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Introduction

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From a purely semantic point of view, the term 'duel' indicates a formal fight between two people as a way of deciding an argument according to an accepted code of procedure. The same term is apparently the most fitting one when describing the relationship between international law and national fundamental principles: on the one hand, international law vindicates its supremacy over internal law, regardless of the kind of national rule which comes into question; whereas, on the other hand, domestic legal systems increasingly claim the right to limit international norms and decisions, insofar as the latter conflict with fundamental (constitutional) principles. Yet if any 'accepted code of procedure' really exists remains questionable, and it is not clear enough whether one may establish, once and for all, whom this supremacy belongs to. The purpose of this book is precisely to deal with such an intriguing question, moving from the traditional assumptions on the supremacy of international law and questioning such assumptions through the lens of the most recent judicial and legislative developments in the matter.

So far, the fact that a state may not rely on the provisions of its 'internal law' as justification for failing to comply with international obligations has been regarded as a traditional norm of international law. State practice largely supports such a conclusion. The most enlightening decision in this regard is that delivered by the Permanent Court of International Justice in *Treatment of Polish Nationals*.[1] In line with this decision, 'a state cannot adduce against another state its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force'.[2] The same principle has been endorsed in Article 27 of the 1969 Vienna Convention on the Law of Treaties, whereby 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.[3] Last but not least, the 2001 International Law Commission's Articles on

[1] Treatment of Polish Nationals and Other Persons of Polish Origin and Speech in the Danzig Territory, Advisory Opinion of 3 February 1932, PCIJ Series A/B No. 44.
[2] *Ibid.* at 24.
[3] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331.

State Responsibility are to a great extent relevant.[4] Both Article 3[5] and Article 32[6] express the above concept.

Of course the supremacy of international law may be derogated from in some specific cases. However, these are exceptions that do nothing but prove the rule. The first example is that offered by Article 46 of the Vienna Convention itself.[7] This article echoes 'a fundamental tension between sovereignty and democracy, on the one hand, and the efficiency of international law, on the other':[8] while the first part of the provision (in line with the aforementioned Article 27) reiterates that a state may not invoke internal law to elude its international obligations, the second part clarifies that this rule only applies if the international obligation is legally valid, that is to say, the consent of a state to be bound must have been expressed by an organ entitled to do so. Accordingly, the exception in question only relates to provisions regarding the competence to conclude treaties.

A further example is represented by the practice of internal reservations. By 'internal reservations', reference is made to all the cases where a state, by ratifying a treaty, formulates a reservation aimed at safeguarding its internal law, i.e. by stating that the application of the treaty must be compatible with the national constitution or other internal laws.[9] For this kind of reservation to be considered valid, its content must be as defined as possible, which means that a generic reference to domestic law in its entirety would be deplorable: it 'may create doubts about the commitments of the reserving state to the object and purpose of the convention and, moreover, contribute to undermining the basis of international treaty law'.[10]

Still, beyond these cases, the tension between supremacy of international law and national fundamental (constitutional) principles is growing unceasingly, and the reason is not hard to grasp. In the face of the relentless expansion of the material scope of international law, the judiciaries of most countries, including those with a

4 Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, UNGAOR, 56th Sess., sup. No. 10, at 43, UN Doc. A/56/10 (2001).

5 'The characterization of an act of a state as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law'.

6 'The responsible state may not rely on the provisions of its internal law for failure to comply with its obligations under this Part'.

7 Above n. 3.

8 M. Bothe, 'Commentary on Article 46 VCLT', in O. Corten and P. Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary*, 2 vols. (Oxford: Oxford University Press, 2011), vol. II, pp. 1100 et seq.

9 It has been argued that 'this practice should be interpreted as making explicit the states' persistent concern for the safeguarding of domestic constitutional principles'. See A. Peters, 'Supremacy Lost: International Law Meets Domestic Constitutional Law' (2009) 3 *Vienna Online Journal on International Constitutional Law*, 170.

