

Interest Group on International Courts and Tribunals

Domestic Contestations against International Courts and Tribunals

Athens, 12 September 2019

PROGRAMME

8:15 - 10:45 1st Panel (*Hall, Faculty Club, Academias 48 - 1st Floor*)

Chair: **Andrea Gattini** (*University of Padua*)

- **Marten Breuer** (*University of Konstanz*) - "The Concept of 'Principled Resistance' to ECtHR Judgments : A Useful Tool to Analyse Implementation Deficits?"

Abstract: National courts have developed a wide range of techniques to evade compliance with judgments of the European Court of Human Rights (ECtHR): A court might simply ignore the relevant ECtHR case law. It might reinterpret a Strasbourg judgment in a way that suits better to its own understanding of the law ('the ECtHR judgment must be understood to have the following meaning'). It might rely on the difference between the Strasbourg Court's function to decide individual cases and the national (constitutional) court's function to review national legislation *in abstracto*.

While these are more or less subtle techniques of resistance, two others are more explicit and more confrontational: The first one means that the national court openly challenges the interpretative outcome of the Strasbourg proceedings. This might, e.g., be due to the fact that the Court has allegedly gone too far with its evolutive interpretation, or because the Court when interpreting the Convention is said to have misunderstood the implications of national law (e.g. for the applicability of Article 6 § 1 ECHR). The second technique involves the scenario that a Strasbourg judgment cannot be implemented, due to obstacles coming from the national level. A prime example of this technique is reliance on the supremacy of the Constitution vis-à-vis the Convention under national law.

It is well-known that national critique of the Court has increased significantly in recent years. Not every criticism, however, may be disqualified as unjustified. It is necessary to distinguish between cases of illegitimate 'Strasbourg bashing' and a critical attitude that has its merits. A recent concept to analyse national resistance to international judgments is the distinction between 'pushback' and 'backlash' as developed by Mikael Rask Madsen. In the Convention context, Fiona de Londras and Konstantin Dzehtsiarou have differentiated between 'dilatatory' and 'principled non-execution'. Yet, a third analytical category that has been developed by the present author is the concept of 'principled resistance' to ECtHR judgments. It aims to analyse the implications which national resistance might have in the execution phase of a Strasbourg judgment.

Given the above examples, one could conclude that judicial resistance is 'principled' whenever the national judge relies on the principle of supremacy of the Constitution

under national law. There have been cases, however, where in response to ECtHR judgments the national Constitution was amended without much ado. ‘Principled resistance’ cases, by contrast, deal with scenarios where execution is likely to be permanently blocked. Hence, supremacy of the Constitution alone is not necessarily problematic. In other cases, the constitutional law argument is combined with reliance on ‘national identity’ or ‘constitutional identity’, concepts that originally emerged in the EU context but have been migrated to the Convention by now. From the execution perspective, they are far more problematic because a State might not easily change its (national/constitutional) identity. Furthermore, it is evident that cases of permanent non-execution might eventually call into question the very functioning of the Convention system. Therefore, it is necessary to distinguish between cases of mere disagreement and of ‘principled resistance’.

- **Jorge Contesse** (*Rutgers Law School*) - "Domestic Contestations in Inter-American Human Rights Law"

Abstract: The Inter-American Court of Human Rights is one of the world’s most active human rights tribunals. It has effectively set itself as the most authoritative voice in fundamental rights adjudication in Latin America. Through an impressive case law on a number of human rights matters, from anti-impunity to social rights to same-sex marriage, the Court exerts significant influence upon many Latin American states. This is a feature that both scholars and advocates have studied and praised with devoted energy. One of the most recent articulations of such interaction is the notion of “judicial dialogue” and the development of an *ius constitutionale commune*: a kind of Latin American common law of rights and constitutionalism that seeks to transform existing structures of social and legal inequality. The Latin American *ius constitutionale commune* school, interestingly crafted in Europe, under the lead of the Max Planck Institute in Heidelberg, creates a distinctive narrative for international adjudication, which assumes, with new theoretical tools, a top-down model—that is, one in which *the Court influences states*.

In recent years, however, States have challenged the Inter-American Court’s authority. Instances of contestation, resistance, and backlash are also part of the human rights legal landscape now. My paper explores the ways in which the Court has expanded its reach upon States, how States have received and, in some cases, challenged such expansion of reach, and how the Court may respond to such challenges. First, the paper focuses on the use (and misuse) of the conventionality control doctrine—whereby the Inter-American Court aims at binding all national judges—, exploring the doctrine’s foundations and, more specifically, how States respond to the Court’s demands for compliance and implementation of international judgments. Here I analyze case studies from Argentina—where the Supreme Court refused to follow the Inter-American Court’s lead—, and Chile and Peru—where high courts have faced domestic criticism for their attempts to implement international decisions. Second, the paper discusses the Court’s use of advisory jurisdiction as a mechanism to influence States, and some of the challenges that such opinions pose to the Court’s authority. Finally, the paper introduces the notion of “constrained deference,” as an interaction mechanism between the Inter-American Court and domestic judges. I review the Court’s decision on the Alberto Fujimori’s pardon, a case in which the Court refused to invalidate the domestic decision but ordered domestic judges to carry out a *constitutional* review using *international* human rights standards. This method of engagement, the paper

argues, could well serve the Court's interest of maintaining and even enhancing its authority in the face of domestic challenges.

