

NYU International Law Course (Kingsbury)

Unit I: Introduction to International Law

User's Guide

Last Updated Jan. 12, 2009

A. Trajectory

Unit 1 introduces the suggested theoretical framework to read the materials of the Course: the foreign office model versus the global governance model. This framework is illustrated through a series of cases dealing with the Vienna Convention on Consular Relations (1963).

B. The Framework: Foreign Office Model vs. Global Governance

The dominant theoretical model of the international legal system is *the foreign office model*, which focuses on the state as its principal actor. States under this model are cohesive juridical units internationally; unitary, univocal and focused on promoting their aggregated interests vis-à-vis other states. The foreign office model adheres to the principles of sovereign equality and territorial sovereignty. It focuses on providing structure for inter-state interaction without interfering and commenting on the internal affairs of states. States alone make and enforce international law. In recent decades, different developments which are often considered features of globalization led to a growing attack on the relevance of the Foreign Office model. The new paradigm for international law is *the Global Governance model*. It moves beyond the state centric issues to address "formal and informal bundles of rules, roles and relationships that define and regulate the social practices of state and non state actors in international affairs."¹

Indeed, the Foreign Office model remains the backbone of int'l law; the assumption is still that states create international law and that they are relatively univocal. But the reality and issues that have to be addressed in cotemporary international relations are situating international legal institutions and actors in a struggle: between the functional needs and challenges of the new global order and the theory and doctrine of the foreign office model of

¹ Anne Marie-Slaughter et al. *International Law and International Relations*, 92 Am. J. Int'l L. 367, 371.

international law. The readings of the following units will often introduce examples of this struggle and would critically examine who are the supporters of which model and why.

The materials address five features of the Global Governance model. (1) ***International Institutions***: the move to create intergovernmental institutions. Some of these institutions were created by state consent but could no longer be conceived as simply operating to fulfill inter-state agreements. (2) ***National Democracy***: the notion that power should be operationalized democratically. This notion is three fold: (a) it criticizes the agnostic posture of the Foreign Office model in reference to the regime chosen by states to conduct their affairs internally; (b) it advocates the need to have democratic procedures in the operations of international legal institutions and agents; (c) it challenges the laws made under the international legal system as potentially undemocratic. (3) ***The Disaggregated State***: Rather than perceiving states as unitary and univocal, states are conceived as multi-dimensional complex actors. The division might be between federal and state units, between different branches of the state (judiciary, executive, and legislature) or further within a political branch which doesn't speak or operate in one voice. (4) ***Transnational Networks***: groupings that make rules outside the foreign office model such as NGOs, Bank regulation networks (e.g. the *Basel Committee*); Crime fighting networks (e.g. *The Financial Action Task Force (FATF)*); Hybrid Transnational Networks (governmental agencies cooperate with private agencies); and Private Networks (e.g. The Global Compact). (5) ***Global Aspirations — the Moral Element/progressive element***: a growing sensibility that the organizations of global governance should respect human rights. One might argue that in effect *security* or the war against terror is an additional sensibility that has become a global aspiration. Free trade and markets could be conceived as one as well.

C. The Logics: Military, Markets, Morals

The following matrix suggests we could identify a frequent correlation between three dominant subject matters of international law – military, markets and morals, and certain theoretical paradigms which are used to address them. Military issues are often dealt with by a realist logic, market issues by institutionalism and moral issues by cosmopolitanism. The struggle between these paradigms has recently intensified as each is claiming supremacy over the others in explaining and evaluating international relations. Intriguingly, the most

challenging and thought provoking cases are those in which more than one logic provides a potentially convincing framework to address the issue at stake.

The *Realist logic* focuses on states as the key actors in international relations; they are univocal and thus often operate in the international arena through a very limited group of people. Realists conceive states as egoistic actors who operate to maximize their interests. The lack of a Leviathan to control the states leaves the international arena in the state of nature, with no constraints on their operation and therefore in *anarchy*. The states do not exit the state of nature since unlike natural persons they could survive it. Indeed, the states in the international system have some notion of order; they don't go to war unless it is worthwhile for them to do so. The objective of the legal order is epiphenomenal – it only exists to the extent it serves the interests of the power constellation that created it. Rules do not outlast the power distribution. Laws of war are aimed to promote effective and rational wars.

The Institutional logic usually applies to situations of interdependence and the possibility of gains, and explains why cooperation is beneficial. The institutionalists begin with similar presumptions to realists, namely: States are the key actors, they would act rationally and are interest maximizing. The key difference is that according to the institutionalists *States who want to maximize their own interests would gain more by cooperating with other states*. This is a standard approach to international economic law (e.g. why GATT was adopted in 1947, the WTO in 1994, NAFTA and other forms of economic cooperation). Institutionalists seek to use international rules to facilitate coordination that would surmount the concern of *cheating* in prisoners' dilemma situations. Institutionalists further advocate clarity of rules to stabilize expectations, the importance of international institutions capacity to monitor commitments, facilitate flow of information and potentially apply sanctions.

