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The Constitutional Function of Contemporary International Tribunals, or Kelsen's Visions Vindicated

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Abstract

In this article the author makes two complementary arguments, one deceptively simple, the other deceptively esoteric. First, contemporary international courts and tribunals (most, though not necessarily all) are increasingly requested, or required (often, though not always), to adjudicate issues in ways that are tantamount to international constitutional judicial review of national acts and domestic measures, rather than traditional inter-state dispute resolution. This is a point that seems to have so far evaded most of the contemporary literature on the continually enhanced judicialized system of international law, and its constitutionalization. Second, in order to understand the emergence of this current predilection towards constitutional judicial review at the international level, it is instructive to look back to Hans Kelsen's post-World War II visionary approach towards the (then) prospective constitutional role of the international judiciary. This approach is analogous to (and has its roots in) Kelsen's Weimar-era positions on the preferred role of courts as constitutional guardians in domestic legal systems. These arguments are demonstrated through analyses of recent jurisprudence of the ICJ, the WTO, and the ECtHR.

A. Introduction

In this article I make two complementary arguments, one deceptively simple, the other deceptively esoteric. First, contemporary international courts and tribunals (most, though not necessarily all) are increasingly requested, or required (often, though not always), to adjudicate issues in ways that are tantamount to international constitutional judicial review of national acts and domestic measures, rather than traditional inter-state dispute resolution. This is a point that seems to have so far evaded most of the contemporary literature on the continually enhanced judicialized system of international law, and its constitutionalization.[1] Second, in order to

[1] See discussion in part C *infra*, but see, as a notable exception, A. S. Sweet, 'Constitutionalism, Legal Pluralism, and International Regimes', 16 *Indiana Journal of Global Legal Studies* (2009) 2, 621, 639-644. Of course, it is now well recognized that international tribunals serve goals that transcend particular state-to-state dispute resolution, though not necessarily of a constitutional nature; see, e.g., Y. Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary', 20 *The European Journal of International Law* (2009) 1, 73,

understand the emergence of this current predilection towards constitutional judicial review at the international level, which is not without self-doubt and even some resistance,[2] it is instructive to look back to Hans Kelsen's post-World War II visionary approach towards the (then) prospective constitutional role of the international judiciary. This approach is analogous to (and has its roots in) Kelsen's Weimar-era positions on the preferred role of courts as constitutional guardians in domestic legal systems.[3] In this frame, there exist several important linkages between historical 20th Century German (and Austrian) constitutional debates, on the one hand, and the contemporary emerging international judiciary and the current discourse on the constitutionalization of international law, on the other hand. Arguably, this constitutionalization – albeit a 'thin' form of constitutionalization, in the sense that it does not concern itself with the content of constitutional normativity or with its systemic implications – represents a vindication, if not a triumph, of the Kelsenian ideals of presumptively legalized international constitutional judicial review of State conduct, both in the international normative space, and in domestic affairs, cutting across virtually all fields of public international law. To be sure, this function of

citing additional functions, including "norm advancement" and the "maintenance" of international co-operative arrangements. Shany avoids the constitutional vernacular, but notes that the aims of the "new" international courts (contrasted with the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ)) appear to be the "strengthening [of] the rule of law in some areas of international relations which have undergone, or are undergoing, a process of legalization". *Id.*, 83.

2 This is only to say that neither parties to international disputes, nor contemporary international judges, would speak openly about the constitutional nature of the international courts they are engaged with. But see J. H. H. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', 35 *Journal of World Trade* (2001) 2, 191, 201, noting that "the [World Trade Organization (WTO)] Appellate Body is a court in all but name and it even has a constitutional dimension"; this is quickly qualified by the statement that the word 'constitutional' is used in the lower case, i.e., referring to the interpretation of the WTO's constituent document; cf. note 38.

3 On Kelsen's theory of public international law in general, see J. von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (2010), and in particular, with respect to Kelsen and the international judiciary, Ch. 6. To my understanding, von Bernstorff does not interpret Kelsen's approach to international law as 'constitutional' as such. Compare J. Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (2011), in particular Ch. 6 on a constitution for international law. However, Kammerhofer does not deal with the role of the international judiciary.

international constitutional judicial review is not concentrated in a single 'world court', as Kelsen might have wished, but rather shared by a many international courts and tribunals within the fragmented and pluralized international system. And this considerable accomplishment is further qualified and imperfect, insofar as the jurisdiction of these international courts and tribunals remains only selective and partially compulsory, limiting the real substantive coverage of the international judiciary. Nevertheless, fundamental elements of Kelsenian constitutional review are well apparent in contemporary international law and tribunals.

In developing these arguments, the article proceeds as follows: the next part outlines the theoretical parallels and extensions between Kelsen's views on the respective roles of domestic constitutional courts and international tribunals. Part C positions Kelsen's theories in relation to the modern evolution of the international judiciary and the contemporary debates on international constitutionalization. Subsequently, part D demonstrates how Kelsen's post-World War II visions have been vindicated within in particular international judicial settings, namely, the 21st-century International Court of Justice (ICJ), the World Trade Organization (WTO) dispute settlement system and the European Court of Human Rights (ECtHR). The conclusion, Part E, will discuss some of the normative gaps between the Kelsenian vision of the international judiciary while reconciling the 'thin' constitutionalism with the multiplicity of international constitutionally-enabled tribunals.

B. Kelsen's Judicial Constitutionalism and its Extension to the International Judiciary

Kelsen's views on the theory of law in general, engaged as they were with sovereignty and the justificatory basis of law, were intermeshed early on with explorations of international law.[4] Kelsen's normative view of the international legal order was undoubtedly monist, although in later years,

[4] See H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts*, 2nd ed. (1928) [Kelsen, Souveränität]; and *id.*, *Reine Rechtslehre: Einleitung in die Rechtswissenschaftliche Problematik* (1934) [Kelsen, Reine Rechtslehre].

har(-)monist would be the better term.[5] Moreover, Kelsen the jurisprudentialist must always be read together with Kelsen the international law theorist, and *vice versa*, mindful of the "tension-filled relationship between the two crucial goals" of the latter: "(1) establishing a non-political method for the field of international law, and (2) promoting the political project – which originated in the interwar period – of a thoroughly legalized and institutionalized world order".[6]

However, these tensions between the pursuit of non-political methodology in law and a recognition of the political dimensions of law and legal determinations are, in themselves, not exclusive to Kelsen's investigations of international law. Indeed, Kelsen did not necessarily view the political as contradistinctive to the law, in any context, whether the constitutional or the statutory. In the constitutional realm he staunchly defended the view whereby law could be distinct from politics, without being in conflict.[7] More generally, in his writings on legal interpretation, he was cognizant of the concepts of indeterminacy in law and the scope of political discretion that it left to judicial law-appliers in making determinations between alternative interpretations of law.[8] Kelsen's worldview therefore extended back, and forth, from the domestic to the international, and from the political to the formalist and the legal. This observation also applies to Kelsen's judicial constitutionalism and his vision of the international judiciary, the focus of the present article.

The Kelsenian expansion of the constitutional role of courts from the domestic to the international plane can be delineated, at least, within the following three dimensions as a 'thin' form of constitutionalism. First, Kelsen's legal formalism maintained that any issue that is legally regulated can be juridically addressed, including issues attached to ostensibly political questions, whether domestic or international. Second, and closely linked to the former, is the notion that, in principle, *all* matters can be legally

5 See Chs 34(h), 43 and 44 of H. Kelsen, *Pure Theory of Law*, 2nd ed. (1970) (the much revised and expanded English language version of *Reine Rechtslehre*, *supra* note 4) [Kelsen, Pure Theory].

