1. Introduction

The opening session of BIIJ 2015 addressed challenges that arise when the requirements of the international legal order do not correspond with those of the domestic legal order. Discussion began with reference to two articles, each of which highlighted aspects of the international/local relationship. The first article, by Judge Hisashi Owada, concerned the interaction between international and domestic legal orders. Observing that the structure of these orders is changing as the Westphalian model gives way to new forms of international relations in an era of globalization, Judge Owada argues that “…the line between international law and municipal law is becoming blurred…” and that “… a more permanent paradigm for regulating the interaction between the international and domestic legal order is called for.”

Much of the discussion that took place over the course of the Institute may be seen as a response to that call.

Focusing more on the interaction between international and domestic actors, the second article by Anne-Marie Slaughter and William Burke-White advanced the argument that “the future of international law is domestic.” Citing examples such as cross-border pollution, terrorist training camps, refugee flows and proliferation of weapons, the authors contend that, “international law must address the capacity and the will of domestic governments to respond to these issues at their sources. In turn, the primary terrain of international law must shift – and is already shifting in many instances – from independent regulation above the national state to direct engagement with domestic institutions.” The multiple ways in which international and domestic actors interact provide the second overarching framework for the exchanges that took place over the course of the Institute.

BIIJ participants considered three judicial cases that show how domestic courts are taking on international legal issues, and the challenges for both domestic and international legal orders and actors that arise as a consequence. The first case concerned the filing of a claim by Argentina in the International Court of Justice (ICJ) against the United States of America asserting that the United States had “committed violations of Argentine sovereignty and immunities…” as a result of judicial decisions adopted by US tribunals concerning the restructuring of Argentine public debt. An act by the domestic legal order of the United States is thus being challenged before the ICJ for its alleged violation of international law and consequent adverse impacts on Argentina.

The second case concerned Germany's challenge to Italy's Court of Cassation decisions on the issue of immunity from wartime claims. The Italian Court had held that jus cogens norms concerning violations of fundamental rights in the context of war crimes had precedence over customary international law principles like sovereign immunity. The ICJ, however, found that Italian courts had violated Germany’s jurisdictional immunity by allowing lawsuits in Italian courts for damages for war crimes committed by German forces during the Second World War. Here again is an example of a domestic legal system adversely impacting another state in
As these three cases demonstrate, the challenges faced by states in simultaneously adhering to the requirements of their domestic constitutional orders while also fulfilling their international legal obligations are found across the diverse international legal domains represented by Institute participants. These include international human rights law, international criminal law, and public international law.

Participants were invited to consider different aspects of the relationship between international and domestic legal orders, taking both the articles and cases cited above and their own experience as inspiration. Their discussion subsequently revealed both tensions and instances of good practice. In what follows, judges’ insights relating to the relationship between the legal orders are summarized, as well as their views on the possible ways that coherence between the international and the domestic orders might be improved.

2. The relationship between international and domestic legal orders

A central theme to emerge from the discussion during these sessions was the role of the domestic constitutional order in determining the effective operation of international law. This order determines not only the means by which international law acquires the status of binding law within the jurisdiction of a particular state but also the relationship between different organs of the state that are involved in the implementation of international law. Thus, participants discussed matters relevant to both the manner in which international law is incorporated and how it is implemented in domestic legal orders.

– 2.1 How international law is incorporated into domestic legal orders

Classical theories of international law envisage two systems for the incorporation of international law in domestic legal orders. The “monist system” treats international and domestic law as being part...
of a seamless whole, with the consequence that international law is directly applicable in domestic legal orders without the need for implementing legislation. In contrast, the “dualist system” sees domestic and international legal orders as distinct, such that international law requires the enactment of implementing legislation before it enters into force domestically.

There was recognition by some of the judges that the concepts of monism and dualism did not necessarily reflect the reality of legal practice, and there are indeed many variations of monism and dualism found in domestic legal orders around the world. Thus, “dualist” systems may evidence instances of monistic application of international law, while “monist” systems can enact implementing legislation, which may even contain provisions that differ from the international legal provision. However, although few systems may correspond to ideal notions of dualism and monism, the practical implications that flow from a domestic legal order describing itself as dualist as opposed to monist can be quite significant indeed.

