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# **Does International Law Obligate States to Open Their National Courts to Persons for the Invocation of Treaty Norms That Protect or Benefit Persons?**

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## I. INTRODUCTION

In its decisions in the *LaGrand*<sup>1</sup> and *Avena*<sup>2</sup> cases, the International Court of Justice (I.C.J. or Court) determined that Article 36 of the Vienna Convention on Consular Relations (VCCR)<sup>3</sup> creates “individual rights” (as opposed to just rights of states) and that the United States has an obligation to provide an individual with meaningful access to U.S. courts to vindicate those rights. Based on those determinations, it might be thought that international law

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<sup>1</sup> *LaGrand Case* (Ger. v. U.S.), 2001 I.C.J. 466 (June 27), *reprinted in* 40 I.L.M. 1069 (2001); *see* William J. Aceves, Case Report, 96 AM. J. INT’L L. 210 (2002).

<sup>2</sup> *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31), *reprinted in* 43 I.L.M. 581 (2004); *see* Dinah L. Shelton, Case Report, 98 AM. J. INT’L L. 559 (2004).

<sup>3</sup> Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR].

generally obligates a state to open its courts for private persons to vindicate rights or benefits that a treaty accords to them, whether or not the treaty expressly provides for such a remedy. Such a proposition, however, is over broad, and does not follow from a close reading of the I.C.J.'s decisions, or from a more general assessment of the international legal system. This chapter seeks to provide a more nuanced assessment of whether international law generally obligates states to open their national courts to persons in such situations.

Because of the equal sovereign status of states, it is generally accepted in international law that a state cannot and should not sue another state in national courts to vindicate a treaty right. Instead, states normally address the matter through resort to international negotiation or dispute settlement. By contrast, the invocation of treaties in national courts usually arises in the context of actions by or against non-state actors or private parties (i.e., persons or companies). In considering those actions, it is useful to note that treaty provisions may seek to regulate three different types of relationships: inter-state relationships (e.g., a treaty provision that commits the state parties to maintain a limit on nuclear weapons); relationships among private parties (e.g., a treaty provision setting rules on the sale of goods across borders); or the relationship between private parties and a state (e.g., treaty provisions protecting against expropriation or a denial of human rights).

With respect to the first type of provision, only on rare occasions will a non-state entity bring suit in a national court in an effort to force a state to comply with a treaty provision that

regulates an inter-state relationship.<sup>4</sup> It is much more common for individuals to seek to invoke a treaty-based norm in national courts for the two other types of provisions, where the treaty seeks to regulate relationships between private parties or between a private party and a state. When this happens, it is not necessarily the case that the private party is directly invoking the treaty before the national court. The individual may be invoking a national constitution or statutory provision that serves to implement the treaty obligation. The individual may be using the treaty provision as a matter of national contract law, such as when a sales contract, a bill of lading, or an airline ticket makes express cross-reference to the rules set forth in a treaty. In other instances, the individual may be using the treaty as a vehicle for dictating a particular choice of law, as might occur in matters relating to family law. For the purposes of this chapter, “invoking of the treaty” is meant to encompass the whole range of ways by which an individual may seek to secure the protection or benefit recognized in the treaty.

For cases where the treaty is regulating relations between two private parties, invocation of the treaty in national courts is usually not controversial; it is generally accepted that such treaties are intended to serve as a basis for adjudication in national courts of disputes among private parties. More contentious is the situation involving a treaty provision that protects or

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<sup>4</sup> *See, e.g.*, *Natural Resources Defense Council v. Environmental Protection Agency* 464 F.3d 1, 2-11 (D.C. Cir. 2006) (suit by environmental group to force U.S. government to comply with its obligations under the Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3, S. TREATY DOC. 100-10 (1987)).

provides benefits to individuals against governmental action. If those protections or benefits are denied, the person may wish to invoke the relevant treaty provision before a national court, especially a court of the recalcitrant state party, but the government may resist the litigation by denying that the treaty may be so invoked. The person may be invoking the treaty provision for various reasons: to support injunctive relief against ongoing or anticipated state action; to support a civil action for harm incurred from violation of the treaty; as a defense to a criminal charge; as a basis for challenging a state's right to detain, deport, or extradite the person; or for some other reason.

Regardless of why the treaty norm is being invoked by an individual, the national court may be confronted with either allowing or precluding reliance on the treaty as a source of national law (if there is no national statute or other source of law applying the norm). In reaching that decision, the national court may consider it relevant whether *international law* obligates a state to open its national courts for invocation of the treaty by individuals. If international law carries great weight in the national legal system, trumping other forms of national law (perhaps even the national constitution), the national court will care deeply about what international law requires. Alternatively, international law may not carry great weight in the national legal system, in which case the court may look solely to its national rules, without concern for what international law has to say on the matter. Yet, even then, international law remains of relevance for that state, since the state will be regarded by other states as having breached international law if it fails to uphold an obligation to allow invocation of the treaty in national courts.

Consequently, it is important to consider carefully whether international law obligates states to open their national courts to persons for the invocation of treaty provisions that are protective of or beneficial to individuals. Part II of this chapter begins by explaining why, at the broadest level, there is no general obligation under international law for states to open their courts to individuals for this purpose. There is no such obligation under the Vienna Convention on the Law of Treaties (VCLT),<sup>5</sup> whether as a component of *pacta sunt servanda* or any other general norm of treaty law. To the extent that the VCLT is regarded as largely codifying the core rules of customary international law on treaties, no such obligation exists as a matter of customary international law either. Rather, the standard view is that customary international law permits states to abide by their substantive treaty obligations through whatever procedural means they choose. So long as the state achieves the substantive objective set forth in the treaty, the mechanism by which that compliance occurs is left to the state. The state can choose to allow individuals to invoke a treaty in its courts, and doing so may assist the state in fulfilling its treaty obligation, but such access to national courts need not be provided as a matter of customary international law. If the state fails to achieve the substantive objective of the treaty, international law speaks to possible remedies available on the international plane, but generally leaves issues

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<sup>5</sup> May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. For treaties involving an international organization as a party, see Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986, 25 I.L.M. 543. This convention has not yet entered into force, but its provisions (which parallel those of the VCLT) are generally regarded as expressing customary international law.

concerning national judicial remedies to principles of national remedial law. While the terms of any specific treaty may include an express or implied obligation relating to the ability to invoke treaty provisions in national courts, it is those particular treaty obligations that govern the issue, not general international law.

Similarly, there does not appear to be any basis for finding a general principle of international law obligating states to open their courts for invocation of treaty norms by individuals. As is clear from many of the chapters in this volume, no such legal principle operates uniformly across the major legal systems of the world; indeed, many “dualist” states reject reliance on treaties as operating *ex proprio vigore* (by its own strength) in national law and instead insist upon only national measures (e.g., a statute) as providing the basis for enforcing the relevant treaty norm. The Roman law principle of *ubi jus, ibi remedium* (where there is a right, there is a remedy) may be regarded as a feature of international law, but not in the sense of establishing a right to compulsory dispute settlement at either the international or national levels, even in situations where the right-holder is a non-state actor. Indeed, in most situations, violations of international law, including violations of treaties, have not been addressed by compulsory recourse to judicial or arbitral fora.

The broad conclusions reached in Part II are not controversial, but they are important in establishing the general backdrop of the international legal system. The remainder of the chapter turns to more difficult questions that can arise in the context of particular treaty regimes, where states may assume an express or implied obligation to allow persons to invoke treaty norms in

the state's national courts. First, as discussed in Part III, a treaty may expressly require that individuals be able to invoke a treaty norm before national courts. When this occurs, the state is obligated as a matter of international law to allow private parties to have such access in the national system.

Second, as discussed in Part IV, even if a treaty does not expressly oblige a state party to allow individuals invoke a treaty norm in the state's national courts, such an obligation may be implicit in the treaty. Determining whether such an obligation is implicit in the treaty requires a careful analysis of the language of the treaty, in context and in light of the treaty's object and purpose, as well as the practice of state parties subsequent to the treaty's entry into force, and possibly the treaty's negotiating history. The I.C.J. engaged in such an analysis, and found an implied right to invoke a treaty in national courts, in the course of rendering its decisions in *LaGrand* and *Avena* with respect to VCCR Article 36.

Part V suggests that implying a right of access to national courts to vindicate a treaty norm should not occur in certain circumstances. Where the treaty expresses a benefit or protection for individuals that is highly inchoate or aspirational in nature, and thus implicitly anticipates some further action by states to clarify and implement the treaty provision, then it is improper to imply a right of access to national courts to vindicate the treaty provision. Further, if there are similar treaties between similar parties, some of which expressly provide for access to national courts and some of which do not, a right of access usually should not be implied in the latter. If a treaty provides a particular mechanism for individuals to vindicate their rights other

than through national courts, then usually a right of access to national courts should not be implied. Finally, if when joining a treaty a state issues an uncontested “understanding,” or some other definitive statement, to the effect that no private right of action is created by virtue of the state’s ratification of the treaty, then access to that state’s national courts to vindicate a right under the treaty should not be implied.

Part VI concludes by speculating that, while the Court’s decisions in *LaGrand* and *Avena* should not be read as evidence of a general rule of international law obliging states to allow individuals to invoke treaty norms in national courts, the Court’s decisions may nevertheless represent an incremental step in the evolution of international law in that direction. As international law increasingly establishes rights protective of the individual, and increasingly develops avenues for individuals to enforce their rights (including before international tribunals), there may emerge a settled expectation that invocation of treaty norms by individuals in national courts is the logical consequence of embedding protections for individuals in treaty regimes, regardless of whether it is expressly or implicitly envisaged by the particular treaty. Such a development may not be optimal; while it may have a valid normative goal (promoting and protecting the rights of individuals), there would likely be confusion about the contours of the right of access to national courts, there might be adverse consequences for the creation and development of treaty regimes that are protective of individuals, it may result in excessive deference to unreliable national fora, and it may be out-of-step with other, more effective mechanisms for vindication of individual rights.

## II. INVOCATION OF TREATY NORMS BY INDIVIDUALS IN NATIONAL COURTS UNDER GENERAL INTERNATIONAL LAW

In determining whether international law generally obligates a state to open its national courts for the invocation of treaty norms, a standard analysis should consider whether the obligation exists as a matter of general treaty law, customary international law, or general principles of law, as evidenced in part by judicial decisions and the writings of highly qualified publicists.<sup>6</sup> As the discussion below indicates, none of those traditional sources of international law supports the proposition that such a general obligation exists.

### A. *Vienna Convention on the Law of Treaties*

The background (or “secondary”) rules that govern the conclusion, operation, interpretation, and termination of treaties emerged over the centuries from the practice of states. The 1969 VCLT codified and in some instances developed these background rules in a single treaty, which is sometimes referred to as the “treaty on treaties.” As of 2007, the VCLT directly binds, as a matter of treaty law, the 108 states that have adhered to it with respect to treaties among those states, so long as the relevant treaty was concluded after the date the VCLT entered into force for the parties to the treaty.<sup>7</sup> For treaties concluded prior to that date, and for treaties

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<sup>6</sup> See Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055.

<sup>7</sup> VCLT, *supra* note 5, art. 4.

concluded by or with states that have not yet ratified the VCLT, the VCLT does not directly apply.

The VCLT addresses in some detail the manner in which a state may react to a breach of a treaty by another state, principally through termination or suspension of the treaty.<sup>8</sup> Further, disputes over such reactions are to be resolved through standard methods of international dispute settlement.<sup>9</sup> The VCLT, however, contains no provision requiring states to open their national courts for invocation of treaty norms, either by other states or by individuals.

Traditionally, states alone have been viewed as the “subjects” of international law and, as noted in the introduction, many treaties concern matters that are solely inter-state in nature. At the same time, individuals have been accorded benefits or protections under international law, such that they have been described as “objects” of international law.<sup>10</sup> There are numerous treaties that accord such protections or benefits: protections for diplomats and consular officials;

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<sup>8</sup> *Id.* arts. 60 & 65.

<sup>9</sup> *Id.* art. 66(a). An annex to the VCLT outlines a process for conciliation through use of the U.N. secretary-general. *See id.* art. 66(b) & Annex.

<sup>10</sup> *See, e.g.*, George Manner, *The Object Theory of the Individual in International Law*, 46 AM. J. INT’L L. 428 (1952); CARL A. NØRGAARD, *THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW* (1962).

protections for aliens visiting or residing in a host state; protections for transnational commercial activities, such as foreign investments or franchises; and, of course, contemporary human rights treaties that restrain governments from infringing upon basic civil, political, economic, social and cultural rights of individuals. Even so, while treaties can be broadly grouped as those that involve states alone and those that involve individuals along with states, the VCLT draws no distinction among treaties on that basis, and hence suggests no differential treatment among them on the issue of access to national courts.

One might postulate that the fundamental obligation of a state to perform treaties in good faith (*pacta sunt servanda*)<sup>11</sup> means that all of the organs of a state—the executive, legislative, and judicial organs—who have the power to bring the state into compliance with the treaty must exercise that power to compel compliance.<sup>12</sup> As the I.C.J. has stated, *pacta sunt servanda* obliges states to apply a treaty “in a reasonable way and in such a manner that its purpose can be

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<sup>11</sup> VCLT, *supra* note 5, art. 26.

<sup>12</sup> See ARNOLD MCNAIR, THE LAW OF TREATIES 78 (2d ed. 1961) (finding that it “is the duty of a party to a treaty to see to it that its municipal law enables it to give effect to the treaty and that its organs—executive and judicial—are properly equipped with the powers required for that purpose . . . .”). At the same time, Lord McNair noted the “great differences between the legal systems and practices of different States” on this point, *id.* at 79, and explained his native system as one that did not recognize any rights for individuals to invoke treaties in municipal courts. *See infra* note 54.

realized,”<sup>13</sup> and in some circumstances perhaps the only reasonable way to apply a treaty that protects or benefits individuals is for national courts to be available for individuals to litigate claims arising from the treaty. There is some intuitive appeal to such an argument, since the conduct of all organs of a state, whether by means of commission or omission of an action, is attributable to the state under the laws of state responsibility.<sup>14</sup>

There are certain problems, however, with this line of argument. First, the VCLT itself contains no language expressly endorsing this approach; there is no reference in the VCLT to the

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<sup>13</sup> Gabcikovo-Nagymaros Project (Hung./Slovk.), 1997 I.C.J. 7, 79 (Judgment of Sept. 25).

<sup>14</sup> See Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in* Report of the ILC on the Work of its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10, arts. 2 & 4 (2001) [hereinafter ILC Articles] (“There is an internationally wrongful act of a State when conduct consisting of an action or omission . . . is attributable to the State under international law; and . . . constitutes a breach of an international obligation of the State”) (“The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions . . .”). The U.N. General Assembly has commended the ILC articles to the attention of governments, but they have not been transformed into a treaty and are not themselves binding upon states. See G.A. Res. 56/83, ¶ 3, U.N. Doc. A/RES/56/83 (Dec. 12, 2001); G.A. Res. 59/35, ¶ 1, U.N. Doc. A/RES/59/35 (Dec. 2, 2004).

means under internal law by which states are to fulfill treaty obligations. In Article 27, the VCLT addresses the issue of “internal law and observance of treaties,” but only provides that a “party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>15</sup> Thus, the VCLT precludes a party from asserting that its national courts are unwilling to uphold a treaty obligation as a means of escaping from that treaty obligation, but the VCLT does not compel the party to use national courts to secure adherence to a treaty obligation.

Second, nothing in the preparatory work of the International Law Commission or the negotiating record of the two sessions of the 1968-69 Vienna Conference,<sup>16</sup> in the associated

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<sup>15</sup> VCLT, *supra* note 5, art. 27. Article 27 was not included in the ILC draft articles; rather it was introduced at the first session of the diplomatic conference. Separately, Article 46 addresses provisions of internal law concerning competence to conclude treaties. *See id.* art. 46.