The logic of Morals, or Cosmopolitanism derives from a long tradition which conceives the individual as the main subject of the global society rather than states. It views international law as emancipatory, liberating people from the interests of states. Conversely, Thomas Nagel's approach conceives the state as the primary means to fulfill moral obligations. International institutions under this view are only desirable for emergency relief and intervention extreme cases of humanitarian catastrophes. The intermediate pluralistic view supports a view of international law as aimed to realized cosmopolitan values but consider the state as an important actor in fulfilling them.

D. Applying the Model: The Vienna Convention on Consular Relations

The Vienna Convention on Consular Relations (hereinafter: The Vienna Convention) provides, among other things, that consular officers shall have the right to visit their national who is in prison, custody or detention, to converse and correspond with him, and to arrange for his legal representation. In *Paraguay v. United States (I.C.J., April 9, 1998) [Breard]* Virginia arrested Breard, a Paraguayan national, for murder. He was convicted and sentenced to death. He was not informed of his right to request consular assistance, nor did Virginia inform the Paraguayan consulate that Breard was in custody. Paraguay sued the U.S. for violating Article 36 of the Vienna Convention. The ICJ jurisdiction in this case derived from the Optional Protocol to which both Paraguay and the U.S. were parties. The ICJ held that the US should take all measures to halt the execution of Breard while claims in the Supreme Court are pending. The ICJ discussed the right of Paraguay *as a state*, using, *inter alia*, the doctrine of *Diplomatic Protection* – on behalf of its national. The case thus exemplifies the tension between the rights of the individual and a state and the unease it causes to the ICJ's Foreign Office model.

The Supreme Court in *Breard v. Green (U.S. Supreme Court, April 14 1998)* addressed the issue of Paraguay's rights but focused on the *individual* rather than the state. The Court concluded that the Vienna Convention embodied the principle in international law that, absent clear statement to the contrary, procedural rules of the forum state govern the implementation of treaties in that jurisdiction. Thus, Breard's failure to raise his claim in state court was *procedural default* under US law and therefore he lost the claim. It further inquired whether the Vienna Convention could be considered the “the supreme law of the land.” The issue raised in these decisions involves a basic tension between a liberal view of universal human rights/disregard of national identity and the value of nationality. Features of the *disaggregated state* are suggested in the Supreme Court's remarks on the role of the Courts in international relations (rule on the basis of law), that of the executive (might utilize diplomatic discussion with Paraguay) and the way it plays out in a federal system (“If the Governor wishes to wait for the decision of the ICJ, that is his prerogative.”).

Eventually Paraguay didn't bring the case to the merits. Its decision not to do so coincided with a US decision to terminate some trade restrictions it imposed on Paraguay. This chronicle fits the Foreign Office Model according to which the state is entitled to settle the case (no behalf of the individual) if it wishes to do so. Nevertheless, *Diplomatic*

Protection claims are gradually being recognized to involve individual rights (an intriguing example in the US context is the *Foreign Claim Settlement Commission* (which decides on allocation of remedies)).

The *Avena (Mexico v. USA, ICJ 2004)* case was concerned with 51 Mexican foreign nationals on the US death row. The ICJ decided that the US violated its obligations under article 36(1)(b) of the Vienna Convention; therefore the 51 sentences needed to be subject to "review and reconsideration". The remedy was defined very carefully; the measures should be decided by the courts "*by means of its own choosing*".

After the *Avena* decision President Bush determined, through a memorandum (*President Bush's Memorandum (February 28, 2005)*) that the United States would discharge its international obligations under *Avena* by having state courts give effect to the decision. The Bush Administration's decision to support the ICJ judgment may stem from the fact that violating the ICJ decision could erode the system of consular relations, seen as very important for Americans abroad. It should be noted that the President did not order the Texan courts to obey the ICJ as a governing body; his memorandum instead referred to *comity* – mutual respect among foreign institutions. On March 7, 2005, following the ICJ's judgment in *Avena*, the United States gave notice of withdrawal from the optional protocol of the Vienna Convention. By doing so it withdrew its consent for the specific jurisdiction of the ICJ with respect to claims arising out of the Vienna Convention.