The discussion began with a reference to the Kadi case in which the Court of Justice of the European Union (CJEU) was called upon to determine whether the EU Regulation implementing a UN Security Council resolution against Mr. Kadi was in accordance with EU law. Although the CJEU did not make findings in relation to whether the Security Council resolution (binding on all member states under Chapter VII of the UN Charter) had precedence over “domestic” (EU) law, the judgment has been described as being uncharacteristically dualistic in holding the implementing Regulation invalid as it failed to ensure due respect for fundamental (constitutional) rights, including the right to property, the right to judicial review, and the right to be heard. This vexing issue regarding the primacy of international versus constitutional legal orders resurfaced many times over the course of the Institute.

Participants then shared their perspectives on the operation of monist and dualist models in the work of their international courts and tribunals, as well as that of the domestic judicial bodies on which some had served. One participant described the increasing willingness of some states to have their own domestic courts preside over trials that have usually been conducted by ad hoc and special criminal tribunals and by the International Criminal Court. Such willingness can sometimes be stymied, however, if “international crimes” such as genocide have not been recognized domestically in a country with dualistic practices. This has been the situation with at least one case that the ICTR transferred to a domestic jurisdiction under Rule 11 bis of the Tribunal’s Rules of Procedure.

Dualist systems by name may, however, reveal instances of monism. One judge with experience sitting in a dualist jurisdiction described an instance where, owing to a lacuna in the domestic legislation, he felt required to directly apply relevant international law notwithstanding the fact that the provision had not been incorporated into the domestic legal order.

Another participant, reflecting on how judges can facilitate the introduction of international law within a dualist system, observed: “Judges have the last say. They can use international law to help the arguments. They are in a position to import international law even in a formally dualist system if they are monist enough in their thinking and attitude.”

Further permutations of the dualist system were also identified, including instances of states within a federation enacting state-level legislation that incorporates international legal provisions where the national parliament has failed to do. The judge providing this example anticipated a challenge for judges at his country’s highest court, should a state-level provision incorporating international law be challenged at the federal level.

This scenario of uneven domestic implementation of international law is reminiscent of the response of
the United States in the ICJ *Avena* case on consular relations\(^{16}\). In that case, the ICJ held that the United States was in breach of its obligations under Article 36 of the 1963 Vienna Convention on Consular Relations for failing to ensure that non-citizens enjoyed the benefits of consular notification when detained by US authorities\(^{17}\). With federal authorities unable to enact legislation\(^{18}\) except for a provision in the Federal Rules of Criminal Procedure, and a finding by the US Supreme Court\(^{19}\) that a presidential memorandum requiring states to “give effect to the decision” could not take precedence over state and federal limitations on issues that can be raised in habeas corpus applications, it has fallen to states to take independent initiatives to bring about piecemeal implementation of the judgment\(^{21}\).

One example comes from the judgment of the Supreme Court of Nevada, which decided in the capital case of Carlos Gutiérrez\(^{22}\) to order a new evidentiary hearing on whether the lack of consular access was prejudicial to his case. This approach contrasts with the response of the Texas judiciary, whose rejection of the presidential memorandum gave rise to the Supreme Court litigation and ultimately led to the execution of José Ernesto Medellín\(^{23}\) one of the Mexican nationals in the *Avena* case, notwithstanding concerns about the fairness of the trial in the absence of consular assistance.

In light of the foregoing, a view may be reached that monist systems offer greater certainty that international law will operate at the domestic level. However, one participant involved in international criminal adjudication observed, “… most systems, even those that are monist, are not entirely monist. There is always some limit in the constitutional system which gives priority to the local constitution. And this inevitably requires local legislation.”

Thus, even states that have adopted a predominantly monist approach to international law may still enact implementing legislation to incorporate pieces of international law into the domestic legal order. In so doing, provisions in the domestic implementing legislation may differ from the international provision. One example is German legislation incorporating the Rome Statute of the International Criminal Court (ICC), wherein it is stipulated that the principle of “command responsibility” shall be interpreted restrictively. The potential for divergence was identified should the ICC provide a wider interpretation of command responsibility at some point in the future. The participant observed that the international community may “invent a statute, but the implementation of the statute is not taken care of. Some states implement the statute partially, but I don’t know of any state that has implemented the ICC statute completely.”

