BOOK REVIEW

Marry the Domestic and the International

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INTRODUCTION

YUJI IWASAWA, DOMESTIC APPLICATION OF INTERNATIONAL LAW FOCUSING ON DIRECT APPLICABILITY (Brill Nijhoff: Leiden, 2022)

The roots of this book run through an article in this Journal almost forty years ago. Professor Iwasawa, as he was then, came to the University of Virginia School of Law as a Fulbright Scholar in pursuit of an S.J.D. One of the fruits of his stay was an article, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*.[1] He had picked as his topic perhaps the most fraught question in all of U.S. foreign relations law, something later described by the *Restatement (Fourth) of the Foreign Relations Law of the United States* as one "of the most complicated doctrines governing the domestic application of treaties in the United States."[2] His interest in the subject evolved and grew, eventually becoming a course of the Hague Academy of International Law delivered in 2002 but, due to his many commitments as a professor and an international lawyer, not published until 2015.[3] The book under review here represents a major revision and extension of that course, completed after the author became Judge Iwasawa upon his election to the International Court of Justice in 2018.

To put the issue at a high level of generality, Iwasawa explores the circumstances and legal foundations that lead persons who exercise official power in domestic legal systems – judges of course, but really any and all government actors – to give effect to international law. He explores the use of international law, both customary and treaty-based, by persons who derive their legal authority from somewhere other than the international legal system. These people interpret and perhaps modify these rules by their writings and their actions. An older generation of international lawyers questioned whether any of this practice could count as international law, as opposed to acts of borrowing of no special interests to people outside the legal system where the borrowing occurs. Iwasawa demonstrates that the domestic application of international law is a vital part of the contemporary world, giving international law its relevance and significance even as the practice presents challenges.

This book represents a deep dive into the concept of direct applicability. It observes that many earlier jurists, relying on language in a decision of the

1. 26 VA. J. INT'L L. 627 (1986). The article drew on Professor Iwasawa's earlier work, published in Japanese and therefore not widely available to the international community. YUJI IWASAWA, DOMESTIC APPLICABILITY OF TREATIES: WHAT ARE "SELF-EXECUTING" TREATIES? (Tokyo, Yuhikaku, 1985).

2. Pt. III, intro. note, at 9 (Am. L. Inst. 2018).

3. Yuji Iwasawa, *Domestic Application of International Law*, 378 RECUEIL DES COURS 9 (2015).

Permanent Court of International Justice, thought that the key to direct applicability was embedded in the international legal system, but that this hope was a chimera. He looks at variants of direct application in important legal systems, including the doctrines of self-execution in the United States and of direct effect in the European Union, to demonstrate the complexity of the concept and its dependence on the features of the relevant domestic legal system. He then provides an analytic framework to clarify and illuminate the practice. He then extends his analysis by considering the domestic application of the customary international law, law generated by international organizations, and the judgments of international courts.

In this short review Essay, I consider the implications of Iwasawa's thorough, incisive, and authoritative approach to domestic application of international law. The marrying of the domestic and international, the Essay argues, has become the central problem in the post-World War II international legal system. International law has taken up many tasks, extensive and intensive, that in the eighteenth, nineteenth, and much of the twentieth century it largely left alone. These ambitions come with burdens but remain the most interesting thing about international law today. Iwasawa clears away a great deal of intellectual underbrush, leaving us with a strong foundation for meeting the challenges of the future.

I. THE PROBLEM OF DIRECT APPLICABILITY AND THE HERMETIC ALTERNATIVE

At least since Jeremy Bentham coined the term "international law" to supplement or replace (views differ) the law of nations, people working in international law have developed and defended a conception of a separate legal system directed at states and based on its own sources and norms and administered by people acting as agents of that system.[4] I use the term "hermeticism" to capture a view of international law as a distinct, separate, and coherent legal system.[5] Hermeticism accepts that international law might choose to borrow from other legal systems, and other legal systems from international law, but maintains that each legal system does so on its

