Teaching the World Court Makes a Bad Case: Revisiting the Relationship Between Domestic Courts and the ICJ

Raffaela Kunz

Abstract *Sentenza* 238/2014 once more highlights the important role domestic courts play in international law. More than prior examples, it illustrates the ever more autonomous and self-confident stance of domestic courts on the international plane. But the ruling of the Italian Constitutional Court (ItCC) also shows that more engagement with international law does not necessarily mean that domestic courts enhance the effectiveness of international law and become 'compliance partners' of international courts. *Sentenza* 238/2014 suggests that domestic courts, in times of global governance and increased activity of international courts, see the role they play at the intersection of legal orders also as 'gate-keepers', ready to cushion the domestic impact of international law if deemed necessary. The judgment of the ItCC thus offers a new opportunity to examine the multifaceted and complex role of these important actors that apply and shape international law, while always remaining bound by domestic (constitutional) law. This chapter does so by exploring how domestic courts deal with rulings of the World Court. It shows that despite the fact that in numerous situations domestic courts could act as compliance partners of the International Court of Justice, in reality, more often than not, they have refused to do so, arguing that its judgments are not self-executing and thus deferring the implementation to the political branches. Assessing this practice, the chapter argues that domestic courts should take a more active stance and overcome the purely interstate view that seems at odds with present-day international law. While it seems too far-reaching to expect domestic courts to follow international courts unconditionally, the chapter cautions that there is a considerable risk of setting dangerous precedents by openly defying international judgments. Domestic courts should carefully balance the different interests at stake, namely an effective system of international adjudication on the one hand and the protection of fundamental domestic principles on the other hand. The chapter finds that the ItCC's attempt to reintroduce clear

R. Kunz (✉)
Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany
e-mail: kunz@mpil.de

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boundaries between legal orders lacks the openness and flexibility needed to effectively cope with today's complex and plural legal reality.

I. Introduction

Judgment 238/2014 of the Italian Constitutional Court (ItCC)[1] is worth exploring from an international law perspective. Besides the obvious questions it raises in relation to state immunity, it also touches upon the role of domestic courts in international law. *Sentenza* 238/2014 is yet another illustration of how domestic courts in recent years increasingly became important actors on the international plane.[2] Not only do they contribute to the creation of new rules of customary international law;[3] they also fill certain gaps in the existing international legal order by applying and giving effect to international law. In this sense, and in line with Scelle's theory of *dédoublement fonctionnel*,[4] domestic judges also fulfil an international judicial function,[5] and by doing so not only serve the domestic but the international rule of law as well.[6] The ruling of the ItCC, more than prior examples of domestic court engagement with international law, illustrates the ever more autonomous and self-confident role domestic courts play on the international plane—they do not even seem anymore to shy away from contradicting their governments, a development that seemed nearly impossible only years ago.[7] In this sense, *Sentenza* appears to suggest that the quest of the *Institut de Droit*

[1] *Corte Costituzionale*, Judgment of 22 October 2014, No 238/2014.

[2] See ILA, Study Group on Principles on the Engagement of Domestic Courts with International Law, Conference Study Group Report Johannesburg: 'Mapping the Engagement of Domestic Courts with International Law', 2016, available at http://www.ila-hq.org/index.php/study-groups?study-groupsID=57.

[3] See Antonios Tzanakopoulos/Christian J Tams, 'Introduction: Domestic Courts as Agents of Development of International Law', *Leiden Journal of International Law* 26 (2013), 531–540, as well as the other contributions in the same issue.

[4] Georges Scelle, 'Le phénomène juridique du dédoublement fonctionnel', in Walter Schätzel/Hans-Jürgen Schlochauer (eds), *Rechtsfragen der Internationalen Organisation. Festschrift für Hans Wehberg* (Frankfurt am Main: Verlag Klostermann 1956), 324–342.

[5] Yuval Shany, 'Dédoublement fonctionnel and the Mixed Loyalities of National and International Judges', in Filippo Fontanelli/Giuseppe Martinico/Paolo Carrozza (eds), *Shaping Rule of Law Trough Dialogue: International and Supranational Experiences* (Groningen: Europa Law Publishing 2010), 29–42.

[6] André Nollkaemper, *National Courts and the International Rule of Law* (Oxford: OUP 2011).

[7] The Italian government intended to comply with the judgment and passed a law implementing it. It was this law, among others, that the ItCC declared unconstitutional. See Art 3 of the Italian Law No 5 of 14 January 2013, Accession of the Republic of Italy to the UN Convention on Jurisdictional Immunities of States and Their Property. On the traditional deference of domestic courts towards the executive on the international plane, see Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts', *American Journal of International Law* 102 (2008), 241–274, at 241; Eyal Benvenisti/George W Downs, *Between*

International, which claimed in 1993 'to strengthen the independence of national courts in relation to the Executive and to promote better knowledge of international law by such courts',[8] is becoming reality.

But Judgment 238/2014 also illustrates that greater engagement with international law does not necessarily mean that domestic courts enhance the effectiveness of international law. In the same vein, they are not automatically 'partners' of international courts and contribute to compliance with their judgments, as has been suggested.[9] To the contrary, the ruling of the ItCC shows that domestic courts—maybe increasingly—see the role they play at the intersection of legal orders also as one of 'gate-keepers', controlling the effects of international law at the domestic level and ready to cushion its impact if deemed necessary.[10] And whereas compliance has always been considered the Achilles' heel of international adjudication,[11] Judgment 238/2014 stands out for yet another feature. It is an example of what has been termed 'principled resistance',[12] that is an instance of a case where a domestic court deals with an international judgment and deliberately decides to reject it.[13]

Sentenza is thus yet another illustration of the dual—and often delicate—role domestic courts perform at the intersection of legal orders.[14] They are 'servants' to international law within the domestic realm and act as pivotal safeguards for its effectiveness. At the same time, they of course remain 'answerable to the dictates of

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Fragementation and Democracy: The Role of National and International Courts (Cambridge: CUP 2017), at 105.

[8]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.

[9]Cf Eyal Benvenisti/George W Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law', *European Journal of International Law* 20 (2009), 59–72.

[10]Nollkaemper calls this the 'shield' function. See André Nollkaemper, 'The Duality of Direct Effect of International Law', *European Journal of International Law* 25 (2014), 105–125, at 115–117.

