

LAW'S FUTURE(S):
THE SUSTAINABILITY OF TRANSNATIONAL,
NATIONAL, AND INTERNATIONAL COURTS

DISCUSSANTS

ROBERT BADINTER, STEPHEN BREYER, SABINO CASSESE,
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CO-CHAIRS

SAM MULLER AND JUDITH RESNIK

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This segment of the readings revisits the tensions and complexities of inter-judicial exchanges, invites reflections on the themes of the preceding materials, and raises questions about the decades to come. Some discussions aim to account for the contemporary allocation of authority among national and supra-national courts. Other excerpts challenge a frame devoted to nation-states and supra-national polities and focus instead on transnational institutions beyond or in lieu of nations and their courts. And yet others question the wisdom of turning to global courts and the relevancy of international law's agendas.

These readings continue the debates raised by the materials on the Brighton Declaration, constitutional pluralism, and (dis)uniformity of rights. Questions are raised again about whether courts identified with one jurisdiction are obliged to comply with judgments flowing from another, and if so, why. The related puzzle is whether the European Union poses unique problems or whether its struggles over authority ought to be assimilated into analyses focused on federations and on the impact of international law on national courts. One can, for example, see links between *Solange* and *Medellin*. Further, echoes of the debate about the U.K.'s relationship to Strasbourg—exemplified here in *Ambrose* and in Chapter III in *Hirst*—can be found in the conflicting opinions in *Medellin* and in the approach taken by the German Constitutional Court's *Lisbon Treaty* decision, aiming to categorize competencies when legitimating authority. Jurists on national courts on both sides of the Atlantic have proved skeptical about the role of supra-national adjudication, just as supra-national courts sometimes seek to avoid or sanction variation through doctrinal approaches such as the margin of appreciation and proportionality to mediate such conflicts. At times, at both the national and supra-national level, the sources of the underlying rules, principles, and claims are identified and debated directly and, at other times, assumed or left ambiguous.

Throughout, concerns are raised about legitimacy and authority, sometimes explored through the frame of democracy, at other times in terms of sovereignty, and elsewhere relying on metrics of efficacy. Some argue that all three—democracy, sovereignty, and efficacy—are dynamic concepts, requiring reformulation in light of global transnational exchanges. In some of the discussion below, commentators recommit to the nation-state, while others believe that locating power either in democratic or sovereign terms misses new forms of authority developing in myriad arrangements in which government and non-governmental entities interact. Some analyses embrace the emergence of a cosmopolitan legal order, to which courts are central. Yet others reject the turn to transnational adjudication and argue that institutions other than courts are the key actors in the decades to come. Worries then emerge about fragmentation, the

uncabined power of elites, and the failures of transnational institutions to deal with problems ranging from famines to mass atrocities.

The challenges of perspective are everywhere. As art theorist Jonathan Crary has explained in *Techniques of the Observer*, “classical models of vision,” which had posited that seeing was intrinsically objective, have been abandoned in modernity; all observations are “embedded in a system of conventions and limitations,” and we are all situated to see “within a prescribed set of possibilities.” From what vantage points, then, ought the present and the future of transnational legal institutions be assessed?

THE NATION STATE AND SUPRA-NATIONAL ADJUDICATION

Dieter Grimm

*Defending Sovereign Statehood Against Transforming the European
Union into a State**

The message of the German Constitutional Court’s (*Bundesverfassungsgericht*) decision on the Lisbon Treaty¹ is that European integration will not be brought to halt by Germany but finds its limits in the German Constitution, the Basic Law. The first aspect of the judgment was received with much relief, the second has brought a mixture of consent and disapproval. However, the judgment does not emerge *ex nihilo*. It is the continuation of a long line of precedents. . . .

Ever since its beginnings, ten years after the establishment of the European Economic Community, the jurisprudence of the Germany Constitution Court in European matters has been determined by a number of basic assumptions. It starts from the premise that the Treaties have not established a European state but a community *sui generis*, later described by the Court as a confederation (*Verbund*) of sovereign nation-states that is supported by these states and has to respect their national identity. It was not sovereignty that has been transferred, but only a number of powers (*Hoheitsrechte*), insufficient to turn

* Excerpted from Dieter Grimm, *Comments on the German Constitutional Court’s Decision on the Lisbon Treaty: Defending Sovereign Statehood Against Transforming the European Union into a State*, 5 EUR. CONST. L. REV. 353 (2009).

¹ Decision of 30 June 2009 (2 BvE 2/08, 5/08, 2 BvR 1010/08, 1022/08, 1259/08, 182/09).

the Community itself into a sovereign entity.⁵ The sovereignty retained by the member states is protected by the principle of conferred powers; they enjoy the *Kompetenz-Kompetenz*. It is for them to decide which powers they want to transfer to the Community instead of the Community deciding which powers it wants to take from the states. They are the 'Masters of the Treaties.'

From this premise several conclusions were drawn. National law and Community law are independent legal orders. Community law is neither a part of international law nor of domestic law. It flows from an autonomous source. Community law, therefore, is not valid in Germany of its own accord, but because of Germany's order to apply it domestically (*Rechtsanwendungsbefehl*). It derives its legal force within Germany from a domestic act. This act 'opens' the German legal order for law from a source other than the state. As such, Community law differs from international law, which is in need of transformation. The order to apply Community law domestically, in turn, is given wholesale by way of ratification of the European Treaties. This means that secondary Community law that has been enacted in accordance with primary law does not need to be ratified. It takes direct effect within Germany.

In principle the same is true for the supremacy of Community law. The supremacy had been established by the European Court of Justice before the *Bundesverfassungsgericht* first dealt with the relationship between European law and domestic law. The German Constitutional Court rejected the assumption that the supremacy follows directly from Article 24 Basic Law. It likewise rejected the assumption that the supremacy was inherent to Community law, for otherwise it would be unable to fulfil its function. In the German Court's view, the legal validity of Community law is not put into question by a lack of supremacy. The Court nevertheless conceded the supremacy, but derived it, like direct effect, from the national order to apply Community law domestically. This order is regarded as constitutive for the applicability of Community law in Germany.

However, Article 24 Basic Law does not empower the German government to open the German legal order without limits. German state institutions may not permit a transfer of powers by which the identity of the German Basic Law would be affected. Further limits result from the democratic principle of the Basic Law. Since the democratic legitimation of the EU emanates from the peoples of the member states, mediated by their parliaments, these parliaments need sufficiently significant fields of activity of their own in which

⁵ BVerfGE 22, 293 (296); 37, 271 (279 f.); 73, 339 (374 f.)–1986 (Solange II); 89, 155 (183). In the Maastrich decision one can find the argument that the member states founded the EU to jointly discharge part of their tasks and to that end to jointly exercise their sovereignty (p. 188 f.). But in so doing, they did not transfer their sovereignty to the EU, cf. BVerfGE 75, 223 (242)–1987.

the people can articulate their ideas and interests and thus influence the formation of the political will. As the people exercises its prerogatives mainly by electing representatives, it must be guaranteed that Parliament can decide about Germany's membership in the EU, its existence and further development. In the Court's view, this is only possible if the programme of integration is clearly and predictably regulated in the Treaties. In no case does the Basic Law permit an indefinite authorisation of the EU.

The *Bundesverfassungsgericht* is, however, aware that every transfer of powers to the EU entails a democratic loss on the national level. Due to the openness of the Basic Law to integration, this loss does not amount to a violation of the democratic principle. Yet, the Court requires that the loss on the national level be compensated by adequate democratic legitimation on the European level. This legitimation is mainly provided by the national parliaments, which ratify the transfer of powers and control the national executive that is active on the European level. The growing power of the EU makes it necessary, however, that a legitimation by the European Parliament be added, although it is not deemed capable of replacing the national parliaments since the societal preconditions of democracy are underdeveloped on the European level. In addition, the democratic principle requires that Community powers are exercised by an organ in which the national governments are represented that are subject to democratic control at home.

Transferred powers can only be exercised within the framework of the Treaties. Amendments to the Treaties are reserved for the member states as the 'Masters of the Treaties.' A change of the integration programme by organs of the EU is not covered by the German ratification law. Should the EU claim a power that has not been transferred by Germany, acts based on that power will not be valid in Germany. This would be against the constitutive force of the German order to apply Community law domestically. Furthermore, the position of the member states must not be allowed to erode through interpretation of the Treaties. Thus, the space for an extensive judicial interpretation is limited. Interpretations that are de facto changes to the Treaty are not within the legal power of the Community's institutions. Legal acts based on this kind of interpretations cannot bind the German authorities. . . .

In sum, Community law is, on the one hand, not applicable in Germany without due regard to the Basic Law. On the other hand, not all Community law that is incompatible with the Basic Law is categorically denied applicability in Germany. To the contrary, it is recognised that the authorisation to delegate powers to the Community level entails a deviation from the Basic Law's legal demands. This does not, however, impede the primacy of Community law.

Exceptions are limited to identity infractions of the German Constitution and *ultra vires* acts by the Community institutions. So far there is no case in which a legal act by the Community has been denied applicability. Yet, there are decisions in which the *Bundesverfassungsgericht* protected the primacy of Community law against conflicting decisions by German courts.³⁴

The new judgment takes all this jurisprudence on board. Since the *Bundesverfassungsgericht* has ruled that the ratification law, and as a consequence also the Lisbon Treaty, are compatible with the German Basic Law, it can confront the dangers that, in its view, nonetheless threaten the German constitutional order only on the domestic level. This takes place in three ways. First, the Court marks the limits for the German institutions when attempting future extension of Union competences or other structural changes. Second, it prescribes parliamentary co-operation on the national level, even in cases where the European Treaties do not require a national ratification process to extend Union competences. Finally, it confirms the constitutional limits of the applicability of Union law in Germany and insists on its own right to review whether the Union institutions have adhered to these set limits.

Like in the Maastricht judgment, the *Bundesverfassungsgericht* derived the standard of scrutiny from the individual right to vote in Article 38 Basic Law. It was this individual right that allowed citizens to launch the procedure for a constitutional review of the Lisbon Treaty in the first place. The review extends to Article 20 Basic Law because elections are the main mechanism to implement the principle of democracy. The principles laid down in this article are not subject to constitutional amendments, which, in turn, brings the eternity clause of Article 79(3) Basic Law into play. This clause is interpreted as the protection of the Basic Law's very identity. It is from this identity of the Basic Law that the *Bundesverfassungsgericht* connects to the issue of sovereignty, which, however, is not explicitly mentioned in the Constitution. Yet, according to the Court the Basic Law not only presupposes the 'sovereign statehood of Germany,' it also guarantees it. . . .³⁵

A certain curtailment of the German Parliament's power to make policy choices is, however, an inevitable consequence of the transfer of powers from the national to the international level, which Article 23 and 24 Basic Law permit State sovereignty therefore exists only within the limits of the Basic Law's receptiveness for international and European law (*Völkerrechtsfreundlichkeit und Europarechtsfreundlichkeit*).

³⁴ BVerfGE 75, 223 (1987).

³⁵ Lisbon Decision, para. 216.

At the same time, Germany's 'sovereign constitutional statehood' (*souveräne Verfassungsstaatlichkeit*) forms the limit of integration. . . . The characteristics of an association of states whose abandonment is prohibited by the Basic Law include that the EU receives its legal foundation from the member states by way of concluding treaties. The EU is not permitted to constitute itself. This has direct implications on the way the EU is endowed with competences. These competences are transferred according to the principle of conferral and may be withdrawn through the same procedure. A transfer of the *Kompetenz-Kompetenz* to the Union is impermissible. If the Union were to rid itself of its legal dependence on the member states and become a self-supporting entity, Germany would have to make use of the exit clause and leave the EU. This possibility must be guaranteed in the Treaty. . . .

These limits may not be undermined by way of treaty interpretation. The 'integration programme' has to be determined by the Treaty. Just as the German government is constitutionally prevented from consenting to blanket empowerments, the effect of such empowerments may not be created by treaty interpretations. Treaty interpretations that tend to maintain the *acquis communautaire* and to guarantee an effective use of the competences (*implied powers, effet utile*) must be tolerated. An interpretation that expanded or changed the primary law would, however, violate the principle of conferred powers and could ultimately lead to a disposal in the hands of the EU over its legal foundations. This is why there have to be control or break mechanisms, at least for extreme cases, that are able to prevent the Union from ridding itself of its legal dependency on the member states.

As the EU institutions exhibit a 'tendency to political self-empowerment' it is not sufficient that the ratification laws and domestic accompanying laws to further integration steps maintain the principle of conferral and make sure that the EU does not avail itself of the *Kompetenz-Kompetenz* or violate the integration-resistant identity of the German constitution. Rather, the possibility of an external control by the *Bundesverfassungsgericht* is indispensable in order to determine in concrete cases whether the EU has remained within its contractual boundaries and respected Germany's constitutional identity:

With progressing integration, the fundamental political and constitutional structures of sovereign member states, which are recognised by Article 4(2) sentence 1 TEU Lisbon, cannot be safeguarded in any other way.

Finally, the *Bundesverfassungsgericht* derives from Article 23(1) Basic Law on the one hand that the European Union, when acting autonomously, has to

follow democratic principles and on the other hand must not erode democratic rule in the member states. As far as European democracy is concerned, the Court sees no need that the nation-state model [be] adopted. The EU's democratic requirements are rather dependent on the 'extent and the weight of supranational power.' If this power increases, the level of democratic legitimacy also has to rise if the increase is to secure German consent. Considering the current development of the EU, the Court finds the level of legitimation sufficient. However, should the development of the EU take a state-like direction, Germany would be forced to demand changes to the Union's democratic legitimacy. If these demands were to be unsuccessful, Germany would have to leave the Union.

With regard to national democracy, the *Bundesverfassungsgericht* derives further limits from the Basic Law regarding the transfer of sovereign powers to the EU, even if the threshold of the constituent power of the German people and the sovereignty of the state have not yet been affected. Germany has to retain sufficient room for shaping the economic, cultural and social circumstances of domestic life. In particular, it must have the decision-making power in areas

which affect the citizens' circumstances of life, especially the private space of individual responsibility and of personal and social security, which is protected by the fundamental rights, as well as for those political decisions that particularly depend on cultural, historical and language preconditions and which unfold in a discursive manner in a public sphere that is organised by political parties and Parliament. . . .

In subsuming the Lisbon Treaty under these criteria, the *Bundesverfassungsgericht* detects a democratic deficit in the EU in comparison to the level of legitimacy within nation states. . . . This deficit is not balanced out by other provisions in the Lisbon Treaty, such as the citizens' initiative, the double majority voting system in the Council, or the participation rights of the national parliaments: 'The Treaty of Lisbon does not lead to a new level of democratic development.'

[I]t is crucial for the Court's approval of the Treaty of Lisbon that it does not transform the EU into a state and thus leaves Germany's sovereignty untouched. The principle of conferral is seen as the most important protection of the member states' statehood. They remain the 'constitutionally organised primary political area' (*verfasster politischer Primärraum*). The EU is but of additional and secondary importance and limited to those tasks that have been conferred to it. Furthermore, it is obliged to respect the national identity of the

member states and bound by the principles of subsidiarity and proportionality and the early-warning system. . . .

An abandonment of the territory of Germany does not occur through the Lisbon Treaty. The EU has no territorial sovereignty. Similarly, there is no Union specific territory. Neither is the citizenry of the member states transformed into a European citizenry by the Lisbon Treaty. In fact, EU citizenship does not constitute a European people with the right to self-determination about its political community formation. EU citizenship is rather derived from state citizenship and added to it. New rights for EU citizens comprised in the Treaty, such as the citizens' initiative, also do not constitute an 'independent personal subject of legitimation at the European level.' Finally, the extension of EU competences does not lead to an erosion of the statehood of the member states. The German *Bundestag* maintains a sufficiently large sphere for policy choices. . . .

What is new are the domestic provisos, which the Court summarises under the 'integration responsibility' of the German *Bundestag*. They extend the prerogative of the German Parliament to consent to Council decisions beyond the limits set by Article 23 Basic Law. Yet, they were instigated by the new or extended possibilities in the Lisbon Treaty to expand competences and alter the decision-making procedures by Council vote and thus without participation of domestic parliaments. The subsequent power of the *Bundesverfassungsgericht* to review these decisions of the *Bundestag* also comes as a novelty. The most conspicuous innovation, however, lies in the judgment's prospective character. It does not content itself with stating the compatibility of the Lisbon Treaty with the Basic Law, but develops limits to future integration steps that are neither taken nor envisaged by the Lisbon Treaty. . . .

The Basic Law empowers the Federal Republic to transfer sovereign powers in general and from the very beginning in Article 24(1), and with special reference to the European Union in the new Article 23(1). Indeed, if by sovereignty one understands the possession of the entire range of public powers in a specific territory, there would be no longer sovereignty at all. Sovereignty perceived as the quintessence of public power would already be given up with the relinquishment of but one single power. This concept of sovereignty was the predominant one for a long period of time. Since the end of the Second World War and the development of an order of international law, starting with the foundation of the United Nations, it is no longer sustainable. Using the term 'state sovereignty' nowadays always includes a compatibility with the existence of supranational public power. This is clearly expressed in the Lisbon judgment.

It is, however, controversial whether the level of public power that is left to the states, including member states of a supranational organisation, can still be classified as 'sovereign.' The question is whether sovereignty in the post-1945 era has been dissolved into its elements, the various powers, or whether sovereignty can be sustained as a concept even if several autonomous actors exercise sovereign powers on one territory. This controversial question cannot be fully discussed here. It suffices to say that the majority of authors tend to agree with the latter interpretation. They recognise the remaining function of sovereignty in the guarantee of the self-determination of a political unity under the conditions of an increasing transfer of public power to the international level where democratic legitimacy is either weak or completely absent.

If this is accepted the *Bundesverfassungsgericht's* differentiation between the notions of sovereignty (*Souveränität*) and sovereign powers (*Hoheitsrechten*) is not unsound. Sovereignty is then no longer a question of 'all or nothing,' but of 'more or less.' It remains true that a community without the right to determine its own basic political order cannot be referred to as sovereign. Apart from that, the answer to the question who is sovereign in the context of multi-level governance depends on who decides about the allocation of sovereign powers and how they are allocated in terms of quantity. Sovereign in a multi-level system of governance is the entity that holds the *Kompetenz-Kompetenz* and does not use this power in a way which leaves but a marginal portion for itself. A few scattered powers are not sufficient to constitute sovereignty. . . .

The question discussed here is not whether a federal European state, especially from a democratic perspective, is desirable. Rather, it is whether Germany would be allowed to join such a state if its democratic legitimacy were at the level required by Article 79(3) Basic Law. . . .

Still, Germany's incorporation in a European state would be a step of such magnitude that it could not be done via the routine amendment procedure of the Basic Law. It would mean that the member states of the EU ceased to be the 'Masters of the Treaty.' . . . The EU would emancipate itself from the member states and would become a self-supporting entity. It would gain the right to self-determination about its legal foundations while the member states would by the same token lose this right. The EU would then be permitted to determine which powers it leaves for the member states. Such an abandonment of national sovereignty would indeed require the direct and explicit consent of the people as the ultimate holders of all state authority (Article 20 Basic Law). . . .

That is facilitated by some peculiarities of Union law that are not always sufficiently taken into consideration. It seems particularly noteworthy that the

European treaties have been 'constitutionalised' by the jurisdiction of the European Court of Justice, but, by contrast to state constitutions, do not only contain the basic principles of the Union order and the norms that regulate the EU organs and their competence and procedure. Rather numerous fields that would be ordinary law in the member states are regulated on the Treaty level and consequently participate in the constitutionalisation. The implications of this difference are considerable. What has been regulated on the treaty level no longer needs to be regulated on the statutory level, nor can it be changed by legislation. The executive and judicial actors of the EU are able to impose what they consider to be the right interpretation without the political actors, Council and Parliament, being able to re-programme that interpretation if they consider its results to be harmful.

However, the implications of the constitutionalisation also extend into the area that is open to legislation, and make their presence known in the form of the familiar asymmetry between positive and negative integration. While negative integration, i.e., deregulation on a national level in order to implement the internal market, can be accomplished in the administrative mode, positive integration, i.e., re-regulation at the European level in order to correct market failure, relies on the political mode, lawmaking in the Council and the Parliament, for which the threshold of consensus is considerably higher and the chances of success are correspondingly smaller. In practice, this results in a bias toward liberalisation, which extends its effects even into the weakly communitarised field of social policy. To be sure, the member states continue to be legally free in this area, but in practice they cannot maintain their level of social policy without damaging their national economy.

The tendency toward a creeping evisceration of state legislative authority is promoted by the way in which competences are distributed in the EU. Unlike federal states, the European Treaties do not allocate legislative competencies according to subject-matters, but according to a teleological criterion. The goal, the establishment and the maintenance of the Common Market, has the effect of blurring boundaries. Since every national law can reveal itself to be a hindrance for the four freedoms of the old Article 14(2) EC, divorce law as well as the educational system, penal law as well as monument protection, it depends largely on the Commission's interpretation of Union law and its initiative to enforce it vis-à-vis the member states and on the attitude of the European Court of Justice to what extent national rules are overridden by Union law. Even the member states' discretionary space and the boundary between communitarised and inter-governmental lawmaking is now coming under pressure.