<sup>16</sup> For citations to the relevant documents of both the ILC’s preparatory work and the negotiating sessions of the diplomatic conference on what became Article 26, see SHABTAI ROSENNE, *THE LAW OF TREATIES: A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION 196-99* (1970); *THE VIENNA CONVENTION ON THE LAW OF TREATIES: TRAVAUX PRÉPARATOIRES 209-14* (Ralf Wetzels & Dietrich Rausching eds., 1978). In the two decades of the ILC’s work, there were a series of reports by the ILC’s esteemed rapporteurs: Brierly (1950-52); Lauterpacht (1953-54); Fitzmaurice (1956-60); and Waldock (1962-66).

commentaries on the VCLT,<sup>17</sup> or in the practice of states under the VCLT<sup>18</sup> support interpreting the general obligation of *pacta sunt servanda* as requiring the use of national courts to uphold treaty obligations, including those protective of individual rights. Shortly after adoption of the VCLT, D.P. O’Connell reiterated the conventional view that, notwithstanding the binding nature of a treaty,

A treaty is a contract, not law. It lays down rules for the parties, and these should be promulgated to the individual before he should be bound by them. Hence, many countries have a rule that treaties must be legislated upon to be internally operative. Even when they have no such rules their courts can only apply the treaty as law when it was the intention of the signatories that it should be internally operative.<sup>19</sup>

Third, when an individual seeks to invoke a treaty norm, the individual does so as a third

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<sup>17</sup> See, e.g., Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT’L L. 495, 516-17 (1970); I D.P. O’CONNELL, INTERNATIONAL LAW 55-57, 265 (2d ed. 1970); IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 83-84 (2d ed. 1984).

<sup>18</sup> See Walter Kälin, *Implementing Treaties in Domestic Law: From “Pacta Sunt Servanda” to “Anything Goes”?*, in MULTILATERAL TREATY-MAKING 111, 112-18 (Vera Gowlland-Debbas ed., 2000) (noting various techniques of states to soften the effects of ratifying a treaty, including “the exclusion of the self-executing character of the treaty without enacting implementing legislation to avoid the possibility that individuals will invoke it vis-à-vis authorities and courts in domestic procedures.”).

<sup>19</sup> O’CONNELL, *supra* note 17, at 54.

party, since persons are never parties to treaties. The general rule under the VCLT is that a treaty applies only as between the parties to it (*pacta tertiis nec nocent nec prosunt*);<sup>20</sup> exceptions to this rule were controversial in the VCLT negotiations. Nevertheless, the VCLT is cognizant of the possibility of third party rights (and obligations), but only recognizes those rights in the context of third party *states*.<sup>21</sup> Under the VCLT a third party right can arise when there is an intent of the treaty parties to create such a right and the third party assents to the right, though assent generally may be presumed.<sup>22</sup> The third party state may exercise the right only in conformity with the “conditions for its exercise provided for in the treaty or established in conformity with the treaty.”<sup>23</sup> In short, recognition of third party rights by the VCLT was contentious, was limited to states, and calls for close attention to the particular treaty in question when determining how it is the third party may seek to exercise or vindicate the right. This approach would appear to disfavor a general rule, under the law of treaties, granting private parties the right to invoke a treaty, and at best calls for careful scrutiny of the language and intent of the treaty being invoked by the individual, rather than reference to a more general norm of

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<sup>20</sup> VCLT, *supra* note 5, art. 34; *see* CHRISTINE CHINKIN, THIRD PARTIES IN INTERNATIONAL LAW 25-88 (1993).

<sup>21</sup> *See* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 207-11(2000).

<sup>22</sup> VCLT, *supra* note 5, art. 36(1).

<sup>23</sup> *Id.* art. 36(2).

treaty law.<sup>24</sup>

To gain traction, an argument in favor of a state's obligation to open its national courts for invocation of a treaty must shift to norms outside the realm of treaty law, such as those present in the law of state responsibility. Those norms are discussed in greater detail in the next section, but for present purposes it must be noted that rules on *attribution* of conduct in state responsibility are not seen as establishing whether there is a *breach* of an obligation under international law: the two concepts are distinct.<sup>25</sup> In other words, the fact that the organs of a state can include a wide array of collective or individual entities, central or peripheral to the government, alone has not been seen as transforming treaty-based obligations into obligations that are to be performed by all such state organs. A legislature may have the power under national law to enact a law that compels executive compliance with a treaty obligation, or courts may have the power to allow lawsuits by state or non-state actors that compel compliance, but the fact that such organs have not acted in a given situation traditionally has not been seen as constituting the violation of international law. Rather, in the absence of a specific treaty obligation that directs itself to national courts, international law only concerns itself with the broader failure of the state, as a whole, in not bringing itself into compliance with the treaty obligation. As Antonio Cassese has explained:

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<sup>24</sup> As discussed *infra*, Part V, this treaty-specific approach was the one taken by both the parties and the International Court of Justice in the *LaGrand* and *Avena* cases.

<sup>25</sup> ILC Articles, *supra* note 14, art. 2.

When a State breaches an international obligation because the national legislation necessary for implementing the rule is lacking or inadequate, other States claim cessation of the wrongdoing or reparation only for that breach, without enquiring about the reasons for non-compliance or protesting at the lack or inadequacy of legislation. In other words, States are only interested in the final result: fulfilment or non-fulfilment of an obligation. They show no interest in the factors that brought about that result. . . . [T]his state of affairs reflects the individualistic structure of the international community and the paramount importance of respect for other States' internal affairs.<sup>26</sup>

Though Cassese acknowledges some exceptions, he concludes that international law generally “leaves each country *complete freedom* with regard to how it fulfils, nationally, its international obligations.”<sup>27</sup>

This unwillingness to impose, under general international law, an obligation on any specific organ to enforce a treaty obligation is no doubt recognition that adoption of such a rule would potentially impose an obligation on courts to enforce the vast array of treaty obligations that are purely inter-state by their nature. In other words, if the state is obligated to comply with the treaty obligation, and courts have the power to order executive authorities to do so, there would appear to be no reason, conceptually, to limit the courts' obligation to only those treaties protective of individuals.) Further, the unwillingness to go in this direction is likely an acknowledgment that when resort is being sought to courts, it may well be for purposes of challenging a decision already taken by a different national organ (the executive or the

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<sup>26</sup> ANTONIO CASSESE, INTERNATIONAL LAW 218 (2d ed. 2005).

<sup>27</sup> *Id.* at 219 (emphasis in original).

legislature. How the state internally resolves that issue is not of concern to international law: what is of concern is determining the nature of the obligation in the context of a specific treaty and whether the state as a whole has violated that obligation. The following section further develops the interface of custom with treaty law on this point.

### *B. Customary International Law*

Does customary international law obligate a state to open its national courts for the invocation of treaty norms by individuals? Many states and international tribunals regard the VCLT as largely reflecting the customary treaty practice of states, and thus accept the VCLT as relevant when considering how states should behave in their treaty relations under customary international law. The lack of provisions in the VCLT requiring states to open their national courts for invocation of treaty norms by individuals demonstrates a lack of conviction at the time the VCLT was drafted that such a rule existed as a matter of customary international law.

Looking beyond the VCLT, there are two further concepts that have helped shape customary international law that also cast doubt upon the proposition that customary international law generally requires states to allow persons to invoke treaties in national courts. The first is the principle (borne out by consistent state practice) that disputes between states, including those arising from treaties, should not be settled in the national courts of one of them. As discussed below, this principle may have somewhat less traction in the context of treaty provisions that regulate relations between private parties and a state, or solely between private

parties, but the sentiments that animate the principle are sometimes of relevance for even those types of treaty provisions. In any event, the principle suggests that a general customary rule allowing invocation of treaties in national courts cannot be sustained; rather, one needs to focus on the specific treaty at issue.

The second relevant concept is the general understanding that treaty obligations may, by their nature, be of a kind that requires a state to achieve a particular result, without requiring that the state do so by any particular means. The distinction between obligations of result and obligations of conduct can be confusing and has led to disagreements among scholars as to the exact meaning of the terms, but there appears to be an acceptance that there exists a category of international obligations, including within it treaty obligations, that cannot be said to require a state to achieve a particular objective through use of a particular means, such as by allowing access to national courts by individuals. To the extent that this is true, it reinforces the difficulty of maintaining that there is a general customary rule allowing invocation of treaties in national courts; again, one needs to focus on the specific treaty at issue instead.

#### 1. *Par in Parem Non Habet Jurisdictionem*

The general practice of states has been that, when disputes arise among them (including treaty disputes), they are resolved through recourse to negotiation or other forms of international dispute settlement, and not through litigation in national courts. Indeed, the ancient feudal principle *par in parem non habet jurisdictionem* or *par in parem imperium non habet* is often

invoked in support of the proposition that states—as sovereigns of equal standing—“cannot have their disputes settled in the national courts of one of them.”<sup>28</sup>

The *par in parem non habet jurisdictionem* principle is relevant to the issue of invocation of treaty norms in national courts by an individual in situations where the individual is suing a foreign sovereign. The principle serves as the foundation for the doctrine of sovereign immunity, as well as the “act of state” doctrine,<sup>29</sup> which essentially exist so as to promote stable relations among states and non-intervention of states in the affairs of other states.<sup>30</sup> While the absolute theory of immunity of states has largely given way to a more restrictive theory of immunity (whereby foreign sovereigns are not immune from suit in national courts in certain

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<sup>28</sup> IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 321 (6th ed. 2003).

<sup>29</sup> Under the act of state doctrine, national courts decline to “sit in judgment” on the acts of a foreign government when those acts are taken within the foreign government’s territory. The principal motivation for this self-restraint appears to be a desire that disputes involving the acts of foreign governments in their own territories be resolved through diplomatic means, not through litigation in national courts. *See generally* OPPENHEIM’S *INTERNATIONAL LAW* 365-71 (Robert Jennings & Arthur Watts eds., 9th ed., 1992).

<sup>30</sup> *See* Hazel Fox, *International Law and Restraints on the Exercise of Jurisdiction by National Courts of States*, in *INTERNATIONAL LAW* 361, 361-65 (Malcolm Evans ed., 2d ed. 2006); *see generally* HAZEL FOX, *THE LAW OF STATE IMMUNITY* (2002).

circumstances, such as when they engage in commercial relations),<sup>31</sup> even under the latter theory states habitually refrain from suing other states in national courts. The restrictive theory of immunity does contemplate persons suing foreign sovereigns in national courts, but adoption of the restrictive theory is not *compelled* as a matter of international law; indeed, a few states (notably China) continue to follow the absolute theory of immunity, barring all suits against foreign sovereigns in their courts.<sup>32</sup>

When a foreign sovereign fails to accord the required protection or benefit to an individual, international law allows the state of that individual's nationality to react to the breach by exercising a right of diplomatic protection of the national. In such a circumstance, the state espouses the right of its national and pursues the matter through whatever means are available, whether by means of international negotiation or otherwise. Espousal, however, is recognized as a discretionary power of the state; if a state chooses not to espouse the claim, international law

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<sup>31</sup> See U.N. Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, U.N. Doc. A/RES/59/38, annex (Dec. 2, 2004); ANDREW DICKINSON ET AL., *STATE IMMUNITY: SELECTED MATERIALS AND COMMENTARY* (2004); JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* (2d ed. 2003).

<sup>32</sup> See, e.g., Huang Jin & Ma Jingsheng, *Immunities of States and Their Property: The Practice of the People's Republic of China*, 1 HAGUE YEARBOOK OF INTERNATIONAL LAW 163 (1988).

accepts that the protection accorded to the national may remain unfulfilled.<sup>33</sup> The inability of the individual to pursue the claim does not deprive the individual of the underlying right; as D.P. O’Connell noted: “He may not be able to pursue his claims and take action to protect his property without the intervention of his own State, but it is still his claim and still his interest which the machinery of enforcement is designed to facilitate.”<sup>34</sup>

The *par in parem non habet jurisdictionem* principle is not directly relevant to the issue of invocation of treaty norms in national courts by an individual for purposes of suing the local sovereign, for in that instance the sovereign is sitting in judgment upon itself. On the other hand, to the extent that the principle is designed in part to preclude states from interfering in the internal relations of another state (by not letting their national courts sit in judgment on a foreign sovereign’s conduct undertaken in its own country), the same concern presumably arises if states are insisting that a foreign sovereign conduct its national legal system in a certain fashion. If so, the same sentiment that animates the *par in parem non habet jurisdictionem* principle would seem to disfavor a general obligation under customary international law that a state must allow itself to be exposed to treaty claims in its own courts.

The *par in parem non habet jurisdictionem* principle is also of less significance when an individual invokes treaty norms in national courts against another individual, as may occur in the

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<sup>33</sup> See CASSESE, *supra* note 26, at 232.

<sup>34</sup> I O’CONNELL, *supra* note 17, at 108.

context of treaties regulating private international law. The lack of direct state involvement in such cases likely explains why those cases tend not to evoke any controversy, even when the parties' positions are based directly on the treaty (as opposed to on an implementing statute or some other instrument). Yet even here, in some instances the *par in parem non habet jurisdictionem* principle may have traction, such as when the individual is impugning the legality of the conduct of a foreign sovereign undertaken in its own territory. In that instance, a national court might apply the act of state doctrine, or some other "avoidance" doctrine, so as to dismiss the claim, even though it is arising as between private parties, due to a concern that the national court's decision might disrupt inter-state relations.<sup>35</sup>

Though the application of the *par in parem non habet jurisdictionem* principle may have differing relevance depending on what type of treaty provision is at issue, the existence of the principle for at least a broad range of treaties makes it difficult to sustain an argument that there is a general customary rule requiring states to allow invocation of treaties in their national courts. At best, presence of the principle suggests that the critical factor is not the existence of a general norm but, rather, a norm emanating from the specific treaty at issue before the court.

*b. Obligations of Result/Obligations of Conduct*

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<sup>35</sup> For a discussion of such avoidance doctrines, see Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT'L L. 159, 169-75 (1993).

As may be surmised from some of the discussion above, customary international law on treaties as it relates to invocation before national courts can also be viewed through a prism that differentiates the existence in treaties of obligations of result and obligations of conduct.<sup>36</sup> The result/conduct distinction in international law is one that can be confusing, both in its relationship to the result/conduct distinction as understood in civil law systems, and in its application to treaty provisions that contain elements of both forms of obligations.<sup>37</sup>

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<sup>36</sup> The distinction between obligations of result and obligations of conduct was made famous through the work of Roberto Ago as the special rapporteur for the work of the International Law Commission (ILC) on the rules of state responsibility. Ultimately, the articles on state responsibility adopted by the ILC refrained from relying on the distinction, not because the distinction was inherently invalid, but because it was not useful in addressing the consequences that flow from a breach of international law (the subject of the ILC's work). *See* JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 21-22* (2002) (stating that the conduct/result distinction has "become an accepted part of the language of international law," but that no "substantive consequences" flowed from the distinction for the ILC articles).

<sup>37</sup> *See, e.g.,* Pierre-Marie Dupuy, *Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, 10 *EUR. J. INT'L L.* 371, 374-78 (1999); IAN BROWNLIE, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY (PART ONE)* 241 (1983).

Nevertheless, the distinction is generally accepted as correctly distinguishing, at a general level, two different ways states might be bound under international law.

On the one hand, treaty obligations often speak to a specific result that must be achieved by each treaty party, rather than a particular course of conduct that the party must undertake. Thus, treaties such as the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol)<sup>38</sup> or the Kyoto Protocol on climate change<sup>39</sup> establish quotas on the emission of certain gases, but leave it to states to determine how such limits should be reached. The obligation might be met by: (1) adoption of a national statute that prohibits emissions in excess of the threshold requirement; (2) regarding the treaty as itself creating a norm within the national legal system that binds governmental authorities to that end; (3) the national government simply exercising its regulatory discretion so as to preclude the emissions; (4) creation of private rights of action whereby persons may sue the government or other private parties in national courts to

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<sup>38</sup> Sept. 16, 1987, 1522 U.N.T.S. 3, S. TREATY DOC. NO. 100-10 (1987). The Montreal Protocol provides for the progressive reduction by specified dates of the production and consumption of certain types of ozone-depleting chemicals—such as chlorofluorocarbons and halons—listed in annexes to the Protocol.

<sup>39</sup> *See* Kyoto Protocol to the U.N. Framework Convention on Climate Change, Dec. 10, 1997, U.N. Doc. FCCC/CP/197/L.7, *reprinted in* 37 I.L.M. 22 (1998). The Kyoto Protocol binds to specific targets and timetables for the reduction of “greenhouse gases” that are regarded as responsible for long-term global warming.

enforce compliance with the treaty;<sup>40</sup> or (5) some other means for promoting treaty compliance. Such a treaty obligation is often referred to as an *obligation of result*. How the state party reaches the result is not the focus of the treaty obligation; so long as the result is reached by some means or conduct, the treaty obligation is satisfied.

