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Book reviews

National Courts and the International Rule of Law, by ANDRÉ NOLLKAEMPER. Oxford: Oxford University Press, 2011, xlv + 304 + (bibliography and index) 33pp (£70 hardback). ISBN 9780199236671.

The interface between international and domestic law is a classical subject of legal academic research. International and comparative law scholars have always paid regard to the differences between constitutional arrangements dealing with the incorporation of international law in domestic legal systems, and with the potential of such norms in advancing a substantive international rule of law.[100] Despite this traditional focus in the scholarship, the topic continues to receive new and, indeed, renewed attention as new treaties are adopted and new constitutions implemented throughout the world. The wave of renewed constitutions following the Second World War, perhaps as a consequence of the unmatched state brutality experienced during that time, popularised a model of relatively open national systems towards international law, particularly human rights law.[101] In more recent years, succeeding the collapse of the Soviet Union and the defeat of the military regimes in most of Latin America, constitutions in those regions are even more permeable to the international rule of law.[102]

In assessing this intricate scenario, André Nollkaemper's *National Courts and the International Rule of Law* offers a remarkable contribution to the understanding of the role performed by national courts whist operating 'in a mixed zone –neither fully national nor fully international'.[103] The ambiguity with which domesticated international law is employed by national judges through their own national procedural rules has driven the topic beyond the concern of international lawyers. In fact, national courts able to perform with independence, when empowered by international law that is enforceable domestically, may give cause for typical constitutionally oriented disputes such as those between the political branches and the courts over the correct interpretation of norms (in this case, the state's international commitments).[104] New concerns of this kind may situate the topic as 'one of the largest challenges for the law in the century ahead'.[105]

100. I Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press 2008) p 31; DJ Harris *Cases and Materials on International Law* (London: Sweet & Maxwell, 2004) p 66; MN Shaw *International Law* (Cambridge: Cambridge University Press, 2003) p 120; JG Starke *Monism and Dualism in the Theory of International Law* (Oxford: Oxford University Press, 1936); A Cassese 'Modern constitutions and international law' in *Recueil des Cours*, vol 192 (Amsterdam: Martinus Nijhoff, 1986) p 394.
101. T Buergenthal 'Modern constitutions and human rights treaties' 36 Columbia J Transnational Law 211 at 215.
102. CR Sunstein And S Holmes 'The Politics Of Constitutional Revision In Eastern Europe' In S Levinson (Ed.) *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton, NJ: Princeton University Press, 1995) p 290; E Stein 'International Law in internal law: toward internationalization of Central-Eastern European constitutions' 88 Amercian J Int Law 427 at 429. On the Latin American perspective, see MF Mohallem 'Immutable clauses and judicial review in India, Brazil and South Africa: expanding constitutional courts' authority' 15 Int J Human Rights 765 at 767.
103. *National Courts and the Rule of International Law*, p 1.
104. Ibid, p 26.
105. M Kirby 'International law: the impact on national constitutions' 1 American Society of Int Law Annual Meeting 55.

The book is divided in three sections (plus introduction and conclusion). The first part, comprised of four chapters, discusses the conditions behind the capacity of national courts to perform the 'critical role' of challenging and eventually reviewing the actions of governments which affront international law. The second part ('application of international law') is divided into three chapters that carefully analyse an array of domestic cases from various jurisdictions and different areas in order to identify the methods and techniques adopted by domestic courts to enforce international treaties at the national level. This part assesses the issues of direct effect of international norms in domestic jurisdictions, techniques and types of consistent interpretation, and decisions dealing with reparation. The last section is the most interesting, in my view. Entitled 'External Effects', it discusses in three chapters the broad implications of the way in which national courts are progressively engaging with international law in domestic cases. The first chapter of Part III discusses the fragmentation of international law from the perspective advanced by this work – that is, the involvement of national courts in the interpretation and application of international law. The following chapter tackles the question of authority underlying the decisions of domestic courts relating to international law. Finally, the third chapter of this last section discusses the cases (or the practice of courts) in which national courts refrain from giving effect to an international obligation, either on the grounds that it contravenes a fundamental national obligation or that the international obligation is incompatible with international law itself.

The book combines theoretical and practical analysis and examines an impressive number of international and domestic judicial decisions, the latter comprising no less than 63 different jurisdictions. The book is organised around a number of core arguments that deserve further engagement here.