[11]Andrea Gattini, 'Domestic Judicial Compliance with International Judicial Decisions: Some Paradoxes', in Ulrich Fastenrath/Rudolf Geiger/Daniel-Erasmus Khan et al (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford: OUP 2011), 1168–1188, at 1168.

[12]This term has been used in the context of the European Court of Human Rights. See Fiona de Londras/Kanstantsin Dzehtsiarou, 'Mission Impossible? Addressing Non-Execution through Infringement Proceedings in the European Court of Human Rights', *International and Comparative Law Quarterly* 66 (2017), 467–490. For a critical answer, see Alice Donald, 'Tackling Non-Implementation in the Strasbourg System: The Art of the Possible?', *EJIL:Talk!*, (28 April 2017), available at www.ejiltalk.org/tackling-non-implementation-in-the-strasbourg-system-the-art-of-the-possible/. In June 2017, the University of Konstanz held a conference on the topic of '*Principled Resistance against ECtHR Judgments—a New Paradigm?*'.

[13]Formally speaking, the ItCC did not 'reject' the ICJ judgment and only decided on the domestic legislation implementing the relevant treaties. Nonetheless, the ruling might entail the responsibility of Italy under international law.

[14]Cf, Nollkaemper, 'The Duality' 2014 (n 10).

applicable domestic law'.[15] Domestic courts are, and in times of global governance probably increasingly will be, torn between the sometimes not easily reconcilable commands of domestic and international law: between an effective system of international adjudication on the one hand and key values of pluralism and constitutionalism on the other hand. Against this backdrop, Judgment 238/2014 offers a new opportunity to examine the role of domestic courts in international law, and, more concretely, in the implementation of the rulings of the International Court of Justice (ICJ/World Court). Recalling some famous instances in which domestic courts have been confronted with judgments of the ICJ, this chapter shows that despite the fact that in numerous situations domestic courts could act as compliance partners and help the ICJ to give effects to its rulings in the domestic sphere, in reality, more often than not, they have refused to do so (section II). After offering some possible explanations for this practice, the chapter moves to the normative level and tries to contribute to the important debate on what role domestic courts should play at the intersection of legal orders and vis-à-vis their international counterparts (section III). It first argues that, given the development of international law, the very state-centred view many domestic courts take is no longer adequate and that domestic courts should take a more active role in the implementation of ICJ judgments. On the other hand, even though good reasons can be brought forward to allow domestic courts to disobey the ICJ in extreme cases where a conflict with core principles of the domestic order seems unavoidable, the risk of setting dangerous precedents that may damage the authority of the World Court demands a careful balancing of the different interests at stake. The chapter concludes by finding that the ItCC's attempt to reintroduce clear boundaries between legal orders lacks the openness and flexibility needed to effectively cope with today's complex and plural legal reality (section IV).

II. The Dual Role of Domestic Courts at the Intersection of Legal Orders

1. Domestic Courts as Law Enforcers

Although international adjudication is often seen as a form of law enforcement, international judgments also need to pass the 'acid test of inforcement [sic]'.[16] In fact, given that international courts lack the capability to take action within the

[15]Rosalyn Higgins, 'National Courts and the International Court of Justice', in Mads Andenas/Duncan Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford: OUP 2009), 405–418, at 417.

[16]Robert Jennings, 'The Judicial Enforcement of International Obligations', *Heidelberg Journal of International Law* 47 (1987), 3–16, at 3; Alexandra Huneeus, 'Compliance with Judgments and Decisions', in Cesare Romano/Karen J Alter/Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford: OUP 2014), 437–463, at 437.

domestic realm, the question of the enforcement of international judgments is as old as international courts themselves.[17] Whereas the enforcement of international judgments has traditionally been considered to be a political matter, best confined to the executive,[18] some have long suggested that domestic courts could fill the enforcement gap at the domestic level and play a role in giving effect to international judgments.[19]

With regard to the World Court, domestic courts can play a role as 'enforcers' in two constellations.[20] First of all, a victorious state can bring an ICJ ruling before a domestic court to oblige the debtor state to comply. So far, however, it seems that no state has ever attempted to enforce an ICJ judgment against another state before a domestic court.[21] Not so, however, with regard to actions brought by private parties. In several instances private parties have called on domestic courts in order to bring a state to comply with an ICJ judgment.[22] That this constellation has been more relevant in practice is unsurprising despite the interstate nature of the procedure before the World Court, given that non-state actors and particularly individuals can have a strong interest in the effective enforcement of international judgments affecting their interests, which has often been the case even before the ICJ.[23] Driven by their interest, individuals operate in a 'private attorney-general' fashion and enhance the effectiveness of international law.[24]

However, most of the attempts by private parties to enforce ICJ judgments before domestic courts have hitherto failed. The following examples suggest that domestic courts are reluctant to assume a role in the direct enforcement of judgments of the ICJ, and that they adhere to the old paradigm according to which domestic and international courts are 'courts of a different legal order'.[25] In this dualist view, the obligations from international judgments remain purely international obligations. Either they are not self-executing—that is they are directed at the state as a whole,

[17]Richard Frimpong Oppong/Angela M Barreto, 'Enforcement', in William A Schabas/Shannonbrooke Murphy (eds), *Research Handbook on International Courts and Tribunals* (Cheltenham: Edward Elgar 2017), 273–298, at 273.

[18]Ibid, at 276; 286.

[19]Wilfred C Jenks, *The Prospects of International Adjudication* (London/New York: Stevens&Sons/Oceana Publications 1964), at 706–715; Jennings, 'Judicial Enforcement' 1987 (n 16), 8–9.

[20]For an overview, see Sarita Ordonez/David Reilly, 'Effect of the Jurisprudence of the International Court of Justice on National Courts', in Thomas M Franck/Gregory H Fox (eds), *International Law Decisions in National Courts* (New York: Transnational Publishers 1996), 335–371. See also Gattini, 'Domestic Judicial Compliance' 2011 (n 11), 1171–1178.

[21]Ordonez/Reilly, 'Effect of the Jurisprudence' 1996 (n 20), 349.

[22]For an overview, see ibid, 351–353.

