

Allocating Remedial Responsibilities Between Domestic and Supranational Courts

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Article 36 of the Vienna Convention on Consular Relations provides that “if [the accused] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if . . . a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner.”¹ Host country officials must “inform the person concerned without delay of his rights” under the Convention.”² It is clear that this obligation is “self-executing” in at least some respects; the Convention does not, for example, require implementing legislation by Congress before domestic law enforcement officers are obligated to comply with its provisions. Unfortunately, compliance by American law enforcement has been spotty at best, leading to extensive litigation in both state and federal domestic courts, as well as before the International Court of Justice. Most recently, in the *Avena* case, the ICJ ordered American courts to provide “review and reconsideration” of the convictions and sentences of over 50 Mexican nationals who have been convicted of capital murder and sentenced to death in various American states, and who had not been notified of their right to speak with the Mexican consulate prior to the initiation of criminal proceedings against them.³

The ICJ’s role in enforcing the Consular Convention is one example, among many, of the delegation of judicial authority to supranational institutions. The *Avena* judgment thus raises basic questions about the allocation of authority between national and supranational courts to enforce rights conferred on individuals under international law. It also raises practical political questions about the degree of deference that supranational courts should pay to domestic legal systems; the Bush Administration’s response to *Avena*’s relatively *undeferential* ruling, after all, was to order domestic institutions to comply with the actual judgment while withdrawing the United States from participation in any further Consular Convention cases before the ICJ. If breakdowns like this are to be avoided in future, it behooves us to think about what went wrong in *Avena* and how the relationship between the supranational and domestic institutions involved should have been structured.

No one seriously disputes that U.S. officials violated rights conferred by the Consular Convention in the course of proceedings against many, if not all, of the *Avena* prisoners. The question is one of remedy. Many of the *Avena* prisoners sought to raise

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¹ Art. 36(1)(b), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

² *Id.*

³ Case Concerning *Avena* and other Mexican Nationals (Mex. v. U.S.), (Mar. 31, 2004), at <http://www.icj-cij.org/icjwww/idocket/imusframe.htm>.

their Consular Convention rights by way of a federal *habeas corpus* petition. Because the petitioners had not presented their treaty claim to the state courts at trial, however, they were barred from raising that claim on *habeas* by the doctrine of “procedural default.” A primary question for the ICJ was thus whether that doctrine could bar redress for a treaty claim. The ICJ held that it could not, relying upon the international law principle that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”⁴

I want to argue that the ICJ’s suggestion that internal legal structures are irrelevant from the standpoint of international law is profoundly wrong. Two of the defining characteristics of international law in the twenty-first century are that it reaches inside the “black box” of the state to govern a state’s internal regulatory activities (including its treatment of its own citizens), and that it creates supranational institutions for the purpose of interpreting and enforcing international obligations. These characteristics make it essential that international law take account of domestic governmental structures, for it is only by integrating international obligations and institutions with domestic political structures that international law can hope to realize its ambitious aims. This essay develops two particular iterations of this more general point. First, I argue for a division of labor between domestic and supranational institutions under which domestic institutions would develop particular remedies for violations of international obligations like the Consular Convention, while supranational courts would evaluate the systemic adequacy of the remedial structure while eschewing the task of guaranteeing a remedy in particular cases. Second, I argue that domestic political institutions should undertake to implement remedies for obligations like the Consular Convention that would be enforceable in domestic courts, instead of seeking to “wall off” the domestic legal system from international norms.

The task of integrating supranational and domestic courts and legal systems is not unlike the one of integrating state and federal legal systems under American federalism. The latter task has given rise to an extensive body of statutory rules and judge-made doctrine usually grouped under the heading of “Federal Courts” law.⁵ This field, moreover, is characterized not only by a particular set of institutional problems but also by a characteristic way of thinking about law. As Richard Fallon has observed, Henry Hart and Herbert Wechsler “defined the field as we now know it, and . . . their definition links the subject matter of Federal Courts inquiries almost inextricably to the Legal Process methodology that they likewise pioneered.”⁶

The most important aspect of this Legal Process approach, for my purposes, is the principle of “institutional settlement,” which Process scholars advanced as a response to

⁴ Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 27, 1155 U.N.T.S. 331.

⁵ See RICHARD H. FALLON, JR., DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (5th ed. 2003).

