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The Implementation of International Law in the French Legal System

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Introduction

This thesis seeks to investigate the complex nature of the relationship between international and domestic law, through the French legal system as a case study. The analysis will explore whether the system adopts a monist or dualist outlook, as well as the normative French hierarchy, and the position of international norms therein. The relationship between the international and domestic legal spheres has long been the subject of debate among legal scholars, due to the tension between the sovereign States and their obligations dictated by the international order. In order to understand the complexity of their relationship, it is necessary to examine the implementation of international obligations into States, on a case-by-case basis, given the absence of a binding global framework on the matter.

This study is grounded upon the classic theoretical framework that distinguishes between monism, which views international and domestic law as part of a single legal system, and dualism, which regards them as separate and distinct legal orders. Considering this distinction, the debate will be then applied to the French example. Besides answering the question of whether the French system is a monist or dualist one, the French normative hierarchy and the judicial impact of international law within this context will also be examined. In fact, the interaction between international law and domestic law in the French legal system is a complex topic that has sparked significant debate among legal scholars throughout the years. In particular, this thesis will build upon the analyses of the French Constitution conducted by Friedrich (1959) and Wahl (1959), as well as on the specific investigations over the implementation of international law in the French system operated by Decaux (2011) and Rivier (2019). The debate on the relationship between domestic and international law in France is especially due to the diverse approaches to international law of the different French Constitutions arising with each of the French Republics. Of course, the present study is based on the current Constitution of France, namely the 1958 Constitution of the Fifth French Republic, but will not be short of references to the previous Constitution, namely the 1946 Constitution of the Fourth Republic.

This thesis supposes that the 1958 Constitution provides a monist legal framework, but it is based on a dualistic conception of international law. In fact, the reception of international norms takes place through an automatic standing mechanism and provides for their supra-legislative nature, as established through the crucial Article 55 of the Constitution. Nonetheless, the supremacy of the Constitution and the emphasis of the Constitution itself

over national sovereignty and the will of the people, as set in Article 3, raises questions about the usual classification of the French system as a monist one (Decaux, 2011; see also Rivier, 2019): here lies the French "false monism" (Decaux, 2011). Moreover, due the particular organization of the French court system, the incorporation of international norms displays a dualist approach.

The theoretical framework provided in the first chapter sets out the monistic and dualistic theories of international law, alongside with their respective critiques, as well as the technical interaction of norms provided by the different mechanisms of implementation, namely automatic standing incorporation, statutory and automatic legislative *ad hoc* incorporation, and self-execution of treaty provisions. Crucial to the present examination is the exposition of the hierarchy of norms between national and international law within domestic legal systems. This section explores the primacy of ordinary domestic law versus international norms, the effects of nationalist versus internationalist approaches, and the reception of customary law and other sources of international law.

Moving on to the specific context of the French legal system, the thesis will delve, in the second chapter, into the historical background and evolution of the French Constitution, the specific roles played by the executive, legislative, and judiciary in the reception and application of international law, and the implications of this for the normative hierarchy within the French legal system. Title VI of the Constitution plays a central role in this analysis, as it outlines the formal implementation of international law within the French legal system. The Constitution grants the President of the Republic significant powers in negotiating and ratifying treaties, reflecting a strong executive role in foreign policy and treaty-making. This executive dominance, coupled with the constitutional provisions that automatically incorporate ratified treaties into domestic law, suggests a monist approach. However, this argument will be rebutted through the concept of legal nationalism within the French Constitution, which upholds the formal supremacy of Constitutional norms and values: this is evident in the hierarchy of norms, where the Constitution takes precedence over international law. In this context, the influence of French legal formalism and the positivist legal culture (Jouannet, 2006) will be taken into account to understand the French such a nationalistic legal approach (Decaux, 2011).

The third chapter of the thesis discusses the central theme of the normative hierarchy in France, as well as the role of the judiciary in applying international law and the resolution of

conflicts between international and domestic norms. These matters further complicate the picture set out in the second chapter, as judicial practice does not always align with the theoretical monism suggested by Article 55. The chapter examines the hierarchy of international law within the French legal order, including the recognition of the primacy of international norms over domestic law – through the landmark *Vabre* and *Nicolo* Judgments – and the aforementioned concept of legal nationalism. Furthermore, it investigates mechanisms for harmonizing French law with international standards and the role of the judiciary, including that of ordinary courts and that of the highest French courts – the *Conseil Constitutionnel*, the *Conseil d'État*, and the *Cour de Cassation* – in applying international law.

Chapter One

The Implementation of International Law in National Legal Systems: A General Framework

This chapter aims at providing the theories concerning the different nature of international law and national law, identifying the issues posed by this separation, as well as analyzing the practices of reconciliation at the State level of the two legal spheres, including their reception and hierarchy. In particular, the consequences at the State level of the distinct legal character of international norms need to be addressed. In fact, the separate generation of the latter and domestic law entails not only that they might represent different sources, according to certain theories, but also that they cover different scopes, bind different legal subjects, and rely on different enforcement mechanisms (Gaeta, Viñuales & Zappalà, 2020). Fundamentally, national or municipal law binds individuals as legal subjects, in light of their relationship with the sovereign authority, while international law binds State entities themselves in relation to other State entities or the global communities. Hence, it is necessary to analyze the complex relationship between these normative spheres which is reflected in the reception of international norms into domestic legal systems. The analysis of the theoretical interaction between the two normative systems is based on the perceived separation – if any – between them, according to different legal theories.

1.1. The Legal Interaction Between National and International Norms: Theories and Critiques

The problematic reconciliation between these two sources of law is manifested at the State level through the issue of reception of international law. It is fundamental for State authorities to interpret and apply international norms in a coherent manner with respect to their own legal traditions, cultural values, and political priorities, not to mention the consistency with the content of existing domestic norms. This can lead to divergent interpretations and implementations in the process of incorporation of international law at the domestic level: thus, it is pivotal to establish whether there is a substantial difference or separation between the two systems, and prioritizing one over the other considering their possibly different natures. Monism and dualism, which entered the debate about international law in the 20th century, are the two main theoretical strands concerning this issue. It is essential to underline that before the two World Wars, the conception of international law as a separate legal system was not widespread, let alone its primacy over the internal law of the sovereign State (Gaeta *et al.*, 2020). Before what is now considered the classic debate between monism and dualism,

the positivist school proposed a subject-based distinction between the two legal spheres, as well as a possible resolution to conflicts of norms. Thus, it is relevant to investigate all of the three theories, for their historical significance and because they serve as the basis for the practical choice of modality of implementation of international norms within domestic legal systems.

1.1.1. Positivist Subject-Based Distinction Between National and International Law

Before delving into the classical antithesis between monism and dualism, it is relevant to investigate the initial stances on the topic of the separation between national and international law, taken by the positivist thinkers in the 18th century, widely regarded as pioneers of international law. Positivist writer Jeremy Bentham created the term "international law" referring to it as the law which relates to "*the mutual transactions between sovereigns as such*" (1789, p. 236): by stating this, Bentham focused on the subject-based definition of the discipline, separating municipal law which applied to individuals, whereas international law applied to States. Early 19th century thinker Joseph Story further developed this idea through the categorization of international law into "public" and "private" international law, where the former applied to international matters between States, and the latter applied to international matters between individuals, which ultimately corresponded to national or municipal law (Janis, 1984). This subject-based distinction between international and national law, however, was conflicting with many early practical examples displaying how individuals can be affected by international norms: in *Respublica v. De Longchamps* (1784), the Pennsylvania Court of Oyer and Terminer declared that "the law of nations" is part of the American municipal law; in the landmark case *The Paquete Habana* (1900), the United States Supreme Court ruled that "*[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination [...]*" (The Paquete Habana, 1900, p. 700). Therefore, individuals had the right to rely on international rules and bring them before national courts. Later, the 1945 Nuremberg Trials demonstrated that individuals can be held directly accountable on the basis of international law: the Nuremberg Tribunal, in its October 1, 1946, Judgment, held that "*[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced [...]*" (International Military Tribunal, 1946, para. 447). The practical realities of the application of international law illustrated that a subject-based distinction cannot explain the interaction

between national and international law. The classic debate between monistic and dualistic theories is able to include a source-based approach, which better describes the relationship, even through two opposite perspectives (Janis, 1984).

1.1.2. Monistic Theories

Monism considers the international and domestic legal orders to constitute a single system. This strand of thought naturally entails normative conflicts between the two kinds of norms, as international law necessarily has to be incorporated in the separate realm of domestic legislation, possibly resulting in clashes of norms. Thus, a normative hierarchy has been developed within the context of monism, leading to two different lines of thinking: internal monism, according to which municipal or national law has the supremacy over international law (Gaeta *et al.*, 2020), and international monism, which will be analyzed in the subsequent sections. The concept of internal monism was the first approach to the implementation of international norms to be formulated, and it is mainly based on the primacy of the sovereignty of the national entities, and their equality among each other – corresponding to the Westphalian system (Wolfrum, 2006). States are the largest societal units, and they are the ones responsible for the horizontal development of international law and its consent-based application. Therefore, it is logical to recognize that domestic law is superior to international law, which derives from and is subsumed into the former. Internal monism denies the existence of international law as a distinct, autonomous, and universal body of law, as Westphalian Nation-States were created through nationalism in opposition to universal and imperial entities, such as the Roman Empire or the Pope (Wolfrum, 2006). Following this logical unitary and State-centered perspective, international law needs not to be translated or incorporated into the domestic legal system, since it is already part of the internal law of the State, which applies it when it is deemed suitable for its interests: monism clearly reflects the nationalist and realist view of international relations. As a consequence, in pure monist States international law is automatically incorporated into the municipal system, as the act of ratification of a treaty makes the norms have an immediate effect into national law. However, according to internal monism, the latter has supremacy in disputes with international law, even though it is unlikely for a State to take a single-handedly purely monist approach (Shelton, 2011). German-British lawyer Georg Schwarzenberger (1908–1991) was one of the first jurists to adopt this approach, in that he regarded many aspects of international law as products of nationalist power politics. His close stance to the realist school of thought of Morgenthau and Kissinger, as appears clear from his work *Power Politics* (1941), is

associated with his conception of primacy of internal law over the international one (Steinle, 2004). The monist view of the supremacy of internal law poses questions about the developments of international law, especially with regards to the role of *jus cogens* and customary law, which will be dealt with subsequently, and the direct effect of international law on individuals: individual criminal accountability, in relation to the aforementioned Nuremberg Trials, and the protection of human beings through international "safety nets", such as human rights safeguards represent prominent practical examples to this theoretical issue of hierarchy of legal systems. Thus, a pure monist approach could not reflect the necessities of the changing international panorama (Shelton, 2011).

1.1.3. Dualistic Theories

Dualism regards international and domestic law as two distinctly separate legal systems, operating with different principles under different authorities, with no hierarchical interaction between each other, even if each with its own internal hierarchy (Gaeta *et al.*, 2020). This school of thought emerged in the second half of the 20th century as opposed to internal monism, based on national case-laws recognizing the effects of international law into their domestic legal system, and the general changing attitude of States towards international law. In fact, it is relevant to note that after the two World Wars, as a response to the failures of internal law, countries became more receptive of international law: the aforementioned "safety nets" were necessary to guarantee the protection of human beings and democratic governance by means of international law should domestic law be unable to do so. Besides this historical perspective, the logical standpoints of the separation between the two systems, is provided by their difference as to the subjects they bind, the sources they are derived from, as well as the content they cover. Municipal law has individuals or groups of individuals as its subjects, whereas international law has States as its subjects. Domestic and national legal systems are generated through separated procedures, which means that they are derived from different sources: while the former derives from the Constitution, parliamentary statutes, judicial precedents and acquires legitimacy through the sovereign authority, the latter is determined through a horizontal process of understanding between States, which ultimately ratify treaties and agreements, and accept customs. Finally, domestic law deals with the internal functioning of the State and its relationship with its residents, whereas the content of international law addresses and regulates the relations between sovereign entities (Gaeta *et al.*, 2020). Due to their different nature, dualism maintains that international law must go through specific legislative or constitutional processes to be incorporated within a domestic

legal system, otherwise they are not automatically binding nor directly applicable. As a result, domestic legislation or constitutional provisions are necessary to transform international treaties, conventions, or customary norms to give them effect. Therefore, dualism creates a procedural hurdle for the enforcement of international law within a State's legal system and entails that international law relies entirely on domestic mechanisms of reception to be effective. This theoretic stance was developed by German publicist Heinrich Triepel (1868-1946) and significantly developed by the Italian Dionisio Anzilotti (1867-1950). As mentioned earlier, this approach is provoked by the 20th century trust in international law to guarantee the protection of human rights and democratic governance, as national laws cannot modify or repeal international laws, since they belong to separate legal spheres, reflecting a necessity for international cooperation. At the same time, a certain degree of nationalism can be manifested through the dualistic standpoint, as a dualistic State may refrain from translating international norms into its domestic legal system, when it is deemed contrary to the national interest: this represents an "emergency exit" for States in cases of conflicting international and domestic laws (Gaeta *et al.*, 2020).

1.1.4. International Monism

A third approach to the qualitative and hierarchical classification of international and domestic laws is represented by international monism. Like internal monism, the international monism conceives the international and domestic orders to form a single legal system, but in which it is international law to have supremacy over the other. This idea is based on the assumption that international law is universal, since it is generally applied to State entities and, as a consequence, their residents. According to Austrian jurist Hans Kelsen (1881-1973), the most prominent exponent of this doctrine, subjects of international norms do not differ substantially from those of domestic ones: both systems ultimately oblige individuals to abide by certain obligations, whether as human beings, State officials, residents of a country. Furthermore, as of the sources which the two legal spheres stem from, municipal law stems from international law, since the necessity of transforming international norms into the domestic legal system is a matter of the latter, not dictated by international law, which exists and binds entities independently from its formal incorporation. Kelsen believes that both systems gain legitimacy from the same single basic *Grundnorm*, which is seemingly not a form of positive law, but rather, as the scholar puts it, a hypothesis of juristic thinking (Gaeta *et al.*, 2020). That being said, the choice between international or domestic law as having supremacy over the other is not entirely made over legal and technical considerations,

but rather represents a practice-based solution. This supremacy is manifested through the international responsibility the State incurs in should it refrain from non-complying with international norms, even in absence of an actual coercive authority. Thus, in the Kelsian perspective, international law needs not to be incorporated in domestic legal systems through specific legislative procedures, as it is automatically applicable, and any conflict between international and domestic law must be resolved in favor of the former, in the quality of *jus super partes*. However, the Kelsian choice of international law as having primacy over domestic law must be regarded as political and ethical rather than purely legal (Wolfrum, 2006). Another notable advocate of international monism is British international and human rights lawyer Hersch Lauterpacht, who called, in his work *The Function of Law in the International Community* (1933) for the direct applicability of international law within national legal systems, believing in the primacy of international law and its integration into domestic law (Koskenniemi, 2004).

In conclusion, it must be highlighted that the three theoretical strands here provided were developed through State practice. Each reflects the changing individual perspective on international law, but none of them is able on its own to mirror the realities of the relationship between international and domestic norms. While monism reflected the Westphalian nationalism that characterized international law at its early stages, dualism was capable of appreciating the domestic necessity of transforming international law to receive it into the municipal system, whereas international monism adapted to the direct effect of international law onto individuals. Accordingly, every State presents certain aspects of the three different schools of thought, ultimately based on the ethical and practical preferences of the States' Constitutions or national authorities. Hence, it is essential to analyze the practical incorporation of international norms into domestic legal systems to grasp the reality of its complexity.

1.2. The Legal Interaction Between National and International Norms: Practice

Many of the questions posed by the evolving relationship between the two legal systems remain unanswered by either of the three theories discussed herein, and provide scope to empirical investigation. In fact, in absence of a doctrine able to thoroughly explain the matter, the assessment of their interaction must be tested through the practice of incorporation of international norms within the municipal legal systems, in other words, the effects of monistic and dualistic theoretical frameworks giving rise to domestic trends of incorporation.