Moving beyond distinctions between monist and dualist legal orders, one judge with experience sitting on a number of international criminal tribunals observed: “We have had a system where national legislation in most countries has lacked the tools to deal with international crimes.” This observation has significant implications for the future of global justice as the international ad hoc and hybrid criminal tribunals wind up their caseloads. Will the ICC have the capacity to administer justice at the volume required by the ongoing perpetration of international crimes? What role will domestic courts play in addressing such crimes? And what steps are being taken to develop the tools that are required at the domestic level? These issues were explored in greater detail in subsequent sessions and will be revisited in this report.

### 2.2 How international law is implemented in domestic legal orders

The domestic legal order determines not only how international law is incorporated, but also how it is implemented in practice. Executive, legislative and judicial branches of a state can be engaged in the domestic implementation of international law, including the decisions of international judicial bodies. Sometimes, implementation is unproblematic, as one participant demonstrated with an example of Bosnian implementation of a judgment from the European Court of Human Rights (ECtHR). In the case of *Maktouf and*
Damjanović v. Bosnia and Herzegovina, the Court held that Bosnia had breached Article 7 (no punishment without law) of the European Human Rights Convention by handing down lengthy custodial sentences to convicted persons that were authorized under a law enacted after the commission of the offenses for which they were convicted.24 Following the ECtHR judgment, the Bosnian constitutional court invalidated the sentences and remanded the matter to the state court for sentencing.

Another example of a domestic legal order responding proactively to the requirements of global justice was provided by one participant with experience of the early days of the International Criminal Tribunal for the former Yugoslavia (ICTY). With judges eager to start work on cases, a preliminary requirement was to secure suspects, some of whom were abroad. Taking the example of Germany, the participant observed that there had been a willingness on the part of the German authorities to transfer suspects on their territory to the ICTY, but an inability to fulfill any such requests owing to the absence of domestic legislation to empower domestic courts to order such a transfer. In that case there was the political will to enact appropriate legislation, as a result of which the suspects were eventually transferred to The Hague.

However, domestic political processes may also inhibit the swift resolution of disconnects between domestic and international legal orders. A judge familiar with the case law of the Inter-American Court of Human Rights (IACtHR) recalled the case of DaCosta Cadogan v. Barbados, which concerned the statutory imposition of a mandatory death sentence in all cases where an accused is convicted of murder.25 The Court, on finding a violation of several provisions in the American Convention on Human Rights, required Barbados to take “the legislative or other measures necessary to ensure that the Constitution and laws of Barbados… are brought into compliance with the American Convention.” The government of Barbados has expressed its willingness to comply with this 2009 judgment, but as of 2015 its parliament has yet to pass amending legislation. The judge recognized the challenges inherent in passing amending legislation, noting that such a process “may require the cooperation of the opposition as well as other actors outside of the parliament.” He added that politics was not the only factor affecting the implementation of international judgments, observing, “a lot of the issues relate to the capacity and resources to deal with the judgments.”

This last example raises the much-discussed issue regarding the distinction between non-implementation and non-compliance with the judgment of an international judicial body. At what point will the domestic obstacles to implementation amount to non-compliance? The issue of non-compliance due to a political decision, in contrast to an institutional impediment, is addressed in the next section of the report.

One participant observed that, particularly in cases where a state is organized as a federation, such as in Russia and Australia, supreme courts may be reluctant to find that a judgment of an international judicial body requires the judgment of the highest court in one of the states of the federation to be altered. This reluctance reflects a delicate political balancing between state and federal legal and political orders, but is also a consequence of the domestic constitutional order that will generally prevent a higher court from directing another court to act in a certain way. An example relating to cases where a national court orders the detention of crews and vessels was provided, and it was observed that when the International Tribunal for the Law of the Sea (ITLOS) subsequently finds the decision of the national court to be contrary to the state’s international legal obligations, “the end result is that the decision… is subsequently not implemented but compliance is assured by the highest court.” Additionally, it was observed that supreme courts sometimes prefer to find ways of securing compliance with an international judgment with reference to domestic legal provisions rather than by acknowledging the authority of the international
judicial body. According to one judge, some courts consider that “it is unacceptable to be in a situation where an international judicial body can be an appellate court that can instruct a national court to act in a certain way.”