Nollkaemper proposes three central arguments. First, national courts have become 'a major institutional force in the protection of the international rule of law'.[106] The second crucial argument is that although domestic courts are employing local legal procedures to enforce international law, they do so within a normative framework of international law. His third core argument is that domestic courts implementing international law contribute to the fragmentation of the international legal order in three different ways: by splitting states between those with courts able to operate international law domestically and those without; by identifying different areas of international law, some of which are routinely applied by domestic courts and some of which are not; and by giving margin to a 'process of judicial auto-interpretation that is inherent in entrusting the protection of the international rule of law to courts that are part of the states they have to control'.[107]

1. NATIONAL COURTS AND THE PROTECTION OF THE INTERNATIONAL RULE OF LAW

It is difficult to deny the increasing importance of domestic courts in the construction and development of international law. In spite of the essentially dualistic nature of the relationship between treaties and domestic courts, many states have adopted constitutional schemes (or such rules derived from a constitutional court interpretation) allowing direct effect of ratified treaties and in some cases even 'conferred on treaties

106. *National Courts and the Rule of International Law*, p 1.
107. Ibid.

a higher normative rank than national legislation'[108] and many others ranking human rights treaties at the same level as their constitutional norms.[109] This is a phenomenon grasped by the book.[110]

The argument draws a link 'between the international protection of human rights, the piercing of the shield of national law and the engagement of national courts'.[111] In this sense, David Sloss argues that:

> 'Insofar as treaties create private rights without granting private parties access to international tribunals, the effective enforcement of transnational and vertical treaty provisions may depend on the willingness of domestic courts to enforce treaty-based rights on behalf of private parties.'[112]

Nevertheless, the engagement of national courts introduces concerns regarding their independence. Since the reach of an independent international judiciary is 'extremely modest', the accountability of states 'remains the most problematic aspect of international rule of law'.[113] This is mitigated in domestic legal orders where independent courts may exercise an effective check on political power and enforce the international rule of law over executive public policies, or even trump domestic legislation.

Nollkaemper considers whether or not national judiciaries should be considered sufficiently independent from the political branches to be given authority to review their decisions regarding the interpretation of international law, even against a 'traditional sceptical reading' of such complementary role.[114] In this sense, despite recognising the lack of independence and predominant 'national prejudice' in domestic courts, the author notes a 'quantitative and qualitative shift' in the role of courts in applying international law.[115] The book relies on many cases non-exhaustively catalogued by the project 'International Law in Domestic Courts', part of the Oxford Reports on International Law,[116] which shows that courts in 30 to 40 states 'relatively frequently' give effect to international law domestically and do so occasionally in approximately 40 other states.

When domestic courts act with independence, the argument goes, they may improve this perception of national bias but will not entirely overcome the problem. While judging with independence, courts must also seek compliance and enforcement by the political branches of the state.[117] The need for integration, and courts' responsibility as an organ of state, may also drive courts to promote international law in domestic adjudication in order to avoid the state in an eventual international wrong. Hence, independence is not an 'absolute ideal'. Dependent courts are not

108. See, eg, France, Belgium and Costa Rica (Buergenthal, above n 101, at 215). Cassese (above n 100, p 402) refers to international law that is enforced in the level of supra-statutory legislation as 'quasi-constitutional law'.
109. This is the case, eg, of Argentina and Brazil (among many Latin American countries) and Austria (with regard to the European Convention on Human Rights) (Buergenthal, ibid, at 217).
110. *National Courts and the Rule of International Law*, pp 112 and 124.
111. Ibid, p 4.
112. D Sloss, *The role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge: Cambridge University Press, 2009) p 2.
113. *National Courts and the Rule of International Law*, p 5.
114. Ibid, p 7.
115. Ibid.
116. Oxford Reports on International Law in Domestic Courts. Available at http://www.oxfordlawreports.com.
117. *National Courts and the Rule of International Law*, p 57.

reliable while overly independent courts may 'lead to the undue judicialization of politics'.[118]

As to jurisdiction, although the author clearly understands that international law does not determine the powers of domestic courts (as it does in relation to international courts) he claims that it indirectly regulates their jurisdiction.[119] However, the role of international law as an indirect jurisdiction regulator in relation to domestic courts is weak and incapable of 'directly alter[ing] the powers of national courts'.[120] Direct regulation by international law is indeed exceptional in this relation.[121] The book also notes that the principle of subsidiarity of international courts inevitably leaves to domestic jurisdictions the primary role in the litigation of international law issues. This is particularly the case of human rights law as individual plaintiffs must exhaust local remedies before they can take a case to an international court.[122]