[23]Gattini, 'Domestic Judicial Compliance' 2011 (n 11), 1173.

[24]Yuval Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary', *The European Journal of International Law* 20 (2009), 73–91, at 79.

[25]PCIJ, *Certain German Interests in Polish Upper Silesia (Germany v Poland)*, Judgment of 25 August 1925, PCIJ Reports Series A No 6, 3, at 20.

and it is not up to the judiciary to directly give effect to them[26]—or individuals simply have no standing to enforce them.

An early example of a private party unsuccessfully seeking to enforce a judgment of the World Court—in this case the predecessor to the ICJ—is the case of *Socobel v Greece*. In this case the Permanent Court of International Justice (PCIJ) had confirmed the validity of a previously rendered arbitral award.[27] Based on the finding of the PCIJ, the *Société Commerciale de Belgique* sought to enforce the award and filed a claim to attach Greek assets before a Belgian court. The *Tribunal Civil de Bruxelles*, however, denied the possibility of giving effect to the findings of the PCIJ. It concluded that the plaintiffs needed an exequatur to enforce the judgment and held that 'in the absence of an independent power of execution belonging to that Court [the PCIJ], which would enable litigants before it to execute its decisions *de plano*, these decisions are not exempt from the servitude imposed on Belgian territory on decisions of other than Belgian tribunals'. Furthermore, it concluded that the judgment of the PCIJ could not be considered a judgment in favour of the plaintiff because it was 'inconceivable that a party which, by definition, is not admitted to the bar of an international court should be able to rely on a judicial decision in a case to which it was not a party'.[28]

Another well-known example where a higher court was confronted with an enforcement action occurred in the course of the *Nicaragua* case. In its judgment the ICJ had found that the support of the Contra rebels by the US government had violated international law and ordered both the cessation of the illegal actions and the payment of reparations.[29] The US had vehemently opposed the bringing of the case before the ICJ and subsequently boycotted the proceedings on the merits stage. This was not a good basis for compliance. Not surprisingly, the US for several years continued its actions and openly defied the judgment of the World Court.[30] Against this backdrop, a group of private individuals tried to bring the US to comply with the judgment via domestic litigation. The domestic court they addressed, however, found that '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.'[31] More recently, the Constitutional Court of Colombia

[26]For terminology, see Yuvji Iwasawa, 'Domestic Application of International Law', *Recueil des Cours* 378 (2016), 9–261.

[27]PCIJ, *The 'Société Commerciale de Belgique' (Belgium v Greece)*, Judgment of 15 June 1939, PCIJ Series A/B No 78.

[28]*Tribunal Civil de Bruxelles, Socobel v Greek State*, ILR 18 (1951), 3, at 4–5.

[29]ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America),* Judgment of 27 June 1986, ICJ Reports 1986, 14.

[30]See, for an overview of the US reaction to the proceedings, Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford: OUP 2004), 190–192.

[31]United States Court of Appeals, District of Columbia Circuit, *Committee of United States Citizens Living in Nicaragua v Reagan*, 859 F.2d 929 (1988), 932.

decided that a judgment of the ICJ concerning the territorial limits between Nicaragua and Colombia in the Caribbean Sea[32] needed to be implemented, in this case through the executive, by means of a treaty.[33]

This reluctance and the underlying dualist view of these courts to a certain extent find their basis in international law itself.[34] Traditionally, international judgments are treated no differently than other international obligations and are formulated as 'obligations of result', stopping 'short at the outer boundaries of the State machinery'.[35] The UN Charter states that '[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party' (Article 94(1)), from which it is generally concluded that the judgments of the World Court address the state as a whole and do not require a direct effect as a matter of international law.[36] For a long time, this was also the line followed by the ICJ, which limited itself to stating whether or not there was a violation of international law, without giving any indication about concrete steps to be undertaken as a consequence thereof. More recently, however, the ICJ cautiously began formulating more concrete obligations in its judgments, which led some observers to conclude that the Court might soon 'pierce the veil' and ask states to give direct effect to its judgments.[37] Unsurprisingly, several of these cases directly dealt with rights of individuals, and even less surprisingly some of these judgments subsequently ended up before domestic judges.

A milestone in this development was undoubtedly the *LaGrand* judgment, in which the ICJ famously stated that the Vienna Convention on Consular Relations[38] also contained individual rights. It decided that the US had infringed upon these rights by not informing two German nationals, the LaGrand brothers—who had each

[32]ICJ, *Territorial and Maritime Dispute (Nicaragua v Colombia),* Judgment of 19 November 2012, ICJ Reports 2012, 624.

[33]Constitutional Court of Colombia, Judgment of 2 May 2014, No C-269/14.

[34]See also Gattini, 'Domestic Judicial Compliance' 2011 (n 11).

[35]ILC, Report of the Commission to the General Assembly on the Work of Its Twenty-Ninth Session, Commentary to the Draft Articles on State Responsibility, 'Breach of an International Obligation Requiring the Achievement of a Special Result', 9 May–29 July 1977, ILC YB 1977 (II), Art 21, para 1. Cf Ward Ferdinandusse, 'Out of the Black Box? The International Obligation of State Organs', *Brooklyn Journal of International Law* 29 (2003), 45–127.

[36]Karin Oellers-Frahm, 'Article 94', in Bruno Simma/Daniel-Erasmus Khan/Georg Note et al (eds), *The Charter of the United Nations: A Commentary* (Oxford: OUP 2012), para 12; Fulvio Palombino, 'Les arrêts de la Cour internationale de Justice devant le juge interne', *Annuaire français de droit international* 51 (2005), 121–139, at 122; Giuseppe Cataldi, 'La mise en oeuvre des décisions des tribunaux internationaux dans l'ordre interne', *Recueil des Cours* 386 (2017), 267–428, at 361–362.

[37]Vladen Vereshchetin, 'On the Expanding Reach of the Rulings of the International Court of Justice', in Pierre-Marie Dupuy (ed), *Völkerrecht als Wertordnung. Festschrift für Christian Tomuschat* (Kehl: Engel Verlag 2006), 621–633.