4. Mark Weston Janis, *Individuals as Subjects of International Law*, 17 CORNELL J. INT'L L. 61 (1984).

5. As James Whitman explains, hermeticism is a form of reasoning, one "that starts from a critical assumption: the assumption that there is a key to the universe. A person engaging in hermetic reasoning believes that the process of reason (whether inductive or deductive) will reveal some relatively simple principle or relatively coherent scheme that explains how the world works; ideally something with the simplicity and evident grandeur (to take the model most popular in eighteenth century) of Newtonian gravity." James Q. Whitman, *Reason or Hermeticism? A Comment*, 5 S. CAL. INTERDISC. L.J. 193, 198 (1997). I discuss the use of hermeticism within international law in my summer 2023 course for the Hague Academy of International Law, *Applying Municipal Law in International Disputes*. The Academy will publish this as a monograph (one hopes) some time in 2024.

own terms and can impose as many limits and conditions on the borrowed rule or norm as it wishes. The issue of compliance is dictated solely by international law, and any congruence or contradiction between international and domestic law is irrelevant.[6]

Early in the twentieth century, Iwasawa recounts, international lawyers recognized that rules based in international law could apply within a domestic legal system. Thus, the Permanent Court of International Justice in *Jurisdiction of the Courts of Danzig* ruled that provisions of an international agreement concluded pursuant to the Versailles Treaty applied directly in Polish law so as to protect the interests of certain civil servants in the Free City of Danzig, even if Poland had not adopted specific legislation to produce that outcome.[7] Many jurists saw that decision as evidence that international law sets the terms of its application within domestic legal systems, and that the rules for doing so could be deduced within the international legal system.[8]

Iwasawa rebuts that proposition from the direction of both international and domestic law. From the perspective of international law, how a state (or any other person on whom international law might impose duties) gives effect to an obligation is never the concern of international law, as long as it satisfies its duty. Any rules deducted from international law rest not on evidence within the international legal system, but rather on hopes and values smuggled in by the interpreter, whether consciously or not.[9]

From the perspective of domestic law, an analysis of state practice shows a wide variety of ways that states choose to give effect to international law. Iwasawa identifies three categories of direct application: (1) application of a rule or norm as soon as it enters into force in international law; (2) adoption of a legal practice by which a state simultaneously accepts an international legal obligation and provides for its direct application in the domestic legal system through an authoritative domestic legal enactment; and (3) enactment of a domestic law that provides for the direct application of a particular international legal obligation, either before or after the state embraces the obligation itself.[10] Each of these approaches operates within a domestic legal system and thus functions alongside the customs, limits, assumptions, and presumptions of that particular system. The common outcome of these approaches, however, is the empowering of domestic legal

6. Sir Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 RECUEIL DES COURS 9, 60 (1957).

7. Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928 P.C.I.J. (ser. B) No. 15 (Mar. 3).

8. YUJI IWASAWA, DOMESTIC APPLICATION OF INTERNATIONAL LAW FOCUSING ON DIRECT APPLICABILITY 12-17 (2022).

9. *Id.* at 160-66.

10. *Id.* at 3-8.

actors, including where appropriate courts, to apply and interpret the international rule or norm in concrete situations.[11]

Iwasawa concludes: "[I]nternational law leaves States to choose the manner in which they implement international obligations."[12] His conclusion, I believe, is impeccable and, as an empirically based account of the present world, irrefutable. It does not foreclose as a logical matter the creation of an international legal system that specifically dictates to states what they must do to fulfil their international obligations, including prescribing rules of procedure and separation of powers that states typically develop internally for their own purposes. The system that comes closest to this model in today's world is that of the European Union, although even there this approach has faced recent challenges.[13] As a general matter, such a system for the present remains a utopia, and not of much interest to practitioners and scholars focused on how actual working international law manifests itself today and in the foreseeable future.

To summarize, Iwasawa defends an approach to international law that takes domestic application as a significant feature and, more significantly, understands that application as dictated by domestic rather than international law. This insight is central to contemporary practice. The remainder of this essay explains how Iwasawa's account reflects the shortcomings of the alternative explanations about the domestic impact of international law. It focuses on the confused doctrine developed by U.S. courts to explain the U.S. approach to direct application as an illustration of these shortcomings. It then describes the implications of Iwasawa's insight more broadly.

