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2006

Domestic Enforcement of International Decisions – Remarks by Lori F. Damrosch

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Recommended Citation
Lori F. Damrosch, *Domestic Enforcement of International Decisions – Remarks by Lori F. Damrosch*, 100 Am. Soc'y Int'l L. Proc. 234 (2006).
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/4094

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that the *Avena* judgment was binding in his case as a result of U.S. treaty commitments. While *Medellin* was pending, the United States took two steps. First, it withdrew from the optional protocol, the treaty conferring jurisdiction to the ICJ. Second, President Bush issued a determination that the United States would comply with its international obligations pursuant to the *Avena* judgment by directing *state* courts to abide by the *Avena* judgment in the fifty-one cases, including that of Mr. Medellin. The Supreme Court dismissed the Medellin case in May 2005 without deciding the question of the enforceability of the *Avena* judgment in order, among other things, to allow state courts the opportunity to consider the *Avena* judgment in the first instance. The state court's decision in the Medellin case remains pending.

In March 2006 the Supreme Court heard oral argument in the case of another Mexican national (not one of the fifty-one cases brought to the ICJ), Moises Sanchez-Llamas, and a Honduran national who alleged that the United States violated the Vienna Convention in their criminal cases. Again several of the justices were interested in the implications of the *Avena* judgment for these cases. When asked to comment by the Court, the Assistant U.S. Solicitor General responded, "To be blunt, the ICJ decision is wrong."

In the interests of full disclosure, I should note that I have served as counsel for Mexico in the *Avena* proceedings and am serving as counsel for Messrs. Medellin and Sanchez-Llamas in their Supreme Court cases. But I hereby vow that my role will not affect my moderating duties today.

On ASIL's centennial, I think it is particularly appropriate to consider these questions since the answers go very much to the heart of the U.S. constitutional scheme and the intended design of the Framers with respect to the United States' compliance with its international obligations. We have an esteemed panel here today to address these issues. The four panelists will address these questions from different perspectives:

- **John B. Bellinger, III**, the Legal Adviser to the Secretary of State, will explore the questions from the perspective of the U.S. Executive;
- **Lori F. Damrosch**, professor of international law and organization at Columbia Law School, and **Paul B. Stephan**, professor at the University of Virginia law school, will address the U.S. constitutional structure and the appropriate means of enforcing international decisions; and finally,
- **Mattias Kumm**, professor of law at New York University Law School, will provide a comparative perspective based on the practice in several European legal schemes.

Remarks by Lori F. Damrosch*

I approach this topic first within the centennial framework, and then with attention to the *Sanchez-Llamas* and *Bustillo* cases just argued at the Supreme Court, as well as the *Medellin* case (pending in Texas) and other current problems.

Rick Kirgis's centennial history reminds us that ASIL's founders had a peculiarly American belief in international arbitration and adjudication as methods for resolving conflicts with other nations. In 1906, John Bassett Moore published his magisterial six-volume *Digest of International Law as Embodied in Diplomatic Discussions, Treaties and Other International Agreements, International Awards, the Decisions of Municipal Courts, and the Writings of Jurists*, building on his five-volume *History and Digest of the International Arbitrations to*

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Which the United States Has Been a Party (1898). In 1905 Moore had published *American Diplomacy: Its Spirit and Achievements*, the book version of a series of articles from Harper's Magazine, one of which was on international arbitration. Thus this eminent ASIL founder endeavored to make accessible to the American public—and to diplomats, lawyers, academics, and students—a fountainhead of information about what the United States had already been able to achieve through international legal dispute settlement.

The benefits to the United States from that vision over more than a century are evident. When I participated in my first international arbitration as a young State Department lawyer in 1978—an aviation dispute with France—we had a ceremonial opening of the tribunal's proceedings in the "*Alabama* Claims" room in the Geneva city hall, to mark the place where an arbitral tribunal had decided in favor of the United States a century earlier, in a dispute with Great Britain over the outfitting of armed ships for the Confederacy in the Civil War. The *Alabama* claims tribunal had awarded $14 million to the United States, a sizable sum which Britain promptly paid. American international lawyers of the late nineteenth and early twentieth centuries were convinced by milestones like the *Alabama* arbitration that legal dispute settlement procedures were very much in U.S. interests. I was convinced as well in my first case, especially when we won the arbitration, persuading not only the neutral Dutch judge but even the party-appointed French arbitrator on the aspect of the case that had to do with enforcement of international obligations through countermeasures. I took this arbitration as a further example of what Moore's turn-of-the-century study showed—that the United States usually wins before a neutral juridical tribunal, because we usually act in accordance with law.

The next year I was tasked to work on the pleadings, request for provisional measures, memorial, and statements for oral argument in the *Tehran Hostages* case at the International Court of Justice. The United States invoked three multilateral treaties and their optional dispute settlement protocols, one of which was the Vienna Convention on Consular Relations—the very treaty that has now been invoked three times against the United States in The Hague. When we prevailed on every point both at the provisional measures phase and on final judgment, there was never any waffling about the U.S. position that Iran had a legal obligation to comply. I was part of the legal team that worked with counsel in London and Paris, in order to persuade third-country courts that the judgment was not only binding between the United States and Iran, but even ought to have collateral legal effects in third-country courts on an *erga omnes* theory.

