

André Nollkaemper. *National Courts and the International Rule of Law*. Oxford: Oxford University Press, 2011. Pp. 337. £75.00 (pbk £24.99). ISBN: 9780199236671.

The book under review concludes research on the practice of domestic courts begun by the author over 10 years ago as part of a project entitled *International Law in Domestic Courts*. As pointed out in the preface, international doctrine lacked a systematic analysis of the domestic judicial application of international law, one based not on a theorization of relations between domestic law and international law but on an accurate analysis of data emanating from the decisions of domestic courts.

The gap has now been filled by this truly commendable work. Access to national cases was facilitated by the continuing publication of national case law in *International Law Reports* and the *Oxford Reports on International Law*. Nevertheless the amount of judicial data assembled and examined in this book is truly impressive, and highly useful for an understanding of the actual and potential role of national courts in the protection of the international rule of law.

The merit of this book, in our opinion, lies in the fact that it sheds light on numerous concepts in respect of which there is often uncertainty, specifically because their definition rests on solely theoretical constructs rather than on an objective analysis of practice.

The introduction is especially instructive for purposes of understanding subsequent elaborations, as it gives a definition of the international rule of law, the *ratio* of which is the submission of power to law in the international as well as in the domestic order. The author points out that the rule of law is far from being achieved, especially because of the 'double standard' of the majority of states that, having embraced the rule of law at home, 'have considered themselves to be at liberty to treat International obligations with disdain' (at 2). By contrast the starting point of this book is that the rule of law that is applied domestically should likewise be pursued in international affairs. The double standard of states puts domestic courts in difficulty as they are at the intersection of the international and national legal orders and must therefore deal with the dilemma of the 'double bind', operating 'neither fully in the national, nor fully in the International legal order, but rather in a mixed zone where they are subject to competing loyalties, commitments, and obligations' (at 14).

The elements of the rule of law are common to both the domestic and the international legal order. The author, on the basis of his analysis of doctrine as well as of domestic and international jurisprudence, lists four: authority conferred by law and controlled by law; prohibition of the 'unlawful act of the legislator', that is, the prohibition of changing rules at will; conformity of the exercise of power to fundamental civil and political human rights; and the accountability of those who exercise functions of public authority. The last being the most sensitive aspect in respect of the application of the international rule of law within a domestic legal order: domestic courts, in fact, have the ability to provide remedies in cases in which the state acts in contravention of its international obligations, thus filling the missing link in the international rule of law created by the double standard of the states. The author's conviction is sustained by Georges Scelle's theory of *dédoublement fonctionnelle*: within the domestic legal order national courts also act 'as agents of the international legal order, in the service of the International rule of law' (at 8).

The book is divided into three parts. In the first part the author analyses the conditions to be met for national courts to perform their role in upholding the international rule of law – the principal condition being independence. Being an organ of the very entity to be controlled naturally limits any action by national courts, as demonstrated by cases of post-conflict situations where the internationalization of courts is promoted in order to guarantee their independence (at 49). On the other hand, threats to the independence of domestic courts are mostly structural and at times created artificially within states, often in a similar manner within different legal orders. The author provides several examples of these threats: the principle of non-justiciability, the duty not to enter the forbidden area of foreign policy, the so-called 'one-voice principle' (that is the principle according to which courts should not totally 'divorce' from the position expressed

by the government, in light of the delicate position of the latter in the conduct of international relations), the political question doctrine, the interpretation of treaties reserved to the executive. What does surprise at times is that even in systems in which domestic courts have great autonomy, it may happen that courts themselves exercise judicial self-restraint, for example not reviewing governmental decisions even in areas where these were subject to precise international obligations (at 51). Another interesting point is the author's observation that national courts face a sort of *prisoner's dilemma* (at 64). He states that if domestic courts had the certainty that foreign courts enforced international law, they too would strive to maximize their powers of cooperation in affirming the international rule of law by exercising control over the actions of other domestic powers. However, in my opinion this collective action problem is rather one of the other branches of a state's authority, mainly the executive, which may face a prisoner's dilemma when called upon to implement international law. When national courts are truly independent in their decision-making, they do not concern themselves with the manner in which the national courts of other states, having the same obligations, treat international law. A comparative analysis of the case law of the courts of member states of the European Convention on Human Rights on the application of the latter is illuminating in this respect.