II. FROM SELF-ENFORCEMENT TO DIRECT APPLICABILITY

Iwasawa's first English-language article focused on the doctrine of self-execution.[14] He understood that this corner of U.S. law is both important and incoherent. In that article, he offered direct application as a more robust way of thinking about the marriage of international and domestic law.[15] This section considers why it makes sense to make this move. It reflects the

11. *Id.*

12. *Id.* at 162.

13. *Compare id.* ("[T]he legal force, direct applicability, and rank of EU law in domestic law are all determined by EU Law."), *with* PAUL B. STEPHAN, THE WORLD CRISIS AND INTERNATIONAL LAW – THE KNOWLEDGE ECONOMY AND THE BATTLE FOR THE FUTURE 243-46 (2023) (documenting growing refusal of EU national courts to apply EU law).

14. Iwasawa first addresses the topic of direct applicability in DOMESTIC APPLICABILITY OF TREATIES: WHAT ARE "SELF-EXECUTING" TREATIES? (1985). As I lack Japanese language capability, regrettably I have been unable to benefit from it directly.

15. Iwasawa, *supra* note 1, at 642 ("[T]he term directly applicable should be used in place of self-executing when a treaty is capable of being applied without the need of further measures.").

perspective of a U.S. lawyer who focuses on the field of foreign relations law. It doesn't purport to speak for Iwasawa, an outstanding specialist in general international law. The narrative, however, generally bolsters his arguments and clarifies why he is right to offer a new and better conceptual framework than that traditionally invoked in the United States.

The Supreme Court first referred to the self-execution doctrine in *Ware v. Hylton*, a 1796 decision that represents the first instance of the Court's refusal to apply a State law because of its repugnance to the Constitution.[16] Before John Marshall became Chief Justice, the members of the Court each wrote separate opinions seriatim, just as the Supreme Court of the United Kingdom does today. Justice Iredell's opinion is the most discursive and has had the greatest enduring impact, even if it dissented from the case's holding.

The question addressed was perhaps the most weighty the Court faced in the eighteenth century: Did the Constitution succeed in its purpose of overriding State legislation that obstructed implementation of the Treaty of Paris, the instrument that established peace between the revolutionary republic and its former colonial master?[17] At the outbreak of the Revolution, Virginia adopted a statute sequestering the claims of British creditors against Virginian debtors. That law allowed debtors to pay off these debts using heavily depreciated Confederation currency, rather than the pounds sterling stipulated in the contracts. The Treaty seemed to restore the creditors' rights, but the Confederation lacked the capacity to do anything about State violations of the Treaty. In response to this impasse, the Constitution was adopted. It solved the problem by establishing a federal judiciary with jurisdiction to hear constitutional challenges to State law as well as adopting the Supremacy Clause, which made the Treaty "the law of the land."[18]

Armed with these new tools, British creditors sued in one of the new federal courts the Virginia debtors who had obtained discharges under Virginia's statute. A circuit court heard the claim first, with Justice Iredell sitting on the tribunal. That court ruled for the debtors on the ground that the treaty provision regarding creditors' rights required implementing legislation to take effect. The Supreme Court overturned that judgment, but Iredell elaborated on his views in his separate opinion.

In this opinion, Iredell, borrowing from contract law, distinguishes between executed and executory provisions of a treaty.[19] The former constitute commitments that "from the nature of them . . . require no further

16. 3 U.S. 199 (1796). Literally, the repugnance was to federal law, specifically a treaty, but the Supremacy Clause provided a constitutional rule to resolve the conflict.

