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National Courts, Domestic Democracy, and the Evolution of International Law: A Reply to Eyal Benvenisti and George Downs[†]

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1 Introduction

Benvenisti and Downs' article addresses a very complex topic which raises a host of difficult problems for which no clear and easy answers are readily available. Accordingly, and in view of the limited space that has been allocated for this response, I had to be selective and restrict myself by adding some other colours and different perspectives to the picture that has been painted by the authors. My response will start by discussing first the analytical framework before moving towards a critique in substance.

It should be noted from the outset that I generally agree with the analytical framework and the diagnosis of the relation-

ship between national and international courts, their governments, and contracting parties (i.e. their 'Masters'), their constraints and the various interests involved.

As the authors correctly point out, two main interrelated developments have been shaping the position and room for manoeuvre of national and international courts. Essentially, it can be stated that the proliferation of international courts and tribunals has resulted in an institutionalization or 'thickening' of international law, giving these judicial and (quasi) judicial bodies extra power to shape the development of international law. But this proliferation of international courts and tribunals is simultaneously accompanied by the increasing fragmentation of international law because of the lack of a formal hierarchy between all the various international judicial bodies.¹ At the

[†] Benvenisti and Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law', 20 *EJIL* (2009) 59, <http://ejil.oxfordjournals.org/cgi/reprint/20/1/59>.

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¹ See for a detailed analysis N. Lavranos, *Jurisdictional Competition – Selected Cases in International and European Law* (2009).

same time, it seems that national courts are increasingly losing their ability to protect their domestic legal systems from international law interference and their capacity effectively to shape the development of international law.

These opposing developments are, so it seems, handily played out against each other by clever governments. On the one hand, governments are keen to establish not only an innumerable number of international judicial bodies, but also all kinds of formal and informal institutions to tackle trans-national problems, such as the financial crisis, the ‘war’ against terrorism, and efforts against global warming.² One of the main advantages of going global is that governments can agree on policies and instruments at the international level and then push them through at the domestic level by playing the ‘helpless’ government which is obliged to enforce the policies adopted at the international level. A good example of this is the continuously increasing powers of law enforcement agencies to collect, store, and exchange personal data. In many countries we have reached an Orwellian level of preventive control measures, which normally would be incompatible with constitutionally protected fundamental rights but which nevertheless have been implemented because they have been agreed upon at the European or international level.³ In addition,

the implementation of international and European law measures often takes place on a purely executive basis, thereby circumventing national parliaments and taking advantage of the non-existence of parliamentary bodies at the international level (the only exception is probably the European Parliament).⁴ Clearly, democracy, transparency, and the rule of law are undermined by this tendency.

On the other hand, governments turn to their domestic courts to call on them to ‘protect’ their domestic constitutional values, principles, etc. against global influences which are perceived as endangering or undermining their domestic legal systems.⁵ Naturally, as is also underlined by Benvenisti and Downs, the prime

been set up by the EU Member States. See further Papayannis, ‘Die polizeiliche Zusammenarbeit und der Vertrag von Prüm’ [2008] *ZEuS* 219; Ziller, ‘Le Traité de Prüm vraie-fausse coopération renforcée dans l’Espace de sécurité de liberté et de justice’, EUI Working Paper No. 2006/32, available at: <http://cadmus.eui.eu/dspace/bitstream/1814/6401/1/LAW-2006-32.pdf>. See also the remarkable judgments of the ECJ in the data retention case: Case C–301/06 *Ireland v. European Parliament and Council*, judgment of 10 Feb. 2009, available at: <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>; and the German Constitutional Court in case 1 BvR 370/07 and 1 BvR 595/07, judgment of 27 Feb. 2008, available at: www.bundesverfassungsgericht.de/entscheidungen/rs20080227_1bvr037007.html, which show that these courts eventually gave their blessing to the expanding powers of law enforcement agencies.

² A good example is the proliferation of the various formats and compositions of the meetings of the G5, G6, G7, G8, and G20 with very broad, informal agendas and unclear scopes of powers.

³ Reference can be made to the ever increasing powers of Europol to collect and analyse data obtained through the Schengen Information System (SIS), which is also continuously being expanded, and national databases which have

⁴ See further N. Lavranos, *Decisions of International Organizations in the European and Domestic Legal Order of Selected EU Member States* (2004).

⁵ See in this regard the recent judgment of the German Constitutional Court on conformity of the Lisbon Treaty with the German Constitution: 2 BvE 2/08, judgment of 30 June 2009, available at: www.bverfg.de/entscheidungen/es20090630_2bve000208.html.

task of national courts, in particular the highest (constitutional) courts, is to protect the domestic system against undue internal and external interferences.

In short, governments play a dual role with a hypocritical touch by choosing the global or domestic level according to whatever fits best.

