Colloquium on "Method and Methodology in International Law"

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The purpose of my research is to determine the scope of the duty not to recognise the consequences of a serious breach of a *jus cogens* norm (art. 41, par. 2, ARSIWA). Whereas it is widely admitted that such a duty has a customary value, a precise list of the acts that can be recognised and acts that cannot is lacking. The so called "Namibia exception" gives the possibility to recognise some acts of an illegal authority in favour of the inhabitants of an occupied territory and international courts decisions referring to this exception have already been analysed. Therefore, I will focus on the national case-law related to this issue. In which circumstances does a domestic judge give legal effects to an act adopted by an authority born in violation of a *jus cogens* norm? Are national case-laws in line with international case-laws? For instance, do national courts make a reference to the "Namibia exception" like ECtHR does or do they rely upon other considerations?

I will first expose the methodological questions I faced (**A.**). Then I'll give the solutions I found/chose (**B.**). Finally, I will briefly mention the main methodological issues I still have to explore (**C.**).

A. THE METHODOLOGICAL QUESTIONS RAISED WHEN DEALING WITH DOMESTIC COURTS DECISIONS IN INTERNATIONAL LAW

I faced **several methodological questions**. Some are more theoretical, other more practical, even if all these questions are linked. On a theoretical level, the different questions can be summed up in one: *what am I doing?* Am I trying to determine a customary rule using domestic courts decisions as State's practice *(law creation)*? Or am I using the case-law of the national courts as a subsidiary mean for the determination of rules of law (art. 38, par. 1, d, ICJ Statute) *(law enforcement)*? On a practical level, how can I find these national decisions? How should I select them? How broad/diversified must the material be to obtain significant results? How can I deal with the language barrier or the diversity of the different national legal system?

B. The methodological framework I chose to apply to my research: the first steps

My current choices can be laid out as follows. The distinction between law enforcement and law creation functions of domestic courts is artificial. Every national court decision has both values[1]. After this assumption, one can follows a comparative international law approach like Anthea ROBERTS suggests by "loosely fus[ing] international law substance with comparative law methodologies"[2]. But such an approach seems less persuasive in order to determine the content of the positive duty not to recognise. This assumption – *that a clear division between law enforcement and law creation functions of domestic courts decisions is artificial* – also seems to make it difficult to follow the method promoted by the ILC's works related to the determination of customary law, that on this precise point is more formalist.

All this led me to a less formal approach. Following the works of André NOLLKAEMPER, I consider domestic courts as "a key component in the protection of the international rule of law [that] do not protect domestic law against international law, but protect international law against itself"[3]. Therefore, **I see domestic courts as State's organs able to sanction a serious breach of a *jus cogens* norm**. Thus, it doesn't matter anymore whether the national courts decisions rely upon an obligation originating from international law (ILC's approach) or from national law (such as "public order", for instance). As soon as a decision gives or denies any effect to an act of an authority born in violation of a *jus cogens* norm, it becomes relevant for my purpose.

Thus, I will assume that all domestic courts decisions dealing with an act issued by an internationally illegal occupying authority as a valid material in order to determine the scope of the duty not to recognise consequences of a serious breach of *a jus cogens* norm.

All these considerations can be exemplified as follows. On March 2021, a French Court of Appeal rendered its decision related to the dissolution of an association whose purpose was to improve the ties between France and the "People's Republic of Donetsk" (PRD). The request was brought before the Court of Appeal by the Attorney-general (*Procureur général*) and relied

[1] A. ROBERTS, « The Role of National Courts in Creating and Enforcing International Law », *International and Comparative Law Quarterly*, 60, 2011, pp. 57-92.
[2] *Ibid*., p. 73.
[3] A. NOLLKAEMPER, *National Court and the International Rule of Law*, OUP, Oxford, 2011, p. 304; *adde* A. NOLLKAEMPER, « Internationally Wrongful Acts in Domestic Courts », *American Journal of International Law*, 101, 2007, pp. 760-799.

upon article 3 of the 1901 French Law relating to the Associations[4]. Under this provision, an association based on "illegal object" or "contrary to the laws" can be declared null and void. In its motivation, the Court of Appeal hold that this association should be considered similar to a State's official representation (like an embassy or consular office). Therefore, the Court of Appeal concluded that this association was grounded with a purpose contrary to the laws and that it should be considered null and void. But it never mentions an *international duty not to recognise* the situation in the Donbass and the consequences of it, nor the legality or not of the PRD *in se.* However, these elements lie at the heart of my research topic. The decision only refers to the "souveraineté de la France" in its right to recognise or not a third State and it also refers to the international rules relating to diplomatic and consular relations[5].