Regardless of their adherence to a more or less (international) monistic or dualistic approach, States ultimately decide on their own the modalities of implementation of international norms. This is compatible with both the increased importance of international law throughout the 19th and 20th century, as well as the necessity for democratic participation of the citizens within the national decision-making process, which arose as a response to the two World Wars. It can be argued that every nation manages the reception of international norms into their legal system at least to a minimal degree in order to fill the "democratic deficit" (Verdier & Versteeg, 2015) left by the international law-making process, and guarantee the participation of the national legislatures, and, consequently, citizens. The matter is almost entirely up to the municipal authorities, given the absence of specific international regulation. Indeed, international law provides that States cannot invoke their own domestic legislation as a justification for their non-compliance with international law. As established through the 1872 Alabama claims, and further developed by the Permanent Court of International Justice (*Cf. Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, *Certain German Interests in Polish Upper Silesia, Exchange of Greek and Turkish Populations*), States have the duty to bring national law in conformity with obligations under international law (Gaeta *et al.*, 2020). This principle was also codified in Article 27 of the Vienna Convention on the Law of Treaties, as well as in Article 32 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). The former states that "*[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.*" Article 32 ARSIWA provides that "*[t]he responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part."* Traditionally, practice showed no particular adherence by nations to this duty, as well as a clear-cut divide between monist and dualist States: a significant number of States considered the transformation of international rules in the domestic legal system as a sovereign matter to be balanced with national interests, resulting in national legal systems to be generally more receptive to international law than others (Verdier & Versteeg, 2015). However, with the increasing number of international treaties, norms, and bodies, and the rising democratic concerns, the divide between monists and dualists has flattened, and States, throughout the second half of the 20th century, have started to adopt similar modalities of incorporating international law into their own legal systems, notwithstanding their freedom of choice for what concerns this internal topic. The prevalent basic trends are analyzed herein.

1.2.1. Automatic Standing Incorporation

In some States, the national Constitution or an internal law provide that international rules, should they be part of a treaty or customs, have direct application inside a domestic legal system, automatically acquiring binding nature over State officials, nationals and residents, without the need to pass *ad hoc* national legislation or statutes. This approach, referred to as automatic standing incorporation, entails that the mere act of a State signing or becoming a party to a treaty results in its provisions directly becoming valid and binding at the State level. Automatic standing incorporation, which contrasts the dualistic view of international and domestic law to stand by the Kelsian perspective, allows domestic legal systems to continuously comply with the evolving international norms without the necessity of further incorporation measures. Such a permanent adjustment permits the State not to spend time and resources to pass specific municipal pieces of legislation over the approval of international law but automatically complying with it. Nonetheless, when an international rule is terminated or conflicts with an internal one, corresponding modifications to the domestic system must take place. For instance, Article 28(1) of the Greek Constitution states that "*[t]he generally recognised rules of international law, as well as international conventions as of the time they are ratified by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law.*" Therefore, treaties enter into force immediately after their signature, without the interference of the constitutionally competent authority and without the intervention of ratification procedures, acceptance, or approval, and without their submission to the Parliament (Yokaris, 2011). Other examples of countries adhering to an automatic permanent incorporation of international law are Bulgaria and Serbia (Shelton, 2011). It must be highlighted that this procedure is used by most systems for what concerns customary rules, as will be discussed subsequently; for instance, Article 10(1) of the Italian Constitution automatically incorporates "*the generally recognized principles of international law*". This approach is typical for the incorporation of customary international law. Although automatic standing incorporation accommodates international law and the demands of the global panorama, it may cause issues of sovereignty loss within the domestic sphere, conflicts of norms, and lack of democratic oversight: therefore, States throughout the 20th century and up to the present day, have been much more inclined to adopt a rather dualist perspective, and explore other means of incorporation or transformation of international rules.

1.2.2. Legislative *Ad Hoc* Incorporation: Statutory and Automatic *Ad Hoc* Incorporation

Legislative *ad hoc* incorporation refers to the process according to which international rules become applicable within a State's legal system only when the legislative body passes, or, in some cases, other State authorities, *ad hoc* implementing laws. Therefore, this approach requires international norms to be transformed into the domestic legislature. The procedure, which is seen as more dualist, can take place in two different manners, either through a detailed Act of Parliament translating the content of the international rule into municipal law, or through a shorter Act of Parliament enabling the incorporation of the entire treaty. The former is referred to as statutory *ad hoc* incorporation, and requires the law-making structure to identify the treaty obligations, draft a piece of legislation, approve and publish the law. The latter is referred to as automatic *ad hoc* incorporation, and it differs from the aforementioned automatic standing incorporation as the transformation of treaties and international law is here achieved on a case-by-case basis. This procedure entails that national courts and State officials must infer how treaty provisions are to be applied or interpreted within domestic law (Müller, 2013). Notwithstanding the economic and time-wise costs of this process, especially for what concerns the statutory modality, the legislative *ad hoc* incorporation allows for effective integration of international obligations into domestic law, clarity, and certainty (Gaeta *et al.*, 2020). Furthermore, it ensures democratic oversight and accountability, as the incorporation process typically involves legislative debate and public scrutiny. Most common law countries require parliamentary consent for ratified treaties to become part of municipal law. Nonetheless, it is important to mention that most countries nowadays, regardless of their tendency towards a monistic or dualistic outlook, are much more likely to require legislative approval to international norms, even though there exists certain cross-country variation in what types of treaties are subject to legislative approval (Verdier & Versteeg, 2015). At the present stage of development of international law, it can be argued that the difference between the role of the legislature in monist and dualist systems is overstated. Treaties that change domestic laws require either prior legislative approval – in monist systems – or subsequent implementing legislation – in dualist systems. Regardless of such differences, treaties usually contain clauses pertaining to their ratification and entrance into force through specific procedures.

1.2.3. Self-Execution or Direct Applicability

As mentioned earlier, while the implementation of customary international law often induces States to resort to automatic standing incorporation, treaties usually require domestic legislation to enter into force. Due to the different effects of choosing either of the three modalities of implementation – that is, automatic standing, statutory or automatic *ad hoc* incorporation – the role of domestic courts is essential. Not only are national courts responsible for the interpretation of treaties that were not translated into national law through the statutory incorporation, but they also need to examine and enforce the treaty provisions invoked by one of the parties in a pending case. In particular, courts have to determine whether the treaty provisions in question are capable of judicial enforcement of whether an intervening legislative or executive act is required for them to be applied (Shelton, 2011). When treaties do not require further steps within the national legislation or executive, they are referred to as self-executing, or as having direct effect or applicability. This entails that such provisions can be invoked before domestic courts by individuals, who can rely on the rights and obligations established by the treaty to make claims, seek remedies, or defend themselves against legal actions without the necessity of supplementing legislation. This concept is fundamental for States adopting a monistic outlook, in which international law is considered as an integral part of municipal law and treaty provisions are presumed to be self-executing and applied regardless of conflicting national norms, such as France and the United States (*Cf.* Article VI(2) of the U.S. Constitution). However, even dualist States, where treaties must be translated into domestic law, may face the question of direct applicability. National Constitutions rarely refer explicitly to the concept of self-execution or direct applicability; thus, this doctrine has developed as judicial practice through case-laws. The practical distinction between self-executing and non-self-executing treaty provisions was carried out by the Russian Federation in 1995, when the Duma adopted the Russian Federal Law on International Treaties. Article 5(3) of the Law provides that "*[t]he provisions of the officially published international treaties of the Russian Federation which do not require the adoption of internal acts for their application are directly applicable. Corresponding legal acts shall be adopted for the application of other provisions of the international treaties of the Russian Federation*" (Butler, 1995). In order to establish the self-executing nature of treaty provisions, most courts look for expressions of intent of the parties, reflected primarily in the linguistic terms of the treaty, whether or not the agreement creates specific rights in private parties, and whether the provisions of the treaty are capable of being applied directly.

This test usually entails the analysis of the clarity and specificity of the language and the attribution of rights specific enough to be capable of being pursued by judicial proceedings (Shelton, 2011). This typical approach is perfectly exemplified by the Netherlands, Greece, and Czech Republic. However, it must be underlined that national courts are tending to restrict the concept of self-executing treaty provisions, allowing for judicial control of international law, and causing inertia in the reception of international law within the domestic legal system. Emblematic examples are constituted by the United States and France, monist States where international norms acquire the rank of ordinary legislation upon their due ratification. For instance, in *Sanchez-Llamas v Oregon* (2006), a majority of the US Supreme Court referred to "*a long-established presumption that treaties and other international agreements do not create judicially enforceable individual rights.*" This decision ignored long-standing precedents that held that a treaty is directly applicable federal law "*whenever its provisions prescribe a rule of law by which the rights of the private citizen or subject may be determined" and 'when such rights are of a nature to be enforced in a court of justice*" (The Head Money Cases, 112 U.S. 580, 1884). By the same token, the Italian Constitutional Court held in *Lockheed* (1979) that Article 14(5) of the UN Convention on Civil and Political Rights was not applicable in judicial proceedings unless it was supplemented by a piece of national legislation (Müller, 2013).

Therefore, the judicial approach to international law is much less accommodating, as more treaties require supplementing pieces of legislation to be applicable. In fact, as a conclusion to the analysis of the incorporation of international norms, it is safe to argue that domestic legal systems have become more receptive to ratified treaties, but that this development interacts in complex ways with the growing prevalence of domestic constraints on treaty-making (Verdier & Versteeg, 2015), usually through *a priori* either constitutional or legislative review. This can be explained through a myriad of political and social factors, which this dissertation does not intend to cover, but may include democratic accountability and sovereignty concerns, civil society and public opinion, and a decreasing trust in international organizations.

The classification of international norms and treaties *per se* and their reception within the domestic legal system has been considered. The analysis of their qualitative nature was carried out within the theoretical framework adopted as well as in consideration of the practical modalities of implementation and the role of the national judiciaries: it is now relevant to investigate the rank acquired by such norms as compared to municipal law.

1.3. Hierarchy of Norms Between National and International Law within Domestic Legal Systems

The hierarchical position taken up by international norms within the municipal legal system is a distinct issue from their reception. In fact, systems of law usually establish a hierarchy of norms based on the particular source from which the norms derive (Shelton, 2006). The international legal sphere itself has a normative hierarchy, in which *jus cogens* is on top of the pyramid and subsequent norms ensue based on the source they receive authority from (*Cf.* Art. 38 ICJ Statute). This paragraph aims at describing the applicability of either of the normative system over the other, once international norms have been received into the domestic system, notwithstanding the modality. By virtue of generalization, it can be noted that domestic legal systems place their fundamental values on the top of the hierarchy, as having constitutional status. Accordingly, such principles are to be given primacy in conflicts with ordinary legislation and regulations. This does not hold true for systems which do not separate religious law from that of the State, in which the former occupies the highest position in the normative hierarchy: in Islamic law, the Koran is the highest authority. Nonetheless, this research focuses attention mainly on civil and common law countries. Given that internal normative hierarchy is an entirely domestic matter, while the determination of the hierarchy guarantees national legal sovereignty and, to some extent, democratic legitimacy, it may also undermine international cooperation, cause the violation of global commitments as well as inconsistencies with legal interpretations. Therefore, it is relevant to analyze the different effects of the determination of such a hierarchy. For the sake of this dissertation, as a final remark before delving into the investigation of the internal hierarchy between domestic and international law, it must be indicated that when reference will be made to international law or norms, treaty provisions are to be intended, unless differently explicit. In fact, rules for the incorporation and internal hierarchical reception will also be discussed in the final sections of this chapter.

1.3.1. Primacy of Ordinary Domestic Law

It is possible to carry out a first distinction between countries who explicitly rank international law on the same footing as national legislation and those who rank it higher than national legislation. While, the former matter will be discussed in a subsequent section, in the former case, the principles of chronologic criterion and specialty criterion governing the general normative hierarchy apply, namely *lex posterior derogat priori*, *lex specialis derogat*

generali, *lex posterior generalis non derogat legi priori speciali*. As a result, any piece of duly passed national legislation may amend or repeal international norms based on the aforementioned chronological and speciality criteria. This legal outlook is adopted, for instance, by the United States, where treaty provisions are considered to be on the same hierarchical position of federal law, which prevails over State law, but they can be set aside by later or more specific federal pieces of legislation. Furthermore, the legislation or Constitutions of many countries, such as China, and many English-speaking African countries, do not provide specific information about the implementation of international nor the position occupied by them within their legal system. Therefore, it is up to the chosen ad-hoc implementing mechanism to establish such a hierarchy. In the case of conflict of norms between a domestic and an international one, while it is true that the State may incur international responsibility for breaching international law, in the absence of a coercive international mechanism, this approach represents a problem for the global political panorama. Thus, in such circumstances, States tend to resort to judicial interpretation of pieces of national legislation which are possibly incompatible with international law. This entails the responsibility of national courts to interpret law to make them consistent with international obligations given by a ratified treaty. Such an approach was adopted by the Italian Court of Cassation in the 1954 *Ditta I Whittingham & Sons Ltd v Soc Flli D'Amico* case, in which the Court held that "*[t]he existence of an international undertaking* […] *and, even more, its implementation by the national legislature cannot amount but to a means of interpretation of subsequent legislation*." As a result, the Court declared the 1924 Brussels Convention could not prevail over the 1932 Italian Maritime Code. The United States have adopted the same concept in *United States v Palestine Liberation Organization* (1988), in which the Southern District Court of New York held that "*[o]nly where a treaty is irreconcilable with a later enacted statute and Congress has clearly evinced and intent to supersede a treaty by enacting a statute does the latter enacted statute take precedence.*"

Furthermore, it is possible to present yet another divide between States: there are systems which do not explicitly acknowledge a hierarchy between international and municipal law. Countries with flexible Constitutions are particularly problematic in this regard: thus, it is necessary to reason by hypotheses. Flexible constitutions are constitutional frameworks which allow amendment or reinterpretation with relative easiness, in order to accommodate changing social, political, or legal circumstances. The United Kingdom, New Zealand, Canada, Israel, and India are examples of countries with flexible constitutions, having a low

threshold for constitutional amendments. Given their adaptability, the only way for a flexible Constitution to empower international treaty provisions to hold higher status with respect to municipal law would be to entrench them (Gaeta *et al.*, 2020). Otherwise, a simple Act of Parliament could produce constitutional amendments to repeal such a hierarchical structure. Through an entrenchment, a law passed with simple majority could not modify the status of international law as ranking higher than ordinary legislation: however, this hypothetical approach has not seemed to have spread throughout countries with flexible Constitutions. In fact, most countries with a flexible Constitution opt for the legislative translation of international law into their domestic legal system: this entails that national norms have primacy, and an international norm can be set aside by an Act of Parliament. Notwithstanding the infrequency of municipal norms deliberately conflicting with international legal standards and treaty provisions, this approach still represents a powerful means of judicial oversight of legislation.

1.3.2. Primacy of International Norms

The possibility of domestic norms to have primacy over international ones has been discussed. On the other hand, some States regard treaty provisions as having supremacy over ordinary legislation. In this case, the resolution of conflicts of norms is less problematic and prevents States from incurring international responsibility. A few examples of countries containing constitutional provisions for treaties overriding ordinary law are France and other French-speaking African countries, Spain, Greece, Bulgaria, Moldova, Estonia, Armenia, Azerbaijan, Kazakhstan, Georgia, Tajikistan (Gaeta *et al.*, 2020). Italy also represents a good example of a monist legal system with a procedure of incorporation that gives primacy to treaty provisions: this occurs according to Article 117 of the Italian Constitution, as interpreted by the Italian Constitutional Court in Judgments 348 and 349/2007. Usually, international treaties may not have supremacy over constitutional provisions, as illustrated by French judicial precedents *Sarran, Levancher et al.* (1998), and *Fraisse* (2000): this does not hold true for the Netherlands, where, at least in some cases, treaties are granted higher status than the Constitution. As mentioned earlier, flexible Constitutions are cut out of the picture in this regard, and a comparative outlook to observe the effects of international law having primacy in rigid constitutions will be embraced (Gaeta *et al.*, 2020).

1.3.3. Primacy of International Norms in Rigid Constitutions: A Comparative Approach

On the other hand, rigid constitutions are characterized by strict rules of procedure for amendments, which require greater effort to carry out. Usually, a court is empowered for the judicial review of such amendments. In these cases, whenever the constitutions provide information about the incorporation of treaties, the latter enjoy quasi-constitutional status, and rank higher than ordinary legislation. Naturally, this internationalist outlook guarantees the effective implementation of international standards as overriding municipal law, as well as preventing a simple parliamentary majority from setting them aside. In addition, many States with rigid Constitutions specifically hold customary law on a higher rank than domestic norms, and the judiciary is usually entrusted with the review of any municipal law inconsistent with international customs, as will be discussed more in depth in subsequent paragraphs.