Another important aspect of this first part of the book is the assertion (at 68ff) that any intervention of national courts ensues from the validation of the international legal order within the domestic order. Here the author seems to adopt a strictly dualistic approach to international law. The two orders are 'self-contained', thus international law must first be validated within domestic law before domestic courts can recognize it. But there are no international rules regarding the modalities through which states make international law a part of domestic law. International law evidences complete neutrality in this respect (at 69). As is well known, the *ratio* of incorporation lies in the frequent need to acquire approval by Parliament, which usually does not participate in the treaty-making process. In addition, there is further differentiation in many systems between the internal effect of treaties and the effect of decisions taken by international organizations, i.e., secondary law, and in respect of the decisions of international courts.

In this section the author also addresses the treatment by national courts of treaties not implemented within domestic systems. He highlights the fact that application of such treaties may constitute a violation of the principles of democratic legitimacy, separation of powers, and of the principle that judges are not empowered to make new laws. Unimplemented treaties may, however, perform an important interpretative function and at times a gap-filling one if there is no specific internal norm to be applied to the case under review. Obviously this problem will be resolved according to the domestic order in which it arises. According to the author, when dealing with the judicial application of international law systems that allow for automatic incorporation are to be preferred, for their efficacy, to others. Of course even automatic incorporation has its drawbacks and limitations that are recognized by the author: '[a]utomatic incorporation may open the door to international obligations that are wanting in terms of democracy and rule of law quality, and that may upset these values domestically. This is particularly true with respect to decisions of International Organisations. Whereas treaties are generally subjected to parliamentary approval, decisions of International Organisations represent a delegation of authority. The act of delegation is generally subjected to parliamentary approval, but individual decisions of International Organisations are not' (at 83). These observations are very important and have led to heated discussions within many systems on the legitimacy of control over Security Council resolutions on the 'listing and delisting' procedures of alleged terrorists in light of the fundamental obligation to safeguard the rights of individuals. We therefore concur with the author's affirmation that '[i]n all cases International Law should accept the power of national courts not to give effect to an international obligation that is incompatible with the international rule of law itself' (at 84). This is the 'core' of the issue and the primary reason for this work, that attributes to national courts a primary and autonomous role in ensuring domestic law's consistency with international law, and in ascertaining the latter's content.

Part III (External Effects) then adopts a different perspective and addresses the protection of the international rule of law, not from domestic powers but from decisions adopted by international organizations (at 280). Domestic courts must be put in a position by the domestic system to apply international law. However, even when this is the case, the major actors in the international legal order still do not consider national courts as institutions that can be relied upon to make a significant and trustworthy contribution to the international rule of law (at 97). This is proven by the almost complete absence of interstate claims in domestic courts, and also by the specific exclusion of national courts in several international treaties regarding specific topics and issues reserved to *ad hoc* international jurisdictions (such as the ICSID or the Iran-USA Claims Tribunal (at 31)). When they are allowed to operate, national courts contribute to the construction and the affirmation of the international rule of law. This role is at times even postulated as a clear duty (see the decision of the German *Bundesverfassungsgericht* in the *Görgülü* case, frequently cited by the author) by the very same courts, which have an additional and essential role, this time entrusted only to them, to *protect* the international rule of law from the political power of the national state, as well in respect of decisions adopted by International Organizations. National courts should decline to give effect to an international decision if it contravenes a fundamental obligation under national or international law. Thus, domestic courts defend the international rule of law from international law itself, as demonstrated by the developments issuing from the *Kadi* decision, also frequently referred to by the author. Moreover, the International rule of law can and must be guaranteed through recognition of the primacy of fundamental rights over norms of international law granted by domestic law, as long as the domestic laws are in turn the expression and guarantee of the international rule of law. This may seem to be a play on words, but is in reality a highly significant concept that, though not new, is nonetheless expressed very clearly by the author, who uses the contrasting examples of the *Kadi* judgments and challenges based on the *Sharia*. Whilst in *Kadi* the right to a judicial remedy was affirmed as a domestic principle not derogable from by an international decision as it is consistent with a fundamental value expressed by the international order, challenges to international law based on the *Sharia* attempt to submit international principles to domestic values not shared as such by the international community. With respect to the *Kadi* decisions the author states, 'It would be odd if states were compelled to blindly give effect to International obligations at the expense of fundamental domestic rights that conform to the highest ambitions of International Law itself' (at 292). The connection between domestic fundamental values and internationally recognized values is the key to determining precedence in opposing norms (domestic and international) and thus the correct application of the international rule of law. Compliance with international law has become a requisite of the domestic rule of law, as long as international law itself conforms to the rule of law (at 302). According to the author (and we agree with his analysis), only national courts can ensure the functioning of this system of relations. As an example of the ensuing 'bottom-up' effect generated by the pressure of domestic courts, the author points to the adoption of Security Council Resolution 1904 (2009), which improved delisting procedures (at 304). In this case national courts did not protect domestic law from International Law, but rather International Law from itself!

