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I. Introduction

1 The traditional international system based on the Westphalian legal order is undergoing a major transformation. Many of its characteristic aspects, as a system of governance for the maintenance of global public order, are facing serious challenges from a confluence of factors. In particular, the advent of globalisation within the world community, which has had the effect of producing one global society, is creating an increasing challenge to the existing institutional framework of international law. A globalised world requires a regulatory framework based on the concept of global public order at an international level. Such a regulatory paradigm must go beyond traditional normative structures, which were built on the principle of national partition of competence inherent in the Westphalian legal order.

2 As globalisation develops and expands, issues which used to belong to the domestic legal order are becoming the active focus of attention of international regulation as issues of common concern of the international public order, such as the protection of fundamental human rights and the question of global climate change. This trend has been noticeable in the field of interaction between separate domestic legal orders of sovereign states since the early 20th century. This is evidenced by the development in the work of the Hague Conference on Private International Law, which was established in 1893 to "work for the progressive unification of the rules of private international law".[1]

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1 Statute of the Hague Conference on Private International Law (adopted 31 October 1951, entered into force 15 July 1955) Art 1.

3 While this solution for the harmonisation of private international law has served the societal needs of the international community up to a point, it can only be considered a sort of "half-way house". In the present age of globalisation, it is no longer viable in meeting the societal needs of the globalised world community. In its stead, what Professor Hudson has called "international legislation",[2] *ie*, the quasi-legislative process through the adoption of law-making treaties in the form of multilateral conventions, is becoming prevalent. As a result, the sphere of application of the international legal order is reaching ever deeper into the domestic legal order. In this new era, a more permanent paradigm for the interaction between the international and domestic legal orders is called for.

4 In this light, I would like today to take up three areas where the dilemmas arising out of the increased interaction between this newly evolving international legal order and the traditionally formulated domestic legal order have been most pronounced. My thesis is that this recent situation is giving rise to new problems of implementation of international law in the domestic legal order. These areas are: (a) the process of incorporation of international treaties into the domestic legal order; (b) the interaction between the international and domestic legal orders relating to the implementation of Security Council resolutions; and (c) the procedures for the implementation of judgments of international courts and tribunals.

II. The place of international law in the domestic legal order

5 The place of international law in the domestic legal order has been one of the most hotly debated issues for both international and domestic lawyers. Traditionally, legal scholars have considered that there existed essentially two different approaches concerning how a municipal court could deal with relevant international legal rules: the monist school and the dualist school.

6 According to the dualist school of thought, international law and domestic (municipal) law are completely separate legal systems.[3] The rationale for this theory is that international law is meant to regulate the relationships between sovereign states, whereas municipal law applies only within an individual state and regulates the relationships among individuals and between individuals and the

2 See, *eg*, Manley O Hudson, *International Legislation: A Collection of the Texts of Multipartite International Instruments of General Interest Beginning with the Covenant of the League of Nations* (1931–1950).

3 Sir Robert Jennings & Sir Arthur Watts, *Oppenheim's International Law* (Longman, 9th Ed, 1996) vol 1 at p 53.

Government.[4] Because international and domestic law are separate legal orders, domestic legislation has to be enacted to implement an international rule so that the international rule can be made applicable domestically. At this point, however, the law is applied as domestic law, not as international law.[5]

7 According to the monist school, by contrast, both international law and domestic law are part of a single legal structure, with "the various national systems of law being derived by way of delegation from the international legal system".[6] Because the monist school takes the position that international law and municipal law form part of the same legal order, the question arises as to which of the two is hierarchically superior. Most monists answer this question in favour of international law, although a minority assert the supremacy of municipal law in a monist paradigm.

8 Against this doctrinal background, it is crucial to examine the practice of states to see how this interaction between the international legal order and the municipal legal order has operated, and what kind of problems have arisen as a result. In the practice of most countries, general international law or customary international law is accepted as constituting part of the legal order of the domestic legal system. Thus, in the doctrine of the UK, customary international law, as a body of law commonly accepted by the civilised nations of the international community, has traditionally been regarded by its very nature as part of the law of the land. This doctrine has come to be accepted in the US, as it inherited the common law system from Great Britain at the time of its independence. Many of the countries belonging to the civil law system on the European continent also have provisions in their constitutions which declare the supremacy of international law over municipal law in their legal systems.

9 When it comes to the issue of the place of international conventional law, namely legal norms accepted by states through bilateral treaties and multilateral conventions, however, the practices of states are much more divergent. It is true that there has recently developed a discernible trend of states including a stipulation in their constitutions assigning a place for international agreements in the constitutional legal order. This trend is the result of states' growing awareness of the internationalisation of their wish to avoid possible conflicts between obligations emanating from the two legal orders, one

4 Ian Brownlie, *Principles of Public International Law* (OUP, 6th Ed, 2003) at pp 31–32.

5 Sir Robert Jennings & Sir Arthur Watts, *Oppenheim's International Law* (Longman, 9th Ed, 1996) vol 1 at p 53.

6 Sir Robert Jennings & Sir Arthur Watts, *Oppenheim's International Law* (Longman, 9th Ed, 1996) vol 1 at p 54.

domestic and the other international – both of which derive their legal authority from the sovereign will of the State. However, the precise place of international conventional law in the domestic legal order differs from state to state. Some states, such as the US, place international treaties on an equal footing as domestic legislation, and take an approach based on the *lex posterior* principle, in which an international treaty (which is applicable as part of federal law under the Supremacy Clause of the Constitution of the United States of America ("US Constitution")) will apply despite a conflicting federal or state law that already exists, if the treaty has been ratified later in time. This also means, however, that should a new law in the form of an Act of Congress be enacted in conflict with an existing international agreement, that domestic law will have superior force. A group of other countries, especially many civil law countries in Europe and Latin America – including Argentina, Belgium, France, Germany, Japan, The Netherlands and Poland – uphold the primacy of an international treaty over earlier or subsequent domestic legislation. An interesting exception is provided by the constitutional doctrine of the UK, where the conclusion of a treaty is a prerogative of the Crown, which concludes that treaty without the intervention of Parliament. A treaty must be transformed into a domestic law in order to be incorporated into the domestic legal order. Yet other countries have not codified any explicit rule as to the place of international treaties within the domestic legal order.[7]