In their article Benvenisti and Downs propose inter-judicial cooperation, judicial dialogue, and other comparable (in) formal forms of cooperation between national courts as the best strategy for regaining some of their lost influence from the international courts and tribunals. This strategy is not really novel or surprising, as it echoes the theory developed almost a decade ago by Anne-Marie Slaughter, who forcefully posited the notion of a global community of international courts based on an increasing dialogue between international judicial bodies, which would eventually lead to a global community of courts.⁶ Moreover, a similar strategy encompassing various types of judicial dialogue, such as the application of the *Solange* method (as long as method) not only between the German Constitutional Court and the ECJ, but also between the ECtHR and the ECJ, has been identified, which overcomes the dichotomy of national courts v. international courts.⁷

⁶ Slaughter, 'Judicial Globalization', *Virginia J Int'l L* (2000) 1103, 'A Global Community of Courts', *Harvard Int'l LJ* (2003) 191, and *A New World Order* (2004). See more recently in the same vein Terris, Romano, and Swigart, 'Toward a Community of International Judges', *Loyola of Los Angeles Int'l & Comp L Rev* (2008) 419.

⁷ See, e.g., Y. Shany, *Competing Jurisdictions between International Courts and Tribunals* (2003); Lavranos, 'Towards a Solange Method between International Courts and Tribunals?', in T. Broude and Y. Shany (eds), *The Shifting Allocation of Authority in International Law* (2008), at 217.

So far, so good; and I generally share the analytical framework of Benvenisti and Downs.

2 Beyond Generalized Dichotomies

But in my view the dichotomies used by Benvenisti and Downs are too general. One cannot speak of 'the national courts', neither can one place all international (quasi) judicial bodies under the heading of 'the international courts'. Similarly, as I will discuss below, it is not always the case that national courts struggle against international courts; instead, sometimes national courts align themselves with international courts, and sometimes international courts struggle for leadership against each other.

In the first place, it is important to emphasize that the many national political and legal systems differ significantly – even if we confine ourselves to the 27 EU Member States – a factor which directly affects the influence and room for manoeuvre of domestic courts, both domestically and internationally. For example, it matters whether or not a system has a Constitutional Court, i.e., the German system which has one, in contrast to the Dutch system which does not. But even if one compares only systems which have Constitutional Courts, significant differences in their respective scopes of influence are visible, i.e., the German Constitutional Court compared with the French Conseil Constitutionnel. In other words, it is the almost unique, powerful, and independent position that the German Constitutional Court enjoys which enables it to play such a prominent role in influencing the jurisprudence in other

European states, as well as in shaping the European integration process with its interaction with the ECJ and fundamental rights through its discourse with the ECtHR. Accordingly, most Constitutional Courts – even in the developed North or West – are, due to the lack of institutional power, simply unable actively to participate in interjudicial cooperation, let alone regain influence from the international courts. So this clearly complicates the rather general North–South dichotomy of national courts used by the authors.⁸ Therefore, I also doubt whether, as suggested by the authors, real collective action involving a significant number of like-minded national courts would offer potential solutions.⁹

Similarly, it is important to highlight the substantial differences between international and national courts regarding the impact the various international courts actually have on the national. For example, if one compares the ECJ and the ICJ it becomes obvious that, due to the supremacy of Community law over all national law, ECJ judgments not only *de facto* bind all domestic courts within the Community but additionally supersede all constitutional law provisions of the EU Member States,¹⁰ whereas the effect of ICJ judgments on domestic courts varies and depends on the relevant constitutional provisions, but usually never has

a comparable impact.¹¹ In contrast, judgments of the ECtHR are usually taken into account by the domestic courts of the state concerned, which eventually leads to their effective implementation.¹² In other words, there is a sliding scale of the direct impact of judgments of different international courts on national courts, the ECJ being at the top of this scale, followed by the ECtHR, and the ICJ at the bottom. Obviously, for non-European states the scale would look different, which is another argument which proves that the use of the North–South dichotomy is not able comprehensively to address the very different situations even within

⁸ Benvenisti and Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law', 20 *EJIL* (2009) 59, at 72, refer to the schism between North and South and the ultimate need for courts of the South and newly developed countries fully to participate in interjudicial cooperation.

⁹ *Ibid.*, at 65.

¹⁰ See further A. Arnulf, *The EU and its Court of Justice* (2006).

¹¹ See, for instance, the US Supreme Court which openly refused even to consider the ICJ's *Avena* judgment (*Mexico v. USA*), Request for the Indication of Provisional Measures, ICJ Order of 16 July 2008, available at: www.icj-cij.org/docket/files/139/14639.pdf. See for a detailed analysis Galway Buys, 'The US Supreme Court Misses the Mark: Towards Better Implementation of the US' International Obligations', *Connecticut J Int'l L* (2008) 39.