It is possible to adopt a comparative approach and analyze the rank of international treaties within domestic legal systems through the constitutionally quorum and the authority required for the ratification of treaties. In fact, behind the hierarchy of norms, there is a hierarchy of authorities (Gözler, 2016). From the research done by Kemal Gözler (2016), four assumptions can be deemed accurate in the analysis of the normative hierarchy within States' legal systems: i) international treaties ratified by the executive may be on the same level as executive acts; ii) treaties ratified by the legislature with an ordinary majority may be on the same level as laws; iii) treaties ratified by the legislature with a majority higher than what is required for the adoption of ordinary laws may have an authority superior to laws; iv) treaties ratified by the constitutional amending power may be on the same level as the constitution. The first assumption is confirmed by the practice of the United States, where the Supreme Court, in *United States v. Belmont* (1937) and *United States v. Pink* (1942), recognized the validity of international agreements ratified by the president without the usual participation of the Senate. An executive agreement is defined as "an agreement between the United States and one or more foreign countries entered into by the president without ratification by the Senate" (Gözler, 2016). Such agreements may not have the same legal authority as acts of the legislature. The second assumption is confirmed by the constitutional provisions and judicial practice of Germany, Turkey, and the United States, where international treaties are ratified by the ordinary legislature and are on the same level as laws. In the case of conflict between these treaties and laws, the principle *lex posterior derogat priori* applies. Hence, if a subsequent law contradicts such a treaty, law will take precedence. Italy belongs as well to

this category of States. Prior to the Constitutional Law of 18 October, 2001, (l. Cost. 3/2001) amending Title V of the Constitution, according to the Constitution of the Italian Republic of 22 December 1947, treaties had the same legal force as as executive acts (presidential decrees), since per to Article 87(8) ordinary treaties were put into effect by the President without any participation of the legislature; otherwise they could have the same order as laws, if they fell into the category of treaties of "political nature" according to Article 80, and were put into effect by ratification of both the President and the legislature (the houses). In both cases, subsequent executive acts or laws could repeal international norms (Gözler, 2016). Currently, this distinction of treaties within the Italian normative hierarchy needs not to be drawn. The new Article 117 states as follows: "*Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations.*" This provision is understood as simply formalizing the existing obligations of legislators, meaning that national and regional legislators must adhere to EU and international law when carrying out their legislative duties (Cartabia & Lupo, 2022). However, this constitutional amendment did have an impact: international treaties typically enter the Italian legal system through a parliamentary legislative act, granting the treaty provisions the same binding effect as ordinary legislative statutes, which are inherently subordinate to the Constitution. Consequently, they are regarded as having lesser authority than constitutional law within the hierarchy of legal sources. This means that after being ratified and incorporated into domestic law, international treaties take precedence over earlier legislative acts but can be superseded by subsequent ordinary legislative acts, in line with the principle of *lex posterior derogat priori* (Cartabia & Lupo, 2022).

However, as stated by Gözler, it is fundamental to mention that there are a great number of countries where constitutional provisions and judicial practice deny this assumption, as treaties ratified through the same quorum as national laws still override the latter. Such countries include Albania, Armenia, Croatia, Czech Republic, Moldavia, Russia, France. Some of these countries were already mentioned by the present thesis in the introduction to those States giving higher normative status to treaties rather than to ordinary law. Furthermore, States such as Romania, Bosnia and Herzegovina, Turkey, and Slovakia consider human rights treaties to have supremacy over domestic law. The third assumption is confirmed by the examples of the Netherlands, Portugal, and Georgia, in which treaties ratified by a majority higher than what is required for ordinary laws, logically, have an

authority higher than that of laws in the normative hierarchy. Finally, the fourth assumption is confirmed by the Austrian, Finnish and Greek Constitutions, which provide that some international treaties can be ratified by the same parliamentary majority required for the adoption of constitutional amendments: in these cases, treaties acquire the same normative rank as the Constitution.

After having analyzed the nature of the domestic hierarchical value of international norms, it is relevant to mention the effects of an overall internationalist as compared to a nationalist outlook of the domestic legal system.

1.3.4. Effects of Nationalist Approach as Compared to an Internationalist Approach

For the purpose of this brief analysis, to determine the difference between an internationalist or statist – nationalist – approach, two aspects are considered: the formal technical modality of incorporation of international norms, and the normative status acquired by the latter within the municipal legal system. A statist approach entails the legislative *ad hoc* incorporation and the equal hierarchical legal value of international norms as compared to municipal law. On the other hand, countries undertaking an internationalist approach opt for automatic incorporation (whether standing or *ad hoc*) and the classification of international norms as ranking higher than domestic law (Gaeta *et al,*. 2020). Of course, the first primary difference in the approach is the sovereignty of national authorities. The former outlook guarantees a legislative and/or executive oversight on international standards, allowing the sovereign to protect the interest of the State and prioritize the will of the citizens over global concerns. States retain the power to repeal any international law by passing municipal legislation inconsistent with international law. Such a realist approach to international relations entails the risk of facing international responsibility, which causes domestic courts to ensure compliance with international obligations through interpretive principles. Another aspect to take into consideration is the growing importance of international norms granting rights to individuals or imposing obligations on them. In contrast, an internationalist approach ensures respect for global legal norms and demonstrates openness to international values and their reception, but the danger is to deepen the democratic deficit of international law-making, by ignoring the will of the duly elected legislation, while at the same time empowering the judiciary. For this reason, most countries adopt a mixture of the two frameworks, leaning towards a more statist approach. Even the aforementioned countries ranking treaties to a higher normative level than national pieces of legislation undertake measures to protect their

domestic legal systems, through either a constitutional or legislative review of treaties before their ratification, such as France, Moldova, Armenia (Gözler, 2016). It is safe to argue that there is a general tendency of protecting the States' interests through a statist approach, with the exception of Greece, the Netherlands, and Spain, which opted for an overall internationalist outlook. In conclusion, the various outlooks embraced by States with regards to international law have political grounds, rather than legal.

1.4. The Reception of Customary Law and Other Sources of International Law in Domestic Legal System

As a final consideration in this theoretical framework about the incorporation and classification of international law within domestic legal systems, it is relevant to discuss customs and other secondary sources of international law. In fact, there exists a certain hierarchy of norms within the international legal system itself, detached from the normative hierarchy of the domestic legal system, which regards customary law, and especially *jus cogens*, as occupying the top position, binding all States regardless of any international agreement ratified by them (Shelton, 2006). Due to their difference from treaties, it is appropriate, in order to carry out a complete analysis of the incorporation of international law, to investigate their reception in the States' legal systems, as well as that of other sources of law, including declarations, resolutions, recommendations, and decisions of international tribunals.

1.4.1. Customs

Customary international law is a body of international law consisting of norms and principles developed over time through common State practices and acceptance of such practices as being legally binding, namely as having *opinio juris*. Unlike formal written agreements like treaties and conventions, customary international law emerges naturally as countries consistently follow certain behaviors and norms. This often reflects shared values and customs within the global community, and due to their relevance, they are considered binding on all States, regardless of their explicit consent. In contrast with the various modalities of incorporation of treaties, the reception of customs appears to be highly uniform throughout the international panorama, as most national systems have adopted the automatic standing incorporation. National constitutions rarely use the term customary international law or custom. It is much more common for the phrase "general principles and norms of international law" to appear or, in some older constitutions, the term "law of nations"

(Shelton, 2011). Through specific provisions, general principles of international law, namely customs, are incorporated within the domestic legal sphere. This approach represents the only feasible way to adapt to the constantly evolving practice of the international community, which may create customs not immediately definable, as the element of *opinio juris* of a certain common State practice develops throughout time. For instance, as discussed before, Greece, Italy, and Poland automatically incorporate customs through specific constitutional provisions. It is relevant to mention that there are customary international rules that are not self-executing, meaning that they need to be supplemented by ordinary national legislation to enter into force. Luxembourg, for instance, has developed a judicial practice according to which it is possible to apply customary international law only if the norm is of direct applicability (Shelton, 2011). Clearly, conflicts of norms between domestic and international customary ones may take place. Therefore, it is necessary to evaluate the hierarchical value of customs within national legal systems, notwithstanding that States may face international responsibility for breaching customary law.

Many countries, usually with rigid Constitutions, consider customs to override any inconsistent ordinary national piece of legislation: Italy, Germany, Japan, Greece, Uzbekistan, Turkmenistan, Belarus are examples of this concept (Gaeta *et al.*, 2020). The first three mentioned countries also entrust a constitutional court with the judicial review of legislation to ensure compatibility with international customs. Furthermore, there are States that do not contain specific constitutional provisions on the matter, but developed judicial practices granting customs higher legal force than ordinary law, such as Russia, Belgium, and South Africa. Instead, countries like the United States, United Kingdom, China, France, do not contain constitutional provisions explicitly concerning the hierarchical position occupied by customs (Gaeta *et al.*, 2020). This can be due to the relative flexibility of the Constitutions: for instance, British common law has traditionally recognized that customary international law automatically becomes part of the domestic system, but only as long as it does not go against municipal laws. This allows it to have direct legal authority within courts without requiring specific enactment to incorporate it. Countries with legal systems based on common law typically follow this tradition. For example, in Canada, lower courts have clearly supported the adoption of customary international law. Similarly, New Zealand's constitutional framework acknowledges customary international law principles as an essential part of its common law. In Israel, customary international law has the status of "law of the land," though a recent Supreme Court ruling has placed the burden of proving the existence

of a custom onto the party claiming its presence, in a pending case. This differs from the prevailing idea that judges have the authority to recognize customary international law without formal proof (Shelton, 2011). Notwithstanding the level of flexibility of the Constitutions, as shown by the absence of information about the domestic rank of customs in rigid Constitutions like that of the United States and France, this lack of information can be problematic for the application and enforcement of customs.

1.4.2. Other Sources of Law: Resolutions and Decisions of International Organizations and Tribunals

Usually, national Constitutions or legislations do not contain provisions concerning the decisions or resolutions of international organizations, regulatory bodies, or tribunals. This does not hold true for the Constitutions of the Netherlands, Greece, and Spain, and the judicial practice of France. In these systems, internationally binding resolutions and decisions of intergovernmental or international organizations become binding simply upon their publication in the State's Official Journal (Gaeta *et al.*, 2020). Of course, non-self-executing instruments need to be supplemented by further implementing legislation, such as in the case of the ICTY and ICTR decisions (Shelton, 2011).

Concerning decisions of international tribunals, many European States have been influenced by Article 46 of the European Convention of Human Rights, which grants the decisions of the European Court binding nature upon the State parties. In fact, countries like Austria and Serbia now allow for the reopening of criminal proceedings in some instances following a judgment of the European Court of Human Rights. Serbian courts are also required to enact decisions of the UN Committee against Torture (CAT). Hungary, Czech Republic, the Netherlands, Japan, Canada, and Germany guarantee at least judicial review of laws on the basis of decisions of international bodies like the ECHR, and the ICCPR and UN Human Rights Committee. By contrast, in the Medellìn case, the US Supreme Court decided that decisions of the International Court of Justice were not to be given effect in the domestic legal system, according to Article 94 of the UN Charter (Shelton, 2011).

1.4.3. Soft Law: Declarations and Recommendations

Section 75, paragraph 22 of the Argentine Constitution, with its reference, among others, to the Universal Declaration of Human Rights and the American Declaration on the Rights and Duties of Man is an example of soft law instruments, such as declarations or non-binding

decisions of international organizations, becoming a binding part of a State's legal system. The same can be said about Article 10 of the Spanish Constitution. Similar forms of soft law, such as human rights resolutions of the United Nations General Assembly, consequently not having binding legal effect, are usually excluded from the domestic legal sphere, but in some common law systems, such as Canada, New Zealand, and the United States, agreements such as those aforementioned together with unratified treaties or not yet incorporated into the national legal sphere, may be used in judicial proceedings as persuasive authority in the interpretation of a domestic piece of legislation. For instance, Israel and the Netherlands consider non-binding declarative texts like the Universal Declaration of Human Rights, the United Nations Standard Minimum Rules on the Treatment of Prisoners, as well as the UN Center for Human Rights Basic Principles for the Treatment of Prisoners, and the European Prison Rules, to be authoritative in judicial proceedings (Shelton, 2011).

In conclusion, the theoretical framework presented in this chapter has explored the complex relationship between international and domestic law. By providing the theoretical standpoints of monism and dualism as well as their weaknesses, it was possible to take an overview on the practical incorporation of international norms into domestic legal systems, and the hierarchical position occupied therein. A key finding was the dynamic nature of this normative interaction, to reflect the necessities of both the global panorama and the individual societal demands. Building upon this theoretical foundation, the subsequent chapters will shift focus to a practical analysis of the incorporation of international law within the framework of the French Constitution, with the aim at contributing to a deeper understanding of the mechanisms of interaction of norms, and offering possible future developments.

Chapter Two

The Reception of International Law in the French Legal System: A Monist or Dualist Approach?

This chapter seeks to thoroughly analyze the relation of international law to internal law in the French Constitutional system, in an attempt to answer the question of whether the French legal system is a monist or dualist one. In the previous chapter, the complexity of the relationship between the two legal spheres has been presented: it is evident from this analysis that it is up to the single States to apply international law and solve the practical repercussions of this lack of certainty on the matter. Hence, building upon the theoretical framework presented therein, this section aims at unfolding the issue illustrating the French Constitution as a case-study. By shifting focus on the reception of international norms in France, it will be possible to display best practices from the French case, as well as identifying areas of improvement. This research will contribute to furnishing examples of recommended actions for the single constituents to build upon in order to achieve a more coherent interaction between international and municipal law across nations.

After an overview of the French Constitution, in terms of both historical background and perspective, the technical aspects of the implementation of international norms will be presented. The specificities of what concerns the formal application of them by the French judiciary will be set aside for the moment, and dealt with in the subsequent chapter. After having presented the French Constitution and its history, this chapter will discuss the constitutional provisions concerning the reception of international law, specifically Title VI of the 1958 Constitution, with comprehensive considerations about the outlook of the French legal system over international law, and its legal approach. This theoretical approach applied to the practical relevant legal provisions will produce the necessary information to address the question of whether the French system is a monist or dualist system.

2.1. The French Constitution

The current Constitution of France was adopted on October 4, 1958. This Constitution replaced the Constitution of the Fourth Republic of 1946 and established the Fifth Republic, which is the current system of government in France. The Constitution of the Fifth Republic was developed through the guidance of Charles de Gaulle, who was the first president to be elected under the Fifth Republic in December 1958. The prominent feature of this

Constitution is the transition from a parliamentary system, with a president holding mainly symbolic powers, to a semi-presidential system, with a powerful president, a strong executive, and a weak Parliament. The Constitution is considered to be an expression of Gaullism and French exceptionalism, in the pursuit of a realist and pragmatic form of government, as well as a stable and strong State, led by a dominant President holding exceptional powers in both internal and foreign policy (Friedrich, 1959). Many scholars have argued that the French semi-presidential form of government established by the 1958 Constitution features certain characteristics of the constitutional monarchies (Friedrich, 1959; see also Wahl, 1959).

The historical passages leading to the fall of the Fourth Republic, as well as the technical passages leading to the drafting of the current Constitution are to be described in the subsequent section.

2.1.1. History

There was a fairly universal agreement that the 1946 Constitution was unsatisfactory: the Fourth Republic suffered from lack of consensus, leading to chronic Government instability (Indian Law Institute, 1959). The triggering factor for the collapse of the French Fourth Republic was the Algiers Crisis of 1958, and the prospect of the loss of Algeria from the French colonial domain. Indeed, France was still a major colonial power, and, even if in process of decolonization, French West Africa, French Indochina, and French Algeria were represented in the French Parliament. The latter colony was certainly considered a crucial part of the French *Métropole* rather than a colony: however, the Algerian electorate was particularly disenfranchised and started pressuring to separate from Metropolitan France. Such pressures led to the Algerian War of Independence (1954-1962), which eventually resulted in the independence of Algeria from France. In this context, the inability of the Fourth Republic Governments to take action was ultimately displayed when a rebellion of the military leaders – in conjunction with indigenous Arab populations and the Pieds-Noirs – arose in May 1958 against the new Pierre Pflimlin's Government. The junta demanded the French President René Coty to name General Charles de Gaulle, who had retired from politics a decade before, as head of a new Government to prevent the complete loss of Algeria. By May 13th 1958, the Government had ceased to function, marking the collapse of the Fourth Republic, and President Coty summoned de Gaulle to the premiership (Friedrich, 1959).

Following this *crise du régime*, de Gaulle created a new government coalition, and started secret negotiations for the drafting of the new Constitution with the non-Gaullist members of the cabinet. On June 5, he nominated Michel Debré, his Minister of Justice, as head of the drafting committee, made up of eight young men chosen for their political affinities with de Gaulle. The committee was divided into teams drafting different sections of the Constitution-to-be, with de Gaulle's assistant Jean Mamert coordinating them and Debré presiding over the plenary sessions to ensure uniformity among the working groups: the works started on June 12. The initial governmental draft – *l'avant projet de la constitution* – was made public on July 29 and the Consultative Constitutional Committee presented recommendations for changes on August 14. The new governmental draft was submitted to the Council of State on August 27, and finally published on September 4. It was then presented for popular approval and adoption in the referendum of September 28, 1958 (Wahl, 1959). The Constitution of the Fifth French Republic was adopted with the approval of 65.8% of the electorate and 82.5% of those voting, an overwhelming majority even in the overseas territories (Friedrich, 1959).