17. Definitive Treaty of Peace, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80.

18. U.S. CONST. art. III, § 2, cl. 2; art. VI, cl. 2.

19. 3 U.S. at 272 (Iredell, J., dissenting).

act to be done."[20] Executory provisions are those that require one of the three branches of government to do something more.[21] On the one hand, Article Six of the Treaty, a provision barring future confiscations of property, addressed the judiciary, which could in an appropriate case enjoin such an act.[22] On the other hand, Article Four of the Treaty, which required reversals of previously lawful discharges of a debt, required an act of Congress, in part because nullification of debtors' vested rights disrupted the existing legal order and might trigger a constitutional right to compensation.[23]

For purposes of unpacking the doctrine of self-execution, what is interesting about Iredell's opinion is that he considered the treaty itself as the source of the distinction. He focused particularly on British law governing creditors' rights, indicating that the treaty expressed the joint expectation of the parties as to how its provisions would be implemented.[24] It helped, of course, that the two treaty parties had very similar legal systems. Still, the best reading of his opinion is that the question of self-execution rested on interpretation of the treaty, and not the special features of one country's legal system.

A majority of the Court disagreed with Iredell as to the status of Article Four. They shared a strong sense that the primary purpose of the Supremacy Clause was to require the newly created courts of the United States to address British concerns about the denial of its nationals' treaty rights. No one, however, rejected the distinction between executed and executory provisions as such or argued that anything but the intention of the makers of the Treaty governed the application of the distinction.

Thirty years later, the Supreme Court returned to self-execution in *Foster v. Neilson*.[25] The case involved a dispute over title to land in what later became the State of Louisiana. The United States maintained that it had gained sovereignty over the land in dispute through the 1803 Louisiana Purchase.[26] Neilson traced title back to the United States, arguing that the sovereignty acquired in 1803 included the power to grant land. Spain disagreed, claiming it had not transferred the land east of the Iberville River to France, which accordingly could not have passed to the United States through the Louisiana Purchase. An 1819 treaty between the United States

20. *Id.*
21. *Id.* at 273.
22. *Id.*
23. *Id.* at 276-80.
24. *Id.*
25. 27 U.S. 253 (1829).
26. Treaty for the Cession of Louisiana, U.S.-Fr., Apr. 30, 1803, 8 Stat. 200.

and Spain settled the matter by conceding U.S. sovereignty over this piece of Louisiana as well as all the territory that became the State of Florida.[27]

The 1819 treaty required the United States to recognize land titles granted by Spain.[28] Foster claimed Neilson's land based on this obligation. This Article of the treaty was not clear, however, whether it applied to all Spanish land grants regarding the covered territory, or only those in territory over which Spain indisputably had sovereignty before 1819. If the title-recognition obligation extended to the area east of the Iberville River and west of what became the border of the State of Florida, it would have put the United States in the position of either violating the treaty or destroying the vested rights of owners such as Foster, who obtained land grants from the United States in the interval between the Louisiana Purchase and the 1819 treaty.

Chief Justice Marshall, writing for a unanimous Supreme Court, recognized, but refused to resolve, the dispute over the coverage of this Article. Rather, walking in Iredell's shoes (but not citing *Ware v. Hylton*), he treated the Article as addressed to the legislature and therefore executory, meaning it depended on legislative action to enter into force. His opinion is murky, and portions of it can be read as relying mostly on the specific phrasing of the Article.[29] Other portions, however, point to evidence that after the treaty took effect, Congress took charge of the process of determining to which titles this Article applied.[30]

To the point, Marshall indicates that the Court should shrink from an interpretation of the treaty that would "materially interfere with [the United States'] own rights and policy in its future disposition of the ceded lands" and would license the judiciary to pass judgment on the United States' position in its pre-treaty dispute with Spain.[31] A fair reading of his opinion is that the language of the treaty created no impediments to an approach to direct application that depended on domestic legal considerations, namely the conclusive validity of the executive branch's position in international territorial disputes, the risk of judicial interference in the government's implementation of the country's international rights and policies, and the intention and capacity of Congress to decide the issues in dispute by itself. The factors that seemed to do the real work, in other words, rested on U.S. law, not the expressed or implied intentions of the treaty makers.

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27. Treaty of Amity, Settlement and Limits, U.S.-Spain, Feb. 22, 1819, 8 Stat. 252; Curtis A. Bradley, *Self-Execution and Treaty Duality*, S. CT. REV. 131, 160-62 (2008).

28. Treaty of Amity, Settlement and Limits, *supra* note 27, art. 8.

29. 27 U.S. at 314-15.

30. *Id.* at 316-17.