The effects also extend to fundamental rights. The Union and the member states do, to be sure, share a common basis of values. However, among the various guaranteed fundamental rights and freedoms, contradictions do arise. These contradictions tend to be resolved differently on the European level and on the national level. On the state level, economic rights are consistently the ones that are most weakly protected, and national measures to regulate the economy are scrutinised less vigorously by the constitutional courts than limitations on personal rights. On the European level, it is the other way round. Here, the economic rights tend to prevail over personal, communicative, social and cultural guarantees. Where national constitutional law grants the national legislature the most freedom, European law grants it the least.

Therefore, risks to identity and evisceration of competences are not just a threat on the treaty-making level, but also on the treaty application level. The only way to counter them would be treaty revisions. There are admittedly few prospects of such revisions being made. In the last treaty revision process, the problems mentioned here were not even an issue. Since on the European level, the European Court of Justice forms the keystone of the system and has tended to use this position in a Union-friendly way, only the highest national courts, particularly the constitutional courts, can potentially counterbalance it. Admittedly, that alone would not allow them to make use of their power if there were no legal grounds for them to act. However, the *Bundesverfassungsgericht* has provided plausible grounds for how its position and controlling authority result from the very premises of Union law and are demanded by the national constitution. . . .

The view that the Lisbon judgment of the German Constitutional Court has brought European integration to an end can only be maintained if a European federal state is seen as the ultimate goal of integration. The question whether this is something worth striving for is debatable. Even if it were something worth striving for, it would not be something that can be quickly accomplished. However, as long as the EU is a community of states whose identities are to be protected, then their position as 'Masters of the Treaties', *Kompetenz-Kompetenz* and the principle of limited and specific power transfer all have their well-deserved places. Below these tenets, particularly in the secondary lawmaking process, nothing is changing anyway, as the Court's endorsement of the Lisbon Treaty shows. At best, the decision will increase the EU's mindfulness that its legitimacy depends largely on the democracy of the member states and that it should be hesitant to exhaust this capital.

Ambrose v. Harris
United Kingdom Supreme Court
[2011] UKSC 43

[Editor's Note: Three applications were before the Court. This excerpt focuses on one—Ambrose.]

The appellant . . . , John Paul Ambrose, was prosecuted on summary complaint at Oban Sheriff Court on a charge of . . . being drunk in charge of a motor vehicle whilst having consumed a level of alcohol in excess of the prescribed limit. . . .

[T]he appeal court referred the following question to this court:

“Whether the act of the Lord Advocate in leading and relying on evidence obtained in response to police questioning of the appellant conducted under common law caution at the roadside and without the appellant having had access to legal advice was incompatible with the appellants rights under article 6(1) and 6(3)(c) of the European Convention on Human Rights, having regard in particular to the decision of the Supreme Court of the United Kingdom in *Cadder v H.M. Advocate* (2010). . . .”

LORD HOPE OF CRAIGHEAD DPSC

1. On 26 October 2010 this court issued its judgment in *Cadder*. It held that the Crown's reliance on admissions made by an accused without legal advice when detained under section 14 of the Criminal Procedure (Scotland) Act 1995 gave rise to a breach of his right to a fair trial, having regard to the decision of the European Court of Human Rights (ECtHR) in *Salduz v Turkey* (2008). This was because the leading and relying on the evidence of the appellant's interview by the police was a violation of his rights under article 6.3(c) read in conjunction with article 6.1 of the European Convention on Human Rights

15. [A] decision by this court that there is a rule that a person who is suspected of an offence but is not yet in custody has a right of access to a lawyer before being questioned by the police unless there are compelling reasons to restrict that right would have far-reaching consequences. There is no such rule in domestic law. If that is what Strasbourg requires, then it would be difficult for us to avoid holding that to deny such a person access to a lawyer would be a breach of his rights under articles 6(1) and 6(3)(c) of the Convention. But the consequences of such a ruling would be profound, as the answers to police

questioning in such circumstances would always have to be held—in the absence of compelling reasons for restricting access to a lawyer—to be inadmissible. The effect of section 57(2) of the Scotland Act 1998 would be that the Lord Advocate would have no power to lead that evidence. I agree with Lord Matthew Clarke that this would have serious implications for the investigation of crime by the authorities. This suggests that a judgment pointing unequivocally to that conclusion would be required to justify taking that step. If Strasbourg has not yet spoken clearly enough on this issue, the wiser course must surely be to wait until it has done so. . . .

17. In *R (Ullah) v Special Adjudicator* (2004), Lord Bingham of Cornhill said that Lord Slynn's observations in that case reflected the fact that the Convention is an international instrument, the correct interpretation of which can be expounded only by the Strasbourg court. From that it followed that a national court should not without strong reason dilute or weaken the effect of the Strasbourg case law. It was its duty to keep pace with it as it evolved over time. There is, on the other hand, no obligation on the national court to do more than that. As Lord Bingham observed, it is open to member states to provide for rights more generous than those guaranteed by the Convention. But such provision should not be the product of interpretation of the Convention by national courts.

18. Lord Kerr of Tonaghmore JSC says that it would be wrong to shelter behind the fact that Strasbourg has not so far spoken and use that as a pretext for refusing to give effect to a right if the right in question is otherwise undeniable. For reasons that I shall explain later, I do not think that it is undeniable that Strasbourg would hold that any questions put to a person by the police from the moment he becomes a suspect constitute interrogation which cannot lawfully be carried out unless he has access to a lawyer, which is the principle that Lord Kerr JSC derives from his consideration of the mainstream jurisprudence. But his suggestion that there is something wrong with what he calls an *Ullah*-type reticence raises an important issue of principle.

19. It is worth recalling that Lord Bingham's observations in *Ullah*'s case were not his first pronouncements on the approach which he believed should be taken to the Convention. In *Brown v Stott* (2003), he said:

“In interpreting the Convention, as any other treaty, it is generally to be assumed that the parties have included the terms which they wished to include and on which they were able to agree, omitting other terms which they did not wish to include or on which they were not able to agree. Thus particular regard must be had and reliance placed on the express terms of the Convention, which

define the rights and freedoms which the contracting parties have undertaken to secure. This does not mean that nothing can be implied into the Convention. The language of the Convention is for the most part so general that some implication of terms is necessary, and the case law of the European court shows that the court has been willing to imply terms into the Convention when it was judged necessary or plainly right to do so. But the process of implication is one to be carried out with caution, if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept. As an important constitutional instrument the Convention is to be seen as a 'living tree capable of growth and expansion within its natural limits' (*Edwards v Attorney General for Canada* (1930)), but those limits will often call for very careful consideration."

The consistency between this passage and what he said in *Ullah's* case shows that Lord Bingham saw this as fundamental to a proper understanding of the extent of the jurisdiction given to the domestic courts by Parliament. Lord Kerr JSC doubts whether Lord Bingham intended that his discussion of the issue should have the effect of acting as an inhibitor on courts of this country giving full effect to Convention rights unless they had been pronounced upon by Strasbourg. I, for my part, would hesitate to attribute to him an approach to the issue which he did not himself ever express and which, moreover, would be at variance with what he himself actually said. Lord Bingham's point, with which I respectfully agree, was that Parliament never intended to give the courts of this country the power to give a more generous scope to those rights than that which was to be found in the jurisprudence of the Strasbourg court. To do so would have the effect of changing them from Convention rights, based on the treaty obligation, into free-standing rights of the court's own creation. . . .

25. [T]he domestic law test for the admissibility of the answers that were given to the questions put by the police is whether or not there was unfairness on the part of the police. The fact that the person did not have access to legal advice when being questioned is a circumstance to which the court may have regard in applying the test of fairness, but it is no more than that. There is no rule in domestic law that says that police questioning of a person without access to legal advice who is suspected of an offence but is not in custody must always be regarded as unfair. The question is whether a rule to that effect is to be found, with a sufficient degree of clarity, in the jurisprudence of the Strasbourg court. . . .

47. The question whether the right of access to a lawyer applies at a stage before the person is taken into custody is now before the Strasbourg court in an application by Ismail Abdurahman. . . .

50. The Lord Advocate placed considerable weight in support of his argument on the judgment of the Supreme Court of the United States in *Miranda v Arizona* (U.S. 1966). In that case the Supreme Court held that the prosecution may not use statements, whether incriminatory or exculpatory, stemming from custodial interrogation of a defendant unless it demonstrated the use of procedural safeguards which were sufficient to secure the privilege against self-incrimination. These safeguards require that, unless other fully effective means are devised to inform the accused person of the right to silence and to assure continuous opportunity to exercise it, he must be warned that he has a right to remain silent, that any statement that he does make may be used as evidence against him, that he has the right to consult with an attorney and that, if he cannot afford one, a lawyer will be appointed to represent him. "Custodial interrogation" for the purposes of this rule means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. . . .

53. It is not unreasonable to think that *Miranda* and subsequent cases that the ruling in that case have given rise to in the United States will influence the thinking of the Strasbourg court as it develops the principles described in *Salduz*. . . .

67. The question in Ambrose's case is whether the act of the Lord Advocate in leading and relying on evidence obtained in response to police questioning of the appellant conducted under common law caution at the roadside and without the appellant having had access to legal advice was incompatible with the appellant's rights under article 6(1) and 6(3)(c). I would answer this question in the negative. . . . I would hold that Ambrose was charged for the purposes of article 6 when he was cautioned and that the police officer had reason to think that the second and third questions were likely to elicit an incriminating response from him. . . .

68. But I would hold it would be to go further than Strasbourg has gone to hold that the appellant is entitled to a finding that this evidence is inadmissible because, as a rule, access to a lawyer should have been provided to him when he was being subjected to this form of questioning at the roadside. This leaves open the question whether taking all the circumstances into account it was fair to admit the whole or any part of this evidence. There may, perhaps, still be room for

argument on this point. So I would leave the decision as to how that question should be answered to the Appeal Court. . . .

[The concurrence of LORD BROWN OF EATON-UNDER-HEYWOOD JSC is omitted.]

LORD DYSON JSC

88. [I]n *Salduz v Turkey* (2008), the ECtHR decided that article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms requires that, as a rule, access to a lawyer should be provided to a suspect when he is interrogated by the police while he is in detention; and that there will usually be a violation of article 6 if incriminating statements made by a suspect during a police interrogation in such circumstances are relied on to secure a conviction. . . . The central question that arises in the present proceedings is whether the *Salduz* principle also applies to interrogations of a suspect that are conducted before he is placed in detention. . . .

89. Lord Kerr of Tonaghmore JSC says that (i) even if the European court has not clearly decided whether article 6 requires the *Salduz* principle to be applied to statements obtained from a suspect when he is not in detention, that is not a sufficient reason for this court to refuse to do so; (ii) to draw a distinction between evidence obtained before and after a suspect is detained is “not only arbitrary, it is illogical”; and (iii) in any event, an analysis of the Strasbourg jurisprudence clearly shows that it draws no distinction between the two cases. . . .

97. The essential question is at what stage of the proceedings access to a lawyer should be provided in order to ensure that the right to a fair trial is sufficiently “practical and effective” for the purposes of article 6(1). What fairness requires is, to some extent, a matter of judgment. . . . I do not doubt that being interrogated by the police anywhere can be an intimidating experience and that a person may make incriminating statements to the police wherever the interrogation takes place. This can occur in a situation of what the majority of the Canadian Supreme Court described as “psychological detention” in *R v Grant* (2009).

98. On the other hand, the arresting of a suspect and placing him in custody is a highly significant step in a criminal investigation. The suspect cannot now simply walk away from the interrogator. For most suspects, being questioned after arrest and detention is more intimidating than being questioned in their home or at the roadside. The weight of the power of the police is more keenly felt inside than outside the police station. As was said in *Miranda v Arizona* (U.S. 1966),

there is a “compelling atmosphere inherent in the process of in-custody interrogation.” No doubt, it is also present to the mind of the suspect that the possibility of “abusive coercion” is greater inside than outside the police station. . . . [I] do not see how it can be said to be arbitrary or illogical to recognise that there is a material difference between the two situations. [O]ne should be careful about making assumptions about the *Miranda* experience or believing that it can be readily transplanted into European jurisprudence. . . .

99. So what should this court do in these circumstances? . . . [T]o the extent that the ECtHR has spoken on the question at all, *Zaichenko [v. Russia]* given 18 February 2010 contains a clear statement that the *Salduz* principle does not apply to statements made by a suspect during police questioning while the suspect (i) is not in custody or (ii) is not deprived of his freedom of action in any significant way. . . .

105. [T]he domestic court should remind itself that there exists a supranational court whose purpose is to give authoritative and Europe-wide rulings on the Convention. [W]e should hold that the *Salduz* principle is confined to statements made by suspects who are detained or otherwise deprived of their freedom in any significant way.

LORD MATTHEW CLARKE

115. [I] am in agreement with Lord Hope that the Strasbourg jurisprudence, to date, does not support the defence contention in these references that the ECtHR has gone as far as to say that the right emerges as soon as a suspect is to be questioned by the police in whatever circumstances.

116. As to whether this court should go further than the European court seems to have gone so far, certain important considerations lead me to the conclusion that it should not. The first is the difficulty that can arise in relation to defining precisely at what point in time someone becomes a suspect, as opposed to being a witness or a detained person. The second is that the broader version of the right, contended for by the defence in these cases, could have serious implications for the proper investigation of crime by the authorities. If the police are to be required to ensure that a person who they wish to question about the commission of a crime (in a situation where the circumstances point to the person being a possible suspect) should have access to a lawyer, if he so wishes, then such a requirement could hamper proper and effective investigations in situations which are often dynamic, fast moving and confused. The unfortunately regular street brawls in city and town centres, or disturbances in crowded places like night

clubs, which, on occasions, result in homicide, are simply examples of situations which highlight the problems that might be involved. . . .

LORD KERR OF TONAGHMORE JSC

126. The well known aphorism of Lord Bingham of Cornhill in *R (Ullah) v. Special Adjudicator* (2004) that the “duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less” has been given a characteristically stylish twist by Lord Brown of Eaton-under-Heywood in *R (Al-Skeini) v Secretary of State for Defence* (2011) where he said that the sentence “could as well have ended: ‘no less, but certainly no more.’”

[127.] Lord Bingham’s formulation [is that] . . . although such case law was not strictly binding, where a clear and constant theme of jurisprudence could be detected, it should be followed because the Convention, being an international instrument, had as the authoritative source of its correct interpretation the Strasbourg court. A refusal to follow this would “dilute or weaken the effect of the Strasbourg case law.”

128. I greatly doubt that Lord Bingham contemplated—much less intended—that his discussion of this issue should have the effect of acting as an inhibitor on courts of this country giving full effect to Convention rights unless they have been pronounced upon by Strasbourg. I believe that, in the absence of a declaration by the European Court of Human Rights as to the validity of a claim to a Convention right, it is not open to courts of this country to adopt an attitude of agnosticism and refrain from recognising such a right simply because Strasbourg has not spoken. There are three reasons for this, the first practical, the second a matter of principle and the third the requirement of statute.

129. It is to be expected, indeed it is to be hoped, that not all debates about the extent of Convention rights will be resolved by Strasbourg. As a matter of practical reality, it is inevitable that many claims to Convention rights will have to be determined by courts at every level in the United Kingdom without the benefit of unequivocal jurisprudence from the European court. Moreover, as a matter of elementary principle, it is the court’s duty to address those issues when they arise, whether or not authoritative guidance from Strasbourg is available. The great advantage of the Human Rights Act 1998 is that it gives citizens of this country direct access to the rights which the Convention enshrines through their enforcement by the courts of this country. It is therefore the duty of this and every court not only to ascertain “where the jurisprudence of the Strasbourg court clearly shows that it currently stands” but to resolve the question of whether a claim to a Convention right is viable or not, even where the jurisprudence of the

Strasbourg court does not disclose a clear current view. Finally, section 6 of the Human Rights Act 1998 leaves no alternative to courts when called upon to adjudicate on claims made by litigants to a Convention right. This section makes it unlawful for a public authority, including a court, to act in a way which is incompatible with a Convention right. That statutory obligation, to be effective, must carry with it the requirement that the court determine if the Convention right has the effect claimed for, whether or not Strasbourg has pronounced upon it.

130. [I]f the much vaunted dialogue between national courts and Strasbourg is to mean anything, we should surely not feel inhibited from saying what we believe Strasbourg ought to find in relation to those arguments. Better that than shelter behind the fact that Strasbourg has so far not spoken and use it as a pretext for refusing to give effect to a right that is otherwise undeniable. I consider that not only is it open to this court to address and deal with those arguments on their merits, it is our duty to do so. . . .

131. The true nature of the right under article 6.1, taken in conjunction with article 6(3)(c), can only be ascertained by reference to its underlying purpose. What is its purpose? The accused argue that its purpose is that when a person becomes a suspect, because of the significant change in his status that this entails; because of the potential that then arises for him to incriminate himself or to deal with questions in a way that would create disadvantage for him on a subsequent trial; and because of the importance of these considerations in terms of his liability to conviction, the essential protection that professional advice can provide must be available to him.

132. The right, it is argued, should not be viewed solely as a measure for the protection of the individual's interests. It is in the interests of society as a whole that those whose guilt or innocence may be determined by reference to admissions that they have made in moments of vulnerability are sufficiently protected so as to allow confidence to be reposed in the reliability of those confessions. . . . [T]hese arguments should prevail. If it has taught us nothing else, recent experience of miscarriage of justice cases has surely alerted us to the potentially decisive importance of evidence about suspects' reactions to police questioning, whether it is in what they have said or in what they have failed to say, and to the real risk that convictions based on admissions made without the benefit of legal advice may prove, in the final result, to be wholly unsafe. The role that a lawyer plays when the suspect is participating in what may be a pivotal moment in the process that ultimately determines his or her guilt is critical.

133. Thus understood, the animation of the right under article 6(1) cannot be determined in terms of geography. It does not matter, surely, whether someone

is over the threshold of a police station door or just outside it when the critical questions are asked and answered. And it likewise does not matter whether, at the precise moment that a question is posed, the suspect can be said to be technically in the custody of the police or not. If that were so, the answer to a question which proved to be the sole basis for his conviction would be efficacious to secure that result if posed an instant after he was taken into custody but not so an instant before. That seems to me to be a situation too ludicrous to contemplate, much less countenance.

134. Two supremely relevant, so far as these appeals are concerned, themes run through the jurisprudence of Strasbourg in this area. The first is that, in assessing whether a trial is fair, regard must be had to the entirety of the proceedings including the questioning of the suspect before trial. The second theme is that, although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial.

135. Taken, as they must be, in combination, these features of a fair trial lead inexorably to the conclusion that where an aspect of the proceedings which may be crucial to their outcome is taking place, effective defence by a lawyer is indispensable. When one recognises, as Strasbourg jurisprudence has recognised for quite some time, that the entirety of the trial includes that which has gone before the actual proceedings in court, if what has gone before is going to have a determinative influence on the result of the proceedings, it becomes easy to understand why a lawyer is required at the earlier stage.

136. There is no warrant for the belief that vulnerability descends at the moment that one is taken into custody and that it is absent until that vital moment. The selection of that moment as the first occasion on which legal representation becomes necessary is not only arbitrary, it is illogical. The need to have a lawyer is not to be determined on a geographical or temporal basis but according to the significance of what is taking place when the later to be relied on admissions are made. . . .

137. Quite apart from these considerations, however, I believe that one must be careful about making assumptions about the *Miranda* experience or believing that it can be readily transplanted into European jurisprudence in any wholesale way. The implications of that decision must be considered in the context of police practice in the United States of America. Nothing that has been put before this court establishes that it is common practice in America to ask incriminating questions of persons suspected of a crime other than in custody. Indeed, it is my understanding that as soon as a person is identified as a suspect,

police are trained that they should not ask that person any questions until he or she has been given the *Miranda* warnings.

168. Custody was identified in *Miranda*'s case as one of the features necessary to activate the need for legal representation but custody has been held to mean either that the suspect was under arrest or that his freedom of movement was restrained to an extent "associated with a formal arrest": see *Stansbury v California*, 511 US 318 (1994); *New York v Quarles* 467 U.S. 649, 655 (1984). So it is clear that the rule that custody is required before entitlement to legal representation arises is not inflexible or static and that its underlying rationale is closely associated with the question whether the person questioned feels under constraint to respond.

Brenda Hale

*Argentorum Locutum: Is Strasbourg or the Supreme Court Supreme?**

My title comes . . . from the short opinion of the late lamented Lord Rodger of Earlsferry in *Secretary of State for the Home Department v AF (No 3)* [(2009)]. This was all about the minimum requirements for a fair hearing in control order cases where the Secretary of State declined to allow some of the material upon which the order was based to be disclosed to the controlled person. In the earlier case of *Secretary of State for the Home Department v MB* [(2007)], the House of Lords had performed heroic feats of interpretation under section 3 of the Human Rights Act 1998 and read the Prevention of Terrorism Act 2005 to mean precisely the opposite of what Parliament had intended: thus, if the Secretary of State was unwilling to make the disclosure necessary to enable the controlled person to have a fair hearing, the Court was unable to confirm the order. But the majority of us thought that disclosure of the closed material to a special advocate would in many, perhaps most, cases enable the controlled person to have a fair hearing.