2.1.2. Overview of the 1958 French Constitution

The French Constitution is conceptually arranged by sixteen different Titles addressing different subjects. The first two Titles deal with the fundamental principles of the Constitution; Titles III-V are about the Executive and the legislature; Title VI addresses international agreements; hence, it will be the main focus of the present dissertation. Titles VII-XVI discuss the broader institutional set up of the State. Recurring principles include self-determination of the peoples, freedom of expression, and sovereignty of the citizens. As previously mentioned, the outstanding feature of the current French Constitution is the primary role of the President-led Executive, as compared to a relatively marginal role of the two chambers of the Parliament, that is to say the National Assembly and the Senate (Art. 24). The Executive is composed by the Council of Ministers, namely the Government, which is presided over by the Prime Minister: the entire cabinet is appointed by the President on the Premier's advice (Artt. 8-9). The law-making process is shared between the Parliament and the Government, but the latter has notable advantages, in that Article 34 of the Constitution delineates areas reserved for exclusive legislation of the Parliament, while the domain for Executive legislation is negatively defined, as it retains legislative authority over the remaining domains through regulations. Thus, the scope of legislation of the Parliament is very limited. Furthermore, the Government can apply an accelerated legislative procedure

and lean towards one of the two chambers if no compromise on a bill is reached between them (Art. 45). While it is true that the Government is responsible to the National Assembly, and, as a consequence, subject to a possible vote of no-confidence by the latter, since 1962 a majority in the National Assembly has always supported the cabinet. The necessity for a strong and stable Executive was dictated by the chronic instability of the Governments of the Fourth Republic. Precisely because the cabinet ultimately depended upon formal parliamentary support, the figure of the President of the Republic has to be powerful and firm: the extensive power associated with this position, detailed under Title II, is a particularly striking feature of the 1958 Constitution. In the initial draft, he was considered to be an arbiter above all institutions, to be elected for a seven-year term by a college consisting of members of the Parliament, General Councils, and Assemblies of the Overseas Territories, whereas since 1962 he is directly elected by the French citizens through universal suffrage, for a five-year term, renewable once. Not only can the President dissolve the National Assembly at most once a year – after Consultation with the Premier and the Presidents of the Houses of Parliament (Art. 12) – but he is also the guarantor of the Constitution, national independence and territorial integrity, and he ensures the "*proper functioning of the public authorities and the continuity of the State"*, as well as respect for Treaties (Art. 5). He can call for a referendum, in specific cases, for treaty ratification or vote on a government bill (Art. 11). Furthermore, the President plays a decisive role in foreign policy and treaty-making, as will be detailed in the present and subsequent chapter, as he *"negotiate[s] and ratif[ies] treaties"*, and should *"be informed of any negotiations for the conclusion of an international agreement not subject to ratification"* (Art. 52). He is the central institution, in that he is above the government, as he appoints both the Premier and the other Ministers, but he is also immersed in it, as he presides the Cabinet, in a position that resembles that of the king in the 1830 French Constitution (Frierdich, 1959). In addition, the President of the Republic appoints three out of the nine members of the Constitutional Council, as well as its President (Art. 56), and can refer treaties – or, rather, acts ratifying treaties – and laws to it for its opinion about their constitutionality (Art. 54 and Art. 61). Finally, and most importantly, the President retains great and controversial "emergency powers", as specified in Article 16, which grant him a rather wide and discretionary scope of action (Hoffman, 1959).

Thus, it is evident that the President is granted rather unrestricted powers, pursuant to the necessity of a "strong man" to avoid the mistakes of the previous French Republic: Michel Debré described this figure as "*the keystone of our parliamentary system*" (Hoffman, 1959).

Even though each of the President's acts are to be countersigned by the Premier and "*where required*" by the concerned Ministers, there are many instances in which no countersignature is necessary, according to Article 19, such as the dissolution of the National Assembly, the appointment of the Premier, the submission of a bill or a treaty to referendum, the exercise of emergency powers (Indian Law Institute, 1959). The gaullist influence is reflected in the presidential and governmental power, constituting an executive branch capable of providing stability and leadership. The President is a "republican monarch" (Wahl, 1959) that allows for decisive action to guarantee continuity of the regime: it seems clear that the Constitution was tailored to fit de Gaulle as President (Friedrich, 1959). Furthermore, the gaullist tradition of a strong State and its French exceptionalism also represent a crucial aspect in foreign policy, treaty-making, and international relations. The extensive influence of de Gaulle and the physical and conceptual presence of him and his associates raises questions about the genuine acceptance by the French citizens of the 1958 Constitution: it is likely that the overwhelming majority of those who voted in favor of the Constitution was approving the return of the French general, rather than the text itself (Friedrich, 1959).

While it is true that it enjoys vast capacity, the French executive, together with the legislature, is subject to judicial review, as per the underlying principle of separation of powers. Prior to 1971, the executive and legislature were bound to comply with general principles of law; thus, the role of the *Conseil Constitutionnel* (Constitutional Council), the highest authority entrusted with the judicial review of statutes, was rather limited. However, with a series of decisions throughout the 1970s, the Council widened its own scope, enlarging the constitutional body of the State and creating the *bloc de constitutionnalité*, which will be examined in the subsequent section. Therefore, the *Conseil* is responsible for the supervision of presidential and parliamentary elections, and the legitimacy of referendums (Artt. 58, 59, 60); it is also empowered with the scrutiny of legislation and acts ratifying treaties, as will be illustrated afterwards (Artt. 52-55, 61, 61-1), in order to ensure coherence with constitutional principles and the block of constitutionality.

2.1.3. The *Bloc de Constitutionnalité*

The expression "block of constitutionality" (*bloc de constitutionnalité*) has developed through judicial practice to designate principles and norms used as a benchmark by the Constitutional Council (*Conseil Constitutionnel*) to exercise its constitutional control over international agreements and bills (Denizeau-Lahaye, 2022). This concept was first presented

by author Claude Émeri in 1969 and formally theorized by French jurist Louis Favoreu in 1975, in light of three constitutional judgments that gave birth to constitutional control and the principle of constitutionality in France. Through such decisions, the *Conseil Constitutionnel* affirmed that constitutional principles and norms are not only those enshrined in the 92 Articles of the French Constitution: Decision 70-39 DC of June 19 1970 has inserted in the *bloc* the Preamble of the Constitution, and Decision 71-44 DC of July 16 1971 has recognized the Preamble of the 1946 Constitution, thus the fundamental principle of freedom of association; finally, Decision 73-51 DC of December 27 1973 has added the 1789 Declaration of the Man and of the Citizen. Together with the 1974 constitutional reform for the expansion of scope of the right to referral to the Constitutional Court (*saisine à l'opposition*), such fundamental decisions widened the scope of the Constitutional Council for its judicial control and the definition of constitutional principles. These principles are held at the same judicial level as that of the Constitution, even if not formally part of it. Besides the written norms included in the Preamble of the Constitution, the *Conseil Constitutionnel* considers part of the block of constitutionality also fundamental principles recognized by the laws of the Republic (*principes fondamentaux reconnus par les lois de la République* – PFRLR) and other principles and objectives enjoying constitutional value (*principes à valeur constitutionnelle*). The distinction between these two categories of principles is of constitutional matter and shall not pertain the present research: the former includes norms such as right of defense in a trial, freedom of instruction and academic freedom, freedom of conscience, independence of administrative jurisdiction, judicial authority guardian of private property, and the prohibition of political extradition; the latter category includes the continuity of the State and the public service, the protection of the dignity of the human person, freedom of entrepreneurship, the right to privacy, the principle of fraternity (Denizeau-Lahaye, 2022). It is relevant to notice that the block of constitutionality serves as a benchmark for constitutional review by the French judiciary, but at the same it is in continuous evolution, with the possibility of incorporating international standards within the principles enjoying constitutional value, as illustrated by the addition of the Charter of the Environment of 2005.

After having presented the French Constitution, its background and principles, it is necessary to delve into the very matter of the present research, namely the specificities of the incorporation of international norms into the French legal system, through the analysis of the constitutional provisions on the matter. Therefore, for the sake of this dissertation, Title VI of

the 1958 French Constitution, *On International Treaties*, is to be addressed in depth, in conjunction with specific Articles found in other sections of the Constitution which are not specifically devoted to treaties, but indirectly discuss the topic. Afterwards, the interpretation of such provisions will be offered in a monist/dualist outlook, as well as other useful theoretical foundations to fully understand the French legal culture and France's approach to international norms.

2.2. Title VI of the 1958 Constitution: *Des Traités Internationaux*

The conclusion of international treaties and agreements and their incorporation into the domestic legal order are subject to a certain constitutional formalism (Conseil Constitutionnel, n.d.). Title VI of the French Constitution, which contains Articles 52-55, specifically addresses the conclusion, normative hierarchy, as well as – partially – the effects and application of international treaties into the French legal system. It is relevant to underline that the section, titled *Des Traités et Accords Internationaux*, was born as a compromise between the nationalistic push of Michel Debré and the internationalist outlook of French jurist François Luchaire, one of the architects of the 1958 Constitution. This section will first delve into the reception of international law according to the constitutional provision; then, the specific roles played by the executive, legislative, and judiciary powers within this context, with particular attention to the function of the Constitutional Council. Since the main objective of the chapter is to address the debate between monism and dualism based on the French case-study, this section will provide the necessary information to be analyzed in the subsequent subchapter from a theoretical standpoint in order to clarify the investigation.

2.2.1. The Conclusion of International Agreements: an Overview

As provided by Article 52 of the Constitution, "*[t]he President of the Republic shall negotiate and ratify treaties.*" Furthermore, "*[h]e shall be informed of any negotiations for the conclusion of an international agreement not subject to ratification.*" According to this Article, it is evident that the President of the Republic is granted wide powers with relation to the conclusion of international agreements. As mentioned numerous times throughout this dissertation, the strong role of the Executive and, in particular, of the President acting as a "republican monarch" (Wahl, 1959), is noticeable in the field of foreign policy and treaty-making. The Article, besides determining the role of the President, also established a distinction between treaties which necessitate ratification, and those who do not require such

a condition. It appears implicit that the approval for agreements not subject to ratification lies within the competencies of the Executive, notably through the figures of the Minister of Foreign Affairs or Foreign Secretary; the Executive is bound to inform the President. This differentiation is delineated in the subsequent Article: in fact, Article 53 establishes that "*[p]eace Treaties, Trade agreements, treaties or agreements relating to international organization, those committing the finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of persons, and those involving the ceding, exchanging or acquiring of territory, may be ratified or approved only by an Act of Parliament. They shall not take effect until such ratification or approval has been secured*." Hence, the provision lists a number of treaty categories according to which an act of ratification by the Parliament is required for the agreements to enter into force: as a consequence, the President does not hold the power to approve such treaties without formal parliamentary approval. The agreements necessitating parliamentary ratification are positively defined through the specific references in Article 53, while the areas of scope for exclusive presidential ratification are defined negatively: thus, it is clear that the President holds greater power than the Parliament, coherently with the general aim of the 1958 Constitution to ensure a strong State guided by a strong Executive and Head of State: in fact, according to the website of the French National Assembly, only around one third of the treaties concluded by the Republic require an act of ratification of the Parliament (Assemblée Nationale, 2023). The subsequent Article 54 sets out the control exercised by the *Conseil Constitutionnel* as well as the necessity for Constitutional amendment in case of conflict between a treaty provision and the Constitution itself. The provision states as follows: "*If the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President of one or the other Houses, or from sixty Members of the National Assembly or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution.*" This Article has been modified through the Constitutional Law of June 25, 1992: in fact, the original text did not mention the possibility of the sixty deputies or senators to refer to the Constitutional Council a case of conflict between a treaty provision and a constitutional norm. This Article delineates the *a priori* constitutionality check operated by the *Conseil Constitutionnel*, which will be analyzed more in depth in the subsequent sections: the procedure has been activated fourteen times since the beginning of the Fifth French Republic, although constitutional amendments have been approved in six of the aforementioned cases, most of the times in

reference to texts relating to the European Union. Hence, a large number of treaties actually dodges the *a priori* constitutionality review of the Council. This Article provides the basis for the normative hierarchy of treaties, since it establishes that the Constitution is regarded as having higher rank than treaties, which have to comply with it. However, the subsequent chapter will be devoted to the debate over the hierarchy of norms within the French legal system; thus, it will not be analyzed herein. Finally, Article 55 represents the core provision for the process of incorporation and application of international law: "*Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.*" The provision allows the French Constitution to be quite receptive to international norms (Rivier, 2019): the absence of the need to transpose treaty provisions and, more in general, international law makes the State adhere to a monist outlook. In fact, the publication of international treaties and agreements makes them binding on citizens (Conseil Constitutionnel, n.d.). In particular, the way in which international norms are directly incorporated in the French legal system upon publication following the duly process of ratification, as according to Articles 52-53, permits a smooth implementation of treaty provisions and international law: treaties are automatically incorporated within the French legal system without the necessity of an *ad hoc* act of Parliament (Decaux, 2011). Thus, the primacy of international law is recognized herein. Nonetheless, the wording of the Article appears to be quite prudent, and this responsiveness seems prudent with regards to the hierarchical value of the Constitution itself, especially if compared to the incorporation of international law within the 1946 Constitution of the Fourth French Republic, as will be analyzed in the following sections. Regardless of the normative hierarchy, it is safe to state that the formal implementation of international law according to Title VI of the Constitution, falls within the category of monist approaches (Decaux, 2011).

Once having presented the formal constitutional provisions concerning the conclusion of international agreements and, as a consequence, the implementation of international law, it is necessary to analyze the distribution of competencies to the various subjects involved in the process, in particular the Executive and the legislature. Instead, the specific role of the judiciary, including that of the Constitutional Council, will be addressed in the following chapter.

2.2.2. The Role of the Executive

First of all, Title VI seeks to delineate the allocation of executive powers between the President of the Republic and the government by establishing a formal differentiation between "treaties" and "agreements". In fact, Article 52 states that "*[t]he President of the Republic shall negotiate and ratify treaties*", while he "*shall be informed of any negotiations for the conclusion of an international agreement not subjected to ratification.*" The implicit delineation lies in the fact that treaties negotiated on behalf of the President of the Republic require ratification, while agreements negotiated by the foreign secretary do not necessitate ratification. Hence, the negotiation of international commitments is the responsibility of the executive, namely the President of the Republic for treaties and the Government for international agreements (Conseil Constitutionnel, n.d.). At the end of negotiations, international treaties and agreements are signed. However, this differentiation does not align with the substantive material distinction between commitments that demand parliamentary authorization as per Article 53 (Decaux, 2011). In fact, apart from "peace treaties" and "trade agreements", all the other instruments mentioned in Article 53 can be both agreements and treaties, meaning they can be either subject to an act of ratification by the Parliament, or not (Decaux, 2011). Said categories of treaties do not fall within any distinction at the international level; thus, they are purely domestic, and described by French jurist Alain Pellet as being "inoperative in international law". Furthermore, the 1958 Constitution does not consider global developments in the field of treaty-making, such as administrative agreements and other forms of instruments in simplified form. Hence, the constitutional provisions concerning the distribution of roles between legislative and executive powers appear less effective than other States, and a more clear distinction has been developed through para-constitutional and judicial practice. Furthermore, due to the aforementioned material distinction between treaties requiring ratification by the Parliament and the negative distribution of competencies of the President and the Executive with regards to treaty-making in Articles 52 and 53, the definition of the scope of action of the Executive and Legislative powers has long represented a gray area for jurists and legal institutions (Decaux, 2011).

It was only in 2009 that the *Conseil Constitutionnel* began to regulate the distribution of competence within the Executive, and between the latter and the legislature. In fact, in a decision of April 9, 2009, the Council established that, under Articles 52 and 53, the competence of the Executive was that of negotiating, concluding, and approving international agreements not submitted to ratification. Instead, the only power recognized to the Parliament

concerning treaties and agreements is to authorize or reject the ratification of treaties only in the cases mentioned in Article 53. In the same ruling, the *Conseil* confirmed the discretionary power of the Executive to issue interpretive declarations and to release reservations. In fact, it has been customary since the 1980s for the Government to merely inform the legislature on these matters as a courtesy (Decaux, 2011).

