to different extents – have developed sophisticated techniques to give teeth to their findings and foster their impact on the domestic order.²⁰¹ More than as attempts to undermine the human rights courts, the reactions of domestic courts in many cases can thus be seen as a reaction to their increased power and reach, and rather than attacking the human rights courts, judges thus seem to be adjusting to today's complex legal reality.

B Judging the Human Rights Courts?

Which role should domestic courts thus play *vis-à-vis* their international counterparts in the face of the competing interests and sometimes even conflicting normative claims? To begin with, there is good reason to support the view that domestic courts should play a role in the enforcement of the judgments of the human rights courts. From a conceptual point of view it is not accurate anymore to see the enforcement of Strasbourg or San José judgments as a matter that only concerns the state as a whole, thus justifying giving the executive the lead on judgment enforcement. This view might have made sense with regard to 'traditional' international law that treated mainly interstate issues. But this certainly does not hold true anymore for today's 'inward-looking' international law and even less for judgments of the human rights courts that deal directly with rights (and duties) of individuals.²⁰² Moreover, both the ECtHR and the IACtHR have stated that the effective compliance with judgments is the materialization of justice for the concrete case²⁰³ and represents an important aspect of the right to access to justice and the rule of law.²⁰⁴ Here, domestic courts fill an important gap. In fact, they might be the only avenue available to individuals who seek enforcement of a judgment rendered in their favour.²⁰⁵ Moreover, the individuals addressing the human rights courts are likely to belong to minorities that have never had the chance to have their voices adequately represented in the domestic fora.

Normative reasons even support the idea that domestic courts should look to Strasbourg and San José beyond the enforcement of individual rulings binding on their states – that is, that they should consider the overall jurisprudence of the human rights courts. As a matter of fact, domestic courts today are no longer alone in deciding what the law is. Rather, in an interconnected world where decisions are taken on different levels of governance, there is an interest in having a functioning system of

²⁰⁰ For the ECtHR, see Rask Madsen, 'Bolstering Authority by Enhancing Communication: How Checks and Balances and Feedback Loops Can Strengthen the Authority of the European Court of Human Rights', in J. Mendes and I. Venzke (eds), *Allocating Authority. Who Should Do What in European and International Law?* (2018) 77, at 82–83.

²⁰¹ See Part 2 above.

²⁰² See generally Ferdinandusse, *supra* note 21; Bedjauoi, 'The Reception by National Courts of Decisions of International Tribunals', in T.M. Franck and G.H. Fox (eds), *International Law Decisions in National Courts* (1996) 23.

²⁰³ *Baena Ricardo*, *supra* note 181, para. 72.

²⁰⁴ ECtHR, *Hornsby v. Greece*, Appl. no. 18357/91, Judgment of 19 March 1997, para. 40.

²⁰⁵ See also Oppong and Barreto, *supra* note 19, at 286.

adjudication across levels and systems. Thus, listening to, and engaging with, each other not only leads to more inclusive and diverse solutions but also has an important systemic function.²⁰⁶

On the other hand, this does not mean that domestic courts should follow the human rights courts blindly. Such a strictly monist conception of the relationship between domestic and international courts is neither accurate on a descriptive level nor desirable from a normative point of view. In the same way in which it is not convincing in today's plural world to only look at the solutions offered by domestic law, the human rights courts do not trump domestic decision-makers simply because they are international institutions. It is thus not surprising that the IACtHR faces increasing criticism for the hierarchical position it takes.²⁰⁷ Already in 1974, Christoph Schreuer defended a certain 'residue of discretion' for domestic courts if they found that an international judgment was either 'erroneous' or 'iniquitous'. Denying this possibility would not only 'eliminate an important means to correct past mistakes but would also deprive international law of a valuable element in its clarification and development'.²⁰⁸ In more recent years, in light of the increasing impact of international law on domestic systems and its persisting legitimacy deficits, it has become clear that the claim for its absolute supremacy, and, thus, a rigid rule favouring the precedence of international law, is not tenable.²⁰⁹ Numerous voices have raised the concern that the much-described legalization and judicialization of international law through international adjudication²¹⁰ does not only strengthen the international rule of law but also sharpens legitimacy concerns linked to global governance.²¹¹ Against this backdrop, some scholars have even claimed a 'constitutional right to resist'²¹² international law.²¹³ Disobedience understood in this sense is a tool that helps to moderate the negative side effects of multilevel governance and to facilitate – and not disrupt – the interplay between different legal orders.