When *MB* was decided, it was not entirely clear what test the Strasbourg Court would apply to the extent of disclosure required for a hearing to be fair. They had recognised that considerations of national security might justify some modification to what would otherwise be required for a fair trial, provided that

*Excerpted from Brenda Hale, *Argentorum Locutum: Is Strasbourg or the Supreme Court Supreme?*, Nottingham Human Rights Lecture (Dec. 1, 2011).

‘any difficulties caused to the defence by a limitation on its rights [were] sufficiently counterbalanced by the procedures followed by the judicial authorities.’ There was a distinct hint that special advocates might be enough. But by the time that *AF (No 3)* reached us, the Grand Chamber had decided the case of *A and others v United Kingdom* [(2009)].

. . . They held that the necessary secrecy had to be ‘counterbalanced in such a way that each applicant still had the possibility effectively to challenge the allegations against him.’ The special advocate could not perform his function of testing the evidence and putting forward arguments on behalf of the detainee properly ‘unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate.’ Where ‘the open material consisted purely of general assertions and [the decision] was based solely or to a decisive degree on closed material the procedural requirements of Article 5(4) would not be satisfied.’

Although *A v United Kingdom* was concerned with detention, and the control order cases were not, the House of Lords in *AF (No 3)* considered it inevitable that Strasbourg would take the same view of the procedural requirements for confirming control orders. Strangely enough, and despite some provocation from the Bench, the government did not challenge our bold interpretation of the legislation and invite us to make a declaration of incompatibility instead. So we adopted the Strasbourg view. As Lord Rodger put it, ‘Even though we are dealing with rights under a United Kingdom statute, in reality we have no choice. *Argentorum locutum, iudicium finitum*—Strasbourg has spoken, the case is closed.’ I do not think that he wholly approved of that conclusion.

But was he right? Does Strasbourg have the last word? The Lord Chief Justice and the President of the Supreme Court have recently expressed slightly different views on this issue. One thought that it did not, at least in the courts of this country, and the other thought that it did, in the end at least. And should we mind if it does?

These are hot topics at the moment. Strasbourg-bashing has become very popular. In his Kingsland Memorial Lecture on Wednesday, 23 November 2011, Michael Howard, the former leader of the Conservative party, attacked the Strasbourg Court for descending into the minutiae of the Convention rights and denying member states their proper margin of appreciation to interpret and apply the Convention in the light of local conditions. But he also attacked the United Kingdom courts for going beyond the Strasbourg case law in extending the interpretation of the Convention. In his FA Mann lecture on Tuesday, 8

November 2011, Jonathan Sumption QC, soon to be a Justice of the Supreme Court of the United Kingdom, also attacked the Strasbourg Court for its detailed development of the general principles in the Convention, for deciding not only whether the member states had proper institutional safeguards for those rights but also whether it agreed with the findings of those institutions, and for attempting to apply the rights in a uniform manner throughout the 47 member states, despite the fact that 'the consensus necessary to support it at this level of detail does not exist.' It is one thing to have common European values but another thing to have the same laws on such contentious issues as, for example, abortion. Given that this is such a hot political topic at the moment, it is perhaps odd that a lecture preaching that judges should stay out of political questions should have entered so publicly into the political arena. For what the United Kingdom as a member state should choose to do about what the politicians see as the over-activism of the Strasbourg Court is a completely different question from what the judges in this country should do with the jurisprudence of the Strasbourg Court.

I want to talk about the questions of law for the courts. First, what should the approach of the United Kingdom courts, and particularly our highest court, be to the Strasbourg case law? And secondly, what should be the approach of the Strasbourg Court towards the decisions of the highest courts in the member states? . . .

If you come and listen to a human rights case being argued in the Supreme Court, you will be struck by the amount of time counsel spend referring to and discussing the Strasbourg case law. They treat it as if it were the case law of our domestic courts. This is odd, because the Strasbourg case law is not like ours. It is not binding upon anyone, even upon them. They have no concepts of *ratio decidendi* and *stare decisis*. Their decisions are, at best, an indication of the broad approach which Strasbourg will take to a particular problem. Over the years, they have built up a considerable body of doctrine, but it is developing all the time. They are always saying things like 'in principle' or 'as a rule' which is not the sort of thing which we often say. . . .

The reason, I suppose, why counsel spend so much time with the Strasbourg case law is the so-called 'mirror principle,' enunciated by Lord Bingham in the famous case of *Ullah*: 'It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more but certainly no less.' With this are usually coupled the words of Lord Brown in *Al Skeini*: 'no less

but certainly no more.’ And that was undoubtedly the approach of our Deputy President, Lord Hope, in *Ambrose v Harris*, a recent devolution reference from Scotland. Sir Stephen Sedley has commented that ‘the logic of this is entirely intelligible; it avoids judicial legislation and prevents member states from getting out of step with one another.’ Although he also points out that ‘it carries the risk that, in trying to stay level, we shall fall behind.’

There are a number of well known objections to the ‘mirror principle,’ most of them voiced by people who take the opposite view from Mr Howard and want the United Kingdom to develop its own home grown human rights jurisprudence. First, although the Human Rights Act defines the Convention rights in the language used by the Convention, it is clear that it has created new rights in United Kingdom law and not simply given the people within the jurisdiction of the United Kingdom the rights which Strasbourg would give them. . . .

Secondly, the Human Rights Act does not require us to follow the Strasbourg jurisprudence, but it does require us to ‘take it into account’ (section 2(1)). The courts have given this a purposive interpretation. As the purpose of the Human Rights Act was avowedly to ‘bring rights home’ and avoid the need for people to take their cases to Strasbourg, we should take into account their jurisprudence with a view to finding out whether or not the claimant would win in Strasbourg. If it is clear that she would do so, then we should find her a remedy. Hence the view that if there is a ‘clear and constant’ line of Strasbourg jurisprudence indicating that the claimant should win, then we should follow it. But this does not apply to stray chamber decisions, particularly if we find them hard to understand or difficult to reconcile with others.

And, of course, this does not necessarily mean the reverse. There is nothing in the Act, or in its purposes, to say that we should deliberately go no further than Strasbourg has gone, or that we should refrain from devising what we think is the right result in a case where Strasbourg has not yet spoken. There is nothing in the Act to support the reluctance . . . to seek such guidance as we can from the jurisprudence of foreign courts with comparable human rights instruments (Canada is the best example), especially on subjects where we do not know what Strasbourg would say. Thus, Lord Kerr, dissenting in *Ambrose v Harris*, thought it our duty to work out the answer to a new question on first principles, albeit derived from the Strasbourg jurisprudence.

A third objection to the mirror principle is that there are plenty of indications in the Parliamentary history that another of the objects of the Human

Rights Act was to enable us to develop our own distinctive United Kingdom approach to the Convention rights. . . .

A fourth reason to doubt the 'mirror principle' is that the reason given for it, in *Ullah* and elsewhere, does not make much sense. The thinking goes back to *Brown v Stott* [(2003)]. Lord Bingham had counselled against implying new rights into the Convention: ' . . . the process of implication is one to be carried out with caution, if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept.'

But that consideration is not one for the national courts to bother about. It may or may not be desirable that the interpretation of the ECHR should be uniform throughout the member states. But anything we decide here is not likely to have any effect in other member states. They probably pay about as much attention to how we interpret the Convention rights as we pay to how they do, which is hardly any attention at all. There is no reason why either Strasbourg or the other member states should object if we go forging ahead in interpreting the scope of the Convention rights in UK law. Indeed, there is good reason to think that they do not.

Lastly, I have heard it argued that our considerable respect for the Strasbourg jurisprudence is getting in the way of our regarding the Convention as a properly British Bill of Rights, of taking its guarantees as a starting point and working out the proper balance between the competing interests for ourselves. It might even be suggested that if we had paid less attention to the Strasbourg jurisprudence, we would not have given human rights such a bad name in certain quarters, because we could be seen to be having regard to British values, British mores, and British legal principles.

So we are damned in some quarters whatever we do, whether we follow Strasbourg or whether we do not. But I think we can find several examples of our trying to follow our own, rather than a pan-European, line.

First, there are those cases where we have definitely gone further than Strasbourg had gone at the time and probably further than Strasbourg would still go. . . .*

*[Editor's Note: The cases referenced are *EM (Lebanon) v. Secretary of State for the Home Department*, [2008] UKHL 74, *R (Limbuella) v Secretary of State for the Home Department*, [2005] UKHL 66, and *G (Adoption: Unmarried Couple)* [2008] UKHL 38.]

Then there are those cases where there may have been an interference with a qualified Convention right, but it is the result of recent legislation, when Parliament was well aware of the arguments, so we have taken a British line. The most obvious example is the *Countryside Alliance* case. . . . [T]he opponents of the [Hunting] Act argued that it was contrary to Articles 8, 11 and 14 of the ECHR and Article 1 of the First Protocol to the ECHR. And as a last desperate throw, they argued that it was contrary to two of the fundamental rights of European Economic Community law, free movement of goods and free supply of services between member states of the [European Union (EU)]. Mostly, we held that the ban did not interfere with these rights at all. But, if it did, it was justified. And this was for very British reasons. . . . As Lord Bingham explained, . . . [f]or the supporters of the ban, ‘it was felt to be morally offensive to inflict suffering on foxes (and hares and mink) for sport.’ He went on, ‘. . . the present case seems to me pre-eminently one in which respect should be shown to what the House of Commons decided. The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament.’ This reasoning convinced Strasbourg that the judgment was within our margin of appreciation. One can imagine that in other European countries, an interference with the time-hallowed right to hunt over other people’s land or shoot tiny song birds for sport would not have been justified.

The test for justification for any interference with the EU rights on grounds of public policy is even stricter. Lord Bingham relied on the well-known *Omega* case (2004) from Germany. This was about the laser gun games. The German police had banned the use of laser guns against human targets. This was found justified in Germany (though we do not find it offensive here) because the simulated killing of human beings for fun infringed the fundamental value of human dignity enshrined in the German Constitution. Here, Parliament had concluded that the prevention of cruelty to animals in the pursuit of sport was a fundamental British value.

In similar vein was our controversial decision in the *Animal Defenders International* [(2008)] case, which was about our very comprehensive ban on any kind of political advertising. The appellants wanted to show an advertisement on TV showing a child chained and caged in the way that chimpanzees and other primates may be chained and caged. Their object was to campaign for a change in the law, which is caught by section 321(3)(b) of the Communications Act 2003. This was clearly an interference with freedom of speech, indeed freedom of political speech, which is the most important of the kinds of speech protected by Article 10 of the ECHR. It would certainly not be tolerated in the United States of America. But, as I pointed out. ‘In the United Kingdom, and elsewhere in Europe,

we do not want our government or its policies to be decided by the highest spenders. . . . We have to accept that some people have greater resources than others with which to put their views across. But we want to avoid the grosser distortions which unrestricted access to the broadcast media will bring.’

A fair balance had to be struck between freedom of speech and the protection of our democracy, based upon the equal value of everyone, rich and poor. Parliament had struck that balance recently and its view should be respected (notwithstanding a decision of a chamber of the Strasbourg Court which pointed the other way).

You can see these cases as examples of our bowing—or surrendering—to the recent judgment of Parliament as to how the balance between the competing private rights and public interest should be struck. But I would also see them as striking the balance in a very British way. Another example of striking the balance in a very British way, this time despite the reluctance of the national Parliament to do so, is the Northern Ireland case of *Re G* [(2008)]. The claimants were an unmarried opposite sex couple who wished jointly to adopt the woman’s 10-year-old daughter. English law and Scottish law have both now permitted joint adoptions by unmarried couples, whether of the same or opposite sexes. But Northern Ireland retained the old law, which restricts joint adoptions to married couples (and even failed to include civil partners when the Civil Partnership Act 2004 was passed). Single people, whether or not they are in a stable opposite or same sex relationship, can adopt alone but the child will not become their partner’s child or a member of their partner’s family. . . .

We decided, not without some hesitation on my part, that the ban was contrary to Article 14 of the ECHR, which prohibits unjustified discrimination in the enjoyment of the Convention rights, in this case, the right to respect for the family life which the child, her mother and her step-father enjoyed together. While there may often be good reasons not to allow an unmarried couple to adopt, it is difficult to find good reasons for a blanket ban. It is, as Lord Hoffmann put it, to turn a reasonable generalisation into an irrebuttable presumption. Bright line rules may be appropriate in some cases, but not where the object is to promote the welfare of children. There could well be cases, especially where the child was already living with the couple and had no contact at all with the other half of her birth family, where adoption by them both would be better for the child than the status quo.

This was a case on which Strasbourg had not yet spoken. The Court had recently held, in a change of mind, that refusing to allow adoption by a gay or lesbian person was incompatible with Article 14. But here, the issue was whether

a ban on joint adoptions by unmarried couples, whether of the same or opposite sexes, was incompatible. Two of us were by no means sure that Strasbourg would find that it was: the European Convention on Adoption was still restricted to married couples and in the Republic of Ireland the married family was protected by the Constitution. It seemed unlikely to me that Strasbourg would oblige the Irish to allow unmarried couples to adopt. But, we were in the United Kingdom. Our paramount principle is the welfare of the child. The blanket ban could not be reconciled with that principle. So we declared it unlawful for the courts in Northern Ireland to refuse to accept an adoption application on the sole ground that the applicants were not married to one another. We could do that, rather than making a declaration of incompatibility, because the law was contained in delegated legislation.

That case led me to change my own position a little on our relationship with the legislature. . . . [I]n *Animal Defenders International* (2008), I declared that ‘I do not believe that, when Parliament gave us these novel and important powers . . . it was giving us the power to leap ahead of Strasbourg in our interpretation of the Convention rights.’ It is tempting to draw a distinction between leaping ahead of Strasbourg when developing the common law and leaping ahead of Strasbourg in telling Parliament that it has got things wrong. It is in the latter context that most of the strongly *Ullah*-type statements have been made. Yet, the concept of the ‘Convention rights,’ upon which all our powers and duties under the Human Rights Act depend, cannot mean different things depending upon whether we are developing the common law, controlling the executive or assessing the legislation. I now think that it is more a question of respect for the balances recently struck by the legislature than a question of the extent of our powers. One reason for this is that an aggrieved complainant can always go to Strasbourg if she disagrees with our assessment, but the United Kingdom cannot.

But all these cases were about the justifications for interferences with qualified rights, on questions which Strasbourg might very well hold to be within our margin of appreciation—indeed, where arguably they should do so even if they sometimes might not. We cannot then decline to decide the case on the basis that Strasbourg has not yet spoken. We have to make the best judgment we can about the balance between the competing interests. It does seem, from the materials quoted earlier, that Parliament intended us to do our best to interpret the Convention rights in accordance with British conditions and British values. . . .

But what about the reverse situation, where we think that Strasbourg has gone too far, and failed to take proper account of our legal traditions here? Jury trial does not sit comfortably with all the requirements of Article 6. But, neither

does the continental inquisitorial practice, in which the defendant may not get an opportunity to challenge everything which is in the dossier compiled against him. The Criminal Justice Act 2003 provides for the admissibility of hearsay evidence in certain circumstances, including when the person making a witness statement has since died. In *Al-Khawaja* (2011), a Chamber of the Strasbourg Court held that it was a breach of Article 6 where this was the sole and decisive evidence against the defendant—even though there was ample corroboration for what the deceased victim had said. So when the same problem came up before the Supreme Court in *Horncastle* [(2009)], the Court went to a great deal of trouble to explain to Strasbourg why we thought they were wrong and that a fair trial could still be had in those circumstances. The object was to persuade the Grand Chamber to hear the *Al-Khawaja* case and to reach a different conclusion. [The Grand Chamber did take the case and adopted a more nuanced stance in December 2011.] . . .

. . . [If the Strasbourg Court had maintained its stance, what would we do when the question next came before us?] We have not so far, at least to my knowledge, ever disagreed with—or failed to apply—a decision of the Grand Chamber which is directly in point or even a ‘clear and constant’ line of chamber decisions. . . . So there would be three choices. First, we could meekly go along with it and engage in some heroic interpretation of the 2003 [Criminal Justice] Act to make it compatible with the Convention rights. How far section 3(1) of the Human Rights Act allows us to go in that direction is a large topic for another day. But I sense some reluctance among my colleagues to go as far as the boldest cases, including *MB*, have gone in the past. So I think that we would not do that. Second, we could meekly go along with it and make a declaration of incompatibility under section 4. Third, however, we could politely decline to make a declaration of incompatibility on the ground that we do not agree with the Strasbourg decision. *Argentorum locutum: iudicium non finitum*. . . .

But what of the Strasbourg Court itself? The newly elected President, Sir Nicolas Bratza, has mounted a serious defence of the relationship between us. He points out that last year there were around 1,200 applications to Strasbourg from the UK, the great majority of which were declared inadmissible or struck out. Only 23 resulted in a judgment of the Court and in several of these there was no violation found. He argues that the Strasbourg Court has shown itself receptive to arguments that it has misunderstood national law or given insufficient weight to national traditions or practices; it does pay close regard to the particular requirements of the society in question; even if a violation is found, it tends to leave it to the national authorities to decide how to put it right—the most obvious example being the prisoners’ voting case. Nevertheless, he believed that there

were things the Strasbourg Court could do to ensure greater harmony between national courts and Strasbourg. . . .

[I]n his view, there is room for increased dialogue between the courts, both informally and in our judgments. . . . Currently under discussion between the politicians, of course, is whether the . . . [ECHR] should be amended so as to allow the member states some way out when there is a serious disagreement between their national Parliament and the Strasbourg Court, as currently there is here about prisoners' voting rights. That is a matter for the politicians and certainly not my concern as a judge. But, as a judge, I am intrigued and encouraged indeed to know that *Argentoratum locutum, iudicium finitum* is not in fact how the President and his fellow judges view the respective roles of our two courts. I think that there is room for us to develop a distinctively British human rights jurisprudence without overstepping the boundaries which Parliament has set for us. It is just as likely to lead to our respecting the recent judgments of Parliament as it is to our declaring them incompatible. We may look forward to an even more lively dialogue with Strasbourg in future.

Jonathan Sumption

Judicial and Political Decisionmaking: The Uncertain Boundary*

The real problem about the Human Rights Convention is not the general principles stated in it, which would be accepted by almost every one. The problem is that the case-law of the Strasbourg Court has derived from them by a process of implication and extension a very large number of derivative sub-principles and rules, addressing the internal arrangements of contracting states in great detail. Many of these sub-principles and rules go well beyond what is required to vindicate the rights expressly conferred by the Convention. In addition, the Strasbourg court has taken it upon itself to decide not only whether contracting states had proper institutional safeguards for the protection of human rights, but whether it agreed with the outcome. . . . The result of this approach has been to shrink the margin of appreciation allowed to contracting states to almost nothing.

*Excerpted from *Jonathan Sumption*, Justice, Supreme Court of the United Kingdom, Judicial and Political Decisionmaking: The Uncertain Boundary, F.A. Mann Lecture (Nov. 9, 2011), available at <http://www.guardian.co.uk/law/interactive/2011/nov/09/jonathan-sumption-speech-politicisati-on-judges>.

One of the most striking features of modern human rights theory is its claim to universal validity. The European Convention has been construed as attributing rights to humans simply by virtue of their humanity, irrespective of their membership [in] any particular legal or national community. In this spirit, the Strasbourg Court endeavours not only to interpret the Convention but to apply it in a uniform manner throughout the 47 states which subscribe to it. This approach conflicts with some very basic principles on which human societies are organised. National communities are diverse, even within a region such as Europe with a strong common identity. Their collective values are the product of their particular culture and history. Rights are necessarily claims against the claimant's own community, and in a democracy they depend for their legitimacy on a measure of recognition by that community. A principled objection to extreme exercises of state power, such as military government, torture or imprisonment without trial is no doubt common to every state party to the Convention. But the Strasbourg Court has treated the Convention not just as a safeguard against arbitrary and despotic exercises of state power but as a template for most aspects of human life. These include many matters which are governed by no compelling moral considerations one way or the other. The problem about this is that the application of a common legal standard . . . breaks down when it is sought to apply it to all collective activity or political and administrative decision-making. The consensus necessary to support it at this level of detail simply does not exist.

Extremes apart, political communities may and do legitimately differ on what rights should be recognised. Even where they recognise the same rights, they frequently differ on what those rights imply or how effect should be given to them. . . . [Human rights issues] are issues between different groups of citizens, whose resolution by democratic processes will not necessarily lead to the same answer everywhere. Yet in the course of its admittedly obscure judgment in *A, B and C v. Ireland* the Grand Chamber of the European Court of Human Rights appears to have thought that because the great majority of European states have since the 1970s given qualified primacy to the health and wellbeing of the mother over the interests of the unborn child, it was not necessarily open to Ireland to take a different view. It is clear from this judgment, so far as anything is, that if the Strasbourg Court had found a European consensus about when life can be said to begin, they would have declared abortion in the interest of the health and wellbeing of the mother to be a human right and imposed it on Ireland. As it was, the only reason why Ireland's highly restrictive abortion laws were judged compatible with the Convention was that they did not prevent Irish women from travelling to England for an abortion.