[38]Vienna Convention on Consular Relations, 24 April 1963, UNTC 596 261.

received the death penalty in the US—of their rights under the Convention.[39] But the case that provoked a flurry of subsequent domestic proceedings was *Avena*, which involved 54 Mexican nationals on death row. In this instance, the ICJ had found that the US had violated the Vienna Convention on Consular Relations by having not properly informed the concerned Mexican nationals of their rights. Whereas in the operative part of the judgment, the Court limited itself to state that the appropriate reparation would consist in the 'review and reconsideration' of the convictions by means of the US's choosing,[40] in the ratio decidendi the ICJ specified that it considered that 'it is the judicial process that is suited to this task'.[41]

Following this ruling, an individual petitioner not explicitly listed in *Avena* but in a situation similar to the one dealt with in the judgment, relied on the ICJ to have his sentence reconsidered. The US Supreme Court found that the ICJ deserved 'respectful consideration'; this, however, did not mean that 'its interpretations were intended to be binding on US courts'.[42] The Supreme Court thus considered itself incapable of giving effect to the conclusions of the ICJ in this case. It was only in *Medellín* that the US Supreme Court was confronted with a claim by an individual directly benefitting from the ruling in *Avena*. The petitioner, José Ernesto Medellín, was backed with a memorandum by the then president George W Bush, which ordered the courts of the US to give effect to the ruling of the ICJ.[43] However, the Supreme Court concluded that 'neither *Avena* nor the President's Memorandum constitutes directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions'.[44] It interpreted the phrase 'undertake to comply' in Article 94(1) of the UN Charter as a 'commitment by member states to take future action through their political branches (. . .)'.[45] The consequence of the lack of direct effect in this case is well known. José Ernesto Medellín was executed shortly thereafter.

[39]ICJ, *LaGrand (Germany v United States of America),* Judgment of 27 June 2001, ICJ Reports 2001, 466, para 77: 'Based on the text of these provisions, the Court concludes that Art 36, para 1, creates individual rights, which, by virtue of Art 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person. These rights were violated in the present case.' Cf, Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge: CUP 2016), 348–387.

[40]ICJ, *Avena and Other Mexican Nationals (Mexico v United States of America)*, Judgment of 31 March 2004, ICJ Reports 2004, operative para 153, No 9.

[41]Ibid, para 140.

[42]US Supreme Court, *Sanchez-Llamas v Oregon*, 548 US 331 (2006), 4.

[43]'I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.' See US Supreme Court, *José Ernesto Medellín v Texas*, 552 US (2008), 7.

[44]Ibid, 2.

[45]Ibid, 12.

A very different stance has been taken by the German Federal Constitutional Court (FCC). This court affirmed a certain direct effect of international judgments before German courts. Equally confronted with claims by foreign individuals—in this case Turkish nationals—that the Vienna Convention on Consular Relations had been violated, it extensively relied on *LaGrand* and *Avena*. It declared that German courts were in principle bound by the findings of the ICJ also in the absence of a formal act of 'execution' by the political branches. Building upon its jurisprudence on the effects of judgments of the European Court of Human Rights (ECtHR) and the constitutional principle of openness towards international law, the FCC stated that German courts had a duty to *take into account* ICJ judgments.[46] It came to this conclusion even though Germany had not been a party to the proceedings before the ICJ in this case and was therefore not legally bound by the judgments' inter partes binding effect. The FCC thus accepted that any judgment of the ICJ (or any other international court) issued against another state deploys a 'normative directing function'.[47]

Called upon to clarify the obligations flowing from *Avena* in light of the different possible solutions, the ICJ subsequently had the chance to give its view on the matter. However, the World Court did not accept Mexico's invitation to unequivocally 'lift the veil' and directly address state organs. Instead, it took a classical 'black box' stance, making clear that it does not require domestic courts to give effect to its judgments directly as a matter of international law.[48]

2. Domestic Courts as 'Gate-Keepers'

In most of the examples described above, domestic courts have thus denied the possibility to directly give effect to judgments of the ICJ and considered the political branches to be the organ most suited for their implementation. By contrast, in the judgment of the ItCC, the 'self-executingness' of the ICJ judgment was not at stake—the Italian parliament had enacted legislation implementing the 2012 ruling.[49] The reasons the ItCC brought forward were rather substantive. It argued

[46] *Bundesverfassungsgericht*, Order of 19 September 2006, 2 BvR 2115/01.

[47] Ibid, para 62.

[48] ICJ, *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals* (*Mexico v United States of America*), Judgment of 19 January 2009, ICJ Reports 2009, 3, para 44: 'The *Avena* judgment nowhere lays down or implies that the Courts in the United States are required to give direct effect to par. 153 (9). (...) [T]he judgment leaves it to the United States to choose the means of implementation, not excluding the introduction within a reasonable time of appropriate legislation, if deemed necessary under constitutional law. Nor moreover does the *Avena* judgment prevent direct enforceability of the obligation in question, if such an effect is permitted by domestic law.'

[49] Italian Law No 5/2013 (n 7).

that the enforcement of the ICJ judgment, obliging Italian courts to uphold state immunity—and deny jurisdiction—in cases of war crimes and crimes against humanity, would violate core principles of the Italian Constitution, namely the guarantee of judicial protection under Articles 2 and 24. Another difference between Judgment 238/2014 and the abovementioned examples is that the Italian Constitutional Court did not argue that implementation would still occure and that it is merely up to another state organ to give effect to the ICJ judgment. The ItCC rather held that the enforcement of the *Jurisdictional Immunities* Judgment would *altogether* be contrary to the Italian Constitution, and therefore that *no* state organ should give effect to it. It therefore declared, inter alia, the law implementing the ICJ judgment unconstitutional.[50]

Sentenza 238/2014 is a telling example of how the Italian Constitutional Court perceives its role at the intersection of legal orders, and vis-à-vis its international counterparts. In other cases, it took a similar position. Towards the ECtHR, the ItCC stated in 2015 that it did not consider itself a 'passive recipient of an interpretative command issued elsewhere in the form of a court ruling (. . .)'.[51] In this judgment, it restricted its hitherto open and friendly position towards the ECtHR[52] and made clear that it is keeping an active eye on Strasbourg, reserving the option not to follow the jurisprudence beyond what is strictly required under Article 46 of the European Convention on Human Rights (ECHR).[53] Most recently, the ItCC even spoke up against the European Court of Justice (ECJ). In a preliminary reference ruling, it argued that the application of the *Taricco* jurisprudence of the ECJ would violate fundamental rights under the Italian Constitution as well as the EU Charter of Fundamental Rights and threatened the ECJ to raise the *controlimiti* bar in case the latter insisted on its position.[54] To widespread astonishment, the ECJ yielded and adjusted its position,[55] a move that has been read by some as a successful example of judicial dialogue[56] and by others as 'the first of many other humiliating and inevitable concessions to national constitutional courts in the near future.'[57]

[50]ItCC, Judgment 238/2014 (n 1), operative paras.