In summary, the intertwining between the two executive powers in the context of treaty negotiation is still partially a gray area for jurists. What is clear is that Ratification of treaties by the President of the Republic (Art. 52, para. 1) and approval of international agreements by the Government are the hallmark of the Republic's international commitment. Nonetheless, the Executive needs to face the influence of the legislator, as ratification or approval sometimes requires a legislative authorization, as will be discussed in the subsequent section. Furthermore, ratification or approval may necessitate the organization of a local referendum, in the case of a treaty involving the transfer, exchange or addition of territory, which must be preceded by a consultation of the populations concerned (Art. 53, para. 3). In addition, consultation of the institutions of the overseas collectivities (DOM-TOM) governed by Article 74 of the Constitution may be required. DOM-TOM indicates overseas departments, regions, and collectivities opposed to metropolitan France and include: French Polynesia, Wallis and Futuna Islands, Saint-Pierre-et-Miquelon, Saint-Barthélemy, and Saint-Martin. These institutions are consulted on the ratification or approval of international commitments entered into in matters falling within their jurisdiction, according to Article 74, paragraph 6 of the Constitution (Conseil Constitutionnel, n.d.).

2.2.3. The Role of the Legislative Power

As mentioned earlier, the role of the National Assembly and the Senate is largely established by Article 53. The targeted categories of agreements included in the scope of action of the legislature are: peace treaties; commercial agreements; treaties or agreements relating to international organizations; treaties involving the State finances; treaties modifying provisions of a legislative nature; treaties relating to the status of persons; treaties involving cession, exchange or addition of territory. Furthermore, agreements concluded by the European Union are submitted to the Parliament when they intervene in an area of shared competence between the Union and the Member States.

Differently from the practice in the American Senate, which only authorizes the ratification of "treaties" and not "executive agreements", no substantial difference is made between

"*traités*" and "*accords*" in France, as previously mentioned. The judicial practice endorses that the criterion according to which an international commitment must or not be submitted to Parliament is material and not formal (Assemblée Nationale, 2023).

As noted above, the material scope of action of the Parliament could, in theory, require it to rule on the content of the reservations, to the extent that they may substantially modify the scope of France's international commitments. However, a different practice has been established: the reservations that the Government intends to present on a text are not incorporated into the bill authorizing its ratification, but are indicated to the commission which, most often, mentions them in its report so that Parliament is informed. This flexible procedure, which allows deputies to deliberate with full knowledge of the facts and discuss the relevance of the reservations, has the advantage of not requiring a return to Parliament in the event of a change in the content of the reservations or their possible subsequent withdrawal (Assemblée Nationale, 2023).

Regardless of implicit competencies, Article 53 establishes an explicit scope of action for the Parliament; nonetheless, the *Conseil Constitutionnel* lacks the authority to enforce compliance with such a provision. Thus, when the Government bypasses parliamentary authorization in areas outlined by the Constitution, there exists no effective recourse due to the absence of an *a posteriori* control of validity by the Council, in light of the principle of *pacta sunt servanda*: these cases constitute instances of "imperfect ratifications" (Decaux, 2001). The *Conseil d'État*, namely the highest administrative court, addressed procedural regularity in its judgment *Parc d'activités de Blotzheim* of December 18, 1998, annulling the publication decree of an agreement that lacked Article 53 authorization. The *Conseil d'État* acknowledged the possibility of invoking such irregularities as exceptions in its *Aggoun* judgment of March 5, 2003. The *Cour de Cassation*, the highest penal court, followed suit in its judgment on *ASECNA v N'Doye* of May 29, 2001. However, this development poses drawbacks, as it leads to judges having the power to exercise a retroactive control on conventions properly applied, although not subject to a duly act of ratification by the Parliament (Decaux, 2001).

Continuing on the line of the explicit distribution of competencies, in the case of treaties falling within Article 53, when a bill authorizing the ratification of a treaty or the approval of an agreement is submitted to the desk of the National Assembly, it is systematically referred to the Foreign Affairs Committee, whatever its purpose: the procedure is different in the

Senate since tax conventions, for example, are referred to the Finance Committee. The Foreign Affairs Committee examines around forty conventions per year on the most diverse subjects, making it the permanent committee which holds the record for the number of bills examined per legislature. The high number of agreements signed by France and submitted to Parliament results in an often significant delay between the date of signature of an agreement and its ratification: this period is on average three years and two months. To try to reduce such delays, the presidents of the foreign affairs committees of the National Assembly and the Senate decided, by mutual agreement, to set up a specific examination procedure for texts which have already been examined by one of the two assemblies. Furthermore, under Rule 103 of the Rules of Procedure, the Government, the President of the Assembly, or a parliamentary group president may refer a bill ratifying an international agreement to the Conference of Presidents (of the parliamentary groups) to initiate a simplified procedure of examination, meaning they are not subject to a public debate. Under the 14th legislature (2012-2017), 156 agreements were the subject of a simplified examination procedure and 23 were subject to a debate. Under the 15th legislature (2017-2022), 58 conventions were voted upon according to the simplified examination procedure and 51 were subject to a debate. Until 2019, the Parliament also had the possibility to delay the adoption of a ratification bill through the "motion to adjourn" (Rule 128), implemented, for instance, in June 1994 for the accession of Greece to the European Union. This motion was suppressed through the Resolution of June 4, 2019, amending the Regulations of the National Assembly. Nonetheless, in practice, the same result as that of an adjournment motion can be achieved when the committee, having decided to adopt the project submitted for its examination, informs the Government of its remarks on the inopportune nature of its inclusion on the agenda of the public meeting. Thus, for example, under the 15th legislature, two bills on which the Foreign Affairs Committee had submitted a report – an extradition agreement with Hong Kong, and mutual legal assistance and extradition conventions with Mali – were not placed on the agenda of the public session, due to the evolution of the internal situation of the two countries, causing political difficulties for the continuation of the legislative authorization process (Assemblée Nationale, 2023).

After having analyzed the technical aspects of the incorporation of international law into the French legal system, through the respective constitutional provisions, it is relevant to explore its normative consequences within the French legal culture.

2.3. Implementation of International Norms into the French Legal System

The French legal system is broadly accommodating of international norms and the Republic's international commitments (Rivier, 2019). In fact, the reception apparatus has long been considered a monist system, in that the Constitution provides, although very prudently, for the automatic incorporation of international norms. In this sense, the Kelsian conception of monism, namely international monism, must be intended: rather than considering the international and municipal legal spheres as separate systems, as perceived by dualists, the French system recognizes the two as part of the same legal order. Consequently, international norms need not to be transposed into the municipal legal system through an Act of Parliament, according to Article 55 of the Constitution. However, as will be illustrated in the subsequent sections, the conception of monism within the French legal system is debatable, and, though domestic courts are generally mindful of the international obligations of France, the status of international norms is not as clear as it seems: the French theoretical monism appear to be rather inconsistent with judicial practice (Rivier, 2019). Therefore, it is useful to analyze the legal tradition that brought the French Constitution to hold international norms in high regard but to a lower level than constitutional laws.

2.3.1. The French Legal Formalistic and Positivist Culture and its Reflection on the Perception on International Law

The understanding of the concept and importance of law within the French legal system has a great influence on the reception of international norms. French scholar Emmanuelle Jouannet describes the dominant model of the French legal culture as legalistic, positivist, and formal. This perspective is opposed to the American perspective on law, which is judicial, pragmatic, and realist (Jouannet, 2006). The comparison between the two legal cultures is relevant to understand the French approach to international law: the focus in the French model is the respect for formal rules and the procedures prescribed by existing norms, while the American model appears to adopt a more instrumental and skeptical perspective on law. Thus, international law seems to be discredited by the American model, while highly valued by the French one. The positivist influence on French legal reasoning consists in a strict distinction between law and political decisions, morals, and religion, as opposed to the legal moralism which characterizes the American pragmatic culture. Thus, the French strive for neutrality, formality, and objectivity, which results in a high responsiveness to international law. It can be argued that the reliance of the French system on formal prescriptions, rather than on the

realistic effectiveness of norms, due to the lower hierarchical position it has taken up in the international panorama after the process of decolonization. In fact, according to Jouannet, France would adopt this formalistic and legalistic perspective, as embodying the traditional culture of the "old Europe" as well as the epitome of colonizing powers in decline: since it has lost the necessary power to impose its own vision of the world, respect for prescribed norms is the only way to reduce the imbalance of power it has found itself in. Therefore, the French ideal is that of upholding legalism as a means to achieve peace through law. On the other hand, the American model gives primacy to justice to be achieved, if necessary, through war, as efficacy of legal justice remains the fundamental condition of legitimacy: law is just one means among the others to attain peace and stability. As a consequence, international norms are perceived differently by the French and American model: the former adopts a positive approach towards international obligations, which are considered to constitute an authoritative legal system, given the principles of generality and equality inherent in the French mentality. On the other hand, the American approach is utterly realistic and considers international rules as a sociological and political phenomenon, rather than a coherent body of principles and rules. Naturally, it must be underlined that the French outlook is not devoid of contradictions, as colonialism is historically rooted in French culture and not easily reconcilable with the present stances on equality. Notwithstanding the inconsistencies of the paradigm, customary international law particularly manifests the two conflicting attitudes: Americans prioritize practice in a more flexible manner, as adaptable to the specific circumstances, and more directly based on moral and political values. The French, instead, give priority to the more rigidly agreed-upon *opinio juris* (Jouannet, 2006). This positivist preference for the written norm is closely related to the concept of legal nationalism, which will be analyzed at a later stage of this research. These notions are exemplified in a sort of mistrust towards non-written international norms, namely customs and *jus cogens*: not only are customs not included in the formal constitutional articles, as the French Constitutional Council has repeatedly opposed to their inclusion, but France has also opposed to the the 1969 Vienna Convention on the Law of Treaties due to its very recognition of the binding nature of peremptory norms (Decaux, 2011).

In conclusion, French legal formalism emphasizes the importance of strict adherence to legal rules and procedures, with a focus on codification and the primacy of written law. Legal positivism asserts that the validity of law is derived from recognized, rather than from moral or political principles, such as equity. In the context of international law, this formalistic and

positivistic approach leads France to emphasize the importance of treaties and conventions as the primary sources of international legal obligations. The French legal culture usually advocates for precise and explicit language in international agreements to ensure clarity and enforceability. This approach relies on formal rules and on adoption of new international rules or institutions as response to international problems (Jouannet, 2006).

However, according a deeper analysis of the French system, the ultimate source of law which all other sources stem from, as formal rules have supremacy, appears to be the French Constitution: the subsequent section is dedicated to the analysis of the reception and hierarchy of international norms in France as derived from the authority of the French Constitution itself.

2.3.2. Article 3 of the 1958 Constitution and the French "False" Monism

As previously mentioned, the concept of national sovereignty is crucial for the Constitution of the Fifth Republic. In Article 1, France is defined as "*indivisible*", which indicates that the French people are united in a single sovereign country. Title I (Artt. 2-4) of the Constitution regulates this notion and its manifestations in the political life of the Nation. In particular, Article 3 represents the keystone of the power attached to the French people to exercise their will. The Article provides that "*[n]ational sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum.*" Thus, the expression of the sovereignty of the people are the universal suffrage, elections, and the referendum. The great importance attached to national sovereignty goes hand in hand with the formalistic significance of law and the Constitution itself: the latter is ultimately the guarantor of the possibility of the people to express their will and, as a consequence, their sovereignty. Further manifestations of national sovereignty, besides the first Title of the Constitution, can be found in Article 5 establishing the President of the Republic as the guarantor of national independence, territorial integrity, and observance of the Constitution and treaties; Article 53, which requires that international treaties be ratified by the President of the Republic after approval by Parliament, ensuring that international agreements are consistent with French law and do not undermine national sovereignty; Article 54, which allows the Constitutional Council to review the constitutionality of international treaties before their ratification, safeguarding against treaties that may infringe on fundamental constitutional principles, including national sovereignty. Therefore, it is evident that there is a close connection between the idea of national sovereignty stemming from Article 3 of the Constitution and

international law. As previously analyzed, France has long been categorized as a monist country, due to the provisions set in Article 55 for the automatic incorporation of international law, as well as its hierarchical status of prevailing over ordinary law. However, the authority held by international law within the French legal system derives from the very Constitution, which is the expression of the general will and of the French national sovereignty itself. According to Article 3, the Constitution is the source of all positive law (Decaux, 2011) and has primacy over international law, as representing the will of the people, in line with the rather populist characteristics of gaullism. As Decaux puts it: "*International law is received in the internal legal system through the legal framework defined by the Constitution, according to the Constitution's fundamental principles and following its procedural modalities. French 'monism' is thus a false monism, or rather a hierarchical 'monism', where the first source of any legal norm is the Constitution, considered to be a 'social compact' between all citizens. Treaties that have been duly ratified have an infra-constitutional and supra-legislative*" (Decaux, 2011, pp. 208-209). Hence, international law is not legally binding in itself within the internal legal order, but by virtue of the Constitution (Rivier, 2019). The hierarchical status of international norms would inevitably yield to the supremacy of constitutional law, as the latter may overrule any international commitment of the State: nonetheless, the question of the hierarchy of norms will be dealt with in depth in the subsequent chapter.

Nonetheless, the harmonious relationship between domestic and international norms, notwithstanding the ambiguous provisions of the Constitution, is ensured through the particular organization of the French court structure, which avoids any direct conflict of norms. In fact, the judicial system of France is characterized by the coexistence of three supreme courts enjoying equal rank, namely the *Conseil Constitutionnel*, the *Conseil d'Etat* and the *Cour de Cassation*, each with its own order and sphere of attribution (Rivier, 2019). The Constitutional Council oversees adherence to constitutional law throughout the legislative process and holds jurisdiction over constitutional affairs, enjoying the authority to scrutinize legislative actions, including the possibility to censure legislation. The other two are the highest courts respectively of administrative tribunals and judicial courts: the latter solve litigations between individuals and are in charge of the punishment of criminal offenses. Resolving conflicts between international obligations and domestic law depends on both the Constitutional Council's understanding of the hierarchy of domestic norms as well as the roles of the Constitutional Council and the ordinary courts based on the separation of

powers. In fact, in the groundbreaking Decision 74–54 DC, dated 15 January 1975, Rec. 19, *IVG* concerning abortion, the *Conseil Constitutionnel* established that it was not within its jurisdiction to assess the compatibility of a parliamentary statute with a treaty. Instead, this responsibility, later termed as "*contrôle de conventionnalité*", was entrusted to the ordinary supreme courts, namely the *Cour de Cassation* and the *Conseil d'État* – this point will be stressed also throughout the subsequent sub-chapter. However, this delegation of authority did not grant the ordinary courts the power to nullify legislation that conflicted with treaty provisions. Rather, the ordinary courts were empowered to acknowledge the legislation's inconsistency with the treaty, thereby invalidating the conflicting domestic laws and applying the treaty (Steiner, 2018).

In this perspective, France appears much more similar to a dualist country, in that it recognizes the international and municipal legal systems as separate and entrusts the correct reception of international law to specific judicial bodies: here lies the French false monism. Nonetheless, unlike other States which invoke the primacy of constitutional law to maintain full sovereignty and scope of actions of the national legislature, the French system relies on the supremacy of constitutional law for each judicial body to conform with the limits of the separation of powers and to guarantee the sovereignty of the people, as enshrined in Article 3. Nonetheless, this concept contradicts the categorization of the French system as a monist one, given the automatic reception of international norms without the necessity of specific statutory enactments. As a matter of fact, it has been argued that France is actually a dualist country, notwithstanding the provision found in Article 55 of the Constitution (Steiner, 2018): the following section will be dedicated to the analysis of the combination of elements of monism and dualism within the French legal system. Thus, the French harmonization of domestic norms with international commitments through the enforcement of constitutional requirements ultimately develops to be a monist system based on a dualist theoretical framework.

In conclusion, the question of the incorporation of international law remains ambiguous and partially unanswered within the Constitution Articles, as customary international law is mentioned only in the Preamble of the 1946 Constitution, which is part of the *bloc de constitutionnalité*: the subsequent section delves into the analysis of this provision, in order to allow for a comprehensive understanding of the process of reception of international norms into the French legal system.

