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National Courts, Domestic Democracy, and the Evolution of International Law: A Rejoinder to Nikolaos Lavranos, Jacob Katz Cogan and Tom Ginsburg

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1. We thank the three commentators for their thoughtful and most helpful comments on our essay. We regret that we cannot do justice to all of them in this brief rejoinder. We would like to note at the outset that we agree with the collective assessment that we have only begun to understand the character and dynamics of inter-judicial cooperation, the nature of the motivations that underlie it, and its potential effects. In a forthcoming paper we examine the nature of the potential externalities of national court coordination with respect to fostering greater democratic accountability at both the domestic and the international level and we argue that, at least relative

to the current status quo, these effects are likely to be positive at both levels. However, much remains to be done.

Progress in understanding the effects of increased national court activism may have been obscured somewhat by the fact that so much early work on court coordination was understandably preoccupied with documenting its existence and rapid growth rather than characterizing its substantive impact. As a result, it tended to focus on describing the nature of the coordination process and the role of new technology (for instance, the growth of cross-referencing in judicial opinions, the expanded traffic on judicial web sites, and the scope of judicial networking). Such evidence made a convincing case that more coordination was taking place and that national court judges were increasingly aware of what was happening at the international level, but it shed less light on its institutional ramifications and systemic consequences.

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Recently, there have been signs that these activities denote a serious attempt on the part of the national courts to adapt to the changes in the domestic and global legal orders brought about by globalization. This was recently evidenced in the inaugural colloquium of International Law in Domestic Courts (ILDC) in March 2008. Judge Rosalyn Higgins, the then President of the International Court of Justice, suggested in her address that domestic courts as state institutions were required to comply with ICJ judgments and opinions because the ICJ states what the law is. She added that domestic law judges were citing international law more often because they wanted to become ‘part of the international mainstream’. Judge Mark Villiger of the ECtHR put forward the vision of his court that the domestic courts in Europe would be acting like ‘little Strasbourgs’. In what was unmistakably a response, the then Senior Judge on the House of Lords, Lord Bingham, indicated that while his court needed to ‘take account’ of the Strasbourg law it did not necessarily need to follow it. He then added that ‘dialogue [among national and international courts] is an extremely valuable concept’, and ‘partnership’ in the interpretation of the law was the basis of his preferred approach.

The recourse of national courts to international law and to comparative constitutional law has been anything but simple, and it has come in fits and starts. Harold Koh has contextualized the changing attitude of the US Supreme Court toward international law as influenced by the increase in power of the US in global politics and in particular in the judges’ unwillingness to tie the hands of the executive during the Cold

War.¹ According to Juliane Kokott, it was through the jurisprudence of the German Constitutional Court that Germany tried to shape European integration.² Wojciech Sadurski noted that the newly formed constitutional courts in Central and Eastern Europe emulated the German court’s approach to EU law as a way of strengthening their position *vis-à-vis* other national political actors.³ In the past national court judges used international law in sophisticated ways to avoid encumbering their executive branches. They learned from each other how *not* to apply international law.

Increased court coordination should be taken seriously even if its character continues to change and its ultimate impact remains obscure. We agree that the mere citation of foreign judicial decisions is by itself an unreliable indicator of judicial coordination. However, there is growing evidence that judges are continuing to develop and strengthen a diverse host of communication tools and venues, and

¹ Koh, ‘Transnational Public Law Litigation’, 100 *Yale L.J.* (1991) 2347, at 2360–2366.

² ‘Post-War Germany still has identity problems. For example, it is much more difficult for German politicians to articulate national interests than for French politicians. In comparison, it is easier for Germany to make its voice heard as the advocate or guarantor of legal principles. [. . .] Germany tries to influence the shape of European integration through the judiciary in the name of the fundamental rights of the individual and of democracy.’ Juliane Kokott, Report on Germany, in A.-M. Slaughter, A. Stone Sweet and J.H.H. Weiler (eds), *The European Court and National Courts – Doctrine and Jurisprudence* (1998) 77, at 126.