[51]*Corte Costituzionale*, Judgment of 26 March 2015, No 49/2015, para 7.

[52]*Corte Costituzionale*, Judgments of 22 October 2007, Nos 348 and 349/2007.

[53]See, for a good summary, Andrea 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', *I-CONnect. Blog*, (30 April 2015), available at www.iconnectblog.com/2015/04/mini-symposium-on-cc-judgment-49-2015.

[54]*Corte Costituzionale*, Order of 23 November 2016, No 24/2017.

[55]CJEU, *Taricco II (M.A.S. and M.B.),* Judgment of 5 December 2017, Case No C-42/17.

[56]Giacomo Rugge, 'The Italian Constitutional Court on Taricco: Unleashing the normative potential of "national identity"?', *QIL, Zoom-In* 37 (2017), 21–29.

[57]Daniel Sarmiento, 'To Bow at the Rhythm of an Italian Tune', *Despite our Differences*, (5 December 2017), available at https://despiteourdifferencesblog.wordpress.com/2017/12/05/to-bow-at-the-rhythm-of-an-italian-tune/. For a good analysis of the case, see Dana Burchardt, 'Belittling the Primacy of EU Law in Taricco II', *VerfBlog*, (7 December 2017), available at https://doi.org/10.17176/20171207-180534.

These examples illustrate that the ItCC sees itself as an active player on the international plane, willing to participate in the shaping of international law. In the *Sentenza* this also becomes clear by the fact that the ItCC refers to the *Kadi* decision of the ECJ,[58] explicitly expressing the ambition that its judgment, like *Kadi*,[59] may contribute to a development of international law in a direction more attentive to fundamental rights.[60]

But these examples also show that the ItCC increasingly sees itself as a gatekeeper positioned at the intersection of legal orders, ready to step in and 'shield' the domestic order from effects of international law it considers negative. Of course, compliance with international law has always been an issue and a certain resistance against the World Court is nothing new. Even though the overall compliance rate of the ICJ is quite good[61] and the enforcement mechanism of Article 94(2) of the UN Charter has been activated only once,[62] there are several well-known examples where compliance with a judgment on the merits has posed problems. One recurring issue is late compliance,[63] another cases in which states boycott the whole proceeding before the ICJ, or openly defy a ruling by other means.[64] It is, however, a different matter if domestic courts start to control international judgments and verify their constitutionality as a matter of principle, and therefore systematically 'judge' them anew, as the ItCC has started to do.[65] Despite the fact that a certain reservation

[58]CJEU, *Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Judgment of 3 September 2008, Joined Cases C-402/05 P and C-415/05 P.

[59]In *Kadi*, the CJEU engaged the fundamental rights standards of the European Union to scrutinize measures implementing anti-terrorist sanctions ordered by the UN Security Council. This decision eventually led to an improvement of the fundamental rights protections within the United Nations sanctioning regime. See, eg, Katja S Ziegler, 'Strengthening the Rule of Law, but Fragmenting International Law: The *Kadi* Decision of the ECJ from the Perspective of Human Rights', *Human Rights Law Review* 9 (2009), 288–305.

[60]ItCC, Judgment 238/2014 (n 1), para 3.3.

[61]Schulte, *Compliance* 2004 (n 30), 271–276.

[62]Irène Couzigou, 'Enforcement of UN Security Council Resolutions and ICJ Judgments: The Unreliability of Political Enforcement Mechanisms', in András Jakab/Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford: OUP 2017), 363–378, at 374.

[63]An example for this is the *Haya de la Torres* case. This dispute between Peru and Colombia gave rise to three ICJ judgments: *Asylum case* (*Colombia v Peru*), Judgment of 20 November 1950; *Request for Interpretation of the Judgment of November 20th, in the Asylum Case* (*Colombia v Peru*), Judgment of 27 November 1950; *Haya de la Torre case* (*Colombia v Peru*), Judgment of 13 June 1951. For an overview, see Schulte, *Compliance* 2004 (n 30), 99–108.

[64]According to Schulte, this has happened in at least four instances, namely in the *Corfu Channel*, *Fisheries Jurisdiction*, *Teheran Hostages* and *Nicaragua* cases. See Schulte, *Compliance* 2004 (n 30), 271. For more examples, see Aloysius P Llamazon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice', *European Journal of International Law* 18 (2007), 815–852, at 825–840.

[65]Cf Fulvio Palombino, 'Compliance with International Judgments: Between Supremacy of International Law and National Fundamental Principles', *Heidelberg Journal of International Law*

towards international law and institutions as such is nothing new and that other constitutional courts have always reserved the right to step in and protect their constitutional orders, especially in more integrated orders such as the EU—the FCC possibly representing the most famous example[66]—the important difference is that the ItCC no longer limits itself to issuing warning shots. This recent development clearly shows that it has started to actually apply the constitutional barriers and that it accepts the price of Italian responsibility under international law.

III. Which Role for Courts at the Intersection of Legal Orders?

How can this development be explained? It is argued here that it is neither surprising that clashes between international and domestic (constitutional) law seem to happen more frequently in recent times, nor that they often emerge with regard to judgments of international courts. This has not only to do with a quantitative change of international law, the proliferation of international courts and tribunals, and more generally the growing importance of international regulation in times of global governance, but also with a *qualitative* change of the norms. Whereas in the past, international law often remained vague and gave states considerable leeway for its implementation, the concrete orders of international courts reduce this leeway and make tensions or even frictions more likely.[67] Chances remain high that this development continues. The consequence is that domestic courts in the near future might be confronted more often with international judgments. This is also true for the ICJ which has started to formulate more concrete obligations.[68]

This brief analysis thus shows once more the difficult—and arguably highly political[69]—role domestic courts assume at the intersection of legal orders. The examples illustrate that the question of whether and how to give effect to

75 (2015), 503–529; Stefano Battini, 'È costituzionale il diritto internazionale?', *Giornale di diritto amministrativo* 3 (2015), 367–377.