However, even the exceptional disregard of international law and judgments bears obvious risks. Whereas single instances of contestation certainly do not build an existential threat to international courts, the risk of opening Pandora's box and causing a 'domino effect' cannot be denied. That this risk is real is illustrated by the fact that the

²⁰⁶ See generally Berman, 'Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Legal Pluralism', 20 *Indiana Journal of Global Legal Studies* (2013) 665, at 675–680; P.S. Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (2012), at 294.

²⁰⁷ See Part 2.A above.

²⁰⁸ Schreuer, 'The Authority of International Judicial Practice in Domestic Courts', 23 *ICLQ* (1974) 681, at 704.

²⁰⁹ See generally Nollkaemper, 'Rethinking the Supremacy of International Law', 65 *Zeitschrift für öffentliches Recht* (2010) 65.

²¹⁰ See generally K. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (2014).

²¹¹ See only A. von Bogdandy and I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (2014).

²¹² Cottier and Wüger, 'Auswirkungen der Globalisierung auf das Verfassungsrecht: Eine Diskussionsgrundlage', in B. Sitter-Liver (ed.), *Herausgeforderte Verfassung: Die Schweiz im globalen Kontext* (1999) 241, at 263.

²¹³ Peters, 'Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse', 65 *Zeitschrift für öffentliches Recht* (2010) 3, at 61; von Bogdandy, *supra* note 137, at 398.

Russian Constitutional Court relied on some of its European counterparts such as the German and the Italian Constitutional Courts to justify its far-reaching jurisprudence on the deviation from the ECtHR.²¹⁴ To solve this issue, attempts have been undertaken time and again to order the relationship between domestic and international law by establishing criteria to distinguish between legitimate and illegitimate forms of contestation of international law. However, none of them seems fully convincing. First, the distinction between ‘onto-legitimacy’ and ‘practice-legitimacy’ – that is, between putting into question an institution itself or ‘merely’ criticizing its practice²¹⁵ – applied to real cases proves to be of little avail. In most of the examples analysed in this article, with the exception of Venezuela and the Dominican Republic, domestic courts have not fundamentally put into question the human rights courts. Yet, the systematic control of their judgments has the potential to undermine the authority of the human rights courts in the longer run.

The same is true for the suggestion that disobedience becomes more tolerable from the viewpoint of international law if domestic courts rely on a common set of values and rules – that is, on international law itself and especially on international human rights guarantees instead of domestic principles and rules.²¹⁶ This approach has the clear advantage that it avoids placing domestic and international law as opposing poles. However, as this article has shown, the conflicts arising in practice often stem not so much from conflicts of norms as such but, rather, from different readings of the same norms. Furthermore, in cases of real norm conflicts as well as in other important cases, the reliance on the conventions and the principle of *pro persona* does not help because the conflict is also one between different convention rights – for example, in cases where a judgment collides with fundamental rights of third persons.²¹⁷

What seems to fit better in this complex legal reality than strict conflict rules and hierarchies is a more flexible approach that allows for factoring in of the different interests at stake. This again does not require domestic courts to follow the human rights courts at any cost but, rather, to at least seriously engage with them and consider their rulings²¹⁸. To see domestic courts in a binary fashion as either ‘gatekeepers’ or ‘compliance partners’ does not capture the multifaceted role they play today at the intersection of legal orders. It has thus been suggested that it is, at the same time, descriptively more accurate and normatively preferable to view courts as bearers of ‘multiple identities’.²¹⁹ In this sense, domestic courts are now part of a wider network, a ‘global community of courts’,²²⁰ and should have in mind the ‘overall systemic interest in creating an

²¹⁴ Constitutional Court (Russia), Case no. 21-Π/2015, 14 July 2015, para. 4.