2. THE MIXED ZONE BETWEEN INTERNATIONAL AND DOMESTIC LAW

The second argument put forward is that domestic courts are employing local legal procedures to enforce international law within a normative framework of international law, operating in a mixed zone that is neither completely international nor fully domestic. This scheme does not mean that courts are independently interpreting international law, but that they are developing a method that places them in a grey area under the influence of both international and domestic legal orders. Nollkaemper emphasises this argument when considering the contribution of direct effect in relation to the performance of international obligations.[123] Although he recognises that 'the decision whether to allow courts to give direct effect to international law . . . is primarily a political and normative choice, both for states and their courts',[124] once direct effect is established, 'international law will exert a considerable influence';[125] hence the conclusion that 'direct effect is a mixed international-national law concept'.[126]

118. Ibid, p 58.
119. Ibid, p 24.
120. Ibid.
121. As Nollkaemper notes: 'The principles of international law that are relevant to the jurisdiction of national courts are primarily concerned with the power of states rather than with the power of courts' (ibid, p 22). Among the exceptions he refers to Art 67 of the Fourth Geneva Convention in addressing the power of courts of occupying states. The International Court of Justice decided in *Cumuraswamy* (Advisory Opinion) that the courts in Malaysia were obliged to deal with the question of immunity from legal as a preliminary question in legal processes (ibid, p 23). The decision, however, did not address which court should deal with the matter (ibid, p 24).
122. The book brings an example of the European Court of Human Rights' (ECtHR) decision in *Drozd and Janousek v France and Spain*. On the occasion, the ECtHR referred to national courts being bound by the Convention 'suggesting that the courts of Member States, and not only Member States as such, are bound by the European Convention on Human Rights (ibid, p 23). Also, Art 5(2) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is a rare example of 'international source of judicial power' as it obliges states to 'establish its jurisdiction' over issues protected by the treaty (ibid, p 35).
123. Ibid, p 122.
124. Ibid, p 126.
125. Ibid.
126. Ibid, p 128.

Nollkaemper emphasises the important roles played by direct effect[127] and consistent interpretation[128] in providing better conditions for the application of international law in the domestic arena. This may allow, he argues, 'for a shift in power from the political branches to the courts'.[129] Perhaps the author attributes too much weight on those elements, or at least leaves aside some relevant factors influencing this active role of the courts. There is a growing literature that identifies parochial motivations behind the use of international law in domestic cases.[130] Courts are now using international law, which was once a shield protecting governments' international policies from judicial review, as 'the sword by which the government's (or governments') case is struck down'.[131] Among other considerations, courts are establishing 'limits on executive unilateralism in the area of foreign policy' in order to 'protect domestic democratic processes and reinforce their own autonomy'.[132] Furthermore, scholars identify that although international law is increasingly more influential in defining domestic constitutional law, its use domestically as an interpretive tool 'reflects a defensive strategy, ostensibly a process of domestication rather than one of submission'.[133]

The book could have also considered the question of how the role of national courts in applying international law impacts on exiting concerns regarding the legitimacy of international law. As it is argued that the 'procedure by which international law is generated increasingly attenuates the link between state consent and the existence of an obligation under international law',[134] the book would have benefited from a discussion of whether the domestication of international law may represent a step towards reclaiming national democracy. Or else, would this process aggravate even more the democratic deficit because international law, despite not having the same parliamentary origin, is equally incorporated (or adopted by the courts) to the body of legal instruments applicable domestically?[135]

3. FRAGMENTATION OF INTERNATIONAL LAW

Nollkaemper's third main argument is that the role of national courts in applying international law contributes to its fragmentation. Although the term 'fragmentation' might be charged with a negative connotation, the author compares the current

127. Ibid, p 122.
128. Ibid, p 143.
129. Ibid.
130. See F De Londras 'Dualism, domestic courts and the rule of international law' in M Sellers and T Tomaszewski (eds) *Ius Gentium: The Rule of Law in Comparative Perspective* (Vienna: Springer, 2004), ch 12; A De Mestral and E Fox-Decent 'Rethinking the relationship between international and domestic law' (2008) 53 McGill Law J 573; E Benvenisti 'Substituting international law' (1993) 100 Proceedings of the Annual Meeting of the American Society of International Law 289.
131. E Benvenisti and GW Downs 'National courts, domestic democracy and the evolution of international law' (2009) 20 European J Int Law 59 at 243.
132. Ibid at 64.
133. PJ Spiro 'Treaties, international law and constitutional rights' (1999) 55 Stanford Law Review 2026.
134. M Kumm 'International law in national courts: the international rule of law and the limits of the internationalist model' (2003) 44 Virginia J Int Law 19.
135. J McGinnis and I Somin 'Democracy and international human rights law' (2009) 84 Notre Dame Law Review 1739; J McGinnis and I Somin 'Should international law be part of our law?' (2007) 59 Stanford Law Review 1175.