⁶ Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 956 (1994). See generally HENRY M. HART, JR., & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey, eds., 1994).

pervasive disagreement in society about substantive values.⁷ Under those conditions, Hart and Sacks argued that “[t]he alternative to disintegrating resort to violence is the establishment of regularized and peaceable methods of decision.”⁸ Once these methods are established, the principle of institutional settlement “expresses the judgment that decisions which are the duly arrived-at result of duly established procedures . . . ought to be accepted as binding upon the whole society unless and until they are duly changed.”⁹

Two particular aspects of institutional settlement are central to my discussion. One is that, in establishing “regularized and peaceable methods of decision,” the Legal Process theorists argued that decisions should be allocated to particular institutions on the basis of comparative institutional competence.¹⁰ Second, once the authority to decide in the first instance has been allocated to a particular institution, then that institution’s decisions are entitled to at least some degree of deference from other actors in the system. As Richard Fallon has observed, “authority to decide must at least sometimes include authority to decide wrongly.”¹¹ These principles are familiar ones—they may strike many observers as almost banal—but they are not values that are frequently emphasized in discussions of international law. I want to argue that it should inform any consideration of the appropriate relationship between supranational and domestic courts.

The *Medellin* Case

Some implications of institutional settlement for supranational adjudication can be illustrated by proceedings involving one of the *Avena* prisoners, José Ernesto Medellín. Medellín was convicted in 1994 of a brutal gang rape and double murder in Houston, Texas.¹² Although he had lived in the U.S. for most of his life, Medellín was a Mexican national and, therefore, entitled to notification of his right to speak with the Mexican consulate following his arrest. As in many cases, local law enforcement failed to provide this notification. Medellín’s appointed counsel made no mention of this failure at trial in state court, and Medellín was ultimately convicted and sentenced to death. When he sought to raise the Consular Convention issue by way of a state *habeas corpus* petition, the state courts held that he was barred by the doctrine of procedural default. Medellín later failed a federal *habeas* petition raising the Consular Convention claim, and in the Fifth Circuit Medellín was able to cite the new *Avena* judgment in further support of that claim. Nonetheless, both the federal district court and the court of appeals rejected Medellín’s arguments on two grounds: first, that Medellín had

⁷ See Young, *Institutional Settlement*, *supra* note *, at 1159-60. For this reason, a frequent criticism of the Legal Process School—that it presumed a 1950’s-style consensus on values—seems considerably less apposite as applied to the particular principle of institutional settlement.

⁸ HART & SACKS, *supra* note 6, at 4.

⁹ *Id.*

¹⁰ See *id.* at 158 (asking, as a central question, “What is each of these institutions good for? How can it be made to do its job best? How does, and how should, its working dovetail with the working of the others?”).

¹¹ Fallon, *supra* note 6, at 962.

¹² For a summary of the facts and proceedings, see *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004).

procedurally defaulted the Consular Convention argument, and second, that the Convention confers no enforceable rights on individual defendants.¹³

The Supreme Court granted *certiorari* to consider the effect of the *Avena* judgment on the federal *habeas* proceedings. The United States filed a brief supporting Texas's position that various provisions of the federal *habeas* statute barred relief, that the Convention creates no enforceable rights, and that the *Avena* judgment was not binding on domestic courts. Prior to oral argument, however, President Bush issued a "Memorandum" stating that "the United States will discharge its international obligations under the [*Avena*] decision . . . 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."¹⁴ Medellin promptly filed a new *habeas* petition in the Texas Court of Criminal Appeals to request the "review and reconsideration" urged by the President's order. The Supreme Court responded by dismissing the writ as improvidently granted, in hopes that the case could be resolved by the Texas courts in the new *habeas* proceeding. The case remains pending in the Court of Criminal Appeals as of this writing.¹⁵

Institutional Settlement and the Nature of a Treaty "Violation"

Virtually all accounts of the *Medellin* and *Avena* litigations seem to assume that because the local police in Houston failed to notify Medellin of his rights to speak with the Mexican consulate, the United States has violated the Consular Convention. I want to suggest that there is useful substance to what may seem like an entirely semantic distinction: It is (or at least ought to be) one thing to violate someone's individual rights under a treaty, and quite another for a nation to be "in violation" of that treaty. The reason this is so derives directly from rejecting the notion that a nation's internal structure is irrelevant to determining whether a violation of international law has occurred.