10 This is what Norway objected to with regard to the reservation formulated by Iran to the 1989 Convention on the Rights of the Child (Convention on the Rights of the Child, New York, 20 November 1989, in force 2 September 1990, 1577 UNTS 3). By this reservation, Iran reserved 'the right not to apply any provisions or Articles of the Convention that are incompatible with Islamic laws and the internal legislation in effect'.

high record of compliance with international norms, have increasingly felt the need to preserve the area of fundamental principles: an area where the state's inclination to retain full sovereignty seems to act as an unbreakable 'counter-limit' to the limitations deriving from international law. Suffice it to consider the astounding contestation of the ICJ judgment in *Jurisdictional Immunities of the State* by the Italian Constitutional Court (Judgment No. 238/2014),[11] the recent Russian practice affirming the supremacy of the Constitution over the decisions of the European Court of Human Rights,[12] or the 2016 Judgment by the German *Bundesverfassungsgericht* on the so-called 'Treaty Override'.[13]

This volume intends to explore the trend referred to in a comparative perspective, with a view to testing three working hypotheses.

According to the *Working Hypothesis No. 1*, conflicts between supremacy of international law and national fundamental principles produce a legal *aporia*. Here the assumption is that such conflicts give rise to a conundrum which, as such, does not lend itself to any formal solution. Accordingly, a departure from the principle of supremacy would always entail a wrongful act.

Working Hypothesis No. 2, on the opposite, moves from the circumstance whereby the supremacy of international law is not infringed where the national value to be protected is susceptible to be internationalized. In other words, there would be some cases where national decisions refraining from giving effect in domestic legal orders to international law are based on rules of domestic law that conform to, or give effect to, another rule of international law. The real issue at stake, therefore, is not the clash between distinct legal orders, but the coordination of different international norms. As a consequence, a question of international responsibility arises only where the national decision results in a breach of the criteria for the resolution of antinomies in international law (*lex superior*, *lex specialis*, *lex posterior*, and so on).

Finally, *Working Hypothesis No. 3* is placed halfway between the first and the second one. Regardless of whether national values can be internationalized or not, national courts adopt a strategy of 'reasonable resistance', i.e. a kind of argumentation consisting of two elements: (i) the clear identification of the national fundamental principle, whose safeguarding entails a deviation from international law; (ii) an illustration of the reasons which justify resorting to fundamental principles as a tool to disregard international law (e.g. that the latter does not duly take into account individual interests and rights, or that it affects fundamental principles peculiar to the forum state). In terms of international responsibility, such a practice may be read in two different ways. On the one hand, while representing a threat to the supremacy of international law and entailing the forum state's international responsibility in any event, this practice is also a (tacit) confirmation of the ongoing

[11] See Chapter 11.
[12] See Chapter 16.
[13] See Chapter 6.

existence of this supremacy: if one assumes that the principle ends up being disregarded only where some strict conditions occur, its general acceptance would not be contradicted. On the other hand, this practice might be symptomatic of the emergence of a new circumstance precluding wrongfulness in customary international law.

In terms of the book's structure, two decisions made by this editor need to be further justified, namely i) that to prefer a comparative country study approach over an analytical monograph; and ii) the choice of the country studies.

As to the first decision, it is rather simple to observe that a book adopting a comparative approach can reach a degree of detail unattainable by any analytical monograph. Indeed, an in-depth analysis of the relevant practice across a vast array of legal systems requires a combined effort of scholars with specific expertise in both international law and the national legal system of the country concerned. No single author possesses the necessary depth of knowledge of such diverse practices. In point of fact, the studies published so far on this subject base their conclusions mostly on the analysis of a limited number of countries and neglect to consider those whose practice, although equally important, is less readily available or harder to contextualize.