6 See von Bernstorff *supra* note 3, 2.

7 See Kelsen's interventions in H. Triepel *et al.*, *Wesen und Entwicklung der Staatsgerichtsbarkeit: Überprüfung von Verwaltungsakten durch die ordentlichen Gerichte* (1929), 30-84, 118-120.

8 H. Kelsen, 'Zur Theorie der Interpretation', 8 *Internationale Zeitschrift für Theorie des Rechts* (1934) 1, 9; English translation: 'On the Theory of Interpretation', 10 *Legal Studies* (1990) 2, 127. See also S. L. Paulson, 'Kelsen on Legal Interpretation', 10 *Legal Studies* (1990) 2, 136.

regulated, and by extension, all matters, including issues normally regulated by domestic law, can be *internationally* regulated. Third, Kelsen was unequivocal in his positive assertions that constitutional law is hierarchically superior to regular law, and furthermore that international law is similarly superior to domestic legal systems, thus providing space for the review of domestic law's conformity with international law, as well as constitutional law. Let us briefly expand on these dimensions, because they are instrumental in understanding Kelsen's vision, as I interpret it, of the international judiciary as equivalent to a constitutional court.

First, any legally regulated issue can be adjudicated as a legal dispute, even if it is concurrently a political issue. This was an essential element of Kelsen's position in the debate with Carl Schmitt over the proper allocation of the authority to settle constitutional disputes within a constitutional democracy. Kelsen insisted that constitutional courts would be capable of distinguishing between the legal and political elements of constitutional disputes, allowing them to adjudicate such disputes in accordance with constitutional law. Indeed, such judicial review would bring the judge closer to the realm of the legislator, but only as a *negativer Gesetzgeber* (negative law-maker) with the legitimate power to strike down legal arrangements that did not withstand review under the higher constitutional norm, but devoid of the positive law-making authority of the legislature.[9] Importantly, Kelsen originally warned against placing human rights within the purview of constitutional courts because the courts would inevitably overstep the line between negative and positive legislation.[10]

The extension of this approach to the international plane is well reflected in Kelsen's spirited objection to the notion of excluding 'political' disputes from the jurisdiction of international tribunals. To Kelsen, "any conflict between States as well as between private persons is economic or political in character; but this does not exclude treating the dispute as a legal dispute".[11] An international dispute is 'political' not because of its subject matter, but because one or more of the parties to the dispute justifies its position on non-juridical arguments. This should not be accepted as a basis

9 H. Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution', 4 *The Journal of Politics* (1942) 2, 183, 187 [Kelsen, Legislation]; see also A. S. Sweet, 'The Politics of Constitutional Review in France and Europe', 5 *International Journal of Constitutional Law* (2007) 1, 69, 83-84.

10 *Id.*

11 H. Kelsen, *Peace Through Law* (1944), 24 [Kelsen, Peace].

for escaping the jurisdiction of an international court of law, entrusted with adjudicating the legal aspects of the dispute.

Kelsen clearly saw this argument necessary in the 1940s and again, in his 1950 commentary on the law of the United Nations (UN),[12] not only in order to uphold the consistency of his rational methodology of legal formalism across domestic and international legal orders, but also to bulwark the jurisdiction of the nascent international judiciary in the same way that he had defended the concept and pervasive scope of *Verfassungsgerichtbarkeit* in Austria and Germany in the 1920s and 1930s.

Second, and closely linked to the first, is the notion that, in principle, all matters *can* be regulated through law. At minimum, all issues indeed are legally regulated in at least one respect: through either positive regulation (explicit prescription and proscription) or negative regulation (by the liberating absence of positive regulation). Kelsen's theory of law in general allowed for no normative gaps, by definition,[13] and the same approach applied to international law: "Only two cases are possible: either the legal order contains a rule obliging one party to behave as the other party demands, or the legal order contains no such rule", but in both cases, law has traction – either accepting or rejecting the claim.[14] Kelsen made little of claims distinguishing between domestic and international legal orders in this regard: "the part that […] [international] law plays in international affairs is neither less nor greater than the part which national law plays in national affairs".[15] Moreover, Kelsen's analysis of law in general as a "dynamic" norm system, one based on a *Grundnorm* without self-evident substantive content, but only the meta-obligation to act in accordance with the commands of the "norm-creating authority",[16] does not limit the regulatory ambit of that authority. The international domain, by extension, is not *a priori* limited in international affairs either. All matters, including issues regularly regulated on the domestic level, can be regulated under international law.

[12] H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (1950), 477-483.

[13] Kelsen, *Reine Rechtslehre*, *supra* note 4, 101.

[14] Kelsen, *Peace*, *supra* note 11, 29.

[15] *Id*., 26.

[16] Kelsen, *Pure Theory*, *supra* note 5, 196-208.

In this respect, Kelsen's analysis of Art. 2(7) of the United Nations Charter (UNC),[17] is illuminating. This provision precludes UN intervention in matters "essentially within the domestic jurisdiction of any state" and UN Members from submitting such domestic matters to settlement under the Charter. Kelsen went out of his way to expose the basic fallacy and the legal dysfunctionality of Art. 2(7) UNC. To him, the idea underlying Art. 2(7) UNC, excluding those matters inherently within domestic jurisdiction, and relegating related disputes beyond the reach of international institutions, is entirely flawed. "[T]here is no matter that cannot be regulated by a rule of customary or contractual international law",[18] and if so regulated, it is no longer merely a matter of domestic jurisdiction. Furthermore, the power to determine when a dispute relates to a matter essentially within the domestic jurisdiction of a State rests with the international judiciary – implying the power to settle the dispute.[19] Finally – and most presciently – Kelsen pointed out that Arts 55 and 62 of the Charter authorize the UN to act in promotion of, *inter alia*, economic and social progress, health, education and respect for and observance of human rights, and that "it is hardly possible to fulfill these functions effectively without intervening in matters of domestic jurisdiction".[20] This is a key divergence from Kelsen's original stance on whether rights should be adjudicated by constitutional courts at the international level. If, clearly, disputes based on the Charter can be judged by the ICJ, and the Charter permits intervention in domestic jurisdiction because of the promotion of human rights, Art. 2(7) UNC notwithstanding, the outcome is that domestic human rights issues can be reviewed by the ICJ.

In sum, just as Kelsen conceived of law in general as knowing no gaps, his concept of public international law was that of an all-pervasive normative system, in which not only were there no excluded fields by nature of their subject matter, but also no excluded areas by virtue of domestic jurisdiction,[21] including human rights. Kelsen even went one step further by recognizing that under international law there are "matters that can be regulated in a positive way *only* by international law, and do not allow of

[17] H. Kelsen, 'Limitations on the Functions of the United Nations', 55 *Yale Law Journal* (1946) 5, 997.
[18] *Id.*, 998.
[19] *Id.*
[20] *Id.*, 1007.
[21] H. Kelsen, *Principles of International Law* (1952), 205 [Kelsen, Principles].

such regulation through national law".[22] He referred to these as norms "that are necessarily norms of international law", as opposed to norms "referring to subject matters that can be regulated *also* by national law".[23]

Indeed, this leads to the third dimension of the extension of the Kelsenian approach from domestic constitutional law to international law and adjudication, which is also the simplest to comprehend and substantiate. Kelsen was consistently unequivocal in his positive assertions that constitutional law is superior to regular domestic law, as the normative order that regulates the creation of hierarchically subordinate law.[24] Kelsen's approach to the relationship between national law and international law was more sophisticated and guarded, but there can be little doubt that when all was said and done, his neo-Kantian perspective viewed international law as the higher order, in several ways analogous to constitutional law. We see this early on in his embrace of the concept of *Völkerrecht als äußeres Staatsrecht* ('international law as external constitutional law').[25] In later years, he would venture that "[i]f there is a legal order superior to the national legal orders, it must be international law".[26] Moreover, he would explain that "even if it is not assumed that international law is superior to national law", then still "the spheres of validity of [the] national legal order are determined by the international legal order".[27] Indeed he argued that the "essential function" of international law is the determination of the spheres of validity of national legal orders – territorial, personal and temporal spheres of validity, and, crucially, the material sphere of validity – the competence of the State: "[t]he fact that a subject matter is regulated by a norm of international law stipulating an obligation with respect to this matter has the effect that this matter can no longer be regulated arbitrarily by national law".[28] Whether viewed as hierarchical superiority or as a normative delimitation of national law by international law, this is surely a constitutional normative construction, which furthermore provides the space for the judicial review – constitutional in nature – of domestic law's conformity with international law.