31. *Id.* at 309, 313, 315 ("[T]he Court is not at liberty to disregard the existing laws on the subject.").

Some further insight about the Court's understanding of self-execution as a pathway to direct application came four years later in *United States v. Percheman*.[32] Percheman had obtained land in Florida through an 1815 grant from Spain, but the Commissioner later set up by the United States to implement its obligations under Article Eight of the treaty rejected the claim. The land in question unquestionably came under U.S. sovereignty only because of the treaty and thus, unlike *Foster*, did not implicate the dispute over U.S. rights under the Louisiana Purchase. Marshall, again writing for a unanimous Court, enforced Percheman's rights under the treaty, even though the legislatively authorized Commissioner disagreed.

A portion of the *Percheman* opinion refers to the Spanish version of Article Eight and might be read as reversing *Foster*.[33] Modern critics of the self-execution doctrine have pressed that point.[34] A better reading of *Percheman*, however, is the Court's recognition that the powerful domestic legal arguments at work in *Foster* against direct application of the provision were irrelevant in this case. Within the territory that the United States acquired only through the 1819 treaty, the treaty's Article Eight, as the "law of the land," set limits as to what Congress and its delegated administrative agency could do. What seems to best explain the opposing outcomes is not a revision of the treaty language and therefore the intent of the treaty makers, but rather the relevance of the domestic legal context.

This reading of *Percheman* indicates that the language of a treaty and the intent of the treaty makers has at most a tertiary role in determining whether a treaty provision applies directly in a party's domestic legal system. Some treaty language might be so unambiguously executory as to preclude direct application. But, as the contrast between the outcomes in *Foster* and *Percheman* illustrates, treaty language and the purpose and intent of the parties can, and often do, fail to address the most important factors pointing to or against direct application. Rather, as Curtis Bradley has put it, "the relevant intent in discerning self-execution is the intent of the U.S. treaty-makers (that is, the President and Senate), not the collective intent of the various parties to the treaty."[35]

The occasion of Bradley's observation was the academic kerfuffle that followed the Supreme Court's decision in *Medellín v. Texas*,[36] a case that ruled out direct application of a judgment of the International Court of Justice in

32. 32 U.S. 51 (1833).

33. *Id.* at 88-89.

34. *E.g.*, Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 632-45 (2008).

35. Bradley, *supra* note 27, at 132.

36. 552 U.S. 491 (2008).

the U.S. legal system.[37] Chief Justice Roberts' majority opinion in this important modern case talks a lot about self-execution and leaves much confusion in its wake. Iwasawa notes Bradley's account as a plausible explanation of actual U.S. practice, not as a conclusion ineluctably drawn from the language of the opinion.[38] He criticizes the argument that the intent of the domestic treaty-makers should be determinative, however. Rather, he observes, evidence of this intent typically is nonexistent, which requires the development of background interpretive rules and presumptions to fill in the gaps.[39]

It takes great effort, including careful parsing of the historical and legal context in which the cases arose, to derive from the language of the relevant Supreme Court opinions either Bradley's or Iwasawa's understanding of what the doctrine of self-execution actually does. The executed-executory distinction, really a metaphor drawn from contract law, sheds almost no light on the fundamental issue. What matters is whether direct application of a treaty (or, for that matter, any rule or norm derived from international law) conforms to the basic assumptions, customs, and structures of the relevant domestic legal system. These include that system's general approach to direct application of international law.

Direct application, unlike self-execution, sets up the right analytical point. The more that the domestic system accommodates a particular obligation resting on international law, the more likely that the system will apply the obligation directly. Conversely, the more disruptive the international law, the more likely that this law will not apply until domestic legal institutions have addressed and tried to manage the disruption. Iwasawa's argument is that the concept of domestic application gets us to this calculus a lot faster, and with fewer distractions, than doctrines such as self-execution.

III. INTERNATIONAL LAW FOR THE CONTEMPORARY WORLD

I see several implications in Iwasawa's core argument, although I am not sure he necessarily would agree with me. This section discusses four, all derived from the assumption that domestic officials, courts included, play an important role in the realization of international law through its direct application. These implications focus on both the value and the difficulties of a marriage of international and domestic law.