By contrast, it is possible for any given treaty to require that a state follow a certain course of conduct, which might include allowing access to its courts for individuals for the purpose of promoting the treaty's objective, in which case the state has undertaken an *obligation of conduct*. For example, under the Vienna Convention on Diplomatic Relations, the state parties are obligated to "take all appropriate steps to protect the premises of the mission against any intrusion or damage . . . ."<sup>41</sup> Such an obligation is in the nature of an obligation of conduct. The fact that damage occurs to the mission alone does not constitute a violation of the treaty provision; rather, it is the state's failure to undertake a particular course of conduct ("appropriate steps to protect the premises") so as to avoid such damage that leads to the violation. Some

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<sup>40</sup> To the extent that national courts are utilized, it should be noted that such courts are organs of the state, and hence are obligated to issue judgments that are consistent with the international obligation of the state. *See* Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights, 1999 I.C.J. 62, 88 (Apr. 29) ("the conduct of an organ of a State—even an organ independent of the executive power—must be regarded as an act of that State").

<sup>41</sup> Vienna Convention on Diplomatic Relations, art. 22(2), Apr. 18, 1961, 500 U.N.T.S. 95, 23 U.S.T. 3227.

scholars have characterized obligations of conduct as only referring to obligations to pursue best efforts or due diligence in trying to achieve a particular outcome (such as the Vienna Convention example),<sup>42</sup> while others have included in this concept obligations that are fairly specific about the course of conduct expected, including steps that must be taken within the internal legal sphere of the state.<sup>43</sup> For example, the obligation in Article 2(c) of the Convention on the Elimination of All Forms of Discrimination Against Women, which provides that states undertake to “ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination,” has been characterized as an obligation of conduct or means.<sup>44</sup> The purpose of this chapter is not to definitively resolve the “proper” scope of obligations of conduct, but simply to underscore the differing nature of treaty obligations that exist in the international sphere.<sup>45</sup>

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<sup>42</sup> See, e.g., Dupuy, *supra* note 37, at 381-82.

<sup>43</sup> See, e.g., II Y.B. I.L.C. at 31 (1977) (examples by Professor Ago).

<sup>44</sup> Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; see Rebecca J. Cook, *State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 228, 232 (Rebecca J. Cook ed., 1994).

<sup>45</sup> A well-known institutionalization of the distinction between obligations of result and obligations of conduct may be seen in the “secondary legislation” created by the institutions of the European Communities (EC). Consistent with the concept of obligations of result, EC

The concept of obligations of result/obligations of conduct is linked to the doctrine of “margin of appreciation” in international law. That doctrine—which has its origins in French and German law and is best known internationally for its application by the European Court of Human Rights (ECHR)<sup>46</sup>—generally may be seen as comprising two elements: (1) an acceptance that certain international norms are open-ended or unsettled (normative flexibility); and (2) a consequent willingness of international courts to exercise restraint when reviewing the decisions

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“directives” bind EC member states to objectives that must be achieved within a certain time-limit, but leave to national authorities the means for achieving those objectives. Directives have to be implemented in national law, but only in accordance with the procedures of the individual member states. By contrast, and consistent with the concept of obligations of conduct, EC “regulations” are binding in their entirety and directly applicable to all EC member states; there is no room provided for EC states to apply the directive selectively or through alternative approaches; indeed, there is no need for any national implementing legislation to support an EC regulation. *See* P.S.R.F. MATHIJSEN, *A GUIDE TO EUROPEAN UNION LAW* 26-27 (8th ed. 2004).

<sup>46</sup> *See* YUTAKA ARAI-TAKAHASHI, *THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR* 2-5 (2002); Oren Gross & Fionnuala Ní Aoláin, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 *HUM. RTS. Q.* 625 (2001).

of national authorities that interpret such norms (judicial deference).<sup>47</sup> When an international norm calls for a particular result, the “margin of appreciation” doctrine is largely unnecessary; since the norm is not regulating the national means by which the end should be secured, there is no need to resort to the doctrine (deference to the means is already built into the norm).

Nevertheless, the doctrine may be useful when determining whether an international norm is in fact an obligation of result, since the policy reasons supporting the doctrine are the same ones that would support viewing an ambiguous norm as an obligation of result.<sup>48</sup> Those policy reasons are: a desire to promote pluralism and diversity in the application of law, within appropriate limits; a preference for empowering decision-makers at the lowest possible level, since they are closest to and most accountable to the persons being governed (often referred to as the principle of subsidiarity); and a concern with the quality, capacity and cost of decision-making at the international level.<sup>49</sup>

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<sup>47</sup> See Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT’L L. 907, 909-11 (2005); see also Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT’L L. & POL. 843 (1999).

<sup>48</sup> See Shany, *supra* note 47, at 917.

<sup>49</sup> *Id.* at 918-22. For a discussion in the context of decision-making within the European communities, see Leonard F.M. Besselink, *Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union*, 35 COMMON MKT. L. REV. 629 (1998).

When an international norm calls for particular conduct, the margin of appreciation doctrine is squarely implicated, for the doctrine is concerned with the level of discretion to be afforded states when undertaking that conduct. Hence, if an international norm calls for particular state conduct, but qualifies the obligation through use of terms such as “appropriate,” “reasonable,” “proportionate,” “necessary,” or “not arbitrary,” then—under the margin of appreciation doctrine—the norm may be seen as preserving a “zone of legality” within which states bound to the norm may operate, thereby allowing multiple states to pursue somewhat differing avenues of action, all of which are intended to satisfy the conduct required by the norm.<sup>50</sup> This preservation of state autonomy, to the extent possible under international law, is consistent with the background principle most famously articulated in the *Lotus* case<sup>51</sup> that states, as a general matter, should be able to engage in their preferred course of action unless international law prohibits them from doing so.<sup>52</sup>

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<sup>50</sup> See Shany, *supra* note 47, at 910 (citing *Vo v. France*, Eur. Ct. H.R., Judgment, July 8, 2004, ¶ 82).

<sup>51</sup> *Lotus Case* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18-19.

<sup>52</sup> See, e.g., *S.D. Myers, Inc. v. Canada*, NAFTA Ch. 11 Arb. Trib., ¶ 263 (Nov. 12, 2001), reprinted in *NAFTA ARBITRATION REPORTS* (2003) and in 40 I.L.M. 1408, 1438 (2001) (“a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the

Turning to the relevance of the results/conduct distinction for this chapter, when a state accepts in a treaty an obligation of result, international law generally does not require that the state fulfill that obligation by allowing individuals to invoke the treaty in the state's judicial system, even in a situation where the treaty provides a benefit to or protects the interests of individuals. If the primary treaty obligation is simply to benefit/protect the individual then, so long as the state complies with that obligation, the mechanism by which that compliance occurs is left to the state. Of course, the state can choose as a matter of convenience to allow access to local courts for this purpose, and doing so may assist the state in fulfilling its treaty obligation,<sup>53</sup> but such access to courts or other measures under national law generally need not be provided as

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international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.”).

<sup>53</sup> See MCNAIR, *supra* note 12, at 322:

The British view appears to be . . . that a treaty creates obligations between the contracting parties solely . . . and not between one party and the nationals of another, or between the nationals of two or more parties; though, as we shall see, in practice it is often, and indeed usually, convenient to allow the assertion by or against individuals in municipal courts of right or liabilities which their State has obtained for them or imposed upon them by treaty.

a matter of international law. It cannot be said that the treaty is violated simply because steps have not been taken to provide access for individuals to national courts for enforcement of the treaty protections. Indeed, as indicated by the quote of Antonio Cassese above,<sup>54</sup> the failure to bring national law into conformance with international law alone is normally not a breach of international law (let alone the failure to provide access to national courts); a breach normally only occurs when the state fails to observe its treaty obligation on a specific occasion.<sup>55</sup>

If the state *does* breach the treaty obligation, then customary international law speaks to the remedies available on the international plane, largely through rules on pacific settlement of disputes, (including diplomatic protection of nationals), on treaty-termination or suspension, or on non-forcible counter-measures. In cases where the affected persons are nationals of the transgressing state, the traditional remedies available under general international law become problematic, but international legal theory does recognize the concept of a limited number of *erga omnes* obligations (obligations owed to the international community as a whole), such as obligations not to engage in genocide, slavery, or racial discrimination.<sup>56</sup>

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<sup>54</sup> See *supra* note 26.

<sup>55</sup> See BROWNIE, *supra* note 28, at 35.

<sup>56</sup> See *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, Second Phase, 1970 I.C.J. 3, 32, ¶ 34 (Feb. 5); *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90, 102, ¶ 29 (June 30); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*,

Of course, any given treaty may expressly or by implication oblige a state to achieve or aspire to a particular outcome through a particular means, such as by permitting individuals to invoke a treaty norm in national courts. That possibility is the subject of Parts III and IV below.

### C. *General Principles of International Law*

If it were possible to show relatively uniform adoption within national legal systems of a principle that individuals are entitled to invoke treaties before national courts, then it might be said that a general principle of international law exists to that effect as well. General principles of law are, of course, one of the classic sources of international law (after treaties and custom), and such principles can be established if they operate in the national laws of states worldwide.<sup>57</sup> Yet, as the ensuing chapters in this volume indicate, national legal systems worldwide are not sufficiently uniform on this point; many national legal systems do not operate on the basis of a legal principle whereby individuals can readily invoke treaties in national courts. The lack of uniformity among national legal systems worldwide on this issue is related to the structural relationship of international law to national law, which is typically discussed in the context of “dualism” and “monism”.

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Judgment on Preliminary Objections to Jurisdiction, 1996 I.C.J. 595, 615-16, ¶ 31 (July 11).

<sup>57</sup> See OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 50-55 (1991).

Some countries, such as the common law and Scandinavian countries, tend to view international law and national law as separate, distinguishable bodies of law (the “dualist” approach). Thus, in countries such as Canada or the United Kingdom, no treaty has any direct effect upon internal law; only with the passage of implementing legislation by the national legislative body does the internal law change.<sup>58</sup> Consequently, there is no legal principle recognized in such countries whereby individuals have a general right to invoke treaties before national courts. For example, in *UL Canada v. Quebec (Attorney General)*, the Court of Appeal for Quebec in 2003 rejected the argument that trade treaties to which Canada was a party could

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<sup>58</sup> See AUST, *supra* note 21, at 150-56; Gaetano Arangio-Ruiz, *International and Interindividual Law*, in NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 15, 19 (Janne Nijman & André Nollkaemper eds., 2007) (noting that the dualist view “is that the *key* to the implementation of international law within the framework of national law is in the hands of national law itself, as impersonated by the constituent, the legislator, or the courts, in the exercise of powers they respectively derive from national law, and . . . just from that law.”). For a discussion of early British cases on how treaties affecting private rights have no force of law before U.K. courts absent confirmation by Parliamentary statute, see SAMUEL B. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 289-92 (2d ed. 1916). For recent cases in U.K. courts involving violations of the European Convention on Human Rights and Fundamental Freedoms, where no remedy of compensation was found available under U.K. law, see Ian Leigh & Laurence Lustgarten, *Making Rights Real: The Courts, Remedies, and the Human Rights Act*, 58 CAMBRIDGE L.J. 509, 527-31 (1999).

be used by a private litigant to strike down a Quebec food regulation. According to the court:

An international treaty does not have force in internal law unless it is incorporated into internal law by the legislative body having jurisdiction under the Constitution. Quebec's [trade agreement] implementation Acts set out a statement of fact and enunciate a truism with respect to legislative competence. They do not express an intent to make the free trade agreements part of Quebec's domestic law, and such an intent could not be inferred from their text. These Acts state only approval for the free trade agreements, and that approval was not sufficient to support the conclusion that the National Assembly intended to incorporate the entire text of the free trade agreements into Quebec law. The trial judge correctly ruled that the international free trade agreements had not been incorporated into Quebec law and could not, therefore, be invoked to invalidate the section.<sup>59</sup>

The existence of a significant number of countries that generally fall into the “dualist” camp makes it quite difficult to establish the existence of a general principle of international law that individuals may invoke treaty norms before national courts.

On the other hand, some countries do view international law and national law as part of the same system of law (the “monist” approach), such that international law is automatically a part of the national legal system. Thus, in several civil law countries, treaties are regarded as

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<sup>59</sup> *UL Canada Inc. v. Quebec (Attorney General)*, 2003 R.J.Q. 2729, 2003 Carswell Que. Cases 2247 (Westlaw); *see Council of Canadians v. Canada (Attorney General)*, No. 01-CV-208141, 2005 Carswell Ont. Cases 2973, paras. 41-43 (Ont. Sup. Ct. Justice July 8, 2005) (finding that international wrongs are to be addressed in international courts); *see generally* THE GLOBALIZED RULE OF LAW: RELATIONSHIPS BETWEEN INTERNATIONAL AND DOMESTIC LAW (Oonagh E. Fitzgerald ed., 2006).

being a part of the internal law as soon as they are ratified.<sup>60</sup> Indeed, in some countries, such as the Netherlands, treaties have the same rank as constitutional law, and thus are paramount even with respect to subsequent legislation.<sup>61</sup> Yet even in those countries, courts are sometimes reluctant to allow treaties to be invoked by private litigants in the absence of language within the treaty to that effect. An example of that reluctance is the 2001 case of *X v. Japan* before the Tokyo High Court, where the plaintiffs sought compensation from the Government of Japan for acts committed in Hong Kong during World War II that arguably violated provisions of the 1907 Hague Convention (and its annexed Regulations). According to the Tokyo High Court, even though the Hague Regulations contain many provisions that directly protect individuals' interests, nevertheless

since international law by its nature regulates relations between States, legal subjectivity in principle is recognized for States, not for individuals. In order for individual rights to be recognized under international law, individuals need to be recognized as having the standing to exercise their rights as a party under a certain treaty, and moreover, procedures for realizing such rights need to be provided under international law. However, the Hague Convention has no such stipulations that recognize the ability of

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<sup>60</sup> For a brief survey of some monist systems, see AUST, *supra* note 21, at 146-50.

<sup>61</sup> See GRONDWET [CONSTITUTION OF THE KINGDOM OF THE NETHERLANDS], art. 94 (“Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.”).

individuals to exercise their rights or that provide procedures for realizing such rights. Thus, the Hague Convention cannot be interpreted as a convention which sets individuals' private rights as interests seeking to be protected by the Convention and which aims to restrain acts that violate those private rights by putting upon a belligerent party [who is] in violation [of] the obligation for compensation.<sup>62</sup>

Further, even in monist countries, there may be significant obstacles to invocation of treaties before national courts due to the "avoidance doctrines" referred to above, especially as against the government.<sup>63</sup>

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<sup>62</sup> X v. Japan, Tokyo High Court, Judgment, Feb. 8, 2001, *reprinted in* 2002 JAP. ANN. INT'L L. 142, 143-44; *see also* X v. State, Osaka High Court, Judgment, Oct. 15, 1999, *reprinted in* 2001 JAP. ANN. INT'L L. 171 (no ability to sue for violation of rights under the International Covenant on Economic, Social and Cultural Rights or the International Covenant on Civil and Political Rights).

<sup>63</sup> *See supra* note 35; *see also* Francesco Francioni, *The Jurisprudence of International Human Rights Enforcement: Reflections on the Italian Experience*, in ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS 15, 17-18 (Benedetto Conforti & Francesco Francioni eds., 1997) (identifying obstacles in the form of the political question doctrine, deference to the executive's ability to breach international law, the doctrine of non-self-executing treaties, the later-in-time rule, the *forum non conveniens* principle, jurisdictional defects, or the act of state doctrine); Kälin, *supra* note 18, at 117 ("[T]he highest Swiss court, which in general shows a positive attitude vis-à-vis the application of international law, has been

Where a country has incorporated a treaty into its national law by statute, it is usually the statute (and background constitutional principles) that serve as the touchstone for the national court's decision making, not an implied right for individuals to invoke the treaty norm. For example, Professor Hofman describes the reasoning by the German Federal Constitutional Court (FCC) in the 2004 *Görgülü* Case on the relationship of the European Convention on Human Rights (ECHR) to German law as follows:

The Second Senate of the FCC sets out by stating that the ECHR and its protocols have been transformed, by pertinent Acts passed by the legislature . . . into German law and therefore have the rank of federal statute law. Therefore, German courts must observe and apply the ECHR within the limits of a methodologically justifiable interpretation of German law. The guarantees of the ECHR are, however, not a direct constitutional standard of review in the German legal system; a complainant cannot, therefore, directly base a constitutional complaint upon an alleged violation of a human right contained in the ECHR. However, the guarantees of the ECHR impact upon the interpretation of the fundamental rights and constitutional principles of the *Grundgesetz* [*i.e.*, the Basic Law or constitution of Germany]. The ECHR and the case-law of the [ECHR] serve as a guiding source in determining the content and scope of the fundamental rights and constitutional principles of the *Grundgesetz*, to the extent that this does not restrict or reduce the protection of a person's fundamental rights under the *Grundgesetz*.<sup>64</sup>

Of course, national legal systems usually are much more complicated than the broad monist/dualist approaches suggest, and one must look—as do the remaining chapters in this

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unwilling to accept the self-executing character of several important treaty provisions that most agree would be suitable for direct application.”).