22 *Id.* (emphases added).
23 *Id.* (emphases added).
24 See Kelsen, *Pure Theory*, *supra* note 5, 221.
25 Kelsen, *Souveränität*, *supra* note 4, 154-159.
26 H. Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence', 55 *Harvard Law Review* (1941) 1, 44, 66.
27 See Kelsen, *Principles*, *supra* note 21, 206.
28 *Id.*, 242.

In sum, Kelsen's theory of international law is not only an extension of his theory of constitutional law, it is *a constitutional theory of international law*. Kelsen understood that the role of the international judiciary would develop along the lines of a constitutional court (or, a constitutionally-enabled judiciary charged not with settling inter-state disputes of a 'private' nature, but with the judicial review of the conformity of national acts and measures with public international law).

A brief yet significant caveat is in order here. Given Kelsen's constitutional law background and experience as an author and judge of the Austrian Constitutional Court, one might surmise that Kelsen's ideal of international constitutional judicial review would be centralized, abstract and *erga omnes* (the 'Austrian' or European constitutional model, perfected).[29] This is indeed discernible in some of his wartime writing,[30] but only partly so. There is no reason to assume that this would either preclude or contradict the advent of a decentralized, concrete and/or *inter partes* form of judicialized review, especially given the 'primitive' nature of international law.

C. The Modern International Judiciary and the Contemporary Constitutional Discourse

I will now turn to positioning the relevant parameters of Kelsen's thinking, the constituent elements of a constitutionally-enabled international judiciary engaged in judicial review of national acts and measures, in relation to two contemporary developments, one empirical (the evolution of a diversity of international judicial bodies) and the other theoretical developments (the development of a discourse on constitutionalism in international law and global governance). Empirically, international courts and tribunals have increasingly taken on the role of Kelsenian international constitutional actors, with significant effects on the structure of international governance. As far as theory is concerned, I contend that this aspect of

29 Kelsen, *Legislation*, *supra* note 9, 184-188. For discussion, see A. S. Sweet, 'Why Europe Rejected American Judicial Review: and Why it May Not Matter', 101 *Michigan Law Review* (2002) 8, 2744, 2769-2771.

30 H. Kelsen, 'Compulsory Adjudication of International Disputes', 37 *American Journal of International Law* (1943) 3, 397; and *id.*, *Peace*, *supra* note 11, 13-14 & 19-23.

contemporary judicialization has by and large been understated by international constitutionalism's contemporary theorists.

The phenomenon of the judicialization of international law over the last two decades is by now well acknowledged, and thoroughly canvassed (especially through the burgeoning literature on 'fragmentation' in international law), and still the continued expansion of the scope of international judicial activity overwhelms. Where, in the past, a 'generalist' in public international law could get by through merely following the trickle of jurisprudence produced by the ICJ and the occasional arbitration or domestic court ruling, contemporary international lawyers must now stay abreast of frequent developments in multiple specialized fora. Numerous international tribunals, permanent or ad hoc, universal or regional, are now active in all fields of international law, from the law of the sea to human rights or from international criminal law to trade and investment. Some tribunals engage in traditional state-to-state dispute settlement, but many actively address non-state actors and individuals as claimants in investment protection disputes or human rights cases, or as the accused in international criminal prosecutions (and their victims). Several significant tribunals now enjoy broad degrees of compulsory or automatic jurisdiction. Indeed, "international adjudication (which was once the exception to the rule – diplomatic settlement) is becoming the default dispute settlement mechanism in some areas of international relations".[31]

We live, therefore in an age of enhanced and intensified international litigation, but we should acknowledge that this is also the era of the international constitutional judiciary, to which the term 'dispute settlement mechanism' simply does not do full justice. In principle and by function, the modern international judge is clearly much more than an arbiter or umpire engaged merely in the craft of resolving inter-state or inter-party disagreement or strife. Today's international tribunals have the role of conducting international judicial constitutional review. This is clear through at least three juridical trends that closely mirror the three Kelsenian dimensions of international constitutional adjudication discussed in part B.

First, fulfilling Kelsen's notion that any issue subject to legal regulation is, regardless of its political baggage, capable of adjudication, today's international tribunals generally do not shy away from asserting jurisdiction over politically sensitive cases while – on the merits – demonstrating a skillful capacity to parse the international legal questions

[31] See Shany, *supra* note 1, 76.

presented to them from the underlying political issues. This often (but not always) elicits judicial rulings that are normatively conservative, formalistic and/or decontextualized. One – anyone, often both sides to a dispute as well as other stakeholders in the international community – can be very critical of and frustrated by many such decisions. However, within the appropriate Kelsenian frame of legal formalism, this is neither surprising nor doctrinally problematic, insofar as courts are only authorized to adjudicate in accordance with the international law available. Furthermore, the judicial decision-makers understand that their systemic institutional legitimacy rests upon observing their limited mandate. This phenomenon holds true even when the weaknesses of international political structures lead to instances in which international tribunals are essentially invited by States and parties to pull political chestnuts from the fire (such as ostensible determinations of statehood),[32] or to make positive law in their stead in areas (like trade and the environment) where the political processes of the development of international law have failed to deliver. Such decisions amount to 'legislative deferrals'[33] or even 'political capitulation'.[34] Indeed, most of the time, international judges and arbitrators, although led into the temptation of positive legislation, are strong enough to resist it, and are all the more robust and legitimate as a result (though not necessarily more powerful).

Second, reflecting the vision of normative pervasiveness in international law as encompassing all subject-matters within its jurisdiction, today the full range of public policy issues appears to be effectively covered by international legal regulation, and is consequently adjudicable by international courts and tribunals. These issues include both affairs that are otherwise within the domestic jurisdiction of States and issues that lie beyond the reach of domestic courts. This is as much a testament to the increased substantive reach of international law as it is to the expansion of the international judiciary. Contemporary international tribunals are increasingly engaged in legal determinations that impact upon purely domestic public regulatory policies, with little or only ancillary

32 See specifically the Advisory Opinion on the *Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Reports 2010, 141 [Kosovo Advisory Opinion] that will be dealt with in some more detail below.

33 On the concept of legislative deferral in the domestic context, see G. I. Lovell, *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy* (2003).

34 See T. Broude, *International Governance in the WTO: Judicial Boundaries and Political Capitulation* (2004).

transnational rationale. Issues of national law enforcement, health and local education policy are regularly adjudicated in the ECtHR and other human rights tribunals and law-applying bodies. The WTO dispute settlement system increasingly addresses cases involving fiscal and regulatory measures applied 'behind the border', not 'at the border', relating to taxation, subsidies, product labeling, the environment, public health and more. Investment protection tribunals review emergency measures taken by States in the face of financial crisis, domestic tobacco control policies, and even the judicial practice of local courts.