This leads to the second aspect mentioned above, i.e. the choice of the country studies. From this angle the editor was faced with the very arduous task of selecting the states to be considered in the volume: every national legal system has its own distinctive features, and of course it was unthinkable to cover all of them. But the comparative approach always requires a certain degree of pragmatism and simplification; hence, the choice of the country studies fell on those regarded as the most fitting ones in order to describe the principle of supremacy of international law as it stands currently. Along this approach, the volume takes into account Germany[14] and Italy,[15] i.e. those countries to which the counter-limits doctrine may be traced back, as well as a sample of European countries (or, more precisely, countries belonging to the European legal area mostly due to their membership of the Council of Europe) where the doctrine of counter-limits has penetrated to some extent and given rise to a sufficiently significant judicial practice. These countries are France,[16] Greece,[17] the Netherlands,[18] Russia,[19] Turkey,[20] and the United Kingdom.[21] Even if not under the name of counter-limits, the need to reconcile the supremacy of international law with national fundamental principles has arisen also outside the European area. For this reason, the volume includes Western (or Western-derived) legal systems where a great number of national provisions or judgments have dealt with the matter under

[14] See Chapter 6.
[15] See Chapter 11.
[16] See Chapter 5.
[17] See Chapter 7.
[18] See Chapter 14.
[19] See Chapter 16.
[20] See Chapter 18.
[21] See Chapter 19.

scrutiny, namely Brazil,[22] Canada,[23] Israel,[24] Mexico,[25] United States,[26] and Japan.[27] Finally, the book comprises several legal systems whose practice presents both points of contact and of divergence with the Western world, namely China,[28] India,[29] Indonesia,[30] Nigeria,[31] and South Africa.[32] As is clear from this overview, the selected countries differ on a variety of points, including language, geographical position, cultural and political environment, legal tradition, and most importantly the overall approach to the relationship between domestic and international law.

In this light, the final aim of the volume should prove straightforward. Based on the information contained in the country studies, an attempt will be made to identify common tendencies as well as the main differences in the approaches followed domestically, to evaluate the initial working hypotheses and, above all, to define the implications of this practice for the future of the principle of supremacy of international law as we know it today.

[22] See Chapter 2.
[23] See Chapter 3.
[24] See Chapter 10.
[25] See Chapter 13.
[26] See Chapter 20.
[27] See Chapter 12.
[28] See Chapter 4.
[29] See Chapter 8.
[30] See Chapter 9.
[31] See Chapter 15.
[32] See Chapter 17.

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Brazil

Paula Wojcikiewicz Almeida

1 INTRODUCTION

The domestic implementation and application of international law in Brazil entails an increasing tension between the supremacy of international law and constitutional principles. This tension is especially visible in the various phases of the application of international law in Brazil whenever it conflicts with fundamental (constitutional) principles.

Understanding the current constitutional text and its impact on the application of treaties by domestic courts seems essential to foresee the extent of the openness to international law of the Brazilian legal system. It should be considered, however, that issues regarding the domestic implementation of international law are regulated by the Constitution only to a very limited degree. In practice, after legislative approval and ratification by the executive, there is still an *extra* domestic requirement in order for the international treaty to enter into force in Brazil, i.e. a promulgation decree. This requirement is not provided for in the constitutional text and derives, instead, from the practice of constitutional bodies. As will be discussed below, this practice reflects adherence to the dualist doctrine that manifestly ignores the conditions of entry into force of international treaties and may lead to international responsibility.

Once duly incorporated into national legislation according to constitutional requirements, international treaties are to be applied by the judiciary. The application of international law in Brazil revives the tension between supremacy of international law and constitutional principles, since there is no general constitutional provision establishing the rank of international treaties within the domestic legal order, except for human rights treaties. Most judgments dealing with this matter consider that, historically, international law's position within the internal legal order is equivalent to ordinary domestic law. As a consequence, superior tribunals have opted for granting primacy to domestic law over international treaties, except in cases involving the application of the *lex specialis* criterion.

A unique scenario concerns the hierarchy of human rights treaties in Brazil. In 2004, a major constitutional reform amended Article 5, paragraph 3, of the 1988 Brazilian Constitution and granted constitutional status to international human rights treaties provided that they have been concluded following the procedures established by Art. 5, paragraph 3, of the Federal Constitution. The practice of the Federal Supreme Court since the enactment of this amendment indicates that there is still much to be clarified, notably with regard to the hierarchy of human rights treaties when colliding with national fundamental principles.