[66] *Bundesverfassungsgericht*, Order of 29 May 1974, BvL 52/71, BVerfGE 37, 271. See, for more examples, Anne Peters, 'The Globalization of State Constitutions', in Janne E Nijman/André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford: OUP 2007), 251–308, at 266–267; Anne Peters, 'Supremacy Lost: International Law Meets Domestic Constitutional Law', *Vienna Online Journal on International Constitutional Law* 3 (2009), 170–198.

[67] See also Nico Krisch, 'Pluralism in International Law and Beyond', (3 June 2015), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2613930, 1–18, at 3.

[68] See section II.1 of this chapter.

[69] Nollkaemper, 'The Duality' 2014 (n 10), 121.

international law is far from being a technical question.[70] Giving effect to international judgments rather involves complex constitutional questions and requires the balancing of sometimes conflicting but equally important interests like the effectiveness of international adjudication and the protection of fundamental constitutional principles, both of which can be considered aspects of the rule of law in a general sense. When asked to give effect to international judgments, domestic courts may even face the dilemma of, on the one hand, abiding by judicial decisions based on international law, which contradict fundamental protections in the domestic legal system, or, on the other hand, adhering to national (constitutional) law, which risks defying international law. More than as instances of backlash, much of the resistance to international courts by their domestic counterparts can thus be seen as an illustration of today's complex and plural legal reality.[71]

This raises the question of how domestic courts *should* deal with international judgments. It is submitted here that good reasons support a solid place for domestic courts in the enforcement of the judgments of the ICJ. First of all, the practice of the ICJ—hitherto considered the archetype of an 'old style' international court[72]—is changing. To be sure, the ICJ refrained from claiming that its judgments enjoy a direct effect in the domestic legal orders, as seen above.[73] Nonetheless, the position of the World Court has undeniably evolved: it is no longer exclusively a 'Court of sovereign States', becoming 'also a court concerned with human rights, as human rights law has finally found its proper place within international law'.[74] The ICJ is now even said to contribute to a 'humanisation in international adjudication'.[75]

The purely state-centred view that some domestic courts still adopt seems to be at odds with this development. Whereas it might have made sense with regard to the

[70]Peters, *Beyond Human Rights* 2016 (n 39), 495; Armin von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law', *International Journal of Constitutional Law* 6 (2008), 397–413, at 398.

[71]See for a differentiated view on the phenomenon of backlash Mikael Rask Madsen/Pola Cebulak/Micha Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts', *International Journal of Law in Context* 14 (2018), 197–220.

[72]Karen J Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton: Princeton University Press 2014), 81.

[73]See section II.1 of this chapter.

[74]Rosalyn Higgins, 'Human Rights in the International Court of Justice', *Leiden Journal of International Law* 20 (2007), 745–751, at 746. Cf Gentian Zyberi, *The Humanitarian Face of the International Court of Justice: Its Contribution to Interpreting and Developing International Human Rights and Humanitarian Law Rules and Principles* (Antwerpen: Intersentia 2008); Bruno Simma, 'Mainstreaming Human Rights: The Contribution of the ICJ', *Journal of International Dispute Settlement* 3 (2012), 7–29.

[75]International Law Association, Committee on International Human Rights Law, Conference Report Washington: 'International Human Rights Law and the International Court of Justice (ICJ)', 2014, available at www.ila-hq.org/index.php/committees, para 86.

'traditional' international law which treated mainly interstate issues,[76] this is no longer the case for the 'inward-looking' international law of today.[77] Accordingly, the 'fiction' of the unitary state is increasingly being considered an obstacle to compliance with international requirements. In the words of Rosalyn Higgins, 'compliance with the findings of international tribunals is made the more difficult exactly because while "the state" carries the international obligation to comply, the necessary action to achieve that must internally be performed by organs of state (. . .).'[78] This is even more so if the judgments directly touch upon rights or interests of individuals. Both the ECtHR and the Inter-American Court of Human Rights have stated that effective compliance with judgments is the materialization of justice for the concrete case,[79] and represents an important aspect of the right to have access to justice and the rule of law.[80] For individuals benefitting from a judgment of the ICJ, domestic courts are likely to be the only avenue open to reach compliance.[81] The use of classical 'avoidance techniques'[82] seems inadequate in such situations.

However, this does not mean that domestic courts should follow the ICJ blindly. Given the increasing impact of international law on domestic systems and its persisting deficits, the claim for its absolute supremacy, and thus a rigid rule favouring the precedence of international law, seems neither normatively desirable nor to correspond to legal reality.[83] A growing body of scholarship argues that, given the lack of democratic legitimacy and effective safeguards for fundamental rights in certain areas of international law, at least the highest domestic courts should in exceptional cases have a 'constitutional right to resist' international law.[84] This means that they may exceptionally disregard international law where its application in the specific circumstances would result in a violation of core principles of the

[76]Allot speaks of 'structural duality'. See Philip Allot, 'The Emerging Universal Legal System', in Janne E Nijman/André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford: OUP 2007), 63–83, at 82.

[77]Cf, Ferdinandusse, 'Out of the Black Box' 2003 (n 35); Mohammed Bedjaoui, 'The Reception by National Courts of Decisions of International Tribunals', in Thomas M Franck/Gregory H Fox (eds), *International Law Decisions in National Courts* (New York: Transnational Publishers 1996), 21–35, at 23.

[78]Rosalyn Higgins, 'The Concept of "the State": Variable Geometry and Dualist Perceptions', in Laurence Boisson de Chazournes/Vera Gowland-Debbas (eds), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (The Hague: Martinus Nijhoff 2001), 547–561, at 547.

[79]IACtHR, *Case of Baena Ricardo et al v Panama*, Judgment of 28 November 2003, Series C No 104, para 72.

[80]ECtHR, *Hornsby v Greece*, Judgment of 19 March 1997, Application No 18357/91, para 40.