Third, without prejudice to the varying degrees of deference that international tribunals undertake upon themselves to grant national laws and measures, it now seems almost trivial to note that the 'entry position' of the international judiciary is that, in its court, international law is superior to domestic law – not merely in a technical, conflict-of-laws sense, but under the logic of Kelsenian normative hierarchy. International tribunals and their judges may not concern themselves with the theoretical questions of 'spheres of validity', but there is little doubt that they employ international law as the superior benchmark for reviewing the substantive legality of the conduct of States and other international actors. Indeed, as such international law may be identified as *äußeres Staatsrecht*, 'external constitutional law'.

In the following part D, I will provide more concrete examples of the manifestations of these elements of international constitutional judicial review in particular jurisprudential settings, with the hope of substantiating my claims. However, before doing so, I will explain how the argument that in many instances contemporary international tribunals are engaged in a form of Kelsenian international constitutional judicial review is unlike current observations on the constitutionalization of international law. This is not intended to fully engage the considerable and diverse literature on constitutionalization in international law, but rather to highlight, by way of comparison, a few points of difference.

To begin, much of the constitutionalist literature has been concerned with constitutional norms *in* international law, whereas here we are concerned with the constitutional nature of international law as such and as a whole in relation to national law and domestic actions. Put differently, the debate has focused on the question of whether international law, writ large or small, in whole or in part, has *within* it certain constituent, privileged normative elements that may be considered 'Constitutional' (upper case, that is) in comparison to the entire general corpus of international law (regardless of their position in relation to domestic law), and, if so, how to

identify that body of international constitutional law.[35] The Kelsenian construction of international constitutional judicial review, however, implicates, a much simpler, admittedly simplistic, yet in some ways more radical assertion. The claim is that, if not by definition, then through the functioning of international tribunals, international law *is itself* Constitutional (upper case, again, but in a different positional context), and externally so in relation to national acts and domestic legal measures.

This distinction is not only a matter of perception, framing, and designation. If we take constitutionalization in international law seriously, the proposition that international law – in essence all international law – has a constitutional character in relation to national law, is quite different from the key accepted discussions of international constitutionalism. To be sure, frames and designation can be confusing. Verdross famously first wrote of "the constitution *of* the international legal community"[36] but this connoted the role of international law as a constitution binding States within a common normative framework; the term did not imply that international law holds a constitutional position in relation to national law and domestic acts. Verdross allocated a constitutional-type status within domestic law only to certain international norms, distancing himself from Kelsen in this way.[37] Decades later, Fassbender wrote of the United Nations Charter as the constitution *of* the international community,[38] assigning special constitutional (mainly lower case) qualities to the United Nations Charter, but not to international law in general. Paulus has written about the "international legal system as *a* constitution",[39] but in practice identifies only particular formal and substantive norms of international law (*jus*

[35] For example, with respect mainly to international human rights law, see different approaches in A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', 19 *Leiden Journal of International Law* (2006) 3, 579; C. Walter, 'Constitutionalizing (Inter)national Governance – Possibilities for and Limits to the Development of an International Constitutional Law', 44 *German Yearbook of International Law* (2001), 170.

[36] See A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926).

[37] See von Bernstorff, *supra* note 3, 98.

[38] See B. Fassbender, 'The United Nations Charter as Constitution of the International Community', 36 *Columbia Journal of Transnational Law* (1998) 3, 529; and *id.*, *The United Nations Charter as the Constitution of the International Community* (2009).

[39] See A. L. Paulus, 'The International Legal System as a Constitution', in J. L. Dunoff & J. P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009), 69.

cogens norms, basic principles, democracy, the rule of law) as constitutional matter.

Jeffrey Dunoff and Joel Trachtman, contemporary leading thinkers on constitutionalism in international and global governance, clearly frame their perceptions of constitutionalization very differently from the idea that international law, through international judicial review, has gained a constitutional status *vis-à-vis* national laws and domestic acts. Dunoff and Trachtman identify three forms of international constitutionalization *within* the international legal system: enabling constitutionalization; constraining constitutionalization; and supplemental constitutionalization.[40] Enabling and constraining internationally constitutionalized norms are rules of international law which are somehow hierarchically superior to what Dunoff and Trachtman label 'ordinary' international law. For example, to focus momentarily on constraining constitutionalization, this concept is, to them, limited to those elements of international law in which certain international norms take precedence over others, such as *jus cogens* norms. Thus, they do not consider the vertical constraints placed by international law upon State action, in this respect, to be constitutional in nature. They posit emphatically that "[i]mposing constraints on State action is the function of ordinary international law",[41] and that "[t]he fact that international law is supreme *vis-à-vis* domestic law, at least within the international legal system, gives international law a constitutional-type role at the domestic level, but this type of international law is ordinary law at the international level",[42] recognizing a constitutional function only in the domestic sphere. The third category of their typology of internationally constitutionalized norms, supplemental constitutionalization, privileges international human rights norms with a constitutional character, not because they are international – all other things equal they would still be considered 'ordinary' international

40 J. L. Dunoff and J. P. Trachtman, 'A Functional Approach to International Constitutionalization', in Dunoff & Trachtman, *supra* note 39, 3, 9-18. 'Enabling constitutionalism' regulates the production of international law of a secondary nature; 'constraining constitutionalism' limits the production of international rules; 'supplemental constitutionalism' is international law that augments and supports domestic constitutional protections.

41 *Id.*, 12.

42 *Id.*, 19-20. However, international human rights law might be considered 'supplementally' constitutional; it is not entirely clear why they do not consider such law Constitutional in its own right, regardless of the existence of domestic protections or lack thereof.

law – but because their normative content roughly corresponds to the rights found in many national constitutions.[43]

Dunoff and Trachtman, like many predecessors in the debate over international constitutionalization, therefore seek a constitution of/for 'ordinary' international law, and identify a constitutional character or content in only *some* norms of international law (be they general or basic substantive principles, or institutional structures), in comparison to the rest of international law. In contrast, from the Kelsenian perspective suggested here, there is no such thing as 'ordinary' international law. Rather, it is the very nature of such 'ordinary' international law – and the evolving practice of international judicial review that has a constitutional character – that takes a constitutional position *in relation* to national law. International law is in this sense indeed external constitutional law.

Therefore most constitutionalist framings of international law have avoided statements that international law as such bears a constitutional character in relation to national law (despite some intimations that *some* international law may play a constitutional role *within* some domestic systems). As a consequence, perhaps, commentators and theorists have avoided equating the function of international tribunals with constitutional judicial review. Most approaches to international constitutionalization do not acknowledge that international courts play a constitutional role at all; if they do, they focus on the upholding (or developing) of those select elevated (upper case) constitutional elements of international law (whatever they might be), or on the enforcement of the (lower case) constitutional aspects of international institutional law *vis-à-vis* international agencies, acts and measures.[44] These frameworks of analysis are paradigmatically different from the constitutional function of the international judiciary suggested in this article, which rests in the overarching capacity to review the international legality (*qua* constitutionality) of national acts and domestic

[43] Compare with the category of 'rights-based constitutionalization' proposed in D. Z. Cass, 'The "Constitutionalization" of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade', 12 *The European Journal of International Law* (2001) 1, 39, 41.

[44] See the category of 'institutional constitutionalization', *id.* For one example, see T. Franck, 'The "Powers of Appreciation": Who is the Ultimate Guardian of UN Legality?', 86 *The American Journal of International Law* (1992) 3, 519; and see Broude, *supra* note 34, 225-239 for analysis of the constitutional authority of the judicial organs of the WTO dispute settlement to review the legality of acts of other organs.

measures, i.e., their conformity with what might otherwise be considered 'ordinary' international law, now framed as external constitutional law.