As part of the hostage settlement, claims of U.S. nationals and companies against Iran were sent to international arbitration. The executive branch worked hard to ensure that arbitral awards against Iran would be enforceable in the courts of *any* country. In the 1981 *Dames & Moore* case upholding the referral of these claims to arbitration, the Supreme Court explained that claims by nationals of one country against another can be "sources of friction" in international relations, and that dispute settlement procedures accepted by the U.S. political branches are a traditional and proper method for resolving such grievances. Awards of the Iran-U.S. Claims Tribunal are enforceable in U.S. and third-country courts under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

It has been my privilege to get to know many of the distinguished predecessors of Legal Adviser John Bellinger, not only the ones I worked under directly (Herbert Hansell and Roberts Owen), but their Republican predecessors, John Stevenson and Monroe Leigh, who labored assiduously for a legal framework under which disputes between U.S. nationals or companies on the one hand, and foreign states on the other (or vice versa), or between the

United States and foreign states, would be resolved through juridical procedures whose outcomes would be enforceable in domestic law. Jack Stevenson was an architect of the compulsory dispute settlement procedures of the U.N. Convention on the Law of the Sea (UNCLOS), including Article 39 of Annex VI on dispute settlement, which provides that the decisions of the Sea-Bed Disputes Chamber "shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought." (The current administration, while generally supportive of ratification of UNCLOS, has taken an obscure position that such decisions should not be directly enforceable, but rather should be enforced only in accordance with implementing legislation to be adopted in the future.) Monroe Leigh tirelessly advocated the international rule of law through a combination of international tribunals and domestic courts, notably in order to protect the interests of U.S. companies in their overseas investments. The provisions on enforcement in U.S. courts under the Foreign Sovereign Immunities Act of arbitration agreements made by foreign states, and of awards pursuant to such agreements, are part of that legacy.

The amicus briefs that I prepared in the *Medellin*, *Sanchez-Llamas*, and *Bustillo* cases document compliance rates approaching 80% for ICJ orders and judgments. Except for the *Nicaragua* case and such continuing problems as persist in the wake of the *LaGrand* and *Avena* cases, the United States has complied with ICJ rulings, and likewise has benefited from compliance by its adversaries. Even the *Tehran Hostages* case eventually resulted in an enduring resolution, with an arbitral process that has successfully resolved innumerable disputes on the basis of law.

Noncompliance cases are usually ones where the respondent contests the existence of proper consent to jurisdiction or the competence of the tribunal to resolve the dispute. For that reason, it is more than a little troubling that in some post-*Avena* cases in U.S. courts (as in the U.S. government's amicus brief to the Supreme Court in *Sanchez-Llamas*), the United States has taken a position of being free to relitigate aspects of the treaty interpretation dispute that it has already lost—more than once—in *LaGrand* and *Avena*, even though ICJ jurisdiction to resolve the dispute on the merits was uncontested.

Cases of U.S. noncompliance with arbitration or adjudication are exceptional, and when they do occur, there is no doubt that U.S. interests suffer. The United States was unhappy with the outcome of the *Chamizal Tract* arbitration and argued that the arbitrators had exceeded their jurisdiction by dividing the tract instead of awarding all of it to either the United States or Mexico. Although this jurisdictional objection was not ultimately persuasive, it entailed at least a colorable claim of nullity of the award due to departure from the terms of consent. Fifty years passed before the United States finally did abide by the award, with well-documented detriments to U.S. diplomatic, political, and economic interests in the meantime. In finally agreeing to settle the matter, President Kennedy observed that our prolonged noncompliance had prejudiced other U.S. interests vis-á-vis Mexico, notably in impeding prospects for settlement of investment disputes. (At the time of the eventual Chamizal settlement, the Texas attorney general agreed with the Department of State's legal opinion affirming federal power to carry out the award.)

The first issue of the *American Journal of International Law* a century ago carried a respectful notice of the death of Carlos Calvo, whose name will be forever associated with the idea that foreigners present in another state's territory should enjoy no greater rights than local nationals under municipal law. Twentieth-century U.S. diplomacy did much to build an edifice of third-party dispute settlement with neutral tribunals and enforceable judgments,

so that by the end of the century even Calvo's Argentina had been brought into the network of bilateral investment treaties providing for compulsory arbitration. Now, we seem to have come full circle again, with some U.S. executive statements reading as if Calvo could have written them.

It is difficult to venture predictions about the outcome of the pending cases. Two years ago, the ICJ handed down its *Avena* judgment on the opening day of the ASIL annual meeting, thereby providing the occasion for thoughtful analysis by Donald Donovan and Catherine Brown at the annual banquet, as well as informal speculation in the corridors about the implications for pending U.S. death penalty cases. The Oklahoma Court of Criminal Appeals had recently set an execution date in the *Torres* case, in apparent disregard of the ICJ's binding provisional measures order. Who among us might have predicted that within two months, the Oklahoma governor would have commuted Torres's death sentence with a press release acknowledging the binding force of the ICJ judgment; that on the same day the Oklahoma Court of Criminal Appeals would remand for a hearing in implementation of *Avena*; that the outcome of that hearing would be a judicial finding that *Torres* was prejudiced by the Vienna Convention violation; and that the ultimate outcome would be a judicial determination that the governor's commutation had essentially cured the prejudice? The bottom line is that Torres was accorded review and reconsideration of his conviction and sentence in implementation of *Avena*; the conviction was upheld but the sentence was mitigated.