Luzius Wildhaber

*A Constitutional Future for the European Court of Human Rights?**

[To the extent that] the national authorities are in a position to apply Convention case-law to the questions before [them], then much, if not all, of the Strasbourg Court's work is done. This is ultimately the objective underlying the system: to ensure that persons throughout the Convention community are able fully to assert their Convention rights within the domestic legal system.

Another way of putting this is that fulfilment of the procedural obligation leaves room for the operation of what we call the margin of appreciation, for those Articles in respect of which a margin of appreciation is capable of existing and therefore excluding Articles 2 [right to life] and 3 [prohibition of torture]. This area of discretion is a necessary element inherent in the nature of international jurisdiction when applied to democratic States that respect the rule of law. It reflects on the one hand the practical matter of the proximity to events of national authorities and the sheer physical impossibility for an international court, whose jurisdiction covers 43 States with a population of some 800 million inhabitants, to operate as a tribunal of fact. Thus the Court has observed that it must be cautious in taking on the role of first instance tribunal of fact. Nor is it the Court's task to substitute its own assessment of the facts for that of the domestic courts. Though the Court is not bound by the findings of domestic courts, it requires cogent findings of fact to depart from findings of fact reached by those courts.

But the margin of appreciation also embraces an element of deference to decisions taken by democratic institutions—a deference deriving from the primordial place of democracy within the Convention system. It is not the role of the European Court systematically to second-guess democratic legislatures. What it has to do is to exercise an international supervision in specific cases to ensure that the solutions found do not impose an excessive or unacceptable burden on one sector of society or individuals. The democratically elected legislature must be free to take measures in the general interest even where they interfere with a given category of individual interests. The balancing exercise between such competing interests is most appropriately carried out by the national authorities. There must however be a balancing exercise and this implies the existence of procedures which make such an exercise possible. Moreover the result must be that the measure taken in the general interest bears a reasonable relationship of proportionality both to the aim pursued and the effect on the individual interest concerned. In that sense the area of discretion accorded to States, the margin of

*Excerpted from Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights?*, 23 HUM. RTS. L.J. 161 (2002).

appreciation, will never be unlimited and the rights of individuals will ultimately be protected against the excesses of majority rule. The margin of appreciation recognises that where appropriate procedures are in place a range of solutions compatible with human rights may be available to the national authorities. The Convention does not purport to impose uniform approaches to the myriad different interests which arise in the broad field of fundamental rights protection; it seeks to establish common minimum standards to provide an Europe-wide framework for domestic human rights protection.

Medellín v. Texas
United States Supreme Court
552 U.S. 491 (2008)

Chief Justice ROBERTS delivered the opinion of the Court, in which Justices SCALIA, KENNEDY, THOMAS, and ALITO joined. Justice STEVENS filed an opinion concurring in the judgment. Justice BREYER filed a dissenting opinion, in which Justices SOUTER and GINSBURG joined.

[T]he International Court of Justice (ICJ), located in the Hague, is a tribunal established pursuant to the United Nations Charter to adjudicate disputes between member states. In the *Case Concerning Avena and Other Mexican Nationals* (2004) (*Avena*), that tribunal considered a claim brought by Mexico against the United States. The ICJ held that, based on violations of the Vienna Convention, 51 named Mexican nationals were entitled to review and reconsideration of their state court convictions and sentences in the United States. This was so regardless of any forfeiture of the right to raise Vienna Convention claims because of a failure to comply with generally applicable state rules governing challenges to criminal convictions.

In *Sanchez-Llamas v. Oregon* (2006)—issued after *Avena* but involving individuals who were not named in the *Avena* judgment—we held that, contrary to the ICJ's determination, the Vienna Convention did not preclude the application of state default rules. After the *Avena* decision, President George W. Bush determined, through a Memorandum to the Attorney General (Feb. 28, 2005), (Memorandum or President's Memorandum), that the United States would “discharge its international obligations” under *Avena* “by having State courts give effect to the decision.”

Petitioner José Ernesto Medellín, who had been convicted and sentenced in Texas state court for murder, is one of the 51 Mexican nationals named in the *Avena* decision. Relying on the ICJ's decision and the President's Memorandum, Medellín filed an application for a writ of habeas corpus in state court. The Texas Court of Criminal Appeals dismissed Medellín's application as an abuse of the writ under state law, given Medellín's failure to raise his Vienna Convention claim in a timely manner under state law. We granted certiorari to decide two questions. First, is the ICJ's judgment in *Avena* directly enforceable as domestic law in a state court in the United States? Second, does the President's Memorandum independently require the States to provide review and reconsideration of the claims of the 51 Mexican nationals named in *Avena* without regard to state procedural default rules? We conclude that neither *Avena* nor the President's Memorandum constitutes directly enforceable federal law that preempts state limitations on the filing of successive habeas petitions. We therefore affirm the decision below. . . .

In 1969, the United States, upon the advice and consent of the Senate, ratified the Vienna Convention on Consular Relations (Vienna Convention or Convention) (1970), and the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention (Optional Protocol or Protocol), (1970). The preamble to the Convention provides that its purpose is to "contribute to the development of friendly relations among nations." Toward that end, Article 36 of the Convention was drafted to "facilitat[e] the exercise of consular functions." It provides that if a person detained by a foreign country "so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State" of such detention, and "inform the [detainee] of his righ[t]" to request assistance from the consul of his own state.

The Optional Protocol provides a venue for the resolution of disputes arising out of the interpretation or application of the Vienna Convention. Under the Protocol, such disputes "shall lie within the compulsory jurisdiction of the International Court of Justice" and "may accordingly be brought before the [ICJ] TTT by any party to the dispute being a Party to the present Protocol."

The ICJ is "the principal judicial organ of the United Nations." United Nations Charter (1945). It was established in 1945 pursuant to the United Nations Charter. The ICJ Statute—annexed to the U.N. Charter—provides the organizational framework and governing procedures for cases brought before the ICJ.

Under Article 94(1) of the U.N. Charter, "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which

it is a party.” The ICJ’s jurisdiction in any particular case, however, is dependent upon the consent of the parties. The ICJ Statute delineates two ways in which a nation may consent to ICJ jurisdiction: It may consent generally to jurisdiction on any question arising under a treaty or general international law, or it may consent specifically to jurisdiction over a particular category of cases or disputes pursuant to a separate treaty. The United States originally consented to the general jurisdiction of the ICJ when it filed a declaration recognizing compulsory jurisdiction under Art. 36(2) in 1946. The United States withdrew from general ICJ jurisdiction in 1985. By ratifying the Optional Protocol to the Vienna Convention, the United States consented to the specific jurisdiction of the ICJ with respect to claims arising out of the Vienna Convention. On March 7, 2005, subsequent to the ICJ’s judgment in *Avena*, the United States gave notice of withdrawal from the Optional Protocol to the Vienna Convention. . . .

Petitioner José Ernesto Medellín, a Mexican national, has lived in the United States since preschool. A member of the “Black and Whites” gang, Medellín was convicted of capital murder and sentenced to death in Texas for the gang rape and brutal murders of two Houston teenagers. . . .

Medellín was arrested at approximately 4 a.m. on June 29, 1993. A few hours later, between 5:54 and 7:23 a.m., Medellín was given *Miranda* warnings; he then signed a written waiver and gave a detailed written confession. Local law enforcement officers did not, however, inform Medellín of his Vienna Convention right to notify the Mexican consulate of his detention. Medellín was convicted of capital murder and sentenced to death; his conviction and sentence were affirmed on appeal.

Medellín first raised his Vienna Convention claim in his first application for state postconviction relief. The state trial court held that the claim was procedurally defaulted because Medellín had failed to raise it at trial or on direct review. The trial court also rejected the Vienna Convention claim on the merits, finding that Medellín had “fail[ed] to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment.”¹ The Texas Court of Criminal Appeals affirmed.

Medellín then filed a habeas petition in Federal District Court. The District Court denied relief, holding that Medellín’s Vienna Convention claim was procedurally defaulted and that Medellín had failed to show prejudice arising from the Vienna Convention violation. . . .

¹ The requirement of Article 36(1)(b) of the Vienna Convention that the detaining state notify the detainee’s consulate “without delay” is satisfied, according to the ICJ, where notice is provided within three working days. . . .

[T]he ICJ [then] issued its decision in *Avena*. . . . In the ICJ's determination, the United States was obligated "to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals." The ICJ indicated that such review was required without regard to state procedural default rules. . . .

Before we heard oral argument, however, President George W. Bush issued his Memorandum to the United States Attorney General, providing:

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

Medellín, relying on the President's Memorandum and the ICJ's decision in *Avena*, filed a second application for habeas relief in state court

The Texas Court of Criminal Appeals subsequently dismissed Medellín's second state habeas application

Medellín first contends that the ICJ's judgment in *Avena* constitutes a "binding" obligation on the state and federal courts of the United States. He argues that "by virtue of the Supremacy Clause, the treaties requiring compliance with the *Avena* judgment are already the 'Law of the Land' by which all state and federal courts in this country are 'bound.'" Accordingly, Medellín argues, *Avena* is a binding federal rule of decision that pre-empts contrary state limitations on successive habeas petitions.

No one disputes that the *Avena* decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an international law obligation on the part of the United States. But not all international law obligations automatically constitute binding federal law enforceable in United States courts. . . .

A treaty is, of course, "primarily a compact between independent nations." *Head Money Cases* (1884). It ordinarily "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." Only "[i]f the treaty contains stipulations which are self-executing, that

is, require no legislation to make them operative, [will] they have the force and effect of a legislative enactment.” *Whitney [v Robertson]* (U.S. 1888).³

Medellín and his amici nonetheless contend that the Optional Protocol, United Nations Charter, and ICJ Statute supply the “relevant obligation” to give the *Avena* judgment binding effect in the domestic courts of the United States.⁴ Because none of these treaty sources creates binding federal law in the absence of implementing legislation, and because it is uncontested that no such legislation exists, we conclude that the *Avena* judgment is not automatically binding domestic law. . . .

As a signatory to the Optional Protocol, the United States agreed to submit disputes arising out of the Vienna Convention to the ICJ. The Protocol provides: “Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice.” Of course, submitting to jurisdiction and agreeing to be bound are two different things. . . .

The most natural reading of the Optional Protocol is as a bare grant of jurisdiction. It provides only that “[d]isputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice” and “may accordingly be brought before the [ICJ] . . . by any party to the dispute being a Party to the present Protocol.” The Protocol says nothing about the effect of an ICJ decision and does not itself commit signatories to comply with an ICJ judgment. The Protocol is similarly silent as to any enforcement mechanism.

The obligation on the part of signatory nations to comply with ICJ judgments derives not from the Optional Protocol, but rather from Article 94 of the United Nations Charter—the provision that specifically addresses the effect of ICJ decisions. Article 94(1) provides that “[e]ach Member of the United Nations *undertakes to comply* with the decision of the [ICJ] in any case to which it is a party.” (emphasis added). The Executive Branch contends [here] that the phrase “undertakes to comply” is not “an acknowledgement that an ICJ decision will have immediate legal effect in the courts of U.N. members,” but rather “a

³ Even when treaties are self-executing in the sense that they create federal law, the background presumption is that “[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.”

⁴ [W]e thus assume, without deciding, that Article 36 grants foreign nationals “an individually enforceable right to request that their consular officers be notified of their detention, and an accompanying right to be informed by authorities of the availability of consular notification.”

commitment on the part of U.N. Members to take future action through their political branches to comply with an ICJ decision.”

We agree with this construction of Article 94. The Article is not a directive to domestic courts. . . .

The remainder of Article 94 confirms that the U.N. Charter does not contemplate the automatic enforceability of ICJ decisions in domestic courts.⁶ Article 94(2)—the enforcement provision—provides the sole remedy for noncompliance: referral to the United Nations Security Council by an aggrieved state. . . .

The dissent faults our analysis because it “looks for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language).” Given our obligation to interpret treaty provisions to determine whether they are self-executing, we have to confess that we do think it rather important to look to the treaty language to see what it has to say about the issue. That is after all what the Senate looks to in deciding whether to approve the treaty. . . .

As against this time-honored textual approach, the dissent proposes a multifactor, judgment-by-judgment analysis that would “jettiso[n] relative predictability for the open-ended rough-and-tumble of factors.” The dissent’s novel approach to deciding which (or, more accurately, when) treaties give rise to directly enforceable federal law is arrestingly indeterminate. . . .

Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution—vesting that decision in the political branches, subject to checks and balances. They also recognized that treaties could create federal law, but again through the political branches, with the President making the treaty and the Senate approving it. The dissent’s understanding of the treaty route, depending on an ad hoc judgment of the judiciary without looking to the treaty language—the very language negotiated by the President and approved by the Senate—cannot readily be ascribed to those same Framers.

The dissent’s approach risks the United States’ involvement in international agreements. It is hard to believe that the United States would enter

⁶ Article 94(2) provides in full: “If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.”

into treaties that are sometimes enforceable and sometimes not. Such a treaty would be the equivalent of writing a blank check to the judiciary. Senators could never be quite sure what the treaties on which they were voting meant. Only a judge could say for sure and only at some future date. This uncertainty could hobble the United States' efforts to negotiate and sign international agreements.

In this case, the dissent—for a grab bag of no less than seven reasons—would tell us that this particular ICJ judgment is federal law. That is no sort of guidance. . . . The dissent's contrary approach would assign to the courts—not the political branches—the primary role in deciding when and how international agreements will be enforced. To read a treaty so that it sometimes has the effect of domestic law and sometimes does not is tantamount to vesting with the judiciary the power not only to interpret but also to create the law.

Our conclusion that *Avena* does not by itself constitute binding federal law is confirmed by the “postratification understanding” of signatory nations. There are currently 47 nations that are parties to the Optional Protocol and 171 nations that are parties to the Vienna Convention. Yet neither Medellín nor his amici have identified a single nation that treats ICJ judgments as binding in domestic courts.¹⁰ In determining that the Vienna Convention did not require certain relief in United States courts in *Sanchez-Llamas*, we found it pertinent that the requested relief would not be available under the treaty in any other signatory country. So too here the lack of any basis for supposing that any other country would treat ICJ judgments as directly enforceable as a matter of their domestic law strongly suggests that the treaty should not be so viewed in our courts

Moreover, the consequences of Medellín's argument give pause. An ICJ judgment, the argument goes, is not only binding domestic law but is also unassailable. As a result, neither Texas nor this Court may look behind a judgment and quarrel with its reasoning or result. . . . Medellín's interpretation would allow ICJ judgments to override otherwise binding state law; there is nothing in his logic that would exempt contrary federal law from the same fate

Even the dissent flinches at reading the relevant treaties to give rise to self-executing ICJ judgments in all cases. It admits that “Congress is unlikely to authorize automatic judicial enforceability of all ICJ judgments, for that could include some politically sensitive judgments and others better suited for

¹⁰ The best that the ICJ experts as *amici curiae* can come up with is the contention that local Moroccan courts have referred to ICJ judgments as “dispositive.” Even the ICJ experts do not cite a case so holding, and Moroccan practice is at best inconsistent, for at least one local Moroccan court has held that ICJ judgments are not binding as a matter of municipal law.

enforcement by other branches.” Our point precisely. But the lesson to draw from that insight is hardly that the judiciary should decide which judgments are politically sensitive and which are not. . . .

[A] judgment is binding only if there is a rule of law that makes it so. . . .

Our prior decisions identified by the dissent as holding a number of treaties to be self-executing, stand only for the unremarkable proposition that some international agreements are self-executing and others are not. . . .

Our holding does not call into question the ordinary enforcement of foreign judgments or international arbitral agreements. Indeed, we agree with *Medellín* that, as a general matter, “an agreement to abide by the result” of an international adjudication—or what he really means, an agreement to give the result of such adjudication domestic legal effect—can be a treaty obligation like any other, so long as the agreement is consistent with the Constitution. The point is that the particular treaty obligations on which *Medellín* relies do not of their own force create domestic law.

The dissent worries that our decision casts doubt on some 70–odd treaties under which the United States has agreed to submit disputes to the ICJ according to “roughly similar” provisions. Again, under our established precedent, some treaties are self-executing and some are not, depending on the treaty. . . . And Congress could elect to give them wholesale effect (rather than the judgment-by-judgment approach hypothesized by the dissent) through implementing legislation, as it regularly has. . . .

In addition, Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial disputes. The judgments of a number of international tribunals enjoy a different status because of implementing legislation enacted by Congress. See, e.g., 22 U.S.C. § 1650a(a) (“An award of an arbitral tribunal rendered pursuant to chapter IV of the [Convention on the Settlement of Investment Disputes] shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States”); 9 U.S.C. §§ 201–208 (“The [U.N.] Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter,” § 201). . . .

Nothing in the text, background, negotiating and drafting history, or practice among signatory nations [to the Vienna Convention] suggests that the

President or Senate intended the improbable result of giving the judgments of an international tribunal a higher status than that enjoyed by “many of our most fundamental constitutional protections.”

[J]Justice STEVENS, concurring in the judgment.

There is a great deal of wisdom in Justice Breyer’s dissent. I agree that the text and history of the Supremacy Clause, as well as this Court’s treaty-related cases, do not support a presumption against self-execution. I also endorse the proposition that the Vienna Convention on Consular Relations “is itself self-executing and judicially enforceable.” Moreover, I think this case presents a closer question than the Court’s opinion allows. In the end, however, I am persuaded that the relevant treaties do not authorize this Court to enforce the judgment of the International Court of Justice (ICJ) in [*Avena*]. . . .

[A]bsent a presumption one way or the other, the best reading of the words “undertakes to comply” is, in my judgment, one that contemplates future action by the political branches. I agree with the dissenters that “Congress is unlikely to authorize automatic judicial enforceability of all ICJ judgments, for that could include some politically sensitive judgments and others better suited for enforcement by other branches.” . . . But this concern counsels in favor of reading any ambiguity in Article 94(1) as leaving the choice of whether to comply with ICJ judgments, and in what manner, “to the political, not the judicial department.”³

[E]ven though the ICJ’s judgment in *Avena* is not “the supreme Law of the Land,” U.S. Const., Art. VI, cl. 2, no one disputes that it constitutes an international law obligation on the part of the United States. By issuing a memorandum declaring that state courts should give effect to the judgment in *Avena*, the President made a commendable attempt to induce the States to discharge the Nation’s obligation. I agree with the Texas judges and the majority of this Court that the President’s memorandum is not binding law. Nonetheless, the fact that the President cannot legislate unilaterally does not absolve the United States from its promise to take action necessary to comply with the ICJ’s judgment.

Under the express terms of the Supremacy Clause, the United States’ obligation to “undertak[e] to comply” with the ICJ’s decision falls on each of the

³ Congress’ implementation options are broader than the dissent suggests. In addition to legislating judgment-by-judgment, enforcing all judgments indiscriminately, and devising “legislative bright lines,” Congress could, for example, make ICJ judgments enforceable upon the expiration of a waiting period that gives the political branches an opportunity to intervene.

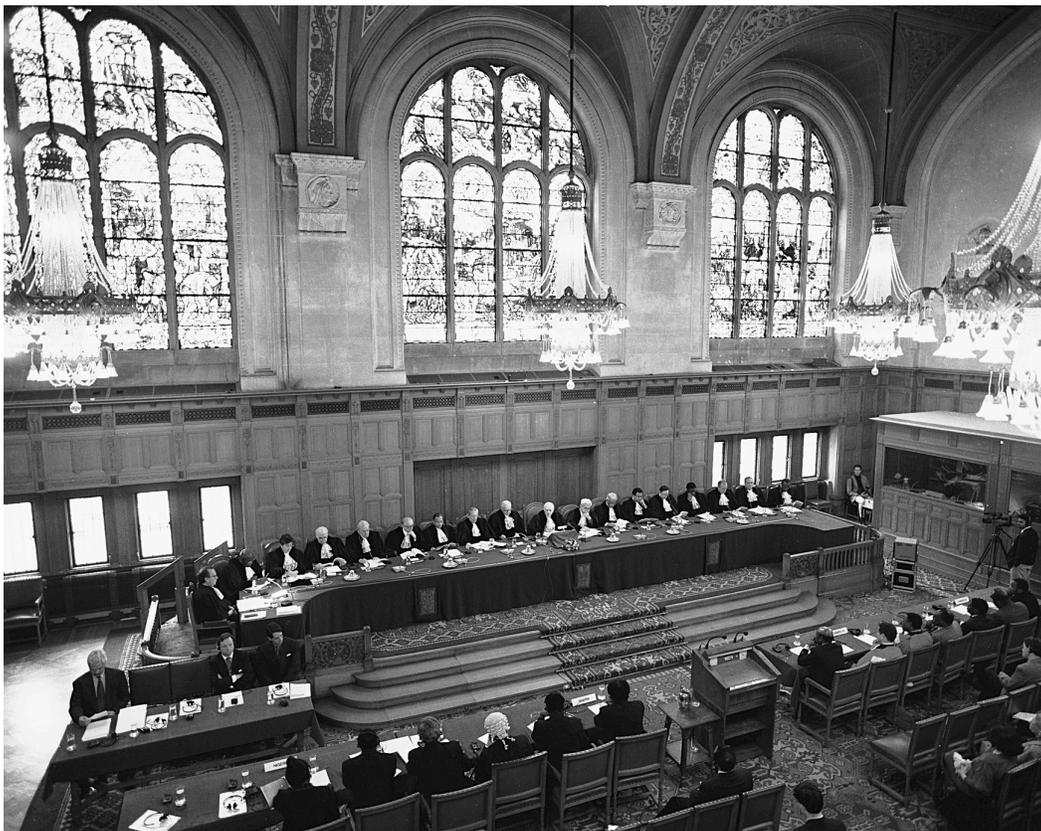
States as well as the Federal Government. One consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation. Texas' duty in this respect is all the greater since it was Texas that—by failing to provide consular notice in accordance with the Vienna Convention—ensnared the United States in the current controversy. Having already put the Nation in breach of one treaty, it is now up to Texas to prevent the breach of another.