2.3.3. Customary International Law and *Jus Cogens* in French Law: Paragraph 14 of the Preamble of the 1946 Constitution

As mentioned in the previous sections, the role of written law is crucial in the French positivist and formalistic legal culture: non-written law, such as customs and peremptory norms have always been seen with a certain degree of distrust by the French (Decaux, 2011). In particular, *jus cogens* represents an area of uncertainty for French jurists and legal advisors, also due to their supranational nature. In fact, Since the Vienna Convention on the Law of Treaties, France has opposed a recognition of the concept of *jus cogens*, and did not hesitate to vote alone against the adoption of the Convention of 1969. Furthermore, the reference to the reception of customary law in the French system is not included in the Constitution itself like many other States (*cf.* Art. 10(1) of the Italian Constitution and Art. 28(1) of the Greek Constitution), but in the Preamble to the 1946 Constitution, namely the Constitution of the Fourth Republic of France. Through the aforementioned crucial Decision 70-39 DC of June 19 1970, the *Conseil Constitutionnel* recognized such Preamble as an integral part of the French Constitution: hence, it is possible to consider Paragraph 14 of the Preamble to the 1946 Constitution as enjoying constitutional rank. This Paragraph provides that "*[t]he French Republic, faithful to its traditions, shall respect the rules of public international law. It shall undertake no war aimed at conquest, nor shall it ever employ force against the freedom of any people.*" This provision reflects the Country's commitment to abide by the principles and norms of international law in its relations with other nations. It underscores the importance of international law as a guiding framework for France's foreign policy and its conduct on the international stage (Decaux, 2011). In terms of the reception of customary international law into the French legal system, paragraph 14 serves as a constitutional basis for the automatic incorporation of customary international law norms into domestic law. Therefore, general principles of international law are permanently incorporated automatically into the French legal system: this is the true monistic element of the French constitutional bloc with regards to the reception of international law, as there is no necessity to pass any legislation to comply with international obligations. In the Kelsian perspective, such an accommodation of international norms is conflicting with the dualist incorporation of treaty provisions as described in the previous section. While treaties ratified by France take precedence over domestic law, customary international law holds a special status in the hierarchy of norms: however, the following chapter will be devoted to the debate about normative conflicts and the application of international agreements and customs. Suffice it to

state that the formal reception of customs appears to be in line with the monist strand of thought, like most of the States in the world, as underlined in the previous chapter.

In conclusion, the incorporation of international law into the French legal system, as enshrined in Paragraph 14 of the Preamble to the 1946 Constitution and Article 55 of the 1958 Constitution, underscores France's commitment to respecting international norms and principles. However, the application and interpretation of customary norms as well as international law in general remain partially within the discretion of French courts, in an attempt to fill a constitutional void: this raises questions about their implementation and enforcement. Hence, the practical impact of international norms on the French legal system must be analyzed through judicial practice in the final section of the following chapter.

Chapter Three

Conflicts of Norms and the Judicial Application of International Law within the French Legal System

This chapter seeks to examine the implications of the previously analyzed incorporation of international law in France from the perspective of the normative hierarchy within the French legal order, as well as the judicial application of international norms. In particular, the question of the resolution of conflicts of norms, namely the hierarchy between international and domestic law is yet to be answered.

It has been settled throughout this research that the French system is positively receptive to international law as a general guiding principle. Furthermore, the inclination of the French legal culture to prefer written norms has been stressed, and will now be examined in connection to the notion of legal nationalism and the question of the primacy of international law over domestic legislation. The certainty and clarity of international agreements definitely represents a positive feature in the eyes of French jurists and scholars, who opt for relying on explicit laws and rulings. Thus, the question of the primacy of national sovereignty (Decaux, 2011), the judicial reception and normative hierarchy of treaties will also be answered through the domestic jurisprudence, especially referring to the groundbreaking *Nicolo* and *Vabre* judgments. In fact, the present chapter will shift focus from the technicalities and theoretical approach of incorporation based on the provision of the French Constitution, to the practical modes of reception adopted by the French judiciary. Due to the binary nature of the French system, tugged between monist and dualist aspects, conflicts of norms are likely to happen: hence, the following sections will discuss the position occupied by international norms within the French normative hierarchy, as well as the possible remedies to solve normative conflicts and the role of the judiciary therein.

3.1. The Hierarchy of International Law within the French Legal Order

Treaties duly ratified have an infra-constitutional and supra-legislative value (Decaux, 2011). In fact, recollecting all of the theoretical elements presented in the previous chapter, it is safe to state that the French system prioritizes the will of the people, which finds its expression in the constitutional values and provisions: the necessary conformity of treaty provisions with the French Constitution is established by Article 54. Instead, Article 55 sets out the hierarchical value of international law as being above ordinary legislation: hence, the two

Articles largely define the French normative hierarchy, which will be analyzed in depth in the subsequent sections. To this end, it is first relevant to take a glimpse at the incorporation and hierarchical position of international law in the 1946 Constitution of the French Fourth Republic in juxtaposition to the present provisions in order to fully understand the reception of international law in the current system, while at the same time retaining a means of comparison.

3.1.1. The Status of International Agreements in the 1946 French Constitution as Compared to the 1958 Constitution

It must be highlighted that the provisions regarding the incorporation of international law inside the 1958 Constitution seem quite ambiguous, at least if analyzed in comparison with the internationalist outlook of the 1946 Constitution of the Fourth Republic. As mentioned in numerous occasions throughout this research, the purpose of the Constitution of the Fifth Republic was that of enhancing and strengthening the role of the Executive and the President: this holds true for foreign policy and the treaty ratification process as well. By the same token, the 1958 Constitution marked a return to a higher degree of legal nationalism (Decaux, 2011), and provided for a much more prudent incorporation of international law. In post-war enthusiasm towards the crucial importance of international relations and norms, Article 26 of the 1946 Constitution determined that "*diplomatic treaties that are ratified in the regular manner and are published have the force of law, even in the case where they would be contrary to French laws, without there being any need to ensure the application of legislative provisions other than those that would have been necessary to ensure their ratification.*" This article established treaties with automatic direct effect, without requiring promulgation or incorporation. Article 27 also outlined the specific categories of treaties that required prior parliamentary authorization for ratification, such as those that modified domestic law. Finally, according to Article 28, "*provisions of diplomatic treaties duly ratified and published, and that have an authority superior to that of internal laws, may only be abrogated, modified or suspended after a regular denunciation that is notified by diplomatic channels.*" Therefore, the provisions in the 1958 Constitution (in reference to Articles 53-55 and 61) are much more vague and substantially relied on judicial case-laws, especially with regards to customary law (Decaux, 2011). In fact, Title VI of the Constitution of the Fifth Republic (On International Treaties), which has been dealt with in the previous chapter, does not reference customary international law.

3.1.2. Article 55 and the Relative Primacy of International Norms

Article 55 of the 1958 Constitution defines the place of international norms within the French normative hierarchy. The primacy of treaties over domestic law appears clear from the wording of the Article: "*Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.*"; it clearly provides for the automatic standing incorporation of international law. In fact, as underlined in the previous chapter, this provision represents not only the cornerstone of the implementation of international law in France, but also the feature that allows jurists to categorize the French system of implementation of international law as – partially – monistic. In line with the Kelsian logic, the French legal system follows a hierarchy of norms which grants international agreements and norms a higher status than parliamentary statutes, namely ordinary laws (*loi*).

The intricate process of prior control, potential constitutional amendments, and subsequent approval, culminating in the publication of the treaty or agreement in the *Journal Officiel*, does not entirely resolve all challenges. Despite Article 55 of the 1958 Constitution seemingly confirming the supremacy of treaties over laws, this principle has not straightforwardly influenced judicial decisions. First of all, this primacy is not unconditional. As indicated in the Article, three conditions must be met: the treaties or agreements in question must be published; they must be duly ratified – in the case of treaties – or approved – in the case of agreements; and reciprocity must be in place, meaning that the treaty or international norm in question must be applied by all the States parties. However, the condition of reciprocity does not apply to all international obligations, such as those protecting the fundamental human rights, according to decision 98-408 DC of 22 january 1999 (*Traité portant statut de la Cour pénale internationale*). The question of reciprocity is central to the French legislature for its self-constraint in order to comply with international obligations, as well as for the French judiciary to evenly apply and enforce them (Neuman, 2012). This condition was designed by Debré to weaken the effect of treaties in the domestic legal system, achieving only a partial retreat from the provisions of the 1946 Constitution, as observed in the previous sections. The treaty provisions and the international obligations arising from them would not come into force until all the member States had ratified it: this means that France binds the application of international law in its internal system to such a requirement. In fact, this provision emerges, as noted earlier, as a compromise between the will of Debré and that of François Luchaire, a prominent member of the *Conseil*

Constitutionnel as well as one of the "founding fathers" of the 1958 Constitution, who imposed the superiority of international law, despite the opposition of the former. The principle of reciprocity is also mentioned in Paragraph 15 of the Preamble to the 1946 Constitution: "*Subject to reciprocity, France shall consent to the limitations upon its sovereignty necessary to the organization and preservation of peace.*" However, judicial practice established a different approach for the application of international norms and their hierarchy within the internal French system: the initial responsibility of upholding the supremacy of treaties over later statutes was carried by the civil/criminal courts, followed by the administrative courts. Subsequently, the administrative courts recognized their distinct duty to interpret treaties autonomously, rather than relying solely on executive interpretation. It must be highlighted that, over time, courts have started to establish exceptions to the reciprocity clause, undermining the original intent envisioned by Michel Debré (Neuman, 2012). Hence, it is relevant to briefly analyze the jurisprudence on the matter, in order to fully appreciate the conditional and relative character of the primacy of international norms as per Article 55. In a controversial ruling on January 15, 1975 (Décision 74-54 DC, *interruption volontaire de grossesse (conformity to the European Convention on Human Rights),* "*IVG*"), the Constitutional Council declined to assess the conformity of a law to a treaty, arguing that absolute and definitive constitutional control wasn't feasible, as will be examined in the subsequent section. This stance underscores the relative and conditional nature of treaty superiority outlined in Article 55 (Decaux, 2011). This decision's validity was further questioned when litigants invoked the European Convention on Human Rights, which possesses an objective nature and is not inherently subject to reciprocity, as mentioned before. The issue resurfaces with questions of unconstitutionality, introducing ongoing tension between conventionality control and constitutionality control, potentially leading to conflicts between the *Conseil* and the European Court of Human Rights. Despite a dozen subsequent decisions reinforcing the principle, the constitutional court revisited its 1975 ruling in a decision on September 3, 1986, emphasizing that the Article's mandate extends even in the absence of explicit legal provisions: as a consequence, all State organs must ensure the application of international conventions within their respective jurisdictions (Decaux, 2011).

Once the question of reciprocity has been settled, it is possible to turn back to the definition of the superiority of international norms over domestic law and the French normative hierarchy. According to Article 55, since promulgation or transposition are not necessary, the

French legal system is supposedly monist, although this question was debated throughout the last chapter. In any case, concerning the normative hierarchy, the supremacy of treaty provisions over ordinary law appears unambiguous from the Article.

Nonetheless, as mentioned throughout the previous chapter, the Constitution is set above international laws, as evident through the examination of Article 54. Thus, the hierarchical order holds as follows: constitutional laws are superior to all sources, then treaties have supremacy over parliamentary enactments, which prevail over governmental regulations – *règlements* (Steiner, 2018). The Constitutional Council reiterated in various rulings the obligation of the legislature to uphold France's international commitments. For instance, in a decision on June 26, 1986, it emphasized that laws enabling the government to issue ordinances must not disregard the State's international obligations or the right to work. Similarly, in a decision on January 22, 1990, it affirmed that while specific provisions for foreigners are permissible, they must adhere to international obligations and uphold fundamental rights for all residents. However, a decision on August 13, 1993, clarified that assessing the constitutionality of a law should not rely solely on comparing successive laws or their conformity to international conventions, but also on their alignment with constitutional requirements (Decaux, 2011).

Therefore, it is evident that the superiority of international law is conditional with respect to domestic laws, and relative to the primacy of the Constitution: it is necessary to delve into the analysis of this latter aspect, in order to understand the complete normative hierarchy of the French legal system and the possibility of conflicts of norms.

3.1.3. The Concept of Legal Nationalism in the French Constitution: the Formal Supremacy of the French Constitution over International Law

Based on the theoretical analysis of the French legal culture, it appears clear that formalism and adherence to the written commitments are key aspects of the French Constitutional system. This holds true for the relationship between international and internal law. The emphasis on formal rules is reflected in the hierarchy of norms established by the French legal structure, where, as will be illustrated, constitutional law holds supremacy. The preference for written norms aligns with the formalistic and nationalistic approach of the French legal system. Written commitments, such as those outlined in the Constitution, provide clear guidelines and serve as the basis for legal interpretation and decision-making: formal rules ensure consistency, predictability, and stability within the legal system. The

Constitution is perceived as embodying the expression of the will of the people, a central concept to the French legal and political culture. Legal nationalism results from the formalistic and positivist adherence to the ultimate written norms – the constitutional ones. The present section is dedicated to the concept of the legal nationalism of the French constitutional system (Decaux, 2011).

Although international norms prevail over domestic law, as per Article 55, the Constitution appears to have the overall supremacy in the hierarchy of norms: thus, nationalism, at least according to the formal constitutional requirements, represents a fundamental aspect of the reception of international law. The current Constitution is accommodating of France's international commitments (Rivier, 2019): Article 55 provides that "*[t]reaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.*" Therefore, domestic courts are mindful of international law, which sets aside internal law in case of conflict of norms. From this provision, the monist features of the French Constitution arise, as international law is automatically incorporated into domestic law without the need for transformation or any *ad hoc* Act of Parliament: thus, international norms automatically hold sway over domestic legislation, as the two were part of the same legal sphere. Nonetheless, the internal French hierarchy of norms provides that the Constitution itself ranks higher than international agreements: hence, international law cannot set aside constitutional principles supplied by the *bloc de constitutionnalité* (Steiner, 2018). The Constitution itself, the 1789 Declaration of the Rights of Man, the social and economic rights listed in the preamble to the former 1946 Constitution, the fundamental principles recognised by the laws of the Republic as referred to in the 1946 Preamble, and the rights and duties defined by the 2004 Charter for the Environment are all at the apex of the pyramid of norms: as such, the Parliament can only enact legislation in accordance with them, through the surveillance of the *Conseil Constitutionnel*. Also treaties, or rather the internal acts ratifying international agreements, are subject to the constitutionality control of the latter, as stated by Article 54 of the Constitution: "*If the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President of one or the other Houses, or from sixty Members of the National Assembly or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution.*" Amendments of the Constitution upon determination of the *Conseil* due to conflicting

international agreements occurred notably in 1992, prior to the ratification of the Maastricht Treaty. The Conseil ruled that certain aspects of the treaty, such as the establishment of a single European currency and the extension of voting rights to non-nationals in local elections, were incompatible with the Constitution. Consequently, constitutional amendments were required before ratification could proceed. Similar instances arose in 1999 concerning the Amsterdam Treaty, in 2005 with the Treaty aimed at establishing a European Constitution, and again in 2008 for the Lisbon Treaty (Steiner, 2018). As mentioned in the first chapter, the *Sarran, Levancher et al.* (1998) and *Fraisse* (2000) cases constitute fundamental precedents in the context of hierarchical classification of internal and international norms. In the former case, adjudicated by the highest administrative court in France, the *Conseil d'État*, it was determined that within the internal legal order, the supremacy of international agreements is limited to parliamentary statutes, not to constitutional provisions. Consequently, if the Constitution, as in the case of *Sarran*, is found to be incompatible with certain treaty provisions, the courts are unable to set aside the Constitution to prioritize the application of the treaty. In the latter case, the Court of Cassation ruled that the Constitution was superior to treaties, echoing the stance taken in *Sarran*. These decisions may appear contradictory, as the process of constitutional review of parliamentary statutes by the *Conseil Constitutionnel* ensures that French law is consistent with the Constitution: on the other hand, treaty provisions may overrule ordinary law previously declared consistent with the Constitution itself. Thus, international law may hypothetically prevail over a constitutionally valid enactment.

This essentially represents the core of the legal nationalism which brings the French system to hold the Constitution in higher regard than international norms. Such concept is in line with both the gaullist tradition of the current Constitution, as well as the legalist and formalistic French culture: on the one hand, the very fact that constitutional norms hold ultimate authority over international law illustrates the gaullist conception of French exceptionalism, and the necessity of a strong State; on the other hand, the Constitution is conceived as the primary source of law, from which both international and internal law stem, following the positivist and formalistic doctrines inherent in the legal culture of the Nation. The importance attached to this norm-based approach is also derivative of the conception of law as expression of the general will: the Constitution is the manifestation of national sovereignty, and must be protected accordingly (Decaux, 2011). Clearly, the Fifth Republic prioritizes the primacy of the people, through the direct election of the President, as well as

the very adoption of its Constitution, which was approved through referendum: the Constitution as guarantor of the democratic expression of the general will could not be overridden by international norms, at least formally.

In the final analysis, by assembling the conceptual elements presented up top this point, it is possible to carry out a clear collective understanding of the incorporation of international norms within the French constitutional system: the French tradition founded upon gaullism, the empowerment of the people and their participation in the political life of the Country, the positivist preference of written norms, legal nationalism and formalism illustrate the rationale behind the primacy of the Constitution over international norms. The following section will be dedicated to the analysis of the judicial recognition and practical application of the normative hierarchy of the French system.