Taking this context into account, the objective of this current research is to evaluate the interaction between international law and domestic law in Brazil, including national fundamental principles. It will firstly analyse the constitutional rules applicable to the incorporation of international law in Brazil (Section 2 below) and, secondly, examine the application of international law by domestic tribunals, its challenges and perspectives (Section 3 below). This analysis is necessary in order to assess the applicability of the volume's working hypotheses.

2 THE INCORPORATION OF INTERNATIONAL LAW INTO THE BRAZILIAN LEGAL ORDER

There is no specific constitutional provision that regulates the incorporation of international law in Brazil. The Federal Constitution of 1988[1] only regulates the rules applicable to the treaty-making power as foreseen in previous constitutions. In particular, the first part of Article 84, VIII, determines that the President of the Republic has 'exclusive' powers to conclude international treaties, conventions and agreements, as well as to maintain relations with foreign states.[2] Article 84, VIII, also requires that international treaties signed by the President should be submitted to the National Congress for approval. The Congress' powers in this respect do not extend to all treaties, though.[3] A joint analysis of Article 84 and Article 49, I, serves to distinguish the treaties that require Congress approval from those which are exempt from such a requirement. It determines that the Congress has an exclusive

[1] For an analysis of the political context in which the 1988 Constitution was adopted, see M. de Almeida Medeiros, *'Legitimidade, democracia e accountability no Mercosul'* (2008) 23 *Revista Brasileira de Ciências Sociais* 51 at 59.

[2] P. Daillier and A. Pellet, *Droit International Public* (7th ed., L.G.D.J., 2002), p. 127. For more details about the Brazilian practice, see C. de Albuquerque Mello, *Curso de Direito Internacional Público* (15th ed., Renovar, 2004), vol. 1, p. 195. The concession of powers to negotiate and conclude treaties in Brazil is regulated by Decree n° 5979–6 of 6 December 2006, which approves the regulatory structure and the framework of posts in commission and the functions delegated to the *Ministério das Relações Exteriores*, Brazil's ministry of foreign relations. Consequently, one of these functions, as an auxiliary institution of the President of the Republic, is that of establishing diplomatic negotiations that will result in international agreements.

[3] On this subject, see de Albuquerque Mello, above n. 2, p. 237.

competence to 'decide conclusively[4] on international treaties, agreements or acts which result in charges or commitments that go against national property'. In summary, this clause opens the path to the discretion of the executive power by allowing it to not submit to the National Congress international treaties that do not affect the national budget.[5]

This practice reveals that a treaty concluded according to the relevant constitutional provisions on treaty making is not immediately incorporated into domestic law. The incorporation of international treaties, indeed, is also dependent upon promulgation by the President.[6] Such an obligation was neither expressed in the 1824 Constitution, nor in the subsequent constitutional texts. Instead, it results from Brazilian constitutional practice since imperial times.[7] The promulgation requirement in Brazil was rooted in its frequent use in Portugal,[8] even though it was no longer in the constitutions of France, Luxembourg and the Netherlands.[9] Through promulgation, the President of the Republic states that the procedure provided for by the Federal Constitution has been duly followed, grants authenticity to the text and makes it executable.[10] The promulgation decree that reproduces the text of the treaty

4 On this definition, see H. Valladão, '*Conceito moderno de ratificação dos tratados e convenções, democrático, originário do Direito Internacional americano*', in A. P. Cachapuz de Medeiros (ed.), *Pareceres dos consultores jurídicos do Itamaraty* (Senado Federal, 2002), vol. 6, p. 88.

5 P. Wojcikiewicz Almeida and M. Fajardo Linhares Pereira, '*Revisitando os efeitos da assinatura de um tratado internacional: da obrigação de boa-fé à sujeição internacional do Estado*' (2013) 9 *Revista Direito GV* 171.

6 J. Hermes Pereira de Araújo, *A processualística dos atos internacionais* (Ministério das Relações Exteriores, 1958), p. 243.