Part II of the book is dedicated to the application of the International Rule of Law. It is subdivided into three parts: (a) Direct Effect; (b) Consistent Interpretation; and (c) Reparation. We cannot agree with the author's definition of direct effect, which he describes as 'one of the techniques (with consistent interpretation and reparation) that enables courts to give effect to an international obligation when the political branches have failed to do so' (at 117). In other words, the author sees the intervention of domestic courts only as subsidiary to that of executive or parliamentary power. This concept of direct effect appears to exclude the possibility that the intervention of a national court is conceived as one method among others of implementing an international obligation. We believe, however, that if the domestic legal order were sufficiently 'open' to international law the obligation of implementation would weigh equally upon

all powers of the state, including tribunals, and each according to its own competence would be called upon to perform. This is exactly what the International Court of Justice intended in the *Avena* case, frequently cited by the author, when it clarified that it is up to the internal legal system to decide how to implement an international obligation within the internal system, and that nothing prohibits the domestic judge from fulfilling this task.

The author rightly distinguishes direct effect from supremacy (at 120ff), the latter not necessarily being connected to the former in international law. It is only in the EU system that supremacy is (usually) a natural consequence of direct effect.

If the domestic order allows for direct effect, then international law penetrates it and domestic political power is more conditioned. This, however, is a discretionary choice of the domestic legal system since the 'given theory', that is, the possibility that international law may autonomously determine, with obligatory effects, whether and when a norm has direct effect, must be rejected. The author emphasizes, however, the tendency of treaties on the protection of human rights to assume a special status compared with other categories of treaties. This status is based on the presumption that such treaties have direct effect. Moreover, the European Court of Human Rights has pointed out that its supervisory role 'should be easier in respect of States that have effectively incorporated the Convention into their legal system and consider the rules to be directly applicable, since the highest courts of these States will normally assume responsibility for enforcing the principles determined by the Court' (at 128).

The author completes his work with an accurate analysis of the relationship between national courts and the decisions of international judges, underscoring (in light of the *Avena* case law of the International Court of Justice) the obligatory effect of the international judgment on domestic courts. With the limitation (highlighted by the same International Court of Justice but contradicted by the Inter-American Court in the case of *Castillo Petruzzi* (at 199)) that it would be impossible for an international judge to declare a domestic decision void.

To conclude, the book under review is an extremely useful work for all those who, either on a theoretical level or as practitioners of the law, are called upon to deal with the relationship between the domestic and the international legal orders. The role of national courts is great, even though, as the author himself cautions, the underlying risk of divergent interpretations of international law from one system to another is fragmentation. However, this is a risk to be taken. Fragmentation is the cost of reliance on national courts, but this is not necessarily to be considered as negative. As the author observes, 'in the case of proliferation of tribunals, a multiplicity of judicial institutions may have positive effects in terms of creative experimentation, exploration and learning' (at 224). An important example of such creativity is provided by domestic case law on jurisdictional immunities.

We would like to point out two general limitations of the work, the first of which is acknowledged by the author himself. We may reconstruct the specific role of domestic courts as enforcers of the international rule of law only if we are dealing with legal orders in which the judge can act in an autonomous manner. But how many such legal orders actually do exist? Surely they constitute a minority.

The second limitation is that although analysis and conclusions are presented in general terms, in fact it is almost only human rights treaties that constitute the subject of inquiry – with the exception of some cases concerning decisions adopted by international organizations. This feature and its significance should have been underlined with greater precision. These criticisms, however, in no way detract from the excellent quality of the work, which in addition provides a useful bibliography and tables of International cases, domestic cases, domestic legislation, treaties, and international instruments.

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doi:10.1093/ejil/chs044