10 There have been some theoretical attempts to harmonise this strict dichotomy between monism and dualism through a third approach, which might be called the co-ordination approach. Scholars who advocate this view try to argue that the difficulty of both monism and dualism is that they operate on a faulty premise that international and municipal law have a common field of operation. In reality the two systems "do not come into conflict as *systems* since they operate in separate spheres".[8] There can be no conflict of systems, they argue, while there "may be a conflict of *obligations*, an inability of the state on the domestic plane to act in the manner required by international law: the consequence of this will not be the invalidity of the internal law but the responsibility of the state on the international plane".[9]

11 In my view, this co-ordination approach fails to meet the requirements of the legal realities of contemporary international life, where states have to co-operate with each other through the adoption of

7 Vera Gowland-Debbas, "Implementing Sanctions Resolutions in Domestic Law" in *National Implementation of United Nations Sanctions: A Comparative Study* (Vera Gowland-Debbas ed) (Martinus Nijhoff Publishers, 2004) at p 55.

8 Ian Brownlie, *Principles of Public International Law* (OUP, 6th Ed, 2003) at p 33.

9 Ian Brownlie, *Principles of Public International Law* (OUP, 6th Ed, 2003) at p 33.

"international legislation" in the form of multilateral conventions, creating a common legal order for the international community. Whatever the legal techniques they may employ, whether through the monist approach or the dualist approach, the objective is to ensure compliance with the international obligations which they have assumed by entering into international agreements, either bilateral or multilateral. From this perspective, it matters little whether what ensues from the non-compliance is a situation of state responsibility or that of the invalidity of the international act in question. The so-called "co-ordination approach" may be a clever device to avoid a theoretical inconsistency resulting from the monist doctrine or the dualist doctrine, but it does not solve the real problem that the present-day international legal order faces – *ie*, how to ensure compliance within a domestic legal order with international obligations assumed through the ratification of international treaties.

12 This is particularly true when one looks at the contemporary international legal order where societal changes in the international community are bringing new challenges to the globalised world. International law is evolving from a system of bilateral relationships between states to an integrated system of law-making treaties protecting community interests.[10] This includes "the shaping of an international public policy in the form of the development of certain universal principles, such as human rights".[11] Compare this with the legal situation one hundred years ago, when Anzilotti opined:[12]

> A rule of international law is by its very nature absolutely unable to bind individuals, *ie* to confer upon them rights and duties. It is created by the collective will of States with the view of regulating their mutual relations; obviously it cannot therefore refer to an altogether different sphere of relations. If several States were to attempt the creation of rules regulating private relations, such an attempt, by the very nature of things, would not be a rule of international law, but a rule of uniform municipal law common to several States.

13 We live in a very different world today. It is now unquestionably the case that international law creates both rights and duties for individuals. The law of international human rights, which just 60 years

10 See generally Bruno Simma, "From Bilateralism to Community Interest in International Law" Receuil des Cours de l'Académie de La Haye, vol 250 (1994) pp 217–384.

11 Vera Gowland-Debbas, "Implementing Sanctions Resolutions in Domestic Law" in *National Implementation of United Nations Sanctions: A Comparative Study* (Vera Gowland-Debbas ed) (Martinus Nijhoff Publishers, 2004) at p 37.

12 Anzilotti, *Il Diritto Interazionale nei Giudizi Interni* (1905) at p 177 (translated in Vera Gowland-Debbas, "Implementing Sanctions Resolutions in Domestic Law" in *National Implementation of United Nations Sanctions: A Comparative Study* (Vera Gowland-Debbas ed) (Martinus Nijhoff Publishers, 2004) at p 42).

ago was codified at a universal level primarily through non-binding declarations of the General Assembly, has grown into a system of numerous binding global and regional treaties. On the side of individual duties, the system of international criminal law has expanded exponentially in the past two decades, including through the establishment of the International Criminal Tribunal for the former Yugoslavia ("ICTY") in 1993, the establishment of the International Criminal Tribunal for Rwanda ("ICTR") in 1994, and the entering into force of the Rome Statute in 2002 and the resulting establishment of the International Criminal Court.

14 Thus, in the modern legal order, international law may be the source of both rights and duties for individuals, or could even serve other purposes which had traditionally been left to municipal law, such as local governance. For example, in a recent case which came before the International Court of Justice – *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*[13] – the court upheld the relevance of the rule of law in a territory's legal framework of local governance to the protection of individual rights of private persons emanating from international humanitarian and human rights law. (Though the result was not to create a specific right of compensation due to those individuals, the court held that, under the law of state responsibility, the injured state was due reparation by the State committing the internationally wrongful act.)

15 There are situations in which an international court, tribunal, or other body purports to declare that a rule of law created by international agreement can give rise to rights for individuals directly enforceable within the domestic legal order. This is the purport of the judgment of the International Court of Justice in *Avena and Other Mexican Nationals (Mexico v United States of America)*.[14] It could be read as creating a directly applicable right for 51 Mexican nationals to have their cases reviewed and reconsidered within the domestic legal order by courts in the US. Similarly, in *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*[15] before the European Court of Justice, the legal effect of resolutions of the Security Council – which directly affected individuals by freezing their assets as part of a sanctions regime – was at issue. Where an international court, or an international body such as the Security Council, purports to create or limit the rights of individuals, it can no longer be said that international and domestic law will not conflict because they exist in separate spheres, as is claimed

13 ICJ Reports 2005, p 168.
14 ICJ Reports 2004, p 12.
15 Joined Cases C-402/05 P and C-415/05 P (judgment of the European Court of Justice, 3 September 2008).

by the co-ordination approach, as the international court or body is expressly reaching into the sphere that was formerly the exclusive realm of domestic law.