[T]he cost to Texas of complying with *Avena* would be minimal, particularly given the remote likelihood that the violation of the Vienna Convention actually prejudiced Jose Ernesto Medellín. It is a cost that the State of Oklahoma unhesitatingly assumed.⁴

On the other hand, the costs of refusing to respect the ICJ's judgment are significant. The entire Court and the President agree that breach will jeopardize the United States' "plainly compelling" interests in "ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law." When the honor of the Nation is balanced against the modest cost of compliance, Texas would do well to recognize that more is at stake than whether judgments of the ICJ, and the principled admonitions of the President of the United States, trump state procedural rules in the absence of implementing legislation.

The Court's judgment, which I join, does not foreclose further appropriate action by the State of Texas.

⁴ In *Avena*, the ICJ expressed "great concern" that Oklahoma had set the date of execution for one of the Mexican nationals involved in the judgment, Osbaldo Torres, for May 18, 2004. Responding to *Avena*, the Oklahoma Court of Criminal Appeals stayed Torres' execution and ordered an evidentiary hearing on whether Torres had been prejudiced by the lack of consular notification. On the same day, the Governor of Oklahoma commuted Torres' death sentence to life without the possibility of parole, stressing that (1) the United States signed the Vienna Convention, (2) that treaty is "important in protecting the rights of American citizens abroad," (3) the ICJ ruled that Torres' rights had been violated, and (4) the U.S. State Department urged his office to give careful consideration to the United States' treaty obligations. . . . After the evidentiary hearing, the Oklahoma Court of Criminal Appeals held that Torres had failed to establish prejudice with respect to the guilt phase of his trial, and that any prejudice with respect to the sentencing phase had been mooted by the commutation order. *Torres v. Oklahoma* (2005).



A Sitting of the International Court of Justice in the Great Hall, the Peace Palace, March 8, 1996.

Photograph by D-VORM.NL, Leidschendam, the Netherlands. Photograph reproduced courtesy of the Carnegie Foundation.

Justice BREYER, with whom Justice SOUTER and Justice GINSBURG join, dissenting. . . .*

In my view, the President has correctly determined that Congress need not enact additional legislation. The majority places too much weight upon treaty language that says little about the matter. The words “undertak[e] to comply,” for example, do not tell us whether an ICJ judgment rendered pursuant to the parties’ consent to compulsory ICJ jurisdiction does, or does not, automatically become part of our domestic law. To answer that question we must look instead to our

*[Editor’s Note: Not reproduced are Appendix A, “Examples of Supreme Court decisions considering a treaty provision to be self-executing,” and Appendix B, “United States Treaties in force containing provisions for the submission of treaty-based disputes to the International Court of Justice.”]

own domestic law, in particular, to the many treaty-related cases interpreting the Supremacy Clause. Those cases, including some written by Justices well aware of the Founders' original intent, lead to the conclusion that the ICJ judgment before us is enforceable as a matter of domestic law without further legislation.

Supreme Court case law stretching back more than 200 years helps explain what, for present purposes, the Founders meant when they wrote that "all Treaties . . . shall be the supreme Law of the Land." In 1796, for example, the Court decided the case of *Ware v. Hylton*. A British creditor sought payment of an American's Revolutionary War debt. The debtor argued that he had, under Virginia law, repaid the debt by complying with a state statute enacted during the Revolutionary War that required debtors to repay money owed to British creditors into a Virginia state fund. The creditor, however, claimed that this state-sanctioned repayment did not count because a provision of the 1783 Paris Peace Treaty between Britain and the United States said that "the creditors of either side should meet with no lawful impediment to the recovery of the full value . . . of all *bona fide* debts, theretofore contracted;" and that provision, the creditor argued, effectively nullified the state law. The Court . . . agreed with the British creditor . . . and found that the American debtor remained liable for the debt.

The key fact relevant here is that Congress had not enacted a specific statute enforcing the treaty provision at issue. Hence the Court had to decide whether the provision was (to put the matter in present terms) "self-executing." Justice Iredell, a member of North Carolina's Ratifying Convention, addressed the matter specifically, setting forth views on which Justice Story later relied to explain the Founders' reasons for drafting the Supremacy Clause. . . .

Justice Iredell pointed out that some Treaty provisions, those, for example, declaring the United States an independent Nation or acknowledging its right to navigate the Mississippi River, were "executed," taking effect automatically upon ratification. Other provisions were "executory," in the sense that they were "to be carried into execution" by each signatory nation "in the manner which the Constitution of that nation prescribes." Before adoption of the U.S. Constitution, all such provisions would have taken effect as domestic law only if Congress on the American side, or Parliament on the British side, had written them into domestic law. . . .

But, Justice Iredell adds, after the Constitution's adoption, while further parliamentary action remained necessary in Britain (where the "practice" of the need for an "act of parliament" in respect to "any thing of a legislative nature" had "been constantly observed"), further legislative action in respect to the treaty's debt-collection provision was no longer necessary in the United States.

The ratification of the Constitution with its Supremacy Clause means that treaty provisions that bind the United States may (and in this instance did) also enter domestic law without further congressional action and automatically bind the States and courts as well. . . .

Some 30 years later, the Court returned to the “self-execution” problem. In *Foster v. Neilson* (1829), the Court examined a provision in an 1819 treaty with Spain ceding Florida to the United States; the provision said that “grants of land made” by Spain before January 24, 1818, “shall be ratified and confirmed” to the grantee. Chief Justice Marshall, writing for the Court, noted that, as a general matter, one might expect a signatory nation to execute a treaty through a formal exercise of its domestic sovereign authority (e.g., through an act of the legislature). But in the United States “a different principle” applies. The Supremacy Clause means that, here, a treaty is “the law of the land . . . to be regarded in Courts of justice as equivalent to an act of the legislature” and “operates of itself without the aid of any legislative provision” unless it specifically contemplates execution by the legislature and thereby “addresses itself to the political, not the judicial department.” The Court decided that the treaty provision in question was not self-executing; in its view, the words “shall be ratified” demonstrated that the provision foresaw further legislative action.

The Court, however, changed its mind about the result in *Foster* four years later, after being shown a less legislatively oriented, less tentative, but equally authentic Spanish-language version of the treaty. And by 1840, instances in which treaty provisions automatically became part of domestic law were common enough for one Justice to write that “it would be a bold proposition” to assert “that an act of Congress must be first passed” in order to give a treaty effect as “a supreme law of the land.” *Lessee of Pollard's Heirs v. Kibbe* (1840) (Baldwin, J., concurring).

Since *Foster* and *Pollard*, this Court has frequently held or assumed that particular treaty provisions are self-executing, automatically binding the States without more. As far as I can tell, the Court has held to the contrary only in two cases: *Foster*, which was later reversed, and *Cameron Septic Tank Co. v. Knoxville* (1913), where specific congressional actions indicated that Congress thought further legislation necessary. . . .

Of particular relevance to the present case, the Court has held that the United States may be obligated by treaty to comply with the judgment of an international tribunal interpreting that treaty, despite the absence of any congressional enactment specifically requiring such compliance. . . .

All of these cases make clear that self-executing treaty provisions are not uncommon or peculiar creatures of our domestic law; that they cover a wide range of subjects; that the Supremacy Clause itself answers the self-execution question by applying many, but not all, treaty provisions directly to the States; and that the Clause answers the self-execution question differently than does the law in many other nations. . . .

The case law provides no simple magic answer to the question whether a particular treaty provision is self-executing. But the case law does make clear that, insofar as today's majority looks for language about "self-execution" in the treaty itself and insofar as it erects "clear statement" presumptions designed to help find an answer, it is misguided. . . .

Indeed, the majority does not point to a single ratified United States treaty that contains the kind of "clea[r]" or "plai[n]" textual indication for which the majority searches. . . . Justice Stevens' reliance upon one ratified and one unratified treaty to make the point that a treaty could speak clearly on the matter of self-execution . . . does suggest that there are a few such treaties. But that simply highlights how few of them actually do speak clearly on the matter. And that is not because the United States never, or hardly ever, has entered into a treaty with self-executing provisions. . . . Rather, it is because the issue whether further legislative action is required before a treaty provision takes domestic effect in a signatory nation is often a matter of how that Nation's domestic law regards the provision's legal status. And that domestic status-determining law differs markedly from one nation to another. . . .

[G]iven the differences among nations, why would drafters write treaty language stating that a provision about, say, alien property inheritance, is self-executing? How could those drafters achieve agreement when one signatory nation follows one tradition and a second follows another? Why would such a difference matter sufficiently for drafters to try to secure language that would prevent, for example, Britain's following treaty ratification with a further law while (perhaps unnecessarily) insisting that the United States apply a treaty provision without further domestic legislation? Above all, what does the absence of specific language about "self-execution" prove? It may reflect the drafters' awareness of national differences. It may reflect the practical fact that drafters, favoring speedy, effective implementation, conclude they should best leave national legal practices alone. It may reflect the fact that achieving international agreement on this point is simply a game not worth the candle.

In a word, for present purposes, the absence or presence of language in a treaty about a provision's self-execution proves nothing at all. At best the Court is

hunting the snark. At worst it erects legalistic hurdles that can threaten the application of provisions in many existing commercial and other treaties and make it more difficult to negotiate new ones.

The case law also suggests practical, context-specific criteria that this Court has previously used to help determine whether, for Supremacy Clause purposes, a treaty provision is self-executing. . . . Instead text and history, along with subject matter and related characteristics will help our courts determine whether, as Chief Justice Marshall put it, the treaty provision “addresses itself to the political . . . department[s]” for further action or to “the judicial department” for direct enforcement.

In making this determination, this Court has found the provision’s subject matter of particular importance. Does the treaty provision declare peace? Does it promise not to engage in hostilities? If so, it addresses itself to the political branches. Alternatively, does it concern the adjudication of traditional private legal rights such as rights to own property, to conduct a business, or to obtain civil tort recovery? If so, it may well address itself to the Judiciary. Enforcing such rights and setting their boundaries is the bread-and-butter work of the courts.

One might also ask whether the treaty provision confers specific, detailed individual legal rights. Does it set forth definite standards that judges can readily enforce? Other things being equal, where rights are specific and readily enforceable, the treaty provision more likely “addresses” the judiciary.

Alternatively, would direct enforcement require the courts to create a new cause of action? Would such enforcement engender constitutional controversy? Would it create constitutionally undesirable conflict with the other branches? In such circumstances, it is not likely that the provision contemplates direct judicial enforcement.

Such questions, drawn from case law stretching back 200 years, do not create a simple test, let alone a magic formula. But they do help to constitute a practical, context-specific judicial approach, seeking to separate run-of-the-mill judicial matters from other matters, sometimes more politically charged, sometimes more clearly the responsibility of other branches, sometimes lacking those attributes that would permit courts to act on their own without more ado. And such an approach is all that we need to find an answer to the legal question now before us.

Applying the approach just described, I would find the relevant treaty provisions self-executing as applied to the ICJ judgment before us (giving that judgment domestic legal effect) for the following reasons, taken together.

First, the language of the relevant treaties strongly supports direct judicial enforceability, at least of judgments of the kind at issue here. The Optional Protocol bears the title “Compulsory Settlement of Disputes,” thereby emphasizing the mandatory and binding nature of the procedures it sets forth. The body of the Protocol says specifically that “any party” that has consented to the ICJ’s “compulsory jurisdiction” may bring a “dispute” before the court against any other such party. And the Protocol contrasts proceedings of the compulsory kind with an alternative “conciliation procedure,” the recommendations of which a party may decide “not” to “accep[t].” Thus, the Optional Protocol’s basic objective is not just to provide a forum for settlement but to provide a forum for compulsory settlement.

Moreover, in accepting Article 94(1) of the Charter, “[e]ach Member . . . undertakes to comply with the decision” of the ICJ “in any case to which it is a party.” And the ICJ Statute (part of the U.N. Charter) makes clear that, a decision of the ICJ between parties that have consented to the ICJ’s compulsory jurisdiction has “*binding force* . . . between the parties and in respect of that particular case.” Enforcement of a court’s judgment that has “binding force” involves quintessential judicial activity. . . .

And even if I agreed with Justice Stevens that the language is perfectly ambiguous (which I do not), I could not agree that “the best reading . . . is . . . one that contemplates future action by the political branches.” The consequence of such a reading is to place the fate of an international promise made by the United States in the hands of a single State. And that is precisely the situation that the Framers sought to prevent by enacting the Supremacy Clause. . . .

The upshot is that treaty language says that an ICJ decision is legally binding, but it leaves the implementation of that binding legal obligation to the domestic law of each signatory nation. In this Nation, the Supremacy Clause, as long and consistently interpreted, indicates that ICJ decisions rendered pursuant to provisions for binding adjudication must be domestically legally binding and enforceable in domestic courts at least sometimes. And for purposes of this argument, that conclusion is all that I need. The remainder of the discussion will explain why, if ICJ judgments sometimes bind domestic courts, then they have that effect here.

Second, the Optional Protocol here applies to a dispute about the meaning of a Vienna Convention provision that is itself self-executing and judicially enforceable. The Convention provision is about an individual's "rights," namely, his right upon being arrested to be informed of his separate right to contact his nation's consul. The provision language is precise. The dispute arises at the intersection of an individual right with ordinary rules of criminal procedure; it consequently concerns the kind of matter with which judges are familiar. The provisions contain judicially enforceable standards. . . .

Third, logic suggests that a treaty provision providing for "final" and "binding" judgments that "sett[le]" treaty-based disputes is self-executing insofar as the judgment in question concerns the meaning of an underlying treaty provision that is itself self-executing. Imagine that two parties to a contract agree to binding arbitration about whether a contract provision's word "grain" includes rye. They would expect that, if the arbitrator decides that the word "grain" does include rye, the arbitrator will then simply read the relevant provision as if it said "grain including rye." They would also expect the arbitrator to issue a binding award that embodies whatever relief would be appropriate under that circumstance. . . .

[W]hat sense would it make (1) to make a self-executing promise and (2) to promise to accept as final an ICJ judgment interpreting that self-executing promise, yet (3) to insist that the judgment itself is not self-executing (i.e., that Congress must enact specific legislation to enforce it)?

I am not aware of any satisfactory answer to these questions. It is no answer to point to the fact that in *Sanchez-Llamas v. Oregon*, this Court interpreted the relevant Convention provisions differently from the ICJ in *Avena*. This Court's *Sanchez-Llamas* interpretation binds our courts with respect to individuals whose rights were not espoused by a state party in *Avena*. Moreover, as the Court itself recognizes . . . and as the President recognizes, the question here is the very different question of applying the ICJ's *Avena* judgment to the very parties whose interests Mexico and the United States espoused in the ICJ *Avena* proceeding. It is in respect to these individuals that the United States has promised the ICJ decision will have binding force. . . .

[T]his case does not implicate the general interpretive question answered in *Sanchez-Llamas*: whether the Vienna Convention displaces state procedural rules. We are instead confronted with the discrete question of Texas' obligation to comply with a binding judgment issued by a tribunal with undisputed jurisdiction to adjudicate the rights of the individuals named therein. "It is inherent in international adjudication that an international tribunal may reject one country's

legal position in favor of another's—and the United States explicitly accepted this possibility when it ratified the Optional Protocol.”

Fourth, the majority's very different approach has seriously negative practical implications. The United States has entered into at least 70 treaties that contain provisions for ICJ dispute settlement similar to the Protocol before us. Many of these treaties contain provisions similar to those this Court has previously found self-executing—provisions that involve, for example, property rights, contract and commercial rights, trademarks, civil liability for personal injury, rights of foreign diplomats, taxation, domestic-court jurisdiction, and so forth. If the Optional Protocol here, taken together with the U.N. Charter and its annexed ICJ Statute, is insufficient to warrant enforcement of the ICJ judgment before us, it is difficult to see how one could reach a different conclusion in any of these other instances. And the consequence is to undermine longstanding efforts in those treaties to create an effective international system for interpreting and applying many, often commercial, self-executing treaty provisions. I thus doubt that the majority is right when it says, “We do not suggest that treaties can never afford binding domestic effect to international tribunal judgments.” In respect to the 70 treaties that currently refer disputes to the ICJ's binding adjudicatory authority, some multilateral, some bilateral, that is just what the majority has done.

Nor can the majority look to congressional legislation for a quick fix. Congress is unlikely to authorize automatic judicial enforceability of all ICJ judgments, for that could include some politically sensitive judgments and others better suited for enforcement by other branches: for example, those touching upon military hostilities, naval activity, handling of nuclear material, and so forth. Nor is Congress likely to have the time available, let alone the will, to legislate judgment-by-judgment enforcement of, say, the ICJ's (or other international tribunals') resolution of non-politically-sensitive commercial disputes. . . .

Fifth, other factors, related to the particular judgment here at issue, make that judgment well suited to direct judicial enforcement. The specific issue before the ICJ concerned “review and reconsideration” of the “possible prejudice” caused in each of the 51 affected cases by an arresting State's failure to provide the defendant with rights guaranteed by the Vienna Convention. This review will call for an understanding of how criminal procedure works, including whether, and how, a notification failure may work prejudice. As the ICJ itself recognized, “it is the judicial process that is suited to this task.” Courts frequently work with criminal procedure and related prejudice. Legislatures do not. Judicial standards are readily available for working in this technical area. Legislative standards are not readily available. Judges typically determine such matters, deciding, for

example, whether further hearings are necessary, after reviewing a record in an individual case. Congress does not normally legislate in respect to individual cases. Indeed, to repeat what I said above, what kind of special legislation does the majority believe Congress ought to consider?

Sixth, to find the United States' treaty obligations self-executing as applied to the ICJ judgment (and consequently to find that judgment enforceable) does not threaten constitutional conflict with other branches; it does not require us to engage in nonjudicial activity; and it does not require us to create a new cause of action. The only question before us concerns the application of the ICJ judgment as binding law applicable to the parties in a particular criminal proceeding that Texas law creates independently of the treaty. [T]he question before us does not involve the creation of a private right of action

Seventh, neither the President nor Congress has expressed concern about direct judicial enforcement of the ICJ decision. To the contrary, the President favors enforcement of this judgment. Thus, insofar as foreign policy impact, the interrelation of treaty provisions, or any other matter within the President's special treaty, military, and foreign affairs responsibilities might prove relevant, such factors favor, rather than militate against, enforcement of the judgment before us. . . .

For these seven reasons, I would find that the United States' treaty obligation to comply with the ICJ judgment in *Avena* is enforceable in court in this case without further congressional action beyond Senate ratification of the relevant treaties. The majority reaches a different conclusion because it looks for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language). Hunting for what the text cannot contain, it takes a wrong turn. It threatens to deprive individuals, including businesses, property owners, testamentary beneficiaries, consular officials, and others, of the workable dispute resolution procedures that many treaties, including commercially oriented treaties, provide. In a world where commerce, trade, and travel have become ever more international, that is a step in the wrong direction. . . .

A determination that the ICJ judgment is enforceable does not quite end the matter, for the judgment itself requires us to make one further decision. It directs the United States to provide further judicial review of the 51 cases of Mexican nationals "by means of its own choosing." [I] believe the judgment addresses itself to the Judicial Branch. This Court consequently must "choose" the means. . . . [I] believe that the proper forum for review would be the Texas-court proceedings that would follow a remand of this case. . . .

The majority's two holdings taken together produce practical anomalies. They unnecessarily complicate the President's foreign affairs task insofar as, for example, they increase the likelihood of Security Council *Avena* enforcement proceedings, of worsening relations with our neighbor Mexico, of precipitating actions by other nations putting at risk American citizens who have the misfortune to be arrested while traveling abroad, or of diminishing our Nation's reputation abroad as a result of our failure to follow the "rule of law" principles that we preach. The holdings also encumber Congress with a task (postratification legislation) that, in respect to many decisions of international tribunals, it may not want and which it may find difficult to execute. At the same time, insofar as today's holdings make it more difficult to enforce the judgments of international tribunals, including technical non-politically-controversial judgments, those holdings weaken that rule of law for which our Constitution stands.

In sum, a strong line of precedent, likely reflecting the views of the Founders, indicates that the treaty provisions before us and the judgment of the International Court of Justice address themselves to the Judicial Branch and consequently are self-executing. In reaching a contrary conclusion, the Court has failed to take proper account of that precedent and, as a result, the Nation may well break its word even though the President seeks to live up to that word and Congress has done nothing to suggest the contrary.