A participant with insight into the relationship between the African Court of Human and Peoples’ Rights (ACtHPR) and the supreme courts of signatory states noted a similar antipathy to international bodies on the part of some national judges. This judge recounted: “When we meet the chief justices, the first thing they say is, ‘This is a sovereign state. Why do we need an African court?’ We say: ‘We recognize you are sovereign and that is why we require that local remedies must be exhausted before people can come to our court.’ Then they say, ‘If local remedies must be exhausted, and if we have dealt with the matter up to the highest level, then why should they be able to come to your court?’”

Reflecting on the approach taken by the ICJ in the Avena case, one judge observed that one way to address the tension between international and domestic courts is to invite states to rectify an identified breach by means of their own choosing. This approach allows states, in the judge’s words, “to try to bridge the gap in order to… make international laws domestic.” Further thoughts on how the manner in which judgments are drafted may affect their impact at the domestic level are reported in Section V of this report.

Matters become still more complicated when any legislative amendments required to give effect to an international judgment are seen by the domestic judiciary as conflicting with fundamental constitutional provisions. The example of the response of the Italian authorities to the ICJ judgment in the Jurisdictional Immunities case was raised by one participant, who described how the Italian Parliament had passed legislation accepting the UN Convention on State Immunity and expressly requiring that final judgments relating to awards for violations by Germany in the Second World War be set aside. The Italian Constitutional Court, however, held that the legislation was unconstitutional and could not be applied. The reasoning of the Constitutional Court was that, while it is for the ICJ to determine the character of the customary international law on sovereign immunity, the Italian constitutional provision accepting customary international law as part of domestic law cannot have effect where the customary international law runs counter to a fundamental principle of the constitution, such as the rule that victims must have redress especially where violations are of rules of jus cogens, as was the case here. The judgment of the Constitutional Court thus holds that, notwithstanding Article 94 of the statute of the ICJ requiring countries to implement the decisions of the ICJ, Italy is unable to do so where such implementation would result in a breach of fundamental constitutional principles.

This Italian constitutional dilemma was seen by several participants as sharing some of the characteristics of the Kadi judgment. However, one participant noted some distinctions, including the fact that the Kadi case concerned a Security Council resolution, which could have been drafted in such a way as to minimize any constitutional challenges, whereas the complicated legal challenge in the Jurisdictional Immunities case arose from the judgment of a domestic court and the international judicial body was called upon to help resolve the issue. At the same time, both cases reflect instances of “domestic” non-implementation of international law on the basis of the requirements of the domestic constitutional order. It is thus seen that domestic actors will often take steps to bring their legal orders into compliance with international law, but there are also instances where political and constitutional forces directly interfere with the implementation of international law.

Not all states experience constitutional dilemmas, however, when encountering international legal obligations. One participant pointed to the Peruvian constitutional legal order as an example of a system that affords the same status to international agreements as it does to domestic constitutional
provisions, with the express recognition of the supremacy of international agreements.

Whereas modern constitutions such as Peru’s offer one model for increasing coherence between international and domestic legal orders, other approaches are also possible. In what follows, the views of participants on potential ways of improving coherence are presented.

3. Improving coherence between international and domestic legal orders

So far, this opening section has reported the observations of participants regarding relationships between international and domestic legal orders in particular instances. However, a number of more general observations were also made by participants about the overarching framework within which international and domestic legal orders interact.

Setting the scene for this discussion, one participant made the following observation, which describes the Westphalian legal order based on the sovereignty of nation states as being in need of structural improvements to take account of the changes brought about by globalization:

“There is an inherent dilemma in the Westphalian legal order when state sovereignty dominates. The social reality of the international community is such that it requires a more regulated framework, possibly with a hierarchical order built into it. I don’t think that, [owing to] the basic fundamental nature of the Westphalian legal order we live in, it is possible to have a harmonious framework... We a need mechanism for consultation, either formally or informally.”

In the absence of such a structure, which this participant considered desirable, it is left to the actors themselves to identify ways of bringing about greater coherence between the legal orders. This can be seen in the way the Nevada Supreme Court reasoned concerning one of the complainants in the *Avena* case, and as the Italian courts ruled in trying to reconcile the constitutional challenges presented by the *Jurisdictional Immunities* case.