In one significant contribution to the international constitutionalist discourse,[45] Ulfstein addresses the possibility that international tribunals "exercise constitutional functions in the sense that they may interfere significantly with the activities of national legislative, executive, and judicial national organs".[46] This statement comes the closest to the framework suggested in this article. I would contend, that the capacity of international tribunals to intervene in national acts – their constitutional function – is not merely an objectively observable fact. Rather, this ability derives from the gradual normalization of the Kelsenian framework of international constitutional judicial review: the composed of full adjudicability of legally regulated issues; all-encompassing international legal regulation; and the supremacy of international law in international fora.

The constitutionally-enabled international judiciary must also be distinguished from the judicial function associated with the idea of "global administrative law".[47] Global administrative law presents an important alternative to constitutional understandings of global governance, defined as "the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing *effective review of the rules and decisions they make*".[48] A central tenet of global administrative law is judicial review of the acts of 'global administrative bodies', which include a broad range of both national and international entities. Inevitably, such review is exercised by international courts and tribunals, and is conducted using normative benchmarks from international law.

Global administrative law (like domestic administrative law) thus partially overlaps with international law understood as external constitutional law, but it is limited to elements of global governance that are similar to administrative acts and to familiar causes of intervention from

45 See G. Ulfstein, 'The International Judiciary', in J. Klabbers, A. Peters & G. Ulfstein (eds), *The Constitutionalization of International Law* (2009), 126.

46 See *id.*, 127.

47 See B. Kingsbury, N. Krisch & R. B. Stewart, 'The Emergence of Global Administrative Law', 68 *Law and Contemporary Problems* (2005) 3/4, 15.

48 *Id.*, 17 (emphasis added).

domestic administrative law – transparency, process and legality (*qua vires*). Global administrative law is a powerful framework for analyzing some central aspects of global governance; but by virtue of its careful definitional delimitations of both its substance and grounds for judicial review, it avoids recognizing the constitutional function of international tribunals.

With these distinctions in mind, let us now examine some actual contemporary examples of the constitutional function of international courts, as construed above in a Kelsenian framework in the jurisprudence of the ICJ, the ECtHR and the WTO dispute settlement system.

D. Kelsen's International Constitutional Visions in Particular Contemporary Judicial Settings

I. The ICJ

The principal judicial organ of the UN system, the most conservative model of state-to-state dispute settlement, nonetheless displays the main hallmarks of the constitutionally-enabled international judiciary. The general jurisdiction that it enjoys means that there are no limits to the substantive matters that States may bring before it, thus recognizing, more than implicitly, that all issues may be regulated by international law. In practice, the Court has generally availed itself of this jurisdiction, whether contentious or advisory, without declining it for justifications relating to the political dimensions of the dispute, or its subject matter. And the Court has staunchly defended the hierarchically superior position of international law in relation to domestic law. While the Court still fulfills the arbitral function of peaceful settlement of disputes between States, it has taken on the addition role of international judicial constitutional review under terms explained above.

The 2010 *Kosovo* Advisory Opinion is a picture-perfect example – almost a caricature – of international constitutional judicial review by the ICJ as an international tribunal within Kelsenian parameters. The Court was tasked with a controversial issue loaded with obvious political overtones – the nascent statehood of Kosovo as a unilateral breakaway from Serbia. There were good causes to decline jurisdiction altogether. According to one argument raised before the Court, declarations of independence are regulated by national law, not international law. The Court almost cursorily set this idea aside, as a preliminary matter, with the clear statement that the question can be dealt with under international law without any recourse to

domestic law.[49] Notably, this statement was made as a general matter, without first examining whether relevant international law existed. In other words, the Court took the *a priori* Kelsenian position whereby all issues can be regulated by international law, either positively or negatively.

Another claim was that Serbia was itself the leading sponsor of the UN General Assembly request for an advisory opinion, suggesting an individual political interest in the issue (to say the least).[50] Here, the Court referred to its prior jurisprudence, according to which, it "will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution".[51] This judicial position brings to mind Kelsen's comments that disputes become political when a party raises non-legal arguments, but at all times the dispute's legal element remains intact. The Court puts on its blinders, at least formally, to the political context, for better or for worse.

Indeed, the question of Kosovar independence was (and still is, even at the time of this writing) a heavily contested political issue. Nevertheless, the ICJ in its *précis* did not decline jurisdiction, using language that takes more than a leaf from Kelsen's book(s): "[T]he fact that a question has political aspects does not suffice to deprive it of its character as *a legal question* […]. Whatever its political aspects, the Court cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, in the present case, *an assessment of an act by reference to international law*".[52] The Court's treatment of the 'political question' claim against review is far from new. Indeed, this has been the position of the ICJ from its very first advisory opinion,[53] and is well reflected in subsequent jurisprudence.[54] It is also evident in the dissenting and separate opinions in *Kosovo*.[55]

49 See *Kosovo Advisory Opinion*, *supra* note 32, para. 26.

50 *Id.*, para. 32.

51 See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 237, para. 16.

52 See *Kosovo Advisory Opinion*, *supra* note 32, para. 27 (emphasis added).

53 See *Conditions of Admission of a State to the United Nations (Article 4 of the Charter)*, Advisory Opinion, ICJ Reports 1948, 57, 61.

54 *Application for Review of Judgement No.158 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1973, 166, 172, para. 14

55 See, e.g., Separate Opinion of Judge A. A. Cançado Trindade, para. 8; the Separate Opinion of Judge Kenneth Keith is an elaborate attempt to avoid political avoidance by focusing on the Security Council-General Assembly relationship; the dissenting

Having determined that the question before it is legally regulated, one way or another, and that it therefore has the capacity to adjudicate it, the Court proceeded to analyze the legality of the declaration of independence under both generally and specifically applicable international law. The Court concluded that general international law "contains no applicable prohibition of declarations of independence".[56] Moreover, specific international law in the form of UN Security Council resolutions "did not bar" the declaration of independence.[57] While asserting its jurisdiction over the case as a legal issue, in Kelsenian terms the Court therefore found that the question was only negatively regulated by international law: there is no rule of either proscription or prescription; hence, the effect of international law is not null, but one of freedom of action. From a political perspective, this outcome seems formalistic and unhelpful. The legality, or rather lack of illegality, of the declaration of independence, tells the international community little if anything about the legality and validity of Kosovar statehood. Yet the Court acted well within the limits of its judicial (constitutional) function, addressing a question as legally regulated and within the bounds of its jurisdiction, while reviewing the act of a non-international entity under international law.[58] Arguably, in *Kosovo*, the Court was not merely avoiding political controversy, but preserving the legitimacy of it role of judicial review.

This underlying approach of the ICJ, so well expressed in the *Kosovo* Advisory Opinion, that all international disputes have a legally regulated element, and that all such legal disputes are, in principle adjudicable under international law and in the Court – an approach that I have described as one of Kelsenian international constitutional judicial review – is not limited to the advisory competence of the ICJ; it extends also to the Court's

opinion of Judge Mohamed Bennouna succumbs entirely to the 'political issue' approach and UN Security Council authority.

56 See *Kosovo Advisory Opinion*, *supra* note 32, para. 84.

57 See *id.*, 119.

58 For representative mixed expressions of frustration at the Court's narrow approach and lack of assertiveness in the *Kosovo Advisory Opinion*, see T. Burri, 'The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links', 11 *German Law Journal* (2010) 8, 881; M. G. Kohen & K. del Mar, 'The Kosovo Advisory Opinion and UNSCR 1244 (1999): A Declaration of Independence from International Law?', 24 *Leiden Journal of International Law* (2011) 1, 109; C. Pippan, 'The International Court of Justice's Advisory Opinion on Kosovo's Declaration of Independence: An Exercise in the Art of Silence', 3 *Europäisches Journal für Minderheitenfragen* (2010) 3/4, 145.

contentious capacity. To be sure, contentious cases must satisfy the requirements of State consent and jurisdiction, but, in principle, all international legal issues may fall within the jurisdiction of the Court. In certain cases the ICJ has determined that it lacks jurisdiction or that an application is inadmissible in circumstances that might be interpreted as disguised avoidance of a sensitive political issue,[59] but never explicitly on these grounds. Indeed, in other cases, the Court has asserted jurisdiction in spite of the political aspects of the dispute.[60] And when explicit claims of inadmissibility have been raised in relation to the political dimension of a dispute, such as the existence of ongoing conflict[61] or ongoing diplomatic negotiations on the matter,[62] the ICJ has rejected them and proceeded with the case.