One would not want to overstate the newness of international agreements and customary law that confer rights on individuals against governments; in some ways, the Consular Convention's concern for the treatment of foreigners within a state's jurisdiction is a very form of international obligation. Nonetheless, I think it is fair to say that the Twentieth Century saw a substantial shift in the central concerns of international law from the relations of states one to another to the relations between states and individuals. Broad international treaties, especially in the area of human rights but also in the trade and intellectual property areas, confer rights on particular individuals, and many of these agreements make those rights enforceable without the traditional requirement that a sovereign state party to the treaty take up or "espouse" the individual's case.

¹³ See *id.* at 279.

¹⁴ George W. Bush, Memorandum for the Attorney General, Feb. 28, 2005, attached as Appendix 2 to Brief for the United States as *Amicus Curiae* Supporting Respondent in No. 04-5928, *Medellin v. Dretke* (Feb. 2005).

¹⁵ See Order on Application for Writ of Habeas Corpus in No. AP-75,207, Texas Court of Criminal Appeals, June 22, 2005. I should note that I filed an *amicus* brief on behalf of several interested state governments in support of Texas's position that the President lacked constitutional or statutory authority to order the state courts to hear Medellin's petition.

The Consular Convention is typical of this shift in some ways, atypical in others. But the important aspects of it for present purposes are twofold: First, it confers rights on a vast number of individuals: Roughly 30 million non-immigrant foreign nationals enter the United States each year.¹⁶ A non-trivial proportion of these are arrested for crimes, giving rise to an extraordinary number of potential Consular Convention claims. Second, the primary responsibility to enforce the Consular Convention falls inevitably on governmental officials who are far removed from the national foreign policy apparatus. In Medellin’s case, that meant the Houston police. The Convention is not like an arms control agreement to destroy a certain number of nuclear missiles, for instance, where compliance will be tightly controlled by a few central government officials who were probably involved in making the agreement in the first place and have intimate knowledge of its requirements.

The inevitable consequence of these two factors is that mistakes will be made—lots of them. That reality has to be relevant to our conception of what “compliance” with an international agreement must mean. An unrealistic definition of treaty compliance cheapens the opprobrium that ought to follow upon real violations by a signatory state. It also seems likely to make states leery of entering into agreements in the first place. The truth is that if state and local law enforcement complied with the Consular Convention in ninety-five percent of the cases in which they arrested a foreign national, we would be ecstatic; to say that the U.S. remained a serial violator in hundreds of cases a year would largely miss the point. And to haul the U.S. before the ICJ for those remaining cases would likely—and appropriately—produce a backlash against the Convention and its enforcement. But under current conceptions of a treaty violation, it would hardly be relevant for the U.S. to plead, if sued in the ICJ for failing to provide notice of Convention rights to a particular foreign national accused of a crime, that the U.S. complies *most* of the time.¹⁷

The present conception also places entirely unrealistic demands on the ICJ. That institution decides a minuscule number of cases a year, and its responsibilities range far beyond the Consular Convention. If for no other reason than this, the primary enforcement responsibility under the Consular Convention is “settled” in the domestic courts; there is simply no other institution that is capable of handling the potential volume of claims. The disconnect between this reality and the legal principle that the ICJ has the same enforcement role that any other court would have—that is, identifying and correcting treaty violations in individual cases—cannot be conducive to respect for supranational institutions. For one thing, when thousands of Consular Convention violations occur worldwide each year in any number of countries, but all the high-profile ICJ decisions finding violations are directed against the U.S., it is reasonable for

¹⁶ [Dept. of State statistics]

¹⁷ I have never seen any solid empirical data on the actual extent of compliance by American law enforcement with the Consular Convention. I suspect that it is far less extensive than in the hypothetical postulated in the text. But I also suspect that one reason we lack such information on the extent of overall compliance is that it is currently not legally relevant to any particular claim of a violation.