<sup>64</sup> Rainer Hofmann, *The German Federal Constitutional Court and Public International Law: New Decisions, New Approaches?*, 47 GER. Y.B. INT'L L. 9, 18-19 (2004) (footnotes omitted).

volume—at each country’s constitutional rules and judicial practice to fully understand how any given national legal system relates to international law.<sup>65</sup> Yet even accepting that there is a spectrum along which different countries achieve differing levels of fusion between international and national law, it remains the case that the lack of uniformity in approach among national legal systems worldwide has precluded the emergence of a general principle of international law requiring states to allow individuals to invoke treaty norms in national courts.

The maxim *ubi jus, ibi remedium* (where there is a right, there is a remedy) may be regarded as a general principle of law that applies within the international legal system, but only in the sense that when a state violates the right of another state (or one of its nationals), that other state is entitled to demand reparation for the injury caused. In national legal systems, the maxim sometimes has been interpreted as entitling a right-holder to have recourse to a court for enforcement of the right, on a theory that if there is no enforcement, then the right is not really legal in nature, but rather a moral or natural right. Close analysis of national legal systems suggests that application of the maxim is far from absolute.<sup>66</sup> Yet whatever the maxim’s meaning

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<sup>65</sup> See AUST, *supra* note 21, at 145 (“If one examines even a small selection of constitutions it soon becomes apparent that many contain both dualist and monist elements.”); see also NATIONAL TREATY LAW AND PRACTICE (Duncan B. Hollis et al. eds., 2005).

<sup>66</sup> For a discussion of the right to a remedy in the context of U.S. law, see, e.g., Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 95 (2001) (arguing “[traditionally, courts were willing to make available all appropriate remedies

may be in national law, international law has never viewed the entitlement to a remedy as entailing a right to compulsory dispute settlement, at either the international or national levels.

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to enforce rights. Most modern cases, by contrast, are ringed about with reservations.”); Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Rights of Action*, 71 NOTRE DAME L. REV. 861, 862 (1996) (describing that since “1979, the Supreme Court has adopted a more passive view of the role of courts in determining implication issues, taking the position that whether to imply a cause of action from a federal statute depends solely on congressional intent.”); David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1198-99 (1992) (finding that state law constitutional “remedy guarantees” which require “that the law furnish a remedy for specified types of injuries, have no federal counterpart, thus forcing courts and advocates to rely on their own skills of research, analysis, and creativity.”); David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355, 359 (2004) (analyzing the difficulties for private plaintiffs in suing state governments and state officers for violations of federal statutes, and noting that “in cases where plaintiffs due to enjoin state executive action that allegedly violates a federal statute . . . , the Court will not address the merits of the claim unless plaintiffs can establish an express statutory cause of action.”); Daryl J. Levinson, *Rights, Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 861 (1999) (explaining a currently “pervasive theory” of constitutional rights “essentialism” whereby, “because courts have no special license or ability to make the types of policy decisions that remedies require, and because the political branches possess no only democratic legitimacy but also superior fact-finding and interest-balancing capacities, courts should defer to the political branches about issues of implementing or enforcing rights.”).

Indeed, to a large extent, this is why many persons are skeptical about referring to international law as “law.” Most rights that arise under international law—including some of the most fundamental, such as the right of a state not to be attacked by another in contravention of the U.N. Charter—cannot be vindicated by the right-holder by compelling the transgressing state to appear before an international court or tribunal. While the right-holder may be able to resort to an international tribunal if a specific treaty supports the tribunal’s jurisdiction to adjudicate that right (e.g., a compromissory clause in a treaty of amity providing for jurisdiction of the International Court of Justice over disputes arising under that treaty), most treaties do not provide for compulsory enforcement of treaty norms, and *ubi jus, ibi remedium* has never been viewed as establishing jurisdiction for an international court or tribunal simply because a treaty or non-treaty norm exists under international law. Even the VCLT only provides a non-binding conciliation procedure for disputes about treaty violations, and a state party may file a reservation rejecting that procedure. Instead, to the extent that the principle of *ubi jus, ibi remedium* exists in international law, it appears to provide simply that, when a state breaches an international obligation, the state becomes obliged to provide reparation for that breach, which may consist of restitution, compensation, or some other form of reparation. The entitlement to that reparation does not carry with it a right to some form of compulsory dispute settlement before an international tribunal.

The situation does not change when the right-holder is a non-state actor. While the non-state actor may be able to resort to an international tribunal if a specific treaty supports the tribunal’s jurisdiction to adjudicate that right (e.g., investor–state arbitration under Chapter 11 of

the North American Free Trade Agreement), the non-state actor cannot invoke *ubi jus, ibi remedium* alone as a means of supporting jurisdiction before some international court or tribunal.

Can *ubi jus, ibi remedium* support the proposition that when a non-state actor is accorded a right under international law, then there is necessarily a right to compulsory dispute resolution before a national court? Given that the principle as it operates under general international law does not entail compulsory dispute resolution, it is doubtful that the principle should be so construed. Moreover, *ubi jus, ibi remedium* has never supported the proposition that a right created under one system of law (e.g., in the United States) entails a right to compulsory dispute settlement before the courts or tribunals of a different legal system (e.g., in the United Kingdom), so interpreting the principle as requiring national courts to adjudicate rights created under the system of international law is equally problematic. There does not appear to be any international case law construing the maxim in that fashion.

#### *D. Views of Publicists*

Scholars are in accord with the assessment that states are not generally obligated under international law to open their courts for such enforcement. As Professor Schachter stated in his lectures before the Hague Academy of International Law (as revised): “There is no general requirement in international law that States provide such remedies. By and large, international law leaves it to them to meet their obligations in such ways as the State determines. This is

sometimes expressed as ‘obligations of result’ in contrast to ‘obligations of means.’<sup>67</sup> Similarly, the commentary to the *Restatement (Third) on the Foreign Relations Law of the United States* provides:

International agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts, but there are exceptions with respect to both rights and remedies. Whether an international agreement provides a right or requires that a remedy be made available to a private person is a matter of interpretation of the agreement.<sup>68</sup>

### III. INVOCATION OF A TREATY NORM BY INDIVIDUALS IN NATIONAL COURTS PURSUANT TO AN EXPRESS TREATY OBLIGATION

While the existence in a treaty of a benefit or right in favor of persons does not necessarily entail a right to invoke the treaty before national courts, a treaty might expressly provide for such a right as a part of the terms of the treaty. Express provision for access to national courts may be for the purpose of vindicating a substantive right contained in the treaty or it may be more procedural in nature, by simply creating a right of non-discriminatory access to national courts.

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<sup>67</sup> SCHACHTER, *supra* note 57, at 240.

<sup>68</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a (1987) [hereinafter RESTATEMENT (THIRD)].

At one time, international legal theory disputed whether it was possible for a treaty between two states to create rights or obligations for individuals that could be vindicated in national courts. Some states and scholars contended that a treaty could only create rights and obligations as between states; if rights and obligations were to be created with respect to individuals, then it was asserted that a national law must be developed separate from the treaty. The Permanent Court of International Justice (P.C.I.J.) laid that contention to rest in its advisory opinion on the *Jurisdiction of the Courts of Danzig*.<sup>69</sup>

In that case, a 1921 treaty had been concluded between Poland and the Free City of Danzig<sup>70</sup> by which Poland had taken into its railway service Danzig railway officials. In certain articles of the treaty referred to as the *Beamtenabkommen*, the treaty obligated Poland to accord various employment protections to the railway officials. When Poland failed to do so, the railway

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<sup>69</sup> Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928 P.C.I.J. (ser. B) No. 15 (Mar. 3).

<sup>70</sup> The Free City of Danzig was an autonomous city-state established in 1920, pursuant to the Treaty of Versailles, from territory that had been possessed by Germany. The city was placed under the protection of the League of Nations (represented by a High Commissioner), though certain economic rights were maintained for Poland. The railway line connecting Danzig, a major port, with Poland was administered by Poland. After World War II, the city became a part of Poland and is now referred to as Gdańsk.

officials sued Poland (specifically, the Polish Railways Administration) in Danzig courts. After the League of Nations High Commissioner for Danzig issued a decision that the treaty provisions could not serve as a basis for individuals to sue in the Danzig courts, the Danzig government succeeded in having the League Council request an advisory opinion from the P.C.I.J.

Before the P.C.I.J., Poland accepted that the 1921 treaty created rights and obligations as between Poland and Danzig, but not ones possessed by the employees upon which they could sue in national courts, at least in the absence of an associated national law. If any violation of the treaty had occurred, Poland maintained that it was only the City of Danzig who might pursue a claim against Poland. By contrast, Danzig impressed upon the Court that the treaty, in effect, created the terms for a services contract, and that what should be emphasized was not the *form* of the instrument but rather its *substance*. The P.C.I.J. agreed, and rejected Poland's position, stating:

It may be readily admitted that, according to a well established principle of international law, the *Beamtenabkommen*, being an international agreement, cannot, as such create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts. That there is such an intention in the present case can be established by reference to the terms of the *Beamtenabkommen*. ...

The wording and general tenor of the *Beamtenabkommen* show that its provisions are directly applicable as between the officials and the Administration. This is particularly the case in regard to Articles 6, *litt. (a)* and *(b)*, 7, 11 and 12, which are of such a nature as to lead possibly to pecuniary claims. According to its contents, the object of the *Beamtenabkommen* is to create a special legal regime governing the relations between the Polish Railways Administration and the Danzig officials, workmen and

employees who have passed into the permanent service of the Polish Administration.<sup>71</sup>

Though the Court recognized that Article 9 of the treaty contemplated that these labor matters would be addressed in accordance with Polish law, the Court stated that Article 9 “should not be construed in a manner which would make the applicability of the provisions of the *Beamtenabkommen* depend on their incorporation into a Polish Regulation.”<sup>72</sup>

The Court’s approach thereafter became accepted doctrine.<sup>73</sup> Consequently, as indicated in the *Restatement (Third)* provision quoted above, it is now commonly accepted that a treaty might, by its express terms, create rights for individuals separate from rights held by states. Moreover, many treaties expressly provide that the parties to the treaty must open their courts to

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<sup>71</sup> 1928 P.C.I.J. (ser. B) No. 15 at 17-18.

<sup>72</sup> *Id.* at 20.

<sup>73</sup> In the same time frame, it also became accepted doctrine that individuals could be empowered by treaty to vindicate treaty norms before an international tribunal (even against their own government). *See, e.g., Steiner & Gross v. Poland*, 4 ANN. DIG. PUB. INT’L L. CASES 291, 292 (1928) (international tribunal established under German-Polish treaty determined that an individual could invoke before the tribunal a treaty norm against his own government, finding that the treaty “conferred in unequivocal terms jurisdiction upon the tribunal irrespective of the nationality of the claimants”).

individuals so that alleged violations of those rights may be litigated.<sup>74</sup>

For example, treaties of friendship, commerce and navigation typically contain provisions that allow persons (including corporations) access to local courts to vindicate their rights, at least on terms no less favorable than are accorded to local nationals or nationals of third states. The 1948 U.S.-Italy Treaty on Friendship, Commerce and Navigation provides that nationals of either party shall “enjoy freedom of access to the courts of justice and to administrative tribunals and agencies” of the other party “both in pursuit and in defense of their rights.”<sup>75</sup> Bilateral

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<sup>74</sup> Of course, there are also treaties that open up national courts for enforcement of judgments from other national legal systems, such as exists in Europe under the Brussels and Lugano conventions. Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, as amended, 1990 O.J. (C 189) 1 (harmonizing rules of jurisdiction and procedures for recognition and enforcement of judgments among EU States); Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9 (harmonizing such rules and procedures among EU States and European Free Trade Area States). In December 2000, the European Commission adopted a regulation that amends the terms of the Brussels and Lugano conventions and transforms them into a European Communities legal instrument which is binding and directly applicable to the member States. *See* Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, (EC) No. 44/2001 (Dec. 22, 2000), 2001 O.J. (L 12) 1.

<sup>75</sup> Treaty on Friendship, Commerce and Navigation, U.S.-Italy, art. V(4), Feb. 2, 1948, 63

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Stat. 2255, 79 U.N.T.S. 171. The provision states in full:

The nationals, corporations and associations of either High Contracting Party shall enjoy freedom of access to the courts of justice and to administrative tribunals and agencies in the territories of the other High Contracting Party, in all degrees of jurisdiction established by law, both in pursuit and in defense of their rights; shall be at liberty to choose and employ lawyers and representatives in the prosecution and defense of their rights before such courts, tribunals and agencies; and shall be permitted to exercise all these rights and privileges, in conformity with the applicable laws and regulations, upon terms no less favorable than the terms which are or may hereafter be accorded to the nationals, corporations and associations of the other High Contracting Party and no less favorable than are or may hereafter be accorded to the nationals, corporations and associations of any third country.

Treaties providing access to national courts for certain purposes have existed for a long time. For example, the Treaty of Peace between the United States and Great Britain that ended the U.S. Revolutionary War provided that British creditors were not to meet with any “lawful impediment” to the recovery of debts they had previously contracted, and that “all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights”—provisions designed to allow colonists who remained loyal to Britain to obtain recovery through U.S. courts. *See* Definitive Treaty of Peace, U.S.-Gr. Brit., arts. 4-5, Sept. 3, 1783, *reprinted in* 2 TREATIES AND

investment treaties (BITs)<sup>76</sup> contain similar provisions, often allowing the affected person to choose either to pursue a dispute in the local courts or to take the matter to international arbitration. Thus, the 1985 China-Denmark bilateral investment treaty provides that when a dispute arises between an investor and the host country, and the complaint cannot be settled within six months, either party “shall be entitled to submit the dispute to the competent court” of the host country.<sup>77</sup> Contemporary BITs are becoming increasingly specific about the standards

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OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 151 (Hunter Miller ed., 1931).

More express reference to access to U.S. courts appeared in the 1795 amity treaty between the United States and Spain, which provided: “It is also agreed that the inhabitants of the territories of each Party shall respectively have free access to the Courts of Justice of the other, and they shall be permitted to prosecute suits for the recovery of their properties, the payment of their debts, and for obtaining satisfaction for the damages which they may have sustained . . . .” Treaty of Friendship, Limits, and Navigation, U.S.-Spain, art. XX, Oct. 27, 1795, *reprinted in 2*

TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA \_\_\_\_ (Hunter Miller ed., 1931). For a general discussion, see Robert R. Wilson, *Access-to-Courts Provisions in United States Commercial Treaties*, 47 AM. J. INT’L L. 20 (1953).

<sup>76</sup> As of 2003, there were 2,265 BITs involving 176 of the world’s 191 countries. See U.N. Conference on Trade and Development, *UNCTAD Analysis of BITs* (Aug. 17, 2004), at [www.unctadxi.org/templates/Page\\_\\_\\_\\_1007.aspx](http://www.unctadxi.org/templates/Page____1007.aspx).

<sup>77</sup> Agreement on the Encouragement and the Reciprocal Protection of Investments, P.R.C.-Den., art. 8, Apr. 29, 1985, 1443 U.N.T.S. 69. The provision states in full:

expected for the national processes. The 2004 model bilateral investment treaty developed by the United States sets forth various provisions on administrative procedures that a treaty party must establish or maintain to ensure protection of foreign investments,<sup>78</sup> and then provides that:

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1. In the event of a dispute between a national or company of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party, the national or company concerned may file [a] complaint with the competent authority of the other Contracting Party. Negotiations for settlement will then take place between the parties in dispute.