16 This general analysis of the contemporary situation leads me to the second, more specific area of the problem of the implementation of Security Council resolutions.

III. Interaction between the international and domestic legal orders relating to the implementation of Security Council resolutions

17 According to the Charter of the United Nations ("UN Charter"), the Security Council is endowed with the primary responsibility for the maintenance of international peace and security. For the purposes of carrying out this responsibility effectively under the collective security system enshrined in the UN Charter, the Security Council can take decisions that are binding on all Member States of the UN, especially when it acts under ch VII of the Charter. Article 25 of the UN Charter states that:

> The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

18 In theory, it logically follows from this provision that because all Member States have consented to be bound by the UN Charter, they are bound by Security Council resolutions under Art 25. The application of this provision, however, can raise issues arising out of the complicated relationship between the international legal order and the domestic legal order in the context of the domestic implementation of Security Council resolutions. The Security Council is a body of limited participation, with 15 members in total, including five permanent members which alone have the right to veto a resolution which they do not support, as compared to the rest of the members of the UN. In theory, all states that are UN members have consented to be bound by Security Council resolutions, even though passed without their specific consent, because they agreed to accept Art 25 when they ratified the UN Charter. In reality, however, they could not have known what they were consenting to. It is quite possible that, when ratifying the UN Charter – in many cases decades ago – states did not foresee the Security Council's role as it has now become, nor were they able to predict the types of decisions it would take, in particular in its activist approach in the area of the maintenance of international peace and security, which in some cases can be quite invasive *vis-à-vis* national sovereignty. Indeed, it is almost certainly the case that the drafters of the UN Charter themselves did not foresee these developments.

19 I would like to address this issue of "consent deficiency" or "democratic deficit" in two contexts to illustrate the issues that can arise in the relationship between the international and domestic legal order with regard to the implementation of Security Council resolutions. First, I will discuss problems which arise in the context of the domestic implementation of Security Council sanctions regimes. Second, I will touch upon the issue of the domestic implementation of Security Council provisions relating to co-operation with international criminal tribunals.

A. Sanctions regimes under Security Council resolutions

20 Sanctions regimes have been put in place by the Security Council, acting under ch VII of the UN Charter, as an effective tool for enforcement action by the UN in the maintenance of international peace and security. In the recent practice of the UN, they have become an important aspect of the Council's role in the maintenance of international peace and security. As that role increases, however, the question of the domestic implementation of sanctions measures has become all the more pressing. It raises complicated issues because sanctions regimes may require states to change domestic law.

21 In many states, sanctions regimes and other decisions of the Security Council are not considered directly applicable in domestic law. For example, the US has considered them to have the same legal status as non-self-executing treaties. The German Federal Court of Justice has held that ch VII sanctions are binding on Member States themselves (under Art 25) but that they do not have direct effect for individuals in those states.[16] Although there are some indications that sanctions regimes may be considered directly applicable in a number of states – Belgium, Argentina, Japan, Poland, and Namibia for example[17] – in others, some subsequent legal instruments implementing the regime are required.

22 However, it is often the case that sanctions measures adopted by Security Council resolutions mandating states to take certain action can clash with existing domestic legislation, or even with some domestic constitutional protections, because they may require the restriction of

16 Vera Gowland-Debbas, "Implementing Sanctions Resolutions in Domestic Law" in *National Implementation of United Nations Sanctions: A Comparative Study* (Vera Gowland-Debbas ed) (Martinus Nijhoff Publishers, 2004) at pp 39–40.

17 Vera Gowland-Debbas, "Implementing Sanctions Resolutions in Domestic Law" in *National Implementation of United Nations Sanctions: A Comparative Study* (Vera Gowland-Debbas ed) (Martinus Nijhoff Publishers, 2004) at pp 40–41.

private constitutionally-protected rights.[18] For example, it has been observed that:[19]

> In the Southern Rhodesian crisis, certain Member States, including the United States, considered that they were barred from implementing proposals relating to severance of postal, telegraphic, radio and other means of communication, or to the prohibition of insurance on the lives of passengers, by constitutional provisions relating to fundamental freedoms, including freedom of information and freedom of movement.

23 A survey of German law suggests that a constitutional issue may also arise under that country's constitution. In particular, Security Council sanctions regimes could be considered to conflict with the right to exercise a profession under Art 12 of the Basic Law for the Federal Republic of Germany ("German Basic Law") or the right to property under Art 14 of the German Basic Law.[20]

24 Similarly, conflicts could arise in Switzerland between Security Council mandated sanctions regimes and Art 27 of the Federal Constitution of the Swiss Confederation ("Swiss Constitution"), which concerns economic freedom.[21] In the Swiss case, however, the conflict is avoided to the extent that, under Art 191 of the Swiss Constitution, the Federal Supreme Court and other law-applying authorities are to follow federal statutes and international law even when they are unconstitutional. Security Council sanctions resolutions are thus in principle to be followed despite any unconstitutionality. The conflict is therefore, from a practical standpoint at least, resolved in favour of the sanctions resolutions.[22]

25 The implementation of sanctions regimes can also become very complex in the context of specific domestic governmental structures. In federal systems of government, such as the US and Switzerland, even when the State as a sovereign entity on the international plane accepts

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18 Vera Gowland-Debbas, "Implementing Sanctions Resolutions in Domestic Law" in *National Implementation of United Nations Sanctions: A Comparative Study* (Vera Gowland-Debbas ed) (Martinus Nijhoff Publishers, 2004) at p 52.