Americans to wonder whether this supranational institution has simply become one more tool of anti-Americanism.¹⁸

The principle of institutional settlement means that conferring the authority on domestic courts to decide Consular Convention cases means that supranational courts need to be at least somewhat deferential in reviewing the decisions that are made. I want to suggest something stronger—the distinction drawn by Dan Meltzer and Dick Fallon, writing in the Legal Process tradition, between individual and structural conceptions of remedies.¹⁹ Professors Fallon and Meltzer differentiate between *Marbury v. Madison*'s principle of “for every right, a remedy”²⁰ – a principle which is aspirational in many ways, given hurdles like sovereign immunity and restrictions on jurisdiction – and a structural requirement that the system provide remedies that are generally adequate to keep the government within the bounds of law. The latter is a strong constitutional requirement, but it can accept the failure to provide a remedy in individual cases here and there.²¹

My argument is that this remedial distinction is a sensible way to divide labor between domestic and supranational courts. There are many domestic courts, and they are close to the facts of particular cases. They can realistically hope to provide individual remedies for the violation of rights like the Consular Convention. What the ICJ should confine itself to is evaluating whether the general *system* that the domestic legal system has in place for enforcing the treaty is generally adequate for keeping the government in line with its obligations.²² The answer to this question in Consular Convention cases might still be *no*—especially if the domestic courts accept the Government's position that the Convention confers no enforceable rights. The point is simply that it makes little sense for supranational courts to be reviewing the outcomes in particular cases. They should be reviewing whether the domestic legal system has made adequate provision for those cases.

This division of labor has both a theoretical and a practical implication. The theoretical one is that our focus has shifted from ignoring the structure of the domestic legal system, when international law rights are involved, to making that system the very center of supranational review. The practical one is doctrines like procedural default will

¹⁸ There are, of course, any number of reasons why one does not see more cases against other countries under the Consular Convention. One is that, with some important exceptions [see Iranian Hostage case], the U.S. generally chooses to rely on more informal types of pressure in cases involving its own nationals. Another is that most of the countries that have accepted the substantive obligations under the Consular Convention have not signed onto the optional protocol conferring jurisdiction on the ICJ to resolve disputes. But this latter fact simply highlights the perception that the ICJ isn't an adequate forum and the sporadic nature of its enforcement efforts.

¹⁹ See Richard H. Fallon, Jr., & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778-79 (1991).

²⁰ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

²¹ Fallon & Meltzer, *supra* note 19, at 1779.

²² This function might amount to a more manageable version of “denial of justice” claims under international law than the recent trend toward using such claims to review the correctness of domestic court decisions on domestic law matters. See Young, *Institutional Settlement*, *supra* note *, at 1170-77.

become important, as we want to force international claims to be presented and resolved within the domestic legal system, and that the impact of such doctrines on individual rights can be evaluated by supranational courts only through a very context-sensitive examination of how the domestic system works.

A further implication is that this view challenges the aversion – most vigorously pressed by Harold Koh – to “double standards” in international law.²³ This view that international law should apply in a uniform way to all countries is grounded in the (fictional) sovereign equality of states.²⁴ But if interjurisdictional rules are to be driven by an evaluation of the comparative institutional competence of supranational and domestic courts, then that comparison is likely to come out differently depending on whether the domestic legal system in question is the United Kingdom or Rwanda. There are both political and administrative constraints on carrying this principle of variability too far: Some countries will be offended by aspersions cast upon their quality of justice,²⁵ and the decision costs of making fine-grained distinctions among institutional structures in different legal systems may be high.²⁶ In at least some situations, however, a viable set of interjurisdictional rules is going to need to treat different domestic legal systems differently.

Individual Remedies in Domestic Courts

The second focal point of current controversy in cases like *Medellin* is whether the Convention creates rights enforceable in domestic courts. This is sometimes framed as a debate about whether the treaty is “self-executing,” but that way of thinking about the problem conflates several distinct issues: for instance, (1) whether local law enforcement officers are legally bound by the Convention absent implementing legislation by Congress; (2) whether a foreign national whose Convention rights have been violated would have a private right of action for damages against the responsible officials; and (3) whether a court trying such a foreign national (or reviewing his conviction) may exclude evidence or set aside the conviction on account of the treaty violations.²⁷ There is general agreement that the Consular Convention is self-executing in the first sense, and few cases so far have raised the second; the third is currently before the Supreme Court in the *Bustillo* and *Sanchez* cases. I want to sidestep these interpretive questions, however, and take up the normative matter of whether direct domestic enforcement—in either the second or third senses—*ought* to be a feature of the Consular Convention regime.²⁸

²³ See Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003).

²⁴ See Ann-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda* 205, 226 (1993).