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37. *E.g.*, *Agora:* Medellín, 102 AM. J. INT'L L. 529 (2008) (collection of essays criticizing the decision).

38. Iwasawa, *supra* note 8, at 69.

39. *Id.* at 178-81.

First, the resources of domestic legal systems are greater and larger than those specific to the international legal system, such as treaty-based courts and tribunals, including the UN Security Council and General Assembly. Accordingly, application of international law through domestic action is likely to affect the lives of people more than the statements and conduct of international actors do. To the extent one thinks of international law as a social practice, domestic application does the most to give it salience.

There are other perspectives on law besides examining its direct instrumental consequences. Many scholars attach greater importance to law's expressive content, its ability to inspire and thus overcome cognitive obstacles to needed advancements.[40] For international lawyers seeking to give effect to the rules and norms of the system, however, the actual consequences in the world as it currently is constituted matter. A focus on consequences leads us in the direction Iwasawa points, toward a better understanding of how domestic actors respond to, implement, and sometimes thwart international law.

Second, it remains possible to think about international law as a hermetic, stand-alone system, but only by sacrificing relevance to the contemporary world. To be fair, many people find much not to like about the contemporary world. Perhaps irrelevance is a virtue. Still, at the risk of repeating myself, for those who work in international law, in the sense of absorbing influences and applying rules and norms, it is essential to consider how domestic institutions will incorporate and respond to international law. Accordingly, at least for practitioners, doing international law means in many instances attempting to master several domestic legal systems on top of international law.

Third, dependence on domestic actors is both a feature and a bug. It is a feature inasmuch as the marriage of international and domestic law and legal actors extends the reach and significance of rules and norms originating in international law. It is a bug inasmuch as it allows noncooperative states to thwart the mandates of international law by refusing to do their part.

State obstructionism is not necessarily fatal to cooperation based on international law. Other institutions and mechanisms complement formal legal processes to enforce international law. Reputational effects may discourage states from behavior that observers, first and foremost other states, would regard as capricious and therefore untrustworthy. A loss of trust in turn may shut off obstructive states from valuable opportunities to cooperate internationally.[41] The point rather is that in some circumstances a

40. Paul B. Stephan, *The Crisis in International Law and the Path Forward for International Humanitarian Law*, 104 INT'L REV. RED CROSS 2077, 2090-92 (2022).

41. *See* ROBERT E. SCOTT & PAUL B. STEPHAN, THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW 110-46 (2006).

state will absorb these costs if achieving its goals matters more to it than do the benefits derived from international law. To that extent, dependence on domestic cooperation always creates a potential vulnerability to the development and application of international law.

Fourth, a dependence on domestic actors to fulfil the mandates of international law may contribute to misunderstandings that may undermine international-law-based collaboration. Developing a working knowledge of international law is difficult enough. Attempting to master the nooks and crannies of one or more domestic legal systems adds exponentially to the difficulty of assessing the legality of state practice under international law. Good faith misunderstandings may result.

A much discussed example involves the obligations of the Vienna Consular Convention that were at issue in *Medellín*.[42] The Convention establishes the privilege of foreign nationals subject to receiving-state criminal prosecution to communicate freely with consular officers. It stipulates that this right shall be "exercised in conformity with the laws and regulations of the receiving State" but that those domestic rules and practices must give "full effect" to the purposes of the right.

During the 1990s, State and local police in the United States frequently failed to notify consular officials of the arrest of persons with consular rights, arguably depriving the arrestees of adequate resources to negotiate the U.S. criminal justice system. Dozens of people convicted of capital offenses raised the treaty violation in post-conviction challenges to their sentences through petitions for State and federal habeas corpus. In no case, however, had a criminal defendant raised the issue during trial or appeal. When Germany and then Mexico sought relief before the International Court of Justice (ICJ), the United States argued that a criminal accused's failure to alert its courts to the treaty claim in a timely fashion precluded any adjustment of the resulting sentences. A waiver rule grounded in domestic law, it maintained, was consistent with the "full effect" proviso of the Convention.