analysis to the case of proliferation of international courts and tribunals as a reference to the potential 'positive effects in terms of creative experimentation'.[136]

His first claim is that the use of international law by domestic courts may cause a division between states in which national courts are a major force in international and those in which they are not. One of the elements touching this point is the issue of independence. The credibility of any court or tribunal – international or domestic – will be partially assessed by reference to how independently it adjudicates. Furthermore, the authority of courts as instances for peaceful settlement of disputes rests on the comprehension by the parties that the judgement will be 'free from harassment and from any political pressure'.[137] When dealing with the application of international law, domestic courts' independence takes on new layers of complexity. A domestic court may have a strong reputation of independence from political branches and yet externalise nationalistic and biased views when it comes to international law cases involving their national state. As discussed above, courts' independence is, on the one hand, an essential part of their success in protecting the international rule of law, while also highlighting the fact that profound differences in how courts are empowered may result in significant variations in the quality of domesticated international law.

Nonetheless, as Nollkaemper indicates, the potential harm of fragmentation may not be so significant as there is practical evidence that domesticated treaties will be interpreted in the light of international principles even by a domestic court.[138] Besides, domestic courts in many situations make reference to international courts' decisions while deciding related cases, even when those decisions are strictly not binding on the respective state. Domestic courts may also play an important role in reducing the effects of fragmentation while considering in their own decisions the findings of another national court regarding the interpretation of the same international treaty. Domestic courts can influence international organisations while enhancing their authority through 'inter-judicial cooperation' (or dialogue). It has been argued that

> 'judgments of several national courts will be difficult for international tribunals to ignore, especially since the tribunals are well aware that national courts will often play a central role in implementing the tribunals' judgments'.[139]

Nollkaemper expresses concern that the fact that different parts of international law are more commonly used by domestic courts than others might result in fragmentation between different international law fields. The reasons why human rights prevail in domestic adjudication are explained by the fact that it enhances the position of the individuals in relation to their own states. Unlike other areas of international law, human rights treaties establish not only individual rights, but the obligation of the state to provide remedies.[140] Besides, general international law has traditionally protected the doctrines limiting the independent power of domestic courts.[141] The different considerations Nolllkaemper's theory offers to international human rights law and to general international law are not always very clear. In some sections (entire chapters)

136. *National Courts and the Rule of International Law*, p 224.
137. D Shelton 'Legal norms to promote the independence and accountability of international tribunals' (2003) 2 Law and Practice of Int Courts and Tribunals 27 at 27.
138. *National Courts and the Rule of International Law*, p 231.
139. E Benvenisti and GW Downs 'Toward global checks and balances' (2009) 20 Constitutional Political Economy 366 at 383.
140. *National Courts and the Rule of International Law*, p 60.
141. Ibid, p 63.

the author seems to be referring to theories that apply to international law more generally instead of an exclusive area of law. For instance, the author's conclusion that 'the principles relating to such matters of jurisdiction, independence, and standing concern only a very narrow sub-set of international law, primarily the field of international human rights' left some confusion in relation to the ambition of the book to cover international law as a whole.[142]

The last argument within the general concern on fragmentation refers to the process of judicial auto-interpretation that is 'inherent in entrusting the protection of the international rule of law to courts that are part of the states they have to control'.[143] Nollkaemper recognises that this issue can easily be overstated. Judicial auto-interpretation is not in itself a problem. To the contrary, international law 'to a large extent' develops on the basis of 'continuous interpretation and application, rather than a set of abstract rules'.[144] Thus the effects of fragmentation are not necessarily related to the decentralisation of the process of interpretation, but to the potential divergence among decisions of domestic courts over the same international norm.

FINAL CONSIDERATIONS

As a final and general consideration, *National Courts and the International Rule of Law* is an outstanding book, written by a distinguished international law scholar, which looks into a complex topic sitting between international and constitutional law. The multidisciplinary (within the law) aspect of the subject indicates that some issues relating to constitutional law could be further assessed. I have suggested above that alternative answers to the question of why parliaments and courts grant domestic permeability to international law could be also explored within constitutional and political theories. Furthermore, Nollkaemper's work shows the potential implications of the enlargement of constitutional courts' leeway for judicial review (when that is the case) by means of domesticated international law for the principle of the separation of powers. Potential disagreements between empowered constitutional courts and international tribunals over the interpretation of international law might be commonplace in the future, but before that states in which domestic adjudication of international law is frequent may see the intensification of institutional tensions between courts and the democratic branches of government.

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142. Ibid, p 300.
143. Ibid, p 1.
144. Ibid, p 220.
145. University College London.