19 Vera Gowland-Debbas, "Implementing Sanctions Resolutions in Domestic Law" in *National Implementation of United Nations Sanctions: A Comparative Study* (Vera Gowland-Debbas ed) (Martinus Nijhoff Publishers, 2004) at p 56.

20 Frowein & Krisch, "Germany" in *National Implementation of United Nations Sanctions: A Comparative Study* (Vera Gowland-Debbas ed) (Martinus Nijhoff Publishers, 2004) at p 257.

21 Krafft, Thürer & Stadelhofer, "Switzerland" in *National Implementation of United Nations Sanctions: A Comparative Study* (Vera Gowland-Debbas ed) (Martinus Nijhoff Publishers, 2004) at p 570.

22 Krafft, Thürer & Stadelhofer, "Switzerland" in *National Implementation of United Nations Sanctions: A Comparative Study* (Vera Gowland-Debbas ed) (Martinus Nijhoff Publishers, 2004) p 568.

the obligation to apply the sanctions as a matter of international law, the federal government may face difficulties as a matter of domestic law in ordering governmental agencies at the state or local level to comply with that implementation.

26 The domestic law of Argentina in relation to the implementation of Security Council resolutions also provides intriguing aspects for comment. Argentina has been following essentially a monist legal doctrine since 1992.[23] Article 27 of the Constitution of the Argentine Nation ("Argentine Constitution") requires international treaties to conform with "principles of public law laid down by [that] Constitution". Paragraphs 22 and 24 of Art 75 of the Argentine Constitution create a degree of hierarchy of treaties according to their object. Human rights treaties expressly listed in that article, and others adopted subsequently, enjoy "constitutional hierarchy", meaning they are considered complementary to the rights and guarantees granted in the bill of rights under the Argentine Constitution. However, the UN Charter does not appear in this list of treaties in Art 75. So, the possibility exists that a sanctions regime established by a Security Council resolution on the basis of the UN Charter could be considered to conflict with a human rights treaty listed in Art 75 of the Argentine Constitution, and that conflict would, according to Art 75, have to be resolved in favour of the human rights treaty.[24]

27 This question of conflict between national law and Security Council sanctions regimes became a real issue also in the US in 1971, when the Byrd Amendment was enacted in an effort to curb US sanctions on Rhodesia, which had been in place for over three years. The Byrd Amendment conflicted with the prohibition on the import of chrome from Rhodesia imposed by the Security Council resolution on economic sanctions on Rhodesia, by making it illegal for the Government to prohibit the import of any metal from "any free world country so long as the importation of any like ore from any communist country is not prohibited by law".[25] Following the entry into force of the Amendment

23 The 1992 decision of the Argentinean Supreme Court in the *Ekmekdjian* case held that in accordance "with the requirements of international cooperation, harmonization and integration recognized by Argentina … the proposition that there is no legal grounds to give priority to a treaty over a law is no longer correct". *Ekmekdjian, Miguel Angel c/ Sofovich, Gerardo y otros* (Fallos 315:1492) (discussed in Cárdenas & Garcia-Rubio, "Argentina" in *National Implementation of United Nations Sanctions: A Comparative Study* (Vera Gowlland-Debbas ed) (Martinus Nijhoff Publishers, 2004) at p 94).

24 Cárdenas & Garcia-Rubiom, "Argentina" in *National Implementation of United Nations Sanctions: A Comparative Study* (Vera Gowlland-Debbas ed) (Martinus Nijhoff Publishers, 2004) at pp 95–97.

25 Byrd Amendment, reproduced in Lowenfeld, "United States" in *National Implementation of United Nations Sanctions: A Comparative Study* (Vera Gowlland-Debbas ed) (Martinus Nijhoff Publishers, 2004) at p 620.

in November 1971, the US began importing chrome from Rhodesia again, despite strong international condemnation,[26] including in a resolution of the General Assembly[27] and three resolutions of the Security Council.[28] Thereupon, a group of concerned individuals and organisations brought suit in the US Federal Court arguing that the Byrd Amendment was in violation of international law. While the US Court of Appeals for the District of Columbia Circuit declared that Congress in passing the Byrd Amendment had blatantly disregarded US treaty obligations, it concluded that it lacked the authority to prohibit Congress from doing so because:[29]

> Under our constitutional scheme, Congress can denounce treaties if it sees fit to do so, and there is nothing the other branches of government can do about it. We consider that this is precisely what Congress has done in this case; and therefore the District Court was correct to the extent it found the complaint to state no tenable claim in law.

28 The most important recent example of a court decision concluding that a Security Council sanctions regime clashed with constitutionally protected fundamental rights guaranties was delivered by the European Court of Justice in 2008. The case of *Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*[30] ("*Kadi*") involved an EC Regulation implementing a series of Security Council resolutions prescribing the suppression of international terrorism, adopted under ch VII of the UN Charter. These resolutions required Member States to freeze the financial assets of individuals and entities associated with Osama bin Laden, Al Qaeda, and the Taliban.[31] The specific list of the individuals and entities in question was prepared by the Sanctions Committee.[32] Kadi, a Saudi Arabian national with substantial assets in the EU, was included in that list, and consequently had his assets frozen. He brought suit against the Council and the Commission of the European Union, arguing that the freezing of his assets constituted a

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26 Lowenfeld, "United States" in *National Implementation of United Nations Sanctions: A Comparative Study* (Vera Gowlland-Debbas ed) (Martinus Nijhoff Publishers, 2004) at p 621.