¹² For instance, in its judgment in case 1 BvR 217/07 *Görgülü* of 9 Feb. 2007 the German Constitutional Court again emphasized that all German courts are bound to take ECtHR judgments into account and can ignore them only after extensive explicit reasoning. The judgment is available at: www.bverfg.de/entscheidungen/rk20070209_1bvr021707.html. Of course, there are ECHR Contracting Parties such as Russia and Turkey whose domestic courts regularly ignore ECtHR judgments against their states. But also courts of developed northern countries such as Austria sometimes fail to implement an ECtHR judgment: see, e.g., App. No. 12350/86, *Kremzow v. Austria*, judgment of 21 Sept. 1993, available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=10&portal=hbkm&action=html&highlight=kremzow&sessionid=28145266&skin=hudoc-en>.

the North, West, or developed countries. Besides, the impact of judgments amongst international (quasi)judicial bodies differs too. For example, a judgment of the ECtHR will under normal circumstances at least guide, if not bind, the ECJ when it adjudicates on cases involving fundamental rights.¹³ Conversely, the ECtHR assumes that ECJ judgments are ‘ECHR proof’ and thus will no longer review them – unless in a case of ‘manifestly deficient’ fundamental rights protection.¹⁴ In this sense, the ECtHR considers ECJ judgments on fundamental rights to be authoritative and binding for the domestic courts of the EU Member States, which happen to be also Contracting Parties to the ECHR. The same cannot be said of WTO Appellate Body rulings and their impact on the ECJ.

In this context, Benvenisti and Downs refer to the ECJ’s *FIAMM*¹⁵ judgment, which seems to me not to be a fitting example. First, in the paragraph on the

self-defined mission of *national* courts as guardians of their domestic legal orders the authors refer confusingly to the ECJ’s *FIAMM* judgment as an example of ‘continuing refusal to constrain their executives when such constraints might harm their economies for example by imposing international trade law obligations on their executives’.¹⁶ Clearly, even the most enthusiastic European integrationist – such as this author – would not consider the ECJ to be a national court. Of course, one could argue that the ECJ is behaving like national (Constitutional) courts in protecting the autonomy of its ‘domestic’ legal order, that is, the Community legal order, and thus its exclusive jurisdiction against interferences from international law,¹⁷ but, unlike national courts, the ECJ also has to fend off interferences by domestic courts of the EU Member States, such as, for example, from several Constitutional Courts on the issue of the European Arrest Warrant.¹⁸ Therefore, it seems strange to me to put the ECJ together with national courts in the same basket.¹⁹

¹³ See, e.g., Case C–200/02, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department* [2004] ECR I–9925; Case C–112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich* [2003] ECR I–5659; Case C–60/00, *Mary Carpenter v. Secretary of State for the Home Department* [2002] ECR I–6279.

¹⁴ App. No. 45036/98, *Bosphorus v. Ireland*, judgment of 30 June 2005, available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=hml&highlight=bosphorus&sessionid=32963708&skin=hudoc-en>

¹⁵ Joined Cases C–120/06 P and C–121/06 P, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC and, Giorgio Fedon & Figli SpA and Fedon America, Inc. v. Council and Commission*, judgment of 9 Sept. 2008, available at: <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>

¹⁶ Benvenisti and Downs, *supra* note 8, at 61.

¹⁷ See on this point Lavranos, ‘Revisiting Article 307 EC: The Untouchable Core of Fundamental European Constitutional Law Values and Principles’, in P. Carrozza *et al.* (eds), *Shaping the Rule of Law through Dialogue* (2009, forthcoming), already available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1441915.

¹⁸ See, e.g., Bures, ‘European Arrest Warrant – Implications for EU Counterterrorism efforts’, *Central Eur J Int’l and Security Studies* (2009) 21, available at: www.cejss.org/assets/pdf/articles/vol3-1/Bures-European_Arrest_Warrant.pdf.

¹⁹ Benvenisti and Downs, *supra* note 8, at 65, do this again when discussing the traditional deference of *national* courts to their executive branches and then refer again in this context to the ECJ’s *FIAMM* judgment, *supra* note 15.

Secondly, the reference to the WTO Appellate Body–ECJ nexus in this context is not so well chosen for another reason, which underlines my general point on the need to differentiate much more between the different types of courts. Indeed, the WTO Appellate Body–ECJ nexus is a prime example of the far more complex multi-level situation, rather than the bipolar dichotomy used by the authors.