Petitioner José Ernesto Medellín was one of the 51 Mexican nationals named in the *Avena* decision (*Medellín Case (U.S. Supreme Court, March, 2008)*). Relying on the ICJ's decision and the President's memorandum, Medellín filed an application for a writ of habeas corpus in state court. Following the dismissal of the Texas Court of Criminal Appeals the Supreme Court granted certiorari and held that neither *Avena* nor the President's Memorandum constitutes directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions. The majority decision (Chief Justice Roberts) based its conclusion on three sources: the UN Charter, the ICJ Statute and the Optional Protocol to the Vienna Convention. Chief Justice Roberts emphasized the importance of preserving an option of noncompliance in sensitive foreign policy issues to the discretion of the political branches rather than state and federal courts. Justice Breyer presented a different approach to the interpretation of treaties which is governed by contextual considerations. Viewed through the prism of the MMM logics, one could argue that while *market* oriented treaties should be regarded as self-executing (because of their subject matter) a different set of considerations

apply for *human rights* treaties, as we move to *morals* (and even more so to *military* considerations). The tendency to regard international law decisions as superior and governing the domestic system becomes more contested. This case highlights the tension between human rights aspirations (the death penalty debate as well as the right to an individual remedy for violation of treaty obligations) and the Foreign Office model.

As for the power and effect of the President's memorandum, the Majority decision held that the Vienna Convention was ratified with the understanding that it was to be non-self-executing, and an executive declaration could not be enough to make it enforceable in domestic courts. Allowing a treaty to vest the President with unilateral authority to make it self-executing conflicts with Art. II(2) of the U.S. Constitution, the ratification requirement. Justice Stevens held that while the law doesn't require Texas to abide with the President's memorandum, it should do so because of policy considerations.² Medellín was executed on August 5, 2008, while Congress deliberated over the Avena Implementation Act of 2008, an act explicitly requiring the states to waive procedural defect rules in the case of VCCR violations. The Supreme Court rejected a further petition for a stay in Medellín's case calling for the opinion of the Solicitor General in the case or more time for Congress to pass the legislation, saying that it had already decided the issue. The legislation has not yet been passed nor reintroduced for 2009. The state court of Oklahoma, however, has implemented Avena and found that Oklahoma courts are required to waive procedural defect rules.³ In essence, the courts left it up to Congress to regulate consular rights at the federal level, and in the absence of further congressional action each state criminal justice system may make their own moral judgment about implementing the VCCR.

E. Questions to Consider

General:

Which model (foreign office or global governance) more accurately reflects the world today? Which one better captures the dynamics of these cases? Could we trace the struggle

² "When the honor of the Nation is balanced against the modest cost of compliance, Texas would do well to recognize that more is at stake than whether judgments of the ICJ, and the principled admonitions of the President of the United States, trump state procedural rules in the absence of implementing legislation."

³ *Torres v. State of Oklahoma*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004) (order granting stay of execution and remanding the case for evidentiary hearing). The hearing was never held, however, as the Oklahoma governor commuted Mr. Torres' sentence to life in prison later that day. Janet Koven Levit, *The Supreme Court, Constitutional Courts And The Role Of International Law In Constitutional Jurisprudence: A Tale Of International Law In The Heartland: Torres And The Role Of State Courts In Transnational Legal Conversation*, 12 TULSA J. COMP. & INT'L L. 163, 172 (2004).

between agents who are advocating for the continuation of the foreign office model v. those who seem to acknowledge that a 'new world order' has arrived? How would you categorize the issues these cases are dealing with (military, markets, morals)? Could only one set of 'logics' be applied to explain their judicial analysis and consequences or maybe we can think of them through more than one theoretical framework? Ask yourself why countries obey the Vienna Convention.

Analysis of the Cases:

In *Bread* the domestic limitations of federalism negatively influence the United States' ability to operate internationally. But might there be scenarios where a state's international position is actually strengthened by domestic constraints? (Consider this question in light of the difficulties that might face the world's lone superpower in making credible commitments otherwise.) How does the Supreme Court in *Breard* treat the Vienna Convention and the opinion of the ICJ?

Notice the interaction between domestic and international law. What role does U.S. constitutional law play in international law, and vice-versa? Does international law rely on domestic actors for enforcement? Contrast the actions of the executive branch in the Paraguay cases versus the Mexico ones. How does the Supreme Court see itself in relation to the ICJ?

Notice the different institutions involved in these cases: Virginia and Texas governors and courts, the executive branch, the ICJ, and the Supreme Court. Who has the better claim to say what the law is, given: that there are moral issues at stake? that it is a criminal case? that issues of reciprocity are at play, and will affect Americans regardless of their state? Should it matter who elects the judges on the various courts?

Does and should Congress have the constitutional power to regulate state police practices or state court procedural default rules with regard to consular notification in the wake of *Medellín*? Does and should Congress have the constitutional power to delegate binding decision-making to an unelected international body such as the ICJ? Should a clear statement be required? Does it matter if we are confident that we have a higher level of 'meaningful' rights protection here in the U.S. than would be provided by international law?