2. If such dispute cannot be thus settled within six months, either Party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting Party accepting the investment.

3. If a dispute involving the amount of compensation resulting from expropriation . . . cannot be settled within six months after resorting to the procedure specified in Paragraph 1 of this Article by the national or company concerned it may be submitted to an international arbitral tribunal established by both parties.

<sup>78</sup> See Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, art. 11(4) (Nov. 2004), at <http://www.state.gov/documents/organization/38710.pdf>.

Each Party shall establish or maintain judicial, quasi-judicial, or administrative tribunals or procedures for the purpose of the prompt review and, where warranted, correction of final administrative actions regarding matters covered by this Treaty. Such tribunals shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.<sup>79</sup>

Access to court provisions have also long-appeared in treaties relating to patents, copyright and trademarks, thereby allowing foreign owners of intellectual property to have access to local courts to vindicate their rights.<sup>80</sup>

Such provisions are not limited to the field of international commerce. Various international environmental agreements expressly provide for suits in national legal systems as a means of vindicating treaty norms, usually in the context of transboundary environmental damage. For example, the 1998 Aarhus Convention, which was developed by the U.N. Economic Commission for Europe, is designed to promote public access to information and participation in decision-making on environmental matters. Article 9, entitled “Access to Justice,” provides in paragraph 1:

Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information . . . has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review

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<sup>79</sup> *Id.* art. 11(5)(a).

<sup>80</sup> *See, e.g.*, Paris Convention for the Protection of Industrial Property, arts. 2 & 3, Mar. 20, 1883, 25 Stat. 1372, as amended, *available at* <http://www.wipo.int/treaties/en/ip/paris/>.

procedure before a court of law or another independent and impartial body established by law.<sup>81</sup>

More commonly, environmental treaties speak to the ability to sue in national courts for damage caused to the environment. In 1974 the Nordic countries adopted a Convention on the Protection of the Environment, which provides:

Any person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another Contracting State shall have the right to bring before the appropriate Court or Administrative Authority of that State the question of the permissibility of such activities, including the question of measures to prevent damage, and to appeal against the decision of the Court or the Administrative Authority to the same extent and on the same terms as a legal entity of the State in which the activities are being carried out.<sup>82</sup>

Examples of treaties requiring access to courts also exist among European States for damage from carriage of dangerous goods by land,<sup>83</sup> from sea-bed exploitation,<sup>84</sup> at transport terminals

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<sup>81</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, art. 9(1), June 25, 1998, 38 I.L.M. 517 (1999) (Aarhus Convention).

<sup>82</sup> Convention on the Protection of the Environment, Den.-Fin.-Nor.-Sweden, art. 3, Feb. 19, 1974, 1092 U.N.T.S. 279, 296, 13 I.L.M. 591.

<sup>83</sup> Convention on Civil Liability for Damage Caused During the Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels, art. 5, U.N. Doc. ECE/TRANS/79 (Oct. 10, 1989).

<sup>84</sup> Convention on Civil Liability for Oil Pollution Damage from Offshore Operations, art.

engaged in international trade,<sup>85</sup> and in the field of nuclear energy.<sup>86</sup> Perhaps the most ambitious effort is the 1993 Lugano environmental convention addressing harm to human health and the environment from a range of “dangerous activities,” although that convention has proven to be unpalatable to some European States.<sup>87</sup>

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11, Dec. 17, 1976, *reprinted in* 16 I.L.M. 1450 (1977).

<sup>85</sup> U.N. Convention on the Liability of Operators of Transport Terminals in International Trade, art. 5, U.N. Doc. A/CONF/152/13 (Apr. 19, 1991), *reprinted in* 30 I.L.M. 1503 (1991).

<sup>86</sup> Paris Convention on Third Party Liability in the Field of Nuclear Energy, art. 3, July 29, 1960, 956 U.N.T.S. 251, *reprinted in* 55 AM. J. INT’L L. 1082 (1960) (subsequently amended); Vienna Convention on Civil Liability for Nuclear Damage, art. 7, May 21, 1963, 1063 U.N.T.S. 265, *reprinted in* 2 I.L.M. 727 (1963). The two regimes were linked in the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention, Sept. 21, 1988, *reprinted in* 42 NUCLEAR L. BULL. 56 (1988). On damage from ships carrying nuclear material, see Brussels Convention on the Liability of Operators of Nuclear Ships, May 25, 1962, *reprinted in* 57 AM. J. INT’L L. 268 (1963); Brussels Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, Dec. 17, 1971, 974 U.N.T.S. 255, *reprinted in* 11 I.L.M. 277 (1972).

<sup>87</sup> Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, June 21, 1993, *reprinted in* 32 I.L.M. 1228 (1993). This convention channels liability to all persons and companies (and State and other agencies) exercising control over

Environmental regimes establishing access to national courts also exist on the global level and in some instances are quite detailed regarding the scope of access to national courts. For example, the 1999 Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal<sup>88</sup> seeks to establish a

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“dangerous activities” that cause damage, with no limitations on liability. The scope of damage extends to all deaths or bodily harm. Liability is not imposed if the activity was taken for the benefit of the person damaged. Since 1993, six European states have signed the convention, but others (including Denmark, Germany and the United Kingdom) have indicated that they do not intend to join. Resistance to the convention from States and industry apparently turns on a belief that the scope of the convention is too wide and too vague in both its definitions and legal rules. *See* Commission of the European Communities, White Paper on Environmental Liability, at 25, COM(2000) 66 final (Feb. 9, 2000).

<sup>88</sup> U.N. Doc. UNEP-CHW.1-WG-1-9-2 (Dec. 10, 1999) (Basel Protocol), *available at* <http://www.basel.int/text/con-e.pdf>. For information, see <http://www.basel.int/convention/about.html>. African States have developed their own convention banning the import into the region of hazardous wastes, which contains an article calling for a protocol on liability. Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, art. 12, Jan. 29, 1991, *reprinted in* 30 I.L.M. 790 (1991). While the Bamako Convention is in force, no liability protocol has yet been concluded.

comprehensive regime for liability, and for adequate and prompt compensation, for damage resulting from transboundary movements of hazardous wastes, including illegal traffic in those wastes. Under the protocol, a person who notifies an importing State of a shipment shall be liable for damage until the disposer has taken possession of the hazardous wastes and other wastes; thereafter the disposer shall be liable for damage.<sup>89</sup> Further, any person shall be liable for damage caused or contributed by his lack of compliance with the Basel Convention or by his wrongful intentional, reckless or negligent acts or omissions.<sup>90</sup> However, compensation may be reduced or disallowed “if the person who suffered the damage ... has caused or contributed to the damage having regard to all circumstances.”<sup>91</sup> Claims must be filed within certain time periods and recovery is limited based on the tonnage of the shipment.<sup>92</sup> Claims may be filed in the courts of the State where the damage was suffered, the State where the damage occurred, or the State where the defendant has his habitual residence or principal place of business.<sup>93</sup> Potentially liable persons are obligated to establish insurance, bonds, or other financial guarantees during the

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<sup>89</sup> Basel Protocol, *supra* note 88, art. 4.

<sup>90</sup> *Id.* art. 5.

<sup>91</sup> *Id.* art. 9.

<sup>92</sup> *Id.* arts. 12, 13 & Annex B.

<sup>93</sup> *Id.* art. 17.

period of potential liability.<sup>94</sup> Final judgments issued by a competent court are enforceable in the courts of the other States who are party to the Basel Protocol, with certain limited exceptions.<sup>95</sup> Additional examples of global regimes providing for explicit access to national courts may be found in regimes concerning damage from carriage of dangerous goods by sea<sup>96</sup> and in the field of civil aviation.<sup>97</sup>

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<sup>94</sup> *Id.* art. 14.

<sup>95</sup> *Id.* art. 21.

<sup>96</sup> International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, IMO Doc. LEG/CONF.10/8/2 (May 9, 1996), *reprinted in* 35 I.L.M. 1415 (1996).

<sup>97</sup> *See, e.g.*, Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention), Oct. 12, 1929, 137 L.N.T.S. 11, 49 Stat. 3000 (subsequently amended). For example, Article 28(1) provides: “An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.” Some 120 States are parties to this convention, which places strict liability on civil airlines for harm to passengers up to certain limits. The treaty was designed in part to help the fledgling civil air industry of the 1920's to attract capital investment by limiting the potential liability of air carriers for accidents.

In the field of human rights, the standard approach in multilateral treaties is two-fold. First, the treaty imposes a duty upon the state to ensure that certain rights are accorded to individuals. Second, the treaty requires the state to adopt national measures, including sometimes judicial measures, necessary to help prevent the abuse of rights from occurring, often by criminalizing certain conduct.<sup>98</sup> More specific to the issue of invocation of the treaty by individuals in national courts, several human rights treaties contain an express obligation to ensure access for persons to competent authorities, including judicial authorities, to secure an effective remedy for violation of rights held by the person under the treaty. For example, the International Covenant on Civil and Political Rights (ICCPR) provides in Article 2(3) that each party will ensure that any person whose ICCPR rights or freedoms are violated “shall have an effective remedy,” “shall have his right thereto determined by competent judicial, administrative or legislative authorities,” and shall “ensure that the competent authorities shall enforce such remedies when granted.”<sup>99</sup> The International Convention on the Elimination of All Forms of

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<sup>98</sup> A further dimension to this result-based and conduct-based dichotomy is the division between individual-oriented and collective-oriented duties of the state. *See* Tara J. Melish, *Rethinking the “Less as More” Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas*, 39 N.Y.U. J. INT’L L. & POL. 171, 248 (2006).

<sup>99</sup> International Covenant on Civil and Political Rights, art. 2(3), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. The provision states in full:

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Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

*See Oscar Schachter, The Obligation to Implement the Covenant in Domestic Law, in THE INTERNATIONAL BILL OF RIGHTS 311 (Louis Henkin ed., 1981); see also International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, art. 83, G.A. Res. 45/158, annex, 45 U.N. GAOR Supp. at 262 (Dec. 18, 1990).*

Access to court provisions may also be seen in the context of rights to the alleged perpetrator of the abuse. Thus, in the context of criminal charges, the ICCPR provides that: “In the determination of any criminal charge against him, or of his rights and obligations in a suit at

Racial Discrimination (CERD) contains a similar provision that expressly contemplates access to national “tribunals” to vindicate an individual’s treaty rights, both to secure injunctive relief for preventing the abuse and to obtain compensation if the abuse occurs.<sup>100</sup>

Other human rights treaties are less explicit in indicating that the access to courts is to vindicate *treaty* rights, as opposed to simply preventing or obtaining redress for a type of harm inflicted on the individual. Thus, rather than emphasize rights granted by treaty, the Convention Against Torture<sup>101</sup> speaks of access by an individual to “competent authorities” both to have “his law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” ICCPR, *supra*, art. 14(1).

<sup>100</sup> Convention on the Elimination of Racial Discrimination, art. 6, Dec. 21, 1965, 660 U.N.T.S. 195, 5 I.L.M. 350. Article 6 states:

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

<sup>101</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, S. TREATY DOC. NO. 100-20 (1988) [hereinafter

case” examined regarding an act of torture<sup>102</sup> and to obtain redress including “fair and adequate compensation.”<sup>103</sup> Similarly, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) obligates states “to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.”<sup>104</sup> The recently adopted convention on disabilities focuses on non-discriminatory “access to justice” for disabled persons.<sup>105</sup>

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Convention Against Torture].

<sup>102</sup> *Id.* art 13 (“Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”).

<sup>103</sup> *Id.* art. 14(1) (“Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.”).

<sup>104</sup> CEDAW, *supra* note 44, art. 2(c).

<sup>105</sup> Convention on the Rights of Persons with Disabilities, art. 13(1), U.N. GAOR, 61st Sess., U.N. Doc. A/61/611, annex (Dec. 6, 2006) (“States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision

On the regional level, the Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms states that “[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”<sup>106</sup> Language to similar effect appears in the inter-American and African conventions on human rights.<sup>107</sup> Interestingly, the Banjul Charter appears to obligate states parties to provide access to their “competent national organs” for individuals to vindicate not just rights arising under the Banjul Charter, but also fundamental rights arising under *other* conventions.<sup>108</sup> Non-

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of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.”).

<sup>106</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 13, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. 5, as amended; *see also id.* art. 6 (right to a fair trial).

<sup>107</sup> American Convention on Human Rights, arts. 8 & 25, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673 (1970); African Charter on Human and Peoples’ Rights, art. 7, June 27, 1981, 21 I.L.M. 58 (1982) (Banjul Charter).

<sup>108</sup> Banjul Charter, *supra* note 107, art. 7(1) (“Every individual shall have the right to have his cause heard. This comprises . . . the right to an appeal to competent national organs

binding human rights instruments also speak of the right of access to national tribunals and courts, including the Universal Declaration of Human Rights<sup>109</sup> and the American Declaration of the Rights and Duties of Man.<sup>110</sup>

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against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force . . .”). For a discussion, however, of how the Banjul Charter has not featured significantly in African case law, in part because some national legal systems have not incorporated the treaty into their national law and in part because the local courts primarily interpret and apply local law, see Frans Viljoen, *Application of the African Charter on Human and Peoples’ Rights by Domestic Courts in Africa*, 43 J. AFRICAN L. 1 (1999).

<sup>109</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III), art. 10, U.N. Doc. A/810 (Dec. 10, 1948) (“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”).

<sup>110</sup> American Declaration of the Rights and Duties of Man, OAS Res. 1591, art. XVIII (1948), *reprinted in* 43 AM. J. INT’L L. SUPP. 133, 136 (1949) (“Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.”).

By contrast, other human rights treaties—such as the Convention on the Prevention and Punishment of the Crime of Genocide<sup>111</sup>—do not expressly contemplate the creation of individual rights that can be vindicated through resort to national tribunals. Moreover, when ratifying human rights treaties, it is entirely possible that a state may reject, modify, or interpret the obligation to allow access to national courts by means of a reservation or understanding to the treaty. For example, when New Zealand ratified the Convention Against Torture, it reserved “the right to award compensation to torture victims referred to in article 14 of the Convention Against Torture only at the discretion of the Attorney-General of New Zealand.”<sup>112</sup> The United States filed an understanding to Article 14 interpreting it as requiring “a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.”<sup>113</sup> When a state takes such action, if other states do not object, the treaty obligation becomes conditioned for that state to the extent of the reservation or understanding.

Finally, it should be noted that express provisions within treaties may also accord rights for individuals to *avoid* suit in national courts, such as immunity from legal process accorded to

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<sup>111</sup> Dec. 9, 1948, 78 U.N.T.S. 277.

<sup>112</sup> See Convention Against Torture, Declarations and Reservations, *available at* <http://www.ohchr.org/english/countries/ratification/9.htm>.

<sup>113</sup> *Id.*

diplomats, consular officials, heads of state, or officials of international organizations. In a 1999 advisory opinion, the International Court considered Section 22(b) of the Convention on Privileges and Immunities of the United Nations, which provided that U.N. experts on mission shall be accorded “immunity from legal process of every kind” for words or acts done in the course of performing their mission.<sup>114</sup> In light of such language, the Court stated that national courts had a direct obligation to take action at an early stage in the proceedings to address the issue of immunity:

By necessary implication, questions of immunity are therefore preliminary issues which must be expeditiously decided *in limine litis*. This is a generally recognized principle of procedural law, and Malaysia was under an obligation to respect it. The Malaysian courts did not rule *in limine litis* on the immunity of the Special Rapporteur . . . , thereby nullifying the essence of the immunity rule contained in Section 22(b). As indicated above, the conduct of an organ of a State—even an organ independent of executive power—must be regarded as an act of that State. Consequently, Malaysia did not act in accordance with its obligations under international law.<sup>115</sup>

#### IV. INVOCATION OF A TREATY NORM BY INDIVIDUALS IN NATIONAL COURTS PURSUANT TO AN IMPLIED TREATY OBLIGATION

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<sup>114</sup> Sect. 22(b), Feb. 13, 1946, 1 U.N.T.S. 16, 21 U.S.T. 1418.

<sup>115</sup> Advisory Opinion on Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. 62, 88, ¶ 63 (Apr. 29). The Court ultimately advised that “the Malaysian courts had the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided *in limine litis*.” *Id.*, at 90.