27 General Assembly Resolution 2946 of 7 December 1972.

28 Security Council Resolution 314 of 28 February 1972; Security Council Resolution 318 of 28 July 1972; Security Council Resolution 320 of 29 September 1972.

29 Lowenfeld, "United States" in *National Implementation of United Nations Sanctions: A Comparative Study* (Vera Gowlland-Debbas ed) (Martinus Nijhoff Publishers, 2004) at p 622 (citing *Diggs v Shultz* 470 F 2d 461 (DC Cir, 1972)).

30 Joined Cases C-402/05 P and C-415/05 P (judgment of the European Court of Justice 3 September 2008).

31 Gráinne de Búrca, "The European Court of Justice and the International Legal Order after *Kadi*" (2010) 51 Harvard International Law Journal 1 at 18.

32 Gráinne de Búrca, "The European Court of Justice and the International Legal Order after *Kadi*" (2010) 51 Harvard International Law Journal 1 at 18.

serious miscarriage of justice, and that the Regulation violated his fundamental rights to property, to a fair hearing and to judicial redress.[33]

29 The Court of First Instance ruled that the primacy of the UN Charter over other international agreements, codified in Art 103 of the UN Charter, extended also "to decisions contained in a resolution of the Security Council, in accordance with Article 25 of the Charter of the United Nations, under which the Members of the United Nations agree to accept and carry out the decisions of the Security Council".[34] Citing the jurisprudence of the International Court of Justice in the *Lockerbie* case, the Court of First Instance concluded that under Art 103 of the Charter, "the obligations of the Parties in that respect prevail over their obligations under any other international agreement".[35] Thus, it was held that the Security Council sanctions regime, as implemented by the EC Regulation, prevailed over the European Convention on Human Rights ("ECHR") and EU laws concerning Kadi's fundamental rights.

30 In its final Judgment on Appeal of 3 September 2008, the European Court of Justice reversed the judgment of the Court of First Instance and annulled the EC Regulation.[36] It stated that "obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights".[37] It concluded that the fundamental rights at issue constituted "a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement".[38] On this basis, the court went on to consider the fundamental rights at stake, concluding that the EC Regulation freezing Kadi's assets constituted an unjust infringement of his right to

33 Gráinne de Búrca, "The European Court of Justice and the International Legal Order after *Kadi*" (2010) 51 Harvard International Law Journal 1 at 18.

34 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, Case T-315/01 (judgment of 21 September 2005) at para 183.

35 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, Case T-315/01 (judgment of 21 September 2005) at para 184.

36 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P (judgment of the European Court of Justice, 3 September 2008).

37 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P (judgment of the European Court of Justice, 3 September 2008) at para 285.

38 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P (judgment of the European Court of Justice, 3 September 2008) at para 316.

property.[39] The judgment made a distinction between "the primacy of the [Security Council] resolution in international law" and the "lawfulness of the Community measure" to implement this resolution, which the "Community judicature" reviews "in accordance with the powers conferred on it by the EC Treaty".[40] The court observed that "the Charter of the United Nations does not impose the choice of a predetermined model for the implementation of resolutions adopted by the Security Council".[41]

31 In conclusion, it can be stated that, as Security Council sanctions regimes become more prevalent and important, the possibility of conflicts with the domestic legal order increases. These conflicts can come about in a variety of different contexts, such as conflicts with domestic constitutional protections on the freedom of information and the freedom of movement (in the Southern Rhodesian example), the right to exercise a profession (in the German context), the right to exercise economic freedoms (in the Swiss Constitution), and the right to property (in *Kadi*[42] before the European Court of Justice).

B. Competence of the international criminal tribunals established by international organisations

32 The second area of conflict arising out of obligations of states to implement the decisions of the Security Council, concerns those resolutions of the Council calling upon Member States to co-operate with international criminal tribunals. As is well known, the *ad hoc* international criminal tribunals established to try individuals for alleged international crimes in the former Yugoslavia and Rwanda – the ICTY and the ICTR – are creatures of the Security Council. The ICTY was established by Security Council Resolution 827 of 25 May 1993, acting

39 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P (judgment of the European Court of Justice, 3 September 2008) at paras 370–371.

40 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P (judgment of the European Court of Justice, 3 September 2008) at paras 288, 326 and 337.

41 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P (judgment of the European Court of Justice, 3 September 2008) at para 298.

42 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P (judgment of the European Court of Justice, 3 September 2008).

under ch VII of the UN Charter. In that resolution, the Security Council:[43]

> Decide[d] that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute.

33 Article 29 of the ICTY Statute provided, in particular, that states were required to comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, *inter alia*, the arrest or detention of persons, and the surrender or the transfer of the accused to the international tribunal.[44]

34 Security Council Resolution 955 of 8 November 1994, adopted under ch VII of the UN Charter, established the ICTR.[45] The ICTR Statute also contained a similar provision to that contained in the ICTY Statute, requiring states to co-operate with requests for assistance by the tribunal, including by "surrender[ing] or … transfer[ing] … the accused to the International Tribunal for Rwanda".[46]

35 All of these provisions could create serious legal problems for states in the process of implementation. Let me take up a typical example of such problems in relation to the obligation to surrender an individual at the request of the international tribunal. This obligation poses legal difficulties to the extent that it may directly conflict with domestic laws on extradition. In Japan, for instance, the extradition of an individual suspected of a crime to another jurisdiction can only take place in accordance with the law on extradition, which requires the existence of an extradition treaty concluded with the State requesting the extradition, *and* subject to certain conditions, such as the principle that the State does not extradite its own nationals and the principle that the act alleged must be criminal in both of the jurisdictions (double criminality). The extradition can only take place through the judgment of the Tokyo High Court. The person subject to the extradition procedure has a constitutional right to petition for *habeas corpus*. A Security Council resolution requiring the transfer of the accused to the international tribunal without going through this procedure for

43 Security Council Resolution 827 of 25 May 1993, para 4.

44 International Criminal Tribunal for the Former Yugoslavia ("ICTY") Statute (adopted 29 May 1993 by Security Council Resolution 827) Art 29(2).