But do the contentious cases provide the Court with opportunities for international constitutionally-enabled judicial review? Or are they merely state-to-state disputes, assimilated to private legal disputes? I would submit that judicial review in the constitutional sense is very much a tenet of the ICJ's contemporary contentious jurisprudence. I will provide one recent example. In the 2012 *Jurisdictional Immunities* judgment,[63] the ICJ was faced, *inter alia*, with the question of the relationship between *jus cogens* norms on one hand, and the general rule of sovereign immunity on the other. As we have seen, in the constitutionalist literature *jus cogens* norms are commonly referred to as bearing a constitutional character, either within

[59] In particular, *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa),* Second Phase, Judgment, ICJ Reports 1966, 6; and *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment, ICJ Reports 2004, 279.

[60] See, e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction of the Court and Admissibility of the Application, Judgment, ICJ Reports 1984, 392 [Nicaragua Case]; and *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, ICJ Reports 1996, 803.

[61] See *Nicaragua Case*, *supra* note 60, 436-438, paras 99-101.

[62] See, most recently, ICJ, *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment of 5 December, 2011, paras 55-60. This is not to be confused with a situation in which the basis of jurisdiction required the exhaustion of negotiations, but it was no longer thought possible to settle the dispute in a diplomatic manner; see S*outh West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, ICJ Reports 1962, 319.

[63] ICJ, *Jurisdictional Immunities of the State (Germany v. Italy)*, Judgment of 3 February 2012 [ICJ, Jurisdictional Immunities].

international law or in national law, or both, whether because of their normative content or because of their non-derogability. Sovereign immunity, in contrast, would more readily be considered to be 'ordinary' international law, notwithstanding its importance as a procedural implementation of the fundamental principle of the sovereign equality of States.[64] Under this view, sovereign immunity belongs to the "traditional, horizontal paradigm of international law", whereas *jus cogens* belongs to "a more vertical, constitutionalist, or public law paradigm".[65] Italy's claim that Germany does not benefit from sovereign immunity in connection with *jus cogens* violations during World War II is an expression of this line of thinking: the constitutional (upper case) trumps the ordinary. The ICJ did not agree, finding instead that the *jus cogens* norms and sovereign immunity were not in conflict at all, operating in different spheres: the former in the sphere of primary norms determining the legality of (Germany's) wartime acts, the latter in the secondary sphere of procedure, determining whether the courts of one State have jurisdiction over another State.[66] To great extent, this finding weakens the construction of *jus cogens* norms as constitutional *within* international law. For the Court, concerning the rules of jurisdiction, there is nothing "inherent in the concept of *jus cogens* which would require their modification or would displace their application".[67]

If *jus cogens* norms are considered as constitutional, this could also have been seen as the end of the road for international constitutional judicial review. However, the real constitutional dimension of this case is entirely different, much closer to the relatively 'thin' constitutionalism described in Kelsenian terms above. The measure of dilution of the relative constitutionality of *jus cogens* within international law stands in contrast with the Court's hardening of sovereign immunity – 'ordinary' international law – as an international rule in relation to national acts and courts, a hardening tantamount to a constitutionalization of the norm. And it is in this respect that the Court can be seen as taking on the role of international constitutional judicial review. The Court's decision in *Jurisdictional Immunities* is not framed merely as a private dispute to be settled between Germany and Italy, relating to the balance of rights and obligations between States, but rather as a case that deals with fundamental questions of the

[64] *Id.*, para. 57.
[65] See S. Gardbaum, 'Human Rights and International Constitutionalism', in Dunoff & Trachtman, *supra* note 39, 233, 237.
[66] ICJ, *Jurisdictional Immunities*, *supra* note 63, paras 93-94.
[67] *Id.*, para. 95.

scope of sovereign immunity in its horizontal constitutional role as an expression of sovereign equality, and in its vertical constitutional role as a procedural constraint on the rights of individuals to extract reparations from States for violations of *jus cogens*.

In essence, while considering the arguments of Germany, Italy (and Greece (intervening)), the function of the ICJ in *Jurisdictional Immunities* was to review the international legality of the decisions of national courts to deny sovereign immunity in the specific circumstances of the case. To be sure, this is not administrative review in the sense of 'global administrative law', but rather concrete constitutional judicial review. The ICJ did not concern itself with the reasonableness of the Italian courts' decisions, or with the propriety of their procedures in terms of due process, transparency and so on. The Court rather conducted what is in essence a *de novo* review of the legal question at hand, employing constitutional presumptions not only of the superiority of the international law of sovereign immunity over domestic law (normative hierarchy), but also of the supremacy of the international tribunal over the national courts (authority hierarchy).[68] As a customary rule of international law, the law of sovereign immunity may have derived from State practice, but having become a rule of international law, it cannot, as Kelsen stated, be "regulated arbitrarily by national law".[69] Indeed, the ICJ cut the Italian courts no slack in interpreting and applying sovereign immunity most evident in the Court's treatment of Italy's argument that, even if each of the three purported justifications for denying sovereign immunity (the gravity of the violations, *jus cogens* status of the violated norms, and the absence of alternative means of redress to victims) cannot independently support the Italian court's decision, their combined or cumulative effect might be sufficient for this purpose. According to the ICJ, the national court has virtually no discretion in this respect: "Immunity cannot […] be made dependent upon the outcome of a balancing exercise of the specific circumstances of each case to be conducted by the national court before which immunity is claimed".[70] In other words, either the conditions for an exception to sovereign immunity *as determined by*

[68] On the distinction between normative fragmentation and authority fragmentation, see T. Broude, 'Principles of Normative Integration and the Allocation of International Authority: The WTO, The Vienna Convention on the Law of Treaties and the Rio Declaration', 6 *Loyola University Chicago International Law Review* (2009) 1, 173.

[69] See Kelsen, *Principles*, *supra* note 21, 242.

[70] ICJ, *Jurisdictional Immunities*, *supra* note 63, para. 106.

international law (and pronounced by the ICJ) are fulfilled, or not. If any balancing is to be done, it is not to be done by the national court.

Thus, in both advisory and contentious capacities of the ICJ, we may identify elements of international constitutional judicial review, including the tendency to cast a broad net of adjudication while focusing on narrowly defined legal questions in substance, which are addressed through the constitutional supremacy of 'ordinary' international law over domestic law.

II. The WTO Dispute Settlement System

For more than a decade, the WTO and its dispute settlement system, composed of *ad hoc* Panels and a permanent Appellate Body, have been the focus of intense debates relating to international constitutionalization. This is so in part because of the WTO's institutional structure and the strength of its dispute settlement system, which is endowed with *de facto* compulsory jurisdiction and an effective system of enforcement; and also in part because of the WTO's centrality in economic globalization: bringing to the fore questions of the legitimacy of international interventions in domestic economic, social and environmental policies.[71] This section will not engage with the full range of constitutional-type elements and impacts associated with the WTO, but will only address some aspects of the WTO dispute settlement system that manifest its capacity, and indeed tendency, to have a constitutional function by providing international constitutional judicial review of domestic law and national acts within the Kelsenian parameters set out above.