3.1.4. The Judicial Recognition of the Domestic Hierarchical Value of International Treaties: the 1975 *Jacques Vabre* Judgment and 1989 *Nicolo* Judgment

The peculiar organization of the French court system and the respective role played by the different and tribunals in the reception of international law was briefly touched in the previous sections dedicated to the analysis of the monistic and dualistic aspect of the French methods of implementation. The examination of the jurisprudence related to this topic as well as its substantive implications in the role of the judicial system will be carried out herein.

The Judgment *Société des cafés Jacques Vabre* was issued by the French Court of Cassation on May 24, 1975. This decision is the keystone of the judicial recognition of the primacy of international norms and represents a precedent for the other French highest administrative court, namely the *Conseil d'État*. The facts are as follows: the companies *Société des cafés Jacques Vabre* and *Société J. Weigel* filed an appeal against customs duties paid between 1967 and 1971 on imports of soluble coffee from the Netherlands, under the domestic consumption tax. Arguing that the coffee in question had been taxed at a higher rate than soluble coffees made in France from green coffee, contrary to the provisions of the 1957 EEC Treaty (Art. 95), the companies sought restitution of the sums collected and compensation. The decision of the Court reads as follows: "*C'est à bon droit, et sans excéder ses pouvoirs, que la cour d'appel a décidé que l'article 95 du traité devait être appliqué en l'espèce, à l'exclusion de l'article 265 du code des douanes, bien que ce dernier texte fût postérieur.*" Therefore, the Court established that, even though the French Customs Code is subsequent to the Treaty of Rome, the latter applies. In fact, "*l'Article 95 du Traité du 24 mars 1957,* [...] *en*

vertu de l'Article 55 de la Constitution, a une autorité supérieure à celle de la loi interne [...].” Thus, Article 55 of the Constitution grants international treaties higher authority than later French domestic law. Hence, the Court applied in France the landmark *Costa v ENEL* decision of the European Court of Justice, establishing the primacy of European Union law over the law of its member States. This decision, though concerning community law, naturally applies to international law outside the European Union as well. Through this case-law, the *Cour de Cassation* has enabled the judicial courts themselves to review the conventionality of laws, namely the abidance of ordinary laws to treaties and international norms. This decision is the consequence of the “*IVG*” decision of the Constitutional Council, which refuses to carry out this review itself, as will be examined in the subsequent section.

The Judgment *Nicolo* is a decision of the *Conseil d’État*, the highest court of the administrative order, issued on October 20, 1989. The legal question that lies within the case is the same as the previous *Vabre* case, namely the compatibility of a law with the terms of a treaty, where the law is subsequent to the international act in question. Through the *Nicolo* case, the entire French legal order recognizes the supremacy of international law over internal norms. In addition, the *Conseil d'Etat* declares itself and the lower administrative courts competent to review the compatibility between international treaties and French laws, even if these are subsequent. The facts are as follows: Mr. Nicolo, a French engineer, lodged an appeal against the results of the European elections held on June 18, 1989, arguing that residents of the French overseas departments and territories (DOM-TOM) had taken part in it, even though they were clearly not part of the European continent. However, the *Conseil d'Etat* ruled that the law organizing the elections (law of July 7, 1977) complied with the earlier Treaty of Rome (Art. 227-1), and rejected Mr. Nicolo’s application (Conseil d’État, 2017). Prior to the *Nicolo* ruling, the *Conseil d’État* considered that it did not have the power to set aside a law that was subsequent to an international treaty and contrary to it: in such cases, the *Conseil* would give precedence to the law over the treaty, as in the *Semolina* case (March 1, 1968, *Arrêt Syndicat général des fabricants de semoules de France*). The institution did not consider itself empowered, as an administrative court, to set aside, based on Article 55, the application of a law contrary to a treaty. This decision was mainly taken based on the principle of separation of powers, and the derived capacity of the sole *Conseil Constitutionnel* to review the constitutionality of laws. In fact, according to the theory of the *loi écran*, the law was an expression of the general will whose validity the judge cannot assess and whose application he confines himself to faithfully applying; as such, it

"interposed" itself between the international standard and the administrative judge. The judge could not, therefore, review the compatibility of a law with the stipulations of a treaty without disregarding his office (Conseil d'État, 2017). The refusal of the Constitutional Council to check itself the application of Article 55 through the aforementioned "*IVG*" case, from which the duty of the ordinary courts to do so necessarily follows, created a judicial gap. With the *Nicolo* judgment, the *Conseil d'État* finally abandoned the *loi-écran* approach, and accepted delegation of power to judges to set aside laws that were contrary to France's international commitments, following the example of the *Cour de Cassation* set by the *Vabre* judgment (Conseil d'État, 2017).

3.2. Harmonization of French Law with International Standards: Questions and Solutions to Conflicts of Norms

Having considered the provisions for the implementation and position within the normative hierarchy of international law in the French legal order, it is possible to carry out an analysis of the approach of the French judicial apparatus towards the application of international norms. The question underlying in the examination of the procedure to ensure consistency of ordinary legislation with international law is which institution is held responsible for the correct application of the latter. As previously mentioned, the Constitution does not expressly give jurisdiction to the Constitutional Council to examine claims that statutes enacted by the legislature are inconsistent with treaties (Rivier, 2019). Through the aforementioned 1975 Decision "*IVG*", the *Conseil Constitutionnel* established that consistency of ordinary legislation with treaty provisions is not a constitutional issue: this section is dedicated to the analysis of the role of the judiciary in the application of international law and the process of ensuring compliance of ordinary legislation with international obligations, as well as the possibility for individuals and authorities to challenge the constitutionality of international law. At the core of this analysis lies the Constitutional Council and the separation of powers with the other highest courts, the *Conseil d'État* and the *Cour de Cassation*, as well as with ordinary courts, in reviewing the constitutionality of treaties while ensuring compliance with international norms.

3.2.1. The *A Priori* Control of the *Conseil Constitutionnel*

It is now relevant to proceed with the discussion of the role of the judiciary and, in particular, that of the *Conseil Constitutionnel*. The judicial power has, in relation to the conclusion of international agreements, a constitutional duty which is closely linked to the concept of

hierarchy of norms. For this reason, the discussion will be resumed in the following chapter about normative conflicts within the French legal system: for the sake of the present topic, the technical role of the Council will be examined with regards to the implementation of international law, rather than delving into arguments relating to legal philosophy.

First of all, international treaties or agreements whose ratification or approval is subject to legislative authorization may be referred to the Constitutional Council to verify their conformity with the Constitution. The matter may be referred to the Council either on the basis of article 54 of the Constitution, or on the basis of Article 61, paragraph 2, on the basis of the parliamentary law authorizing ratification or approval of the international commitment in question. In the event of unconstitutionality, ratification or approval of the international undertaking can only take place after revision of the Constitution (Conseil Constitutionnel, n.d.).

Since Article 54 and the possibility for the Constitutional Council to block an Act of Parliament ratifying a treaty deemed contrary to constitutional provisions have been largely analyzed, it is relevant to focus attention on Article 61. This provision establishes the constitutionality review of the Council: in fact, as mentioned before, its role is fundamental in the context of the hierarchy of norms, since this organ is responsible of ensuring that any new international obligation conforms with the Constitution (Decaux, 2011). The primacy of the Constitution stems from the provisions in Article 54 itself; it must be noted that the notion of Constitution includes that of the entire *bloc de constitutionnalité* previously analyzed. Instead, the *Conseil Constitutionnel* has always refused to introduce treaties into the corpus of constitutionality, meaning it does not have to assess the conventionality of a new treaty with one previously ratified. In general, if an obligation is deemed to be in conflict with the Constitution, either the proposed treaty is discarded, or an amendment to the Constitution becomes necessary before ratification, as happened, for instance, with the Treaty of Maastricht, which has been subject of three constitutional referrals. This amendment could be enacted by Congress or initiated through a referendum. Subsequently, in a secondary phase, ratification of the treaty also requires authorization, either through parliamentary approval or via a referendum as stipulated in Article 11. The progressively refined and precise jurisprudence by the Constitutional Council is closely linked to the ultimate authority to "national sovereignty", which is presently embodied in the Constitution (Decaux, 2011).

3.2.2. Ensuring Compliance of Ordinary Law with International Law

The judicial authority responsible for the correct application of international law, namely the process ensuring compliance of ordinary French legislation with international norms and obligations, is the crucial question of the analysis of the practical implementation of international norms within the French normative system. First, it is necessary to explain the refusal of the Constitutional Council to review the coherence between domestic and international law: in *Interruption Volontaire de Grossesse* ("*IVG*"), the *Conseil* determined that an ordinary legislation that violates a treaty is not necessarily contrary to the Constitution, since Article 55 subjects the superior authority of treaties over statutes to a condition of reciprocity (Rivier, 2019). In fact, the *Conseil Constitutionnel* determined that, even if treaties are superior to statutes, Article 55 "*does not prescribe or imply that compliance with this principle should be ensured in the context of the constitutional review of Statutes provided by Article 61 of the Constitution*" (*Conseil Constitutionnel*, DC n° 74–54, January 15, 1975, *Interruption volontaire de grossesse (conformity to the European Convention on Human Rights)*, (1975) *Journal du droit international*, at 249). Since the Constitutional Law of 23 July 2008 amending certain provisions of the Constitution, Article 61 entrusts courts with the authority to refer questions regarding the constitutionality of laws to the Constitutional Council. The Court of Cassation, which oversees civil and criminal courts, as well as the Council of State, which oversees administrative courts, both review and process the inquiries forwarded from the courts within their jurisdiction. By virtue of Articles 61, 61-1, and 62, the *Conseil* has the responsibility of conducting an *a posteriori* review of already promulgated laws, in the context of a judicial litigation. By excluding international norms from its jurisdiction, the Council reduces its scope of action, as well as the remedies to challenge the constitutionality of international law, as will be analyzed afterwards. Thus, rather than a question of constitutionality, the review of international law is a question of "conventionality", which is out of the jurisdiction of the *Conseil Constitutionnel*. The "conventionality" of the law expresses its conformity with a conventional norm resulting from the international legal order: the validity of a law presupposes that it complies with both the international conventions that bind France at the first level and the French constitution at the second level. What is implicit in this refusal to adjudicate is that ordinary courts are responsible for the control of "conventionality" of statutes: it is not the place for the Constitutional Council to oversee ordinary law *ex ante* through treaty provisions to ensure their compliance with the latter; nor can ordinary norms be tested for an *ex post* review.

Therefore, there is a strict distinction between constitutional and treaty-based issues. The *Conseil*'s decision is not based solely on ideological grounds, but it also has been justified based on the practical consideration of the large number of potentially conflicting treaties, as well as the limited timeframe available for the institution to deliver judgements – one month at most, according to Article 61 of the Constitution. Should the Council be required to screen the conformity of newly-enacted statutes with treaties *a priori*, its resources and capacity would be overwhelmed (Neuman, 2012).

As a result of the Constitutional Council's institutional distinction between review of constitutionality and conventionality of internal norms, ordinary courts had to bear the responsibility of guaranteeing compliance of ordinary norms with international treaties. This duty was in reality not fully accepted from the beginning: under the 1958 Constitution, there were several paths available for ensuring the coherence of later statutes with earlier treaties. This could have been achieved through legislative self-restraint, as outlined in Article 61 referring offending statutes to the *Conseil Constitutionnel*, or addressed through litigation in civil and administrative courts as specific cases arose: as previously mentioned, a case-by-case enforcement of Article 55 by civil/criminal and administrative courts would have permitted a better management of the French institutional resources. Initially, however, these courts hesitated to prioritize treaties over subsequent statutes. The judicial enforcement of later treaties over earlier statutes could be justified by considering the later treaty as representing a prevailing expression of sovereign will, similarly to a later statute: the judicial enforcement of an earlier treaty against a subsequent piece of ordinary law would have correspond to the judicial control of legislative powers, contradicting the principle of separation of powers inherent to the French legal culture. The procedure is analogous to that of enforcing constitutional norms against the legislature (Neuman, 2012). Judicial courts and administrative tribunals are not judges of legislative acts, which is a duty that lies within the jurisdiction of the Constitutional Council. In fact, they assumed this responsibility only after the *Conseil Constitutionnel* declined to intervene in such matters, more due to the imperative of applying Article 55 and in recognition of the supremacy of treaties over preceding statutes, rather than to yield to the Council's stance, which holds no precedence over their decisions. Still, it has fallen on them to oversee the compliance of internal law with international obligations. Nonetheless, in observance of the principle of separation of powers which distincts between the legislature and the judiciary, courts can only set the application of a non-complying domestic norm aside in the event of a conflict and apply the treaty rule

instead. Thus, treaties do not technically prevail over statutes, as they do not have supremacy due to the latter being valid on the grounds of being consistent with the former. Article 55 serves in practice as a rule of conflict, determining the preferential application of treaty provisions by courts and tribunals. This principle has resulted in numerous judgments which have effectively paralyzed the implementation of ordinary laws deemed incompatible with specific treaties, particularly in the realm of human rights. Despite the absence of a direct violation of Article 55 of the French Constitution when enacting statutes inconsistent with treaty law, both Parliament and the Executive are *de facto* obliged to adhere to treaties and international agreements during the legislative process (Rivier, 2019). The "conventionality" control carried out by ordinary courts will be analyzed in depth in the subsequent sections, through the *Nicolo* and *Vabre* judgments. Besides treaty provisions, it is necessary to navigate the differences with the review of customs, general principles of international law, and *jus cogens*.

3.2.3. The Lack of Remedies to Challenge the Constitutionality of International Obligations

As previously mentioned, the role of the Constitutional Council in the review of international norms is rather limited: the scope of the *ex ante* constitutional review concerns only treaties subject to legislative authorization, as the *Conseil* can block the authorization to ratify or approve a treaty that would conflict with constitutional law, but it must step in either the legislation to commit the State to international obligation is authorized (Art. 54), or before it is promulgated (Art. 61). Therefore, most of the agreements concluded by France as well as international customs are outside of the scope of the institution, as they do not fall within the category of treaties established as of Article 53. As pursuant to Article 54, "[*i*]*f the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President of one or the other Houses, or from sixty Members of the National Assembly or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution.*" Furthermore, authorization to approve or ratify is frequently granted to the executive notwithstanding any referral to the Council. The French law does not set up an *a posteriori* review of treaties or customs: thus, once international norms have been ratified, they are presumed to be consistent with the Constitution.

Therefore, French judicial practice and constitutional provisions illustrate that conflicts between international and domestic law create a legal impasse devoid of a clear resolution. When addressing the application and enforcement of international law within France's domestic sphere, the overarching authority lies with constitutional law. However, it is noteworthy that French constitutional law doesn't explicitly safeguard the alleged monist notion of the superiority of international norms within domestic legal frameworks, ensuring the State's consistent adherence to its international commitments. While the primacy of international law is not explicitly enshrined in French constitutional doctrine, practical interpretations ensure the avoidance of direct clashes between domestic and international legal norms. The separation of powers between the legislative and judicial branches, as well as the delineation of authority between the Constitutional Council and the other courts, precludes any active efforts to maintain complete autonomy from international legal constraints. Domestic courts, as integral components of the State apparatus, remain deeply invested in upholding France's international commitments within the framework of its Constitution. Through numerous rulings grounded in domestic law, they effectively implement France's international legal obligations (Rivier, 2019).

3.3. The Application of International Law within the French Legal System: The Role of the Judiciary

In the French litigation system, the ordinary courts and tribunals have complete jurisdiction over the State's international commitments (Rivier, 2019). The structure of the court system is vital in the implementation of international law in France, as it avoids any direct conflict of norms despite the three different ranks that international, domestic, and constitutional norms cover: as mentioned in the previous chapter, the three highest courts of the French system, namely the *Conseil Constitutionnel*, the *Cour de Cassation*, and the *Conseil d'État,* all enjoy equal rank and have their own sphere of attribution. Because of this differentiation, international norms are received within the State in a dualist approach, as argued previously. It is not the Constitutional Council that has the responsibility of reviewing the constitutionality of treaty provisions, instead they are incorporated automatically as per Article 55, and applied by ordinary courts and tribunals. Nonetheless, they do not possess the institutional authority to force the legislature to adhere to the Republic's international obligations; nor can they defend the principles and values upheld as fundamental in domestic law from international law infringement. Although they lack the power to scrutinize the constitutional validity of international law, they do not impede its implementation

domestically. While ordinary courts cannot leverage French constitutional identity to resist international law on one hand, and do not find full constitutional backing to enforce a "monist" approach on the legislature on the other, they maintain equilibrium through alternative means. Their specific methods of operation, particularly French legal frameworks, serve to prevent limitations imposed by international regulations from taking effect in domestic law, simultaneously aiding the state in meeting its international commitments (Rivier, 2019).