45 Security Council Resolution 955 of 8 November 1994, para 2.

46 Statute of the International Tribunal for Rwanda, Annexed to Security Council Resolution 955 of 8 November 1994, Art 28.

extradition would run counter to the Extradition Law and possibly with the Constitution of Japan.

36 A similar problem has been encountered with regard to the Swiss domestic law. Switzerland addressed this problem by adopting a new law meant to ensure full co-operation with these international criminal tribunals.[47] However, Swiss law requires that the principle of double criminality be met before a transfer may take place, and it has been argued that this is because "the principle of double criminality is of fundamental importance in any extradition procedure".[48] Moreover, the issue of the possible transfer of Swiss citizens led to another conflict, because, under Art 45 of the previous Swiss Constitution, no Swiss citizen could be expelled from Switzerland.[49] Article 45 was eventually revised to state that Swiss nationals cannot be expelled from Switzerland *or delivered to a foreign authority unless they consent*.[50] In other words, transfer to the international tribunal is not considered to constitute expulsion, so long as the individual, if convicted, serves his or her sentence in Switzerland (unless he or she consents to serving it elsewhere).

37 These examples would seem to amply demonstrate the kind of challenges that a state may face in trying to comply with Security Council resolutions requiring co-operation with international tribunals. In the case of Switzerland, not only did the State have to enact a major new law outlining the procedure for co-operation with the international tribunals, but it even had to change its constitution. A very similar situation occurred in Germany. Following the establishment of the ICTY and ICTR, the German Federal Parliament passed two substantially similar laws establishing a general duty of the German judiciary to co-operate with those tribunals, in particular in relation to transfer proceedings at those tribunals' request.[51] According to those two laws,

47 Arrêté fédéral relative à la coopération avec les tribunaux internationaux charges de poursuivre les violations graves du droit international humanitaire, 21 Décembre 1995, RS 351.20.

48 Arrêté fédéral relative à la coopération avec les tribunaux internationaux charges de poursuivre les violations graves du droit international humanitaire, 21 Décembre 1995, RS 351.20.

49 Arrêté fédéral relative à la coopération avec les tribunaux internationaux charges de poursuivre les violations graves du droit international humanitaire, 21 Décembre 1995, RS 351.20, p 565. Similarly, Art 7 of the law on international judicial assistance in criminal matters prohibits the extradition of Swiss nationals to foreign authorities.

50 Arrêté fédéral relative à la coopération avec les tribunaux internationaux charges de poursuivre les violations graves du droit international humanitaire, 21 Décembre 1995, RS 351.20, p 566.

51 Frowein & Krisch, "Germany" in *National Implementation of United Nations Sanctions: A Comparative Study* (Vera Gowlland-Debbas ed) (Martinus Nijhoff Publishers, 2004) at p 258.

the transfer procedure is assimilated to an extradition procedure.[52] As in Switzerland, this raised a constitutional problem, because Art 16 of the German Basic Law provided that "No German may be extradited to a foreign country".[53] Eventually, the Parliament amended Art 16 of the German Basic Law to read: "A different regulation to cover extradition to … an international court of law may be laid down by law, provided that constitutional principles are observed."[54] Just as in the case of Switzerland, co-operation with international criminal tribunals has required Germany not only to pass implementing legislation but also to amend its constitution, though the scope of the provision that "constitutional principles are [to be] observed" is not quite clear.

38 As these examples in Japan, Germany and Switzerland demonstrate, states attempting to comply with resolutions of the Security Council concerning co-operation with international criminal tribunals can face serious legal problems arising out of the interaction between the international legal order and the domestic legal order. This is so primarily because the legal process for transferring individuals to international criminal tribunals, even if mandated by the Security Council, can create inconsistencies with the State's constitution. The fact that several states have passed implementing legislation,[55] and have even amended their constitutions, is strong evidence that serious conflicts may arise when states must ensure compliance with Security Council resolutions relating to co-operation with international criminal tribunals.

IV. Interaction between international and domestic legal orders in relation to judgments of international courts

39 The final area I would like to discuss today which raises a significant dilemma in the area of interaction between the international legal order and the domestic legal order is with regard to the implementation of decisions by international courts and tribunals. It is true that in a number of countries, international treaties concluded by

52 Frowein & Krisch, "Germany" in *National Implementation of United Nations Sanctions: A Comparative Study* (Vera Gowland-Debbas ed) (Martinus Nijhoff Publishers, 2004) at p 259.

53 Frowein & Krisch, "Germany" in *National Implementation of United Nations Sanctions: A Comparative Study* (Vera Gowland-Debbas ed) (Martinus Nijhoff Publishers, 2004) at p 259.

54 Frowein & Krisch, "Germany" in *National Implementation of United Nations Sanctions: A Comparative Study* (Vera Gowland-Debbas ed) (Martinus Nijhoff Publishers, 2004) at p 260.

55 The Netherlands has passed similar implementing legislation to Switzerland and Germany. See Alfred H A Soons, "Netherlands" in *National Implementation of United Nations Sanctions: A Comparative Study* (Vera Gowland-Debbas ed) (Martinus Nijhoff Publishers, 2004) at pp 368–369.

them are considered to be part of the law of the land, but virtually no country has such a specific rule on the question of the domestic legal effect of judgments of international courts and tribunals binding on them at the international plane. While it could be argued in theory that those judgments are equally binding as international treaties by virtue of the binding character of the instruments from which a given international court derives its legitimacy – in the case of the International Court of Justice, the UN Charter and the Statute of the Court – this is a somewhat formalistic argument which does not necessarily ensure that such judgments are actually implemented and enforced in the domestic legal orders of the states to which the judgments in question are addressed.