[81]Cf Oppong/Barreto, 'Enforcement' 2016 (n 17), 286.

[82]ILA, 'Engagement of Domestic Courts' (n 2), para 21.

[83]Cf André Nollkaemper, 'Rethinking the Supremacy of International Law', *Zeitschrift für öffentliches Recht* 65 (2010), 65–85.

[84]Thomas Cottier/Daniel Wüger, 'Auswirkungen der Globalisierung auf das Verfassungsrecht: Eine Diskussionsgrundlage', in Beat Sitter-Liver (ed), *Herausgeforderte Verfassung: Die Schweiz im globalen Kontext* (Freiburg: Universitätsverlag Freiburg 1999), 241–281, at 263.

domestic constitutional order or the 'constitutional identity'.[85] Under these narrow circumstances, disobedience 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. In this vein, it might, in the long run, foster rather than weaken the ideal of the rule of law also at the international level.[86]

This shows that seeing domestic courts in a binary fashion as either 'gatekeepers' or 'compliance partners' does not capture the complex role they play today at the intersection of legal orders. It has thus been suggested that it is at the same time more accurate descriptively and normatively preferable to view courts as bearers of 'multiple identities'.[87] In this sense, domestic courts are now part of a wider network, a 'global community of courts',[88] and should have in mind the 'overall systemic interest in creating an interlocking system of adjudication.'[89] Domestic courts should take into account that to abide by judgments resulting from disputes that the parties voluntarily submitted to an international court belongs to the very foundations upon which the system of binding international adjudication is built.[90] Non-compliance imperils 'the raison d'être for the functioning'[91] of international courts, and arguably the (rather fragile) international rule of law. Rather than as guardians of one particular order, in today's complex legal reality courts should thus see themselves as mediators *between* orders.[92] More than strict conflict rules and hierarchies, what better fits to the complex reality is an approach that allows to take into account the different interests at stake and to balance them. This again does not require to follow international courts at any prize, but at least to seriously engage with them and consider their rulings. This flexible, procedural solution thus reflects the fact that many different interests and claims are at play and to a certain extent allows to reconcile the multiple roles played by domestic courts.

The middle-ground position some courts such as the FCC take, requiring to *take into account* international judgments, seems most suited to reconcile those multiple

[85]Anne Peters, 'Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse', *Zeitschrift für öffentliches Recht* 65 (2010), 3–63, at 61; von Bogdandy, 'Pluralism, Direct Effect' (n 70), 398.

[86]See, on these 'feedback loops', Machiko Kanetake/André Nollkaemper, 'The International Rule of Law in the Cycle of Contestations and Deference', in Machiko Kanetake/André Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestation and Deference* (Oxford: Hart 2016), 445–460.

[87]Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: OUP 2010), at 291–294.

[88]Anne-Marie Slaughter, 'A Global Community of Courts', *Harvard International Law Journal* 44 (2003) 191–219.

[89]Paul S Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge: CUP 2012), 294.

[90]Karin Oellers-Frahm, 'Article 94 UN Charter', in Andreas Zimmermann/Karin Oellers-Frahm/Christian Tomuschat et al (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford: OUP 2nd ed 2012), para 1.

[91]IACtHR, *Baena Ricardo v Panama* (n 79), para 72.

[92]Krisch, *Beyond Constitutionalism* 2010 (n 87), 294.

roles of courts.[93] Certainly, this jurisprudence has been extensively criticized, especially in the context of the European human rights system, precisely because it widens the scope of possibilities to disregard binding judgments.[94] The Russian Constitutional Court even called it an 'emblematic' example of deviation from judgments of the ECtHR.[95] However, this line has thus far allowed German courts to reconcile claims of the different legal orders with few frictions. The reason is that the FCC reads this requirement generally in a result-oriented and international law friendly way, seriously engaging with its international counterparts.[96] By contrast, for the US Supreme Court in order to satisfy the requirement of taking into account international judgments, a mere reference to the relevant judgment seems to suffice.[97] Such merely formal cross-referencing certainly does not allow a serious engagement and lacks the openness needed to effectively cope with today's complex legal reality.

How is Judgment 238/2014 to be read against this backdrop? Two aspects of the judgment deserve to be highlighted in this regard. First of all, and despite the fact that the ItCC stresses that the effect of its judgment remain limited to the Italian legal order,[98] its aim is not only to avoid legal consequences it deems intolerable, but furthermore to contribute to the evolution of the law of immunities in a way more considerate of human rights.[99] It thus considers that it enters into a form of *judicial dialogue* with the ICJ with the aim to push for a change it deems necessary.[100]

[93]See section II.1 of this chapter. See also ILA, Committee on International Human Rights Law, Resolution No 2/2016: 'The impact of international human rights law on the International Court of Justice', 2016, No 9 a): 'They [Constitutional and supreme courts] take the pertinent judgments and decisions of courts and quasi-judicial bodies, also in those cases to which the state was not a party, fully into account and integrate them in their reasoning in good faith', available at http://www.ila-hq.org/index.php/committees.

[94]For an overview, see Matthias Hartwig, 'Much Ado about Human Rights: The Federal Constitutional Court Confronts the European Court of Human Rights', *German Law Journal* 5 (2005), 869–894.

[95]Russian Constitutional Court, Judgment of 14 July 2015, No 21-П/2015, para 4.

[96]See, for a paradigmatic example of adjustment to the ECtHR, *Bundesverfassungsgericht*, Order of 4 May 2011, 2 BvR 2365/09, BVerfGE 128, 326 (*Sicherungsverwahrung*). See, on the stance of the FCC towards the ECtHR, Eckart Klein, 'Germany', in Janneke Gerards/Joseph Fleuren (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law* (Cambridge: Intersentia 2014), 185–216; Elisabeth Lambert-Abdelgawad/Anne Weber, 'The Reception Process in France and Germany', in Helen Keller/Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford: OUP 2008), 107–164. Cf Krisch, *Beyond Constitutionalism* 2010 (n 87), 109–152.

[97]US Supreme Court, *Sanchez-Llamas v Oregon* (n 42).

[98]ItCC, Judgment 238/2014 (n 1), para 3.3.

[99]Ibid.