The first crucial responsibility fulfilled by courts is that of conventionality control, namely the review of ordinary domestic law as being compatible with prior international obligations. Furthermore, the ordinary courts are also empowered with the interpretation of treaty provisions, and they also play a role in the application of treaties enjoying direct effect. Lastly, the application of customary international law will be examined.

3.3.1. The *Contrôle de Conventionnalité*

The validity of a law presupposes that it complies both with the international conventions binding France in the first instance, and with the Constitution in the second. The role of the ordinary courts is that of adjudicating on the consistency of legislative provisions with treaty law, without impeaching the conflict piece of domestic legislation, but only setting it aside, as explained in the previous sections. As a consequence, they do not positively safeguard the constitutional principles before international law: the supremacy of the Constitution does not imply an *ex post* constitutional review of treaties of customs by courts. It must be underlined that French courts and tribunals often leverage their interpretive authority within the framework of conventionality control to uphold domestic values or principles. At the same time, this constitutional supremacy does not impede the national implementation of international norms at the domestic level, and has not endangered the monist character of the French system giving international law primacy over the international one (Rivier, 2019).

The fundamental role played by the ordinary courts and tribunals is represented by the control of conventionality, which was briefly mentioned in the previous section devoted to the debate about monism and the reception of international law through the action of the *Conseil Constitutionnel*. This is the review of the conformity of an internal piece of legislation with international conventions: judges who declare a law to be contrary to the international norm allow the latter to take precedence over the former. The law, or the part of the law concerned, is not strictly speaking repealed, but rendered ineffective. In fact, according to the principle of

the separation of powers, domestic norms cannot be annulled by ordinary judges, but they can be set aside in the context of the pending trial in question. Naturally, this procedure is crucial to guarantee the correct application of international norms as per Article 55, ensuring the primacy of the international obligations of the State. As previously mentioned, the control of conventionality needs not to be confused with the control of constitutionality, which the Constitutional Council is accountable for: in fact, according to Article 61 of the Constitution the *Conseil* must ensure the adherence of ordinary laws to constitutional norms.

As already mentioned, the institution declared itself incompetent to exercise the conventionality review through the "*IVG*" judgment; hence, the ordinary tribunals filled this gap, starting with the judges of the judicial order through the *Vabre* judgment, and the judges of the administrative order following suit through the *Nicolo* judgment. The conventionality review is not unconditional, as not all conventional norms are eligible for such control: only international conventions that are directly applicable in the French legal system can be used to review the conventionality of a law. Direct applicability refers to the ability of the stipulations of a convention to be applied directly in legal proceedings, without the national authorities having to specify its content by means of intermediate implementing regulations. More generally, the direct applicability of an agreement is assessed article by article, according to two cumulative criteria based on case law: the norm in question must contain an a prescription of behavior individually directed of sufficient precision, and it must demonstrate the intention of the author – the French State, in particular – to confer direct applicability. It is up to the judges to examine this, under the control of the judges of the law alone, the *Cour de Cassation* and the *Conseil d'Etat*. It is important to note that the direct application of a conventional standard does not prejudge its "direct effect", namely the possibility for an individual to invoke a treaty provision and set it up against another individual – horizontal direct effect – or the French administration – vertical direct effect – in the context of a dispute. The conventionality control is composed of three steps: the identification of the relevant – and potentially conflicting – treaty provisions; the verification of their direct applicability; and the assessment of the conformity of the object inspected, which is the ultimate goal of this procedure. To this latter end, three different methods of conventionality assessment are used: The "abstract" or "*in abstracto*" control, which evaluates the rule by comparing it with other rules rather than with its concrete consequences, and, as a result, tends to validate the new provision; the "*in concreto*" control, which assesses the concrete consequences of the rule rather than the rule itself, and, a result, tends to

invalidate the new provision; the mixed control, which attempts to combine the two previous types, and tends to validate the new rule in law, subject to the proportionality of its *de facto* consequences. The three methods are used interchangeably on a case-by-case basis. Despite the past jurisprudence, the matter still represents an uncertain matter for the French courts (Sélégny, 2019).

When assessing the invalidity – unconventionality – of an ordinary norm, the judge may solely invalidate an unconventional law or regulation during litigation, wherein the plaintiff can interpose an objection of unconventionality. Clearly, the challenge may only be deemed admissible if the law or regulation under scrutiny for its conventionality is meant to be applied to the ongoing dispute. This alternative method of scrutinizing the law is to be discerned from the *Question Prioritaire de Constitutionnalité* (QPC), which enables any individual, in the course of a dispute, to petition for an examination of the constitutionality of a legislative provision. This examination permits the law to be annulled and rendered inoperative immediately in the pending case (Conseil Constitutionnel, n.d.)

3.3.2. The Interpretation of Treaties

One of the main responsibilities of the courts in the process of application of international norms is that of interpreting the norm: the interpretation of a treaty, in fact, is complementary to the application of a treaty itself, either in isolation or in combination with other sources (Decaux, 2011). Traditionally, the practice of interpretation provides for the referral for the meaning of the terms of a treaty to the Ministry of Foreign Affairs; this figure is essential as possessing the knowledge of the *travaux préparatoire* and relevant implications of the agreement, while judges of ordinary courts and tribunals are only partially aware of such information. Nonetheless, this practice has been challenged following the precedents established by the European Court of Human Rights. In fact, in the GIST judgment of June 29, 1990, the *Conseil d'État* declared itself competent to interpret treaties, without a mandatory referral to the Ministry of Foreign Affairs; despite this, the *Conseil* was directly charged by the European Court with accusation of lacking independence and impartiality in the *Beaumartin* judgment of November 24, 1994. Hence, the French highest administrative court established, through the *Serra Garriga* judgment of December 21, 1994, that it could reject the interpretation provided by the Ministry, as well as official interpretations of the International Court of Justice Statute, as per the *Aquarone* judgment of June 6, 1997. Similarly, the *Cour de Cassation* declared, through the *Banque africaine de développement* of

December 10, 1995, "*that it is a matter of course for the judge to interpret international treaties that have been invoked, without it being necessary to request the advice of a non-legal authority*". However, the referral for interpretation to the Ministry of Foreign Affairs stays in practice due to its efficacy and utility, but the official interpretation of the treaty provision in question does not bind the ordinary judge when issuing the sentence (Decaux, 2011).

3.3.3. Direct Applicability of Treaties

Another fundamental responsibility which the judiciary is entrusted with, concerns the incorporation and application of treaties enjoying direct applicability. In fact, as already mentioned on numerous occasions throughout this dissertation, the French legal system is arguably a monist one, but does not lack dualist aspects. In this case, the introduction of treaty provision having direct applicability is not completely automatic and as straightforward as it appears to be (Decaux, 2011). Within the context of the primacy of the French nationalistic primacy of the Constitution, the features rendering a treaty provision directly applicable, namely clearness, preciseness, direct enforceability, and the possibility to be invoked by individuals, this principle stems from the Constitution itself, specifically Article 55. Although treaties are typically directly applicable, there are exceptions that in reality cover a significant number of cases: either the convention contains only obligations solely directed to the States; or the rules require additional internal measures for application (Decaux, 2011).

The application of the European Convention on Human Rights (ECHR) illustrates the nuanced approach taken by French courts. Initially, there were inconsistencies in its application, with some judgments diverging from European jurisprudence. For instance, a 1980 judgment by the *Cour d'Appel* of Paris considered ECHR provisions as merely guiding principles for state legislations. However, subsequent judgments established the direct applicability of the ECHR, both in legal and administrative matters. However, there have been instances of judicial errors and inconsistencies. In a 2005 judgment by the Commercial Chamber of the *Cour de Cassation*, confusion arose regarding the invocation of international treaties, resulting in a considerable error despite no tangible consequences. Similar uncertainties persist regarding the direct applicability of recent treaties, particularly in the realm of social rights and child rights (Decaux, 2011).

Regarding the European Social Charter (ESC), the *Conseil d'État* initially held that claimants couldn't successfully invoke it, but recent developments show a more nuanced approach, though infrequently invoked due to prevailing ideas. The application of the International Covenant on Economic, Social and Cultural Rights (ICESCR) also follows a cautious approach by French courts, often denying direct applicability of its provisions. The Convention on the Rights of the Child (CRC) has seen a fluctuating application, with initial reluctance by courts, followed by a more flexible approach in later judgments. However, debates persist over the direct applicability of France's international obligations, especially with the advent of the priority question of constitutionality, which may shift the human rights discourse towards constitutional interpretation rather than strict adherence to treaty provisions. This tension between conventional and constitutional sources of law will likely continue to shape legal debates in France (Decaux, 2011).

3.3.4. The Application of International Customary Law in the French Judiciary System

Ordinary courts are also entrusted with the review of the conventionality of statutes with international custom and general principles of international law. The status of these sources of international law within the French internal system as well as their application by domestic courts is still unclear. The obligation to uphold international norms within domestic law stems from constitutional principles, specifically outlined in paragraph 14 of the Preamble to the 1946 Constitution, as observed in the previous sections. However, the interpretation of this obligation tends to adopt a minimalist approach in practice. Notably, the Constitutional Council has consistently refused to recognize customary norms as constitutionally binding (e.g., *Conseil Constitutionnel*, DC 98–408, January 22, 1999, *Statut de la Cour pénale internationale*). By denying constitutional validity to general international norms, the Constitutional Council primarily avoids their incorporation into the constitutional review process of ordinary legislation; thereby, the formal autonomy of the national legal system and the supremacy of its Constitution would be preserved. Yet, it remains ambiguous whether a conflict between a statute and a general international norm should be considered a constitutional matter falling under the jurisdiction of the Constitutional Council, especially considering France's commitment to respecting the general principles of international law. Additionally, the interpretation of the 1946 Preamble does not mandate ordinary courts and tribunals to prioritize general international law over statutes. As illustrated by the aforementioned *Aquarone* case, the *Conseil d'État* has denied the mandate of administrative courts to apply general principles of international law as having primacy over internal

legislation. In absence of effective constitutional provisions on the matter, judicial practice largely plays a role in shaping the application of general principles of international law and customs. Juridic precedents generally align with the constitutional obligation of the State to uphold international law: nonetheless, courts do not explicitly invoke this obligation to justify their actions, indicating a discretionary rather than obligatory approach to prioritizing the application of customary rules. Overall, courts tend not to base their decisions on the will of the Constituent when international custom is at stake (Rivier, 2019).

Therefore, French courts are obligated to apply customary international law directly when it conflicts with domestic legislation. However, it is up to the judges to establish whether there is a conflict of norms, and the position of non-written sources of international law, in absence of a clear constitutional provision, ultimately belongs to them. For instance, the *Aquarone* judgment of 6 June 1997, the *Conseil d'État* determined that neither Article 55 of the Constitution nor any constitutional provision "*prescribe or imply that the administrative judge must let international custom prevail over the law where there is a conflict between these two norms*" (Rivier, 2019). Hence, while recognizing the existence and normative value of international customs, the *Conseil d'État* seems to reduce it to an infra-legislative character, depriving itself in this way of a useful source (Rivier, 2019). The same outcome was declared through the *Paulin* judgment of 28 July 2000, reiterating the reduced function of customs. Although the international commitments of France are not "constitutionalized", Paragraph 14 of the Preamble to the 1946 Constitution is crucial for the respect due to international custom under the Constitution falls not just upon those bodies in charge of foreign policy but on all public bodies (Rivier, 2019).

Conclusion

This thesis has argued that the French legal system presents a unique model of incorporating international law, balancing principles of both monism and dualism. First of all, according to the crucial Article 55 of the 1958 Constitution, international norms are automatically incorporated into the French legal system upon ratification, and, as a consequence, need not to be transposed into the municipal legal system through an Act of Parliament. This clearly supports the Kelsian view of international monism. Furthermore, it has been examined how paragraph 14 of the Preamble of the 1946 Constitution, which enjoys constitutional rank, serves as the basis for the automatic incorporation of customary international norms into the domestic legal sphere: thus, general principles of international law, including peremptory norms, are permanently incorporated automatically into the French legal system. Therefore, formally speaking, the Constitution seems to provide a monistic outlook. However, this research has argued that the French monism is, in reality, a "false" monism, in that Article 3 of the 1958 Constitution, with its emphasis on national sovereignty and the weight of the will of the people, manifests a certain degree of legal nationalism. This concept represents the fundamental argument in favor of the dualist approach of the French system. In addition, Article 54 safeguards the compatibility of international treaties and agreements with the Constitution. Hence, a deeper analysis of the Constitution, with a particular focus to Articles 3, 5, 53, and 54, has allowed this thesis to take into account the dualistic aspect of the French incorporation of international norms, found in the supremacy of the Constitution over international law. As stated by Decaux, in fact, the Constitution is the source of all positive law, and has primacy over international law, as it represents the social compact resulting from the will of the people: it is the Constitution itself to define the criteria, principles and modalities according to which international law is received within the French system. It can be argued that such a method of incorporation entails the perception of international and domestic norms as being part of two separate legal spheres. The present research has recognized this dualism as compatible with the French positivist, legalistic and formalistic culture, which implies strict adherence to legal rules and procedures, and a focus on codification and the primacy of written law: the primacy of the Constitution as the source of all written law is coherent with this view. Besides the legal aspects, the political features and the historical developments of the drafting of the Constitution explain this tension between legal nationalism and an internationalist outlook, namely the gaullist and populistic demand for a strong State, and the international demand for respecting global standards and rules: this

pressure is exemplified by the compromise, during the drafting of the Constitution, between the will of Michel Debré and another one of its architects, François Luchaire, who imposed the superiority of international law, despite the opposition of the former. That being said, it is undoubtedly safe to declare that the system is widely accommodating of international norms and the French Republic's international commitments, although in a nuanced blend of monist and dualist characteristics.

The second crucial debate discussed in this thesis was the position occupied by international norms within the French normative hierarchy, as well as the judicial application of the former, with a focus on the resolution of conflicts of norms. It has been argued that treaties duly ratified have an infra-constitutional and supra-legislative value: thus, the primacy of international law is relative to that of the Constitution. This necessarily entails the necessity to harmonize domestic laws to treaty provisions, and ensure conformity of both with the Constitution. The crucial role of the *Conseil Constitutionnel* in performing an *a priori* review of Acts of Parliament ratifying a treaty deemed contrary to constitutional provisions has been observed. However, this control is rather limited. First of all, the scope of the ex ante constitutional review concerns only treaties subject to legislative authorization: in fact, the *Conseil* must step in either the legislation to commit the State to international obligation is authorized (Art. 54), or before it is promulgated (Art. 61). Furthermore, French law does not set up an *a posteriori* review of treaties or customs, according to the principle of *pacta sunt servanda*: thus, once international norms have been ratified, they are presumed to be consistent with the Constitution. Therefore, it has been demonstrated that the lack of remedies to challenge the constitutionality of international obligations seems not to be in line with the aforementioned legal nationalism and the primacy of the Constitution, which appears more formal rather than practical.

Lastly, it has been observed that ordinary courts have the larger role in the application of international norms and ensuring the compliance of ordinary law to international obligations, through the *contrôle de conventionnalité*. In fact, the refusal of the *Conseil Constitutionnel* to review the conventionality of pieces of national legislation (Décision 74-54 DC, January 15, 1975, *Interruption volontaire de grossesse (conformity to the European Convention on Human Rights),* "*IVG*") created a judicial gap field by the *Conseil d'État* and the *Cour de Cassation*, or, rather, their respective lower ordinary courts (see *Vabre* and *Nicolo* Judgments). This delegation of power of the Constitutional Council creates a separation of the reviews of constitutionality and conventionality, which can be associated with a dualist

perspective, in that it sharply distinguishes between the international and domestic legal spheres.

In conclusion, this research can serve as a contribution to comparative studies on the reception of international law in other jurisdictions, by utilizing the French case study as an example. The French system definitely provides some positive features to be possibly applied in other constitutional contexts, such as the internationalist development of the judicial decisions, as well as the explicit constitutional recognition of the supremacy of international law over the domestic one. Furthermore, the French Constitution's block of constitutionality evolves to incorporate international standards, reflecting a dynamic legal system capable of receiving international law to a constitutional degree. On the other hand, the lack of clarity with regards to the supremacy of the Constitution, coupled with the lack of remedies to challenge the constitutionality of treaty provisions, poses some contradictions within the system. In addition, dialogue between the administrative and judicial courts should be fostered in order to generate a coherent method of incorporation of international norms. As the global order further interconnects and evolves, French policy-makers and judges will have to face and solve the tension between monism and dualism, namely that between the sovereignty of the people and international pressures.

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