Even if a treaty does not expressly require that access be provided to national courts in order to vindicate a treaty norm, a requirement of such access may be implicit in the treaty. The P.C.I.J.'s advisory opinion on the *Jurisdiction of the Courts of Danzig* is an example of implying access to national courts; in that case, the 1921 treaty did not expressly indicate that railway officials were to be granted access to the national legal system of either party to the treaty. Determining whether a right of access is implicit in the treaty requires a careful analysis of the language of the treaty, in context and in light of the treaty's object and purpose, as well as the practice of states parties subsequent to the treaty's entry into force, and possibly the treaty's negotiating history.

The I.C.J. engaged in such an analysis in the course of rendering its decisions in *LaGrand* and *Avena* with respect to VCCR Article 36.<sup>116</sup> In those cases, the Court found that the United

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<sup>116</sup> VCCR, *supra* note 3, art. 36. Article 36 provides:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

- (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and

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access to consular officers of the sending State;

- (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
- (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that

States had violated its obligations under Article 36(1) by not informing aliens of their right of consular notification, by not notifying their consulates of their detentions, and by effectively depriving the consulates of their ability to communicate with and have access to the aliens. The further question that arose was whether the failure to provide judicial review in U.S. courts of the aliens' convictions and sentences, in light of the lack of notification, constituted an additional violation of the VCCR.

Article 36 does not expressly provide for judicial review in the national courts of a failure to provide consular notification. Yet Article 36(2) states that the rights expressed in Article 36 “shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.”<sup>117</sup> Germany argued that this *proviso* required that violations of the consular notification obligations of Article 36(1) be remedied through the criminal justice systems of parties to the convention.<sup>118</sup> The United States responded that the failure to provide consular notification did not trigger any such requirement.

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the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

<sup>117</sup> *Id.* art. 36(2).

<sup>118</sup> Memorial of the Federal Republic of Germany, LaGrand Case (Ger. v. U.S.), ¶¶ 4.17-4.24 (Sept. 16, 1999).

According to the United States, the purpose of Article 36(2) was simply to recognize that the ability of consular officials to communicate with and visit detainees was subject to local laws, so long as those laws did not defeat the purpose of Article 36.<sup>119</sup> The express language of Article 36 did not establish an “individual right” and certainly did not establish any remedy for criminal defendants in national legal systems.<sup>120</sup> Further, “the language and structure of Article 36(1) do not support any claim that the receiving State must hold its criminal justice process in abeyance pending the provision of consular services. Because Article 36(1) does not link the justice process to consular notification, it cannot be read to require that receiving States provide remedies in the criminal justice process if Article 36(1) is not fully observed.”<sup>121</sup>

In its judgment, the Court found that Article 36(1) did create “individual rights.” When reaching that conclusion, the Court found significant the language in Article 36(1)(b) that the “said authorities shall inform the person concerned without delay of *his rights* under this subparagraph,” and in Article 36(1)(c) that consular assistance to the detained person may not be exercised “if he expressly opposes such action.”<sup>122</sup> According to the Court:

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<sup>119</sup> Counter-Memorial of the United States of America, LaGrand Case (Ger. v. U.S.), ¶ 79 (Mar. 27, 2000).

<sup>120</sup> *Id.*, ¶ 76.

<sup>121</sup> *Id.*, ¶ 87.

<sup>122</sup> LaGrand, *supra* note 1, ¶ 77 (emphasis in original).

The clarity of these provisions, viewed in their context, admits of no doubt. It follows, as has been held on a number of occasions, that the Court must apply these as they stand. . . . Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person. These rights were violated in the present case.<sup>123</sup>

The Court did not find it necessary to determine, as Germany urged it to do, that the right at issue had the character of being a “human right.”<sup>124</sup>

The Court then determined that Article 36(2) concerned not just the rights of the sending State, but also the individual rights of the detained person, such that the local laws and regulations must “enable full effect” to be given to the purposes of those individual rights.<sup>125</sup> Although the United States argued that the language of Article 36(2) “does not require States Party to create a national law remedy permitting individuals to assert claims involving the Convention in criminal proceedings,”<sup>126</sup> the Court found that U.S. laws and regulations, principally the procedural default rule, could not be invoked so as to preclude review in U.S. courts of arguments that the detainees’ convictions and sentences were flawed due to the lack of

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*, ¶ 78.

<sup>125</sup> *Id.*, ¶ 89.

<sup>126</sup> Counter-Memorial of the United States, *supra* note 119, ¶ 77.

consular notification.<sup>127</sup> In other words, “the procedural default rule had the effect of preventing ‘full effect [from being] given to the purposes for which the rights accorded under this article are intended’, and thus violated paragraph 2 of Article 36.”<sup>128</sup>

Looking to the future, Germany asked that the Court order the United States to issue assurances that it would “provide effective review of and remedies for criminal convictions impaired by the violation of the rights under Article 36.”<sup>129</sup> The Court declined to order that such assurances be made, but it did find that if future violations of Article 36(1) were to occur, a mere apology from the United States would not be a sufficient response. Rather, the Court stated in *LaGrand* that “should nationals of the Federal Republic of Germany ... be sentenced to severe penalties” without their right to consular notification having been respected, the United States, “by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth” in the VCCR.<sup>130</sup> The choice of the means for such “review and reconsideration,” said the Court, must be left to the United States.

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<sup>127</sup> *LaGrand*, *supra* note 1, ¶¶ 90-91.

<sup>128</sup> *Id.*, ¶ 91.

<sup>129</sup> *Id.*, ¶ 12.

<sup>130</sup> *Id.*, ¶ 128(7); *see id.*, ¶ 125.

With respect to the some fifty Mexican nationals at issue in the *Avena* case, the Court reached similar findings. For three of the nationals who had already failed to get past the procedural default rule, the Court found that using the rule to preclude “review and reconsideration” of the effects of an Article 36(1) violation separately violated Article 36(2). According to the Court, the “*review and reconsideration of conviction and sentence required by Article 36, paragraph 2*, which is the appropriate remedy for breaches of Article 36, paragraph 1, has not been carried out.”<sup>131</sup> As such, “by not permitting the review and reconsideration, in light of the rights set forth in the Convention, of the conviction and sentences [of the three individuals], after the violations [of Article 36(1)] had been established in respect of those individuals, the United States of America breached the obligations incumbent upon it under Article 36, paragraph 2, of the Convention.”<sup>132</sup>

As was the case in *LaGrand*, the *Avena* Court also found that there should be prospective “review and reconsideration” of the effects of violations of Article 36(1).<sup>133</sup> With an eye to the

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<sup>131</sup> *Avena*, *supra* note 2, ¶ 152 (emphasis added). Mexico had asked the Court to find that the United States had “violated its obligations under Article 36(2) of the Vienna Convention by failing to provide meaningful and effective review and reconsideration of convictions and sentences impaired by a violation of Article 36(1) . . . .” *Id.* at 23.

<sup>132</sup> *Id.*, ¶ 153(8).

<sup>133</sup> *Id.*, ¶ 153(9).

U.S. approach of relying on governors and parole boards to commute death sentences in light of the VCCR violations, the Court in *Avena* also stated that prospective “review and reconsideration” must entail “a procedure which guarantees that full weight is given to the violations of the rights set forth in the Vienna Convention” and “should occur within the overall *judicial* proceedings relating to the individual defendant concerned.”<sup>134</sup> The Court specifically noted that “the clemency process, as currently practised within the United States criminal justice system, does not appear to meet the requirements.”<sup>135</sup>

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<sup>134</sup> *Id.*, ¶¶ 138-39 (emphasis added).

<sup>135</sup> *Id.*, ¶ 143. The Court revisited the “review and reconsideration” obligation as a part of Mexico’s 2008 request for an interpretation of the judgment. One of the Mexicans on death row in the United States, José Ernesto Medellín Rojas, was unsuccessful in obtaining “review and reconsideration” of his conviction and sentence in Texas courts. Consequently, he asked U.S. federal courts to regard as binding federal law either the *Avena* judgment itself or a February 2005 memorandum by President Bush stating that the United States would “discharge its international obligations” under *Avena* “by having State courts give effect to the decision.” After the U.S. Supreme Court found that neither source constituted directly enforceable federal law, *Medellin v. Texas*, 552 U.S. \_\_\_\_ (2008), Germany filed an application at the I.C.J. asking for an interpretation of ¶ 153(9) of the *Avena* judgment. In the course of issuing provisional measures of protection (calling for Medellín and four others not to be executed pending the I.C.J.’s interpretation), the Court noted that both Mexico and the United States regarded the Court’s

Four aspects of the Court's reasoning in *LaGrand* and *Avena* are worth emphasizing. First, the Court did not simply conclude that since persons benefited from obligations imposed on states under the VCCR, those persons consequently were entitled to invoke the VCCR in national courts in order to secure those benefits. Rather, the Court found it necessary to determine that the treaty created "individual rights," which the Court said existed in this particular treaty by virtue of specific language referring to personal rights ("his rights") and assigning significance to the individual's personal preference regarding the operation of the treaty (consular assistance may not be exercised "if he expressly opposes such action"). By its language, the treaty expressly accorded to the individual an important role in the process by which consular notification was to be undertaken; the process was not one entailing simply conduct by representatives of states. By contrast, a treaty that did not contain such language—perhaps one that simply imposed constraints on governmental action—might not lead to the same result, even if the treaty was beneficial to the interests of third parties (individuals).

Second, in *LaGrand* the existence of those individual rights alone did *not* trigger a

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"review and reconsideration" finding as creating an "obligation of result," since there were various means by which the United States might accomplish such review and reconsideration. Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2008 I.C.J. \_\_\_\_ (July 16), *reprinted in* 47 I.L.M. \_\_\_\_ (2008).

requirement that there be access to local courts to vindicate those rights. Indeed, the only consequence that flowed from a finding that there were “individual rights” was that *Germany* could invoke those rights *before the I.C.J.*, given that the United States had accepted the I.C.J.’s jurisdiction over disputes arising under the VCCR.<sup>136</sup> Rather, the Court’s scrutiny of the treatment of the individuals in U.S. courts arose because of the language of Article 36(2), which stated that national “laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.”<sup>137</sup> The Court explicitly characterized the process of “review and reconsideration” as “required by Article 36(2)” and characterized Article 36(2) as setting forth the “remedy” for violations of Article 36(1).<sup>138</sup> The application by U.S. courts of the procedural default rule so as to preclude an alien from challenging his conviction and sentence (a challenge based on violation of Article 36(1)) was a further violation of the treaty, this time arising under Article 36(2).

Hence, the Article 36(2) language directly linked the primary international obligation (concerning notification of the right to consular access) to the national legal system, transforming

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<sup>136</sup> LaGrand, *supra* note 1, ¶ 77 (“the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person.”).

<sup>137</sup> VCCR, *supra* note 3, art. 36(2).

<sup>138</sup> Avena, *supra* note 2, ¶ 152 .

what might otherwise have been solely a protection accorded to individuals that was actionable before an international court into, instead, a protection for which the treaty provided a remedy in a national court. In essence, the Court viewed the United States as having agreed in Article 36(2) of the treaty that the individual rights arising under the treaty may be “exercised” in national law and that, while such exercise must be in accordance with national “laws and regulations,” those laws could not be applied or construed in a manner that precluded giving “full effect” to the purposes underlying the treaty rights. Had Article 36(2) not existed, it is not at all clear that the Court would have found an obligation for national courts to allow individuals to invoke VCCR rights; there is nothing express or implied in the Court’s reasoning to suggest as much.<sup>139</sup>

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<sup>139</sup> In their pleadings before the Court, neither Germany nor Mexico alleged that there was a general norm of international law requiring that nationals protected by VCCR Article 36(1) be accorded access to national courts in order to vindicate their rights. In particular, neither state argued that the general obligation of a state under international law to perform a treaty in good faith, *see* VCLT, *supra* note 5, art. 26, required the United States to open its courts for vindication of Article 36(1) rights (even though both states cited the VCLT for other reasons in other contexts, such as on how treaties should be interpreted). Neither state argued that such a general obligation under international law provided the legal basis for the Court to declare the barring of such claims in U.S. courts to be unlawful. Rather, Germany and Mexico both pled that the adjudication of Article 36(1) rights must be allowed in U.S. courts due to VCCR Article 36(2), with their arguments focusing in depth on the text of Article 36(2) and on its *travaux préparatoires*. *See* Memorial of Germany, LaGrand Case (Ger. v. U.S.), ¶¶ 4.17-4.24, 7.02(2)

Instead, it is possible the Court would have only found that Germany or Mexico had an ability to bring a diplomatic claim against the United States to vindicate the individual rights of their nationals.

At the same time, the Court additionally ordered that, in the future, when U.S. courts are confronted with a claim that Article 36(1) has been violated, U.S. courts shall allow review and reconsideration of the conviction and sentence taking into account that violation. Here, the Court's finding is best regarded as a form of declaratory relief, similar to an order from the Court that the United States provide assurances of non-repetition of Article 36(1) violations. However it may be characterized, the Court's issuance of such reparation does not appear to arise from the simple existence of a provision in a treaty providing protection for an individual (i.e., Article 36(1)), nor from some general principle of international law mandating enforcement of such rights in national courts. Rather, the issuance of the relief appears fully grounded in, and exercised for the purpose of forestalling future violations of, Article 36(2).

Third, there are important aspects relating to the posture of the *LaGrand* and *Avena* cases that suggest caution in reading the cases too broadly. These cases concerned criminal actions in which the individuals were exposed to the severest of penalties—death. Thus, the Court's finding

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(Mar. 27, 2000); Memorial of Mexico, *Avena* Case (Mex. v. U.S.), ¶¶ 209-225 (June 20, 2003).

The Court's reasoning followed suit, with no suggestion of any kind that a norm external to the VCCR required that U.S. courts adjudicate Article 36(1) claims.

of a U.S. violation by not allowing review and reconsideration in national courts, both retrospectively and prospectively, arose in the context of an inability of individuals to invoke the violation of a treaty as a potential means for avoiding execution. There is nothing in Article 36 that would preclude the Court's reasoning from being applied to criminal cases involving less severe penalties,<sup>140</sup> but it would not be surprising for an international court to adopt a wider "margin of appreciation" to national courts in circumstances where the stakes are much lower for the individual. Further, the *LaGrand* and *Avena* cases did not involve a civil action; indeed, Article 36 is exclusively concerned with the treatment of an individual in a criminal context. Therefore, the Court's decisions are not speaking directly to the ability of individuals to invoke treaties in national courts for the purpose of advancing civil claims against a government or against other individuals.

Fourth, in applying Article 36(2) so as to find an obligation that national courts take the effects of a treaty violation into account in their decision-making, it should be borne in mind that the Court rendered a very circumscribed judgment. The obligation found to exist for U.S. courts was to "review and reconsider" the convictions and sentences in light of the treaty violation, not

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<sup>140</sup> In a separate declaration to the *LaGrand* judgment, the President of the Court indicated that the Court's reference to "severe penalties" did not necessarily mean that non-severe penalties would not benefit from the same protection, *LaGrand*, *supra* note 1, at 517 (declaration of President Guillaume), but the reality is that the issue of less severe criminal penalties was simply not before the Court.

to alter them through any particular substantive response. Although Germany did not request that the convictions and sentences of the LaGrand brothers be annulled<sup>141</sup> (which is not surprising, since the brothers had already been executed at the time the Court considered the case on the merits), Mexico did request a finding that the United States was obligated “to restore the *status quo ante* by annulling or otherwise depriving of full force or effect the convictions and sentences of all 52 Mexican nationals.”<sup>142</sup> The Court refused to order any such remedy. Consequently, it presumably meets the obligation of the United States for U.S. courts, after review and reconsideration, to determine that the convictions and sentences should stand. If so, then the Court’s conclusion that an individual must be entitled to raise a treaty violation before the national court left considerable discretion to the national court in determining what consequences flow from that violation.<sup>143</sup>

The willingness of the Court to find an implicit obligation within a treaty to permit

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<sup>141</sup> See LaGrand, *supra* note 1, ¶ 12 (setting forth Germany’s final submissions).

<sup>142</sup> See Avena, *supra* note 2, ¶ 14 (setting forth Mexico’s final submissions).