[100]See on judicial dialogue Anne-Marie Slaughter, 'A Global Community of Courts', *Harvard International Law Journal* 44 (2003) 191; Christopher McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights', *Oxford Journal of Legal Studies* 20 (2000), 499–532; Sujit Choudry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation', *Indiana Law Journal* 74 (1999), 819–892.

Especially in the European human rights system, domestic courts have sometimes successfully entered into such a dialogue,[101] which enhances the 'shared responsibility' for the standards of the ECHR[102] and provides 'a constructive way for channeling substantive disagreement or criticism (...)'.[103] However, it is submitted here that to enter into a 'dialogue' with the ICJ seems less fruitful from the outset. Other than the human rights courts, the World Court is much less flexible and does not have the same possibilities to react.[104] In the case of the ECtHR, for instance, the Grand Chamber can correct a judgment. Furthermore, in the European system a change of jurisprudence is much easier to undertake due to the rich case-law of the ECtHR. This is different for the World Court, which only deals with a handful of cases per year. The risk of damaging its authority seems thus even bigger.[105] In fact, in cases of legal conflict such as in the one at hand, where a domestic court (at least de facto) contests a final and binding international judgment with the consequence that enforcement of this judgment becomes difficult or even impossible, the term 'dialectical review' seems to fit better than 'judicial dialogue'.[106]

The second point relevant from the viewpoint of the interaction of different legal orders is that *Sentenza* 238/2014 indicates a move towards a more national and 'gatekeeper' type of understanding of the ItCC's role at the intersection of legal orders. Even though it would be too far-fetched to read *Sentenza* as an instance of nationalism trumping multilateralism and as an inevitable sign of crisis and decline of the international judiciary, the judgment clearly indicates a certain shift of the ItCC to a more dualist vision of the relationship between legal orders. Whereas several of the recent judgments of the ItCC touching upon the relationship of the Italian legal order with international or European law show that the *Corte* pursues a

[101] In the European system, several cases are known where the ECtHR adjusted its position. See, eg, ECtHR, *Case of Al-Khawaja and Tahery v The United Kingdom*, Grand Chamber Judgment of 15 December 2011, Applications Nos 26766/05 and 22228/06.

[102] On the notion of shared responsibility, see ECtHR, 'Implementation of the Judgments of the European Court of Human Rights: a Shared Judicial Responsibility?', (31 January 2014), available at www.echr.coe.int/Documents/Seminar_background_paper_2014_ENG.pdf. See also High Level Conference on the Future of the European Court of Human Rights, 'Copenhagen Declaration', 12–13 April 2018, available at https://rm.coe.int/copenhagen-declaration/16807b915c, paras 6–11. See, for the legitimizing effect of court interaction, Armin von Bogdandy/Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford: OUP 2014), 196.

[103] Sarah Lambrecht, 'Assessing the Existence of Criticism of the European Court of Human Rights', in Patricia Popelier/Sarah Lambrecht/Koen Lemmens (eds), *Criticism of the European Court of Human Rights. Shifting the Convention System: Counter-Dynamics and the National and EU Level* (Cambridge: Intersentia 2016), 505–554, at 549.

[104] See also Alessandro Bufalini, chapter 'Waiting for Negotiations', in this volume.

[105] See, in more detail, Raffaela Kunz, 'The Italian Constitutional Court and "Constructive Contestation": A Miscarried Attempt?', *Journal of International Criminal Justice* 14 (2016), 621–627.

[106] Cf Robert B Ahdieh, 'Between Dialogue and Decree: International Review of National Courts', *New York University Law Review* 79 (2004), 2029–2163.

more substantive check and makes the application and enforcement of legal norms from other orders dependent on their compatibility with Italian law,[107] in the *Sentenza* it becomes particularly clear that by neatly distinguishing the 'inside' from the 'outside', the ItCC attempts to reintroduce clear boundaries between legal orders. And while this might be seen as a reaction to some of the problems and controversies surrounding global governance, it is submitted that such a stance lacks the openness and flexibility needed to effectively cope with the challenges of today's complex and plural legal reality. Rather than shielding off their legal orders, domestic courts should acknowledge that they are important actors at the intersection of legal orders, and that the functioning of the overall system in the long run to large extents will depend on them.[108] Moreover, they should be aware that their judgments are indeed read and that nowadays their audience is global. The danger of setting dangerous precedents is thus a real one. The fact that the Russian Constitutional Court justified its disregard for judgments of the ECtHR explicitly relying, among others, on the ItCC[109] indicates that Pandora's box is already wide open.

IV. Conclusion

Judgment 238/2014 is a good occasion to explore once more the role of domestic courts in international law. This chapter has done so with regard to the particular question of the relationship between domestic courts and international courts, and more concretely the ICJ. As the case studies show, though domestic courts could act as enforcers of judgments of the World Court, in many instances they have not assumed such a role and deferred implementation to the political branches. This chapter argues that in light of the current state of international law and the important role the individual now plays—however indirectly—before the ICJ, the very dualist stance many domestic courts take is inadequate. Often, domestic courts can be the only avenue available for individuals to enforce judgments rendered in their favour. That this can be a matter of life or death is highlighted by the *Avena* saga. On the other hand, in light of the growing impact of international law and its persistent deficits, it seems too far-reaching to expect domestic courts to follow international courts blindly. A certain control undertaken by domestic courts might compensate for these deficits and in the long run even contribute to the international rule of law. However, in the face of today's plural legal reality, domestic courts should take into account and carefully balance the different interests at stake, namely an effective system of international adjudication and the protection of fundamental constitutional

[107] Section II.2. of this chapter.

[108] See also Paul S Berman, 'Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Legal Pluralism', *Indiana Journal of Global Legal Studies* 20 (2013), 665–695.

[109] Russian Constitutional Court, Judgment No 21-П/2015 (n 95), para 4. See also Heike Krieger, chapter '*Sentenza* 238/2014: A Good Case for Law-Reform?', in this volume.

principles. Only in very exceptional circumstances should they contradict their international counterparts. This is even more so in the case of the ICJ, which after all barely has a chance to react. The danger of damaging its authority seems significant. Domestic courts should recognize that they are crucial actors at the intersection of legal orders, and that a functioning system of adjudication across levels and orders at the end of the day will to large extents depend on them.

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