40 The International Court of Justice has recently been faced with some complex compliance questions of this nature. This point can be best illustrated by the recent case of *Avena and Other Mexican Nationals (Mexico v United States of America)*[56] ("*Avena*"). The judgment of the International Court of Justice in this case in 2004 raised a unique issue of implementation and therefore of compliance. In that case, the court gave its judgment, *inter alia*, that "by not informing, without delay upon their detention, the 51 Mexican nationals [at issue in the case] of their rights under Article 36, paragraph 1 (h), of the Vienna Convention on Consular Relations of 24 April 1963, the United States of America breached the obligations incumbent upon it under that [provision]".[57] On this reasoning, the court in its operative para 153 (9) of that 2004 judgment, concluded:[58]

> [T]he appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) above, by taking account both of the violation of the rights set forth in Article 36 of the [Vienna] Convention [on Consular Relations] and of paragraphs 138 to 141 of this Judgment.

41 Following the *Avena* judgment, one of the Mexican nationals included within the ambit of this judgment, José Ernesto Medellín, brought a *habeas corpus* petition in the US on the ground that the State of Texas, where he had been convicted and sentenced to death, had failed to implement that judgment. As the judgment of the International Court of Justice left to the US the choice of means to provide review and reconsideration of the convictions and sentences, the US President

56 ICJ Reports 2004, p 12.

57 *Avena and Other Mexican Nationals (Mexico v United Slates of America)* ICJ Reports 2004, p 12 at para 153(4).

58 *Avena and Other Mexican Nationals (Mexico v United Slates of America)* ICJ Reports 2004, p 12 at para 153(9).

urged the states which had failed to carry out the obligations under the Vienna Convention on Consular Relations to comply with the judgment. In particular, he issued a Memorandum of 28 February 2005 instructing the US Attorney General to implement the judgment at the constituent state level. The executive branch in effect argued, in the case *Medellín v Texas*[59] ("*Medellín*") before the US Supreme Court, that the President's instruction was based on the constitutional power of the President in the conduct of foreign affairs of the US, and thus was lawful and binding on the states, including their courts.

42 The US Supreme Court, in its judgment of 25 March 2008 in *Medellín*, accepted that the *Avena*[60] judgment constituted an international obligation on the US as such.[61] It held, however, that the *Avena* judgment of the International Court of Justice did not as such constitute a legally enforceable norm which was binding upon the domestic courts of the US and thus was not directly enforceable in a US state court. The applicant, Medellín, therefore could not seek a remedy in the Texas court.[62] The US Supreme Court concluded that this international law obligation did not constitute automatically binding domestic law because none of the relevant treaty sources to which the US was a party – the UN Charter, the Statute of the International Court of Justice, and the Optional Protocol of the Vienna Convention on Consular Relations – was "self executing".[63] Furthermore, the Supreme Court concluded that, under the US constitutional provisions governing the separation of powers between the executive and legislative branches, the President's power to conduct foreign affairs *did not include* the authority to instruct, through a Presidential Memorandum, the judicial branch of the US to enforce the *Avena* judgment, which would pre-empt contrary state law procedural default rules.[64]

43 The *Medellín*[65] decision provides the most striking example of the difficulties of implementing an international judgment in the domestic legal order, though it is not the first time that a US court has applied the same logic in relation to the issue of the interaction between the international legal order and the domestic legal order. In a decision in 1988 of the US Court of Appeals for the District of Columbia Circuit, the plaintiffs, a group of organisations and individuals who opposed US policy in Central America, advanced the claim that continued funding by the US government of the Contras in Nicaragua harmed their

59 552 US 491, 530 (2008).

60 *Avena and Other Mexican Nationals (Mexico v United Slates of America)* ICJ Reports 2004, p 12.

61 *Medellín v Texas* 552 US 491 at 522 (2008).

62 *Medellín v Texas* 552 US 491 at 509 (2008).

63 *Medellín v Texas* 552 US 491 at 506 (2008).

64 *Medellín v Texas* 552 US 491 at 525–526 (2008).

65 *Medellín v Texas* 552 US 491 (2008).

interests.[66] The basis of their claim was that the funding violated the judgment of the International Court of Justice in *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*.[67] The Court of Appeals dismissed their claim, stating:[68]

> Neither individuals nor organizations have a cause of action in an American court to enforce ICJ judgments. The ICJ is a creation of national governments, working through the UN; its decisions operate between and among such governments and are not enforceable by individuals having no relation to the claim that the ICJ has adjudicated – in this case, a claim brought by the government of Nicaragua. Appellants try to sidestep this difficulty by alleging that our government has violated international law rather than styling their suit as an enforcement action in support of the ICJ judgment. The United States' contravention of an ICJ judgment may well violate principles of international law. But, as we demonstrate below, those violations are no more subject to challenge by private parties in this court than is the underlying contravention of the ICJ judgment.

44 The Court of Appeals emphasised that Art 94 of the UN Charter, providing for enforcement of judgments of the International Court of Justice, spoke of such enforcement by "parties", but that only states could be parties to disputes before the court. Furthermore, it reasoned that under Art 59 of the Statute of the International Court of Justice ("ICJ Statute"), "[t]he decision of the Court has no binding force except between the parties and in respect of th[e] particular case".[69] It therefore concluded that, "[t]aken together, these … clauses make clear that the purpose of establishing the ICJ was to resolve disputes *between national governments*". It thus held that the drafters of the UN Charter and the ICJ Statute had "no intent to vest citizens who reside in a UN member nation with authority to enforce an ICJ decision against their own government".