How can I handle this case? I see two options. First option: I can decide to ignore this decision, because the national judge does not refer to an obligation of international law. That seems to follow the ILC's position, when it stands that "seeking to comply with domestic law, is not acceptance as law for the purpose of identifying customary international law: practice undertaken with such intention does not, by itself, lead to an inference as to the existence of a rule of customary international law"[6]. Second option: I can decide to take this decision into consideration in order to determine the scope of the duty not to recognise – or *to make a contribution* to the determination of the scope of the duty not to recognise, *using domestic courts case-law*. That's the choice I did. But then I need to explain how/why did I make this choice. Which theoretical framework allows me to do that? I need something to put importance more on the effects of the national decisions than on their formal motivation. I think that the framework proposed by NOLLKAEMPER allows me to do that. Indeed, the purpose of the duty not to recognise is to impede the *fait accompli*; to avoid that a situation born in grave violation of a peremptory norm can be consolidated through the years. As I assume that domestic courts are State's organs able to sanction a serious breach of a *jus cogens* norm, I can therefore consider every single decision that impede or favour such a consolidation/legitimation of the *fait accompli* as a pertinent decision in order to determine what can be recognised and what

[4] « Toute association fondée sur une cause ou en vue d'un objet illicite, contraire aux lois, aux bonnes mœurs, ou qui aurait pour but de porter atteinte à l'intégrité du territoire national et à la forme républicaine du gouvernement, est nulle et de nul effet. »

[5] « Il doit ainsi être considéré que la création unilatérale d'une représentation officielle de la République populaire de Donetsk méconnaît d'une part la souveraineté de la France en sa prérogative de reconnaître ou non un État tiers et d'autre part les règles internationales régissant l'établissement de relations diplomatiques et consulaires. »

[6] ILC, *2018 Draft conclusions on identification of customary international law, with commentaries*, A/73/10, commentary to Conclusion 9, par. 4, p. 139.

cannot, notwithstanding the material considerations[7] that led the judge to his/her decision. In this kind of theoretical view, the expressed motivation of the judge is less relevant[8]. Even if the judge bases his/her decision on a domestic rule, the purpose can be the same: *avoid the consolidation of that illegal situation*. That's precisely the example of the French Court of Appeal I mentioned.

On the practical side, I will proceed by analysing a set of international law journals, such as *Revue belge de droit international, Anuario Español de Derecho Internacional, Netherlands Yearbook of International Law*, etc. In these journals I will focus on the sections dedicated to the national practice or domestic courts decisions and I will look for decisions relevant to my topic. I will also use more specific collections, like the *International Law Reports* or *the Oxford Reports on International Law in Domestic Courts* online database. Finally, I will also check my results with online search tools available for the same above-mentioned international law journals, using key words in the search bar (keywords like *Nagorno Karabakh*, *Namibia exception*, *Crimea*, *Western Sahara*, etc.). When possible, I will first set the search tool on "case-law", and then broaden the result (I already found some interesting case-law not reported in any of the journals I selected but mentioned in a footnote).

I set some milestones. I focus on decisions published since 1945. I've planned to analyse some 40 journals. From the *International Law Report*, I've found approximatively 50 domestic courts decisions relevant to my research topic (very few of them make an explicit reference to a duty not to recognise). From a conference I attended two months ago – where the speaker said that he was working on a broader issue that mine –, I can estimate that I will probably find up to 80-100 relevant decisions.

C. The methodological framework I chose to apply to my research: the missing parts

Other problems remain. Some probably are unsolvable questions, while others require further exploration.

On the practical side, the main unsolved question remains *how can the decisions be found?* What one can find in international law journals or in databases cannot be considered as comprehensive of all the relevant national decisions. They are selected (*by whom? according to which criteria?*), translated if necessary and then possibly published. I thus must recognise

[7] As opposed to procedural considerations.
[8] Another problem is the difference between expressed motivation and hidden motivation.

that I have a low level of control of the data I select. Conversely, when dealing with international courts case-law or with UNSC resolutions, one examines raw data in open-access. Trying to get something out of domestic courts decisions involves analysing data already processed and selected by someone else. Here I can use the same example of the 2021 Court of Appeal's decision related to PRD. How did I find it? Until May 5th – when I last checked – I saw no comment nor mention of this decision in any law reviews nor in the International Law Report. I knew about this decision because French media talked about it. And then I simply sent an email to the office of the Attorney-general to ask if they would allow me to see this decision for scientific purpose. And they agreed.

On the theoretical side, I must implicitly deal with the divide between international law and national law. As I said, I will consider as relevant even those national decisions denying/granting some legal effects to the acts of an authority subject to the duty not to recognise basing their legal reasoning on domestic considerations like "public order". Finally, all those considerations pertain to the determination of *what international law is*.

In conclusion, two main issues remain: (1) what is the link between international law and national law? (2) how can one determine the law based on hidden or hardly accessible sources?