³ Sadurski, ‘“Solange, chapter 3”: Constitutional Courts in Central Europe—Democracy—European Union’, 14 *European Law Journal* (2008) 1.

coordination is increasingly being institutionalized in ways that should promise to ensure its growth and future survival. For example, the Board of the Network of the Presidents of the Supreme Judicial Courts of the European Union held its first meeting in May 2009 and is continuing to explore ways to increase this cooperation.⁴

2. Our analysis of inter-judicial coordination may appear to echo the concept of 'judicial networks' as elaborated by Anne-Marie Slaughter and others. This is true insofar as judicial coordination plays a role in both theories. Yet while we recognize the importance of global networks and the productive role that they play in knowledge dissemination and policy coordination, we do not believe that national court judges have as yet come to identify themselves primarily as members of a common epistemic community or that the coordination that occasionally takes place among them has led them to converge on a common normative conception of what should constitute a global rule of law. Rather, in general, we think that these judges 'continue to regard themselves first and foremost as national agents and their sensitivity to the national interest continues to reflect itself in any number of traditional and predictable ways'. Their chief motivation remains that of primarily if not exclusively protecting the domestic rule of law. The task of promoting global justice is typically a secondary concern. Moreover, we contend that the important fruits of inter-judicial coordination are less likely to be the product of

a technologically facilitated exchange of information than the result of a special constellation of circumstances that creates common interests among national courts and provides opportunities to gain collectively from strategically exploiting the differences among executives (at the level of the global institutions) or between executives and legislatures and others (at the domestic level). Of course, the two perspectives do not necessarily conflict with each other. However, their implicit predictions are somewhat different. Slaughter's model and to some extent Tom Ginsburg's reference to a collective process of learning suggests a relatively smooth and accelerating trend toward preference convergence and value-driven multilateral cooperation. We suspect that progress will be considerably more discontinuous and event driven.

3. The two-level phenomenon and its embodiment of the recognition that constraining the executive branch does not necessarily harm the interests of the executive branch or the national interests helps account for the willingness of national judges to intervene in global politics. This realization need not be based on a familiarity with the two-level literature per se. Judges are politically astute actors who possess a refined ability to read implicit signals from their executive branches. As Kokkot suggests, the German court was sensitive enough to realize that it could not leave it to the German government to demand that the rights regime in the EU be strengthened.

Professor Ginsburg raises the issue of whether national courts will be able to solve the collective action problem. While we are concerned about this problem, we think that there are good reasons to be optimistic, particularly in the near term.

⁴ <http://www.network-presidents.eu/IMG/pdf/NewsletterJuly2009.pdf>.

The number of influential national courts is relatively small, the societies that they represent share much in common, they have a refined knowledge of each other's jurisprudence, and they can expect to be dealing increasingly with international legal issues in the future. In addition, to the extent to which, like Stephenson,⁵ one assumes that the independence and prestige of a national court is tied to the quality of the information that it provides its citizens relative to that provided by the executive branch, all national courts possess a common domestic motivation to address salient international legal issues when they believe that their executive branch has erred.

4. The ECJ is, of course, not a national court. We simply find it noteworthy to keep in mind that *even* the ECJ is not dependably cosmopolitan in its impulses. It frequently adopts parochial rather than universal policies. For example, it has been an avid guarantor of the integrity of its own institutions *vis-à-vis* external institutions such as the UN (in the *Kadi* judgment) or the WTO (in *FIAMM*). In the latter sphere the ECJ has always acted like the traditional national court in insulating its executives acting in the global sphere (in this case, the WTO) from internal (both EU and Member States) legal constraints.⁶

Although unique in many respects, the history of the evolution of the EU as a legal system demonstrates our thesis that national courts' cooperation with an international tribunal can play a critical role in developing review powers *vis-à-vis* the executive operating at the level of an international organization. The ECJ's visibility and success stems from its ability to capitalize on a rare confluence of circumstances involving the differences among the original state parties to the EEC (and the requirement of consensus for overcoming ECJ judgments) *and* a steady flow of cases from Member States' national courts.⁷ Had these two events not happened *together*, the court-led transformation of the legal system of the EEC may never have occurred. The fact that this transformational moment that solidified the EU legal space resulted from an instance of highly successful and unanticipated cooperation between a subset of weaker national courts (the courts of the strongest EEC members initially being more reluctant to join than the others) and an international tribunal exemplifies our suggestion that judges are capable of identifying the special constellation of circumstances that enables them to gain collectively from exploiting the differences among executives. It also supports our broader position about the potential positive contribution that national courts can make in concert with international tribunals toward producing a less fragmented and more constitutionalized global legal system.

⁵ Stephenson, 'Court of Public Opinion: Government Accountability and Judicial Independence', 20 *Journal of Law, Economics, and Organization* (2004) 379.

⁶ Benvenisti, 'Exit and Voice in the Age of Globalization', 98 *Mich L Rev* (1999) 167, at 196; Hilf, 'The Role of National Courts in International Trade Relations', 18 *Mich J Int'l L* (1997) 321, at 338-343.

⁷ Weiler, 'A Quiet Revolution: The European Court of Justice and its Interlocutors', 26 *Comparative Political Studies* (1994) 510, at 518.