On August 5, 2008, in a per curiam opinion, the Supreme Court denied Medellín's request that his execution be stayed to enable Congress or the Texas legislature to respond to the ICJ's ruling. See 554 U.S. 759 (2008). Four individual dissents, filed by Justices Stevens, Souter, Ginsburg and Breyer, argued that time should be permitted to gather further information from the Executive, as well as to allow Congress to respond in light of a pending bill, the *Avena* Case Implementation Act of 2008. Justice Breyer also noted that Mexico had returned to the ICJ to seek the U.S.'s compliance. The Court's denial of the stay was issued at approximately 9:45 p.m. At 9:57 p.m, Texas executed José Ernesto Medellín, then aged 33.



Logo of the International Court of Justice, developed from the 1922 design by Johannes Cornelis Wienecke for the logo of the Permanent Court of International Justice.

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Armin von Bogdandy & Ingo Venzke

*In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification**

Court judgments are epitomes of sovereign rule in many grand theoretical sketches. How may such judicial power be justified nowadays? Many domestic courts decide in the name of the people and thus invoke the authority of the democratic sovereign literally at the very beginning of their decisions. International courts, to the contrary, do not say in whose name they speak the law.

* Excerpted from Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification*, 23 EUR. J. INT'L L. 7 (2012).

This void sparks our driving question: how does the power of international courts relate to the principle of democracy? In other words, how can the rule of international courts be justified in accordance with basic premises of democratic theory?

International courts form part of institutional designs that are geared towards helping to solve some of the most pressing global problems. They are part of strategies that pursue shared aims, seek to overcome obstacles of cooperation, and try to mend failures of collective action. Like few other institutions, they stand in the service of international law's promise of contributing to global justice. And yet, every new institution gives rise to new concerns. We wish to investigate their democratic justification in particular and are concerned that international courts might fall victim to their own success. This inquiry does not exhaust the broader issue of international courts' legitimacy. Above all it should be noted that the international legal system is far from perfect and sometimes judicial action, even if it does not wholly live up to democratic principles, is better than no action at all. At times it may deliver what everyone wants and yet fails to achieve by other means. And yet, the question persists.

We understand international judicial practice as an exercise of public authority and thereby wish to convey the idea that international courts' practice can neither be sufficiently justified on the traditional basis of state consent, nor by a functionalist narrative that exclusively clings to the goals or values they are supposed to serve. Nor can they draw sufficient legitimacy from the fact that they form part of the legitimation of public authority exercised by other institutions, be it states or international bureaucracies. As autonomous actors wielding public authority—this is our principal contention—their actions require a genuine mode of justification that lives up to basic tenets of democratic theory. In Martti Koskenniemi's fitting words “[i]t is high time that ‘international adjudication’ were made the object of critical analysis instead of religious faith.”⁵

Our investigation is part of the general question of legitimate governance beyond the nation state and specifically triggered by the observation that, at times, international jurisprudence has shown quite drastic consequences for the possibilities of democratic self-determination. Many international courts have grown to be powerful institutions. An example from the vibrant field of international investment arbitration serves as a case in point. International investment protection is inter alia based on Bilateral Investment Treaties (BITs),

⁵Martti Koskenniemi, “The Ideology of International Adjudication and the 1907 Hague Conference,” in Y. Daudet (ed.) *Topicality of the 1907 Hague Conference, the Second Peace Conference* (2008), at 127, 152.

whose vague obligations are not only applied by arbitral tribunals in singular cases, but also creatively formed and fostered in the practice of adjudication. As a matter of fact, this is not only a collateral side-effect of judicial practice but from the outset it was part of a deliberate plan. The *International Centre for Settlement of Investment Disputes* (ICSID) can be traced back to the political advocacy of then General Counsel of the World Bank, Aron Broches, who, faced with failed international negotiations about the applicable material law, advanced the programmatic formula “procedure before substance.” The substance, he argued, would follow in the practice of adjudication. And so it did, as judge-made law and deeply imbued with the functional logic pervading the investment protection regime. In the wake of its economic crises, Argentina felt the painful squeeze and had to realize how narrow its room of manoeuvre had become for maintaining public order without running the risk of having to pay significant damages to foreign investors. Also Germany might have to pay 1.4 billion Euro for the elections in its city state Hamburg. This, at least, is the amount that the Swedish energy company Vattenfall claimed for the losses it has to bear due to the higher ecological standards that the new government advocated during the electoral campaign. Democracy in the city state now has a price.

We wish to state clearly at the outset that our investigation does not aim at marking decisions of international courts as illegitimate, let alone illegal. We take a number of very different international courts into consideration and any concrete normative assessment would need specific and detailed analysis. Our aim is rather to develop a meaningful conceptual framework for debating the issue. Moreover, we do not at all share the view that international authority is in principle undemocratic the moment it does not respond to the input of democratic states. Such strands of critique miss the mark because international action is also a mechanism for overcoming the democratic deficit that results from the projection of one state’s power onto the people of another domestic polity. Dismantling international authority usually does not amount to a convincing solution.

This contribution follows a critical intention but is much more forward-looking. We briefly recall the demand for international compulsory jurisdiction as part of progressive legal politics and then unfold an understanding of international judicial practice as public authority, highlighting how a powerful judiciary withdraws the law from the grasp of political-legislative bodies—the most important source of democratic legitimation. A constitutionalist reading of international adjudication, we contend, is unconvincing and cannot justify the decoupling of law and parliamentary politics. Processes of fragmentation further add to the problem. In a third step, we turn to strategies in response. Adjustments in the judicial procedure and increased politicization are common avenues for reacting to the problems we identified. Furthermore, elections traditionally

respond to the exercise of public authority, and systemic interpretation as well as a dialogue between courts may bear the potential of easing concerns that spring from processes of fragmentation. Even if all strategies were spelled out in closer detail and were met to full satisfaction, it still seems that international courts may not always be in a position to carry the whole burden of justifying their authority. Domestic constitutional organs then step in and decide from their angle about the effect of international decisions in the municipal legal order. They contest and accommodate public authority in a normative pluriverse. Our critique ultimately shows that the normative vanishing point for the future development of the international judiciary should be the idea of a transnational and possibly cosmopolitan citizenship. . . .

Our piece has identified problems in the democratic legitimation of international decisions and has shown that those problems are not easy to solve. No solutions are readily available to ease all concerns. Strategies in response to persistent problems must be spelled out in further detail and it remains to be seen how they stand the test of practice and which legitimacy effect they will actually be able to achieve. In view of this ambivalence, our conviction that the increasing authority of international courts constitutes a grand achievement is paralleled by a sense of discomfort springing from the thought that, as of now, international courts may not always satisfy well-founded expectations of legitimation. The resulting tension may be relaxed by holding up the political and legal responsibility that municipal constitutional organs retain in deciding about the effect of international decisions and by bearing in mind how they, in turn, can feed back into developments on the international level.

It is important to note then that international decisions generally have no direct effect in municipal legal orders and that their implementation is mediated by the municipal legal system. In the present state of international law, the possibility should exist that decisions about the effect of international norms or judicial decisions be made on the basis of the municipal legal order, at least in liberal democracies and to the extent that the international norm or decision severely conflicts with domestic constitutional principles. This approach frees the international legal order from legitimacy burdens that it may not always be in a position to shoulder. The interplay between levels of governance opens up yet another strategy of maintaining the possibilities of democratic self-determination in the post-national constellation.

This approach does not provide an obstacle to the further development of international law. Quite to the contrary, relieving international law from some of the burdens of legitimation may actually subserve its development. To clarify: the more incisive international decisions would be, the more they immediately

impacted capacities for individual or collective self-determination, the higher would be demands for their democratic justification. It is thus important that the consequences of non-compliance are rather clear. Unmistakably then, the mere disregard of an international decision[] cannot justify military sanctions. The remaining weakness of international courts with regard to the enforcement of their decisions might in fact turn out to reduce legitimacy concerns.

The disencumbering role that municipal organs can perform may also positively feed into processes of international law's development because municipal organs not only control the effects of international decisions within their legal order. We suggest that they do so with explicit reasons. They can thus formulate standards for their assessments and may inspire further developments in the international legal order. It should be added that non-compliance triggers argumentative burdens. Domestic organs should consider the consequences of their decisions for the international legal order. Non-compliance may indeed damage broader processes of legalization and could place stress on constitutional principles such as the rule of law and a general openness towards international law.

In an overall assessment in line with the Kantian tradition, the contemporary power of international courts amounts to a great achievement even if it does not fulfil all aspirations and remains critically entrenched in processes of fragmentation. Above all, it is probably one of the most important effects of the rise of an international judiciary that it has contributed to the legalization and transformation of international discourses. In principle, this corresponds to the Kantian quest for an international order of peace and offers empirical support for this thread of thinking. This assessment holds true even if international courts have so far not unambiguously turned out to work towards a more just world. It also prevails in spite of the fact that not all interests are protected by compulsory jurisdiction.

And yet, developments in international adjudication demand a moment of contemplation and reconsideration that centres on the legitimacy foundations and their limits; not least so as to prevent international courts from falling victim to their own success. We have tried to elucidate legitimacy problems with regard to their practice, building our investigation on an understanding of international judicial decisions as an exercise of public authority. With this qualification we first of all wished to express the needs of justification and then carved out a number of concrete propositions; namely, expanding roles for the public to play in judicial elections and in judicial proceedings, extending complementary political procedures, clearly marking the goal of systemic integration in judicial interpretation as well as in the dialogue between courts, and

stressing the responsibility that municipal constitutional organs retain in implementing international decisions.

Now, in whose name do international courts decide? International jurisprudence appears to be predominantly based on international agreements and intergovernmental interaction. International courts then decide in the name of states as subjects of the international legal order. In view of democratic principles for the justification of international public authority, this seems to be increasingly unsatisfactory. There are a number of ways in which the democratic legitimation of international decisions may be improved. In the Kantian tradition, and this is the best one we have, there is philosophically only one answer to the question: starting point of democratic justifications are the individuals whose freedom shape the judgments, however indirect and mediated this may be. In this vein, international adjudication in the postnational constellation should be guided by the idea of world citizenship. . . .

THE GROWTH, LEGITIMACY, AND RELEVANCE OF TRANSNATIONAL INSTITUTIONS

Sabino Cassese
*The Global Polity**

[W]ho runs the world? The customary answer to this question is that the world is run by national governments (states), by common agreement, in different territories. States have different degrees of influence, and therefore power is not balanced; they establish links among themselves, giving rise to international law.

This answer overlooks two important facts. The first is that states have gone through a complex process of aggregation and disaggregation over time; the second is that they have been joined, during the last twenty years, by a growing number of non-state bodies.

If we examine the trends in the numbers of polities in Europe over the course of the last thousand years or so, we see that there has been a process of aggregation. In two centuries they halved (from 1000 in the 14th century to 500 in

*Excerpted from SABINO CASSESE, *THE GLOBAL POLITY* (2012).

the 16th), and then diminished by a further 30% in the two hundred years that followed, leaving some 350 by the end of the 18th century.² By the early 20th century there were only 25 such polities in existence. The British historian Mark Greengrass has summarized this process in his claim that “‘swallowing’ and ‘being swallowed up’ were fundamental features of Europe’s political past.”³

If, however, we ask the same question of the 20th and 21st centuries, we are immediately struck by the extent to which the opposite process of disaggregation has occurred. In half a century, the number of polities in existence has increased fourfold. In 1945, there were 50 (the 50 states that attended the San Francisco Conference, at which the United Nations Charter was drafted); by 2010, there were approximately 200.⁴

Moreover, from the middle of the 20th century onwards, national governments have increasingly been accompanied by other actors, such as multinational corporations, international governmental organizations (IGOs) and non-governmental organizations (NGOs), that challenge the capacity of the states to lead. In this neo-medieval system, an important role is played by the approximately 2000 existing global regulatory regimes. Among them, “[f]ive main types of globalized administrative regulation are distinguishable: administration by formal international organizations; administrations based on collective action by transnational networks of governmental officials; distributed administration conducted by national regulators under treaty regimes, mutual recognition arrangements or cooperative standards; administration by hybrid intergovernmental-private arrangements; and administration by private institutions with regulatory functions. In practice many of these layers overlap or combine. . . .”⁷

International governmental organizations⁸ are—as a rule—established by national governments: states integrate in larger bodies that incorporate diversified “local” legal orders. But IGOs sometimes reproduce themselves (many IGOs,

² It should be noted that during this 400-year period, these political bodies were progressively integrated within larger, hierarchically organized institutions (empires).

³ M. Greengrass, Introduction: Conquest and Coalescence, in M. Greengrass (ed.), *Conquest and Coalescence: The Shaping of the State in Early Modern Europe*, London, Edward Arnold, 1991, 2.

⁴ For example, there are 192 members of the United Nations (UN); 183 members of the International Labour Organization (ILO); and 153 members of the World Trade Organization (WTO).

⁷ B. Kingsbury, N. Krisch, R. Stewart, “The Emergence of Global Administrative Law”, in *Law and Contemporary Problems*, 2005, vol. 68, Summer-autumn, n. 3-4, 20. . . .

⁸ Including minor organizations, IGOs numbered 7530 in 2006 (in 1981, 1039; in 1960, 154; in 1951, 123). To give one example of their growth in size: There were 75,282 United Nations officials in 2007 compared to only 52,107 in 1997.

such as the Codex Alimentarius Commission, are established by other IGOs). Moreover, they are not mere agents of the States, from which they have become increasingly autonomous. On the contrary, they have a role in guiding and constraining state behaviour: they conclude treaties and make rules; they create standards; they help transform the internal structure of national governments; and they establish rules that are directly binding on private parties. Many global regulators were established as mission-oriented bodies, but subsequently evolved in a sector- or field-oriented direction (for example, the UN refugee agency (UNHCR) was established to protect refugees, but has expanded its remit to deal with issues relating to displaced persons in general).

An example of an intergovernmental network of national regulators is the Basel Committee on Banking Supervision, which includes representatives of 27 national banking supervisory authorities (usually the central banks).

A remarkable model of hybrid public-private global organization is provided by the international organization for standardization (ISO), whose members are the national bodies “most representative of standardization in their countries.” Therefore, the ISO is a “non-governmental organization that forms a bridge between the public and private sectors,” within which some bodies are entirely private, while others are part of the governmental structure of their countries or have some form of governmental mandate. Another example of hybrid private-public organization is the Internet Corporation for Assigned Names and Numbers (ICANN). It is a non-profit partnership, established in 1998 under California law. Its structure conforms to a “multi-stakeholder” or “multi-organizational” model, characterized by the existence of multifarious entities and institutions.¹³ Nevertheless, it differs from the ISO in that it displays a particular form of hybridization: it is composed of private entities, but it performs a public function; in other words, it has a private “façade,” but the substance of its activities is public in nature.

The International Chamber of Commerce (ICC) is, on the other hand, a perfect example of an entirely private global regulator. It brings together only private bodies and its main tasks involve the promotion of “international trade, services and investment.” Furthermore, the enforcement of its standards is completely entrusted to the chamber itself, without any interference from public or national authorities. The ICC, however, collaborates with several states and

¹³ These entities are the “board of directors”; three “supporting organisations” that deal with IP addresses (ASO), domain names (GNSO) and country code top-level domains (CCNSO); four “advisory committees”; a “Technical liaison group”; and the president and the chief executive.

governmental organizations, by concluding agreements and providing recommendations.

To these global institutions must be added the large—and increasing—number of international NGOs (of which there were 61,345 in 2006; 14,752 in 1981; 1,422 in 1960; and only 955 in 1951) and numerous different epistemic communities (for example, those of environmentalists, of physicists, of biologists).

Such global regulatory regimes operate in so many areas that it can now be said that almost every human activity is subject to some form of global regulation. Global regulatory regimes cover fields as diverse as forest preservation, the control of fishing, water regulation, environmental protection, standardization and food safety, financial and accounting standards, internet governance, pharmaceuticals regulation, intellectual property protection, refugee protection, coffee and cocoa standards, labour standards, antitrust regulation, regulation and finance of public works, trade standards, regulation of finance, insurance, foreign investments, international terrorism, war and arms control, air and maritime navigation, postal services, telecommunications, nuclear energy and nuclear waste, money laundering, education, migration, law enforcement, sport, and health.

There are significant differences between regulatory regimes. Some merely provide a framework for state action, others establish guidelines in order to guide domestic agencies, and others still impact upon civil society at a national level. Some regulatory regimes create their own enforcement mechanisms, while others rely on national or regional authorities for implementation. To settle disputes, some regulatory regimes have judicial bodies, while others resort to different forms of dispute resolution, such as negotiation, conciliation or mediation. Many areas are covered by more than one regulatory regime (leading to an overlapping of regulators).

Global regulatory regimes are established because a growing number of issues and problems cannot be addressed or resolved by national governments alone. These issues themselves are global in nature, and as such are beyond the power of individual governments to regulate: internet governance, environmental control, the Olympic Games, and the recent economic crisis provide example[s]

[I]t is important to identify [the global political organization's] particular characteristics. . . .

In what follows, I will set out the main features of this global polity, and subsequently analyse the most important ones.

a. There is no single global and comprehensive legal order and no global government, but rather several global regulatory regimes, without one hierarchically superior regulatory system (the United Nations Organization is more comprehensive than others, but it is less developed, as—for example—it lacks an efficient dispute settlement mechanism open to private parties). The global polity is the empire of “ad-hoc-crazy”: global regulatory regimes do not follow a common pattern; they are not uniform because they have to balance, area by area, national diversity and global standards.

This system has been nicely encapsulated in the formula “governance without government.”²⁶ It is also possible to interpret this as a global composite constitution, with many “feudal lords,” either territorial and general (national governments), or functional and specialised (IGOs). National governments retain the monopoly over the use of force, but surrender their sovereignty. Like the “feudal anarchy,” the global polity is not “systematic,” unitary and centralized and therefore does not fit into the state paradigm.

Genetically, the global polity is the result of a piecemeal approach. National governments have promoted—or at least allowed—the development of their competitors (global regulatory regimes that exercise public power, and frequently constrain the behaviour of states). It would have been impossible to establish one single and unitary legal order, because this would have replaced national governments with a cosmopolitan government.

b. Vertically, there is continuity and no clear dividing line between the global and the national levels. National governments are at once principals (because they establish and control global institutions) and agents of IGOs (insofar as they implement international regimes). Global organizations are subject to the control of national governments even as they supervise them. Global institutions have also in many cases established direct links with national civil societies. The global legal space, therefore, is neither hierarchical, nor layered, but rather “marbled”: global, transnational, supranational and national are intermixed.

c. Horizontally, the diverse global regulatory regimes are self-contained (leading to the fragmentation of the global legal space), but they establish mutual interconnections and linkages; together, they constitute an enormous

²⁶ GOVERNANCE WITHOUT GOVERNMENT. ORDER AND CHANGE IN WORLD POLITICS (J. N. Rosenau & E.O. Ezempiel eds., 1992).

conglomeration of interdependent legal orders. This interconnection has been called a "regime complex": "[. . .] a collective of partially overlapping and non-hierarchical regimes."

d. The public-private divide is blurred and does not follow the domestic paradigm of government regulating business.

e. Compliance, while compelled in national legal orders through enforcement and the legal exercise of power ("*covenants, without the sword, are but words*" (Hobbes)), in the global space is "induced."

Global bodies use surrogates to implement their standards. One such surrogate, noted above, is that of the "regime complex," linking one regime to another: trade and labour, trade and human rights, environment and human rights (for example, allowing the imposition of trade penalties for non-implementation of labour or environmental standards). Another possibility is retaliation, authorizing control-led self-enforcement: it induces one party (one state) to obey to the law because of the threat that another party (another state) will be authorized by a third party (the WTO dispute settlement body) to react. Still another option is to introduce incentives for compliance: for example, to provide additional rights as a "prize" for fulfilling obligations. Implementation and enforcement may also be left to national governments acting as instruments of global institutions.

f. Global regulatory regimes impose the rule of law and democratic principles on national governments. A body of administrative law principles has developed in the global space: due process, the right to be informed and consulted, the right to a hearing, the duty to give reasons, the right to a judge; both procedural fairness and judicial review are influenced by the new context and thus open to change. Some democratic principles (free elections, freedom of association, free speech) are imposed by global actors (such as the European Union) on national governments.

g. There is no representative democracy at the global level; but a surrogate, deliberative democracy emerges through participation in the decision making processes.

The existence of the global polity raises many analytic and normative questions. The most salient of the former are: do global rules bind national administrations and private individuals within states, or do global administrations only have the power to make recommendations? is there a core of command-and-control (i.e. regulatory instruments that rely on public orders, which must be

obeyed and enforced with recourse to police power) in the global administrative system? are disputes settled through judicial (or quasi-judicial) procedures, or are they mainly settled through negotiation?

The most important normative questions are: should there be direct or indirect democratic legitimation of the global polity? Should global administrative bodies (agents) be accountable to governments (principals)? Should it be possible to participate in the administrative process and obtain a review of the decisions? Should participation and review mechanisms be made available to only national administrations or also to private parties?

Sam Muller

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*Why Law Scenarios to 2030?**

[T]hese alternate scenarios may vary in probability and none of them are an actual prediction of the future. Rather, they are plausible accounts of possible futures that may not be intuitive or self-evident and that allow strategic thinkers to assess the possible implications for their respective legal strategies. . . .