The ICJ ruled that only a criminal accused, and not the accused's lawyer, could waive rights under the Convention.[43] The Supreme Court of the United States, when it came time for domestic application of that ruling, responded that U.S. law gave equal force to procedural rights under the Constitution and treaties, an approach that permits competent counsel to waive a claim through failing to present it to the court in a timely fashion.[44]

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42. Vienna Convention on Consular Relations and Optional Protocol on Disputes art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

43. LaGrand Case (Ger. v. U.S.), Judgment ¶ 91, 2001 I.C.J. 466 (Jun. 27); Avena & Other Mexican Nationals (Mex. v. U.S.), Judgment ¶ 112, 2004 I.C.J. Rep. 12 (Mar. 31).

44. United States v. Sanchez-Llamas, 548 U.S. 331, 356-60 (2006).

The ICJ approach reflects the procedures of criminal trials usually followed in accusatorial domestic systems, while the U.S. courts deal with the issue as most common-law systems would. Accusatorial systems put the onus on the presiding judge to consider all relevant claims, whereas adversarial systems attach greater consequences to the decisions of the parties' lawyers.[45]

Arguably, both the ICJ and the Supreme Court regarded each other with good faith mutual incomprehension. Civilians would find the presiding judge ultimately responsible for identifying and considering the claim. They would hold the United States accountable for a violation of international law because presiding judges failed to do this. A common-law court would focus on the defendant's attorney and apply the rule of deliberate bypass based on the choices of competent counsel to remove from judicial consideration a potentially helpful argument.[46] Such a rule would provide a full response to the version of international law that the international court applied in the case. Because the international claim was married to domestic law, incomprehension led to conflict.

Generalizing the point, any approach to law that increases the number of bodies of expertise that can affect the outcome of a dispute makes reaching those outcomes less certain and more vulnerable to challenge. This indisputably correct point seems to me the strongest argument against an approach to international law that enlists domestic actors in the implementation of international rights and duties. It is not, however, conclusive.

The hermetic approach to international law, one that focuses exclusively on the capacities and competence of the international legal systems and treats domestic law and actors as at most a potential source of noncompliance with international law, promotes focused specialization. It probably is easier for these specialists to form a "epistemic community," a group that can exclude conflicts and misunderstanding that a more heterodox body might create.[47]

As international law takes on greater responsibilities and aspires to greater real-world consequences, however, the benefit of lower-cost consensus seems to me outweighed by the need to recruit more resources for its application and enforcement. The trade-off is inevitable. If one takes

45. Paul B. Stephan, *The Political Economy of Judicial Production of International Law*, in THE POLITICAL ECONOMY OF INTERNATIONAL LAW: A EUROPEAN PERSPECTIVE 202 (Alberta Fabbricotti ed., 2016).

46. Johnson v. Zerbst, 304 U.S. 458, 468-69 (1938) (noting that on collateral review, "the burden of proofs rests on [the petitioner] to establish that he did not competently and intelligently waive his constitutional right"); *cf. Medellín*, 552 U.S. at 502 n.1 ("Medellín had the assistance of consulate counsel during the preparation of his *first* application for state postconviction relief, yet failed to raise this argument at that time.").

47. Peter M. Haas, *Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1 (1992).

Iwasawa's argument seriously, the need for more resources to achieve a greater impact will outweigh the concern about misunderstanding.

CONCLUSION

At a time when the international legal system has greater responsibilities and more projects than ever before, but where a growing number of states have chosen obstruction over cooperation, careful, judicious, and systematic thinking about the marriage of international and domestic law is much needed. Iwasawa provides us with a comprehensive account of how a variety of national practices has brought us to contemporary direct application of international law. He makes it clear that direct application is a widespread practice, not something confined to a few oddball states. He emphasizes the variety of state practice as well as its commonality.

An implication of Iwasawa's argument is that practitioners dealing with concrete international legal disputes regularly are called on to master domestic legal contexts. This insight applies especially to those people in the position that Iwasawa now occupies, as a member of a vitally important international court. The difficulty is substantial and might lead to good-faith but unproductive conflicts. Yet asking this of international legal practitioners seems a fair price to pay for greater vitality and relevance in international law.

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