<sup>143</sup> See Shany, *supra* note 47, at 935-36 (noting that the Court refused to resort to the traditional *Chorzów Factory* remedy of *status quo ex ante*). In the *Chorzów Factory* case, the P.C.I.J. stated that “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.” *Factory at Chorzów (Ger. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17, at 47.

litigation by individuals of treaty rights in national courts echoes the jurisprudence of the European Court of Justice (E.C.J.) concerning the “direct effects” of European Communities (E.C.) treaty instruments. Successive E.C. treaties have been concluded among the E.C. member states; by their terms, those treaties impose obligations upon the member states, without any express provision for redress by individuals in national courts when those obligations are unfulfilled. While E.C. *regulations* were to be directly applicable in national legal systems, E.C. member states originally did not view E.C. *treaty* provisions as creating directly enforceable individual rights. Only after the E.C.J.’s 1963 decision in *Van Gend en Loos v. Nederlandse Administratie der Belastingen*<sup>144</sup> did it become accepted that individuals could directly invoke certain EC treaty provisions as a source of individual rights in national courts. Interestingly, it is generally understood that the E.C.J. in *Van Gend en Loos* sought to distinguish the E.C. system from the traditional system of public international law—the E.C.J. saw the latter as “merely creat[ing] mutual obligations between the contracting states.”<sup>145</sup> Instead, the E.C.J. said that the

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<sup>144</sup> Case 26/62, *N.V. Algemene Transport- en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, 25, 1963 C.M.L.R. 105, 130-31 (finding that it was necessary to interpret the treaty article in question “as to produce direct effect and to create individual rights which internal courts should protect”). For a discussion of subsequent EC practice, see ANGELA WARD, *JUDICIAL REVIEW AND THE RIGHTS OF PRIVATE PARTIES IN EC LAW* (2000).

<sup>145</sup> *Van Gend en Loos*, *supra* note 144, at 12. For a discussion, see Joseph H.H. Weiler,

E.C. regime “constitutes *a new legal order* of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.”<sup>146</sup>

The approach of both the I.C.J. and the E.C.J. in viewing certain treaties as establishing rights for individuals that are actionable in national courts is consistent with the position expressed by Hersch Lauterpacht in his study of the status of the individual under international law. Lauterpacht maintained:

The question [of] whether individuals in any given case are subjects of international law and whether that quality extends to the capacity of enforcement must be answered pragmatically by reference to the given situation and to the relevant international instrument. That instrument may make them subjects of the law without conferring upon them procedural capacity; it may aim at, and achieve, both these objects.<sup>147</sup>

V. WHEN SHOULD A RIGHT TO INVOKE THE TREATY IN NATIONAL COURTS *NOT* BE IMPLIED IN THE TREATY?

While for some treaties there will be an implied right for individuals to invoke the treaty in national courts, a standard treaty interpretation analysis may lead to a conclusion that a right of access to national courts should not be implied. That analysis would focus on the ordinary

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*The Transformation of Europe*, 100 YALE L.J. 2403, 2427-30 (1991).

<sup>146</sup> Van Gend en Loos, *supra* note 144, at 12 (emphasis added).

<sup>147</sup> HERSCHEL LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 27 (1950).

meaning of the treaty provisions, in context and in light of the object and purpose of the treaty, as well as the practice of states under the treaty and possibly the travaux préparatoires. Four factors should be of particular relevance in rejecting an implied right of access to national courts.

First, where the treaty expresses a benefit or protection for individuals that is highly inchoate or aspirational in nature, and thus implicitly anticipates some further action by states to clarify and implement the treaty provision, then it is improper to imply an international obligation to accord access to national courts to vindicate the treaty provision. For example, the provisions on human rights set forth in Articles 55-56 of the U.N. Charter represent important pledges by U.N. members to pursue improvements in the economic well-being of individuals and the promotion of human rights, but they are precatory in nature; they require further elaboration by states for implementation either on the international or national planes. That further elaboration has occurred in numerous global and regional treaties on human rights.

Yet even for those subsequent treaties, careful attention must be paid to the content of the “rights” that are established. For example, the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>148</sup> provides greater detail regarding the content and scope of economic, social and cultural rights, but it contains several caveats which demonstrate that the parties have not accepted wholesale obligations to provide social security, employment, food and shelter to their nationals. Thus, Article 2(1) recognizes that there can be a “progressive”

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<sup>148</sup> Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

realization of these rights over a period of time.<sup>149</sup> Given that the rights are contingent on further steps, there is no basis for implying into such a treaty a right to invoke these treaty rights in national courts.

Second, if the treaty is similar to certain other treaties in nature or scope, and the other treaties expressly provide for a right of access for persons to national courts, then a right of access to national courts should not be implied with regard to the treaty that is silent on the matter. Thus, the 1989 U.N. Convention on the Rights of the Child<sup>150</sup> is similar to other U.N. human rights treaties in terms of setting forth certain normative standards, requiring state parties to report on their implementation, and creating a committee of experts to review that implementation. Unlike other U.N. human rights treaties, however, such as the treaties on civil

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<sup>149</sup> *Id.* art. 2(1). Article 2(1) states:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum extent of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

<sup>150</sup> Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter Convention on the Rights of the Child].

and political rights, racial discrimination, and torture,<sup>151</sup> the Convention on the Rights of the Child contains no express, general provisions calling for access to national organs, including national courts, for vindication of personal rights.<sup>152</sup> The absence of such a provision, when it was included in earlier human rights treaties, weighs against implying such access to national courts based on that convention. Obviously, this factor is strongest when a comparison is being made between treaties that have the same parties and that were concluded in the same temporal period.

Third, if the treaty itself provides a mechanism for private individuals to vindicate private rights, then an alternative mechanism (access to national courts to vindicate a treaty norm) should not be implied. Certainly this is the case when the international agreement both creates an alternative mechanism and expressly precludes the pursuit of actions in national courts, as occurred under the 1981 Iran.-U.S. Algiers Accords. In that instance, the two states created an

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<sup>151</sup> *See supra* notes 99-101.

<sup>152</sup> There are some provisions concerning access to courts that are more limited in nature than the provisions contained in other human rights treaties. *See* Convention on the Rights of the Child, *supra* note 150, art. 9(2) (opportunity to participate in proceedings on separation); *id.* art. 12 (opportunity of child to be heard in any judicial proceedings that are held); *id.* art. 37(d) (prompt access to court to challenge a detention); *id.* art. 40(2)(b)(iii) (opportunity for speedy penal proceedings).

international arbitral tribunal in the Hague for the resolution of commercial claims,<sup>153</sup> provided access to that tribunal for individuals with large claims, and expressly foreclosed U.S. nationals whose claims fell within the scope of that tribunal from pursuing actions in U.S. courts.<sup>154</sup> To imply that the agreements oblige the United States to allow individuals access to U.S. courts would fly in the face of the express terms of the agreements.

Yet even where actions in national courts are not expressly precluded by a treaty, an obligation under the treaty to provide access to national courts should not be implied if the treaty creates an alternative mechanism for individuals to vindicate their treaty rights. For example, a bilateral investment treaty that solely provides for reference of a dispute between the investor and the host state to international arbitration should not be read as implying a right of access to national courts as well.<sup>155</sup> When this occurs, the treaty regime is “self-contained” in nature; it

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<sup>153</sup> See Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims, Jan. 19, 1981, arts. II(1) & VII (2), *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. 9, 11 (1981-82).

<sup>154</sup> See Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, ¶ 11, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. 3, 6-7 (1981-82).

<sup>155</sup> See, e.g., Agreement Concerning the Mutual Promotion and Protection of Investments, Fr.-Isr., art. 8(2), June 9, 1983, 1410 U.N.T.S. 3 (providing that, if a dispute cannot be settled amicably within six months, either party may submit it for arbitration at the International Centre

reflects a package deal by the treaty parties whereby individual rights are created, but only in the context of vindication by individuals through a forum with which the treaty parties are comfortable. For this factor to apply, the alternative mechanism should be one that permits invocation of treaty rights by individuals; a mechanism that only allows states to pursue those rights, such as before the I.C.J., does not by itself indicate an intention by the parties to displace actions by individuals in national courts.

In the field of human rights, the I.C.J. has suggested that “where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves.”<sup>156</sup> As indicated above, some human rights treaties contain obligations for states to enact national measures that punish human rights abusers and some oblige states to provide an effective remedy in the national legal system for victims. Where the treaty is silent on such matters, an important aspect when determining whether to imply a right to invoke the treaty

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for Settlement of Investment Disputes); Protocol Amending the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes, Ger.-U.S., art. XIII, June 1, 2006, *available at* <http://www.treas.gov/press/releases/reports/germanprotocol06.pdf> (providing for arbitration of tax disputes).

<sup>156</sup> Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 134 (June 27).

before national courts is whether the treaty provides some other mechanism for vindication of individual rights, such as through a system of individual petition to a treaty monitoring committee. The presence of such a mechanism, even if it were only triggered on an optional basis, would weigh against implying any such right.

Finally, if when joining a treaty a state files an uncontested understanding, or in some other definitive way signals to its treaty partners that the treaty does not require the state to open up its national courts for vindication of treaty norms, then the state's interpretation as to the meaning of the treaty should weigh against implying any such right of access. (Implying such a right is even less compelling if numerous states have filed similar understandings.) For instance, as part of the statute by which the United States consented to ratification of the Uruguay Round Agreements of the World Trade Organization, the United States enacted statutory language stating that no person shall have any "cause of action or defense" based on those treaties.<sup>157</sup> This

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<sup>157</sup> 19 U.S.C. § 3512(c)(1) (2000) states:

No person other than the United States (A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or (B) may challenge . . . any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement.

position of the United States was well-known to its treaty partners and elicited no adverse reactions. In such a situation, it is implausible to imply into the Uruguay Round Agreements an obligation on the United States to open its courts to claims or defenses based on those treaties.<sup>158</sup>

## VI. EVOLVING INTERNATIONAL LAW?

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*See* *Bronco Wine Co. v. Bureau of Alcohol, Tobacco & Firearms*, 168 F.3d 498 (9th Cir. 1999) (finding no cause of action based on the Uruguay Round Agreements for a private litigant).

Similar statutory language was adopted by the United States when it entered into the North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 & 605. *See* 19 U.S.C. § 3312(c) (2000) (“No person other than the United States . . . shall have any cause of action or defense under” the NAFTA or “may challenge . . . any action or inaction by any department, agency or other instrumentality of the United States . . . on the ground that such action or inaction is inconsistent with” the NAFTA).

<sup>158</sup> *See* MITUSO MATSUSHITA, THOMAS J. SCHOENBAUM & PETROS C. MAVROIDIS, *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE AND POLICY* 102 (2003) (“The United States has adopted virtually a purely dualistic approach to the WTO agreement. . . . No person may assert any cause of action or defence directly under any of the WTO agreements before a U.S. tribunal.” (footnote omitted)).

While the Court's decisions in *LaGrand* and *Avena* should not be read as broadly supporting a customary international law rule that states must allow individuals to invoke treaty norms in national courts, the decisions may nevertheless represent an important incremental step in that direction. As international law increasingly establishes treaty norms protective of the individual and increasingly develops avenues for individuals to invoke their rights (including before international tribunals), there may emerge a settled expectation that access to national courts is the logical consequence of embedding protections for individuals in treaty regimes. The exact contours of this "right to invoke," however, are at present unclear, and there are reasons to think that the emergence of such a right would prove problematic.

*A. Trends in International Law*

The "arc" of the development of international law may point in the direction of a more general obligation to allow invocation of treaty norms by individuals in national courts in situations where the treaty contains provisions that are protective of individuals. For reasons stated below, the same forces that motivated the E.C.J. to develop the direct effects doctrine in E.C. law may, over time, crystallize in general international law.

It is commonly said that when public international law first emerged, its principal focus was on the regulation of relations among states, not the regulation of persons. Yet that understanding of early international law was never quite accurate; international law from its inception concerned itself with individuals in various respects. There were crimes under

international law for which persons could be prosecuted, such as for the slave trade or for piracy, and rules emerged holding states responsible for injuries inflicted upon aliens present in their territories.

Moreover, international law has not viewed international and national legal systems as hermetically sealed spheres, especially when it comes to the treatment of persons. As the international law of state responsibility developed, an expectation emerged that host states must not deny aliens procedural justice in local courts. This “denial of justice” standard requires a host state to treat aliens with a minimum level of internal security and law and order, including police protection for the aliens and their property, and to provide aliens a minimally adequate system of justice for resolving disputes, including in national courts.<sup>159</sup> If a host state fails to accord the alien such treatment, the alien’s state is empowered to pursue an international claim (derivative of the alien’s claim) against the host state. The standard continues to operate today, notably in the context of claims brought for alleged mistreatment of foreign investors.<sup>160</sup>

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<sup>159</sup> See generally JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005); Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT’L L. 809 (2005). For an example, see *Van Bokkelen Case*, 2 MOORE, INT’L. ARB. 1807 (1888).

<sup>160</sup> One NAFTA dispute resolution panel recently characterized the standard as follows:

By means of the “exhaustion of local remedies” rule, customary international law also has accorded to national courts an important role both in clarifying whether a state has in fact breached a norm of international law as it relates to a person and in establishing the factual record upon which international tribunals will operate in considering that alleged breach.<sup>161</sup>

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The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial [international] tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome [in the national court], bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a [international] tribunal can conclude in the light of all the available facts that the impugned [national court] decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment. This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities.

Mondev Int’l v. United States, NAFTA Ch. 11 Arb. Trib., ¶ 127 (Oct. 11, 2002), *reprinted in* NAFTA ARBITRATION REPORTS (2003).

<sup>161</sup> See generally C.F. AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW (2d ed.

States advancing claims based on an injury to their national must show that the national has “exhausted” remedies in the national legal system of the defendant state; failure to do so bars the claim as inadmissible before the international court or tribunal. According to Jiménez de Aréchaga, the basis for the rule is “the respect for the sovereignty and jurisdiction of the state competent to deal with the question through its judicial organs.”<sup>162</sup>

Piercing through into the national legal system may be viewed as especially appropriate in situations where the gravest forms of human rights abuses are at issue. It is commonly accepted that international law contains within it *jus cogens* (peremptory norms), which may be defined as norms “accepted and recognised by the international community of States as a whole as [norms] from which no derogation is permitted and which can be modified only by a

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2003); International Law Commission, Second Report on Diplomatic Protection, U.N. Doc. A/CN.4/5/514 (Feb. 28, 2001) (report of special rapporteur John Dugard); A.A. CANÇADO TRINDADE, *THE APPLICATION OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL LAW* (1983). For a recent example at the I.C.J., see Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, ¶¶ 68-75 (May 24, 2007), *available at* <http://www.icj-cij.org>. For an arbitral example, see Loewen Group. v. United States, NAFTA Ch. 11 Arb. Trib., ¶ 217 (June 26, 2003), *reprinted in* NAFTA ARBITRATION REPORTS (2003).

<sup>162</sup> Jiménez de Aréchaga, *International Responsibility*, *MANUAL OF PUBLIC INTERNATIONAL LAW* 584 (Max Sørensen ed., 1968).

subsequent norm of general international law having the same character.”<sup>163</sup> Some *jus cogens* norms relate to the rights of individuals; for example, the Inter-American Court of Human Rights has advised that the prohibition against racial discrimination is *jus cogens*<sup>164</sup> and the International Criminal Tribunal for the former Yugoslavia (ICTY) has declared that the prohibition against state-sponsored torture “has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules.”<sup>165</sup>

In the *Furundžia* case, the ICTY trial chamber stated that for such a norm, it was not sufficient to follow the normal approach of allowing states to reach the desired result by a means

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<sup>163</sup> VCLT, *supra* note 5, art. 53; see Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT’L L. 571 (1937); but see Georg Schwarzenberger, *International Jus Cogens?*, 43 TEX. L. REV. 455, 467 (1965).

<sup>164</sup> See Advisory Opinion on Juridical Condition and Rights of Undocumented Migrants, 2003 Inter-Am. Ct. Hum. Rts. (ser. A) No. 18, ¶¶ 98-101 (Sept. 17, 2003). Various decisions of the Inter-American Commission on Human Rights have also declared norms as *jus cogens*. See, e.g., Domingues, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, ¶¶ 45-46, 64 (2002) (regarding death penalty for juvenile offenders).