Our research indicates that there are two broad legal trends that have the greatest impact on the global legal environment.

A growing patchwork of international law, institutions and transnational cooperation.

Globalisation is driving the increased interconnectedness of legal systems. More and more societal challenges require international cooperation. The increase of international trade goes hand in hand with the internationalisation of contract law, torts, business law, intellectual property law, and tax law. Because national laws are not harmonised, conflicts and gaps between national laws are increasingly evident. These conflicts exert pressure on governments towards convergence and harmonisation. The international movement of humans, capital technology, and crime drives national law towards more internationally formulated rules and enforcement mechanisms. Although one can describe this as a global trend, it is not happening in the same way, with the same depth, in the

*Excerpted from The Hague Institute for the Internationalisation of Law, WHY LAW SCENARIOS 2030? (2012).

same areas across the world. And most importantly, it is not clear whether this trend will continue, slow down, or even reverse.

The internationalisation trend thus requires careful elaboration and nuance. Three important clarifications must be made.

First, legal globalisation does not mean that a coherent corpus of global law is evolving. Legal globalisation is a patchwork both with regard to the legal areas involved and to the extent of internationalisation. For example, most economic cooperation is located on the regional level.

The EU is probably the most far-reaching instance, but other environments, like the North American Free Trade Agreement (NAFTA), the Asia Pacific Economic Cooperation (APEC), the Economic Cooperation Organisation (ECO), and the Common Market for Eastern and Southern Africa (COMESA) also create economic cooperation and laws that support that. There are also examples of even smaller, sub-regional economic cooperation organisations, such as the East African Community (EAC), which falls under COMESA and which explicitly strives for a federal union and a common currency between its members.

There are also differing views of what should be regulated if one regulates economic cooperation. For example, within the context of APEC, soft law has been created on the protection of personal data within transnational corporations and on transparency standards. These legal environments for competition law are connected—some loosely, others more explicitly—with the global legal environment on competition law of the WTO. The patchwork pattern of the environment also extends to the legal areas involved.

The growing patchwork of international law and international legal institutions thus demonstrates a variety of shapes. Furthermore, the pace with which this development is unfolding also varies substantially. The pace of the internationalisation of competition law differs from that of criminal law. Whereas competition law is rapidly internationalising, criminal law is still predominantly national in nature. Decisions of regional courts, like the European Court of Human Rights, do sometimes accelerate the process. Some legal areas have a long history of internationalisation, such as sea law, the regulation of air traffic, and humanitarian law. Other legal areas, like family law and civil procedure, lag behind. In short: the trend towards internationalisation of law is diverse.

Second, legal globalisation does not imply voluntarism or a consciously built structure. Instead, incidents, crises, and the continuous manifestation of new

problems are the primary drivers of the process. National lawmakers all over the world are continuously confronted with political and legal problems that cannot be dealt with, without the cooperation of other national lawmakers or international bodies like the UN or the IMF. Migration, transnational criminal networks, terrorism, illicit trade, financial markets, and tax tourism by transnational corporations, all force governments to find solutions on a transnational level. The trend towards internationalisation can be best described as ‘muddling through.’ There is no executive director. Not all actors have access to these processes, which run through many small decisions made by national legal actors (either legislators or courts), regional and international organisations, legal professionals, and informal networks of policy makers and experts.

Thirdly, we do not know whether the internationalization trend will continue. Conflict, crisis, and transnational challenges may push governments and other actors towards more cooperation. But it can also drive fragmentation. And internationalization creates its own resistance. The volume of anti-European Union sentiment has grown a lot louder as the euro-crisis continues. Similarly, criticism of the European Court of Human Rights has also never been so widespread. In the area of the environment we have seen examples of ‘going local,’ turning away from what is perceived to be excessive internationalism.

The growth of private legal regimes for rule making, enforcement and dispute resolution

Both national and international law have traditionally firmly rested on public authority. Even though norms are established and enforced differently in different legal systems, state institutions usually play a major role in these processes. Nevertheless, we increasingly see examples of rulemaking and enforcement by private actors, who sometimes operate completely outside of the public legal environment.

These private governance mechanisms appear in different shapes. A business sector, sometimes together with NGOs, can set standards, guidelines, or rules concerning governance or liabilities. These standards may concern the environment, health, work conditions, social security or other aspects of corporate social responsibility (CSR). The alcohol industry within the EU has set standards on advertising and sales to minors. The timber industry—with the Forest Stewardship Council—set standards on sustainable logging and the sale of timber. Accounting standards and other industry-made standards or rules in the financial sector have become more prevalent since the recent global financial crisis. The now somewhat embattled Kimberly Certification process is an interesting

example of a joint effort by governments, the business community, and civil society to regulate the precious stones industry.

Standards also create interesting forms of enforcement. Transparency International measures corruption perceptions in 183 countries (2011) and the likelihood that large companies in 19 specific sectors use bribes. This information is published on their website. In this case existing standards (here, on corruption) are measured and monitored by an NGO. Sometimes an industry creates a standard contract or agreement. The Model Mine Development Agreement, developed in consultation with mining companies, governments, and civil society within the context of the International Bar Association, is a prime example. An example of a different kind is seen in the leading position taken by Microsoft which, in the course of civil procedures taking place as part of fighting Internet crime, has performed raids—accompanied by United States marshals—on alleged criminals in a scheme to infect computers and steal personal data.

Another facet of this trend is the growing use of alternative dispute resolution mechanisms instead of court systems. The eBay/PayPal resolution centre solves around 60 million disagreements between buyers and sellers every year (in 16 different languages!). An example of a more mixed approach is the OECD Guidelines for Multinational Enterprises. This 'code of responsible business conduct' was adopted by the OECD member states, but was drafted with wide participation of businesses and civil society. In the EU, a Common Frame of Reference for European Private Law was drafted and freely made available on the web. This was not a government initiative; instead it sprang forth from European legal scholars. It has now become a point of reference for legislators and courts in the EU. A final example is privacy, where companies like Google, Apple, Vodafone, and Facebook hold vast amounts of user-data that can be misused. Public regulators have only a limited ability to regulate here, so there is often little choice but to encourage and stimulate self-regulation among these private actors.

This broad trend also requires some elaboration to prevent misunderstanding. First, the rise of private regimes does not mean that these are isolated from legal regimes created by public authorities. Sometimes the creation of transnational law starts as a private initiative and is later adopted by public authorities. Sometimes a legal obligation is created by public authorities that requires (trans)national corporations to develop private regimes. For example, child labour law or an anti-corruption law may force corporations to verify whether their supply chains are free from child labour or corruption. In order to fulfil its obligations, the corporation or an industry then builds its own private regime that regulates its supply chain. Secondly, here too, we see wide diversity. The trend could relate to rules, standards, or guidelines. The term 'soft law' is

used loosely and it is important to understand what actually happens; in their actual effect, guidelines can sometimes be 'hard' as law. Private rule making may or may not include enforcement. The practice varies significantly per industrial sector, per topic, per state and per region. But there is no doubt about the broader trend: the global legal environment contains an increased amount of rules and procedures that do not fall within the classic parameters of public law. Will this trend continue? . . .

[W]e use scenarios to force us to explore what may happen if things develop in a different way than we expect. . . .

Will we witness continued internationalisation of rules and institutions or will this trend stagnate or even reverse? Will private governance mechanisms and private legal regimes further expand and become predominant, or will state-connected institutions and legal regimes retain their position?

Taken together, these contingencies allow four scenarios, in short catchwords:

International—Public (Global Constitution)

International—Private (Legal Internet)

National—Public (Legal Borders)

National—Private (Legal Tribes)

Regarding the names we have given each of the scenarios, rather than take them for their literal meaning, one ought to bear in mind that they use metaphors meant to convey the central feature of each respective scenarios. Thus, *Global Constitution* does not imply there will actually be a single world constitution, rather that in this scenario [there will be a] global legal environment; in *Legal Internet*, the name does not mean that this scenario is about the Internet, rather it implies that that the global legal environment in this world is characterised as a decentralised transnational network involving a big range of actors. Similarly, *Legal Tribes* does not denote a world that is composed of tribes, rather it hints to a reality whereby the global legal environment is composed of many relatively small 'communities,' with relatively little contact and coordination and a weaker role for the state.

Scenarios are simplifications—they serve as analytical tools not as precise descriptions of reality—and they are 'what ifs,' not predictions. The Law Scenarios to 2030 present wind tunnels of four different global legal environments—worked out in the extreme—in which the national lawmaker can

test how his legal system holds together and with the help of which he can develop strategies to address undesirable effects or strengthen desired ones.

In each of the scenarios we explore four legal-systemic questions. [W]hat is the main ordering? Who makes the rules? How are those rules enforced? How are conflicts resolved?

Jan Klabbers

*The Idea(s) of International Law**

[T]he trends identified by perusing future scenarios do indeed suggest that difficult times lie ahead. A rapid population increase of near-Malthusian proportions is expected, crime will become ever more rampant, the environment is spinning out of control and, if the last three decades are anything to go by, public solutions are frowned upon and lightly replaced by confidence in the market, with performances being monitored by means of the hard currency of indicators. Those markets themselves, however, prove uncontrollable. Crisis is the global keyword, and goes hand in hand with privatisation even to the extent that yesterday's citizen is being replaced by today's consumer, whose political affiliations are being replaced by brand loyalties. Those brands, in turn, are just that—labels placed on products produced anonymously by others, sometimes even in sweatshops by children who should be out playing. The politics of symbolism takes over, and the leading symbol is that of greed. . . .

Intellectually, international law is still based on late nineteenth century conceptions, which were necessary at the time to facilitate an emerging global capitalist economy. It is still taught as a system of law that applies between states (with the occasional nod to individual human rights, or to international organisations and some tut-tutting about terrorist groups); as a system made up of rules expressly consented to or, alternatively, rules that happen to be to the teacher's liking, dressed up in Latin garb; and as a system devoid of sanctions. . . . Globalisation seems to have bypassed the discipline of international law completely, and to the extent that international law covers the global economy, it does so in support of the major players rather than the poor

*Excerpted from Jan Klabbers, *The Idea(s) of International Law*, in *THE LAW OF THE FUTURE AND THE FUTURE OF LAW* 69 (Sam Muller, Stavros Zouridis, Morly Frishman & Laura Kistemaker eds., 2011).

and dispossessed. International law, in other words, is strongly biased, favouring the rich over the poor, and facilitating rather than regulating global capitalism.

Much of international law relates to economic issues. Sometimes it does so directly, for instance in the form of rules on trade between states, or rules on investment protection. Much of it is less visible though. The emergence of the legal concept of the continental shelf, *e.g.*, owes much to economic incentives: as soon as oil and gas were to be found, states recognised an interest in acquiring such a shelf, and developed the law to facilitate it. Much the same applies to the time-honoured freedom of the seas, or the far younger rules on air traffic.

Over the last couple of decades, moreover, within the international legal framework two sub-disciplines have emerged which both address the protection of capital. International trade law already arose in the 1970s, but came to full blossom with the creation of the WTO and in particular its strong dispute settlement mechanism. More recently, investment protection law has established itself as an important branch of international law, characterised by a multitude of treaties and the mushrooming of arbitration and similar proceedings.

And yet, amidst all this attention for the global economy and the protection of investments and market access, it is useful to note that some topics have been cast aside or are still mostly left to domestic law. There is, for example, little or no attention for development in international law—how to overcome the structural causes of poverty—unless one would regard foreign investment as the road to development (this, however, is plausible only within a neo-liberal political philosophy). Likewise, economic, social and cultural rights are still the stepchildren of the human rights revolution, if only because they involve the sort of political choices that insistence on civil and political rights manages deftly to avoid. Global finance is by and large unregulated, as the recent banking crisis underlined yet again. Alternatively, to the extent that it is regulated, it is done on the legally subliminal level through standards established by the leading participants themselves, far from the public view.

The domestication of international affairs applies to taxation. Despite the existence of many, many treaties to avoid double taxation, international law has been reluctant to embrace international taxation as part of international law. . . . The results are twofold. To the extent that companies are taxed, they can pick and choose in the absence of a harmonised regime which jurisdictions serve their interests best. Here, the absence of global regulation facilitates free movement and free choice. Starkly though, the opposite happens when individuals are concerned: they cannot normally relocate to places of low taxation (also because this will immediately affect the level of public services) but, instead, can count

themselves lucky if they don't have to pay taxes twice. . . . Here then, the absence of a global regime tends to affect free movement negatively.

It is not just taxation which is left to national regulation—the same applies to migration. Migration law is typically absent from the textbooks on international law and left to domestic law, which again means that states are at liberty to erect barriers for foreigners to enter, and can exclude people at will.

Labour law too is not often treated as part of international law. Much is left to the International Labour Organisation which . . . is essentially a device to facilitate global corporatism. Universal rules concerning labour standards or working hours or the acceptable age for children and the elderly to start and stop working are few and far between, not to mention anything about acceptable minimum wages. Again then, as with taxation and migration issues, the system allows for, and even stimulates, a race to the bottom.

Tellingly, international law has not even occupied itself with competition other than between states. The behaviour of private companies is left without regulation, and any form of control is left to domestic authorities (these include the EU, for present purposes) and their own ideas on what would constitute a proper market, and reasonable company size and company behaviour. Tellingly, the WTO has no powers in the field of competition law, allowing companies to move freely and even affect each other's markets.

The problem with all these issues is not so much that there is no regulation on the international level, as regulation as such is no guarantee for good and desirable rules. The problem is rather that there is not even much recognition that it could be useful or desirable for international law to address these issues. And this applies *a fortiori* to global poverty. It may be the case that poverty cannot be tackled by any direct legal measures, in that typically it results not from agents' activities but from economic structures, but at the very least international law could and should recognize that it helps create those structures and helps keep them intact. . . .

The net effects of such activities are, at minimum, twofold. First, it means that domestic procedures with respect to treaty-making have eroded. Parliaments have often fought long and hard to receive some influence on the making of foreign policy, if only to prevent their position from being eroded by means of the conclusion of treaties. As a result, many parliaments have some formal role to play when it comes to the conclusion of treaties. However, they have no formal role to play when it comes to the conclusion of other kinds of instruments. Hence,

the possibility of concluding a non-legally binding agreement will often involve the circumvention of a domestic parliament, and thereby undermine democracy.

Second, it means that the power of law (the culture of law, if one so wishes) is also being eroded. The seeming possibility of choosing which norm system or normative order is most suitable for the circumstances at hand means that law has become, and will increasingly become, an option among options. Where earlier generations still respected, or even celebrated, the law as a human artefact in its own right, the law now has to compete with politics, morality, and even brute and untrammelled force for its place in the sun. . . .

Of course, there is no action without reaction . . . One such response is to press for stronger sanctions elsewhere in the system. Many have advocated a bigger role for the International Criminal Court. Surprisingly, while states are increasingly left off the hook, individuals are increasingly thought suitable subjects for punishment, even those (or especially those, perhaps) who exercise little or no political power. In much the same way that water flows wherever it can, so too is responsibility assigned where the chances of actually holding someone responsible are greatest, rather than on the basis of their perceived guilt.

While non-compliance procedures have mushroomed, so too have calls for greater involvement of domestic courts in the application of international law. Those domestic courts themselves have responded in a lukewarm fashion, sometimes creating sophisticated but untenable distinctions between the existence of an international obligation and the authoritative interpretation thereof (as the US Supreme Court did in *Medellin* (2008)), and sometimes simply ignoring the international setting altogether (like the ECJ in *Kadi* (2008)). . . .

What now is the discipline of international law to do? First, it should come to the realisation that international law ultimately, and in particular by regulating the global economy, affects the life of people, not just of states and other actors. That does not mean (as is often supposed) that individuals should be considered as subjects of international law; it might be perfectly possible to respect each and every individual without giving them a formal status, in much the same way that the US can respect the lives of people in other countries without pronouncing them subjects of US law. International lawyers should realise that world poverty and malnutrition are a product (or at least a side-effect) of international law, as is unequal development. To the extent that the domestication of tax law, migration law and labour law help sustain a 'race to the bottom,' it would be useful for international lawyers to make sure that those fields do not remain as neglected as they now are, if only for the discipline's own sake: the fragmentation of international law may entail that the discipline as such will end up shattered,

replaced by fragmented specialists in, say, maritime law, or trade law, or indeed tax law. The best way to combat fragmentation may be not so much the desperate search for uniformity, but rather to ensure that all aspects of life are part of the same broader fabric—only in this way can the fabric itself survive.

International lawyers (at least those working as independent academics) should stop providing states with the arguments to kill off their very discipline. Arguments that agreements can be binding yet remain non-legal rest on very flimsy, and eventually untenable, theoretical assumptions and, what is more, only produce similar orders devoid of the guarantees that come with law. [I]f one takes the idea of nonlegally binding agreements seriously, one would need to develop a set of rules to deal with the creation of such agreements, their effects, implementation and application, and their termination. Such a system of rules can only mirror the law of treaties, so, in the end, there is no real difference, except for democracy and legal protection being eroded. Much the same applies to the creation of compliance procedures: if taken seriously, these will come to look like courts in all but name. The big loser here is the idea of law, to be replaced by some kind of unclear, untransparent functionality that only serves the interests of those in positions of power.

Finally, one lesson to learn is that while the law is a great invention, not everything can be captured in terms of standards and tribunals. Deontology begets deontology. Increased sets of standards will lead to increased accountability mechanisms, but not necessarily to greater accountability of public power. Instead, there is every reason to believe that this will lead to increased distrust. The only remedy may well reside in a new faith in the classic Aristotelian insight that what matters is not just the standards applicable to our political leaders, but also their individual character traits.

Jean L. Cohen

*Whose Sovereignty? Empire Versus International Law**

[T]alk of legal and constitutional pluralism, societal constitutionalism, transnational governmental networks, cosmopolitan human rights law enforced by “humanitarian intervention,” and so on are all attempts to conceptualize the new global legal order that is allegedly emerging before our eyes. The general claim is

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that the world is witnessing a move to cosmopolitan law, which we will not perceive or be able to influence if we do not abandon the discourse of sovereignty. The debates from this perspective are around how to conceptualize the juridification of the new world order. Despite their differences, what seems obvious to those seeking to foster legal cosmopolitanism is that sovereignty talk and the old forms of public international law based on the sovereignty paradigm have to go.

[I]f one shifts to a political perspective, the sovereignty-based model of international law appears to be ceding not to cosmopolitan justice but to a different bid to restructure the world order: the project of empire. . . . Like the theorists of cosmopolitan law, proponents of this view also insist that the discourses of state sovereignty and public international law have become irrelevant. But they claim that what is replacing the system of states is not a pluralistic, cooperative world political system under a new, impartial global *rule of law*, but rather a project of imperial world domination. From this perspective, governance, soft law, self-regulation, societal constitutionalism, transgovernmental networks, human rights talk, and the very concept of “humanitarian intervention” are simply the discourses and deformed mechanisms by which empire aims to rule (and to legitimate its rule) rather than ways to limit and orient power by law.

I agree that we are in the presence of something new. But I am not convinced that one should abandon the discourse of sovereignty in order to perceive and conceptualize these shifts. Nor am I convinced that the step from an international to a cosmopolitan legal world order without the sovereign state has been or should be taken. The two doubts are connected: I argue that if we drop the concept of sovereignty and buy into the idea that the state has been disaggregated, and that international treaty organizations are upstaged by transnational governance, we will misconstrue the nature of contemporary international society and the political choices facing us. If we assume that a constitutional, cosmopolitan legal order already exists, which has replaced or should replace international law and its core principles of sovereign equality, territorial integrity, nonintervention, and domestic jurisdiction with cosmopolitan right, and if we construe the evolving doctrine of “humanitarian intervention” as the enforcement of that right, we risk becoming apologists for imperial projects. Under current conditions, this path leads to the political instrumentalization of “law” (cosmopolitan right) and the moralization of politics rather than to a global rule of law. I will argue that we face the following political choice today: We can either opt for strengthening international law by updating it, making explicit the particular conception of sovereignty on which it is now based and showing that this is compatible with cosmopolitan principles inherent in human rights norms;

or we can abandon the principle of sovereign equality and the present rules of international law for the sake of human rights, thus relinquishing an important barrier to the proliferation of imperial projects and regional attempts at *Grossraum* ordering (direct annexation or other forms of control of neighboring smaller polities) by twenty-first-century great powers, who invoke (and instrumentalize) cosmopolitan right as they proceed. Clearly I opt for the former over the latter.

The first project entails acknowledging the existence and value of a dualistic world order whose core remains the international society of states embedded within (suitably reformed) international institutions and international law, but that also has important cosmopolitan elements and cosmopolitan legal principles (human rights norms) upon which the discourse of transnationalism and governance relies, if inadequately. On this approach (my own), legal cosmopolitanism is potentially linked to a project radically distinct from empire and pure power politics—namely, the democratization of international relations and the updating of international law. *This requires the strengthening of supranational institutions, formal legal reform, and the creation of a global rule of law that protects both the sovereign equality of states based on a revised conception of sovereignty and human rights. . . .* Cosmopolitan right can supplement—but not replace—sovereignty-based public international law. . . .