7 The Treaty that recognized the independence and the empire between Brazil and Portugal, signed 29 August 1825, was promulgated by the Decree of 10 April 1826, after the exchange of ratification instruments, in A. P. Cachapuz de Medeiros, *O poder de celebrar tratados* (Sergio Antonio Fabris, 1995), p. 470. For more details referring to the system of promulgation and its adoption in Brazil, see Hermes Pereira de Araújo, above n. 6, at 249–50. On the requirement of promulgation of international acts for their effectiveness in the internal order, see A. A. Cançado Trindade, *Repertório da prática diplomática brasileira do Direito Internacional Público, 1889–1898* (Fundação Alexandre de Gusmão, 2012), p. 81; A. A. Cançado Trindade, *Repertório da prática diplomática brasileira do Direito Internacional Público, 1899–1918* (Fundação Alexandre de Gusmão, 2012), pp. 125–27, pp. 147–68; A. A. Cançado Trindade, *Repertório da prática diplomática brasileira do Direito Internacional Público, 1919–1940* (Fundação Alexandre de Gusmão, 2012), p. 120; A. A. Cançado Trindade, *Repertório da prática diplomática brasileira do Direito Internacional Público, 1941–1960* (Fundação Alexandre de Gusmão, 2012), pp. 86–90.

8 Hermes Pereira de Araújo, above n. 6, at 250.

9 According to Paul Reuter, *Droit international public* (4th ed., P.U.F., 1973), p. 39, the requirement of promulgation is disappearing. For a study on countries that have adopted the system of promulgation, see Hermes Pereira de Araújo, above n. 6, pp. 245–49.

10 In this respect, see C. Debbasch, J.-M. Pontier, J. Bourdon and J.-C. Ricci, *Droit constitutionnel et institutions politiques* (4th ed., Economica, 2001), p. 736; H. Accioly, '*A ratificação e a promulgação dos tratados, em face da Constituição Federal Brasileira*' (1948) 4 *Boletim da Sociedade Brasileira de Direito Internacional* 5 at 10; and A. Mestre, '*Les traités et le droit interne*' (1931) 38 *Recueil des Cours de l'Académie de Droit International* 233 at 256. According to R. Carré de Malberg, the promulgation 'has a triple objective: initially it represents a confirmation of the adoption of the law by the legislative institution; it certifies the existence of the law and of its text; it is the affirmation of its imperative value and executability' (free translation from author), in R. Carré de Malberg, *Contribution à la théorie*

serves to ensure that the content of the domestic rule corresponds to the content of the international legal norm that it aims to incorporate, as well as to confirm compliance with the legislative procedure.[11] However, the Executive power still holds a reasonable margin of manoeuvre since nothing guarantees that the promulgation will indeed occur.

Furthermore, entry into force occurs only after the publication of the promulgation decree. This decree is published in the *Diário Oficial*, according to the Portuguese tradition.[12] The treaty may only become domestically applicable after the publication of the promulgation decree.[13] The promulgation practice gives transparency to the conclusion of international agreements and also ensures their execution in domestic law.[14] This is because, unlike the promulgation decree, the publication of the legislative decree that approves an international agreement is not followed by an integral version of its text: the *Diário Oficial* only mentions the international agreement that has just been approved. This practice has been applied since the adoption of the first Constitution of the Republic.[15]

However, the promulgation requirement does not present any other benefits.[16] On the contrary, it seems to be inadequate in the international sphere, as the entry into force of an international agreement at the domestic level does not coincide with its entry into force at the international level. According to the data provided by the Brazilian Ministry of Foreign Affairs, there are currently 568 multilateral treaties that have been ratified and are in force at the international level, but are not in force domestically because they have not yet been promulgated.

In the absence of other constitutional provisions that regulate the incorporation of unilateral acts adopted by international organizations,[17] the same formula prescribed by Articles 49, I, and 84, VIII, is used to proceed with their incorporation. The applicability of the classic international law mechanisms to the incorporation of

générale de l'État (Sirey, 1920). See also J. Grandino Rodas, *A publicidade dos tratados internacionais* (Revista dos Tribunais, 1980), p. 200.

[11] H. Triepel, '*Les rapports entre le droit interne et le droit international*' (1923) 1 *Recueil des Cours de l'Académie de Droit International* 77 at 97. See also C. de Albuquerque Mello, *Curso de Direito Internacional Público* (15th ed., Renovar, 2004), p. 240.