It was in the context of the creation of the EC banana regime in the early 1990s that German courts swamped the ECJ with numerous requests for preliminary rulings challenging the longstanding refusal of the ECJ to take WTO Appellate Body rulings into account.²⁰ In other words, the German courts were trying to cooperate with the WTO Appellate Body in forcing the ECJ to change its jurisprudence – alas hitherto without success. So, the *FIAMM* example used by the authors was not so much about the refusal of the ECJ to constrain the EC executive, but rather about the efforts of national courts to convince the ECJ through the formal channel of interjudicial dialogue provided for by the preliminary ruling procedure (Article 234 EC) to give effect to binding decisions of another international quasi-judicial body, i.e., the WTO Appellate Body. In other words, intensive interjudicial cooperation between German courts and the WTO Appellate Body took place. Accordingly, this example shows that putting the ECJ and national courts in the same basket is not very useful – at least in the WTO Appellate Body–ECJ nexus.

²⁰ See, e.g., Lavranos, 'Die Rechtswirkungen von WTO panel reports im Europäischen Gemeinschaftsrecht sowie und im deutschen Verfassungsrecht', [1999] *Europarecht* 289.

Another example which shows that the use of generalized dichotomies may prove insufficient is the recent open schism between the ICJ and the ICTY regarding the question of which court is ultimately competent to define the conditions of state responsibility which, in turn, determine the conditions for individual responsibility.²¹ The way the ICTY openly disregarded the ICJ's *Nicaragua* test and instead applied its own *Tadic* test²² and the way the ICJ explicitly reprimanded the ICTY in its *Genocide Convention*²³ judgment for stepping beyond its narrowly defined jurisdiction are stark examples which contradict the general argument posited by the authors that the cooperation between the ICJ and other specialized international courts gives those courts the first mover advantage of shaping the interpretation of international law before national courts form their own interpretation.²⁴ Instead, it seems to me that it has been the interjudicial cooperation between several national courts, such as the House of Lords and the ICTY, which, over the past decade, have significantly reinterpreted fundamental principles and rules of international law

²¹ See, e.g., A. Cassese, 'The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18 *EJIL* (2007) 649; Dimitrijevic and Milanovic, 'The Strange Story of the Bosnian Genocide Case', 21 *Leiden J Int'l L* (2008) 65; Goldstone and Hamilton, 'Bosnia v. Serbia: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia', *Leiden J Int'l L* (2008) 95.

²² ICTY Appeals Chamber, *Tadic*, judgment of 15 July 1999, available at: www.icty.org/action/cases/4.

²³ ICJ, *Genocide Convention – Bosnia-Herzegovina v. Serbia and Montenegro*, judgment of 26 Feb. 2007, available at: www.icj-cij.org.

²⁴ Benvenisti and Downs, *supra* note 8, at 64.

so as to enable the prosecution of (former) heads of state and other high officials as well as individual perpetrators for various types of serious crimes which previously could not be prosecuted, which has done that. In contrast, the highly politicized framework in which the ICJ has to operate and its relatively slow and low output of judgments compared with that of ICTY or domestic courts has left the ICJ lagging behind in these fast developments. Consequently, this has put the ICJ in the position of slowing down rather than shaping as a front runner the developments in international law.

3 Towards Individualized, Regime-based Analytical Frameworks

As mentioned before, I share Benvenisti and Downs' principle argument that national courts must find ways to regain lost jurisdictional competence in order to be able to participate effectively in shaping the development of international law. There can be no doubt that national courts play a fundamental dual role by ensuring the effective implementation of international law as well as by supervising and reviewing the decisions of the many formal and informal international bodies which have been established in recent decades, thereby adding some transparency, democratic control, and rule of law safeguards.

However, I find the dichotomies used by the authors to be too general and therefore not able sufficiently to capture the dynamic, complex, and varying configurations of the relationship and interaction between national courts and international courts. This is already illus-

trated by the fact that for every example the authors use it is not difficult to point to other examples which contradict or challenge the argument put forward. As the authors rightly argue, interjudicial cooperation among national courts, among international courts, and between national and international courts promises to be the best strategy for enhancing the evolution of international law in a more transparent, democratic way based on the rule of law. But because of the dynamics and configurations of the interaction between national and international courts involved, it seems to me that it is time to develop individualized, regime-based analytical frameworks which take into account regional specific characteristics rather than one overarching grand theory. This seems particularly important for Europe because of the predominant and influential role played by the ECJ, and to a lesser extent by the ECtHR, which cannot be compared with that in any other region. But even within Europe it would be necessary to zoom in even closer and distinguish between systems which have Constitutional Courts and those which do not, but also between systems with powerful Constitutional Courts and less powerful ones. Similarly, it would be necessary to look more closely into the African, American, and Asian regions and take into account their specific characteristics and judicial and interjudicial configurations. This would make it possible to track and understand the various forms of interjudicial cooperation much more comprehensively.

Thus, by way of conclusion, the work of Benvenisti and Downs is a useful starting point, which calls for further comprehensive research which will develop individualized, regime-based analytical frameworks.