There are two versions of the thesis that a decentered cosmopolitan world order has emerged that renders the discourse of sovereignty irrelevant: one focuses on political institutions and the other on legal developments. Both maintain that a transition has occurred away from the international society of states and international law to a decentered form of global governance and cosmopolitan law. And both cite the individualization of international law, the invocation of *jus cogens*, which signals the obligatory character of key human rights norms based on consensus, not state consent, and the emergence of transnational loci of decision and rule making as evidence for this shift. . . .

Transgovernmental networks involve collaborative work by the same officials who are judging, regulating, and legislating domestically. Examples of horizontal regulatory governmental networks are the G-7 and the G-20 organizations, the regular meetings of national finance ministers, as well as the IMF Board of Governors. . . . Such regulatory networks engage in information exchange, enforcement cooperation, and harmonization of practices. . . .

Examples of vertical networks include the relationship between the European Court of Justice (ECJ), the International Criminal Court (ICC), and the courts of their respective member states. In each case, primary responsibility for

adjudication and enforcing decisions devolves upon the judges within the member states (of the European Union or the United Nations), thus differing from the traditional model of international law adjudication, which assumed that a tribunal such as the International Court of Justice (ICJ) would hand down a judgment applicable to “states,” leaving it up to states to enforce or ignore. There are also vertical regulatory networks, in the EU, for example, which link antitrust authority of the European Commission and national antitrust regulators.

This new world order is a world full of law, but to perceive the nature of the new global law, proponents of the disaggregated state argue that we need a concept of legalization that drops the idea that law is produced or enforced by a sovereign. Accordingly, one must also finally relinquish the myth of formalism, accept the legal realist critique, shift to an external sociological perspective, and acknowledge a wide range of norms and regulations in the global system as law. Instead of a bright line between legalized and nonlegalized institutions in the global order, there is a continuum between legal and nonlegal obligations and a broad spectrum of norms that ranges from soft to hard law. The point is that as sovereignty breaks down, as the state becomes disaggregated transnationally, and as global transgovernmental (and nongovernmental) networks produce more and more norms to regulate their own interaction, “the dynamic of a politically oriented law will no longer tolerate formalism.” Indeed, compared with interstate cooperation and the slow collective action (and inaction) by formal international institutions such as the UN, coordinated action by networks of regulators, judges, and other government officials is fast, flexible, and effective. . . .

To parry qualms that this transformation of international relations amounts to global technocracy and governance by unaccountable regulators and judges (given the paucity of legislative networks to date), this analysis comes replete with a set of fundamental norms that should acquire “constitutional” status in the disaggregated world order. . . . Once these norms are in place, a fully disaggregated world order could dispense entirely with the anachronistic discourse and rules of sovereignty and replace the old international law and slow international institutions with decentered, efficient cosmopolitan governance and law making.

This brings me to the second version of the thesis that we have entered a postsovereign, decentered world order—namely, the claim that a cosmopolitan legal system regulating global politics actually exists and that it is already constitutionalized. . . .

Indeed, from this perspective it is the legal system itself, and not external political, administrative, or corporate economic actors, that determines what the

law is. A legal system cannot be understood in terms of the implementation of political programs or sovereign will; it must be seen as autonomous and in charge of the codification of the code: legal/illegal. Courts, in short, are at the core of any legal system, and they must decide whether the law has been violated in any particular instance and resolve any controversy over the legal status (validity) of norms. Accordingly, legality is not a matter of more or less, nor can legalization be understood in terms of a continuum. From the internal perspective concerned with validity, oriented by the code "legal/illegal," a legal order must be construed as a closed, gapless normative system. . . .

Relying on H.L.A. Hart's criteria, this approach points to several indicia of global constitutionalism. The transnational judicial networks described above are construed as a "heterarchical" organization of courts, which provide *global remedies* and are at the center of global political constitutionalism. These involve various levels of communication, ranging from the citation of decisions of foreign courts by national courts, to organized meetings of supreme court justices, such as those held triennially (since 1995) by the Organization of Supreme Courts of the Americas, to the most advanced forms of judicial cooperation involving partnership between national courts and a supranational tribunal, such as the ECJ and more recently the ICC. The proliferation of supranational courts must be seen as providing *global remedies* for violations of *cosmopolitan law* despite the fact that they originate in treaty organizations. Even national courts can double as elements of this cosmopolitan legal system, insofar as they participate in the interpretation and judgment of violations of global law. Thus, despite the fact that states are the primary agents responsible for delivering on individual rights, what they enforce are cosmopolitan legal norms, and their failure to do so may expose them to "cosmopolitan justice."

[T]hus, there exists a closed, autopoietic (self-creating) global legal system. . . .

There are several problems on the empirical level. First, the existence of a global, networked, constitutionalized political order, even an incomplete one, is vastly overstated. States have yielded some powers to supra- and transnational organizations, transgovernmental networking is an important new phenomenon, there is a good deal of nonstate governance and rule making, and certainly there are trends in a cosmopolitan direction, especially regarding human rights

But it is not clear that these constitutional elements are the sign of a cosmopolitan legal order that has *replaced* instead of *supplemented* international law based on the consent of states, which remain sovereign, albeit in an altered way. To legal cosmopolitans, these developments indicate that we are in a

transitional phase. . . . But it is not the case that all of the constitutive principles of the new international order can be so characterized—several of them point in the opposite direction. Indeed, it is unclear just which version of international society and which model of sovereignty is being replaced. The legal cosmopolitans speak as if the move is from Westphalian sovereignty to a cosmopolitan legal order, but this is a conceptual sleight of hand: the former, if it ever existed, disappeared long ago. Certainly one would be hard pressed to construe the principle of the sovereign equality of states or the strictures of nonintervention and nonaggression, articulated in the UN Charter, as either Westphalian or as indicating the disaggregation and irrelevance of sovereignty.

Moreover, it is important to acknowledge that such principles as sovereign equality, nonaggression, nonintervention, and self-determination are, in key respects, *new* [rather than] remnants of the traditional Westphalian international order or of the conception of sovereignty that prevailed within it. The latter involved a legal arrangement, *jus publicum europaeum*, that attributed Westphalian sovereignty and equal recognition only to European states, and gave these states the right to acquire colonies and the right to go to war for any reason. . . .

The new version of sovereign equality articulated by the UN Charter is ascribed to *all member states*, and since the 1960 General Assembly Resolution (1514 and 1541), *colonialism* has been explicitly rejected. This shift allowed for the emergence in principle of an egalitarian international system with a single norm of nonintervention applying to all states. . . . To be sure, the Charter also articulates the principle of collective security, eliminating the *jus ad bellum*, and it gives the Security Council wide authority to decide when to use force to parry threats to peace and security. . . . This is the cosmopolitan dimension of the Charter. Nevertheless, sovereignty, reconstituted and revised as sovereign equality, entailing the principles of domestic jurisdiction and nonaggression, remains the default position in the Charter, the collective enforcement provisions and the recent *jus cogens* status of human rights norms notwithstanding.

These principles should thus be seen as part of a project to “democratize,” not to “abolish sovereignty.” Of course, the conception of what are the prerogatives of sovereignty has changed. . . . There has, to be sure, been a partial disaggregation of sovereignty in the sense that some functions once considered the prerogatives of the sovereign state are now placed in the hands (authority) of supranational bodies: courts, the Security Council, and some transnational regulatory bodies. But the overly strong and misleading disaggregation thesis described above is not helpful: representative government (internal and external) has not been replaced by governance, and the unity and sovereignty of the state

remain intact, as does the importance of public international law and institutions despite the emergence of transnational governmental networks.

I argue that the core of the world political system remains the “international society of states,” although it has undergone important transformations. The global political system is dualistic, composed of sovereign states and international law along with non-state actors, new legal subjects, and consensual, cosmopolitan elements. Segmental differentiation persists alongside the new functional differentiation. There can be collisions between the principles expressed in each aspect of the global political order. It is hardly news that the principles of human rights can clash with the principles of nonintervention and “domestic jurisdiction.” What is needed today is the articulation of new legal rules that anticipate and regulate these clashes. . . .

[T]he theory and practice of modern constitutionalism demonstrates that limited sovereignty is not an oxymoron, and that sovereignty, constitutionalism, and the rule of law are not incompatible. It also shows that functions or prerogatives once ascribed to the unitary sovereign can be divided and/or ascribed to other bodies (such as the EU or the UN) without the abolition of sovereignty or the disaggregation of the state.

[T]he concept of sovereignty is a reminder not only of the political context of law but also of the ultimate dependence of political power and political regimes on a valid, public, normative legal order for their authority. Sovereignty is thus a dynamic principle of the mutual constitution and mutual containment of law and politics. From a purely juridical perspective, sovereignty refers to a valid, public legal order that allocates authority and jurisdictional competence. . . .

The paradox of a multilayered global political order that enunciates sovereign equality and human rights can be a productive one. . . . The core intuition that makes the paradox productive rather than destructive is the idea that rights and democracy (popular sovereignty) are coequivalent—democracy without constitutionalism is as unacceptable today as is constitutionalism without democracy. The parallel intuition regarding external sovereignty is that we must sever political autonomy from the idea of comprehensive jurisdiction and realize that the apparent antinomy between sovereignty and human rights or between state sovereignty and multiple sources of international law is based on an anachronistic conception of the former as absolute. . . .

Let me be very clear here. I am most certainly *not* arguing that external sovereignty be made contingent upon a particular internal political arrangement, such as constitutional democracy, or that a “human right to popular sovereignty”

renders unilateral military intervention to protect this right acceptable. To construe popular sovereignty or democracy as a human right is to make a category mistake: it collapses political into moral categories, reducing the citizen to “person” and confusing collective political action of a citizenry with the citizen’s legal standing. Yes, citizenship involves basic individual rights, such as the right to vote, but it also has a political meaning and an identity component that cannot be reduced to the dimension of individual rights. To argue for making the international legal principle of sovereignty contingent on the “human right” of popular sovereignty as an individual right is sophistry. Popular sovereignty is a regulative principle, not an individual right. The relation between internal sovereignty, citizenship, constitutional democracy, and external sovereignty I outlined above must be understood differently—namely, as constituting a regulative principle, a normative set of meanings to which we should aspire, not a recipe to justify abolishing the principle of sovereign equality. . . .

Constitutionalization of the global political system is a work in progress, not a *fait accompli*. The dualistic model I have in mind would involve the articulation of public power and public law on multiple levels of the world political system. It would seek to harmonize the core principles of international relations today—sovereign equality and human rights—not abandon one in favor of the other. At issue is a shift of the culture of sovereignty from one of impunity to one of accountability and responsibility of states in light of their obligation to protect. This entails reformulating, not abandoning, the default position of sovereignty and its correlate, the principle of nonintervention, in the international system

Mark Osiel

*After International Law: Non-Juridical Responses to Mass Atrocity**

Some of the most prominent efforts to restrain and redress mass atrocities in our time, heartening from almost any view of global justice, are largely non-legal and extra-judicial in character. They rely scarcely at all on the application of binding international rules by international courts; they bear only the most equivocal, attenuated, often-tangential relation to international law, and in fact sometimes sit quite uneasily with it. Why is this so, and what does it mean for

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assessing the proper place of international law—and its alternatives—in the world's response to mass atrocity?

Consider, in this regard, the following recent initiatives:

1) Under the rubric of voluntary 'corporate social responsibility,' managers of multinational corporations find themselves increasingly pressed to tread much more cautiously in countries whose rulers covertly employ forced migration and involuntary labour to assist foreigners' construction projects.

2) Fearing the opprobrium of global opinion, military leaders in democratic states are impelled to unprecedented efforts at reducing innocent civilian casualties in war, in ways that the international law of war crimes does not itself require.

3) Without fully affirming its legal status, diplomats everywhere earnestly proclaim their countries' 'responsibility to protect' the denizens of distant societies from mass atrocity by local despots.

4) Inspired by a growing global expectation of 'effective remedies' for mass atrocity victims, national legislators in many countries engage in anguished deliberations over how best to provide such persons with some form of civil compensation or administrative redress.

5) Heads of state in Turkey suffer worldwide chastisement in parliamentary resolutions for failing to acknowledge and apologise for their distant predecessors' policies of genocide, despite the absence of any legal duty to issue such proclamations. Similarly, Japanese leaders have increasingly become targets of official condemnation by regional neighbors, victimised by Japan's crimes of WWII.

These initiatives give rise to a number of questions. To what extent and for what reasons have they evaded or eluded juridicisation? What influence, if any, does international law nonetheless exercise upon their workings, if only at the margins? And what influence in turn have these initiatives had, or may likely have, upon law? When does the particular initiative serve to buttress the commitments of international law, to resist such law, and when does it simply stand aloof, charting a different but compatible path? If we compare and contrast the five efforts, what overall patterns emerge and can such patterns be explained by any existing or imaginable theory of international law's place in the world?

The non-judicial aspects of these responses present a puzzle, if not an outright embarrassment, for anyone concerned with strengthening the response to

mass atrocity by international law and international tribunals. The mainstream view within the field, and among lawyers and rights advocates more generally, is that atrocity responses should be governed by law and undertaken to a substantial degree by legal institutions, often international ones. Yet much of the most promising and intriguing action today lies elsewhere.

To imply that there is a problem here might be to succumb to a certain ‘legalism’—our professional tendency to view the delivery of justice as properly the monopoly of the state and its law, or of only those international institutions to which states formally delegate law-making authority. Such ‘legalism’ in responses to mass atrocity has been subject to trenchant criticism. More generously, we might see the ‘problem’ of international law’s relative absence from these initiatives as simply a legitimate expression of our desire to lend a helpful hand, with (what we consider to be) relevant expertise, to such morally salutary developments. And since the non-legal initiatives seek to coerce conduct, they necessarily raise questions about the legitimacy of limiting freedom without the accompanying protections of formality, neutrality, and accountability which law may uniquely provide. International lawyers are not the only people vexed by the curious conundrum. Many of their creators and proponents view such initiatives—however successful in certain respects—as unstable, precarious, in need of support and consolidation by international law, through the forms of institutionalisation it alone can provide, they believe. . . .

In their central aim and overall import, the new non-judicial initiatives sketched above at first seem congruent with the major progress of recent years in holding perpetrators of mass atrocity accountable for their crimes. That progress takes a decidedly juridical form, in the creation of several criminal tribunals (international and hybrid national-international), in the significant number of high-profile cases they have processed, and in their judicial development of legal doctrines imposing clearer, more stringent demands upon those who employ force in service of their political aims. The creation of an International Criminal Court, in particular, reflects a great emboldening of international law’s moral agenda in this area.

National courts as well, increasingly applying rules of international law, have been integral to the legalising turn. The upshot has been a growing ‘juridification’ of the world’s response to mass atrocity, in the sense of a collective insistence on extricating the terms of that response from the influence of ‘politics,’ in a word, an influence perceived as almost invariably corrupting. It should not pass without brief observation here, at least, that many millions of people throughout the world now look to these developments with great hope and yearning.

All these considerations make the conspicuously non-judicial aspect of the initiatives mentioned above that much more perplexing, and worthy of reflection. We must ask: are these concerted efforts to improve the world's response to mass atrocity likely to continue in their nonjudicial form? Or do they show signs of likely assimilation to the more prominent forces of legalisation just noted? If they will persist in standing significantly apart from these forces, do they merely represent curious contingencies, anomalous outliers to deeper trends and abiding tendencies, disclosing no general significance—practical or theoretical? Or do they hint at serious and even inherent limits to the process of juridification, suggesting places where it cannot and will never successfully go? If so, then study of these conscientious initiatives should help identify the likely future contours of international juridification itself. This in turn will educate us lawyers about where and how we might most effectively press forward and make a valuable contribution—and where we may not. . . .

Despite some significant differences between them, the organised initiatives examined all find their chief inspiration and institutional footing in social forces and political processes—domestic and transnational—largely insusceptible by nature to international juridification. That these efforts have operated in ways exogenous to the field of international law is not a contingent fortuity, but an ineluctable fact. It would be misguided, even counter-productive at key points, to insist on somehow rendering them into international legal form. We international lawyers should resist the temptation to take on board these salubrious responses to mass atrocity, according them juridical recognition and endorsement, in hopes of bolstering their prospects. These efforts will and should remain mostly beyond our professional ken, notwithstanding the revealing and occasionally fruitful interactions between it and them. . . .

[D]ifferences between the legal and extra-legal responses to mass atrocity ultimately prove more salient, sometimes strikingly so, than the congruencies, limiting the scope of effective interchange and frictionless reciprocal endorsement. Our instances of response to atrocity often find effective expression, take organisational form; in ways that international law fails even conceptually to cognise, much less practically advance. These pragmatic and theoretical 'failures,' if they may be so described, owe to reasons that no measure of good intentions and professional ingenuity on our part, as international lawyers, can hope—or should therefore seek—to overcome. What might these reasons be? . . .

[P]owerful states have no interest in, and effectively prevent, juridification from going further, on this view, since that process is a means of 'moralising' the resolution of questions which states prefer to leave to the play of power. Such

considerations loom vaguely in the background within most of our case studies, to be sure. . . .

A second hypothesis would be that international law's stance toward these salubrious initiatives may be limited not so much by external geopolitical constraints on its sphere of operation as by its own normative commitments, particularly its implicit liberalism, i.e., the moral and political theory underlying much of Western legality. For instance, an official apology for mass atrocity (or other extensive human rights abuse), delivered on behalf of an entire national population, for the misconduct of unelected prior leaders who ruled long ago, over an altogether distinct governmental entity (e.g., the Ottoman Empire vs. modern Turkey), sits uneasily with most understandings of liberalism. So does the extensive public provision of 'reparations' to beneficiaries bearing only the most indirect relation to immediate victims of atrocity. Yet mass atrocity often calls forth both such remedies today, in many countries.

In such situations, we have more reason to be concerned about the undesirability of extending international law's reach in requiring such practices than with the practical impossibility of so doing—the preoccupation of avowed 'realists' in the study of international politics. We might understandably wish to see international law take no position at all on such contentious issues, steer clear altogether. For the question of just how liberal a national society we truly wish to inhabit—in principled but uncompromising ways that might foreclose such 'collectivised' atrocity responses—is likely best resolved by elected representatives more sensitive to domestic public sentiment than us international humanitarian lawyers, with our promiscuous proclivity for pronouncing and propagating (what we consider to be) universalistic moral truths.

A related possibility is that there exists a category of normative claims—Kant calls them 'imperfect duties'—that properly influence our conduct in non-justifiable ways. These duties are imperfect in that they are not clear enough about whom they bind, and in which concrete ways, to warrant legal liability for infraction. The 'responsibility to protect' potential victims of mass atrocity in other countries is surely a plausible candidate, at least, for such characterisation. So are, in differing measure, some of the other initiatives here examined. . . .

We must also consider the possibility that obstacles to further juridification of the world's response to mass atrocity turn out to be quite different . . . , disclosing no overarching pattern, belying efforts at generalisation and theorisation. . . .

In recent years international law has devoted great efforts to reduce, if not quite eliminate, the distorting influences of power politics in how the world responds to mass atrocity. This effort has not failed, exactly. In fact, the aspiration for a body of international criminal law that is morally meaningful and relatively determinate has been so broadly achieved in recent years that the central and harder questions we must now ask of this field are quite different from those of the last century. The proper place of political considerations, of democratic opinion especially, in determining official response to such crimes must be reassessed and, in key respects, revalorised.

The prospect of liability before courts of law, national or international, remains and will remain far less significant than the influence of such political forces, broadly speaking, in restraining and redressing mass atrocity. There is no reason why such political pressures should necessarily find full expression through formal legal mechanisms. This is true even as the pressures at issue work to give additional effect to aims unequivocally embraced by international law as well. . . .

The most compelling objection to international juridification, here as in other areas, has always been its apparent 'democracy deficit,' the relative unaccountability of international decision-makers to those affected by their decisions at the national level, i.e., those who are asked to entrust international legal institutions with governance authority over them. [Other initiatives] offer an alluring counterpoint . . . for they hold out the prospect of greater accountability to the world community—for both those perpetrating mass atrocity and those claiming authority to redress it—through forms of normative ordering that avoid the delegation of coercive legal powers beyond the nation-state. For that reason these organised efforts may offer the provisional basis for an alternative model of international response to atrocity, or at least a necessary supplement to more juridicised approaches—where and whenever the latter give out. This is, at least, a possibility requiring investigation and reflection herein. . . .

Thus, mass atrocity—because of its surpassing moral exigency—will enthusiastically call forth voluntary initiatives at first requiring no complex global legal apparatus. Over time their limited efficacy will reveal, however, the unavoidable need to put the world's response to such recurrent crises on stronger institutional footing, an objective which juridification surely advances. Beginning, then, with an International Criminal Court, prosecuting only the world's most grievous wrongdoings, the empire of international law will expand willy-nilly. By demonstrating its increasing efficacy, it will move into territory where staunchly liberal societies like the U.S. may not wish to follow. Whether initiatives like those here explored seriously risk our descent along such a slippery slope to

serfdom is a question over which reasonable readers may differ. It will occasionally press itself upon our consideration, from an ever-present backdrop where it hovers gloweringly. . . .