²⁵ On the other hand, the prospect of more supranational deference as a reward for reform of the domestic legal system may serve as a valuable spur.

²⁶ I am indebted to Cass Sunstein for this point.

²⁷ See generally Carlos Vazquez, *The Four Doctrines of Self-Executing Treaties* [cite] (distinguishing among the various issues often lumped together under the label of “self-execution”).

²⁸ This could be brought about either by a judicial federal common lawmaking or by implementing legislation. My own preference would be for the latter.

This question is part of a broader debate, which I have canvassed elsewhere with respect to NAFTA and WTO rules,²⁹ about whether the best domestic response to potentially intrusive international law norms is to try to “wall off” the domestic legal system by denying international norms any entry, or to open up the domestic legal system to those norms in the hope that domestic courts can play an influential role in shaping them in such a way that is sensitive to domestic institutional arrangements. It should be clear from my argument so far that I generally come down on the latter side: If the proper role of the ICJ is to evaluate the domestic machinery for implementing the Consular Convention, rather than enforcing it itself in particular cases, then there needs to *be* domestic machinery for enforcement. Empowering the domestic court to interpret the Convention in individual cases should have the further benefit of allowing them to play a substantial role in interpreting its requirements. We are likely to get better interpretations—from the standpoint of consistency with domestic sensibilities and arrangements—if the domestic courts play this role than if interpretation of the Convention is left primarily to supranational bodies.³⁰

If one is concerned about the intrusion of international norms on domestic arrangements, then the choice between “walling off” and participatory approaches involves a strategic assessment that may not come out the same in all areas. On some issues, it may not be too late to cut back on international commitments that unduly threaten the domestic legal system. In many other areas, however, I think the “walling off” strategy has become unrealistic. The economic consequences of seceding from the WTO and NAFTA, for instance, make it unlikely that the U.S. will even withdraw from those regimes. And while it is true that WTO and NAFTA decisions have no direct legal effect on domestic law, it seems profoundly unrealistic to think that the judgments rendered in arbitration cases—which may range from \$100’s of millions on up—will not have seismic effects on the domestic legal system.³¹

We may be in a somewhat different position with respect to the Consular Convention. The fact that most signatories have not accepted ICJ jurisdiction over consular disputes makes it easier for the U.S. to withdraw from that jurisdiction in response to overreaching in the *Avena* case. But at the same time, the U.S. has a huge stake in protecting its own nationals traveling abroad, and that stake is no doubt reflected in President Bush’s extraordinary—and probably unconstitutional—order requiring state courts to provide the “review and reconsideration” ordered in the *Avena* judgment.³² That action suggests that, whether or not the U.S. re-signs the Optional Protocol providing for ICJ jurisdiction, some form of enforcement mechanism for Consular

²⁹ See Young, *Institutional Settlement*, *supra* note *, at 1221-29.

³⁰ As I have explained elsewhere, moreover, such concurrent jurisdiction over treaty interpretation need not mean that domestic courts will be subjected to hierarchical review by supranational bodies. See *id.* at 1229-36.

³¹ See Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 TEXAS INT’L L. J. 527, 535 (2003).

³² For an explanation of the constitutional argument, as well as an argument that the President’s action is not best interpreted as a mandatory order, see Brief for the States of Alabama, Montana, Nevada, and New Mexico as *Amici Curiae* in No. AP-75,207, *Ex parte* José Ernesto Medellín, Texas Court of Criminal Appeals (filed Aug. 31, 2005).

Claims will have to be developed in order to reassure other signatories of our commitment to compliance. My argument has been that such a mechanism should maximize the extent to which the cases play out in our own courts, in order to ensure that international rules develop in ways that the domestic legal system can live with.

Conclusion

The Consular Convention is only one example of the more general problem of how to allocate remedial authority between national and supranational courts. NAFTA arbitrations under the private right of action provisions of Chapter Eleven would pose another, as would the interpretation of the principle of complementarity in the statute of the International Criminal Court. By emphasizing the importance of comparative institutional comments, one necessarily commits to some degree of variation in the treatment of the general question in these particular institutional contexts. Nonetheless, I hope that the principle of institutional settlement can shed light on the questions posed in each. Despite likely skepticism from proponents of strong international norms, the ultimate result of thinking about supranational institutions in this way seems likely to be a more legitimate and effective role for international law on the domestic plane.