[12] Cachapuz de Medeiros, above n. 7, p. 470.

[13] Debbasch, Pontier, Bourdon and Ricci, above n. 10, pp. 254–55.

[14] Hermes Pereira de Araújo, above n. 6, at 251. For more details referring to the obligation of promulgation and evolution of Brazilian constitutional texts, see Hermes Pereira de Araújo, above n. 6, at 249–54.

[15] *Ibid.*, pp. 255–56.

[16] For Georges Scelle, no act of reception or of internal authority is necessary to confer a binding force on treaties. There is, furthermore, no need for promulgation, for the act of promulgation does not have any other legal meaning beyond affirming the validity of the legislative act and precisely determining the moment it begins to produce effects, G. Scelle, '*Règles générales du droit de la paix*' (1934) 46 *Recueil des Cours de l'Académie de Droit International* 327 at 452.

[17] See P. Daillier and M. Forteau, *Droit International Public* (8th ed., LGDJ, 2009), p. 404; M. Virally, 'Unilateral acts of international organizations', in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (Dordrecht: Martinus Nijhoff, 1991), pp. 241–63.

acts by international organizations has been repeatedly confirmed by the *Supremo Tribunal Federal* (*STF*), Brazil's Federal Supreme Court.[18]

In 2004, Article 5, paragraph 3, of the 1988 Constitution was introduced by the Constitutional Amendment n° 45 and created a different scenario for the incorporation of human rights treaties in Brazil. It states that international human rights treaties and conventions, which are approved in each House of the National Congress in two rounds of voting by three-fifths of the votes of the respective members, shall be hierarchically equivalent to constitutional amendments. According to this constitutional provision, international treaties concerning the protection of human rights approved in accordance with the referred procedure will have constitutional hierarchy. However, the question arises as to the hierarchy of human rights treaties incorporated, both prior to the enactment of the aforementioned constitutional amendment and also after the enactment of the amendment, which have not been approved by the required majority.

3 THE APPLICATION OF INTERNATIONAL LAW BY BRAZILIAN SUPERIOR TRIBUNALS

After incorporation, international law is to be applied by domestic tribunals. Customary international law is not frequently applied or referred to by courts in Brazil.[19] An exception concerns the topic of jurisdictional immunities of states since there is no legal provision on this matter. The only mention of customs in the Brazilian legal system can be found in Article 4 of the Introductory Law to the Brazilian legal order, embodied by Decree n° 4657, which states that 'when the law is silent, the judge will decide the case according to the analogy, customs and general principles of law'. Therefore, it appears that customary international law mostly serves to fill in gaps, being applicable only when no conflicting domestic law exists.

The Supreme Court has relied on customary law to rule in a few cases.[20] In a renowned case, the *STF* denied immunity to the Federal Republic of Germany in a claim involving responsibility for the violation of labour rights. In line with the separate vote of Minister Francisco Resek, the Court applied the principle of restrictive immunity and, in particular, distinction between acts *jure imperii* and *jure gestionis*. This reasoning confirms the subsidiary nature of

[18] In an emblematic case, the *STF* affirmed that the reception of treaties and agreements concluded by Brazil in the framework of *Mercosur* is subject to the same constitutional rules that govern the incorporation of treaties and other international agreements in the Brazilian legal order: *Agravo Regimental* in rogatory letter n.° 8.279–4, Justice Celso de Mello, judged on 17 June 1998. See also O. A. Drummond Cançado Trindade, *O Mercosul no direito brasileiro: incorporação de normas e segurança jurídica* (Del Rey, 2007), p. 94; Cançado Trindade, Repertório da prática diplomática brasileira do Direito Internacional Público, 1889–1898 above n. 7, p. 94.

[19] A. Lipp Pinto Basto Lupi, '*O Brasil é dualista? Anotações de normas internacionais no ordenamento brasileiro*' (2009) 46 *Revista de Informação Legislativa* at 38.

[20] Federal Supreme Court, *Ação Civil* n° 9696, Justice *rapporteur* Sarney Sanches, judged on 31 May 1989, published in the *Diário Oficial* on 12 October 1990.