One year ago, the Supreme Court heard argument in the *Medellin* case just before our annual meeting opened. As the Court wrestled with the implications of President Bush's memorandum instructing compliance with *Avena* (issued just a month earlier, followed shortly by the U.S. notice of withdrawal from the Vienna Convention's Optional Protocol), ASIL members discerned about nine different ways in which the case could be decided. The precise line-up of the plurality and concurring and dissenting justices probably could not have been predicted—though it did not come as a surprise that the Supreme Court would not proceed to the merits as long as there were still remedies to be pursued in the courts of Texas, where the matter remains pending even now.

The arguments this week in *Sanchez-Llamas* and *Bustillo* leave open a wide range of possibilities for how the Court might decide those cases. The likeliest scenario is that the Court will indeed give "respectful consideration" (its own term from *Breard v. Greene* in 1998) to the views of the ICJ and then form its own view on the contested treaty interpretation and remedial dimensions. It is not likely to be more generous in interpreting the treaty than the ICJ was itself, and it is highly unlikely that the Supreme Court would require a remedy that the ICJ declined to require (though the briefs in support of petitioner in *Sanchez-Llamas* set forth strong arguments for doing so).

A worst-case scenario would be for the Supreme Court to embrace some of the more outrageously international-law-unfriendly arguments found in the briefs of respondents and their amici (including the U.S. government's briefs). At the far end of the spectrum of outrageousness is the proposition that it could be unconstitutional for the highest court in the land to require state courts to comply with an ICJ judgment that is concededly binding as a matter of international law. The theories of potential unconstitutionality range from claims of usurpation of Congress's law-making powers (via "delegation" to the International Court to determine the meaning of a treaty), to a supposed intrusion on the federal judicial power to "say what the law is," to an assertion of violation of the Constitution's appointments clause (because none of the judges in The Hague has been confirmed by the U.S. Senate),

to contentions that principles of federalism are jeopardized if a treaty-based judgment of an international tribunal is allowed to affect the outcome of a state criminal proceeding. Of course, since the earliest days of the Republic, treaties protecting rights of foreigners have indeed been enforced by the Supreme Court, which has frequently reversed state court judgments in treaty cases.

Almost as outrageous is the U.S. government's contention that the executive branch has exclusive power to determine whether a treaty-based judgment in favor of a foreigner is to be enforced. The executive's position on *Avena* compliance as expressed in its *Medellin* amicus brief is that only the President's memorandum supplies the rule of decision, and not the *Avena* judgment itself (or the treaty interpretation reflected in the judgment). Its position in *Sanchez-Llamas* and *Bustillo* is that *Avena* has no status whatsoever. As the deputy solicitor general told the Supreme Court, "To put it bluntly, the ICJ was wrong." The government thus seeks to reassert a litigation position that has been twice rejected on the merits by the ICJ. This international-law-friendly audience should be aware that extreme positions rejecting international law aren't limited to politicians scoring cheap shots, but are put forward in briefs and articles endorsed by some of the members of this learned society.

Justice Kennedy's address yesterday properly didn't intimate views on any of the issues now pending before his Court. But we can readily adapt his analogy between treaty and contract law for a more general point on the legal effects that courts everywhere give to the rule-based outcomes of consensual dispute settlement processes. Justice Kennedy reminded us that if Smith and Jones have a contract for Smith to render some performance to Jones, we don't say that Smith surrendered his sovereignty to Jones, but rather that he exercised his freedom to contract. Similarly, when Smith and Jones—or in this case the United States and Mexico—freely consent to have the ICJ decide their dispute over the interpretation and application of a treaty, we expect that Smith will carry out the result. If he doesn't, we expect that Jones—Mexico at the international level, and all similarly situated Mexican (or foreign) nationals in the domestic legal system—can look to courts to enforce the outcome of the dispute-settlement process. And if one of those Mexican nationals is incarcerated on the strength of a trial held in violation of rights that have been repeatedly confirmed through international dispute settlement procedures, surely it is no abdication or surrender of the domestic judicial function, but rather a proper exercise of it, for the state and federal courts to exercise their judicial powers to grant the internationally required remedy.

U.S. Judges and International Courts

By Paul B. Stephan[*]

The current debate over enforcing the judgments of the International Criminal Court through federal court litigation is fundamentally confused. The legal issues raised by the Medellín case have little to do with U.S. compliance with its international obligations and everything to do with the law of federal courts. The core question is whether courts in the United States should construct their jurisdiction in light of the normative preferences of the judges or the President, or instead whether they should respect constitutional and statutory allocations of jurisdiction. A critical issue is whether Congress has the primary role in

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