The WTO dispute settlement system has many policy-oriented goals,[72] but its chief judicial concern is the conformity of national 'measures' with GATT/WTO law. These measures are overwhelmingly legislative or administrative at the domestic level,[73] including measures that

[71] The literature addressing constitutionalism and constitutionalization in the WTO is vast. For one survey and debate see J. L. Dunoff, 'The Politics of International Constitutions: The Curious Case of the WTO', in Dunoff & Trachtman, *supra* note 39, 178. See also J. P. Trachtman, 'Constitutional Economics of the World Trade Organization', in Dunoff & Trachtman, *supra* note 39, 206.

[72] See S. Shlomo-Agon, 'The Effectiveness of the WTO Dispute Settlement System Procedures', in Y. Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach* (forthcoming).

[73] See A. Yanovich & T. Voon, 'What is the Measure at Issue?', in A. D. Mitchell (ed.), *Challenges and Prospects for the WTO* (2005), 115.

operate 'behind the border',[74] while the benchmark for review is international. This is the clear setup for international constitutional judicial review. In this context, there is little question that any legally regulated issue that falls within the material jurisdiction of the WTO dispute settlement system can be adjudicated by it. This material jurisdiction is of course limited to the "Covered Agreements" of the WTO defined by Art. 1.1 and Appendix 1 of the WTO Dispute Settlement Understanding (DSU),[75] as a tribunal of special rather than general jurisdiction. However, once a dispute is "properly before"[76] it, a Panel *must* exercise its jurisdiction.

In contrast with the ICJ case law, WTO jurisprudence has effectively prevented the adoption of doctrines of inadmissibility. In *Mexico – Soft Drinks*,[77] Mexico, the respondent, requested the Panel and Appellate Body to decline jurisdiction over the dispute because it would, in its view, more properly be settled by an arbitral panel under Chapter Twenty of the North American Free Trade Agreement (NAFTA). This request was resolutely rejected, not as an exercise of discretion within the *Kompetenz-Kompetenz* of the judicial decision-maker, but because various elements in the construction of jurisdiction in the DSU implied that Panels were not "in a position to choose freely whether or not to exercise its jurisdiction".[78]

74 The term 'behind the border' refers to regulatory measures (e.g., health or environmental requirements), that may constitute barriers to international trade and/or discriminate against foreign goods and services, even though they are part of the domestic regulatory system, in contrast to "border measures" such as import quotas and tariffs, that clearly apply to foreign goods at the border and manifestly discriminate against them (see, e.g., J. H. Barton *et al.*, *The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO* (2006), Ch. 5).

75 Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations, 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

76 "Properly before the Panel" is the term used by parties to the General Agreement on Tariffs and Trade (GATT)/WTO dispute settlement system to raise jurisdictional issues in dispute settlement at least since the early 1990s (before the establishment of the WTO DSU); see *United States-Anti-Dumping Duties on Gray Portland Cement and Cement Clinker from Mexico*, ADP/82, 7 September 1992, para. 3.1.2.

77 See WTO, Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, 7 October 2005 [WTO, Panel Report]; and *id.*, Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006 [WTO, Appellate Body Report].

78 *Id.*, Panel Report, *supra* note 77, para. 7.8 and *id.*, Appellate Body Report, *supra* note 77, para. 41.

Unrelatedly, in accordance with Art. 3.8 DSU, and in accordance with previously developed GATT jurisprudence,[79] WTO Members enjoy a general (rebuttable) presumption that an alleged infringement of the Covered Agreements has resulted in harm ("nullification or impairment") to their benefits under the agreements. Hence, if the issue is legally regulated, and a WTO Member complains, the issue *must* be adjudicated. This reflects a high degree of faith in the Kelsenian notion that such legally regulated issues *can* be adjudicated and judicially reviewed. Furthermore, the WTO is quite expansive in its acceptance of issues as legally regulated (again, within the bounds of the Covered Agreements). Under Art. XXIII:1 of the 1947 General Agreement on Tariffs and Trade (GATT) and Art. 26(1-2) DSU, WTO Members may complain about measures of other Members that have harmed them even if not in clear violation of commitments in the Covered Agreements (as "non-violation" (NV) or even "situation" complaints). Such complaints have historically been few and far between, but the important point for present purposes is that such NV complaints have not been treated as extra-legal, equity-based (political) cases. Rather, they have been considered to be legal disputes, albeit with relatively indeterminate legal elements such as the doctrine of legitimate expectations.[80] The WTO dispute settlement system has also eschewed any notions of *non liquet* or *lacunae*,[81] meaning that any issue that parties send its way is adjudicable.

Nothing captures this international constitutional judicial function more evidently than the concept of 'as such' challenges in the WTO. 'As such' claims are challenges to national measures like legislation or administrative regulation "independently from the application of that legislation in specific instances"[82] and a reviewable measure is a "rule or

[79] See GATT, Panel Report, *Uruguayan Recourse to Article XXIII*, L/1923BISD 11 S/95, adopted 16 November 1962.

[80] See S.-j. Cho, 'GATT Non-Violation Issues in the WTO Framework: Are they the Achilles' Heel of the Dispute Settlement Process?', 39 *Harvard International Law Journal* (1998) 2, 311; C. Larouer, 'WTO Non-Violation Complaints: A Misunderstood Remedy at the Heart of the WTO Dispute Settlement System', 53 *Netherlands International Law Review* (2006) 1, 97.

[81] See J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003), 152-153; and T. Broude & M. Moore, 'U.S.-Anti-Dumping Measures on Certain Shrimp from Viet Nam: A Stir-fry of Seafood, Statistics and Lacunae', 12 *World Trade Review* (2013) (forthcoming).

[82] See WTO, Appellate Body Report, *US-Anti-Dumping Act of 1916*, WT/DS136/AB/R, adopted 24 February 2004, para. 51, *et seq.*, 60.

norm of general and prospective application",[83] regardless of whether or how it has been applied in practice. These are challenges to the national 'law on the books' – the equivalent of an abstract constitutional challenge to a statute as opposed to a concrete violation of constitutional rules (although clearly, Panels and the Appellate Body do not have the authority to annul a measure within a national legal system, but only to find it incompatible with the Covered Agreements). The distinction between 'as such' and 'as applied' is not always easy in practice, but it is an important one: national measures can be (and are) deemed not inconformity with the Covered Agreements – internationally unconstitutional – even if they have not yet been applied and have had no practical effect.

Thus, within the WTO system, all issues can be legally regulated – everything legally regulated (and more) is adjudicable – including national measures regardless of their actual application, and the Covered Agreements clearly enjoy supremacy in relation to national acts and domestic measures. The modern WTO dispute settlement system would also be identified by Kelsen as one of international constitutional judicial review.

III. The ECtHR

With the ECtHR, our task here is much simplified, because this tribunal has already been characterized (or at least debated) by others as a constitutional court, indeed with reference to 'thicker' concepts of international constitutionalization, rather than the Kelsenian one expounded upon in the present article.[84] Alec Stone Sweet has argued that the nature of the ECtHR's competence, especially with the enhancement of individual standing through Protocol No. 11, have led to a situation in which it "performs many of the same functions that most national constitutional courts do, using similar techniques, with broadly similar effects. The Court

[83] See WTO, Appellate Body Report, *United States - Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 4 February 2009, para. 179.