For another participant, the starting point was to recognize that “governments prefer to comply with international law rather than not comply. Where compliance bumps up against contrary political interests is another matter – but the preference is to comply.”

Other participants also noted, however, clear examples of states being willing to opt out of the system of international justice when it suited their interests. A highly publicized situation concerned the US decision to refuse to comply with the judgment of the ICJ in the *Nicaragua* case. Other examples are provided in Section II of this report, as there are clear political dimensions to this phenomenon. However, the focus here is on the structure of the international legal system that makes it possible for states to “pick and choose” how they use international law, not the fact that they do so.

Holding out the Peruvian constitutional order as an example of a system that openly embraces international law, one participant identified what he considered to be the positive implications of having a domestic legal system that encourages coherence with the international legal order: “Experts believe that this is a way to increase human rights in the country. Why? Because the more signals that Peru provides that [it is] a community that respects human rights and due process of law, the more it will be considered a serious country. The country had the Shining Path, revolutions, and a man who was president is now in jail. So the idea is to provide the signal that [Peru] is respectful of everything, the main purpose being to attract investment.” For this participant, there is thus a strong business case to be made for increasing the coherence between domestic and international legal orders.

This same participant pointed to other Latin American states that, in his view, had placed a
greater premium on national sovereignty with the consequence that they have experienced numerous challenges before both the IACtHR and the Andean Tribunal of Justice (ATJ). In relation to the latter institution, some cases involve states asserting their sovereign right to “protect their consumers, industries and welfare, and [those states] forget about the main principle of using trade for increasing the welfare of the community.”

One participant identified a statutory obligation in his country for judges to bring serious problems in the law to the attention of a law reform commission, which is mandated to consider such matters and advance recommendations to the government to address the issues. A similar system which would impose a binding obligation on international judges to forward concerns about the operation of the international legal system to a similar kind of law reform body was, in this participant’s view, a desirable and practicable way of addressing some of the problems that arise in the context of international adjudication. Responding to this proposal, another participant expressed cautious interest, but noted that the tradition of judges to refrain from discussing cases they have been involved in could present difficulties in referring any problems with the operation of the law to such a body.

Another participant suggested that international judicial bodies address some of the challenges that arise in the operation of the international legal order directly in the text of their judgments. He argued that courts and tribunals could follow the proactive lead of international human rights courts, where judgments point to a need for states to address elements of the domestic legal order that counter the principles of international human rights law. Taking the Jurisdictional Immunities case as an example, he continued, the ICJ could have been more proactive by perhaps providing stronger directions to states parties, using terms like “should” rather than “could” when recommending that negotiations be entered into by Germany and Italy with a view to providing reparation to the victims of war crimes committed by the Nazis during WWII.

4. Conclusion

To the extent they are willing to recognize and abide by international legal obligations, sovereign states are bound by the agreements they enter into, as well as by principles of customary international law and rules of jus cogens. The domestic constitutional order will determine whether international law is directly binding or requires implementing legislation, and whether international law or the domestic constitution has primacy. Although it may be the case that most states intend to adhere in good faith to the requirements of the international legal order, it is clear that the Westphalian paradigm underpinning the international system provides room for states to prioritize domestic obligations and interests over international ones, creating instances of discord between international and domestic legal orders.
Notes

1 Hisashi Owada, Problems of Interaction Between the International and Domestic Legal Orders, 5 Asian J. Int’l L. 2, 247 (2014).

2 Id. at 2.


4 Id. at 328.


6 Id.


9 See supra note 7.

10 Id.


12 Id. at 42, para. 78 (S. Afr.).


15 Rule 11 bis gave the Tribunal discretion to transfer selected ICTR cases to appropriate national jurisdictions.


17 Id.


20 Memorandum from President George W. Bush for the Attorney General concerning Avena decisions (Feb. 28, 2005), available at http://www.state.gov/s/l/2005/87181.htm. (“…the United States will discharge its inter-national obligations under the decision… 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.”).

21 See supra note 18.


26 See supra note 16.

27 See supra note 7.


29 Id.

30 See supra note 13.


32 See supra note 22.

33 See supra note 28.


35 The reference is to Alberto Fujimori, who is currently serving a sentence after conviction by a Peruvian court on charges of human rights violations.

36 See supra note 7.