- **Gabriela Cristina Braga Navarro** (*University of Frankfurt*) - "The Struggle After the Victory : Domestic Resistance to the Inter-American Court's Jurisprudence on Indigenous Territorial Rights"

Abstract: The present research analyses domestic resistance to decisions issued by the Inter-American Court of Human Rights related to indigenous territorial rights. The objectives of the research are (I) to quantify and to analyse the level of compliance with reparation orders issued by the Court in indigenous territorial decisions; and (II) to comprehend the level of influence of legal and institutional factors in the State's response to the decisions. Over the last two decades, the Inter-American Court has developed a forward-looking jurisprudence on the protection of indigenous territorial rights. Even though the American Convention on Human Rights enshrines only individual civil and political rights, the Court managed to recognize States' duties to ensure social, cultural and economic rights, asserting their indirect justiciability through interpretation methods. The Court has not only expanded the reach of classical rights (recognizing the right to a dignified life and to collective property of ancestral lands), but it has also affirmed implicit rights (right to cultural identity and to self-determination). The innovations are also present in the reparation orders issued, as they overcome the individual sphere and are aimed at avoiding future violations. Besides compensation, the Court has ordered the demarcation and entitlement of traditional lands, the adoption of legislative and administrative measures necessary to guarantee the right to collective property and the implementation of social programs. There is an increasing concern about the domestic implementation of the remedies, as compliance rates in indigenous cases are considerably low. Victims maintain their struggle for justice years after the judicial victory; in some cases living in extremely wretched conditions. Partial compliance prevails, as States usually comply with compensation and satisfaction measures, but they barely comply with non-repetition and restitution measures. Previous studies have appointed variables related to compliance with decisions from the Court, including the constitutional recognition of the regional system, the existence of domestic institutions and/or regulation related to the implementation of international decisions, the type and structure of the reparation order and the amount of dependence on domestic courts. However, until now, no research has analysed the influence of these variables specifically in indigenous cases. In order to achieve the objectives, a comparative analysis was pursued between the two countries with the most indigenous territorial cases, Suriname and Paraguay, which have contrasting rates of compliance. The methodology adopted is qualitative research, with an inductive analysis of the data, based upon primary sources (legislation and judicial decisions). The research concludes that compliance is stimulated when the State already counted on enshrined indigenous rights and indigenous institutions before the international litigation. Institutions designated to implement international decisions might also promote compliance. The impact of the jurisprudence, however, goes beyond compliance, as it might strengthen domestic institutions, empower communities, reinforce enshrined rights and restore cultural practices. The results might serve as practical guidance for the actors involved: victims and their representatives can improve their strategy for implementation and the Court can adequate its reparation orders, tailoring them for a more effective implementation. The

outcomes might be applicable not only for indigenous cases, but for general strategic litigation on social and cultural rights as well.

10:45 - 11:00 Coffee Break

11:00 - 13:30 2nd Panel (*Hall, Faculty Club, Academias 48 - 1st Floor*)

Chair: **Machiko Kanetake** (*University of Utrecht*)

- **Relja Radović** (*University of Luxembourg*) - "The Rise of Arbitral Jurisdictional Regulation in Investment Treaty Arbitration and the Controlling Role of Domestic Courts"

Abstract: The evolution of investment treaty arbitration has witnessed the rise of the arbitral law-making function, and particularly of the arbitral regulatory activity in jurisdictional matters. Tribunals often rely heavily on the arbitrator-made rules and standards which guide the interpretation and application of investment treaties and arbitration agreements, on the one hand, and occasionally impose independent jurisdictional requirements, on the other. Such arbitrator-made jurisdictional rules frequently play a crucial role in the determination of jurisdictional outcomes, and their significance therefore should not be undermined.

Investment treaty arbitration (outside the ICSID context) is peculiar insofar that although it is governed by public international law, it is subject to a limited control by domestic courts. This paper examines the effect of such controlling role of domestic courts on the development of arbitral jurisdictional regulation. To this end, the paper tracks the treatment of arbitrator-made jurisdictional rules in the processes for challenges of investment arbitral awards before domestic courts. It is argued that, contrary to common intuitive expectations, domestic courts have not been resistant to but rather supportive of the proliferation of arbitrator-made jurisdictional rules. This can be observed in two particular aspects. First, domestic courts have observed the development of arbitrator-made jurisdictional rules as an ordinary part of the arbitral judicial function and interpretative exercises. Second, even when contesting the views of arbitrators taken in their jurisdictional determinations, domestic courts have tended to engage in the discourses on the appropriateness of arbitrator-made jurisdictional rules in substance, and have refrained from challenging such regulatory activity in principle. In turn, judicial contestations have the potential of being picked up by other tribunals and included in the law-making process.