45 While this case did not directly concern the implementation of the judgment of the International Court of Justice in the domestic legal order of the US, the legal reasoning of the Court of Appeals was similar to that used by the US Supreme Court 20 years later in *Medellín*.[70]

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66 *Committee of United States Citizens Living in Nicaragua v Reagan* 859 F 2d 929 (DC Cir, 1988).

67 ICJ Reports 1984, p 14.

68 *Committee of United States Citizens Living in Nicaragua v Reagan* 859 F 2d 929 at 934 (DC Cir, 1988).

69 *Committee of United States Citizens Living in Nicaragua v Reagan* 859 F 2d 929 at 938 (DC Cir, 1988).

70 *Medellín v Texas* 552 US 491 (2008).

46 Such difficulties in enforcing a judgment of the International Court of Justice in the domestic legal order would seem likely to arise (a) when the domestic legal order at issue treats the UN Charter and the ICJ Statute as "non-self-executing", whereas the international judgment in question purports to be directly applicable in that domestic legal order (*eg*, such as by conferring individual rights created under an international agreement); and, in particular, (b) when the domestic legal order exists in a federal system, in which the federal government has limited control over certain actions of its constituent entities, which purport to be free from the obligations emanating from the judgment of the international court, and thus to be free to infringe the rights that the international judgment expects to be protected within the domestic legal order in question.

47 In these situations, it is not easy to offer a one-size-fits-all solution, because each case depends upon the unique character of the domestic legal order involved. While it can be safely stated that the rate of compliance with judgments of the International Court of Justice at the international level has been quite high,[71] direct implementation in the domestic legal order of International Court of Justice judgments that confirm justiciable rights for individuals created by international treaties is a much more complicated process.

V. Conclusion

48 Commenting on the *Kadi*[72] decision by the European Court of Justice, an author observed:[73]

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71 Schulte, Constanze, *Compliance with Decisions of the International Court of Justice* (OUP, 2004) at pp 271–275. ("[S]tates [have] openly and wilfully chosen to disregard the Court's judgments: in the Corfu Channel, Fisheries jurisdiction, Tehran hostages, and Nicaragua cases. Even in these cases, the effects of non-compliance were mitigated to a certain extent, given eventual or partial compliance by the losing party, or changes in the law, or political scene that diminished the relevance of the original decision. In some cases, fears of non-compliance proved unfounded in spite of substantial grounds for concern because of important interest[s] involved or past military clashes. Thailand followed through with its obligations under the judgment in *Temple of Preah Vihear*, despite its initial reaction to the decision. In the Territorial Dispute (Libya/Chad) case, Libya withdrew its troops from the area in question despite fears that it might refuse to do so. These cases point positively to the respect of parties for the Court's role in the settlement of disputes, as it demonstrates that states will comply even with judgments contrary to their national interests.")

72 *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P (judgment of the European Court of Justice, 3 September 2008).

73 Gráinne de Búrca, "The European Court of Justice and the International Legal Order after *Kadi*" (2010) 51 Harvard International Law Journal 1 at 49.

> The striking similarity between the reasoning and interpretative approach of the US Supreme Court in *Medellín* and that of the ECJ in *Kadi* regarding the relationship between international law and the 'domestic constitutional order' at the very least calls into question the conventional wisdom of the United States and the EU as standing at opposite ends of the spectrum in their embrace of or resistance to international law and institutions.

49 This comment points to the crux of the matter, to the extent that both in the *Medellín*[74] case before the US Supreme Court and in the *Kadi*[75] case before the European Court of Justice, the court appears to take a position effectively denying international law – *ie*, the judgment of the International Court of Justice in the case of *Medellín* and the Security Council resolution in the case of *Kadi* – its legal effect in the domestic legal order on the ostensible ground that constitutional or other principles would be infringed by the particular mode of implementation proposed. In the case of *Medellín*, the conflicting principle in the domestic legal order was the procedural default rule in the Texas criminal justice system. In the case of *Kadi*, the conflicting principle in the European legal order was the protection of fundamental rights of an individual.

50 While these three areas of interaction between the domestic legal order and the international legal order that I have tried to depict present unique challenges, they raise the same basic problem that I described at the beginning of this lecture: how best to incorporate and integrate the international legal order, which purports to reflect the normative values of the international community, into the domestic legal order of each sovereign state as member of that international community. With the fast-growing reality of globalisation, international law has come to regulate new areas, and thus intrude into the areas which had traditionally been the exclusive domain of municipal law. The social reality of the present-day world is that international institutions (such as the UN or the International Court of Justice) are attempting to do what previously only domestic institutions of governance (*ie*, the national Legislature and the Judiciary) were assigned to do – namely, to create and confirm direct rights or obligations of individuals. Whether it be the implementation of a Security Council resolution in the European legal order or the implementation of an International Court of Justice judgment in Texas, the same basic challenge inevitably surfaces because of the growing gap – or mismatch – between the socio-political requirements of the international community

74 *Medellín v Texas* 552 US 491 (2008).

75 *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P (judgment of the European Court of Justice, 3 September 2008).

and the judicial-institutional framework in which it operates in the essentially Westphalian world. There are no easy answers in addressing this challenge. Nonetheless, it is encouraging to discern a clear trend which shows that states are in fact recognising the essential relevance of the international legal order to the domestic legal order and in some cases are trying to integrate the two, even by amending their constitutions to achieve this goal, as I mentioned with respect to the Swiss and German examples in relation to their co-operation with the international public order.

51 Today I have tried to touch upon some of the fascinating new areas that are opening up as new realities on the horizon of international life, which clearly will require ongoing attention both at the domestic and international levels for some time to come. It has been my pleasure and honour to share with you some of my thoughts on the complex issue of the interaction between the international legal order and the domestic legal order in an ever-more globalising world. Thank you for your attention.