²¹⁵ Lemmens, ‘Criticising the European Court of Human Rights or Misunderstanding the Dynamics of Human Rights Protection?’, in P. Popelier, S. Lambrecht and K. Lemmens, *Criticism of the European Court of Human Rights. Shifting the Convention System: Counter-Dynamics at the National and EU Level* (2016) 23.

²¹⁶ Nollkaemper, *supra* note 209, at 81–83.

²¹⁷ On the rights of third persons as a limit to the reception of international judgments, see Part 3.B.2 above.

²¹⁸ See also Berman, ‘Jurisgenerative Constitutionalism’, *supra* note 206, arguing for a ‘procedural pluralism’.

²¹⁹ Krisch, *supra* note 114, at 291–294.

²²⁰ Slaughter, ‘A Global Community of Courts’, 44 *HILJ* (2003) 191.

interlocking system of adjudication'.²²¹ In today's complex legal reality, courts should thus be seen as mediators between orders rather than as guardians of a particular order.²²² A flexible solution thus reflects the fact that many different interests are in play and, to a certain extent, acknowledges the multiple roles played by domestic courts.

The flexible middle-ground position taken by many courts seems to fit best to this pluralist ideal and allows domestic courts to reconcile their multiple roles in a rather successful way. Despite the fact that courts regularly stress that they must keep a certain control, they have found ways in many cases to give effect to the human rights judgments even if domestic law has stood in the way. The cases show that courts often take a result-oriented and, at times, even pragmatic stance, limiting themselves to the case at hand and refraining from developing theories that point beyond the individual case, along the lines of what Cass Sunstein has called a 'minimalist jurisprudence'.²²³ Rather than acting as judges of one order, they try to find just solutions for the cases at hand. Rather than being members of a particular legal order, what seems to unite courts in these situations is their judicial task.

Quite to the contrary, some of the recent cases discussed above suggest a certain dualist shift and indicate that the self-perception of those courts seems to move again towards a more national vision of their role. The most obvious example is the Russian Constitutional Court with its recent theory on the deviation from international judgments.²²⁴ The fact that the Court completely rules out the enforcement of international judgments in any case in which it finds a conflict with the Constitution sits ill with the pluralist ideal just described. Again, while pluralist approaches do not exclude that domestic norms may prevail in some cases, they hold that domestic values, even if enshrined in the constitution, should not prevail as a matter of principle.²²⁵ Rather, all of the different interests at stake in a given case should be weighed against each other. The solution adopted by the Russian Constitutional Court, however, completely rules out such a balancing in cases of conflict with the Constitution. This widely criticized approach clearly goes beyond a check that is aimed at avoiding excessive results and at mitigating negative side effects of multi-level governance. Rather, the Russian Constitutional Court imposes the values of the Russian legal order on the ECtHR. The fact that it interpreted its powers broadly only reinforces this conclusion.

The more recent jurisprudence of the Argentinian Supreme Court, which now requires judgments of the IACtHR to respect 'fundamental principles of the public order' points in a similar direction.²²⁶ Even though it is unclear how far-reaching and systematic the control undertaken by the Supreme Court will be, the clear change in tone of the decision is noteworthy, along with the fact that for many years the Supreme Court had accepted the far-reaching remedial practice of the IACtHR.

²²¹ Berman, 'Global Legal Pluralism', *supra* note 206, at 294.

²²² Krisch, *supra* note 114, at 294.

²²³ C.R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (2001); C.R. Sunstein, *Legal Reasoning and Political Conflict* (2nd edn, 2018).

²²⁴ See Part 3.C above.

²²⁵ On the constitution as a barrier to the recognition of foreign awards, see Berman, 'Global Legal Pluralism', *supra* note 206, at 297–299.