[84] See L. Wildhaber, 'A Constitutional Future for the European Court of Human Rights?', 23 *Human Rights Law Journal* (2002) 5-7, 161; S. Greer, 'Constitutionalizing Adjudication under the European Convention on Human Rights', 23 *Oxford Journal of Legal Studies* (2003) 3, 405; L. R. Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', 19 *The European Journal of International Law* (2008) 1, 125.

regularly confronts cases that would be classified, in the context of national legal systems, as inherently 'constitutional'."[85] This dimension of constitutionality is, to large extent, the result of the ECtHR's jurisdiction over human rights – a jurisdiction that Kelsen would have denied even to national constitutional courts, at least in the pre-war years, for fear of 'positive legislation'. In its jurisprudential treatment of rights, the ECtHR has adopted doctrines of balancing and proportionality similar to national constitutional courts while increasingly paying its own doctrine of the margin of appreciation mere lip service, and in this way subjecting national systems to broad international judicial discretion.[86] Yet, importantly, national constitutions and their courts have by and large accepted the supremacy of the European system of human rights and the ECtHR.[87] Moreover, even though the ECtHR lacks the competence to annul national decisions, and its rulings are of an individual, concrete rather than general and abstract one, in recent years there has been an overt shift from an appellate-like function – the identification of wrong national decisions in individual cases – to a more constitutional and systemic role, facilitated by the cooperative stance of national courts towards cases dealt with under the 'pilot judgment' procedure, in which large numbers of cases with the same underlying legal problem are dealt with together.[88]

Thus, it would appear that the ECtHR also satisfies, *a fortiori*, the 'thinner' Kelsenian parameters of international constitutional judicial review. The recourse to rights means that literally all national acts and domestic measures are subject to legal regulation, and that the material jurisdiction of the ECtHR is pervasive.[89] And through the frequent

85 A. S. Sweet, 'On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court', available at http://works.bepress.com/alec_stone_sweet/33/ (last visited 4 September 2012); *id.* 'Sur la Constitutionnalisation de la Convention Européenne des Droits de l'Homme: Cinquante Ans après son Installation, la Cour Européenne des Droits de l'Homme Conçue comme une Cour Constitutionnelle', 22 *Revue Trimestrielle des Droits de l'Homme* (2009) 4, 923.

86 *Id.*, 931.

87 See *id.*, 934-937; Helfer, *supra* note 84.

88 See W. Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments', 9 *Human Rights Law Review* (2009) 3, 397; for example, see *E.G. v. Poland, and 175 other Bug River Applications*, ECHR, Application no. 50425/99, Decision of 23 September 2008.

89 Grounds of inadmissibility in the ECtHR do not include anything remotely similar to a 'political question' grounds; see Council of Europe/European Court of Human Rights, 'Practical Guide on Admissibility Criteria' (2011), available at http://www.echr.coe.in

interpretation and discussion of national measures and constitutions on its own discretionary terms, the supremacy of the European Convention and the ECtHR over national constitutions is indubitable. In this context, one need only think of the recent *Lautsi* case,[90] in which the ECtHR's Grand Chamber examined the compatibility of Italy's legislation and practice regarding the affixing of crucifixes in classrooms with the right to education and the freedom of thought, conscience and religion protected by the European Convention and its Protocol No. 1. Although clearly loaded with political charges, there was essentially no question that the case was admissible and subject to the European human rights system of law. Given the diversity of relevant practices of secularity or neutrality within domestic legal systems, the ECtHR emphasized the role of the margin of appreciation in the case,[91] but this margin was for the same reason immediately limited by a prohibition on religious indoctrination derived from the Convention and the ECtHR's prior jurisprudence.[92] The ECtHR ultimately upheld the Italian legislation and practice, but in doing so it acted as an international tribunal conducting international constitutional judicial review – as it does in much, if not all, of its jurisprudence.

E. Conclusion: The Constitutionally-Enabled International Judiciary

International tribunals were never designed, let alone appointed as constitutional courts, and international law and its sub-streams were not designated as a constitution (upper case). Nevertheless, international courts have taken on a constitutional function, regularly reviewing the conformity of national acts and domestic measures with international law as if it held a constitutional status. This status is independent of the law's content, as most constitutional approaches to international law would hold. If this constitutional function of international tribunals is acknowledged, all international law gains a constitutional dimension. It is the benchmark

t/NR/rdonlyres/B5358231-79EF-4767-975F-524E0DCF2FBA/0/ENG_Guide_pratique.pdf (last visited 4 September 2012).

90 See *Lautsi and others v. Italy*, ECHR, App. No. 30814/06, Judgment of 18 March 2011.

91 *Id.*, para. 70.

92 *Id.,* paras 62, 69.

against which the international legality (*qua* constitutionality) of State behavior is measured. Formally, though international courts cannot annul national legislation, their decisions on international legality have significant implications in the domestic sphere, and are taken seriously by national courts, executives, and parliamentary assemblies. International law now regulates virtually all areas of State activity, and international courts do not exclude any such area of action from their jurisdiction. International tribunals have thus been constitutionally-enabled along parameters traceable back to Kelsenian constitutionalism, that itself comes around full circle to Kelsen's historical appreciation of the role of the international judiciary.

To be sure, this stylized Kelsenian form of international constitutionalism is a 'thin' one. Unsurprisingly, it seems to lack a normative element. It raises more questions (not unfamiliar in either national constitutional or international spheres) – about democratic accountability of international tribunals, judicial activism and positive legislation by courts, and the inclusion of open-ended human rights in the jurisdiction of courts – than the answers it provides. But this 'thin' international constitutionalism is coherent, even concrete, and it is actually more than implicitly normative in its internationalism, through which it gains its robustness. It legitimizes the intervention of international courts and tribunals in national acts, and this intervention is by and large accepted as legitimate.

The extension of 'thin' Kelsenian constitutional review from the domestic to the international is of course partial, of a *mutatis mutandis* nature. Most international tribunals lack compulsory jurisdiction, at least formally, although the trend is towards compulsion – the WTO, the ECtHR, the International Criminal Court (ICC) and *ad hoc* criminal tribunals, investment arbitration all have elements of compulsory rather than consent-based jurisdiction. International judicial review is normally concretely case-based, not abstract. But, as noted above (in consideration, for example, of ICJ Advisory Opinions, WTO 'as such' challenges, and ECtHR 'pilot procedure' judgments), this is a line that is increasingly becoming blurred and irrelevant. International tribunals – from the ICJ to the human rights courts and treaty monitoring bodies to the criminal courts and investment panels – readily address individual rights and freedoms in ways that Kelsen would have censured; but national constitutional courts preceded them in crossing the theoretical line between negative and positive legislation. Despite these gaps in the analogy, its core stands firm in the sense that international tribunals are increasingly taking the role of reviewers of

national acts and domestic measures in relation to international law, rather than arbiters of disputes.

Perhaps the largest gap – at least ostensibly – between Kelsenian judicial constitutionalism and the contemporary realities of international law lies in the plurality of international judicial bodies simultaneously engaged in such international constitutional judicial review. As with his preference for a central constitutional adjudicator in national systems, so would Kelsen have preferred, perhaps, a central international adjudicator. But this first-best choice is clearly tied to global consolidation of legislative and executive functions that are hardly manifested in the complexities of contemporary global governance. In this fragmented global legal system, it would not be possible for international tribunals, themselves products of fragmentation, to avoid their constitutional roles. Moreover, there is no real contradiction between the tenets of 'thin' judicial constitutionalism, on one hand, and the existence of a constitutional pluralism in international law.[93]

Kelsen's ideals of presumptively legalized international constitutional judicial review of State conduct, both in the international normative space and domestic affairs, now dominate the jurisprudence and practice of international law, cutting across virtually all its sub-fields. In this sense, his judicial visions have indeed been vindicated.

93 On constitutional pluralism, see A. S. Sweet *supra* note 1; D. Halberstam, 'Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational, and Global Governance' (November 2011) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1758907(last visited 4 September 2012).