<sup>165</sup> Prosecutor v. Furundžia, Judgment, Case No. IT-95-17/1-T, ¶ 153 (Int’l Crim. Trib. former Yugo. Dec. 10, 1998).

of their choosing; rather, states must affirmatively act in certain ways, such as through the adoption of national criminal laws, so as to forestall the egregious act from occurring. The failure to adopt such laws itself constituted a violation of international law.<sup>166</sup> The chamber's decision should be seen in the context of treaties—such as the Convention Against Torture—which contain an express obligation for parties to adopt “effective legislative, administrative, judicial or

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<sup>166</sup> The chamber stated:

Normally States, when they undertake international obligations through treaties or customary rules, adopt all the legislative and administrative measures necessary for implementing such obligations. However, subject to obvious exceptions, failure to pass the required implementing legislation has only a potential effect: the wrongful fact occurs only when administrative or judicial measures are taken which, being contrary to international rules due to the lack of implementing legislation, generate State responsibility. By contrast, in the case of torture, the requirement that States expeditiously institute national implementing measures is an integral part of the international obligation to prohibit this practice. Consequently, States must immediately set in motion all those procedures and measures that may make it possible, within their municipal legal system, to forestall any act of torture or expeditiously put an end to any torture that is occurring.

*Id.*, ¶ 149.

other measures to prevent acts of torture in any territory under its jurisdiction.”<sup>167</sup> Nevertheless, the language of the decision suggests a wider sentiment, which is that in situations where a serious violation of human rights may be at issue, states are obligated to take certain measures internally to forestall violations. To the extent that such reasoning becomes prevalent in certain areas of international law, it may lead to an expectation that the international norm carries with it an obligation to allow invocation of treaty norms in national courts by individuals. Already there are voices calling for moving past traditional notions of sovereign immunity so as to ensure that fundamental protections are accorded to individuals,<sup>168</sup> and it seems likely that those voices will become more insistent.

An example of the evolution occurring in the international sphere may be seen in the 2006 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Guidelines)*. The *Basic Guidelines* originated in the U.N. Human

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<sup>167</sup> Convention Against Torture, *supra* note 101, art. 2(1).

<sup>168</sup> See generally Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988); see also Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 I.C.J. 3, 63 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans & Buergenthal); *id.*, at 137 (dissenting opinion of Judge *ad hoc* Van den Wyngaert).

Rights Commission,<sup>169</sup> were blessed by the U.N. Economic and Social Commission,<sup>170</sup> and then were adopted by consensus in the U.N. General Assembly.<sup>171</sup> Hailed by one of its drafters as an “international bill of rights of victims,”<sup>172</sup> the non-legally-binding *Basic Guidelines* call upon states to incorporate international human rights and humanitarian law into their national law and to adopt “measures that provide fair, effective and prompt access to justice” so as to vindicate those norms.<sup>173</sup> The premise of the *Basic Guidelines* is that the obligation to implement prohibitions on “gross violations of international human rights law and serious violations of international humanitarian law” necessarily entails a duty to “[p]rovide those who claim to be

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<sup>169</sup> U.N. Commission on Human Rights Res. 2005/35, annex (Apr. 19, 2005).

<sup>170</sup> ECOSOC Res. 2005/30, annex (July 25, 2005).

<sup>171</sup> G.A. Res. 60/147, U.N. Doc. A/RES/60/147, annex (Dec. 16, 2005) [hereinafter *Basic Guidelines*]. For a forerunner to these guidelines, one principally focused on remedies for victims of crimes committed by non-state actors under national law, and on abuse of power by a government, see Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. Doc. A/RES/40/34, annex (Nov. 29, 1985).

<sup>172</sup> See M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS. L. REV. 203 (2006). Professor Bassiouni served as a special rapporteur on the topic for the Human Rights Commission, building upon earlier work by Professor Theo van Boven.

<sup>173</sup> *Basic Guidelines*, *supra* note 171, art. 2(b).

victims of a human rights or humanitarian law violation with equal and effective access to justice . . . .”<sup>174</sup> The victim’s right of “access to justice” includes both a right to have the state criminally prosecute the offender<sup>175</sup> and a right to effective reparation. Consequently, whether or not a particular treaty expressly so provides, “[i]n accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law.”<sup>176</sup> The forms of reparation contemplated are: (1) restitution; (2) compensation; (3) rehabilitation; and (4) satisfaction and guarantees of non-repetition.<sup>177</sup> This emphasis in the *Basic Principles* on an obligation of states to provide “access to justice” within their national legal systems, though arising in the context of serious violations of international human rights/humanitarian law, may reflect increased expectations that individuals must have resort to national courts to vindicate individual rights cognizable under treaties.

As international treaties contain increasingly detailed rights and obligations for individuals—not just in the context of treaties on international human rights, but in other areas as

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<sup>174</sup> *Id.* art. 3(c); *see id.* art. 12.

<sup>175</sup> *See* Bassiouni, *supra* note 172, at 263.

<sup>176</sup> *Basic Guidelines*, *supra* note 171, art. 15.

<sup>177</sup> *Id.* art. 18.

well<sup>178</sup>—it seems plausible that there will be a growing expectation that national legal systems are indispensable for making those rights and obligations fully effective. Even a cursory perusal of the highly legislative treaties that have emerged to address contracts for the international sale of goods, abduction of children, regulation of pollution from marine vessels, or other matters makes clear that treaty regimes are becoming far too complex to be viewed as principally inter-state regulation, such that deviations should only be hashed out through inter-state negotiation and dispute settlement. Indeed, in many cases the treaty regime runs in tandem with extensive national laws and regulations that implement the treaty, often through incorporation by reference. Where national laws and regulations exist, the individual might be seen as bringing an action nationally based on those laws and regulations, and not on the treaty, but that distinction is becoming increasingly blurred and artificial.

Moreover, there appears to be an increasing acceptance that the individual, rather than the state, should be in a position to vindicate, on the international plane, international rights possessed by the individual. While prior to the mid-twentieth century, the state was the principal vehicle for vindicating those rights on the international plane,<sup>179</sup> there are now numerous

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<sup>178</sup> See generally Symposium, *Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L L. 1 (2006).

<sup>179</sup> The main exception were the some sixty mixed claims commissions set up to address disputes arising from injury to the interests of aliens.

examples of international mechanisms whereby the individual serves as the claimant, whether in the fields of human rights (e.g., ECHR or the Inter-American Commission on Human Rights), investment (e.g., NAFTA Chapter 11 dispute resolution or ICSID), other property rights (e.g., Iran-U.S. Claims Tribunal for large-value claims), or international organizations (e.g., U.N. Administrative Tribunal). To the extent that there is an increasing recognition that individuals have an important role to play in vindicating rights accorded to them under a treaty, and indeed a desire on the part of states that they do so without state involvement, a collateral expectation may emerge that individuals be able to do so through national legal systems.

This evolution, if it is occurring, may be yet another facet of the trend in globalization, whereby the once-monolithic nation state is increasingly disaggregated and non-state actors are increasingly challenging traditional state structures.<sup>180</sup> As Peter Spiro has noted, in the aftermath of the Cold War, an “architectural change” may be occurring in the international legal system, whereby prior doctrines (e.g., deference by courts to political branches, concern with entanglement in foreign affairs) are no longer necessary or appropriate.<sup>181</sup> If so, national legal

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<sup>180</sup> See generally Janne Nijman & André Nollkaemper, *Beyond the Divide*, in NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 341 (Janne Nijman & André Nollkaemper eds., 2007) ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

<sup>181</sup> Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649 (2002)

systems may need to find a way to adapt to those changes, and allowing persons to invoke treaty norms in national courts may be a step in that direction. National courts provide a ready-made and extensive infrastructure for interpretation and application of treaty law; as those treaties become more and more complex, regulating wide arrays of areas and wide arrays of actors, perhaps it is now inevitable that national courts be called upon in support. While there is potential for conflicting views among different fora, there is also considerable potential for coordination among international and national courts on interpretation and application of treaties, and one can postulate certain ground rules for doing so.<sup>182</sup>

*B. Concerns with the Emergence under General International Law of a Private Right to Invoke Treaties in National Courts*

The emergence under general international law of a right for individuals to invoke treaties in national courts may serve to help promote and protect the rights of individuals, and to force states to take more seriously the treaty commitments they make. Yet there are also reasons to be concerned about such a development.

First, if such a right emerges under general international law, there will likely be confusion about the contours of the right. Presumably the individual cannot invoke all the rights

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<sup>182</sup> See Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003).

contained in treaties, but only those rights that protect individuals. If so, some standards must be developed for differentiating between treaty norms that may only be invoked by states and those that may be invoked by individuals. Once the latter are determined, a further determination must be made concerning how those rights may be invoked in a national court. Does the right to invoke a treaty apply only in the context of enjoining state action against the individual or does it extend to other contexts, such as the pursuit of claims for damages? Is the right to invoke the treaty solely a procedural right, leaving the national court with the discretion to decide the merits as it sees fit, or does the right to invoke the treaty in some fashion narrow that discretion? The I.C.J. in *LaGrand* and *Avena* focused solely on the individual's ability to raise the treaty violation, and studiously avoided dictating to U.S. courts the consequences that should flow from judicial review/reconsideration of the treaty violation. Indeed, the "review" by U.S. courts could lead to an annulling of the conviction, but could equally lead to a conclusion that the treaty violation had no significant effect on the conviction and therefore was irrelevant. Providing national courts with such discretion is consistent with the "margin of appreciation" doctrine discussed above, and a nascent rule intruding upon that discretion might elicit hostile reaction from states, and perhaps widespread non-compliance with the rule.

Even if the right to invoke the treaty in national courts is principally a procedural right, what is the relationship between that procedural right and other procedural rules of the national court? In *LaGrand* and *Avena*, the I.C.J. stated that a particular national rule—the procedural default rule—could not be used to bar invocation of the treaty. Yet if a right emerges under general international law for individuals to invoke treaties in national courts, it might weak

havoc on national legal systems if that right trumps all national procedural rules, such as rules on personal and subject matter jurisdiction, statutes of limitations, *forum non conveniens*, or *res judicata*. Presumably some kind of balance would have to be reached, but drawing the line may prove quite difficult. Moreover, if the individual is invoking the treaty in a national court against a *foreign* sovereign, the nascent rule might be in competition with other elements of international law, such as rules on immunities accorded to governments and government officials, rules circumscribing the exercise of national jurisdiction extraterritorially, or notions of comity such as are reflected in the “act of state” doctrine.<sup>183</sup>

Second, if there emerges an implied right to invoke in national courts treaties that are protective of individuals, there might be collateral consequences for the creation and development of such treaty regimes. National courts might be powerful engines for treaty implementation, but the fact of that power may well chill governments from negotiating and ratifying robust treaties that are protective of individuals. While it is conjectural whether a new rule would result in less enthusiasm for meaningful treaties, it is worth noting that many of the

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<sup>183</sup> See RESTATEMENT (THIRD), *supra* note 68, § 907 cmt. a (“Where a remedy was intended [in an international agreement for private rights in national courts], suit against a foreign state (or the United States) might nonetheless be barred by principles of sovereign immunity, unless such immunity is found to have been waived.”).

environmental treaties that expressly provide for civil jurisdiction in national courts<sup>184</sup> have elicited relatively low rates of adherence by states. Alternatively, if it is known that a right to litigate the treaty in national courts will be readily implied, states may be prompted to find ways of drafting around the new rule by expressly stating in the treaty that no such right should be implied or by crafting reservations or declarations to that effect when ratifying the treaty.<sup>185</sup>

Third, it is not entirely clear that the emergence under general international law of a private right to invoke treaties in national courts would help to promote and protect the rights of

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<sup>184</sup> See, e.g., the treaties noted *supra* notes 81 to 97 .

<sup>185</sup> A Coasian analysis might suggest that, at least for new treaty regimes, it does not matter whether there emerges, under general international law, a ground rule favoring private rights to invoke treaties in national courts, so long as the ground rule is clear. If the ground rule recognizes the existence of an implied right to invoke treaties in national courts, then states can either allow it to operate or can bargain out of it through an express provision in the treaty or through reservations/declarations. Alternatively, if the rule does not recognize the existence of an implied right to invoke treaties in national courts, then states can expressly write into the treaty a right for access to national courts, if they wish there to be one. Such theorizing, however, breaks down if there are factors that impede the bargaining process. For example, the content of the ground rule *does* matter if it can be shown that politically it is much harder for states to expressly contract out of a rule favoring access for individuals to national courts, than it is for states to simply remain silent in the face of a rule that does not favor such access.

individuals. If the paradigmatic human rights case concerns the right of an individual to invoke a treaty against conduct by a government in that government's own national courts, then presumably that right is only useful in situations where the national courts are sufficiently independent from the political branches and are capable of unbiased decisions in accordance with the rule of law. National courts of that caliber do exist, but they are lacking in many national legal systems, especially those where the most grievous human rights abuses occur. Even in well-developed national legal systems, national courts at times can be driven by extreme forms of nationalism, patriotism, or xenophobia, which is why many treaties in the commercial or tax law area are designed to get disputes out of national courts and into international arbitration. Arguably, a better approach would be for alleged violations of a treaty first to be addressed in the context of an international proceeding, and then have the international forum's decision be enforced through whatever national means are appropriate. That approach could allow for a less biased or parochial adjudication of the alleged treaty violation. Indeed, although the prior section suggested that the increasing ability for individuals to litigate claims in international fora might concomitantly increase expectations that individuals should be able to litigate treaties in national fora, it might actually lead to the opposite result, by promoting a sense that national fora are inferior to international fora.

Finally, to the extent that we are looking to national courts for implementation of treaties because those treaties have become complex regulators of relations between states and persons, one must ask whether national courts are up to the task. As national legal systems have become more complex, techniques have developed for administrative remedies or other mechanisms for

handling entitlements, rather than traditional litigation. Further, judges in national courts typically are not trained in international law, are not familiar with the techniques of treaty interpretation, and are unaware of how to go about researching relevant background rules.<sup>186</sup> Even if a judge has such expertise, the complexity of a treaty regime may favor methods of dispute resolution other than traditional litigation in national courts. One of the most fertile areas of transnational dispute resolution today is the mass claims procedures that have been developed for use by institutions such as the U.N. Compensation Commission, the Bosnia Real Property Commission, the Claims Resolution Tribunal for Dormant Bank Accounts in Switzerland, and the International Commission for Holocaust Era Insurance Claims.<sup>187</sup> In some of those mass claims situations, removal of cases from national court proceedings to more stream-lined international fora was a key objective for resolving the claims, since the prospect for multiple national courts, in multiple jurisdictions, addressing multiple claims all of a similar nature,

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<sup>186</sup> For an indication of the complexity of the issues that confront national courts in such situations, and some guidance on how to cope with it, see André Nollkaemper, *Internationally Wrongful Acts in Domestic Courts*, 101 AM. J. INT'L L. 760 (2007).

<sup>187</sup> See INTERNATIONAL MASS CLAIMS PROCESSES: LEGAL AND PRACTICAL PERSPECTIVES (Howard M. Holtzmann & Edda Kristjánsdóttir eds., 2007); PERMANENT COURT OF ARBITRATION, INSTITUTIONAL AND PROCEDURAL ASPECTS OF MASS CLAIMS SETTLEMENT SYSTEMS (2000).

portended an extremely inefficient and costly approach to dispute resolution.<sup>188</sup>

## VII. CONCLUSION

At present, there is no obligation under general international treaty law, customary international law, or general principles of international law for a state to open its courts for invocation by individuals of treaty norms. Various treaties, however, either expressly or by implication, provide a right for individuals to invoke those treaties in national court systems. The I.C.J.'s decisions in *LaGrand* and *Avena* indicate the circumstances in which a right of this kind may be implied in a treaty, but there are also various circumstances that can be postulated for when such a right should not be implied.

International law is changing, particularly under the pressures of globalization. It is possible that one aspect of that change will be the ultimate recognition of a general obligation under international law for states to make their national courts available to individuals seeking interpretation and application of treaty norms that are protective of the individual. While there are reasons to welcome a general obligation of that nature, there are also reasons to be wary of it. The caution evinced by the I.C.J. in the *LaGrand* and *Avena* cases should be heeded as states and non-state actors contemplate whether such a general norm should be recognized.

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<sup>188</sup> See, e.g., *American Ins. Assoc. v. Garamendi*, 539 U.S. 396 (2003).