²²⁶ *Ibid.*

Further examples of courts undertaking more substantial control in recent times are the Italian Constitutional Court and the German Federal Constitutional Court.²²⁷ Importantly, in both cases, the jurisprudence does not concern the enforcement of judgments in the stricter sense but, rather, answers the question of how to deal with the wider jurisprudence of the ECtHR.²²⁸ Even though the restriction that the German court has undertaken is quite substantial – it asks to only consider the ‘principal values’ of the ECHR – it does not introduce hard criteria, and much will depend on the application of this refined jurisprudence to further cases. By contrast, and despite the fact that it does not plainly ignore the ECtHR and, to a certain extent, also allows for a balancing of different interests,²²⁹ the predetermined criteria that the Italian Constitutional Court inserted into its jurisprudence are likely to hamper a true engagement with the Strasbourg Court. The second important consequence of the more recent Italian position is that the Constitutional Court changed the parameters: whereas before, the rule was to follow the Strasbourg Court, now Italian courts are expected to systematically check whether it should be followed.²³⁰ The presumption now seems to be that the ECtHR should not be followed.

While it is too early to speak of a shift in the attitude of domestic courts towards international law, recent developments do reflect a more national self-perception of their role. And, while many cases, rather than being instances of a backlash against international law, may be seen to some extent as witnesses of problems and controversies surrounding global governance, attempts to tame the plural legal reality by reintroducing fixed rules and hierarchies lacks the openness and flexibility needed to effectively cope with today’s complex legal reality. It is not a satisfying answer to the problems arising out of the interplay of legal orders if domestic courts systematically judge anew on matters already decided by the human rights courts. International judgments are not foreign awards for which certain reservations regularly exist;²³¹ they are binding decisions, and domestic courts can make an important contribution in implementing them. Judges need to recognize that they have become important actors at the intersection of legal orders and that the functioning of the overall system in the long run depends, to large extent, on them.

5 Conclusions

In recent times, the two best-known regional human rights courts are under pressure as probably never before, and, somewhat surprisingly, some of the resistance they are experiencing is coming from their domestic counterparts. This sits ill with the image of the role of domestic courts in international law; even though examples of clashes

²²⁷ *Ibid.*

²²⁸ On this distinction, see Part 4.A above.

²²⁹ See Part 3.C above.

²³⁰ *Ibid.*

²³¹ *Cf.* also Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters 2007, OJ 2007 L 339/3, Art. 34.

and disputes about the famous ‘ultimate say’ are well known to more integrated systems, such as the law of the European Union, the prevailing picture of domestic courts in international law more generally is that they contribute to its enforcement and thus fill important gaps in the current international order.

The analysis undertaken in this article shows that domestic courts have become important ‘compliance partners’ of the human rights courts and are contributing to the implementation of their judgments in numerous situations and at times even against the will of their governments. Rather than acting as judges of one particular legal order, courts often weigh the different interests at stake on a case-by-case basis and thus try to find just solutions for the particular situation with which they are dealing. Given that judgment enforcement is traditionally considered a political task, best confined to the executive, the fact that courts do contribute to implement the judgments of the human rights courts as such is an important finding. This finding also offers empirical support for those who argue that domestic courts today play an international judicial function independent of the interests of their governments.

But the analysis also shows that the loyalty of courts towards their international counterparts is not endless. The much-increased interaction has multiplied the tensions between legal orders and led many courts to reveal that there are limits to their openness. The interplay with the human rights courts thus once more illustrates the multiple – and, at times, conflicting – roles that domestic courts play at the intersection of legal orders. Domestic courts are important enforcers of international law, but, at the same time, they remain bound by domestic law and, in their position at the intersection of legal orders, often encounter competing interests and legal claims. The enforcement of judgments of the human rights courts thus reveals some of the most difficult questions and controversies arising in times of global governance. More than as attempts to undermine the authority of the human rights courts, many instances of resistance thus seem to reflect the complex legal reality.

Even though, overall, this analysis suggests that it is too simplistic to see the different patterns of resistance as instances of nationalism trumping multilateralism and inevitable signs of crisis and decline of the international judiciary, some cases indeed indicate a certain dualist shift and turn towards a more inward-looking stance of domestic courts. Ultimately, the article finds that an open and flexible stance is better suited to cope with the plural legal reality than systematically judging anew on matters already decided by the human rights courts.