These findings contradict the usual narratives about the backlash against international courts and tribunals, particularly in the context of investment treaty arbitration. While state executives as treaty negotiators have often been highly reactive to the development of arbitrator-made jurisdictional rules, domestic courts have been rather cooperative with arbitral tribunals. Instead of challenging the arbitral law-making process in principle, they have engaged in the discourses on the substance of the arbitrator-made jurisdictional rules. And despite frequent arbitral-judicial disagreements in substance, the practice appears positive overall, because domestic courts can equally contribute to the law-making process and the production of nuanced rules governing the jurisdiction of investment arbitral tribunals.

- **Yahli Shereshesvky** (*University of Haifa*) - "The Unintended Negative Effect of Complementarity"

Abstract: Much of the discussion over domestic contestations against international courts and tribunals focuses on the reactions of governments to international decisions. This proposal focuses on a related phenomenon – the potential negative reaction of domestic courts to the principle of complementarity.

The principle of complementarity under Article 17 of the Rome Statute dictates that a case is inadmissible before the International Criminal Court (ICC) “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”. The notion of positive complementarity aims to utilize complementarity to incentivize states to investigate and prosecute alleged international crimes themselves.

Positive complementarity suggest that domestic courts will be more active in relation to IHL violations that might lead to ICC proceedings. Nonetheless, the behavior of the Israeli Supreme Court (ISC) in recent years suggest a possible negative effect complementarity on the willingness of domestic courts to intervene in such cases.

Ostensibly, we might have expected that the shadow of the ICC would push the Court to intervene in military operations policies. However, in contrast to the court behavior in the first decade of the twenty-first century, the Court has been reluctant to intervene in such cases since the ICC's involvement in the situation began in 2009. This reticence can be explained by the fact that the logic of positive complementarity does not work in the context of general policies. While it is reasonable to assume that states will investigate cases of low- and mid-ranking soldiers who allegedly committed international crimes, those responsible for general policies are the highest-ranking officers and government officials. In most cases, it is highly doubtful that these individuals will be criminally investigated or whether a state will be willing to genuinely investigate the systematic violations resulting from such policies. Under these circumstances, determining that a policy is illegal will not help show that the state is willing and able to prosecute, since it will probably not be followed by a criminal investigation of the relevant crimes and suspects, in contrast to specific incidents of alleged severe violations of the law. Moreover, while illegality under international law does not necessarily imply an international crime, in cases such as house demolitions and targeting, determinations of illegality come very close to acknowledging potential international criminality, since the norms in question were criminalized in the Rome Statute. At best, intervention will have no effect, and at worst (from the state perspective), it will highlight the state's failure to investigate the relevant crimes and the appropriate suspects, increasing the likelihood of ICC intervention. The logic of positive complementary is inverted in these cases; domestic courts have an incentive not to review the legality of general policies. This might explain at least part of the Court's reluctance to intervene in recent years.

The paper builds on the Israeli case to develops a theory on the conditions for positive and negative effects of complementarity on domestic courts.

- **Edoardo Stoppioni** (*Max Planck Institute Luxembourg*) - "Domestic Contestations against the Legal Reasoning of International Decisions"

Abstract: The literature on domestic contestation against international courts and tribunals generally focuses on the legitimacy of the dispute settlement mechanisms as a whole. Instead, this paper will focus on a particular form of domestic contestations, directly tackling the legal reasoning of the decision. Four examples will be used, dealing with different domains of international adjudication.

The first case study deals with the reaction of the Italian Constitutional Court against the ICJ decision in the *Germany vs Italy* case.

The second case deals with the reactions of Ecuador against some legal issues addresses in different ICSID awards having engaged its international responsibility. The State Prosecutor published different books criticizing directly the reasoning of those awards, notably in the *Occidental* case.

The third case study deals with the national reactions against the Advisory Opinion of the Inter-American Court of Human Rights on homosexual unions. After this groundbreaking opinion was rendered, conservative parties in Costa Rica and other southern-American States used the legal reasoning of the Court as an example of the problematic tendencies of the human rights ideology of the court, perverting social structures.

Finally, a fourth example deals with the reaction of the President of the *Section du Contentieux* of the French *Conseil d'État* against the ECJ decision in *Commission v. France*. In this decision, the ECJ condemned for the first time the refusal of a Supreme Court for not having sought a preliminary ruling while deciding a case.

The paper will attempt to sketch a theory of this contestation rhetoric. Using discourse analysis, this paper will aim at sketching the different forms taken by this particular 'dialogue'. How does this critique of the legal analysis of an international court function? Stemming from a domestic legal order, how does the inter-systemic dimension change the terms of the debate? What are the implications of the contestation of a court that is located at the top of an international normative space? Does this discourse of contestation change depending on the degree of integration of the international jurisdiction? Does the context of the decision change the terms of the dialogue?